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Committee on Legal Affairs and Human Rights

The future of the Strasbourg Court and enforcement of ECHR standards: reflections on the Interlaken process

Conclusions of the Chairperson, Mrs Herta Däubler-Gmelin, of the hearing held in Paris on 16 December 2009

1. These conclusions are presented under four distinct headings, to reflect the manner in which the hearing was organised, even though such a sub-division is somewhat artificial. The conclusions are not a *verbatim record* or a detailed overview of all issues raised at the hearing. Instead, I have decided to focus on what I perceive to be the most important points raised in discussions (and in documents made available to Committee members).

I. The context: Interlaken Conference to be held on 18-19 February 2010

2. Why did I propose to the Committee a hearing on this subject? There were two reasons for this. It struck me as rather odd that the Assembly had not been involved in any of the substantive discussions or in meetings leading up to the conference. Also, it appeared to me that the title of the conference – "*The Future of the European Court of Human Rights"* – was too narrowly circumscribed, suggesting that problems facing the Court should be our primary concern. Our hearing dispelled this misunderstanding: the conference must also urgently address domestic (non-)implementation of Convention standards and determine how best to ensure prompt and full compliance with Strasbourg Court judgments – as our best hope to help stem the flood of applications submerging the Court.

3. When circulating the draft Interlaken Declaration, the Swiss authorities specified that the declaration should pursue three objectives: (i) reaffirm a commitment to the ECHR system (including the right of individual application), (ii) express support for the Strasbourg Court to act autonomously in its initiatives to increase its own efficiency, and (iii) put on track in-depth reform to guarantee the long-term efficiency of the system of individual complaint. This Declaration, together with an eight-point Action Plan, is presently the object of consultations with member states (draft text available on the Committee of Ministers' Chairmanship website www.interlakenconf.admin.ch). But how, and exactly upon whose authority, and in whose name, have these priorities been established and would they be implemented? I note, in this connection that – as yet – the potentially key role of national legislative organs and of the Assembly is not alluded to.

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4. The Swiss authorities must be commended for their initiative. But do member states, at ministerial level, have the courage to "bite the bullet" to confront the real human rights issues and problems facing member states and the Council of Europe? We are all fully aware that:

- the Strasbourg Court is not equipped to deal with large scale abuses of human rights (why has the Committee of Ministers not made vigorous use of its 1994 Declaration on Compliance with Commitments?; *ditto* the Assembly, in refocusing its monitoring priorities?);

- a number of the Court's main "clients" have made no serious effort to put into effect the 2000-2004 reform package (will ministers take upon themselves the responsibility to 'name and shame' states that have put into jeopardy the existence of the ECHR system?), and

- considering that the Court is financed through the Council of Europe's budget, state contributions are totally inadequate, not to say pathetic (several states' contributions to the Council of Europe's budget do not even cover – or only barely – the salary of a single judge on the Court!).

II. The authority and effectiveness of the ECHR: need for a renewed impetus

5. The authority of the Strasbourg Court is contingent on the stature of judges and the quality and coherence of the Court's case-law, which certain states have put into question. The most eminent jurists in member states with relevant experience should be encouraged to leave flourishing national careers, preferably in their late 40s, 50s and early 60s, to serve in Strasbourg. When national selection procedures are inadequate, the Assembly's hands are tied; often candidates are good, but not outstanding. If the findings of the Strasbourg Court are to be recognised as authoritative by their peers at the domestic level, the Assembly must be in a position to elect top quality judges.

6. The sheer volume of applications needing attention in Strasbourg has led to unacceptable delays which prevent judges from concentrating on their principal judicial task in dealing with cases that merit priority consideration. In this sense, quality and effectiveness are jeopardised by workload. The Strasbourg Court's Registrar provided us with alarming statistics. By the end of 2009, the Court will have received almost 57,000 new applications, an increase of 14%. On the side of output, the Court will have rendered judgment in more than 2,000 cases, an increase of more than 20% compared to 2008. But the backlog has reached almost 120,000, with a deficit of 1,800 applications every month. When analysing the Court's problems, we were informed that a small number of states dominate the Strasbourg Court's backlog: Russia represents nearly 28%, Turkey 11%, Ukraine 8.6% and Romania 8.3%. These four states together represent roughly 57% of the backlog. If one takes the ten high case-count states, the backlog comes to 77% (adding Italy, Poland, Georgia, Moldova, Slovenia and Serbia). Indeed, in 2008, 86% of the Court's judgments (1,543 in total) concerned just 12 states.

7. Another factor to be taken into account is the very high number of repetitive applications before the Court, deriving from the same structural problems at the domestic level, some of which have remained unresolved for many years. Over half of the judgments concern repetitive applications. The registrar estimated that there are probably about 20,000 such cases in the Court's backlog. In 2008 70% of the Court's judgments concerned breaches of the Convention in repetitive or clone cases.

8. To these statistics can be added information about late (and non-)execution of Strasbourg Court judgments. The number of cases pending before the Committee of Ministers at the end of 2000 was 2,298, while the equivalent figure for 2009 was 8,614, of which 80% concern repetitive cases. This too, is unacceptable.

9. Simply put, the Convention system in Strasbourg is in danger of asphyxiation:

- it is impossible for the Court to render justice to all individuals (as recognised by the existence of committee and single-judge procedures, a 'fig-leaf' that maintains the legal fiction of a judicial determination of all applications);

- it is totally absurd for the Court and its staff to waste time and effort in dealing with repetitive applications (surely old democracies, like Italy, not to mention more recent 'persistent defaulters' such as Moldova, Poland, Romania, Russia and Ukraine, ought to be subjected to "aggravated", if not "punitive" or "exemplary", damages)

- failure of many states to provide appropriate effect to their Convention obligations, haphazard implementation of the 2000-2004 reform package and unacceptable delays in full execution of Strasbourg Court judgments (what prevents national parliaments and the Assembly from summoning ministers to account for this at "hearings" in full view of the media, and for the Committee of Ministers to bring "infringement proceedings" against recalcitrant states with respect to non-execution?)

10. The root causes of the Court's workload and increasing backlog have to be eliminated. All meritorious cases, even if mostly repetitive, must be dealt with by the Strasbourg Court. There are no easy solutions, and in this respect reference can be made to ideas mooted, in particular, in the CDDH Opinion and by the Secretary General in their contributions to the Interlaken Conference. But should we embark, already now, on yet another major (internal) reform of the Strasbourg Court? Is there an imperative necessity to create within the Court an additional judicial filtering body, as advocated by the German authorities and others? Why cannot this be done by a "*chambre des requêtes"* composed of (a rotating pool of) existing judges? Could not such work be undertaken by ad *litem* judges taken from within the Court's registry and/or states' judicial *corps?* Should we not wait to see how the "pilot judgment" procedure develops? And what about the introduction of the system of "astreintes" (a fine for delay in performance of a legal obligation) to be imposed on states that persistently fail to comply with Court judgments (see Assembly Opinion No.251 (2004), paragraph 5)? Could one not consider, for example, the utility of imposing a small court fee to discourage potentially hopeless applications being addressed to Strasbourg?

11. There exist no miracle solutions to the difficulties confronting the Strasbourg Court if we are to maintain its dual role of ensuring common European human rights standards and individual supervision and adjudication. Tinkering with such controversial issues as the compulsory use of the Court's official languages or compulsory representation by a lawyer might simply divert precious time and energy from other essential work.

III. The authority and effectiveness of the ECHR: need for prompt and full implementation of the Court's judgments

IV. The authority and effectiveness of the ECHR at the national level: stemming the flood of applications

12. These two subjects were dealt together at the hearing; both touch upon issues in relation to which we parliamentarians – in our dual capacity as national legislators and members of the Assembly – have a crucial role to play. They also concern the "principle of subsidiarity", in that states have primary responsibility to prevent human rights violations and to remedy them when they occur.

13. National parliaments can and should ensure the compatibility of draft laws, existing legislation and administrative practice with Convention standards, and in particular possess "*specific mechanisms and procedures for effective parliamentary oversight of the implementation of the Court's judgments on the basis of regular reports by the responsible ministries"* (Assembly Resolution 1516 (2006), paragraph 22.1). For present purposes suffice to recall work we have been undertaking on this subject since 2000, the hearing we had in November 2009 on "parliamentary scrutiny of ECHR standards" (highlighting the effectiveness of parliamentary procedures in the United Kingdom and in the Netherlands), and the fact that too few parliaments have, to date, set up appropriate oversight mechanisms to ensure the rapid and effective implementation of Strasbourg Court judgments.

14. The Strasbourg supervisory mechanism is "subsidiary" in nature. States are responsible for the effective implementation of the Convention and it is the shared duty of all state organs (the executive, the courts and the legislature) to prevent or remedy human rights violations at the national level. This is principally, but not exclusively, the responsibility of the judiciary. Hence the logic of putting into place an effective human rights complaints mechanism at the national level, which would diminish the risk of the Strasbourg Court acting as a fourth instance appellate jurisdiction. Witness the small amount of complaints, comparatively speaking, that reach the Strasbourg Court from Spain and Germany. Appropriate domestic remedies, intensive training of lawyers, prosecutors and judges, the creation of a human rights culture and the impregnation of the Strasbourg *acquis* within national state structures – especially with respect to the "big sinners" (see paragraphs 6 to 8 above) – would help stem the flood of applications to the Court. Thus, well-functioning national human rights protection mechanisms might make superfluous the idea of creating a separate filtering body within the Strasbourg Court and shift back primary responsibility to national legal systems, where it belongs.

15. One subject of particular significance, discussed at the hearing, was the need to enhance the authority and direct application of the Strasbourg Court's findings in domestic law. Rather than refer to the *erga omnes* effect of Grand Chamber judgments of principle, it is probably more accurate to refer to its interpretative authority (*res interpretata)* within the legal orders of states other than the respondent state in a given case. Here, I have in mind the United Kingdom's 1998 Human Rights Act, Section 2 § 1 of which specifies that national courts "*must take into account"* Strasbourg Court judgments, and Article 17 of Ukrainian Law No.3477–IV of 2006, which reads: "*Courts shall apply the Convention [ECHR] and the case-law of the [Strasbourg] Court as a source of law*". This subject merits special attention in Interlaken.

16. The Council of Europe and its member states must do their utmost to solve a number of – often very serious – human rights problems in a handful of recalcitrant states. Rather than concentrate time, energy and money on reform (primarily) within the Court, is it not better to await, as proposed by the Group of Wise Persons in 2006, the effects of Protocol No.14 (which is to improve the Court's efficiency by 25%), and place greater emphasis on the implementation of the 2000-2004 reform package? I believe that I reflect the majority view of the Committee when citing the CDDH position on this subject:

> *"In order to ensure the long-term effectiveness of the Convention system,* ***the principle of subsidiarity must be fully operational.*** This should be the central aim of the Interlaken Conference" (CDDH Opinion, § 9, my underlining).

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17. As this is my last contribution to the work of the Parliamentary Assembly, I allow myself one final observation, namely the need for the rapid accession of the European Union to the European Convention on Human Rights. This would guarantee a coherent Europe-wide system of human-rights protection, reinforce legal certainty and provide greater protection of individuals' rights. The Treaty of Lisbon assures a legal basis for EU accession, and the imminent entry into force of Protocol No.14 to the Convention will provide the legal basis on the Strasbourg side.

18. Then, rather than enter into an institutional agreement – entailing many years of negotiation –, a "memorandum of understanding" could be quite quickly agreed between the EU and ECHR states parties by mid-2010, and accession foreseen soon afterwards (with practical details as to the participation of the EU in the Convention system being settled separately in parallel). If we are not inventive in deciding how best to deal with EU accession to the Convention, we will be confronted with the prospect of a long, protracted process of 47 individual ratifications on the Council of Europe side.

APPENDIX I

Programme of the hearing

I. The context: Interlaken Conference to be held on 18-19 February 2010

- **Mr Paul Widmer**, Ambassador and Permanent Representative of Switzerland to the Council of Europe (Strasbourg)
- **Mrs Deniz Akçay** Chairperson of Council of Europe Steering Committee for Human Rights (CDDH)
- **Mr Erik Fribergh**, Registrar, European Court of Human Rights (Strasbourg)

II. The authority and effectiveness of the ECHR: need for a renewed impetus

- **Mr Pierre-Henri Imbert**, former Director General of Human Rights at the Council of Europe (Strasbourg)
- **Mr Rick Lawson**, Professor of Human Rights at the University of Leiden (Netherlands)

III. The authority and effectiveness of the ECHR: need for prompt and full implementation of the Court's judgments

- **Mr Philip Leach**, Solicitor, Director of the European Human Rights Advocacy Centre (London)
- **Mr Iurii Zaitsev**, Ukrainian Government Agent before the European Court of Human Rights, former Chair of the Ukrainian Legal Foundation

IV. The authority and effectiveness of the ECHR at the national level: stemming the flood of applications

- **Mr Mark Entin**, Professor and Director of the Institute of European Law at the Moscow State Institute of International Relations
- **Mr Jens Mayer-Ladewig**, former German Government Agent before the European Court of Human Rights
- **Mr Andrzej Rzeplinski**, Judge on the Polish Constitutional Court

APPENDIX II

Background documents (a selection)

i. For Interlaken:

- Provisional Programme of High Level Conference on the Future of the European Court of Human Rights on 18 and 19 February 2010, Interlaken, Switzerland, available on the Committee of Ministers' Chairmanship website: www.interlakenconf.admin.ch

- Draft Declaration - Interlaken Ministerial Conference – 11 December 2009, available on the Committee of Ministers' Chairmanship website: www.interlakenconf.admin.ch

- Memorandum of the President of the European Court of Human Rights to states with a view to preparing the Interlaken Conference – 3 July 2009, available on the Court's website: http://www.echr.coe.int/ECHR/homepage_en

- Contribution of the Secretary General of the Council of Europe to the preparation of the Interlaken Ministerial Conference – 18 December 2008 - Doc. SG/Inf (2009) 20.

- Prevention of human rights violations is necessary through systematic implementation of existing standards at national level. Memorandum of the Commissioner for Human Rights in view of the High-Level Conference on the Future of the European Court of Human Rights – 7 December 2009. Doc. CommDH (2009) 38 rev, available on the Commissioner's website: http://www.coe.int/t/commissioner/default_EN.asp

- Opinion on the issues to be covered at the Interlaken Conference. Steering Committee for Human Rights (CDDH) – 1 December 2009 - Doc. CDDH (2009) 019 Addendum I, available on the CDDH's website: http://www.coe.int/T/E/Human_rights/cddh/

ii. Working documents of the Assembly's Committee on Legal Affairs and Human Rights:

- Parliamentary scrutiny of standards of the European Convention on Human Rights. Background document. Doc. AS/Jur/Inf (2009) 02 – 16 October 2009, available on the Committee's PACE website: http://assembly.coe.int/default.asp

- Implementation of judgments of the European Court of Human Rights. Progress report. Rapporteur Mr Pourgourides - 31 August 2009. Doc.AS/Jur (2009) 36 and addendum, available on the Committee's PACE website: http://assembly.coe.int/default.asp

- Guaranteeing the authority and effectiveness of the European Convention on Human Rights. Outline report. Rapporteur: Mrs Bemelmans Videc – Doc AS/Jur (2008) 07 – 21 February 2008

- Minutes from two hearings of the AS/Jur held in Paris on 16 November 2009 (("Parliamentary scrutiny of ECHR standards") and on 16 December 2009 ("The future of the Strasbourg Court and reinforcement of ECHR standards")

iii. Other background documents:

- Opinion. On Reform of the European Court of Human Rights. P. Leach, *European Human Rights Law Review* (2009), pp.725-735

- Bringing rights home or how to deal with repetitive applications in the future. Contribution of Erik Fribergh, Registrar, European Court of Human Rights, to Round Table held in Bled, Slovenia, on *ways of protecting the right to a trial within a reasonable time – countries' experiences – and short-term reform of the European Court of Human Rights.* – 21-22 September 2009, available on the Court's website: http://www.echr.coe.int/ECHR/homepage_en

- Council of Europe publication Reforming the European Convention on Human Rights. Work in Progress (April 2009, 718 pages, a compilation of publications and documents relevant to the ongoing reform of the ECHR, prepared by the CDDH)