Address given by Gil Carlos Rodríguez Iglesias (Strasbourg, 31 January 2002)

Caption: On the occasion of the formal sitting of the European Court of Human Rights in Strasbourg on 31 January 2002, Gil Carlos Rodríguez Iglesias, President of the Court of Justice of the European Communities, gives an address which highlights the special relationship that has developed over the years between the two European Courts.

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Address given by Gil Carlos Rodríguez Iglesias, President of the Court of Justice of the European Communities, on the occasion of the opening of the judicial year (Strasbourg, 31 January 2002)

Mr President,

Members of the European Court of Human Rights,

Presidents of the Constitutional Courts and of the Supreme Courts,

Your Excellencies,

Ladies and Gentlemen,

In giving me this opportunity to address this formal sitting, you do great honour to the institution of which I am President, and to me personally.

Permit me, first of all, to thank you, Mr President, for your kind invitation to take part in this formal sitting. I appreciate it not only as a mark of your friendship and collegiality, and that of the Court of which you are President, but also as a shining example of the close cooperation which has grown up over the years between the European Court of Human Rights and the Court of Justice of the European Communities.

That cooperation goes back many years, but has been considerably strengthened since the "new" European Court of Human Rights was set up in 1998.

Moreover, it meets a need of which both Courts are conscious.

Those two European Courts differ not only as regards the subject-matter and scope of their respective competences from a material standpoint, but also in terms of their territorial jurisdiction, which is more limited in the case of the Court of Justice of the European Communities.

Nevertheless, our two Courts share many common characteristics.

Permit me, in that regard, to point out first of all the novelty of the judicial models which each of our Courts embodies. Their respective situations as institutions do not correspond to any traditional model, just as the European Convention for the Protection of Human Rights and the Community legal order do not reflect any of the classic models of any international or national judicial system. Similarly, the legal remedies to which individuals have access before the two Courts are generally recognised as constituting groundbreaking developments in the history of legal protection.

The two Courts also have an undeniable vocation as European "constitutional" courts, which they have expressly affirmed. Thus, the European Court of Human Rights has described itself as "an international court responsible for a European constitution governing human rights", the Convention being regarded as "a constitutional instrument of European public order". Similarly, the Court of Justice of the European Communities has described the Treaty establishing the European Community, observance of which it ensures, as "the constitutional charter of a Community based on the rule of law".

In addition, each Court recognises a fundamental need for cooperation with national courts.That cooperation is of a more organic nature in the case of the Court of Justice of the European Communities, on account of the existence of the mechanism of references for preliminary rulings established by the Treaty; but in my view it is equally crucial as regards the European Court of Human Rights, inasmuch as the effective implementation of the European Convention is founded to a very great extent on the acceptance and application by national courts of the case-law developed by that Court, just as the effectiveness of the case-law of the Court of Justice of the European Communities depends on its being applied in a legal and social context by the national courts of the Member States of the European Union.

Lastly, the two Courts share an essential commitment to basic values forming an integral part of the common heritage of Europe, founded on democracy and fundamental rights, by virtue of which they contribute, together with the Supreme Courts and Constitutional Courts, to the emergence of what has been termed a "European constitutional area".

As regards the protection of fundamental rights, it is well known that there does not currently exist any normative system comprehensively covering the relationship between the European Convention for the Protection of Human Rights and the Community legal order. Because of that lacuna, the two Courts have a special responsibility for organising relations between those two legal orders.

The European Court of Human Rights has on many occasions, and applying different methods, been prompted to take cognisance of the Community aspect. I do not propose to comment on your case-law in that regard or, naturally, on any other cases pending before you which raise the question of the relationship between the Convention and the Community legal order.

Instead, I should like to take this opportunity to put forward a number of ideas on the role which, according to the case-law of the Court of Justice, the Convention plays in the Community legal order and on the possible prospects for the future.

To begin with, there are two factors which might at first glance appear contradictory but which serve to explain the special responsibility incumbent on the Court of Justice in matters concerning the protection of fundamental rights: first, the absence in the Community legal order of any exhaustive list of fundamental rights having constitutional or legislative status; and second, the essential character of respect for human rights as a pivotal element of the common heritage on which the Community is founded.

It is true to say that, in its very first judgments, the attitude shown by the Court of Justice towards the protection of fundamental rights was somewhat negative: in its response to pleas and arguments based on fundamental rights protected by the constitutions of the Member States, its initial reaction was to declare that the validity of Community measures could be assessed only by reference to Community law itself, thus excluding all reference to national laws.

Very rapidly, however – prompted by the Supreme Courts and Constitutional Courts of the Member States –, the Court of Justice acknowledged the central position occupied by fundamental rights in Community law, and confirmed that measures which were incompatible with respect for human rights could have no place within the Community.

In reaching that conclusion, the Court of Justice took the view that the protection of fundamental rights forms part of the general principles of law the observance of which it ensures.

In establishing those general principles, the Court of Justice drew inspiration from the internal laws of the Member States and from the international obligations assumed by the various States.

In looking for inspiration to the source provided by national laws, the Court of Justice has relied primarily on the constitutional traditions common to the Member States.

As to the international obligations assumed by the various States, it has taken into consideration a very extensive range of international instruments, including in particular the European Social Charter, the Conventions of the International Labour Organization and the United Nations' International Covenant on Civil and Political Rights. Those provisions for the protection of human rights are not formally applied by the Court of Justice as international rules, but are taken into account for the purposes of identifying general principles.

Amongst the international obligations assumed by the Member States, the Court of Justice very quickly focused its attention on the European Convention for the Protection of Human Rights, the "special

significance" of which has been emphasised. Thus, the Court has on numerous occasions declared that it ensures respect for human rights – and I quote – "as laid down in particular in the European Convention on Human Rights".

Given that, without exception, all the Member States of the Community have acceded to the Convention, it might be thought that its substantive provisions were binding on the Community as the repository of powers assigned to it by the Member States.

However, the Court of Justice has not followed that path, and has formulated a less radical interpretation, regarding the Convention as a special source of inspiration. Nevertheless, this has made it possible, in essence, to arrive at a result which is equivalent to direct application of the substantive provisions of the Convention.

In that context, the Court of Justice, together with the Court of First Instance, has clearly shown its willingness to respect not only the provisions of the Convention but also the caselaw of the European Court of Human Rights.

By way of example, I would mention the judgment of the Court of Justice of 28 March 2000 in the case of *Krombach*, which concerned the recognition, under the Brussels Convention, of a judicial decision alleged to have been delivered in violation of the right to a fair trial.

The Court of Justice, recalling that the European Court of Human Rights had held on several occasions that the right of every person charged with an offence to be effectively defended by a lawyer, if need be one appointed by the court, is one of the fundamental elements in a fair trial and that an accused person does not forfeit entitlement to such a right simply because he is not present at the hearing, held that a refusal to hear the defence of an accused person who is not present at the hearing constitutes a manifest breach of a fundamental right and may thus exceptionally justify refusal to recognise a judicial decision on the ground that it is contrary to the public policy of the State in which enforcement is sought.

In conclusion, even though the Convention is not formally applied as a constituent element of Community law, being instead merely taken into account as a source of inspiration for the purposes of identifying general principles, the case-law of the Court of Justice clearly shows that it applies the Convention as if its provisions formed an integral part of Community law.

That case-law of the Court of Justice has since been constitutionally enshrined in the Treaty of Maastricht. I would refer, in particular, to the current Article 6(2) of the Treaty on European Union, which reads: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

I should not omit to mention the question of accession by the European Community to the Convention, which has for many years been the focus of much discussion. As you know, that question formed the subject, in 1996, of Opinion 2/94 of the Court of Justice, which raised an issue of competence "as Community law now stands". The Court, recalling that the Community has only those powers which have been conferred on it, held that no Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in that field. It further ruled out recourse to the former Article 235 of the Treaty (now Article 308 EC), taking the view that, because of its fundamental institutional implications for the Community and for the Member States, accession would be of constitutional significance.

I should like to emphasise that that Opinion did not in any way constitute the expression of a negative attitude on the part of the Court of Justice towards the principle of such accession, still less the manifestation of any reluctance to occupy a position subordinate to the Strasbourg Court. It should be borne in mind that that Opinion was delivered on the eve of an intergovernmental conference which could easily have created the constitutional basis for the conferment of the competence needed for accession, had the political will to

do so existed.

Although the Court of Justice has always avoided adopting a position on the desirability of acceding to the Convention – rightly, in my view –, some of its members, including myself, have expressed themselves personally to be in favour of such accession, which would reinforce the uniformity of the system for the protection of fundamental rights in Europe.

I cannot conclude without mentioning the new Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 by the European Parliament, the Council and the Commission. This contains a long list of fundamental rights, not only civil and political but also social and economic, which goes further than the matters dealt with by the Court of Justice in the cases determined by it.

For the time being, the Charter has no formal legal validity. Several Advocates General of the Court of Justice have commented on it, considering, in essence, that it was intended to serve, at the very least, as a "substantive point of reference". The Court has not expressed a view on that point and, that being so, you will understand that I must refrain from formulating any opinion whatever in that regard.

If, at some point in future, the Charter is formally given normative or even constitutional validity, this could increase the risk of conflict between the case-law of the European Court of Human Rights and that of the Court of Justice, having regard in particular to the differences of content and formulation between the Charter and the Convention.

I would point out, however, that those drafting the Charter, conscious of the importance of the relationship between the Charter and the Convention, have inserted provisions catering for this.

I am thinking, first of all, of the "conformity clause" contained in Article 52 of the Charter, which reads: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention." Moreover, according to Article 53 of the Charter, "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised ... by ... the European Convention for the Protection of Human Rights and Fundamental Freedoms ...".

I would also point out that the preamble to the Charter expressly refers not only to the European Convention for the Protection of Human Rights but also to the case-law of the European Court of Human Rights.

Those provisions provide valuable guidance on the way in which the Charter is to be interpreted. In particular, they should make it possible for the case-law of the European Court of Human Rights to continue to be taken fully into account in the Community sphere.

Thus, rather than competing with each other and creating a schism in the protection of fundamental rights in Europe, the Convention and the Charter should serve to enrich one another.

From that point of view, it will be recalled that, according to the recent Laeken Declaration on the future of the European Union: "Thought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights." This clearly involves complementary, not alternative, considerations. All these questions will have to be considered by the Convention which has been convened and which will start work this year.

Thus, the protection of human rights in Europe and, more particularly, in the European Community is bound to undergo development in the future.

It is very pleasing to note that such development can proceed in an atmosphere of close collaboration between our two Courts, as witness the invitation extended to me, as President of the Court of Justice of the

European Communities, to address you today.

Thank you for your kind attention.