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Colloquy Towards stronger implementation of the European Convention on Human Rights (ECHR) at national level

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Theme 3 Assisting member States in implementing the Convention

The Commissioner's role, by Thomas Hammarberg, Council of Europe Commissioner for Human Rights

Effective work for human rights must start at home. The diplomatic exchanges between countries as well as the international treaties and their monitoring mechanisms are important and do encourage further efforts at national level. However, genuine progress must be based on domestic decisions. This perspective should not be forgotten and is a key dimension of the mandate of the Commissioner.

This mandate is spelled out in Article 3 of my terms of reference:

The Commissioner shall:

- a. promote education in and awareness of human rights in the member States;*
- b. contribute to the promotion of the effective observance and full enjoyment of human rights in the member States;*
- e. identify possible shortcomings in the law and practice of member States concerning the compliance with human rights as embodied in the instruments of the Council of Europe, promote the effective implementation of these standards by member States and **assist them, with their agreement, in their efforts to remedy such shortcomings**"; (emphasis added).*

This mandate means that the Commissioner, beyond, the mere indication of shortcomings, is expected to enter into dialogue with the governments of the member states. This non-judicial institution, is not to deliver legally binding judgments on whether or not human rights obligations have been breached. Rather, I am asked to be a bridge between the Council of Europe and its member States. To assist the various authorities of the member states in construing national solutions for the implementation of the ECHR and also of the other Council of Europe human rights instruments.

Let me in this context mention specifically three important activities under my mandate.

I. Assistance to member states in preventing ECHR violations

Permanent contact with the various human rights actors in the member states allows the Commissioner to screen developments on an ongoing basis. When he detects activities or omissions that might lead to non-abidance by the ECHR, he alerts the authorities of the member state concerned. This may encourage the national authorities to address the issue before it becomes a breach of the Convention and is brought before the Court (or the other monitoring mechanisms).

Aware of the Court's case law with respect to the wide range of situations found in our member States, I am in position to recognize shortcomings which may be problematic vis a vis the Convention. For example, during my special mission to Armenia following the State of Emergency in March this year, the lack of an effective and independent investigation on the events crystallized as an obvious problem. Based on the Court's requirements, I highlighted the absolute need for such kind of investigation. This analysis was welcomed by the Armenian Government and we are now discussing possible ways of setting such independent investigation into motion.

Indeed the Commissioner can, respectfully, take the pragmatic approach of indicating, by way of "*recommendation*" possible measures which he has found to work well in other countries that had to face similar difficulties. Thus, the sort of constitutional principles set out by the Court can be adjusted by the Commissioner in the form of concrete suggestions. Recently, the Polish Government, following my report of 2007, has put into place a special Committee on the implementation of my recommendations and consults me and my Office regularly to make sure my recommendations are well understood. This is one of the most promising examples.

II. Assistance to member states in correcting situations of non compliance with the ECHR

When the national authorities, the Court, one of the various specific monitoring bodies or the Commissioner detect situations that have already created violations of human rights in a country, the Commissioner can assist the authorities in correcting the situation.

While the Court cannot go beyond the object of the application before it, the Commissioner can look at all aspects of a phenomenon. For instance, in its judgment in the case of *Hummatov v. Azerbaijan* of 29 November 2007¹, the Court found that the medical care provided to the applicant in the Gobustan Prison had been inadequate and must have caused him considerable mental suffering which had diminished his human dignity and amounted to degrading treatment. Consequently, the Court held that there had been a violation of Article 3. During my recent visit to Azerbaijan, I visited the Gobustan Prison and I was able to consider a number of issues related to prisoners sentenced to life sentences, their conditions of detention and their legal regime. In light of the Court's principles and also of the CPT recommendations, I tried to suggest measures to the authorities that went beyond the issue which was considered by the Court.

From his country visits and thematic work, the Commissioner has knowledge of the ways in which the various countries address difficulties which, after all, often resemble one another.

¹ Applications nos. 9852/03 and 13413/04.

This allows him to bring possible avenues of solution to the attention of the national authorities who face the need to react. Good practices of other member States are shared *via* the Commissioner.

In reality the difference between prevention and corrective measures is not easy to make. Corrective measures are part of prevention. Let me give you an example.

The Court has found quite a number of cases where it concluded to a lack of an independent investigation into police misconduct. Having encountered this issue in many countries, I decided to organise an expert workshop on police complaints in the end of May in Strasbourg to find out together what can be done. Participants included representatives of complaints mechanisms, police, prosecutors, government authorities, inter-governmental and non-governmental organizations as well as academic experts.

Currently, there is a variety of different mechanisms for investigating police complaints in the member states of the Council of Europe. A few countries have set up bodies operating separately from the police. Many countries entrust public prosecutors to lead and supervise investigations carried out by the police. Another model is to have teams with specialized prosecutors and police officers. Several European states are also in the process of reforming their current procedures. The purpose of this workshop was to share experiences from the Council of Europe's member states models and procedures, to assess their independence, effectiveness and transparency and to discuss good practices and challenges regarding these different models.

III. Assistance to National Human Rights Structures (NHRs) in implementing the ECHR

Resolution (99) 50 expressly tasks the Commissioner to cooperate with the NHRs and help them perform their own duties in the best possible way². NHRs are independent national bodies set up under the laws of their countries to advise their government and other national authorities on how to best abide by human rights standards. They have a longstanding experience of constructive dialogue with the authorities at all levels. In line with proposals made by the Group of Wise Persons, I have engaged in an enhanced co-operation with the NHRs in order to foster their awareness of the Council of Europe standards, which they may help their authorities to implement. Also, we have set up a network between the NHRs that allows for mutual inspiration between these national non-judicial human rights protectors in the member States. This is an asset when it comes, for instance, to preparing a national human rights action plan.

Three concrete results should be mentioned in this respect:

² Article 3 c: “[T]he Commissioner shall, wherever possible, make use of and co-operate with human rights structures in the member States. Where such structures do not exist, the Commissioner will encourage their establishment.” Article 3 d: “The Commissioner shall [...] facilitate the activities of national ombudsmen or similar institutions in the field of human rights.”

The involvement of NHRSSs in the implementation of the 2004 Recommendations

Our contact persons in the NHRSSs were involved in the review of the implementation of the 2004 Committee of Ministers Recommendations undertaken by the Steering Committee for Human Rights (CDDH). Taking into account their workload, the Office of the Commissioner decided to consult the NHRSSs only on two of the five Recommendations, namely Recommendation (2004)⁵ on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights and Recommendation (2004)⁶ on the improvement of domestic remedies. These recommendations appeared to have the closest links with the mandates of most NHRSSs.

The reaction of NHRSSs was very positive. The Commissioner received 36 replies from the Contact Persons and made a compilation of them which was transmitted to the Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR). This experience has proved that the Commissioner's Office can serve as an effective channel to inform, stimulate and collect contributions from the NHRSSs, in particular by using the new tool now put in place in the form of the network of Contact Persons. The second positive outcome of this consultation was that it contributed to the awareness raising of the role of NHRSSs for the implementation of the Court's judgments.

The execution of the Court's judgments

Some NHRSSs have expressed the wish to enhance their capacity to act in the execution of ECtHR judgments. They have asked my Office to help them fully understand their role under Rule 9³ of 2006 Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements⁴. Working with them on the public documents of the CM website and on the First Annual Report on execution, we have provided the NHRSSs with information they had sought. As a result, under the aegis of my Office experts from a number of NHRSSs have discussed good practices that might allow for the execution of certain sorts of judgments. This, in turn, would ensure the non repetition of violations at national level

³ *Rule 9 Communications to the Committee of Ministers*

1. The Committee of Ministers shall consider any communication from the injured party with regard to payment of the just satisfaction or the taking of individual measures.
2. The Committee of Ministers shall be entitled to consider any communication from non-governmental organisations, as well as national institutions for the promotion and protection of human rights, with regard to the execution of judgments under Article 46, paragraph 2, of the Convention.
3. The Secretariat shall bring, in an appropriate way, any communication received in reference to paragraph 1 of this Rule, to the attention of the Committee of Ministers. It shall do so in respect of any communication received in reference to paragraph 2 of this Rule, together with any observations of the delegation(s) concerned provided that the latter are transmitted to the Secretariat within five working days of having been notified of such communication.

⁴ Adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies.

Training of NHRs

Co-financed by the Council of Europe and the European Union the Project (referred to as “The Peer-to-Peer Project”) consists of a work programme to be implemented by the Office of the Commissioner for Human Rights in 2008 and 2009. It aims at setting up an active network of independent non-judicial National Human Rights Structures (NHRs) compliant with the Paris Principles, with special focus on non EU-member States. The Peer-to-Peer Project seeks to enable national structures to improve their performances in terms of:

- raising human rights awareness in their countries;
- detecting potential or existing human rights problems;
- proceeding to efficient investigations where this is in their mandate;
- engaging in constructive dialogue with the authorities to avert or solve problems of human rights protection;
- triggering rapid mobilisation of international partners if necessary.

The main tool of the programme will be the organisation of workshops for small groups of practitioners from the NHRs to convey select information on the legal norms governing priority areas of NHRs action and to proceed to a peer review of relevant practices used or envisaged throughout Europe. A manual in several languages will be prepared after each workshop for dissemination amongst NHRs and other relevant actors. The choice of the themes for the workshops takes due account of priorities indicated by the NHRs. The feedback from the first two workshops was very positive. I do believe that when NHRs become increasingly aware of their own means and responsibilities as well as of good practices of colleagues abroad, they will play a more and more proactive role in advising their authorities on how to better protect human rights in our member States.

We are moving towards more emphasis of the principle of subsidiarity with the Commissioner in the role of a facilitator. For this progress to be successful, State authorities must be open minded and receptive to ideas and suggestions. So far, I can report encouraging signals.