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« The Future of the European Court of Human Rights in the light of the Wise Persons' report »

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**Alternative or complementary means of resolving disputes
and other issues broached in the Wise Persons' Report**

Speech by

Thomas Hammarberg,
Council of Europe Commissioner for Human Rights

We are all gathered here thanks to the hospitality of the Presidency of San Marino to mark the kick off of the report of the Group of Wise Persons (“the GWP”). I see this major event as a turning point of a reflection process which started back in May 2004. The different steps of this process, namely the “reform package” of the recommendations accompanying Protocol No. 14 to the European Convention on Human Rights (“the ECHR” or “the Convention”), the Oslo seminar in 2004, the Warsaw Summit which led to the creation of the GWP were all animated by the same guiding principle: bring back the responsibility for respecting and protecting human rights to the member States in the name of the subsidiarity of the ECHR mechanism, affirmed 40 years ago by the Court¹ and qualified once again by the GWP as “one of the cornerstones of the system for protecting human rights in Europe”².

The need to relieve the European Court of Human Rights (“the Court”) from its workload is one more reason to underline our attachment to the principle of subsidiarity. When we reaffirm our attachment to this principle –which the Court in its fertile case law has defined in its various aspects³- and we remind to member States their role as the natural guarantors of human rights, we actually pledge for the development of a human rights conscience at all levels of society. One year after the taking up of my functions and having visited different parts of our continent, this necessity appears even more evident. The development of a Human Rights conscience in our member States gives full effect to the objective character of the Convention and the collective guarantee of its system⁴ as it was qualified by the former European Commission of Human Rights. In this historic point in time, when we are planning to go further, we ought to remember the guiding principles of our history.

The title of my intervention “Alternative or complementary means of resolving disputes” is the one under which the report of the GWP –together with the part on friendly settlements and mediation- envisages the new functions that the Commissioner should undertake with ombudsmen and national human rights institutions (“NHRIs”) in order to assist the long term effectiveness of the Convention. This title did not figure in the interim report issued by the Group for the Ministerial Session in May 2006. Thus, before entering into the substantive part of my intervention, I would like to make some preliminary remarks of a more formal nature.

When the interim report was issued, I had the honour to be invited by the Chairman of the Group, Mr. Rodriguez-Iglesias, to submit my comments in writing. The publication of the interim report coincided with the taking up of my functions and with the opening of two gates of major importance for the future of my work. First, the preparation for the entry into force of Protocol No. 14 which allows the Commissioner to take part in the judicial proceedings

¹ *Handyside v. the United Kingdom*, 7 December 1976, Application no. 5493/72, §48: “The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (judgment of 23 July 1968 on the merits of the “Belgian Linguistic” case, Series A no. 6, p. 35, para. 10 in fine). The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted (Article 26)”.

² Report of the GWP, para. 16.

³ See *inter alia*, Dinah Shelton, Subsidiarity and Human Rights Law, Human Rights Law Journal, 28 April 2006, Vol. 27, No. 1-4, p. 4-11.

⁴ Decision of the Commission as to the Admissibility of Application No. 788/60 lodged by the Government of the Federal Republic of Austria against the Government of Italy, 11 January 1961.

before the Court without betraying the explicit prohibition of a judicial competence as provided with by his mandate. Secondly, the decision to expand and intensify my cooperation with ombudsmen and NHRIs building on the very important foundations set up by Alvaro Gil-Robles.

I submitted my comments to the interim report and as the latter referred to the need for an enhanced cooperation with ombudsmen and NHRIs (which under my mandate are defined as National Human Rights Structures - “NHRSS”), I decided to consult the latter immediately. Indeed, the cooperation between NHRSSs and the Commissioner was based, from the outset, on the mutual respect of each other’s independence. As a result of a conference in Vienna in June 2006, the European branch of the International Ombudsman Institute (IOI) prepared a questionnaire for the attention of its members in order to collect their reaction to the GWP interim report and my comments thereto⁵. Preliminary discussions with the European Group of NHRIs were held in September 2006 in Athens during the 4th Round Table of the Commissioner and the European NHRIs⁶. I had informed the GWP of all these consultations during the hearing they organised with me in September 2006. I am glad that in its final report the Group has noted “with approval that the Commissioner is extending his current co-operation with national and regional ombudsmen and national human rights institutes” (para. 112).

The discussions continued in Dublin in December 2006 and in January 2007 in Berlin respectively with NHRIs and ombudsmen⁷. This intense dialogue will be pursued in Athens on 12-13 April 2007 on the occasion of a Round Table co-organised by the Greek Ombudsman and my Office. It will bring together the ombudsmen and the NHRIs of all Council of Europe member States and will mark the kick-off of a new phase of co-operation. With a view to preparing the Athens Round Table next month, my Office has prepared a draft background paper defining the terms of the future co-operation between NHRSSs and the institution of the Commissioner.

Let me now turn to some of the detailed proposals contained therein, leaving aside issues not covered by the GWP report. I would like to stress that the proposals I am making to the National Human Rights Structures do make the necessary link between the suggestions of the GWP and those emanating from other Council of Europe instances on the same topics. I see them all as complementary. In this respect, particular reference is to be made to the work carried out by the Committee of Experts for the improvement of procedures for the protection of human rights (DH-PR) working under the aegis of the Steering Committee for Human Rights (CDDH) following the new mandate given to the latter by the Committee of Ministers. My office has participatory status in that Committee and is involved in the work carried out there.

⁵ *Preliminary discussions between the Commissioner and National Human Rights Structures on possibilities of enhanced cooperation, German Parliament, Berlin, 11 January 2007: Compilation of replies to a questionnaire of the International Ombudsman Institute-European Region, CommDH(2007)1, 17 January 2007, document to be found on the Commissioner’s website. A revised version of this document was issued on 28 March 2007, CommDH(2007)1 Rev.*

⁶ 4th Round Table of the European National Institutions for the Promotion and Protection of Human Rights and the Council of Europe Commissioner for Human Rights, Athens 27-28 September 2006 (organized jointly with the Greek Commission for Human Rights). The complete file of the Round Table can be consulted at the Commissioner’s website.

⁷ The initiative for that meeting came from the President of the European Chapter of the IOI, the Austrian Ombudsman Peter Kostelka.

The first proposal mentioned in the GWP report is that the Commissioner and his partners “should respond actively to the announcement of Court decisions finding serious violations of human rights” (para. 110).

There can be no better implementation of this proposal than cooperating with NHRs in order to assist the other Council of Europe instances as well as national authorities in rapidly executing the Court’s judgments, in particular pilot judgments. Indeed when it comes to monitoring the execution of judgments, NHRs and the Commissioner are very well placed to inform the Court and the Committee of Ministers as to whether or not practices or situations declared in breach of the Convention by the Court persist or have actually been stopped and the relevant Court judgment thus been implemented. Given their longstanding experience of constructive dialogue with the authorities at all levels, they could not only play the role of a watchdog, but also be helpful to the authorities for achieving that objective. This becomes much more relevant with a view to the tripartite annual meeting on execution of judgments between the Committee of Ministers, the Parliamentary Assembly and the Commissioner in accordance with the Declaration of 19 May 2006⁸.

Many channels for the timely sharing of pertinent, reliable information need to be established. On the one hand, NHRs could provide information to the Commissioner who could use it for his institutionalised relations with the Committee of Ministers and the Parliamentary Assembly. On the other hand, the Commissioner, in reaction to information provided by the Council of Europe instances, could work with NHRs at the national level. This could be done in the context of country visits or on an ad hoc basis. The latter modality might be appropriate with respect to pilot judgments where the GWP envisages a specific role for the Commissioner’s partners⁹. Ombudsmen could act as mediators in order to assist in addressing the issue at national level. The Commissioner stands ready to offer his advice and his guidance to them in order to ensure that the procedures are fair and in keeping with ECHR standards. The GWP report does not mention explicitly the Commissioner in the part dedicated to pilot judgments¹⁰. However, the role envisaged by the GWP for the Commissioner and the ombudsmen at national level does have a direct bearing on this issue.

I believe that, with the assistance of NHRs, the Commissioner could assist the Court in identifying cases that should give rise to a pilot judgment, in defining the domestic measures required by the execution of a judgment in such a pilot case and in understanding the difficulties preventing national authorities from taking such measures. The Commissioner and his partners could help the Court to formulate realistic, inventive and precise prescriptions of the measures expected from the States concerned, not only the States party to the proceedings but also third States concerned by the substance of the judgment.

Furthermore, and although these proposals do not figure explicitly in the final report of the GWP, the work regarding the execution of judgments should in my view involve the top priority recommendations of 2004, namely Recommendation Rec(2004)5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards

⁸ Declaration of the Committee of Ministers on sustained action to ensure the effectiveness of the implementation of the European Convention on Human Rights at national and European levels adopted on 19 May 2006, point X(c).

⁹ “113. *This network could help to reduce the Court’s workload with the active support of the Commissioner, who could identify a specific problem in a state likely to trigger a large number of applications to the Court and help to find a solution to the problem at national level in conjunction with the national ombudsman [...]*”.

¹⁰ Paras. 100-105.

laid down in the European Convention on Human Rights and the improvement of domestic remedies called for by Committee of Ministers Recommendation Rec(2004)6. I believe that the findings of the Court, especially in pilot cases, should lead the Commissioner and his partners to take a proactive approach in triggering verification procedures to assess the compatibility of draft laws, existing laws and administrative practices with the ECHR standards as they emerge from the Court's case law. From the work carried out at present by the DH-PR it becomes clear that NHRs have a key competence regarding both recommendations. I stand ready to assist them in initiating such compatibility exercises in their respective countries, in discussing the findings of such exercises with the authorities and in issuing opinions related to national legislation and administrative practices. I also stand ready to support findings by the NHRs with respect to deficient domestic remedies in the way they deem it appropriate. Adequate communication channels and procedures between the Commissioner and his partners would need to be instituted for all these purposes.

The second package of proposals concerns the dissemination of information on human rights and the Strasbourg Court¹¹.

I have already explained on an earlier occasion my views on dissemination of information regarding the execution of judgments. During the meeting with the ombudsmen in Berlin, the discussion focused on the dissemination of relevant information on the Court's case law. The latter would be in line with the part of the GWP report on "Enhancing the authority of the Court's case law in the States Parties"¹². From the work carried out by DH-PR it seems that most of NHRs receive adequate information on the Court's case law, which was confirmed by some ombudsmen at the meeting in Berlin in January 2007. However, it has been decided in Berlin to explore the desirability and usefulness of receiving information on the Court's case law from the Commissioner's Office on targeted issues dealt with by NHRs at national level. In the Athens Round Table I intend to discuss if it would not be desirable that NHRs, in co-operation with the Commissioner, accept the task of providing general information to individuals about the Court's mandate and competence, admission criteria and just satisfaction policies.

I have read carefully the concrete proposals of the Group regarding friendly settlements and mediation. Although bargaining might well bring about relief for the Court's workload, it might also entail the risk that the practical arrangements found between the parties to a case are questionable with respect to questions of law and principle. This procedure should remain in line with the spirit of the Convention. In case national ombudsmen are involved, I stand ready to contribute through advising and working with national ombudsmen in this respect in order to ensure that the procedures are fair and in keeping with the Convention's standards.

¹¹ "112. The Group notes with approval that the Commissioner is extending his current co-operation with national and regional ombudsmen and national human rights institutes in order to form an active network of all these institutions, so as to disseminate appropriate information on human rights and, as far as their competence permits, take action on alleged violations and abuses.

113. [...] National ombudsmen could also play a role in informing the public about the right to apply to the Court by distributing application forms and, above all, informing the public about the Court's mandate and competence and about the Court's mandate and about the admissibility criteria contained in the Convention."

¹² Member States' obligations in this respect are defined by Committee of Ministers Recommendation Rec (2002)13 on the publication and dissemination in the member States of the text of the ECHR and of the case law of the European Court of Human Rights, Committee of Ministers Resolution (2002)58 on the publication and dissemination of the case law of the European Court of Human Rights and Committee of Ministers Recommendation Rec (2004) 4 on the European Convention on Human Rights in university education and professional training.

Allow me to conclude by making some final remarks with respect to three remaining issues touched upon by the GWP in its report:

➤ First, the question of whether or not the mandates of NHRs allow them to deal with Human Rights problems. The GWP has addressed that issue in the following terms:

“111. Under his mandate, the Commissioner facilitates the activities of national ombudsmen and similar institutions. However, these are not always competent in human rights matters. The Committee of Ministers might consider adopting a recommendation with the aim of assigning such competence to them.” It was made clear in the meeting in Berlin, that some NHRs cannot deal, without an extension of their mandate, with some of the issues envisaged by the GWP. This being a prerequisite for the implementation of the GWP’s proposals and for the other items of the enhanced co-operation, the participants of the Berlin meeting decided to consider during the discussions at the Round Table meeting in Athens, whether additional European standards are required in that respect.

➤ Secondly, the issue of staff and resources at the disposal of the Commissioner and the NHRs has been stressed by the GWP which *“considers that the Commissioner should have the necessary resources to be able to play a more active role in the Convention’s control system, acting either alone or in co-operation with European and national non-judicial bodies”*¹³. This constitutes an prerequisite for the rapid and effective implementation of any programme of enhanced co-operation between them. I welcome such support which should be also benefit to NHRs. However, much can already be achieved with mutual willingness and improved communication. Specific information provided to NHRs on the Court’s case-law as well as a special training for their attention could facilitate their work.

➤ Finally, the need to ensure full respect for the respective independence of the Commissioner and his partners should be the cornerstone of an enhanced cooperation agreement. This entails for me the obligation to respect their willingness to cooperate on any given case or not. One year after the beginning of the second mandate, having travelled in several parts of Europe, I have a clear picture of the effectiveness of the NHRs and their contribution to the development of a Human Rights conscience at national level. While defining the lines of my further work with them, I feel that a major obligation lies on us, on the Council of Europe, now: We should offer a quantity and quality leap to NHRs in order to cooperate with them more intensely and to complement and assist each other so as to be able to implement what the Wise Persons and others have advised us to achieve.

¹³ GWP report, para. 110.