Luzius Wildhaber

President of the European Court of Human Righs

Presidents, Secretary General, Excellencies, dear friends and colleagues, ladies and gentlemen,

It gives me great pleasure to welcome you here today to our traditional ceremony to mark the opening of the judicial year. The numerous guests who honour us with their presence this evening include thirty-two Presidents and nineteen judges from Supreme and Constitutional Courts. In particular, I should like to welcome our distinguished guest of honour, Mr Valery Zorkin, President of the Constitutional Court of the Russian Federation, and the three rapporteurs from this afternoon's seminar, Mr Guy Canivet, President of the French Court of Cassation, Mr Valerio Onida, President of the Italian Constitutional Court, and Mr Francis Jacobs, Advocate General at the Court of Justice of the European Communities, whom I thank most warmly for their thought-provoking contributions.

Looking back, it has once again been a year rich in events of importance for the Court. Some of them have been sad events; we lost two respected and well-loved colleagues last year, Judge Gaukur Jörundsson, and Wolfgang Strasser, who was Deputy to the Registrar responsible for the Grand Chamber. Our thoughts go to their families. On a happier note, fourteen of the Court's judges were re-elected, and we welcomed our new colleagues Judges Mijović, Spielmann, Jaeger, Myjer, Jebens, David Thór Björgvinsson, Jočienė and Šikuta.

Of the moments which stand out, I would mention the opening for signature in May of Protocol No. 14 to the European Convention on Human Rights, the delivery by the Court of its first so-called "pilot" judgment and the adoption of the Constitutional Treaty by the Intergovernmental Conference of the European Union.

Aware, however, that a court's activities are primarily reflected in its case-law, I should like to begin by making some brief comments about a few of the key judgments delivered in 2004. You will realise immediately that they all concern the issue of effective execution of the Court's judgments. Indeed, this is one of the themes that dominated the Court's case-law last year. But it has also to be seen in a wider context, that of the need to restore the balance between national and international jurisdiction in implementing the Convention.

The first of those judgments was delivered in the case of *Maestri v. Italy*[1]. Until recently, the Court always hesitated to stipulate the measures to be taken by a State in order to redress the effects of a violation. Indeed, in line with the Convention's subsidiary character, every respondent State remains free to choose the means by which it will discharge its obligation to execute the Court's judgments, provided that such means are compatible with the conclusions set out in them.

In *Maestri*, however, the Court was more robust. The case concerned a career judge whom the Court had held to be the victim of a violation of Article 11 as a result of a disciplinary sanction imposed because he belonged to a Masonic lodge. The Grand Chamber of the Court underlined that, in ratifying the Convention, the Contracting States undertook to ensure that their domestic legislation was compatible with it. Consequently, it was for the respondent State to remove any obstacles in its

1 [GC], no. 39748/98, judgment of 17 February 2004, ECHR 2004-I.

domestic legal system that might prevent the applicant's situation from being adequately redressed. It was therefore for the Italian government to take appropriate measures to redress the effects of any past or future damage to the applicant's career as a result of the disciplinary sanction against him which the Court had found to be in breach of the Convention.

A second judgment warrants mention in this context, especially since in addition it helps to clarify the concept of "jurisdiction", which defines the Convention's scope. Until now, each time the Court was required to rule on the concept of "jurisdiction", it had considered the concepts of imputability and responsibility as going together, since the State's responsibility under the Convention could only arise if the alleged violation could also be imputed to it. In *Assanidze v. Georgia*[2], the problem was posed differently. The applicant, a well-known opposition politician, had been acquitted by the Georgian Supreme Court on all the charges against him, but continued nonetheless to be detained by the authorities of the Ajarian Autonomous Republic. The Georgian central authorities had taken all procedural measures possible under domestic law in order to obtain enforcement of the judgment acquitting the applicant, had also had recourse to various political means to settle the dispute, and had on numerous occasions repeated their request to the Ajarian authorities for the applicant's release, but without success. The Court concluded that, within the domestic system, the applicant's continued imprisonment was directly imputable to the Ajarian authorities. The Georgian Government considered that on this basis it could not be held responsible for the situation.

The Court, however, took a different view. It emphasised that, under the Convention, it was solely the international responsibility of the State that was in issue, irrespective of the national authority to which the breach of the Convention could be imputed at the domestic level. The Court concluded that the applicant's continued imprisonment was within the "jurisdiction" of Georgia and that the responsibility of the Georgian State alone was engaged under the Convention. Consequently, having found that the applicant was being detained arbitrarily contrary to Article 5 § 1 of the Convention, the Court held – and stated for the first time in the operative provisions of a judgment – that the respondent State had to secure the applicant's release at the earliest possible date. The very day after the judgment was delivered, the applicant was released from prison in Ajaria, which is a striking demonstration both of the effectiveness of the human rights protection afforded by the Convention and of the very practical importance of the execution of the Court's judgments.

In a joint judgment against Russia and Moldova, the Court took a similar approach, albeit in a markedly different context. Again in the operative provisions of the judgment, it urged the two respondent States to take all necessary measures to put an end to detention that the Court had described as arbitrary and to secure the immediate release of those applicants who were still imprisoned.

One last judgment must be mentioned here, namely the Court's first so-called "pilot" judgment. Delivered in the case of *Broniowski v. Poland*[3], it followed on from the Committee of Ministers' resolution on judgments revealing an underlying systemic problem, adopted recently as part of the Protocol No. 14 package. Human rights violations arising from a systemic problem in the States Parties to the Convention account for a considerable proportion of the Court's workload. In all these cases, despite their similarity, the Court is obliged on each occasion to repeat the same message, something that could be avoided if the State concerned were to rectify the problem as soon as it was identified by the Court. For that reason, in its resolution the Committee of Ministers invited the Court to identify, in its judgments finding a violation of the Convention, what it considered to be an underlying systemic problem and the source of that problem, in particular when it was likely to give rise to numerous applications.

2 [GC], no. 71503/01, judgment of 8 April 2004, ECHR 2004-II.

3 [GC], no. 31433/96, judgment of 22 June 2004, to be reported in ECHR 2004-V.

This is what the Court did in *Broniowski*. The case concerned a scheme for compensation in kind for the loss sustained by property owners whose properties had had to be abandoned after the Second World War and who had thereby acquired "a right to credit" against the State. However, the latter had been unable to honour all those obligations due to a shortfall in the amount of land available. It is estimated that 80,000 people are affected.

The Court was unanimous in concluding that, by failing to honour its obligation to the applicant, the respondent State had violated Article 1 of Protocol No. 1. Above all, however, it also found, for the first time in the history of its case-law, a so-called "systemic" violation, arising from the fact that the violation in question resulted from a large-scale problem originating in the malfunctioning of Polish legislation and administrative practice which had affected, and still had the potential to affect, large numbers of people, a situation that could give rise to numerous well-founded applications.

Consequently, the Court indirectly extended the benefits of its finding to all those persons by holding that the respondent State was, through appropriate legal measures and administrative practices, to secure the implementation of the property right in question in respect of the applicants or to provide them with equivalent redress in lieu. Finally – and this is a very important element – the Court announced that, pending the implementation of such general measures, which were to be adopted within a reasonable time, it would adjourn examination of applications resulting from the same general problem.

Faced with a structural situation, the Court is in effect saying to the respondent State and to the Committee of Ministers that they too must play their role and assume their responsibilities. This is surely also in the interests of the individual applicants who may secure redress more rapidly through the general measures to be introduced by the respondent State than if the Court were to attempt to process and adjudicate each application in turn. In sharing out the burden of Convention enforcement, this approach is entirely consistent with the aim of restoring the balance in the relationship between international and domestic protection of fundamental rights; the failure of States to provide adequate remedies at national level is a significant, though not the sole, source of the current overloading of the Court's docket.

In the eyes of many, the Court in Strasbourg has come to represent the last resort for every imaginable complaint. However, as developments over the past fifteen years have amply borne out, the Court cannot live up to this expectation. The package of resolutions and recommendations from the Committee of Ministers accompanying Protocol No. 14 contains a timely reminder to the member States of their essential contribution to the proper functioning of the system. The Convention system has always been intended to be a subsidiary one. The primary level of protection has to be the domestic one. Only where that first level of protection has failed to operate effectively does the European supervision by the Court come into play.

An encouraging development to point out is therefore all those judgments in which domestic courts – and in particular Constitutional and Supreme Courts – have demonstrated their determination to apply the Convention standards directly and to integrate the Convention case-law into their respective legal systems. By way of example, let me refer here to the British House of Lords, which on the basis of a comprehensive and penetrating analysis of the Strasbourg case-law recently declared that foreigners suspected of being terrorists could not be detained under the Anti-Terrorism, Crime and Security Act 2001 indefinitely without trial; to the Belgian Court of Cassation, which last year reaffirmed the supra-constitutional rank of the Convention in the Belgian legal system; to the critical part played by the Ukrainian Supreme Court in securing to the Ukrainian people their right to free elections; and let us not overlook the remarkable decision of the Plenary of the Russian Supreme Court of 10 October 2003, which insists that the judgments of the European Court "are binding on all authorities of the Russian Federation, including the courts", and the important developments in the case-law of the Russian Constitutional Court to which I believe President Zorkin will draw our attention.

Let me now turn to some institutional aspects which marked the Court's life in 2004. Indeed, the adoption of Protocol No. 14 provides an appropriate opportunity for a brief stocktaking of what has been achieved by the new Court set up in November 1998 by Protocol No. 11. This Protocol

marked a huge leap forward in terms of principle, in fully judicialising the international control machinery: it merged the former Court and the Commission and made the new Court a permanent institution, it made the right of individual petition mandatory, and it abolished the adjudicative role of the Committee of Ministers, all elements which today are considered cornerstones of the Strasbourg system, taken for granted by everybody, but which came into being only six years ago.

But Protocol No. 11 has also been a success in practice in that the single, permanent Court in Strasbourg has shown itself able to cope with a much heavier caseload than its two predecessors, while maintaining the authority and quality of the case-law in the substantial cases. I do not intend to bore you with a long list of statistics, so I will confine myself to giving you just three figures covering the last five years: in that period the number of applications lodged has increased by 99% – a frightening figure in itself – but the number of applications finally disposed of has risen by nearly five times that figure, that is by 470%, and this against a background of budgetary growth of more modest proportions, amounting to 72%.

In 2004 the Court terminated 21,100 cases, by delivering 20,348 decisions and 718 judgments, an output which represents an increase of 18% on the 2003 output and which was achieved under difficult circumstances, and with means which all in all appear quite modest when compared with those of other international courts. This output is the result of a collective and sustained effort by a highly dedicated Court assisted by an equally motivated and competent Registry, to which I would like to pay tribute here. Unfortunately, however, all productivity gains achieved over the years have been eaten up by the constant rise in the number of incoming cases. The desire of more and more European citizens to seek justice on an international level as regards their enjoyment of their basic human rights has outstripped the benefits of the structural innovations introduced by Protocol No. 11.

This brings me now to Protocol No. 14, which was opened for signature last May after several years of intensive reflection and negotiation on how to adapt the Convention's procedural framework so as to help the Court cope with an ever-increasing caseload.

The main changes which the Protocol will bring about are well-known: the single-judge formation for clearly inadmissible applications, the extended competence of the Committees of three judges instead of seven-judge Chambers for routine admissible applications, the joint examination of admissibility and merits of applications and the "significant disadvantage" as a new admissibility criterion. Besides these changes, which will definitely help to speed up the processing of applications, innovations like the judges' single term of office, the new role for the Commissioner for Human Rights, and the "infringement proceedings" for a State's failure to fulfil its obligations to execute a judgment finding a violation represent additional elements strengthening the Strasbourg system.

Another major signal sent out by Protocol No. 14 is to be found in the new provision permitting the European Union to accede to the Strasbourg system. Along with the corresponding provision of the European Union Constitutional Treaty, it puts an end to several decades of discussions and hesitations over whether such a move was desirable and whether the nature of the Strasbourg review was compatible with the very essence of Community law. Even though the details of such an accession remain to be worked out, the answer now given in parallel and almost simultaneously by the Convention and the European Union Constitutional Treaty is clear: not only is accession by the European Union desirable, it has become a necessity if action by European Union authorities is to enjoy the same degree of human rights acceptability with the citizen as action by national authorities. It can only be for the good of European unity if there is an integrated overall framework for the development and implementation of human rights standards in Europe, whatever the legal source of the measure affecting the citizen. I would therefore urge both the Council of Europe and the European Union to explore together as soon as possible the steps which could be taken as from now with a view to enabling negotiations on accession to be finalised as soon as Protocol No. 14 and the Constitutional Treaty have come into force. I hope that the Third Summit of Council of Europe member States will also send a clear signal to this effect.

In May 2003 the Committee of Ministers reaffirmed its determination "to guarantee the central role that both the Convention and the European Court of Human Rights must continue to play in the protection of human rights and fundamental freedoms on this continent". It is my belief that Protocol No. 14 represents a major contribution towards achieving that goal, and this is why I would urge all Contracting States to ratify it as soon as possible.

The Court, for its part, will do its utmost to use to the full all the instruments contained in Protocol No. 14, just as it did with Protocol No. 11. In an effort to anticipate formal entry into force, the Court has even begun adapting some of its procedures to reflect the scheme foreseen in the Protocol. Preparations with a view to adjusting our structure and working methods in time for the entry into force of Protocol No. 14 are under way.

Yet, as I have repeatedly said, Protocol No. 14 is unlikely to be the end of the story, as it might well not be sufficient to get the caseload problem under control. For there is one thing which, despite all its potential and all our efforts, Protocol No. 14 will not do, and the Court has always been very clear about that: it will not itself reduce the volume of cases coming to Strasbourg; it will not turn off the tap; it will not even slow down the flow.

On the other hand, ceaselessly raising judicial productivity has its limits, if only physical ones; nor can it be a dictate to which the Court should continue to yield at all costs, as this would amount not only to an interference with the Court's independence in organising its judicial work, but would also be wrong in principle. Indeed, the main aim of the Convention is not to have as many applications as possible declared inadmissible, but rather to secure effective protection of human rights in the member States. Driving up the statistics of terminated cases every year can only be achieved by concentrating on the easier, more numerous inadmissible applications, which will inevitably be at the expense of the more complex, meritorious ones.

To keep its priorities right, the Court recently decided, in line with the objectives pursued by Protocol No. 14, to devote more attention to adjudicating on the meritorious cases, the ones where the applicant will often have a serious claim of being the victim of a human rights violation. This may well result in the future in what could at first sight appear as a stagnating or even lower overall productivity. In reality, however, the figures, if compared category by category, should then indicate that the Court is progressively reverting to its core business, to the substantial cases, cases which actually contribute to enhancing the protection of human rights throughout the Council of Europe member States and even beyond.

Ladies and gentlemen, it is time for me to conclude. My personal philosophy concerning judges and courts is that they should only speak in public of their own role, their judgments and their contributions to society with, if I may put it that way, a sort of British understatement and/or perhaps Swiss sobriety. However, abandoning for once both understatement and sobriety, I would like to emphasise that the independent international protection machinery of the European Convention on Human Rights, embodied since 1998 in the single European Court of Human Rights, has proved to be an incredibly successful institution, known and respected across the whole world. The Council of Europe, which created and nurtured it, can be proud of this Court and its achievements and should be seeking not only to preserve, but also to strengthen it. Undoubtedly the Council of Europe's Third Summit of Heads of State in Poland in May will constitute a precious opportunity to do this. It is no secret that I often feel obliged to call attention to workload and even backlog problems, but let me insist that the Court is overburdened because it has become so widely known over the years and such high expectations are placed on it by more and more European citizens, not because it has failed in its mission or in adapting its working methods. This Court is, without a shadow of doubt, the most productive of all international tribunals.

Most importantly, however, let us not forget that the European Court of Human Rights corresponds to a necessity for the democratic life of our European countries. The fact that the European Union Constitutional Treaty provides not only for a Charter of Fundamental Rights, but also for the accession of the European Union to the Strasbourg Convention system powerfully demonstrates how important it has become today for the credibility of action by public authorities to allow external

judicial control over their compliance with human rights standards. In other words, there is simply no alternative to preserving the efficiency of the Strasbourg control machinery, while of course adapting it to the changes in modern European society. So, as we begin the preparations for making Protocol No. 14 a success, we should in parallel keep thinking about the long-term future of this unique institution. The European Convention on Human Rights is an essential part of our common heritage, an outstanding testimony to European ethical and legal culture, and we have every reason to be proud of it.

Before I pass the floor to our guest of honour for tonight, we would like to express our gratitude to the new Secretary General of the Council of Europe, who has had what you might call a baptism of fire in his first budget negotiations. He stood firm in his support for the Court and we are grateful to him for that. We also thank all those ambassadors who reaffirmed their commitment to preserving the effectiveness of the Convention system in the course of those discussions. As I have said on many other occasions, additional resources cannot and should not be the only answer to the caseload problems facing the Court, but to exclude all budgetary growth for a system which is itself growing in every sense is not an option.

Let me now turn to our guest of honour, Mr Valery Zorkin, President of the Russian Constitutional Court. Dear President, it is a privilege and honour to have you here tonight. You have an enormously important role in modern Russia and modern Europe. So please tell us all about it.