APPLYING AND SUPERVISING THE ECHR

Towards stronger implementation of the European Convention on Human Rights at national level

Colloquy organised under the Swedish chairmanship of the Committee of Ministers of the Council of Europe

Stockholm, 9-10 June 2008

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Introduction

Guaranteeing the long-term effectiveness of the monitoring system established under the European Convention for the Protection of Human Rights and Fundamental Freedoms is a main priority for the Committee of Ministers of the Council of Europe. To this end, the Swedish Presidency of the Committee of Ministers organised a Colloquy on the "stronger implementation of the European Convention on Human Rights at national level" (Stockholm, 9-10 June 2008). The Colloquy focused on the improvement of domestic remedies, enhancement of the effect of the Court's case-law and the assistance given to member states in implementing the Convention.

This event brought together representatives of the member states' governments and parliaments and the Parliamentary Assembly, the Secretary General, judges of the European Court of Human Rights, including its President, and members of the Registry, and representatives of other Council of Europe bodies working for human rights, including the Commissioner for Human Rights, and civil society.

Among the many ideas discussed during the Colloquy were the possibility of drafting more specific recommendations on effective domestic remedies, in particular concerning the excessive length of proceedings at national level; means for reinforcing the *erga omnes* effect of Court judgments, and the possibility of developing the non-contentious jurisdiction of the Court, notably as regards advisory opinions. These and other issues will be examined in greater detail in the framework of the human rights intergovernmental co-operation work undertaken within the Council of Europe. ★

Welcome address

Ms Beatrice Ask

Swedish Minister for Justice

Mr Secretary General, Mr President of the Court, Ladies and gentlemen,

It is a great pleasure for me to welcome you all to Stockholm. I consider it an important task for us all to discuss how the Convention for the Protection of Human Rights and Fundamental Freedoms can have a clearer impact at national level and thus promote important efforts to strengthen respect for human rights and fundamental freedoms all over Europe.

But this is also an opportunity for more light-hearted elements. Stockholm is often called the "Venice of the North", and not without good reason. Throughout history, proximity to water has made its mark on Sweden's capital city in many different ways. You will have the chance to become better acquainted with one example of this later on this evening. The Vasa Museum – one of Sweden's biggest tourist attractions – houses the warship Vasa, with which Sweden hoped to achieve domination over the Baltic Sea. However, the ship sank on its short maiden voyage in 1628. After 333 years submerged under water, the Vasa was salvaged in spectacular fashion. The ship is a unique and well-preserved treasure trove, containing almost a thousand dramatic sculptures and ornaments. I would like to welcome you all to this evening's dinner, set against the backdrop of the exciting history that the Vasa represents.

Ladies and gentlemen,

Sweden has always been a keen supporter of the Council of Europe and the European Convention for the Protection of Human Rights and Fundamental Freedoms. We were one of ten countries that signed the Treaty in London in 1949 establishing the Council of Europe; and we had already ratified the Convention when it entered into force in 1953.

It has to be said that it took some time for the Convention to have a proper impact in Sweden. This was, of course, partly due to the dynamic interpretation of the rights and freedoms contained in the Convention by the bodies responsible for the Convention; but it must also be acknowledged that, to begin with, we didn't have an entirely realistic view of how our legal system stood in relation to the Convention's requirements. This has perhaps been especially clear concerning the right to access to a court of law when examinations of civil rights and obligations are conducted, as laid down in Article 6. For in Sweden, it had long been the case that the Government was often the last instance for such examinations. The fact that this wasn't compatible with the Convention's requirements was established for the first time in the case of *Sporrong and Lönnroth v. Sweden*, in which a judgment was delivered on 23 September 1982. This judgment was later followed by several others with the same result. These judgments had an immediate impact on Swedish legislation.

Sweden has chosen two different paths to resolve the problem that the judgments adopted by the European Court of Human Rights highlighted. Firstly, in a large number of cases, appeals have been transferred to courts of law. Secondly, 1988 saw the introduction of a special act on judicial review in a court of law of decisions that would not otherwise be the subject of a court examination following a normal appeal. The act was replaced in 2006 by an updated act on the same subject.

Examples in other areas in which the Convention has had a direct impact on the Swedish legal order include the shortening of the length of time a person may be detained before having their detention examined by a court of law;[1] the introduction of stricter rules for children being taken into care by the public authorities;[2] highlighting the right to oral hearings in courts of law;[3] and paying increased attention to the right to a court examination within a reasonable length of time. Not least in respect of the latter, focus has been directed towards the right – laid down in Article 13 of the Convention – to an effective national legal remedy to claim that one's rights and freedoms, as stated in the Convention, have been violated. Later on today, Justice Anna Skarhed from the Swedish Supreme Court will speak a bit more about Sweden's experience in this area.

So the European Convention for the Protection of Human Rights and Fundamental Freedoms has helped to develop the Swedish legal order in such a way that human rights and fundamental freedoms have continued to gain greater prominence.

1. See the case of *McGoff v. Sweden*, judgment of 26 October 1984.
2. See, for example, the case of *Olsson No.1*, judgment of 24 March 1988.
3. See, for example, the case of *Ekbatani*, judgment of 26 May 1988.

Sweden is a dualist state. Any international convention must therefore be transformed or incorporated in order to become a part of Sweden's internal legal order. When Sweden adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1950, it was deemed unnecessary to incorporate it into Swedish law. This view was maintained until 1995, when the Convention was incorporated into Swedish law by means of special legislation. At the same time, an addition was made to the Instrument of Government to the effect that acts or other regulations may not be introduced in contravention of Sweden's commitments because of the Convention. It can also be mentioned here that the Administrative Procedure Act was adjusted in 2006; it is now clear that the Act's provisions on appeals to an administrative court always apply, regardless of what is prescribed by other acts or ordinances, if this is necessary in order to satisfy the right to examination by a court of law as laid down in Article 6 of the Convention. Thanks to these measures, the importance of the Convention for the Swedish legal order has been emphasised further.

In view of its broad area of application, it is important that the Convention is discussed in the whole of society, and that citizens are informed of their rights under the Convention, as well as how they should go about exercising these rights. As far as Sweden is concerned, I can mention the Government's website on human rights,[4] which contains questions and answers about the Convention, as well as other information. Public officials are also required to have sufficient knowledge of the requirements placed on them by the Convention. It can also be mentioned in this respect that the Swedish National Courts Administration publishes regular summaries of the judgments and decisions adopted by the European Court of Human Rights, not just those involving Sweden but also the most interesting of those involving other countries. These summaries are available to everyone on the Internet.[5] I would also like to make a point of mentioning the courses in human rights issues that are offered by universities and higher education institutions, and that are often a part of compulsory education as well.

Ladies and gentlemen,

The European Court of Human Rights is currently facing major challenges. The number of states parties is now at 47 – compared with the original ten. There is a large stream of complaints flowing into Strasbourg. If the Court is to continue to be able to perform its important task of interpreting the Convention – thus helping to strengthen human rights in Europe – it's important for the Court to be able to work with efficient methods that are adapted to the demands

4. www.manskligarattigheter.se
5. www.dom.se

currently placed on it. These demands are completely different to those that applied just over 50 years ago. Perhaps I need say no more than to simply remind you that the Convention now protects more than 800 million inhabitants throughout Europe, and that more complaints to the Court were registered in 2007 than in the entire period from 1955–1997.

Protocol 14 amending the Convention is an important step in streamlining the work of the Court. It's therefore highly regrettable that after four years the Protocol has still not been ratified by all of the member states of the Council of Europe, and thus has not been able to enter into force.

I hope that our discussions at this Colloquy here in Stockholm will highlight the future potential there is in the Convention system. But we must look after this system. This is why it is important that the principle of subsidiarity be observed. The states parties must, as far as is possible, provide mechanisms to deal at a national level with claims that the Convention has been violated. The objective must be that citizens in the member states of the Council of Europe who feel that their rights and freedoms, as laid down in the Convention, have been neglected should not have to turn unnecessarily to Strasbourg to obtain redress for any wrongs done to them. And in the cases where this is not possible, the procedure at the Court must be so efficient and at the same time legally secure that an individual citizen can have a decision on his or her complaint from the Court within a reasonable period of time. Unfortunately, this is not the case today.

Ladies and gentlemen,

With these words, I would once again like to wish you a very warm welcome to Stockholm. I am certain that the next two days of discussions will be fruitful for our joint efforts to safeguard and develop the unique system to protect the rights and freedoms that the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights and the Committee of Ministers represent.

Thank you. ★

Member states of the Council of Europe and their responsibilities under the European Convention on Human Rights

Rt Hon Terry Davis

Secretary General of the Council of Europe

A few weeks ago, Bernard Kouchner, the Foreign Minister of France, was in Strasbourg to inaugurate a new building of the Council of Europe. At a ceremony which took place across the street from the European Court of Human Rights, he made a statement to which I fully subscribe, he said and I quote "In its noble task of protecting human rights and fundamental freedoms, the Court is not, alas, as is often said, the victim of its own success. It is rather the victim of the failures and bad habits of our member states. We all know that the improvement of domestic remedies is part of the solution. We also know that the full and effective execution of Court judgments, of which each state party has accepted the binding effect, without derogation, will contribute to resolving the problem of overburdening with which the Court is confronted."

With 80 000 outstanding applications in Strasbourg, one might ask why we are here talking about national measures? The answer, of course, lies in the term "subsidiarity". The Convention system is first and foremost about protection at national level. The Strasbourg Court is only intended – indeed, its jurisdiction only allows it – to intervene after domestic remedies have been exhausted.

In a perfect world, there would be no violations of human rights, or at least none without remedy at national level. To have so many outstanding applications

in Strasbourg – even if 90% of them turn out to be inadmissible – suggests that perfection, whether or not attainable, is certainly a very, very long way away.

I must then make the point that although the roles of national courts and the European Court of Human Rights are extremely important, this does not mean that the Council of Europe is only about Courts. We also try to help member states to reinforce their national systems, through standard-setting, advice, co-operation and monitoring. If widespread or chronic problems persist in member states and floods of cases continue to flow into Strasbourg, calls to increase the budget of the Court will continue. As I said in San Marino two years ago, our zero-growth budget means that our other activities must then be cut – including, sooner or later, those activities which could help to improve the situation in member states and thus reduce the flow of cases. And if this leads to yet further increases in the Court's share of the budget, well… they call that a vicious circle. In the long term it makes no sense to take money from the fire prevention team to pay for the fire brigade. I would even go so far as to say that member states have an implicit duty and responsibility to ensure that the Council of Europe as a whole is able to promote and support the implementation of the Convention at national level.

It is certainly the case that, by increasingly focusing our activities and resources on human rights, we are doing more and more to help member states to meet their responsibilities under the Convention.

Much of the reflection and standard-setting work is done by the Steering Committee for Human Rights – CDDH – and its subordinate bodies. These bodies have been very active – they drafted most of the instruments contained in the Reform Package of the 2004 Declaration; and since then they have been engaged in follow-up to implementation of the five main Recommendations. The examples of good practice identified should be studied carefully by member states in order to make progress in the relevant areas. For example, in most of our member states, criminal proceedings can now be reopened, after a Court judgment, either at the request of the applicant or at that of either the public prosecutor or some other public authority.

The Council of Europe also assists its member states in implementing higher standards of human rights through our programmes of targeted co-operation activities. These programmes complement standard setting and monitoring by translating their results into practice. Of course, successful implementation depends on the co-operation of the national partners, and I am pleased to say that in most cases this works very well. However, human rights assistance programmes can only have a long-term impact if member states are fully committed to ensuring that the results are maintained – indeed, commitment and co-operation should be seen as part of the responsibilities of member states under the Convention.

In other words, strengthening the national capacity to implement the Convention is a task for the member states themselves, with support from the Council of Europe, and not the other way around

The Wise Persons report envisaged the Commissioner for Human Rights as having an increasingly important role in connection with the Convention system. One suggestion was to enhance his function as an "early-warning" mechanism for acute or systemic problems. In some respects this is already happening through his innovative, growing co-operation with Ombudsmen and national human rights institutions, which has included detailed work on the implementation of some of the Reform Package recommendations.

Other ideas for his role – some well-received, others less so – have been suggested, and as the budget and resources of his office continue to increase, I hope that he will be able to respond to the best of them.

Moving on from standard-setting and support for implementation, we come to monitoring activities.

The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly is currently reporting on the effectiveness of the Convention at national level. Its composition of members from the national parliaments of all member states make it an important partner in our activities – sometimes critical, but always constructive.

Other bodies which are not represented at this colloquy are also playing an important part. I would mention here the European Commission for Democracy through Law - the Venice Commission - and the European Commission for the Efficiency of Justice. Both have worked on improving domestic remedies, in particular the excessive length of judicial proceedings, an especially important issue in terms of the number of applications which arise from these delays.

And, of course, the Court itself helps member states to improve their domestic protection of human rights, by revealing deficiencies and, increasingly, providing guidance for solutions. For example, much more can be done to increase the impact of the case-law like advice which comes straight from the horse's mouth, if President Costa will forgive the expression. It has been said many times before, but it is a fact that systematic, targeted dissemination of the case-law, translated into ever more languages, for the benefit of national judges, lawyers and civil servants would be very useful. It is for member states to choose the best method, whether full judgments, extracts of judgments or summaries of judgments. But until then, problems which the Court has already sought to remedy continue to generate new applications to Strasbourg, through simple, but avoidable, ignorance on the part of those concerned.

Speaking of the Court, of course, brings me to a related issue which I will mention even if this Colloquy will not consider it in depth.

I refer to the execution of judgments, the down-stream counter-part to the otherwise up-stream process of judgments. Full execution of each judgment, including any general measures, can go a long way to ensuring that similar or related cases do not subsequently find their way to Strasbourg. Even where it has not been possible, prior to the Strasbourg judgment, to remedy a violation domestically, it should always be possible to learn the lessons of a judgment and ensure that an effective remedy is found for such violations in future. "Clone" or repetitive cases are a major component of the burden on the Court, and it is a burden which can and should be lifted by the member state concerned.

I hope that this Colloquy will live up to its title and, ultimately, lead to more effective implementation of the Convention at national level. The Council of Europe is ready to take up new ideas which I am sure will emerge. Drawing on the programme of the Colloquy – and without wishing either to influence your discussions or to present an exhaustive list – I would suggest that you might consider some of the following questions.

First, domestic remedies, in particular the idea – mentioned briefly at the San Marino seminar – of a new legal instrument, binding or otherwise. The Steering Committee on Human Rights, the CDDH, has already had a first look at this issue and found it to be interesting enough to recommend further work. What would be the purpose of such an instrument? If one is needed, should it be binding? If so, should it have a monitoring or control mechanism? Are the existing standards – in particular those based on Article 13 and the case-law of the Court, along with the Recommendation of 2004 – sufficiently clear so that they can be brought together in a comprehensive legal instrument? Or are they –with the existing 2004 Recommendation – sufficient by themselves?

Second, without doubt more can be done to ensure the compatibility of domestic legislation with Convention standards in order to avoid the creation of avoidable, systemic problems. We should look into what are the roles of the various national authorities – not only the legislature – in doing so, and what can the Council of Europe do to support them?

Third, we must improve execution of judgments, both the judgments of the Strasbourg court and national judgments. Judicial systems are pointless if their decisions are not given full and prompt effect. Much has been done to improve the supervision of execution of judgments by the Committee of Ministers and further work is underway. This Seminar is an opportunity to hear your views and proposals, including your ideas about possible improvements at national level.

Fourth, we should make sure that everyone in our member states should know about the possibilities which the Convention system offers to protect their rights and thereby resolve their problems. including by application to the Court. Of course, we do not want to encourage even more applications which do not have any merit, but a well designed system of information and advice should both

deter some of the hopeless applications and improve the quality of those which do merit consideration. Who should provide this information and advice? Is there a role for the Council of Europe or for the Court, which currently has a pilot scheme providing advice through the Council of Europe Information Office in Warsaw?

Fifth, we should look at the possibility of professional training in Convention standards. Again, this was the subject of one of the Recommendations, going hand-in-hand with dissemination of the case-law of the Court, which I mentioned earlier. Without doubt, more can and should be done: when judges and lawyers are better aware of the Convention, then domestic court proceedings and judicial decisions should be less likely to generate applications to Strasbourg. I would like to hear your opinion about what member states can do to improve the situation, and how the Council of Europe can help.

One form of help, of course, is the "HELP" Programme or, to give its full title, the European Programme of Human Rights Education for Legal Professionals, which assists member states in training judges and prosecutors with reference to the Convention. This programme has produced all the necessary tools and materials, making them available online, free of charge, in many different languages, using the latest interactive methods. Member states really should make the fullest possible use of this important resource.

Regrettably, the HELP programme is only guaranteed funding until the end of this year. That is why I invite member states to make the financial commitments necessary to ensure its continued existence – by doing so, you will in effect be investing both in your own judicial systems and in the proper functioning of the European Court.

And finally, we need a clear and comprehensive vision of the pilot judgment procedure of the Court, with sufficient detail to indicate the type of cases it could cover , the way it will operate and the results it is intended to achieve? What are the respective roles of the Court, respondent states and the Committee of Ministers? How do we protect the interests of applicants, which must come first – they are, after all, the raison d'être of the Court?

And – I don't want you to be limited in your thinking – anything else your collective experience, wisdom and creativity may generate over the next two days is welcome.

With these, I hope, encouraging words, I thank you all for your attention and your participation on this Colloquy, and I look forward to the debate and its outcome. ★

National aspects of the reform of the human rights protection system: the expectations of the European Court of Human Rights

Mr Jean-Paul Costa

President of the European Court of Human Rights

Madam Minister, Mr Secretary General, Mr Ambassador, Ladies and Gentlemen,

I wish first of all to thank the Swedish authorities for the warmth and quality of their welcome. Sweden has held the Presidency of the Committee of Ministers of the Council of Europe for one month, and it is a great pleasure for me to participate in the colloquy held in the context of this presidency, as I did in the events organised by the previous Chairmanships in San Marino, Belgrade and Bratislava.

My presence bears witness to the strong links I have sought to establish since the beginning of my mandate with the various Council of Europe bodies – the Committee of Ministers, the Parliamentary Assembly, and the Secretary General, not forgetting the Commissioner for Human Rights, with whom we maintain close contacts.

The Court is moreover very well represented here since my colleagues and friends, Elisabet Fura-Sandström and Giorgio Malinverni, the judges elected in respect of Sweden and Switzerland respectively, will be taking the floor. The most senior officials of the Registry are also present, first and foremost our

Registrar, Erik Fribergh, for whom, as you all know, Stockholm is not exactly *terra incognita*, and Roderick Liddell, Director of Common Services. I think it not inappropriate to seize this opportunity to pay tribute to our Court's Swedish Registrar, whose qualities and competence are unanimously acknowledged.

Sweden has always shown proof of its commitment to human rights, for example by devising the word and the institution of "Ombudsman", and by its support for the Court. A founder member of the Council of Europe, Sweden recognised the right of individual petition very early on; the first judgments pronounced by the Court in Swedish cases in fact date from 1976!

It is to be welcomed that Sweden has placed at the forefront of the priorities of its Chairmanship the achievement of a fundamental objective of the Council of Europe – to make human rights a reality and, in particular, to strengthen the implementation of the European Convention on Human Rights at national level.

This colloquy on the subject will, I am convinced, be a highlight of the Swedish presidency.

Implementation of the European Convention on Human Rights at national level is an essential theme but, at the same time, the national aspects are so closely linked with the international aspects that I cannot dispense with a brief overview of the latter.

Everyone here knows the situation at the Court. For several years now, we have experienced exponential growth in the number of applications and, in 2007, there was a sharp increase in the number of cases referred to a judicial organ for decision or judgment.

Although the number of cases settled in 2007 was close to 29 000, the annual deficit was close to 13 000 cases. As to our current caseload, it is around 80 000 pending cases. This situation, which I have described to the Committee of Ministers on many occasions, notably at the last ministerial session, is difficult to bear.

As we all know, one of the solutions lies in the rapid entry into force of Protocol No. 14, signed by all Council of Europe member states, but of which we are awaiting the ratification of the Russian Federation. Without solving all the problems on its own, the Protocol's entry into force will, thanks to a reform of the internal procedures laid down in the Convention, lead to a substantial increase in the Court's efficiency and the number of its decisions, even with a constant budget.

Once more, I call on Russia, party to the Convention for over ten years, which participated in the drafting of Protocol No. 14 and signed it without reservation, to show its respect for the law and for international law by ratifying it without delay.

Dare I say I am confident that the institutional authorities of this great country will heed my call? My answer is yes.

Moreover, only the Protocol's entry into force can make it realistic to follow-up the report of the Wise Persons, who took Protocol No. 14 as their starting point, in accordance with the terms of reference given to them at the 3rd Summit of the Council of Europe. The Wise Persons' report, which contains several avenues for reflection, some of which most interesting, cannot really be implemented for the time being, and that is a great pity.

From this, I come to the core theme of this colloquy, implementation of the Convention at national level and the Court's expectations.

The expectations of the European Court of Human Rights can be summed up under three main heads:

1. Due application of the principle of subsidiarity and complementarity.
2. Close co-operation with governments and parliaments
3. Appropriate training of judges and lawyers.

Due application of the principle of subsidiarity and complementarity

The particularity of the European human rights protection system lies first in the fact that, under Article 1 of the Convention, the High Contracting Parties undertake to secure to everyone within their jurisdiction the rights and freedoms enshrined in the Convention. The Court, which was set up under Article 19 to ensure respect for the states' commitments, above all expects of the latter that they should not infringe these rights and freedoms, or as little as possible. In other words, that they honour the negative and also the positive obligations they entered into on acceding to the Convention and its protocols. In a world as unlikely as it would be ideal, the Court would serve no purpose because the Convention would be fully respected. In the real world, it is in any case to be hoped that it will be as much so as possible. We must all acknowledge that reality is still far from this ideal.

Fortunately, protection is nonetheless assured at both the national level, at least to a certain extent, and the international level. If the system is to be fully effective, all of its components must work perfectly.

Clearly, the Court cannot compensate for the total deficiency of a national system. This is, moreover, the reason why, in order that they must be exhausted before lodging an application, domestic remedies must be effective. Conversely, even a protection well-assured by the national judicial system does not prevent the Court from playing its supranational role. The system thus supports itself, in combining the essential role performed by the national authorities, in particular the courts, with European oversight, which is, in the last analysis, incumbent on the Court.

This mechanism is therefore by definition of a subsidiary nature, but one could also talk of complementarity, a term more reminiscent of the dialogue between national judicial systems and the Court and ultimately, through this process, of an informal but real co-operation. The national aspects of protection are thus crucial, and it is right that this colloquy should recall this.

Since the Convention system is subsidiary in nature, the national courts have the right and the duty to ensure the supremacy of the Convention. I naturally believe in preventing litigation: apart from the fact that it is always preferable to prevent human rights violations, rather than subsequently repair them, subsidiarity is essential to the proper functioning of the human rights protection mechanism embodied in the Court: many applications, often of a repetitive nature, would become pointless and would not need to be lodged in Strasbourg, if effective mechanisms to prevent and remedy breaches of human rights existed at national level.

To mention only Article 6 of the Convention, concerning a fair trial, which is by far the provision most frequently invoked in applications to the Court, the reasonable-time requirement could be far better guaranteed by the national authorities if only they had the will to do so and gave themselves the means.

That is far from being the case, although it is a cause for satisfaction that the national courts, in particular Supreme and Constitutional Courts, are implementing the Convention increasingly well, this being a proper application of the subsidiarity principle.

Constructive co-operation with governments and parliaments

The national courts are not the only players the Court expects to intervene. In addition to the simple individual case in which the national courts apply the Convention, solutions to the structural problems that inundate our Court are increasingly being found at national level. This is where co-operation with the executive and parliaments takes on its full importance.

This is notably the case for the compensation schemes introduced in several member states to sanction proceedings of undue length. These solutions must be extended. The same applies to pilot judgments, which Erik Fribergh will talk about this afternoon.

All the branches of power thus have a role to play in the prevention and reparation of violations. Moreover, things are heading in the right direction. On each of my official visits or during visits to the Court by politicians or judicial officers, I can see that they are totally convinced of the need to amend their countries' legislation and case-law to bring them into line with the Court's decisions, thereby avoiding the need for the Court to issue new judgments of a repetitive nature. Perseverare diabolicum!

I am also struck by the fact that judicial reform – which has in fact become a permanent process, so great are the demands on justice systems – is on the agenda everywhere, particularly as a result of the conclusions that states draw from our leading decisions.

Effective execution of the Court's judgments is an essential aspect of our co-operation with the member states. The executive plays a key role here, and I wish to commend the Committee of Ministers, which supervises execution and without which the system could not work properly. Both before and after the entry into force of Protocol No. 11, the Convention has always provided that the Committee of Ministers shall supervise execution of judgments. This original mechanism, to which the relevant department of the Council of Europe contributes with great competence, has proved its worth over the years.

But the executive and the judiciary are not the only parties involved. It is true that the legislature also plays an essential role in the implementation of the Convention, especially after the Court has rendered judgment and it is a matter of execution.

The Court is not empowered to repeal legislation or to set aside national decisions. It is for the respondent state to adopt the individual or general measures that allow it to remedy findings of violations and thereby avoid further rulings against it in future.

In certain cases, to bring national law into line with the European Convention on Human Rights, it is the legislature that must introduce amendments modifying legislation and making it, if I may say so, "euro-compatible". Sometimes, it does so in a preventive capacity, to avoid condemnation in Strasbourg. Sometimes, and perhaps more often, its aim is to take into account the implications of our case-law, whether concerning the state in question directly or another respondent state experiencing similar problems (what might be termed the *erga omnes* effect of our judgments).

These must, therefore, be better known to parliamentarians. For this reason, enhanced dialogue between the Court and the national parliaments is far from futile. It is always a pleasure for me to receive parliamentary delegations, an ever-growing number of which visit the Court and wish to know our institution better. We have noticed the usefulness of these visits, which help ensure that legislators are better informed.

The Court also maintains regular close contacts with the Parliamentary Assembly of the Council of Europe, emanating from the parliaments of all our member states, and of course with its President and its Secretary General. I moreover hail the presence here of Mrs Bemelmans-Videc, a member of the Parliamentary Assembly's Committee on Legal Affairs and Human Rights, whom I also had the pleasure to meet along with her fellow committee members in The

Hague, and I will be interested to hear what she has to say in her address on the parliamentary dimension of the effectiveness of the Convention at national level.

To underline the importance of exchanges with the legislative branch of national authorities, may I recall the fact that last March, in Lithuania, I spoke, for the first time, before a parliament in plenary session. I was able to draw the attention of members of this parliament to the legislative reforms expected of them in the wake of certain of our judgments. It was a very enriching experience to hold a direct, uncompromising dialogue with a legislative assembly, and I hope to be able to repeat it in other states.

In any case, mechanisms to monitor the decisions handed down by the Court should be set up in the national parliaments, so as to react as quickly and as effectively as possible to the Court's findings of violations. Similarly, where a state has mechanisms, as is more and more often the case, for codifying laws, it would be very useful if knowledge of the Convention and our case-law could be included.

Appropriate training of members of the judicial and legal professions

Strengthening subsidiarity also entails that states should co-operate with the Council of Europe and the Court so as to enhance knowledge of the latter and its case-law, in order to train judges, prosecutors and lawyers. Efforts have already been made in this direction and must continue.

We expect states to emphasise, in training programmes for the judicial professions, knowledge of the European Convention on Human Rights. The aim is, of course, to train judges so that they can apply the Convention more effectively and lawyers so that they can prepare applications with better prospects of acceptance in Strasbourg. The states also make a considerable effort to make the case-law better known in the national languages and not only in English and French. This is also very helpful.

Certainly, judicial training must be carried out at national level, but the Court contributes to it and is willing to receive judges and lawyers from all over Europe (and even beyond) so that they can familiarise themselves with our system.

It also receives human rights defenders, whose role is essential. In this connection, although "civil society" is by definition independent of the state, our expectations of the latter also extend to NGOs and non-state actors. In many countries, consultative or advisory bodies on human rights play a valuable role in promoting and reinforcing protection of human rights. Ombudsmen also make a strong contribution.

Apart from simple study visits by judges to the Court (hundreds of which take place each year), we have decided to take things further and to establish an exchange scheme, which will make it possible, under the auspices of the Euro-

pean Judicial Training Network, for European judges to spend a year in the registry.

This will indeed represent an effort for the member states, which will have to do without their judges for a relatively long time, but this interchange between the national system and the Court is absolutely necessary if the aim is for the domestic courts' judges really to consider themselves as European judges.

Another approach that we are developing, in accordance with the wish of the Steering Committee for Human Rights – whose Chair, Ms Deniz Akçay, present today, I salute – is the temporary secondment of member states' judges to the Court. Several states have already taken up this possibility, for which I thank them. We are going to continue with this process. As we are in Stockholm, may I mention Sweden, which has already tried the experience with success and wishes to repeat it. Such secondments take place in strict compliance with the principles of independence and impartiality, for whose disrespect the Court reprimands national courts, and which it must therefore apply to itself.

The European Court of Human Rights is now the largest human rights court in the world, with 47 judges and more than 600 Registry staff. It is experiencing difficulties but, without the Court, the human rights situation in Europe would undoubtedly be less good or worse, even much worse.

Faced with the problems that confront it, the Court expects the member states to continue to provide it with support, as they always have done, but even more than in the past. I am not unaware of the economic and financial difficulties being experienced in Europe and the world. This might seem the wrong time to ask our member states to make additional budgetary efforts. However, if, in the long term, prevention, enhanced subsidiarity, better training and other measures will eventually bring about a decrease in the number of applications, in the short and medium term an increased budgetary effort is indispensable. I hope it will be granted, without any detrimental impact on the Council of Europe, which, under the terms of the Convention, bears the Court's operating expenses. It is not utopian to expect states to see the big picture and make this effort.

Ladies and Gentlemen, what the Court expects of the states is, if not a permanent revolution, at least ongoing reform of human rights protection in Europe. We are thus calling for **virtue** in a far from always virtuous world. Virtue requires great patience. Strengthening implementation of the Convention at national level is itself a lengthy undertaking. All the more reason to thank the organisers of this colloquy, which enables a frank dialogue with states.

Thank you. ★

A reminder of the main elements of the reforms agreed by the Committee of Ministers

Ms Deniz Akçay

Chairperson of the Steering Committee for Human Rights (CDDH)

The Committee of Ministers' role as actor and "strategist" in the "national" application of the Convention

The need for a global strategy pursued on three fronts, namely increasing the efficiency of the Court, improving the execution of Court judgments and taking action at national level, is a relatively recent strategy.

Furthermore, each of the three aspects emerged during different periods and evolved progressively. Towards the middle of the 1980s, the notion of a form of international justice more concerned with judicial safeguards and, at the same time, more rapid and less costly began to take shape. At the beginning of the 1990s, an interim response to this concern was found by making the Commission permanent.

Protocol 11, establishing the single Court, offered a relative, but brief, calm to the debate on this aspect.

As early as the end of the 1990s, continuation was ensured with a more intensive reflection on the execution of judgments, culminating in the Rome conference.

But the explosion in the number of applications was already directing thoughts towards a more "integrated" action at national level.

Of course, the importance of the national aspect has always been recognised since the beginnings of the control mechanism. However, discussions became polarised around monist and dualist theories and on the methods for applying

the Convention at domestic level. The concept of subsidiarity, moreover, gave rise to numerous debates on interpretation.

It was only from 2000 on that we saw a new political awareness emerge, with the Council of Europe, and more specifically the Committee of Ministers, accepting a more general responsibility.

Since 2004 we have witnessed the implementation of a concerted strategy by the Committee of Ministers to "get a grip" on the question of national measures to reduce the number of alleged violations. To put it another way, this new concern is linked not only to the obligation to comply with the Convention in the national setting, but also to its critical importance for ensuring the long-term effectiveness of the control mechanism.

The 2001 report prepared by a group of three – President Wildhaber, the former Deputy Secretary General, Mr Hans Christian Krüger, and the Irish Ambassador, as the Chair-in-office of the Ministers' Deputies – was already arguing for the need to take national measures.

The turning point came in 2004, by which time there had been a series of recommendations that formed the basis for action directed towards the member states.

This body of five recommendations was followed by the Committee of Ministers' Declaration adopted on 12 May 2004 at its 114th session: "*Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels*", which set the tone for the new approach.

The declaration faithfully reproduced the triple approach agreed since 2000, namely effectiveness of the Court, improved execution of Court judgments and the national level.

One might say that the first – effectiveness of the Court – already benefited from a major instrument, namely Protocol 14, and that the execution of Court judgments, as a responsibility of the Committee of Ministers, was largely within the powers of the Committee itself. But a new process was starting concerning the national level.

For the first time, the Committee of Ministers saw itself as being directly involved in the application of the Convention by member states.

The preamble of the declaration clearly stated its objective: "*considering that it is indispensable that any reform of the Convention aimed at guaranteeing the long-term effectiveness of the European Court of Human Rights be accompanied by effective national measures by the legislature, the executive and the judiciary...*"

The Committee's involvement has been structured around five recommendations that, according to the declaration, were supposed to "help member states to fulfil their obligations."

These recommendations are:

- Recommendation Rec(2000)2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights;
- Recommendation Rec(2002)13 on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights;
- Recommendation Rec(2004)4 on the European Convention on Human Rights in university education and professional training;
- Recommendation Rec(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;
- Recommendation Rec(2004)6 on the improvement of domestic remedies.

The Committee issued these five recommendations with an invitation addressed to member states to implement these recommendations speedily and effectively.

It also asked the Ministers' Deputies to undertake a regular and transparent follow-up of their implementation.

Four years later, it is clear that this part of the declaration was the most original, and even the most advanced, which bore, and must still bear, the greatest promise for the future.

The 2004 declaration not only received the support of the Warsaw Summit, but had a number of practical and tangible consequences in the form of a further series of Committee of Ministers' decisions in 2006.

The declaration on sustained action to ensure the effectiveness of the implementation of the European Convention on Human Rights at national and European levels, adopted by the Committee of Ministers at its 116th session in May 2006, did not content itself with simply calling on all the member states to implement the five recommendations effectively. It extended and deepened the Ministers' Deputies' original mandate by instructing them to:

– continue their review of implementation of the five recommendations with a view to obtaining a better assessment of the actual impact of implementation measures on the long-term effectiveness of the Convention;
– deepen this review by focusing henceforth on verification of the effectiveness of implementation measures and filling outstanding information gaps, particularly in three priority areas: improvement of domestic remedies, re-examination or reopening of cases following judgments of the Court, and verification of compatibility of draft laws, existing laws and administrative practice with the Convention;
– involve in this review other Council of Europe bodies as set out in their report, such as the Parliamentary Assembly, the Court and the Commissioner for Human Rights.

With the CDDH Activity Report recently presented to the Committee of Ministers' 118th session, the first phase of the exercise appears to have come to an end, at least for the time being.

We are faced with two questions:

1) What has been the direct impact of the exercise?
2) What might be the future of the exercise; might it continue as such at national level or should it receive fresh impetus from the Committee of Ministers?

Real, potential and possible future impact of the first cycle

It seems to me impossible to establish any quantifiable relationship between the first review cycle of the five recommendations and the number of applications to Strasbourg. On the other hand, I think that from the point of view of our respective authorities, the impact of this first attempt to secure a certain consistency between the various applications and interpretations of the recommendations has had a considerable impact, all the more so in that it has been spread over several years.

First, the exercise has made member states acutely and simultaneously aware of the fact that the Court's potential cannot be extended indefinitely and of our responsibility, as member states, to deal with this problem.

Second, we have had an opportunity to take broad stock of the situation at the level of our respective authorities, who themselves have had to look to other sources. There has thus been a great deal of "hustle and bustle" at various levels and with a huge goal, in the sense that we aimed at effective application of five recommendations at the same time.

Third, we have been able to have a clear and comprehensive idea of all the relevant legislation and legal practices relevant from the point of view of the Convention. We have thus had the possibility to compare our legislation and even our legal systems, and also to have an idea of how other member states react, which has created a sort of imitation.

Fourth, the review of the five recommendations, by requiring all member states, without discrimination and simultaneously, to supply very detailed information, may create a sense of collective responsibility and even solidarity, in the face of the risk of the system's implosion.

Fifth, often the very fact of requesting information gives rise to a reflection on whether existing provisions are sufficient and adequate. Relevant authorities

faced with a "simple" request for information may sometimes be persuaded to launch a process of improvement of the existing rules. In all cases, it has been possible to bring out examples of good practice that could serve as models for others.

Sixth, other Council of Europe bodies have been able to participate in the exercise and contribute, in accordance with their functions, competences and expertise. Thus:

- The Commissioner for Human Rights, for his part, has been able to contribute to the exercise through his contacts within national structures;
- The Venice Commission has produced a report on the effectiveness of domestic remedies;
- The CEPEJ has identified indicators for a better understanding of judicial timeframes;
- The Parliamentary Assembly has prepared a report on the effectiveness of the Convention at national level.

Furthermore, we have extremely valuable information on the practical impact of the five recommendations from the Court Registry, which has noted that in the countries where new remedies have been introduced, the Court's workload has been reduced, even if the total number of applications has risen.

Limits of the Committee of Ministers' role in connection with the review of the five recommendations

The control mechanism of the Convention is subsidiary to national legal systems, whether at the level of the Court or the Committee of Ministers, when it is acting under Article 46 of the Convention. However, this is not the case when the latter is reviewing the implementation of the five recommendations.

The Committee of Ministers has neither the power nor the means to require states to implement its recommendations in a uniform manner, and this would in any case be impossible, given the specificities of each legal system. Legally, moreover, this would also amount to equating recommendations to binding instruments, which would go against Article 15 of the Statute of the Council of Europe.

Furthermore, the continuation of such an exercise would lead to exhaustion on the part of member states, frequently solicited with requests for information.

Nor would the continuation of the monitoring exercise have the real effect sought by the Committee. Scrupulous application of the Convention requires case-law benchmarks from the Court, and more specifically its Grand Chamber. The most "respectful" interpretations by states risk being superseded by the evolution of the Court's case-law.

Given, therefore, the inherent limits to the role and competences of the Committee of Ministers, on the one hand, and the relative nature of any permanent validity of the Court's case-law on the other, it was necessary to rethink the effective role that the Committee of Ministers could play at national level to assure the long-term effectiveness of the control system of the Convention.

The future of the Committee of Ministers' role in strengthening respect for the Convention at national level

To begin with, for as long there is no significant improvement in the Court's situation, the Committee of Ministers cannot finally and, from one day to the next, cease to be involved in the process of implementation of the five recommendations. It must be borne in mind that these reflect the most important concerns of member states about the very future of the Court.

The fact that Protocol 14 has not been able to come into force has made these concerns even more pressing. When consideration of the recommendations started in 2004, it was thought that by 2006 there would already be a new instrument to expedite Court proceedings.

In fact, today, two years beyond 2006, the expected positive impact of the Protocol is still not being felt and we are now reaching the limits of the usefulness of the review process, which threatens to become trivialised by a stream of repetitive, and eventually even exhausting, information.

Yet the problems remain the same and, more than ever, the Committee of Ministers cannot ignore them.

How, then, can we imagine and configure the new role of the Committee of Ministers at national level?

The CDDH activity report adopted by the Committee of Ministers suggested that "*the Ministers' Deputies come back to the issue of the national aspect of the reform in 2-3 years' time*".

It is true that solemn occasions such as the sixtieth anniversary of the Council of Europe in 2009 and of the Convention in 2010 could constitute target dates for a new reflection on the Committee of Ministers' role with regard to the national level.

But how to proceed; and on what basis and using what methods to resume an exercise on the "national level"?

One cannot deny that the five recommendations reflect the "national interface" of the range of problems faced by the Court as a result of the rising number of applications.

However, do they necessarily constitute an indivisible whole in 2008?

It is a question that we must ask ourselves. Does the recommendation on the reopening of cases present the same relevance in 2008 as in 2000? Although it is

important in certain individual cases following the finding of a violation, its impact in terms of general measures whose absence would generate applications to Strasbourg has not been established.

The recommendations on university teaching and the dissemination of the Convention and the Court's case-law are certainly still important, but do we need to resume a review exercise when there is no quantifiable correlation with the increased number of applications?

By contrast, the recommendations on improving domestic remedies, complemented by the recommendation on compatibility of draft laws, existing laws and administrative practices, concern matters that are closely linked – almost in a causal relationship – with the number of applications.

In the context of a new reflection on the Committee of Ministers' role, we must also await the measures retained by the CDDH in its exercise of examination of the Wise Persons report, the Woolf report and other reform proposals, which will be submitted to the Committee on 30 April 2009.

In conclusion, the more in-depth, and even exhaustive, review of the five recommendations, supplemented by contributions from other Council of Europe bodies and to a certain extent from civil society, was an exercise that confirmed the Committee of Ministers' determination to ensure the effectiveness of the Court.

It has also induced member states to a general appraisal of their legal systems and their scope for reducing the number of applications to Strasbourg, by taking account both of their own potential and of examples of good practice from all the other countries.

In the future, particularly in the event that Protocol 14 does not come into force, there could be an evaluation of the Committee of Ministers' setting up similar or analogous exercises, or otherwise taking responsibility for the national aspect. ★

State of implementation of the national aspects of the Reform

Mr Vit A. Schorm

Chairperson of the Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR)[6]

The introduction to my contribution is made much easier by what has just been said. The Committee of Ministers' demarcation of the national aspects of what we here call the Reform, which aimed at guaranteeing the long-term effectiveness of the Convention system, was doubtlessly not exhaustive and we continue to discuss as much the European aspects of the Reform as the complementary national measures.[7] However, to simplify the situation, I shall talk about the implementation of five recommendations of the Committee of Ministers addressed to the member states between 2000 to 2004, which the Committee of Ministers itself placed in the framework of the Reform when it adopted the last three of them in May 2004.[8]

These five recommendations cover quite varied subjects:

- *restitutio in integrum* for wronged applicants who have succeeded before the Strasbourg Court,
- translation and dissemination of the Convention and of the Court's case-law,
- teaching of Convention standards,
- verification of the compatibility of legislative and administrative action with Convention standards, and

6. I thank the team of the CDDH secretariat, whose various members have been closely associated over time in monitoring the implementation of the five recommendations of the Committee of Ministers, for their suggestions bringing improvements to the text of my contribution.
7. Cf. the recent work of the Reflection Group DH-S-GDR.
8. The recommendations are mentioned in the footnotes on pages 6-9.

- improvement of domestic remedies capable of redressing violations of the Convention.

In May 2004 the Committee of Ministers instructed the Steering Committee for Human Rights (CDDH) to undertake a follow up the implementation of the five recommendations. This task was assigned more specifically to a working group composed of governmental experts[9] who studied these questions for almost four years.

To study the implementation of a reform promoted in an organisation of 47 member states at national level necessarily means analysing the situation in the 47 member states, each of which is supposed to submit information with regard to the five recommendations. It naturally results from this that the process has not gone ahead without encountering difficulties. These have been linked chiefly to a fairly large volume of information being collected (compiled by country in a document of several hundred pages) which then had to be compared and digested in order to draw the appropriate conclusions, themselves to some extent subject to caution as the information did not come from a single source, however true to the exercise it may have been.

We began by sending general questionnaires to all experts, and subsequently went on to put more targeted questions to certain experts in order to make the material to be analysed comparable and comprehensive. Efforts were made to present civil society with the information submitted by the governmental experts, with a view to satisfying ourselves that we were in the process of obtaining a true-to-life picture. Seeing that these efforts proved somewhat in vain for want of adequate response from the many non-governmental organisations that we approached, we had to look more towards the other Council of Europe bodies, including the Commissioner for Human Rights for whom, I feel able to say, an idea of this kind was well-matched to his desire to build a stronger network of co-operation with the national human rights protection structures.

Thanks to all these inputs, we have been able to make a number of findings, of which I shall now try to give a summary.

Firstly, the interest raised among the member states is undeniable. They have seriously considered the implementation of the recommendations, "played the game" and submitted information in this respect, even if sometimes to an unequal degree of precision. Although this aspect marks one of the inherent limitations of the exercise, it seems that the state of implementation of the recommendations is fairly satisfactory overall. Thus, on a purely illustrative basis:

9. The GT DH-PR B, i.e. Working Group B of the Committee of Experts for the Improvement of Procedures for the Protection of Human Rights.

- in virtually all states, there is the possibility of requesting the reopening of criminal proceedings after a Court judgment finding a violation of the Convention;
- the Convention is available in all official languages of the member states and has often been published in an official journal; the Court's case-law undergoes dissemination thanks to public or private initiative;
- the provisions of the Convention are taught in law faculties and are part of professional training for lawyers, judges, prosecutors or police officers;
- in many states, drafters of bills are required to examine the compatibility of their drafts with the Convention;
- the existence and effectiveness of domestic remedies is verified on various occasions, at a minimum "if certain concerns arise".

However, again by way of example, some points are still worthy of attention:

- the reopening of civil proceedings after a Court judgment may be excluded even outside situations where refusal to reopen them is justified by imperatives of legal certainty or the protection of third parties in good faith;
- by force of circumstances, there are reservations as to dissemination of the Court's case-law concerning third states, language barriers still preventing many practitioners' access to knowledge of Convention standards;
- development of training for trainers and testing the knowledge acquired during professional training sessions are not yet well established practices in our member states;
- evaluation of the effectiveness of mechanisms for verifying the compatibility of draft legislation or regulations or of administrative practice with Convention standards is largely lacking;
- verification of the effectiveness of domestic remedies is not always applied as an instrument of prevention, that is before an application communicated by the Court raises doubts.

Secondly, it should be noted that some recommendations substantially correspond to states' legal obligations, and their non-fulfilment may be pointed out, even sanctioned, by an appropriate body. Thus the possibility of reviewing or reopening certain cases at domestic level following Court judgments and the introduction of effective remedies at domestic level are routinely considered by the Committee of Ministers in the context of its supervision of the execution of the Court's judgments, the Court itself being obliged to find an absence of domestic remedies and thus a violation of Article 13 of the Convention. Other recommendations have only an indirect link to states' obligations and we lack a Council of Europe body which could check on a case-by-case basis whether this or that recommendation has in fact been followed up. However, in all probability, this is not necessarily a criticism of the system; only a real "inspection" would be capable of filling this apparent gap. We think there is scope here for other

Council of Europe agencies or initiatives, whether the Office of the Commissioner for Human Rights, the European Commission for the Efficiency of Justice (CEPEJ), the European Commission for Democracy through Law (Venice Commission), the Department for the Execution of Judgments on the one hand, or the HELP programme for professional training of judges and prosecutors or the Council of Europe assistance programmes, on the other.

Thirdly, measuring the positive impact of the implementation of the recommendations on the long-term effectiveness of the Convention has proved a difficult if not impossible task in the current circumstances. The word "impossible" does not, in principle, hold good when it comes to the impact of certain practical measures on the trend in the number of applications to the Court: particularly when faced with a systemic problem that is at the origin of a high number of applications,[10] introduction of an effective domestic remedy of a compensatory nature and with an at least partly retroactive effect almost always has an impact on the Court's caseload. But even here, the Court does not have available statistical tools that would allow accurate measurement of the decrease in number (or even workload) that the introduction of a new remedy would represent. We are even less well equipped in other areas. The impact of implementation of the recommendations remains unclear. For example, better knowledge of the Convention, sought by one of the recommendations, may easily translate into an increase in the number of applications addressed to the Court, which is shown by the quantitative analysis often considered easier to undertake, and the positive impact according to a qualitative analysis, that is in terms of better preparation of the applications submitted for the Court's examination, remains difficult to affirm.

Our work has produced two series of documents, one dating from 2006 which covers all of the so-called "Reform" recommendations,[11] after which the Committee of Ministers considered it expedient to continue the exercise, and the other from 2008, which completed a more in-depth phase of examination of the implementation of three recommendations which were considered to have priority, namely the one concerning review or reopening of certain cases following Court judgments,[12] that on improvement of domestic remedies[13] and that relat-

10. Typically, cases involving undue length of judicial proceedings.

11. Three recommendations are mentioned in the footnotes on the following pages; the other two recommendations are Recommendation R (2002)13 on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights and Recommendation R (2004)4 on the European Convention on Human Rights in university education and professional training.

12. Recommendation R (2000)2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights.

13. Recommendation R (2004)6 the improvement of domestic remedies.

ing to verification of the compatibility of national standards with the Convention.[14] These documents are both synoptic fact-sheets for each recommendation[15] and compendia of information collected by country. Now, even though it is not possible to consider as final the second phase, completed this year, the need for a break is felt in the context of intergovernmental co-operation, unless the work is continued under other arrangements. The CDDH has nonetheless reiterated the importance of this major issue and its willingness to keep it on its agenda: in the light of the work to be done by other bodies, it will regularly exchange views on the follow-up to the recommendations.

As I have already indicated, intergovernmental co-operation, albeit at a level of experts, has limitations that only a change in the nature of the exercise (passing from follow-up to monitoring) would, theoretically, allow to be overcome. The recommendations are undoubtedly not implemented one hundred per cent, and we have the feeling that the degree of proactivity which they sometimes advocate[16] is not attained in practice. It should be recalled that to the mind of the Committee of Ministers, these legal instruments are part of the general configuration of the Reform and that, from this point of view, they are more than mere recommendations in the ordinary sense of the word, although without becoming precise legal commitments.

There is great scope for work on improvement so that the treaty system, almost sixty years old, may still have a long life before it. Indeed, I am afraid that, despite an overall good standard of human rights protection in Europe, we cannot yet do without it. ★

14. Recommendation R (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.
15. See CDDH(2006)008 Add. I and CDDH(2008)008 Add. I.
16. Cf. point I of the operative part of Recommendation (2004)6.

Theme 1

Ways and means of strengthening the implementation of the European Convention on Human Rights at national level

Keynote speaker: Mr Giorgio Malinverni

Judge elected in respect of Switzerland to the European Court of Human Rights, Emeritus of the University of Geneva

There are many possibilities for examining the ways and means of strengthening the implementation of the European Convention on Human Rights at national level.

One of them – among many others – is to examine these ways and means from a dual perspective. The first would be devoted to the ways and means of strengthening the implementation of the Convention as a general obligation of every contracting party, irrespective of any judgment pronounced against it. The second approach would focus on the obligations arising for each contracting party after a judgment is pronounced against it and a violation found.

Ways and means of strengthening the implementation of the European Convention at national level as a general obligation of the states parties

1. The principle of subsidiarity of the European supervision

It is hardly necessary to recall here that the mechanism of control instituted by the European Convention rests on the principle of subsidiarity. This principle, which is implicitly enshrined in Articles 1, 13 and 35 of the Convention, means that the obligation to apply the guarantees of the Convention lies primarily with the national authorities.

The Court itself has often reiterated[17] that it exercises its supervisory role subject to the principle of subsidiarity and has underlined the subsidiary character of the machinery of individual complaint, pointing out that by virtue of Art. 1 of the Convention, "the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities".[18]

2. The obligations deriving from Art. 13

The best expression of the principle of subsidiarity is probably to be found in Art. 13 of the Convention. This provision aims at affording a means whereby individuals may obtain relief at national level for violations of their Convention rights before having recourse to the Strasbourg Court.

Indeed, it may be said that the effectiveness of the European Convention of Human Rights largely depends on the effectiveness of the remedies which are provided at national level to redress its violations. In other words, the international guarantee of a remedy, as enshrined in Art. 13, implies that a state has a duty to protect human rights and freedoms first within its own legal system.

In its Lukenda judgment the Court has described the obligations deriving for the states from Art. 13:

"By becoming a High Contracting Party to the European Convention on Human Rights the respondent state assumed the obligation to secure to everyone within its jurisdiction the rights and freedoms defined in Section 1 of the Convention. In fact, the states have a general obligation to solve the problems that have led to the Court finding a violation of the Convention. This should therefore be the primary goal of the respondent state. Should violations of the Convention rights still occur, the respondent states must provide mechanisms within their respective legal systems for the effective redress of violations of the Convention rights."[19]

To be considered effective and thus conform to Art. 13, a domestic remedy must allow the competent national authority both to deal with the substance of the relevant Convention complaint and to grant "appropriate relief". This can entail, for example, the termination, modification, non-application or annulment of the act complained of or reparation for damage resulting from the violation.

The principle of effectiveness also implies that the procedure for obtaining domestic remedies must not be unjustifiably hindered by acts or omissions of the authorities of the state concerned.[20]

17. See, for example, *Z. and others v. the UK*, judgment of 10 May 2001, para. 103.
18. *Kudla v. Poland*, judgment of 26 October 2000, para. 153.
19. *Lukenda v. Slovenia*, judgment of 6 October 2005, paras. 94 and 95.
20. *Altun v. Turkey*, judgment of 1 June 2004, para.70.

3. The "revitalisation" (reinforcement) of Art. 13 in the Court's recent case-law

I don't want to go into detail here about the complicated history of the interpretation given by the Court to Art. 13, which is one of the most mysterious provisions of the Convention.

What I would like to stress here is that there is a clear trend in the Court's recent case-law towards reinforcing the scope of Art. 13.

This new trend can be seen in at least two fields: the first is the role of Art. 13 in respect of allegedly unreasonably lengthy proceedings; the second is the importance of Art. 13 in cases in which the Court finds a procedural violation of Art. 2 or 3 of the Convention.

- The relationship between Art. 13 and Art. 6 of the Convention

– In general

Until fairly recently, when a claim concerned the absence, within a national legal system, of a body competent to examine the claim that the length of proceedings was excessive, or of any means to shorten or terminate the excessive length of the proceedings, the Court considered that, since the requirements of Art. 6 para. 1 are stricter than those of Art. 13, where a violation of Art. 6 para. 1 was found, it was unnecessary to determine whether there had also been a breach of Art. 13, the requirement of the latter being entirely "absorbed" by those of the former.[21]

The change in reasoning with regard to the right to an effective remedy in respect of excessive length of proceedings came in 2000, with *Kudla v. Poland*.[22]

In that judgment the Court considered, "in the light of the continuing accumulation of applications before it concerning the alleged violation of the right to a hearing within reasonable time", that "the time has come to review its case-law" according to which, in case of a violation of that right (Art. 6, para. 1), there would be no separate examination of an alleged breach of the right to an effective remedy (Art. 13). In support of this view the Court noted the "important danger that exists for the rule of law within national legal orders when excessive delays in the administration of justice occur in respect of which litigants have no domestic remedy".

21. See, for example, *Giuseppe Tripodi v. Italy*, judgment of 25 January 2000, para.15, and *Bouilly v. France*, judgment of 7 December 1999, para. 27.

22. Judgment of 26 October 2000. See Jean-François Flauss, Le droit à un recours effectif au secours de la règle du délai raisonnable: un revirement de jurisprudence historique, in: Revue trimestrielle des droits de l'homme, 2002, pp. 179-201; L. Burgorgue-Larsen, De l'art de changer de cap, in: Libertés, justice, tolérance : Mélanges en hommage au Doyen Gérard Cohen-Jonathan (Vol. I), Bruxelles, Bruylant, 2004, pp. 343-347 ; J. Andriansimbazovina, Délai raisonnable du proces, recours effectif ou déni de justice? In : Revue française de droit administratif, 2003 (I), pp. 85-98.

The Court's change of position must certainly have been inspired by concerns of judicial economy, as a radical effort to find an antidote to its ever increasing backlog.

– The assessment of the existing national remedies by the European Court of Human Rights

Since the requirement of Art. 13 constitutes an obligation of result, the contracting states have some discretion as to the manner in which they provide the relief required.[23]

Until recently, the Court, respecting the margin of appreciation given to the contracting states, refrained from indicating a specific form or type of "effective remedy" with respect to an alleged violation of the right to a hearing within a reasonable time.

The Court has recently adopted a more directive approach regarding what remedy is to be considered as effective within the meaning of Art. 13. In its *Scordino* judgment[24], it has given explicit indications as to the characteristics which an effective domestic remedy in length-of-proceedings cases should have.

The Court has thus expressly encouraged certain respondent states to proceed speedily with proposals to enact laws[25] or to amend the existing range of legal remedies or add new remedies so as to secure genuinely effective redress for violations of the right to a speedy trial, in accordance with the indication as to the characteristics of an effective remedy given by the Court itself in the judgments.[26]

According to the Court's case-law, some remedies are found to be effective while others are considered to be ineffective.[27]

In the case of Italy, for example, the Grand Chamber delivered a number of judgments concerning the effectiveness of the Pinto Law. It found that the proceedings under that Law were not entirely sufficient and therefore did not deprive the applicants of their victim status for the purpose of bringing a case to Strasbourg.

In assessing the effectiveness of various domestic remedies, the Court has formulated several criteria and guidelines. It has even given certain explicit indications as to the characteristics which an effective domestic remedy should have.

According to the Strasbourg Court, states have to

23. *Kaya v. Turkey*, judgment of 19 February 1998, para. 106; *Chahal v. UK*, par. 145.
24. *Scordino v. Italy*, judgment of 29 March 2006, para. 183.
25. *Sürmeli v. Germany*, judgment of 8 June 2006, para. 139.
26. *Lukenda v. Slovenia*, para. 98.
27. *European Commission for Democracy through Law (Venice Commission), Report on the Effectiveness of National Remedies in Respect of Excessive Length of Proceedings, of 3 April 2007, CDL-AD (2006) 036 rev, pp. 23 ss.*

i) organise their legal system so as to prevent unreasonable procedural delays from occurring;

ii) if excessive delays occur, acknowledge the violation of Art. 6 and provide adequate redress;

iii) when their legal system is deficient in terms of reasonableness of the length of proceedings, provide an acceleratory remedy;

iv) if they choose not to do this, and also in cases where excessive delays have indeed already occurred, provide a compensatory remedy in the form of either financial compensation or other forms of compensation such as mitigation of the sentence and discontinuance of the prosecution.

- The relationship between Art. 13 and Arts. 2 and 3 of the Convention

Another area where the importance of Art. 13 has been increasing in recent years is that of the relationship between this provision and Arts. 2 and 3 in their procedural limbs.

Usually, when a violation of the procedural limbs of Arts 2 and 3 has been found, the Court does not deem it necessary to examine whether there has also been a further violation of Art. 13. There is, however, an exception to this rule. The Court deals with the issue of Art. 13 when the applicant alleges that the domestic procedures for receiving an indemnity are either inexistent or ineffective.[28]

Thus, in all the "Tchetchen cases" against Russia, it has become the rule to examine the applications under both the procedural limb of Art. 2 and under Art. 13.[29] In all these cases, the reasoning used by the Court to justify the cumulative approach is the following:

"It follows that in circumstances where, as here, the criminal investigation into the deaths was ineffective and the effectiveness of any other remedy that may have existed, including the civil remedies suggested by the Government, was consequently undermined, the state has failed in its obligation under Article 13 of the Convention."[30]

28. See, for instance, *Bozaru v. Romania*, judgment of 26 July 2007; *Dölek v. Turkey*, judgment of 2 October 2007.
29. See, for example, *Bitieva v. Russia*, judgment of 21 June 2007; *Alikhadjiyeva v. Russia*, judgment of 5 July 2007.
30. *Moussaïev*, para. 175.

Ways and means of strengthening the implementation of the European Convention at national level once a judgment has been delivered and a violation found

The jurisdiction of the Court under the Convention is a very important legal mechanism for the promotion and protection of human rights. The effectiveness of that mechanism depends to a large extent on the execution of its judgments. A timely and complete execution of the Court's judgments is of vital importance for the authority of the Court, for an effective legal protection of the victims of violations and for the prevention of future violations.

Any judgment of the Court has a double characteristic. It has the character of *res judicata* for the respondent state and the character of *res interpretata* for all the other states.

1. The Court's judgments as res judicata

- General obligations

Pursuant to Art. 46 para. 1 of the Convention, member states must abide by the Court's judgments in any case to which they are parties.[31] The obligation to "make reparation" is threefold.

When the Court has deemed it necessary to award just satisfaction, it is the state's duty to pay the applicant the relevant sums.

The adoption of individual measures for the applicant's benefit may be necessary to ensure that the latter is put, insofar as possible, in the same situation as he or she enjoyed prior to the violation of the Convention.

In addition, states may have to take general measures, such as legislative amendments, in order to prevent further violations of a similar nature.

states have a particular responsibility regarding the execution of the Court's judgments in relation to repetitive applications, because these applications would never have seen the light of day if general measures to prevent further violations had been taken or taken more promptly by the state concerned.

- Enactment of legislation allowing for review or reopening of domestic proceedings

A further measure that states should take is the enactment of legislation allowing for review or reopening of domestic proceedings following the finding by the Court of a violation of a Convention provision.

31. See Jörg Polakiewiez, Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofes für Menschenrechte 1993, p. 251; Peter Leuprecht, The execution of judgments and decisions, in: R.St.I. Macdonald, F. Motscher and H. Petzold (eds), The European system for the protection of human rights 1993, p. 792; F. Matscher, Le système de la Convention et le fonctionnement du mécanisme de contrôle, in: RCADI, Tome 270 (1997).

This is a priority which should be pursued in all possible venues and on all possible occasions. The importance of such legislation has been stressed and reiterated by the Committee of Ministers.[32] The Court has implicitly endorsed the practice of the Committee of Ministers of pursuing the reopening of domestic proceedings in cases of infringements of the right to a fair trial.[33]

2. The Court's judgments as res interpretata

The Court's judgments, in fact, serve not only to decide those cases brought before the Court, but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the states of the engagements undertaken by them as contracting parties.[34] This means that states parties, besides having to abide by judgments of the Court pronounced in cases to which they are party, also have to take into consideration the possible implications which judgments pronounced in other cases may have for their own legal system and legal practice.

This means that at the national level legislation should ensure that they have appropriate procedures for verifying that all new legislation which could potentially interfere with human rights complies with the Convention.

Governments should take the necessary action for executing the Court's judgments as swiftly as possible. Judges should work towards giving direct effect to the Court's judgments.

To make their task easier, the Court's judgments should be available in the relevant national languages. ★

32. Recommendation Nr R (2000) 2, of 19 January 2000. See Elisabeth Lambert-Abdelgawad, "Le réexamen de certaines affaires suite à des arrêts de la Cour européenne des droits de l'homme", in: Revue trimestrielle des droits de l'homme, 2001, pp. 715-42.

33. *Pisano v. Italy*, judgment of 24 October 2002, para. 45.

34. See *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A, No. 25, para. 154 in fine.

The effectiveness of the European Convention on Human Rights at national level: the parliamentary dimension

Ms Marie-Louise Bemelmans-Videc

Member of the Parliamentary Assembly of the Council of Europe

I would like to thank the organisers for inviting me to speak before you today. I am honoured to be able to participate in this Colloquy on a topic that is very dear to me: the stronger implementation of the European Convention on Human Rights at national level and in particular, the role of national parliaments in verifying state obligations to comply with the ECHR, including Strasbourg Court judgments.

We all agree – as is clear from the title of this Colloquy – on the need to reinforce national implementation of the ECHR, thereby putting back into focus the "subsidiary nature" of the Strasbourg control mechanism, It is also evident that national parliaments should, where possible, play a significant role in ensuring a substantial reduction of individual applications to the Strasbourg Court.[35]

So let me first state the obvious. States are responsible for the effective implementation of human rights and it is incumbent on all state organs, be they the executive, the courts or the legislature, to prevent or remedy alleged human rights violations at the national level. This is principally, but not exclusively, the

35. This point has been very aptly underscored in the title of an article just published on this subject by C.Paraskeva "Returning the protection of human rights to where they belong, at home", in the June 2008 issue of The International Journal of Human Rights, vol. 12, pp. 415-448.

responsibility of the judiciary. In so far as the legislature is concerned, this may entail, for instance, rigorous "Strasbourg vetting" of draft legislation. Only when the domestic system fails, should the Strasbourg Court step in. Subsequently, if and when there is an adverse finding by the Strasbourg Court, emphasis shifts back to the domestic arena when the state is required to execute the judgment under the supervision of the Committee of Ministers (Article 46 of the ECHR). At this stage too, parliamentary involvement may be necessary, as the rapid adoption of legislative measures may be required to ensure compliance with the Court's judgments.

As a result of the foregoing, it is also obvious that the double mandate of national parliamentarians – as members of PACE and of their respective national parliaments – can be of fundamental importance in ensuring that human rights guaranteed by the ECHR and the Strasbourg Court are effectively protected and implemented domestically without, in the vast majority of cases, the need to seek justice in Strasbourg. There is a heavy burden on us, parliamentarians, especially those with such a double mandate, to ensure stronger implementation of the Convention at national level.

It follows that member states, *including their legislative bodies*, must be more rigorous in ensuring regular verification of the compatibility of draft and existing legislation with ECHR standards, as well as the existence of effective domestic remedies.[36] Indeed, as concerns draft legislation, such verification has in the last few years been systematically undertaken by parliamentary committees in several member states. The extent to which this is also carried out – specifically in the context of the ECHR – by the legal services of legislative bodies, I am simply not able to answer. Probably (hopefully?) quite often, but I lack empirical evidence to back up this statement. That said, the compatibility of existing laws with ECHR standards often crops up within the framework of parliamentary debates. Likewise, oral or written questions are put to the executive when, for instance, the execution of a Strasbourg Court judgment is at issue. [For an overview of different parliamentary practices on this subject, I refer you to the background document prepared for this colloquy, and in particular its addendum.]

As explained in the background document prepared for the presentation I am making today, a questionnaire entitled "Parliament's role in verifying state obli-

36. For a recent overview see Committee of Ministers doc.CM (2008) 52, of 4 April 2008: CDDH Activity Report "Sustained action to ensure the effectiveness of the implementation of the ECHR at national and European levels", especially Appendix IV (which refers to improvement of domestic remedies; including mechanisms within the legislature, at §§ 11–19), and Appendix VI (which concerns the need to verify draft and existing laws, including parliamentary verification at §§ 13- 18). See also my AS/Jur working document "The effectiveness of the ECHR at national level", doc. AS/Jur (2007) 35 rev 2 (declassified by the Committee on 26.06.2007).

gations to comply with the ECHR, including Strasbourg Court judgments", was sent to the parliaments of all 47 Council of Europe's member states in February of this year. To date, 39 have replied.[37] This questionnaire was preceded, in November 2007, by a separate initiative taken by the former Assembly President, Mr René van der Linden, who invited the Speakers/Presidents of all parliaments of Council of Europe member states to submit information on the follow-up to PACE Resolution 1516 (2006) on the establishment of internal parliamentary systems to monitor the implementation of the Court's judgments.

The result product of this, admittedly incomplete survey is, on the one hand, not too encouraging as concerns the lack of a pre-established and systematic parliamentary procedures of "Strasbourg ECHR vetting", and on the other hand, the readiness of an increasing number of parliaments to take a more pro-active approach to help ensure that appropriate and rapid following-up is given after an adverse finding by the Strasbourg Court.

Very few parliamentary mechanisms exist with a specific mandate to verify compliance with ECHR requirements; one could probably include the work of the UK Joint Committee on Human Rights in this rubric. Most replies indicated that "Strasbourg vetting" is carried out within existing "normal" parliamentary procedures (see, e.g., replies from Albania, Andorra, France, Poland, Portugal, Serbia and Slovakia). In other countries, the reply often given was that, as the ECHR is part of domestic law, this in itself necessitates the need to regularly check compatibility of national laws with Convention standards. In Austria, where the ECHR has "constitutional status", special attention is indeed given to this. But in the vast majority of states this is not a function with respect to which *national legislators* appear to take a "lead role".

In so far as the need to comply with the judgments of the Strasbourg Court is concerned, a different "scenario" can be detected. This is due to the growing "interaction" between national parliamentary bodies and the Parliamentary Assembly. I am fully aware that, in so far as implementation of Strasbourg Court judgments is concerned, the principal task of supervising the execution of such judgments – by virtue of Article 46 of the ECHR – is the responsibility of the Committee of Ministers.[38] Nevertheless, the Parliamentary Assembly has, since 1993, played an increasingly important role in the process of implementation of the Court's judgments.[39] Six reports and resolutions and five recommendations have been adopted by the Assembly since 2000 to help member states overcome

37. No replies have as yet received from the parliaments of Azerbaijan, Luxembourg, Malta, Moldova, Monaco, Montenegro, San Marino and Slovenia.

38. See, e.g., Committee of Ministers 1st annual report on the supervision of the execution of judgments of the European Court of Human Rights 2007 (Council of Europe, March 2008), *passim*.

structural deficiencies and to accelerate the process of fully complying with the Court's judgments. In addition, various implementation problems have been regularly raised by other means, notably through oral and written parliamentary questions. A number of complex implementation issues have been solved with the assistance of the Assembly and of the national parliaments and their delegations to the Parliamentary Assembly, Indeed, in the context of his sixth report on the implementation of ECHR judgments, Mr Erik Jurgens, Rapporteur, visited five states where the most difficult and/or longstanding implementation issues arose (namely Italy, the Russian Federation, Turkey, Ukraine and the United Kingdom).[40] He used these visits to examine, with fellow parliamentarians and national decision-makers, the reasons for non-compliance with Court judgments and to stress the urgent need for solutions to problems raised. Subsequently, in its Resolution 1516 (2006) – based on Mr Jurgens' sixth report – the Parliamentary Assembly emphasised that "*member states methods and procedures should be changed to ensure immediate transmission of information and involvement of all domestic decision makers concerned in the implementation process, if necessary with the assistance of the Council of Europe*."[41] The Resolution further "***invites all national parliaments to introduce 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***."[42]

What is probably again worth emphasising is the privileged status which we parliamentarians have in our dual capacity as members of the Assembly and national legislators, and that we can be in a position to help facilitate the implementation of Strasbourg Court judgments.[43]

Please permit me, at this juncture, to inform you of my "disappointment" with respect to *two* matters, before I provide you with a more optimistic picture for the future.

39. See PACE Resolution 1516 (2006), § 3. See also, E Lambert Abdelgawad *The execution of judgments of the European Court of Human Rights*. Human Rights File No. 19 (Council of Europe Publishing, 2008), at p. 59.
40. See § 5 of PACE Resolution 1516 (2006). In addition, problems of non-execution were also analysed with respect to eight other states, namely Bulgaria, France, Germany, Greece, Latvia, Moldova, Poland and Romania.
41. PACE Res. 1516 (2006), § 19.
42. *Idem*, § 22.1. Emphasis added.
43. See, in this connection, § 116 of report of Mr Christos Pourgourides (the successor of Mr Jurgens, as rapporteur) on "Implementation of judgments of the European Court of Human Rights", doc. AS/Jur (2008) 24 (declassified by the Committee on 2 June 2008).

I am disappointed by the fact that the Committee of Ministers (in effect, the Steering Committee for Human Rights, the CDDH) has not taken sufficient account of the importance of the "parliamentary dimension" in its recent Recommendation on the efficient domestic capacity for rapid execution of judgments of the Strasbourg Court. Here, I have in mind the outcome of discussions Mr Jurgens (one of the most active members of the Assembly's Legal Affairs and-Human Rights Committee and recently retired colleague of mine in the Dutch Senate) had with the CDDH in November 2007 when the CDDH proposed – despite Mr Jurgens' strong objections – that national parliaments be informed, "*as appropriate*", of measures taken to execute Strasbourg Court judgments. In other words, national parliaments are to be informed if and when the state's (administrative? executive?) authorities feel like doing so. There is something fundamentally wrong in this approach, as I will illustrate to you later on in the specific context of the Dutch experience. [For further information about this rather unfortunate development, I refer you to a text prepared by Mr Jurgens on this subject at the end of last year.[44]]

My second "disappointment" concerns lack of regular *parliamentary* "Strasbourg vetting" in most parties to the Convention. This observation is based on a "*constat*", a "finding" based on information gathered by the PACE Legal Affairs and Human Rights Committee. In a recent overview of "parliamentary verification of state compliance with ECHR standards" – prepared for this colloquy – it has been noted that [and I cite from paragraph 11 of the said text]:

"*Despite [a few examples] it would appear that parliaments in very few states exercise regular control over the effective implementation of Strasbourg Court judgments*".[45]

As my French colleagues say: *nous avons du pain sur la planche!*

Now, with your permission, I would now like to evoke my own national parliament's system as a positive mode and then cite a few more positive examples from other countries. In the Netherlands, the Government Agent before the

44. This concerns § 9 of Committee of Ministers Recommendation CM/Rec (2008) 2, to member states on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights, adopted on 6 February 2008. See, in particular, §§ 12-18 of the Assembly's Legal Affairs and Human Rights Committee (AS/Jur) working document "Implementation of judgments of the ECtHR – issues currently under consideration" presented by E. Jurgens, doc. AS/Jur (2007) 49 rev, and Appendix III thereof (declassified by the Committee on 11.09.2007).

45. This document, entitled "Role of national parliaments in verifying state obligations to comply with the ECHR, including Strasbourg Court judgments: an overview" was issued on 23 May 2008.

Court makes a yearly report on cases and judgments brought against the Netherlands, which is sent by the government to both houses of parliament. The parliamentary justice committees examine this report, ask questions, and make suggestions if they are not satisfied by the government's actions. In 2006 the Senate requested that an overview of implementation of Strasbourg Court judgments be added to the report. As a result, this broadened report contains not only judgments against the Netherlands, *but any judgment which could have a direct or indirect effect on the Dutch legal system*. I understand that a similar procedure has been instituted in Switzerland, as of the beginning of this year, where regular reports to parliament now cover *all* Strasbourg Court judgments which may have a bearing on the Swiss legal system.

From a very cursory overview of the replies to the questionnaire sent out in February, as well as to the letter of the former PACE President, Mr van der Linden, a few examples stand out:

- the conference of the presidents of the **Belgian** *Chambre des Représentants* has proposed that the *Commission de la Justice* be charged with the control of the implementation of Strasbourg Court judgments, with the report to be delivered on an annual basis.
- The **Finnish** government submitted a first report on the Finnish human rights policy to the Parliament in 2004, affirming that such reports, which shall include an assessment of the implementation of Strasbourg Court's judgments, shall be regularly produced, with the next one being scheduled for early 2009.
- A particularly comprehensive model is the one recently established in **Luxembourg**: the Legal Committee of the Chamber of Deputies adopted a new mechanism to the control the implementation of Strasbourg Court judgments. At the beginning of each year the Ministry of Justice will report on the Court's judgments with respect to Luxembourg. When so doing, the Ministry will inform the Luxembourg Parliament what action, if any, has been taken following any adverse findings by the Strasbourg Court.

As regards national parliamentary procedures foreseeing not only the monitoring of the implementation of Strasbourg Court judgments but also the prior screening of domestic legislation, the **United Kingdom** model appears particularly noteworthy (this work will be presented to you this afternoon by a member of the UK Joint Committee for Human Rights, the Earl of Onslow). The "UK model' is a rare example of the existence of a special parliamentary body with a specific mandate to verify and monitor the compatibility of national law and practice with the ECHR. I should also mention, in this connection, a recent development in the **Romanian** Parliament. As a direct result of "prodding" by the Parliamentary Assembly (PACE Resolution 1516 of 2006), the Romanian Chamber of Deputies has set up a Sub Committee of their Committee of Legal

Affairs which is specifically mandated to ensure a better and faster implementation of Strasbourg Court judgments. Other interesting procedures include the one put into place by **Italy** (based on "the Azzolini law", Law no 12, of 2006), and the **Ukraine**, law of 2006 which focuses on domestic procedures to enforce and apply the case-law of the Strasbourg Court. Also worth a mention, perhaps, is the **Swiss** longstanding practice of the Government Agent regularly briefing Swiss members of the Assembly's delegation on important developments before the European Court of Human Rights.

I could go on, but I will stop here, and refer you to the detailed replies available in the Addendum of the PACE Secretariat background document. However, what is certainly worth noting is the fact that *the vast majority of parliamentary initiatives undertaken on this subject, are relatively recent initiatives*. And I take pride in emphasising that more often than not, they stem from initiatives taken by the Assembly, and in particular its Legal Affairs and Human Rights Committee.[46]

Thank you all for your attention. ★

46. See also, in this connection, the concluding remarks made by PACE President de Puig at the recent European Conference of Presidents of Parliament, held in Strasbourg on 22-23 May 2008, cited in § 8 of the PACE AS/Jur's Secretariat's background document prepared for this Colloquy. The complete text of the PACE President's concluding remarks can be accessed at http://assembly.coe.int/ASP/APFeaturesManager/defaultArtSiteView.asp?ID=779

Domestic remedies: the Austrian experience

Ms Ingrid Siess-Scherz

Head of the Legal, Legislative and Research Service of the Austrian Parliament, former Vice-Chair of the Steering Committee for Human Rights (CDDH)

Ladies and Gentlemen, colleagues and friends,

First of all I would like to thank the authorities of Sweden wholeheartedly for the organisation of this colloquy and their kind invitation. I am very proud and honoured that I was asked to present the Austrian experience on domestic remedies.

Introduction

Austria acceded to the Convention in 1958. Since then we had to change our constitution, our structure, our remedies as well as our legal landscape several times due to the Convention and the jurisprudence of the Court.

In the following I would like to discuss with you our constant struggle and attempts to comply with the requirements of the Convention and the case-law of Strasbourg. My first intention while preparing my presentation was to list as many successful domestic remedies that have been introduced as a direct consequence of cases directed against Austria as possible. But then I thought what is much more important for us, for colleagues, for those, who are constantly engaged in the battle to improve their respective human rights situation in their home country is to share our experience. It is important to share the problems we all have to face when we inform our ministers of the latest case-law, of the requirements, of the possible implications, including the financial ones; the problems in the negotiations with all important players and stakeholders in our country.

So I will refrain from trying to impress you with our success stories. I will present to you some few examples for the introduction of domestic remedies in Austria of the past; and here I decided to present also those which required a very long period to be implemented. Secondly, I would like to discuss with you recent attempts to improve the human rights system in Austria. Finally, I will turn to some ideas how we try to manage to overcome problems within a short time-period.

Examples for the introduction of domestic remedies

I would like to state that Austria – when the Court has found Austria in violation of the Convention – is always willing to do its utmost to remedy the situation, to pay the just satisfaction, to improve the situation of the applicant and to set the required general measures. As promised, I will refrain from trying to sum up all domestic remedies we established because we are member of the European Convention of Human Rights. I will only cite some carefully selected examples:

A real story of success was the establishment of the so-called independent administrative tribunals in 1988. These tribunals were introduced because of judgments by the Court against other member states. The case of *Benthem v. the Netherlands*,[47] which stated that certain administrative, public, measures had to be regarded as "civil rights" within the meaning of Article 6 of the Convention, prompted Austria to start the process of completely changing the structure of our system of domestic remedies, including the structure of public authorities, in this field. Instead of an appeal before a public authority, appeals against decisions of first instances, including on criminal charges by administrative authorities, should now be brought before independent tribunals that should fulfil all requirements of Article 6 of the Convention. The process of introducing the necessary amendments in our constitution started in 1985, and in 1988, these provisions were already adopted by parliament. After three further years of preparation, these tribunals started to operate on 1 January 1991. I would assume that only three years of discussions, deliberations and negotiations with all relevant stakeholders, including all nine *Länder* are a very short time for such a far reaching change in the constitutional structure of a member state.

But sometimes it takes a long time to improve the domestic legal system after judgments in Strasbourg:

In the case of *Erkner and Hofauer v. Austria*,[48] the underlying facts were the following: The applicants complained of consolidations proceedings taken in respect of their land since 1969. In 1979 Mr and Mrs Erkner addressed the Com-

47. *Bethem v. the Netherlands*, 23 October 1985, Application No. 8848/80.
48. *Erkner and Hofauer v. Austria*, 23 April 1987, Application No. 9616/81.

mission in Strasbourg and complained of the length of proceedings. They also alleged a breach of Article 1 of Protocol No. 1 of the Convention. The Court finally reached its decision on the 23 April 1987 – the proceedings in Austria were still pending and exceeded at that moment sixteen and a half years! Other aspects in which the Court found a violation concerned aspects of the protection of property.

After delivery of the judgment of the Court it took us six further years to achieve the adoption of the necessary legal provisions: The regulation of land consolidation is a difficult matter in Austria: First, it requires a federal law laying down principles, the Federal Agricultural Land Planning Act. It is then necessary to adopt implementing laws by all nine *Länder*. Furthermore, the Agricultural Proceedings Acts, again federal law, had to be amended as well as the Federal Agricultural Authorities Act, in order to take into account the problems which had arisen under the Convention. So, in order to achieve the necessary adjustments, negotiations with all *Länder* had to take place. These negotiations can be, as one might imagine, very time-consuming. But, and this was the positive aspect, the lacking legal provisions did not lead to further cases before the Court within the six years between the judgment and the entry into force of the new provisions.

In another area which I would like to present to you, the Court had to deliver six further judgments on the same aspects before we were able to amend the necessary legal provisions. And I dare to state that it was the pressure exerted by the number of violations found on the same aspects and even more cases to come in the future that finally led to the amendment of the Criminal Proceedings Compensation Act:

Already in August 1993, with the delivery of the judgment in the case of *Sekanina*,[49] in which the Court found Austria in breach with Article 6 para. 2 of the Convention, we knew about the problem. The applicants were not able to obtain compensation for their imprisonment on remand following the discontinuance of or the acquittal in criminal proceedings. The criminal court deciding on the question of compensation had dismissed claims for compensation by arguing that there still had been a reasonable suspicion against the applicant, which had not been dissipated. This reasoning was found to violate the presumption of innocence. After this first judgment, the Federal Ministry of Justice submitted a circular note containing relevant information and recommendations to the competent courts aiming at avoiding the repetitions of the violation of Article 6, para. 2 of the Convention. The Austrian Government was of the opinion that these measures were sufficient and was also able to convince the Committee of Ministers to be content.[50] But following cases brought to Stras-

49. *Sekanina v. Austria*, 25 August 1993, Application No. 13126/87.

bourg revealed that the recommendations how to interpret the relevant legal provisions were not apt to prevent further violations:

Further judgments were adopted by the Court in the cases of *Szücs*[51] and *Werner*[52] of November 1997 (on a somewhat different question, but nevertheless an amendment of the same law was then necessary), *Rushiti*[53] of March 2000, as well as in the cases of *Lamanna*[54] of July 2001, *Weixelbraun*[55] of December 2001, *Vostic*[56] of October 2002 and *Demir*[57] of November 2002.

The following discussions were difficult. Many different proposals were tabled, some of them were regarded as not being necessary according to Article 6 and therefore too generous towards persons who were acquitted. An idea, which was finally found to be acceptable, was to transform the decision on the question of compensation from the criminal court to the civil courts.

Finally, the new Criminal Compensation Law ("Law on compensation of damages resulting from criminal-judicial detention or condemnation – StEG 2005") was issued on 15 November 2004 and entered into force on 1 January 2005.

Recent attempts to improve the human rights system in Austria

In the following I would like to present to you the most recent efforts Austria is undertaking in order to further improve its human rights situation.

1) Establishment of administrative courts of first instance

Austria definitely has a problem with length of proceedings, especially before the Administrative Court.[58] A second problem concerning again the Administrative Court are cases in which Austria is found in violation of the Convention because this Court of last instance has not held a public hearing.[59] The background of this situation is the fact that still in some administrative proceedings the Court of last instance, the Administrative Court, is the first and only tribunal according to Article 6 of the Convention, because all other, lower, instances are administrative authorities.

50. Resolution DH(94)49.
51. *Szücs v. Austria*, 24 November 1997, Application No. 135/1996/754/953.
52. *Werner v. Austria*, 24. November 1997, Application No. 138/1996/757/956.
53. *Rushiti v. Austria*, 21 March 2000, Application No. 28389/95.
54. *Lamanna v. Austria*, 10 July 2001, Application No. 28923/95.
55. *Weixelbraun v. Austria*, 20 December 2001, Application No. 33730/96.
56. *Vostic v. Austria*, 17 October 2002, Application No. 38549/97.
57. *Demir v. Austria*, 5 November 2002, Application No. 35437/97.
58. See p.e. *Stempfer v. Austria*, 26 July 2007, Application No. 18294/03, §37f.
59. See p.e. *Abrahamian v. Austria*, 10 April 2008, Application No. 35354/04.

All relevant bodies, be it ministries, regional governments, politicians, are aware of the problem and there is widespread consensus that the establishment of regional administrative courts of first instance that fulfil all requirements of Article 6 of the Convention would be the solution. But: It takes time. Already at the time of the introduction of the independent administrative tribunals in the late 80es, the idea of the establishment of real administrative courts of first instance was brought up and discussed. In 1994 the Federal Chancellery, the competent ministry for elaborating proposals to amend the constitution, had already worked out a draft on the introduction of administrative courts.

However, the deliberations and negotiations are still going on. The problems are obvious: Costs, loss of power and influence, implications on departments within administrative bodies that would no longer fulfil the functions of appeal bodies. In May 2003, a Covenant was set up in order to elaborate a new constitutional reform. One committee was mandated to work on proposals for regional administrative courts. In the following two years all relevant players, NGOs, experts from universities, last instance courts, deliberated, discussed and finally came up with many proposals for a new constitution.

According to the government's program concluded last year in January, the government is intending to adopt a draft law bill, including reforms on the human rights sector, based on the proposals of the Covenant.

In May 2007, the Federal Chancellery sent out a draft containing constitutional reforms, including proposals for regional administrative courts. At the moment, experts in the ministry of finance are working on the financial implications of this constitutional reform. And we do hope that the process of improving our system of domestic remedies is soon in the final phase so that the draft bill can be presented to the parliament. But, still, even if we manage to adopt the necessary legal provisions, I would assume that the preparations to enable these new courts to come into operation would take some further three years. So, until then, many more cases directed against Austria, on the very same aspects, will be brought to Strasbourg, contributing to the workload of the Court; and not in all cases we will be able to settle the case by concluding a friendly settlement.

2) Efforts to improve the human rights appeal

In autumn 2007 the Ministry of Justice started an attempt to improve the human rights situation in the field of civil and criminal law by amending the regulations in respect of the already existing "human rights appeal". So far, this appeal only allows for claims on alleged violations of the right to personal freedom. The idea was to extend the possibilities to complain against judgments and other decisions by judges, whenever these decisions violate further human rights: the right to a fair trial, Article 8 of the Convention, the protection of property (Article 1 of the first protocol). But the criticism and the opposition were

considerable: The reasons were different, but it was not the case that the lack of will to improve the human rights situation in Austria was the secret motivation. Some criticised that the proposal was not far reaching enough. The Supreme Court was afraid that the new proposal might restrict its latest jurisdiction concerning violations of human rights which improves the already existing domestic remedy. And then the Constitutional Court was criticising these proposals because it itself asked to be mandated with this task. To keep the story short: So far, no consensus could be found on the proposal.

3) Failures and disappointments

Now I would like to turn to a different aspect: Even if a domestic remedy has been successfully established, the application according to the requirements of the Convention must be guaranteed:

On 1 January 1990, a new provision entered into force which should address the problem of the length of proceedings in criminal and civil proceedings before the courts. By that the Austrian legislator intended to respond to a lacuna in the Austrian civil and criminal procedure where the parties did not have any possibilities to combat delays in the conduct of proceedings. This new provision should enable a person to complain about an excessive length of proceedings. Article 6 and Article 13 of the Convention were expressly mentioned in the explanatory report of the law bill.

This provision enables all parties to the proceedings to submit a request notwithstanding any other remedies within the legal system. The judge may take the requested procedural steps within four weeks. If he or she is not in a position to respond to this request, the request will be determined by the superior court. This court has to decide whether the alleged delay is reasonable or not. If the lower court has been dilatory, the superior court will impose a time-limit.

A similar domestic remedy is available in respect of administrative proceedings:

The Austrian Administrative Procedure Act imposes on authorities the obligation to give a decision within six months. If the decision is not served on the party within this time-limit, the party may file an application for the transfer of jurisdiction. If the administrative authorities fail to abide by this obligation finally an application against the administration's failure to decide can be brought before the Administrative Court in accordance with Article 132 of the Federal Constitution.

Both domestic remedies have been regarded as being effective within the meaning of the Convention system: In the case of *Holzinger v. Austria* the Court conceded that the domestic remedy concerning courts' proceedings must be considered an effective and sufficient remedy which the applicant has not used. Accordingly, domestic remedies were not exhausted in the instant case.[60]

The same holds true for the domestic remedy available for administrative proceedings: In the judgment in the case of *Basic v. Austria*, the Court held that the applicant should have made use of the application under Article 132 of the Federal Constitution and therefore bring the case before the Administrative Court. By failing to use this domestic remedy he had not complied with Article 35 of the Convention and therefore had not exhausted the domestic remedies.[61]

One might conclude that Austria has fulfilled its obligations to introduce effective domestic remedies. But a case which happened last year revealed that the struggle to overcome shortcomings never stops:

In the case of *Achleitner v. Austria*, the Court of Strasbourg held that Austria had violated – again – Article 6 of the Convention because of the length of proceedings.[62] The case concerned water-rights of the applicants who ran a fishing farm. The proceedings had started in 1969 and were still pending at the time of the delivery of the judgment of the Court in October 2003. So the proceedings have already lasted for twenty seven years. After the delivery of the judgment, in 2005, the applicant brought the case before the Administrative Court. The Court of last instance could have decided on the merits of the case, but found the case to be too complex – a public hearing would have been necessary, experts would have to be entrusted to examine the situation – and therefore in 2007 the Court decided to refer the case back to the authority of first instance. So, the case is still pending. This decision was severely criticised by human rights experts.

To conclude, I would like to underline that the introduction of domestic remedies is sometimes time-consuming, it requires many negotiations, deliberations, discussions. But even after the establishment of domestic remedy, the battle is not over, also the application has always to be in accordance with the requirements of the Convention.

Another series of cases, which also concern the necessity to introduce domestic remedies concerning length of proceedings, were the source of much discussion last year and have not been solved yet:

In the judgment in the case of *Jancikova*, April 2005, Austria was for the first time confronted with the fact that the Court in Strasbourg also asks for domestic remedies against a delay in the conduct of proceedings at a court of last instance.[63] The Court reiterated the same interpretation of Article 13 of the Convention in the case of *Hauser-Sporn* in December 2006[64] by stating the following:

60. *Holzinger No. 1 v. Austria*, 30 January 2001, Application No. 23459/94.
61. *Basic v. Austria*, 30 January 2001, Application No. 29800/96, §40.
62. *Achleitner v. Austria*, 23 October 2003, Application No. 53911/00.
63. *Jancikova v. Austria*, 7 April 2005, Application No. 56483/00.
64. *Hauser-Sporn v. Austria*, 7 December 2006, Application No. 37301/03.

"The present proceedings exceeded the reasonable-time requirement under Article 6 of the Convention as delay occurred while the case was pending before the Constitutional Court and the Administrative Court (see paragraph 32 above). Since the Government have not shown that any form of relief – either preventive or compensatory – was available for the delays caused by these authorities, there has been a violation of Article 13 of the Convention in that the applicant had no domestic remedy whereby he could enforce his right to a hearing within a reasonable time as guaranteed by Article 6 § 1 of the Convention. (para 40)"

The Austrian government asked for a referral to the Grand Chamber, which was rejected. The same questions were again raised in the judgments in the cases of *Schutte*,[65] *Stempfer*[66] and *Vitzthum*,[67] all issued in July 2007.

The Federal Chancellery sent out a draft law bill in March 2006, addressing exactly the issues raised by the judgment in the case of *Jancikova*. The proposed new provisions would have foreseen that both the Administrative and the Constitutional Court have to decide on questions which fall under Article 6 of the Convention – as for as possible - within one year. The applicant, awaiting such a decision would have been entitled to issue a complaint after the expiry of this time-limit before the president of the respective court. The reactions during the general examination procedure were unexpectedly fierce, especially by the Administrative and the Constitutional Court. The Administrative Court stated that the solution must be found by introducing administrative courts of first instance, the Constitutional Court questioned whether the proposed measure might be able to address the problem. So far we were not able to find a solution. And I am afraid that the cases will be pending for some time before the Committee of Ministers; in the meantime more cases will be brought – successfully – before the Court. At the moment we try to conclude friendly settlements in the majority of cases, but in the near future we might not be able to set the general measures.

Some ideas to overcome problems in introducing domestic remedies

As stated earlier, the establishment of new domestic remedies sometimes requires a far reaching re-structure of the domestic system which takes time, sometimes even many years. So, in order to achieve quicker results, it is sometimes advisable to explore other means:

65. *Schutte v. Austria*, 26 July 2007, Application No. 18015/03.
66. *Stempfer v. Austria*, 26 July 2007, Application No. 18294/03.
67. *Vitzthum v. Austria*, 26. July 2007, Application No. 8140/04.

I have presented to you our domestic remedies allowing to accelerate the conduct of criminal and civil proceedings which have been introduced in 1990. The problem of this – in principle effective remedy – is that it is rarely used by applicants.

Generally speaking the instrument is more often used – for obvious reasons – in civil proceedings. In civil proceeding around 100 requests are submitted per year. The number is much lower in criminal proceedings.

I have heard that lawyers normally do not advice to lodge this request because it might put the competent judge into a bad mood if he or she will be given a time-limit by the superior court.

So, as a complementary measure, on 1 November 2007, new ombudspersons were established at the courts of second instances. The first evaluation is encouraging and promising: In the first 5 months around 3 500 persons contacted the ombudspersons. 20% of cases that are brought before these ombudspersons concern complaints because of the length of proceedings before the civil and criminal courts. The ombudspersons offer competent information as well as mediation between all parties involved, including the judge. So, the first impression by the ministry of justice is that of a well-functioning measure.

Austria has gained notoriety concerning the violation of freedom of speech, the most popular cases in this field are Austrian. Last year the Austrian Supreme Court took highly respected and very important decisions.[68] The Court raised the question of the high numbers of judgments against Austria in which the Court in Strasbourg has found a violation of Article 10 of the Convention. In addressing this problem, the Supreme Court extended the possibilities to take up and decide on allegations of violations of Article 10 of the Convention.

In addition to this improvement in the jurisdiction, the Minister of Justice instructed the „Generalprokuratur" (Procurator General, meaning the highest level of prosecution) to screen judgments raising aspects of Article 10 of the Convention and bring them before the Supreme Court.

Conclusion

To conclude my presentation, I would like to sum up.

I am convinced that the task to introduce a necessary domestic remedy is a very challenging one. For obvious reasons, the establishment of new domestic remedies might create problems: in cases where the legal structure of a given member state has to undergo major amendments; in cases where many "players" are involved; in cases where many different legal provisions have to amended; in cases where financial implications are raised.

68. Decision 1 August 2007, 13 Os 135/06m; see also decision 23 August 2007, 12 Os 36/07.

With the examples I gave to you I wanted to convey the message that failures and problems that might arise can sometimes not be attributed to the lack of political will. Sometimes surprising opposition comes up from unexpected players. And sometimes a given member state might have successfully introduced a domestic remedy which helps to win cases in Strasbourg but which does not help to improve the human situation.

And I also wanted to encourage all of us to be flexible, to be innovative. I would like to state that the challenge to further improve our human rights system never stops.

I thank you for your attention. ★

Domestic remedies: the Swedish experience

Ms Anna Skarhed

Justice of the Swedish Supreme Court

Introduction

The promotion and protection of human rights are prerequisites for peace and stability. A democratic society based on respect for human rights and the rule of law is one of the fundamental goals of the Council of Europe. By identifying problems in the member states and suggesting solutions, the Council helps to strengthen the judicial system and democracy. This is why special emphasis must be given to the implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms in all member states.

In Sweden, as in other member states of the Council, the primary aim must be to ensure that the shaping of our legislation and the practice of the law are such that no violations of the Convention occur. However, to ensure this, a well-functioning system for monitoring the implementation of the Convention must be in place. This is necessary both in order to guarantee injured parties their human rights in practice and to provide the means for every individual to claim their right to effective legal redress.

The activity of the European Court of Human Rights is crucial for monitoring the implementation of the Convention in all member states. With an increasing number of individual applications, the caseload of the European Court has grown to such a level that it is now of utmost importance to find solutions that can facilitate the functioning of the Court. It is important here to bear in mind that international monitoring by the European Court is meant to be a guarantee, while the primary responsibility for the implementation of the Convention at national level lies with the member states themselves. To create an equitable situation for the Court, it is necessary for every member state to strengthen the implementation of the Convention at national level.

I will now try to give a brief description of how this is done in Sweden today.

Domestic remedies: the Swedish experience

When Sweden ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1952, the Convention was not incorporated into Swedish law. This meant that the Convention was not considered to be part of Swedish legislation. Over time, however, the Swedish courts developed principles according to which Swedish law should be interpreted so as to be consistent with the Convention.

Today, the Convention is part of Swedish legislation. In 1995 a special law was passed that incorporated the Convention into Swedish law. The overall aim was to strengthen the protection of human rights and fundamental freedoms for all Swedish nationals. To this end, the Government stated that if the protection given by the Convention were found to be stronger than the protection given by the Swedish constitution, which contains provisions on fundamental rights and freedoms in chapter 2 of the Instrument of Government (*Regeringsformen*), the Convention should be applied.

Initially, the incorporation of the Convention did not bring about any dramatic changes, but over the last few years the importance of the Convention has increased radically in the Swedish courts. The two supreme courts in Sweden – the Supreme Court and the Supreme Administrative Court – have both shown to be unwilling to interpret domestic law in a way that could risk their decisions being rejected by the European Court. To avoid this, they have attached special importance to the Convention in their application of the law, and they have been prepared to take measures in order for their decisions to accord with the provisions of the Convention.

This has been the case even when the applicable Swedish law has recommended a different solution or when the result has meant that the plaintiff has been awarded a right that was not grounded in Swedish national law.

Let me give you four examples:

1) In order to ensure the right to a fair and public hearing in matters concerning civil rights, as laid down in Article 6 (1) of the Convention, the Supreme Administrative Court has decided that plaintiffs should have a right to appeal decisions, in spite of the fact that no such right existed under the applicable Swedish laws (RÅ 1997 ref 65 and RÅ 2001 ref 56).
2) In order not to violate the prohibition against discrimination, as laid down in Article 14 of the Convention, the same court set aside a demand for registration for census purposes which was a prerequisite for a certain tax reduction according to Swedish law (RÅ 1997 ref 6). The decision by the Supreme

Administrative Court was made after the European Court had ruled that such a demand was discriminatory and not in accordance with the Convention.

3) When a conviction for racial agitation, with respect to the facts of the case, would have been disproportionate and likely amount to an infringement of Article 9 or 10 of the Convention, the Supreme Court dismissed charges against a pastor for racial agitation (NJA 2005 p. 805).
4) The Supreme Court has also dismissed charges against three men charged with handling stolen goods on the grounds that they had been incited to commit the crime and that hence their right to a fair trial had, from the very outset and definitively, been irremediably undermined (NJA 2007 p. 1037). The Supreme Court in its judgment referred to the cases of *Teixeira de Castro v. Portugal* and *Vanyan v. Russia*, among others.

In this way, domestic laws are interpreted so that decisions will comply with the Convention, all with a view to avoiding violations of the Convention and safeguarding the rights of individuals. These examples cannot be described as remedies, but I have found it important to describe how Swedish courts have tried to steer clear of non-observance of the Convention.

When it comes to the right to an effective remedy, as defined in Article 13 of the Convention, there have been a number of cases before the Supreme Court in recent years concerning the possibility for individuals to claim financial compensation in a Swedish court based directly on the Convention. The main reason for these claims has been that, according to the Swedish Tort Liability Act, compensation for violations of human rights and fundamental freedoms as defined in the Convention does not include compensation for non-pecuniary damage and also requires "fault or negligence" on the part of the state. It can be mentioned that an inquiry has proposed that changes be made in the Tort Liability Act to make it consistent with the stipulations in the Convention (*Skadeståndsfrågor vid kränkning* (Compensation for non-material damage), Ds 2007:10).

I will give you four examples. These are all cases that have been tried by the Supreme Court after the judgment of the European Court in October 2000 in the case of *Kudla v. Poland*.

1) A man who had been charged with and convicted of a fiscal offence claimed compensation according to Article 6 (1) of the Convention on the grounds that he had suffered as a result of the proceedings taking almost seven years from the time he had been informed of the suspicions against him until the case had been tried in a final judgment. The lower courts rejected his claims but the Supreme Court found them admissible and remitted the case to the district court. (NJA 2003 p. 217).
2) A man was indicted for a fiscal offence and acquitted after seven years. He claimed compensation under Article 6 (1) of the Convention on the grounds that his case had not been tried within a reasonable time. The Supreme Court

in its judgment remarked that according to Articles 6 (1) and 13 of the Convention, and as the European Court had stated in the case of *Kudla v. Poland*, the state has an obligation to supply its nationals with an effective remedy when their rights, as set forth in the Convention, are violated. The Supreme Court first tried the claims under the provisions of the Swedish Tort Liability Act and found that the man could be awarded financial compensation for loss of income. The Supreme Court then ascertained that since no crime had been committed against him, it was not possible, under Swedish law, to award compensation for the infringement. Despite this, the man was awarded SEK 100 000 as compensation for non-pecuniary damage. The Supreme Court concluded that in light of the practice established by the European Court in the case of *Kudla v. Poland*, it should be possible for a Swedish national court to award such compensation when doing so would guarantee the right to an effective remedy. (NJA 2005 p. 462).

3) A man who had been detained, with restrictions imposed on his right to communication for 16 months before the main hearing, claimed compensation on the grounds that the state had violated Article 5 (3) of the Convention and that he was therefore entitled to compensation according to Article 5 (5). The Supreme Court stated that in order for Sweden to meet the conditions of Article 5 (5) of the Convention, the state could have an obligation to pay more compensation, over and above what the application of national Swedish laws would require. (NJA 2007 p. 295).
4) Some children who were suspected of having been abused by one of their parents were subjected to a medical examination decided by the police. The decision to examine the children was unlawful and also found to be at variance with Article 8 of the Convention. The Supreme Court found that the parents and the children were entitled to compensation for the infringement, which should be determined in accordance with the practice established by the European Court.

These are examples of court decisions. It should be noted that in Sweden all claims for compensation of this kind do not have to be tried in court. The Swedish Chancellor of Justice has the power to award compensation, and in fact does so in many cases.

As has been laid down by the European Court, the remedy need not necessarily be in the form of financial compensation. In criminal cases where the right to a fair trial within a reasonable time has not been met, Swedish courts have reduced the penalty as a way of ensuring the right to an effective remedy.

Finally, I would like to mention that an official report has recently been presented which proposes that Sweden, so as not to breach Article 6 (1) of the Convention, should allow the chief judge of a court to decide that a case which

has been delayed shall be given priority (*Förtursförklaring i domstol*, SOU 2008:16).

I hope these examples have served to give you a picture of how the Swedish courts and the Swedish legislature try to take responsibility for the implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms on a national level.

Thank you for your attention. ★

Execution of national judgments: the Russian experience

Ms Veronika Milinchuk

Representative of the Russian Federation at the European Court of Human Rights, Vice-Minister of Justice

Failure to execute, or delays in execution of, court decisions was one of the pressing issues addressed by Russian nationals filing applications with the European Court of Human Rights until recently. The major problem at that concerned execution of decisions adopted by Russian courts against the state (treasury), federal bodies of the state power and bodies of the state power of the Russian constituent entities, self-government bodies, state and municipal institutions, etc.

The issue was caused by tight budgetary resources within certain time periods, on the one hand, and, which is of prime importance, by the lack of proper regulation of intergovernmental fiscal relations, deficiency of Russian laws as regards the procedure for payment of various categories of compensation, indexation and remuneration of non-pecuniary damage, as well as unwillingness of the leadership of some state authorities and self-government bodies to promptly handle arising problems and their attempts to shift the burden of "social debts" onto the federal center, on the other hand.

Notwithstanding all the efforts taken (including the allocation by the Russian Ministry of Finance of purposeful large-scale transfers), at the beginning of 2007 there were thousands of non-executed court decisions on settlement of "old" debts, especially indexation of tardy monetary payments, at the expense of the Russian constituent entities' budgets.

The leadership of the state authorities of the Russian constituent entities did not even conceal that, taking note of the fact that it is the Russian Federation as

a whole that bears full responsibility for non-execution of all such court decisions within the framework of the European Court's procedures, regional authorities benefited from their failure to execute court decisions while expecting the execution thereof by the Russian Federation by means of the federal budget by virtue of a decision of the European Court.

The references of the leadership of the constituent entities' state authorities to the tight regional budget were often farfetched since the experience of the Russian Agent's Office as concerns particular cases shows that necessary resources were easily raised in the shortest possible time due to an active intervention of the Russian President's plenipotentiaries and involvement of the Russian Federal Bailiff Service and the Russian Prosecutor General's Office in solution of the issue.

Upon lively discussion of relevant issues at the level of the agencies concerned involving the Registry of the Council of Europe, the failure to execute court decisions with respect to various categories of payments was thoroughly analysed and a set of measures was developed, the implementation of which was ensured by, in particular, the Russian Agent's Office.

In the above context, immediate efforts for redress of the situation by the Russian state authorities were considered. It is noteworthy that the Russian Agent is not only authorised to represent Russia before the European Court but also "ensures, in co-operation with federal executive bodies, development of bills and makes proposals as to enjoyment of the right to a legislative initiative in line with law provided that compliance with the European Court's judgments requires that the federal laws be somehow amended;

facilitates, in co-operation with the federal executive bodies, development of draft regulatory documents and submits them for consideration to relevant state authorities in case execution of the European Court's judgments involves amendment of certain statutory acts of the Russian President, the Russian Government, and other statutory documents." Taking account of the above terms of reference, profound change of the situation and general measures for prevention of similar violations in future were considered during meetings at a federal and regional level.

It is necessary to underline that there are 3 main points the Russian state authorities were focused on, namely:

- improvement of the legislation;
- general organising measures;
- measures aimed at further improvement of the system of enforcement proceedings in particular court decisions.

Improvement of the Russian legislation concerning primarily the budget contributed greatly to enhancement of the efficiency of the system of enforcement of judicial acts in respect of the claims against public associations.

The Constitutional Court of the Russian Federation referred in its Decision No. 8-P of 14 July 2005 to the necessity of adoption of the above points by virtue of a federal law and making them binding upon the Russian constituent entities and municipal units.

In pursuance of the above Decision, the Russian Government developed amendments, subsequently adopted by the state Duma of the Federal Assembly of the Russian Federation, to the Russian Fiscal Code, the Russian Civil Procedure Code, the Russian Arbitration Procedure Code and the Federal Law on Enforcement Proceedings that entered into force on 1 January 2006. The Russian Fiscal Code was supplemented by Chapter 24.1 setting out the order of execution of judicial acts with respect to public associations and budget-funded institutions.

Thus, a number of significant amendments made to the Russian legislation collectively contributed to the creation of a co-ordinated mechanism of ensuring intergovernmental fiscal relations between the Russian budget system entities.

The effective budget legislation provides for the procedure for enforcement of judicial decisions, order of co-operation between the budget system bodies in execution thereof, time-limits for each stage of the enforcement procedure, requirements for the resulting effect of each stage.

As concerns the execution of judicial decisions on discharge of liabilities of budget institutions by means of the budget, as well as the subsidiary responsibility of public associations for compliance with pecuniary obligations of budget institutions, the Russian Fiscal Code provides for the right of the Russian Federal Treasury's bodies to suspension of monetary spending transactions on personal accounts as a measure of unconditional and timely enforcement of judicial decisions with respect to all the instances of violation of the order of execution.

Thus, the number of judicial acts executed grew up by 30% in 2007 if compared to the similar time period in 2006. Such an efficiency progress in execution of judicial acts was facilitated, first of all, by a more active application of coercive measures aimed at compliance with judicial acts by the debtors through suspension of the transactions on their personal accounts.

The courts took efforts for development of a unified law enforcement judicial practice as regards determination of a proper defendant on the part of public associations supposed to participate in court proceedings in respect of claims against public associations and budget-funded institutions.

Thus, the Russian Supreme Arbitration Court provided clarifications as to determination of a subject to be levied on monetary funds.

Moreover, the Russian authorities discussed establishment of a special federal fund and/or special reserve budget lines with a view to ensuring discharge of financial obligations of execution of judicial acts. However, the agencies concerned concluded that it was inexpedient to set up a special federal fund and/or

special reserve budget lines in order to secure prompt payment of amounts to a debtor in pursuance of judicial acts for the reasons as set forth hereinafter.

Such measures would fundamentally reconstitute the practice of execution of judicial decisions being in force in the nineties of the last century in Russia through direct debiting of monetary funds on the budget accounts of the Russian budget system. This practice was one of the grounds for destabilisation of the budget system and ensuing decrease in confidence in the state.

As far as organising and technical measures are concerned, it is noteworthy that a unified information system for execution of judicial acts (AIS "Finances") was created and Order No. 271 of 15 August 2006 on organisation of activities in the Ministry of Finance of the Russian Federation on execution of judicial acts on recovery of pecuniary means as a measure sought by claims against the Russian Federation under the Russian Fiscal Code providing for the information to be include in the said system was adopted. The above Order enabled to ensure explicit supervision over consideration and adoption of judicial acts.

Furthermore, the Russian Federal Bailiff Service puts an emphasis on the analytical work aimed at raising efficiency of fulfillment of powers of this Service, detection of deficiencies in the enforcement proceedings system with a view to eliminating the prerequisites for violation of the terms of execution of judicial acts. In this connection, territorial bodies are made aware on a permanent basis of the legal standpoint of the European Court of Human Rights as set forth in its judgments as regards execution of judicial acts with respect to claims against public associations and budget institutions, and this legal standpoint is a subject of workshops.

Moreover, on 22 October 2007 the Russian Federal Bailiff Service transmitted to the executives of the territorial bodies of the Service an analytical review titled "On the results of the activities of consideration of requests of the Russian Agent at the European Court of Human Rights within the first six months of 2007" and a number of instructions seeking to improve the efforts for prevention of delays in execution of judicial decisions and increase of personal responsibility of functionaries.

Recognising the measures taken by the Russian state authorities as noticeable, it is reasonable for the time being to conclude that there is a progress in execution of judicial acts adopted in claims against public associations and budget institutions.

The number of the executed judicial acts on discharge of financial liabilities of federal budget institutions by means of the federal budget adopted by the Federal Treasury bodies amounted to 90% in 2007. This number equated to 80% in 2005 and 87% in 2006.

The effective budget legislation does not stipulate payment of an automatic compensation for delays in execution of a judicial decision to a claimant in case of an unlawful delay in execution of a judicial act provided by the latter.

If a claimant believes that execution of a judicial act submitted by him (or by a court) has been unlawfully delayed, he is entitled to claim compensation in court under the Russian civil legislation in the form of the interest amounting to the sum as defined in a judicial act for the use of others' monetary funds due to the delay in their payment, as well as in the form of compensation for the pecuniary damage (Article 395 of the Russian Civil Code) and non-pecuniary damage inflicted upon him (Article 151 of the Russian Civil Code).

The Russian legislation provides for feasible indexation of monetary amounts recovered for compensation of non-pecuniary damage by virtue of a court decision as a remedy for delays in execution of court decisions adopted in favour of a national.

This is an efficient and easy-of-access remedy. The establishment of the fact of lengthy execution of a court decision (without looking into a relevant authority's guilt) entails unconditional application by a court of indexation of the monetary amounts previously awarded.

Furthermore, another remedy allowing for compensation for both pecuniary and non-pecuniary damages caused by delays in execution of a judicial act is a responsibility of state authorities, self-government authorities and their functionaries, as defined by Article 1069 of the Russian Civil Code.

Property responsibility of public associations is stipulated in Decision No. 60-O of 24 February 2005 of the Constitutional Court of the Russian Federation. In its Decision, the Constitutional Court maintained that a special nature of legal capacity of public associations does not release them from property responsibility and oblige a federal lawmaker to look for ways and instruments for proper discharge of obligations and execution of budget powers of state authorities.

With a view to improving the national compensation mechanisms applied, in particular, for failure to execute (improper execution) of judicial acts, there was a working group for the arbitration procedure legislation improvement set up within the Russian Supreme Arbitration Court. The working group is authorised to introduce a bill on amendments to the Russian Arbitration Procedure Code as to the mechanism of compensation at a national level for the damage caused by the conduct of functionaries. The creation of such a mechanism will significantly supplement the available compensation instrument tailor-made for failure to execute a court decision in the form of indexation of the monetary amounts awarded, the provision for which was included in the above Code in 2002 (Article 183 of the Russian Arbitration Procedure Code).

Moreover, the Russian Supreme Arbitration Court has an intention to include legal propositions on compensation for the damage caused by failure to execute

judicial acts, as well as the remedies available to the parties to a dispute (indexation of amounts by virtue of judicial decisions in case of failure to execute, appeal against the conduct of a bailiff, and payment of compensation for the damage caused, etc) in the draft decision of the Plenum being developed, as referred to hereinbefore.

The Supreme Court of the Russian Federation is planning to ensure that the issue of compensation by the state of the damage caused by lengthy non-execution of judicial decisions (alongside the issue of remedies used in the instances of lengthy court proceedings) be governed by the Federal Constitutional Law on compensation by the state of the damage caused by violation of the rights to court proceedings within reasonable terms and the right to execution of judicial acts that entered into force within reasonable terms, the work over which is underway.

Thus, there are currently two approaches to regulation of responsibility for lengthy failure to execute judicial decisions that entered into force within the framework of the effective legislation, namely: through making amendments to the procedural legislation and updating the law enforcement practices of the Russian courts, or by means of adoption of a special statutory document governing compensation for the damage caused by violation of the right to execution of a judicial decision that entered into force within reasonable terms.

The entry into friendly settlement with applicants of the European Court of Human Rights is worth special attention. Friendly settlement is actively entered into by regional authorities with respect to applications pending before the European Court of Human Rights likely to be unfavourable to the Russian authorities and to result in excessive additional legal costs (incurred in lengthy court proceedings).

In conclusion, I would like to address the issue of co-operation between the Russian Agent and various state authorities in securing timely and comprehensive execution of the European Court's judgments and ensuring responsibility for any violations. In order for the Russian Federation to be able to take efforts related to nationals (payment of monetary compensation thereto), or state authorities of the Russian constituent entities or self-government bodies (e.g., facilitation of their execution within three months of a court decision or compliance with the terms and conditions of a friendly settlement agreement in full) when required by virtue of a judgment of the European Court, active support, assistance of, and co-operation with, both prosecuting authorities and agencies of the Russian Federal Bailiff Service are required. The Russian Agent's Office is in a position to handle most of such issues in co-operation with the above state authorities only for lack of its own representatives in the regions.

Thus, in 2007 the Prosecutor General's Office of the Russian Federation carried out a check-up as to the compliance with the provisions of the budgetary

legislation in execution of judicial acts on payment of amounts by means of budgets of the Russian budget system. As a result, violations of the budgetary legislation, civil and arbitration procedure laws, and enforcement proceedings legislation by the Russian Ministry of Finance were discovered. Executive officers of the Russian Ministry of Finance were therefore brought to disciplinary responsibility, and general measures were taken.

The Russian Agent's Office is continuing its active work in close co-operation with the Russian Federal Bailiff Service and Russian prosecuting agencies, while sometimes enjoying direct support of the Russian President's plenipotentiaries to the federal districts, on monitoring unconditional execution by authorities of the Russian constituent entities and self-government bodies of relevant court decisions. At that, special emphasis is placed on the systemic approach to setting the budget by representative bodies at a regional and local level granting pecuniary means for the next fiscal year in order to ensure execution of judicial decisions. ★

Theme 2
Amplifying the effect of the Court's case-law in the states parties

Keynote Speaker: Ms Elisabet Fura-Sandström

Judge elected in respect of Sweden to the European Court of Human Rights

Mr Chair, ladies and gentlemen.

I am very happy to be here. Allow me to take the opportunity to congratulate the organisers and to say how grateful I am for the invitation to address you in the town where I was born and which will always occupy a special place in my heart.

All views expressed are my own and do not necessarily reflect the ones of the Court.

Let me make my position clear right away – there is no *erga omnes* effect *de jure*. Art 46: "The High Contracting Parties undertake to abide by the final judgment of the Court in any case **to which they are parties**" (emphasis added). But hopefully there is an *erga omnes* effect *de facto*.

Enhancing the authority of the Court's case-law beyond the judgment's binding effect on the parties would be a most powerful tool to ensure the effectiveness of the protection of human rights in Europe. If we think this is an important goal in itself - not mainly because we want to get to grips with the overwhelming and growing caseload in Strasbourg - we have to discuss how this can be achieved as a matter of urgency.

Allow me to put a few (provocative) questions to you and later make some suggestions:

- Do we **want** the Court to expand its authority above and beyond the parties in a particular case?

- Do we **need** a European Constitutional Court of Human Rights dealing only with cases raising a new issue of principle, making decisions of principle with a binding effect *erga omnes* leaving the rest of the caseload for the domestic courts and authorities to deal with in accordance with the principle of subsidiarity and the Convention as interpreted by the Court?
- Would it be **right** to allege that this could be achieved without changing the Convention? The principle of subsidiarity is already there and could be reinforced as I will try to show you.

The benefits of such an approach is that there will be a clearer "division of labour" between the national courts and the Strasbourg Court, that will hopefully get a manageable caseload without a back-log. But more importantly it would enhance the protection for the individual because it would mean less delay in the administration of justice since it will be done domestically. There is already today an obligation for states to comply, see Art 1. Justice delayed is justice denied – or, using a positive formula – quicker justice is better justice.

In a doctoral thesis defended a week ago in the faculty of law in Copenhagen I found a new idea that might be helpful. Jonas Christoffersen suggests that the Court should stop repeating the subsidiarity to focus instead on the primary responsibility of the contracting parties to implement the Convention in domestic law. He introduces a new concept he calls the **principle of primarity** based on the binding effect of the Convention (Articles 1 and 3) and mirrored in the principle of subsidiarity. He advocates a new interpretation of Article 13, making it applicable on domestic legislation, law and general policy.

"The Court might be more alert to interpreting the Convention in a manner that can strengthen its position in domestic law." (page 503, "Fair Balance")

Should we be so bold as Dr Christoffersen suggests and move focus away from the international enforcement machinery towards the primary role of national decision-makers?

The Court high-lights the judgments and decisions of principle on its website. There is no precise definition of what is to be regarded as a judgment or decision of principle so this is not rocket-science but it is hopefully a help in as much as it indicates what is important and new in the eyes of the Court. However most of the case-law is not made up of judgments of principle.

Some judgments are of great importance without having the quality of a judgment or decision of principle with an *erga omnes* effect. In *Leyla Sahin v. Turkey* (Judgment (Merits) of 10 November 2005, No. 44774/98) where a young female student was barred from continuing her studies of medicine since she refused to take off her headscarf, the Court did not find a violation of Art 9, arguing that in the specific Turkish context the ban was proportionate to the aims pursued, namely to protect the secular state. This judgment cannot be interpreted as giving *carte blanche* to domestic authorities in other signatory states to ban the

use of the Muslim head-scarf in schools or similar public institutions. A series of complaints against France and UK for instance will be examined by the Court in due course, in their particular context which is not necessarily similar to the one in Turkey.

One way of achieving an effect *erga omnes* within the current system would be to invite, on a regular basis, states to intervene as third parties in the Grand Chamber. They would not be bound by the judgment legally speaking but the states will be aware that the Court will follow the leading judgment and this will motivate them both to participate in the proceedings and to observe them afterwards.

Easy and speedy access to the Court's case-law **in the domestic language** is of crucial importance to obtain an *erga omnes* effect. While the responsibility for publishing judgments and decisions rests with the Court, whose publications committee makes a careful selection of the cases that merit inclusion in the official Reports, published in English and French, translation into the other languages of the COE states is a task that must be taken up by national authorities. There is a current deficit in this respect and the Court held in *Scordino v. Italy* (No. 1) GC, No. 36813/97, paragraph 239, ECHR 2006-…

"…domestic courts must….be able, under domestic law, to apply the European case-law directly and their knowledge of this case-law has to be facilitated by the state in question ".

The Court further held in its response to the Report of the Wise Persons (see Opinion of the Court on the Wise Persons' Report, as adopted by the Plenary Court on 2 April 2007):

"Although its judgments do not, strictly speaking, have *erga omnes* effect all states should take due notice of judgments against other states, especially judgments of principle, thereby pre-empting potential findings of violations against themselves."

Much has already been done but there is still room for improvement. Some states translate and publish Court judgments in their official journal, but this usually concerns cases taken against that particular country. Yet the courts in every contracting state must be aware of both the judgments handed down against that state and the most important judgments of the Strasbourg Court. states should therefore ensure that these judgments are translated into the different national languages. The scale of the undertaking is substantial, but workable solutions can be found, e.g. case-law digests, newsletters like the Swedish newsletter from the Court Agency, distributed to judges on a monthly basis with brief summaries of relevant case-law, joint funding by countries sharing a common language, alternative sources of funding, participation of commercial or professional publishers.

If speed is of the essence (timely and accurate information) so is filtering. It is simply not realistic to believe that judges of domestic courts or other decision makers on the domestic level will have the time to consult the case-law, sift through endless decisions/judgments in English or French, in order to identify if there is anything relevant there to deciding the cases before them. A structured and systematic presentation is also desirable and necessary. Handbooks updated on a regular basis in electronic form or as hard copy is definitely a useful means of dissemination to judges, officials and legal practitioners.

Even where there is knowledge and the case relates to the home state, things are not all that easy for the domestic judge.

The so-called *Görgulu* case from 2004 (*Gorgulu v. Germany*, 74969/01) provides us with an interesting example. In what could be described as a routine child custody case the Court found the decision of the German authorities (taken in 2001) in particular the exclusion of the natural father's access rights, had violated Article 8 of the Convention. The Court awarded 15 000 EUR in damages. The father turned to the local court asking for a temporary regulation as to his access rights. The Naumburg Oberlandesgericht refused, observing that the judgment of the Court "bound only the Federal Republic of Germany as a subject of public international law, but not its bodies, authorities and the bodies responsible for the administration of justice, [...] The judgment of the ECHR remained a judgment that at all events for the domestic courts was not binding".

A constitutional complaint was lodged against the decision of the Naumburg Court and the Federal Constitutional Court of Germany reversed that decision and referred the matter back to the local court noting that the local court "did not take sufficient account of the judgment of the Court when making its decision, although it was under an obligation to do so". The Federal Constitutional Court went on to say "the judgments of the Court are binding on parties to the proceedings and thus have limited substantive *res iudicata* [...] restricted by the personal, material and temporal limits of the matter in dispute". In other words; the judgments of the Court do not have a straightforward *erga omnes* effect, according to the Federal Constitutional Court.

Human rights and the Court's case-law must be a part of the curriculum at all law faculties. The Group of Wise Persons held that the basic principles of international and European law should be compulsory subject in both secondary and university level education. I would add that moot courts should be encouraged and supported financially, if need be. Students are the best promoters of human rights and it simply does not matter what professional path they choose; the principle of subsidiarity is best served if the knowledge and awareness of human rights is spread to all areas of life, not just in public life through the administration of justice proper, but also in the areas of education and health care to mention some other examples. Business, banking, insurance as well as the finan-

cial sector becomes more and more relevant to consumers and their rights might be jeopardised if they are not aware of their existence.

The bar associations have a key role to play. Members of the bar (lawyers in private practice) enjoy a special credibility and legitimacy because they are independent. With their experience and knowledge they are particularly well positioned to disseminate the Court's case-law and to raise awareness in the public at large about the Court and its activities. Therefore the bar associations should be encouraged to include courses on human rights in the programs for continued education as well as in the bar exams, where applicable.

The possible introduction of some kind of preliminary reference procedure for advisory opinions like the one used in the ECJ should be seriously studied. If the main problem is the lack of implementation of the Convention into the national systems then the success story of the advisory opinion procedure for implementing community law in national systems merits a thorough study. It is not a new idea but never examined in depth so far. It fits well with the quasi-constitutional role of the Court, to interpret a text generally with an *erga omnes* effect.

My conclusion, Mr Chair, is that we do need a European Constitutional Court and that the time has come to take such a bold step, maybe by first introducing a procedure for preliminary rulings. If we do not act now we risk getting overtaken by the ECJ since the protection of fundamental rights within the EU is becoming more important and the ECJ will be called to interpret for example the Charter. Even if the European Court of Justice continues to refer to the Court's case-law, the fact remains that, being more of a constitutional court its preliminary rulings on fundamental rights might ultimately seem more accessible and instructive to national courts than the decisions from Strasbourg, all the more so because they are translated into all the official languages of the member states. So the time has come. The learning period is over. The Strasbourg Court should become a constitutional court on human rights deciding cases of principle with an *erga omnes* effect, leaving all the other cases to the domestic courts. These courts are much better placed to adjudicate alleged violations of human rights and fundamental freedoms than an international court.

To the defenders of the individual right of application to the Court I would say that this principle, so cherished by human rights activists all over the world and rightly so, is today somewhat illusory, at least in many cases because of the Court's back-log. When an individual has to wait for a number of years before receiving an answer from the Court that her case has not been tried on the merits because it was lodged out of time, this is not justice. The right for the individual to apply should be maintained but the right to an individual answer from the Court in the form of a reasoned judgment or decision will no longer be absolute. In my opinion the Court must be provided with the possibility to choose among

the applications lodged to address the new serious problems and develop its case-law where it is needed. Only then can the Court continue to fulfil its role in the system of the protection of human rights in Europe.

Some relevant background material:

COM Recommendation REC (2002)13 on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights (adopted on 18 December 2002)

COM Resolution Res(2002)58 on the publication and dissemination of the case-law of the European Court of Human Rights (adopted on 18 December 2002)

Report of the Group of Wise Persons to the Committee of Ministers. CM(2006)203, 15 November 2006

Opinion of the Court on the Wise Persons' Report (as adopted by the Plenary Court on 2 April 2007)

Fair Balance – A Study of the Principles of Proportionality, Subsidiarity and Primarity in the European Convention of Human Rights, doctoral thesis by Jonas Christoffersen 2008. ★

Screening domestic legislation

The Earl of Onslow

Member of the House of Lords, Joint Committee on Human Rights, UK Parliament

Legislative Scrutiny in the UK: who we are and what we do…

Introduction

Ladies and gentlemen.

You may think it is odd that you should be lectured on human rights by someone who is in parliament as a result of his forbear being speaker of the House of Commons in the early part of the eighteenth century who got drunk with our first prime minister, but God and the British constitution move in mysterious ways. Those mysteries are also the progenitors of common law. That common law was as you all know the foundation of the European Convention on Human Rights. Its authors were heavily influenced by common lawyers, the late Sir David Maxwell Fyfe later the Lord Chancellor, the first Viscount Kilmure and David, Lord Renton. I say this in opening because it explains a little why my country was so late in adopting into domestic law the Convention. It felt that common law and parliament were good enough and was I admit not particularly keen to adopt it. I thought that the House of Commons was there to protect Englishmen's liberties. I realised that it was not doing an adequate job and I have now become a keen supporter and I believe that the Human Rights Act, which incorporates most Convention rights, now plays an essential part in the governance of the United Kingdom.

I also agree with Ms Bemelmans-Videc who emphasised the duties of Parliaments to reinforce Governments obligations under the ECHR. The UK has its

Parliament appointing a joint committee of both Houses to scrutinise the Government and the state of human rights in the United Kingdom. I urge other contracting parties to do the same. Our Joint Committee on Human Rights consists of 12 members, with an equal number of members from each House of Parliament. We are mixed politically, with 5 Labour Party members, 4 Conservative, 2 Liberal Democrats and one cross bencher. It is chaired by a Labour member of the House of Commons, Andrew Dismore MP, for whom I am standing in today.[69] Andrew is participating in a debate, raising our concerns about the compatibility of the UK Governments current proposal to extend the possible period for pre-charge detention of terrorist suspects from 28 days to 42, so I hope you will forgive him for being absent today.

We have broad terms of reference which mean we set our own priorities.

Legislative scrutiny has been part of the Committee's work since 2001.

Similarly we've made it our business to scrutinise the Government's responses to key Strasbourg judgments against the United Kingdom.

In our thematic and ad hoc work we consider the practical effect of existing legislation and administrative practice in particular areas on the human rights of individuals, including the implications for Convention compatibility.

We have had a clear head start on helping the UK meet its commitments under the 2004 Committee of Ministers recommendation on screening draft laws, existing laws and administrative practices and remain committed to this part of our work.[70]

The Chairman has been guiding the Committee to make our work on screening domestic legislation more relevant to members of our parliament and to the public.

When emphasising the negative, we do not take a rigid, legalistic view of screening domestic legislation. Also, when the Government gets something right, we give praise. If we need to, we propose more compliant alternatives. We encourage the Government to take a positive view of the Convention and of their positive obligations. We encourage the Government, where appropriate, to include human rights enhancing measures in new legislation and new policy initiatives. Not only will this help to give better effect to the Convention, but it will make human rights more understandable to people in the UK.

69. The terms of reference of the JCHR and more information about our work is available online: http://www.parliament.uk/parliamentary_committees/jchr

70. Rec (2004) 5. Recommendation of the Committee of Ministers to member states on the verification of the compatibility of draft laws, existing laws and administrative practices with the standards laid down in the European Convention on Human Rights. Our predecessor Committee welcomed this and other recommendations designed to increase the effectiveness of the Convention in its report on Protocol 14 to the Convention. First Report of Session 2004-05, *Protocol No 14 to the European Convention on Human Rights*, HL Paper 8/HC 106.

Parliamentary Scrutiny of Government Bills

The Human Rights Act 1998 ("HRA") was the basis for the Joint Committee's creation and it forms the foundation for our work on legislative scrutiny. As the Government's way of bringing Convention rights home, the Act is designed to ensure that human rights screening plays a clear role in the democratic and legislative process.

Incidentally, no UK or foreign court can overturn an Act of Parliament. The UK courts can only declare an Act incompatible with Convention rights. There is then a fast track method of repeal, but that repeal has to be done by Parliament.

The Act requires our courts to interpret our law "as far as possible" in accordance with Convention rights – in a manner – screening our legislation for compatibility.

The HRA requires the Government to make a Statement of Compatibility with Convention rights ("Section 19" Statements) to accompany every law introduced to parliament. The Government must either say a Bill is compatible with the Convention (and the accompanying case-law of the Court), or that it is incompatible, but that the Government would like parliament to pass it into law anyway.

Our Parliament has no effective process for obtaining independent legal advice on the accuracy of any Government statement of compatibility. That's where our Committee plays an essential role.

We submit every draft law proposed by the Government – every Government Bill – to scrutiny for compatibility with the Convention (and with the UK's other international obligations). The UN Convention on the Rights of the Child and the Torture Convention are recent examples.

With the assistance of our Legal Advisers' view on significant human rights issues, we write to the Government with our concerns.

We take the Government's view on compatibility as a starting point, but we express our own view on compatibility and on any amendments which we think are necessary to make a Bill compatible with the UK's human rights obligations. We have started to draft amendments to legislation for individual members of the Committee to move in either house. When I, and another member, Lady Stern, moved amendments to the Criminal Justice and Immigration Bill recently, the fact that we could speak as members of the Committee gave great weight to our opinions and I am happy to say that the Government accepted many of them or we were convinced that they were unnecessary.

We are incidentally hearing rumours that in the bowels of Government there is irritation at our recent activities. Good.

We aim to Report on every Bill in time to inform parliamentary debate and to give parliamentarians an opportunity to challenge the Government's view that a Bill is compatible with the Convention.[71]

Our scrutiny of legislation work is becoming increasingly integrated with our other strands of work and this is making our work more effective. For example, we might recommend an amendment to a Bill to make the change required by a court judgment[72] or to give effect to a recommendation made in one of our thematic inquiries.[73]

Originally when I heard that we were to do an inquiry on the influence of the HRA on the treatment of older people in healthcare (we came here to Sweden and were very impressed by what we saw but the problems of ageing populations are pan European), I thought that the Act was irrelevant as looking after people was a matter of proper care and common sense but I soon found out that the Human Rights Act was regarded by the professional carers as a very useful tool in keeping staff and institutions up to scratch.

Does our work really make the Convention more effective?

The Government has relied on our work as part of its implementation of the Committee of Ministers recommendations on the effectiveness of the Convention, and we've been praised for our work on the implementation of Strasbourg judgments by the Parliamentary Assembly of the Council of Europe Legal and Human Rights Committee.

Parliamentarians are becoming more human rights literate and this leads to real democratic discussion of how to implement the Convention effectively.

Courts increasingly use our reports to inform themselves about the human rights issues being litigated before them, encouraging a domestic dialogue on how the UK should meet its Convention obligations.

71. Further information about the Committee's working practices is available in its last report on its working practices: http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/239/239.pdf. Further information about its recent work can be found in its last Annual Report: http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/103/103.pdf

72. For example, in its Report on the Housing Bill 2004, our predecessor Committee recommended an amendment to give effect to the judgment in *Connors v. UK*. Similarly, we are currently recommending a further amendment to the Housing and Regeneration Bill before Parliament to give effect to a domestic judgment on discrimination and access to social housing in breach of Article 8 and Article 14 ECHR.

73. For example, we are currently working to encourage the Government to adopt a human rights framework for a new health and social care regulator. This series of proposed amendments is based on the findings of our lengthy inquiry on the rights of older people in healthcare. This inquiry concluded that a more positive approach to the protection of human rights was necessary to secure the rights of older people to dignity and equality.

What happens when the Government listens…

Our recent work on the new Criminal Justice and Immigration Act 2008 shows what happens when Government listens to us. The authority of the JCHR forced, as I have said previously, this degree of attention.

In that Bill, the Government proposed the Violent Offender Order, a new civil preventative order which could be obtained against individuals who had committed a violent crime in the past and who were suspected of being liable to commit similar offences or posing a risk of similar offending in the future.

We raised significant concerns about the Government's proposals. We considered that without additional safeguards, the draft legislation proposed a significant risk to the individual's right to a fair hearing and his or her right to respect for their private and family life, as guaranteed by Articles 6 and 8 of the Convention.

We proposed a number of amendments to the Bill, moved by members of our Committee and other members of the House of Lords. This prompted the Government to introduce a number of significant additional safeguards and procedural protections before the Act became law.

We consider that these safeguards make it less likely that the Act will lead to breaches of individual rights and will reduce litigation not only in our domestic courts but will lessen the load on the European Court of Human Rights.

What happens when they don't…

Control Orders and the Prevention of Terrorism Act 2005 concern us – and continue to raise concerns – about the compatibility with the Government's counter terrorism policy with Convention rights. The cornerstone of this policy includes Orders for the control of individuals suspected of terrorism by the Home Secretary. These Orders may include confinement and electronic tagging, restrictions on contact with specified individuals and restrictions on access to communications equipment and computers. A number of cases have involved Orders for confinement to a particular address, usually home, for 18 hours a day. We have raised particular concerns about the compatibility of these Orders with the individual right to liberty, to a fair hearing and to respect for private and family life.

These Control Orders are subject to the oversight of the High Court. During hearings the High Court may consider sensitive information in secret, which may not be disclosed to the person subject to a Control Order or to his legal representative. We have raised concerns about the compatibility of these provisions with the right to a fair hearing over the course of the past three years. This story is not yet over.

Earlier this year, the judgment of the House of Lords in *MB* confirmed a number of our concerns and "read down" the effect of the Prevention of Terrorism Act 2005 in order to ensure that it is applied in a Convention compatible way. The House of Lords referred to our reports in their judgments.

We are currently attempting to persuade our Government to use their new Counter Terrorism Bill to amend the law to give statutory effect to the decision of the House of Lords and to make the existing law Convention compatible. We hope they are listening.

On the new Counter Terrorism Bill, we have just issued a very forthright report on the error of the Government's ways over pre-charge detention for 42 days and on that point, our conclusions were unanimous.

The ECHR will continue to be an enormous help in protecting the ancient liberties of the subject which are so much older than, and the parents of, the relatively new doctrine of the rights of man.

Clearly checking legislation before it becomes law strengthens the implementation of the Convention by the UK. This checking has had the beneficial effect of increasing the influence of both Houses over the executive. All a plus for Parliament.

We think it makes better the law and reduces the likelihood that individuals are likely to have to make the trip to Strasbourg to have their rights and liberties under the Convention protected.

That said, we will always work to be more effective and more relevant. I hope that we can use this conference to share our new working practices and to learn from yours.

Improving our work: What we can do ?

- *Get in early*: We plan to increase our scrutiny of pre-legislative documents, draft Bills and Government policy papers. This is not only more likely to meet the broad approach envisaged by the Committee of Ministers in their recommendation, but it is more likely to highlight problems at an early stage and before Government Ministers become committed to a policy set in stone
- *What really matters*: We are working towards a narrower focus on key human rights issues. We do this by setting a "significance threshold" for issues which we consider raise important Convention concerns. We review this threshold regularly and focus on the importance of an individual right, the likely number of people that a provision will affect and the vulnerability of those people.
- *Keep checking*: More and more of our legislation gives Government the power to make administrative regulations. Although the Bill may appear to be HRA compliant, the regulations may not be and these are more difficult to police. We are increasing our work on delegated legislation and on post-legislative

scrutiny. This is not only in keeping with the Council of Ministers recommendation to scrutinise administrative practice and existing legislation, but can highlight serious human rights concerns which only arise some time after the Government have passed their original Bill into law.

- *The Convention is not just for lawyers*: We hope to engage more parliamentarians by shaking up our working practices a) by making human rights relevant and using amendments to trigger debates; b) using thematic inquiries to engage NGOs and members of the public in scrutinising the practices of central and local Government for compliance with the Convention. There is a tendency in some parts of the press to sneer at the HRA and some parts of the public take similar views, this must be countered.
  So, for example instead of talking about a "potential incompatibility with Article 6 of the ECHR" we try to get people interested by talking about the possibility that people accused of a crime might not get a fair hearing. Instead of talking about "the possibility that existing legislation on public order offences may be implemented in a way which breaches the right to freedom of assembly", we will launch an inquiry on policing and protest and ask people to tell us whether the police are doing their job well with the tools they've got.
  As part of this work, we've begun following up our formal inquiries and committee reports with informal mini-conferences. This practice is in its infancy, but we've been working to bring representatives of NGOs, charities and other interested groups to meet Government Ministers to explore our concerns about the effective protection of human rights in the UK. Our last two conferences – on health and social care and counter-terrorism – have encouraged Ministers to change proposed Government legislation to provide enhanced protection for Convention rights.

Improving our work: What can the Government do?

Our Government has the power to make our work most effective. By engaging actively with the screening process, the Government can make us work with the Convention. No other individual may need again to go Strasbourg, if every civil servant and every Minister, every service provider and every local authority will stop before taking action and ask "What would Strasbourg say?" But they must be do this from the heart and not with tick-boxes in mind.

We're working to make sure that Convention compatibility – and more importantly, respect for human rights – becomes second nature in public service. Remembering ancient British liberties and creating a human rights culture in the UK are work in progress. We think the Government is on our side, but we're pushing it to do more.

They can and should:

- *Tell us what they really think*: The Government need to provide fuller human rights memoranda explaining the reasons for their view that draft laws are Convention compatible.
  An increasing amount of our law is made by delegated legislation. These statutory instruments are not subject to the full scrutiny of parliament and Government must provide full statements of compatibility with Convention rights with any delegated legislation which may engage human rights.
- *Talk to us*: Government Departments must engage more constructively with our analysis and proposals for improvements to legislation; and give us their draft policy, consultation papers or legislation at an early stage. In order to provide a foundation for this constructive approach, we plan to produce Guidance for Government Departments on our approach to legislative scrutiny.
- *And the hardest of these guides, admit when you get things wrong...* ★

Pilot judgments from the Court's perspective

Mr Erik Fribergh

Registrar of the European Court of Human Rights

Introduction

I am very pleased to be able to address the issue of "pilot judgments from the Court's perspective" at this important meeting.

As we know the Court's main problem today is the high number of cases waiting for a decision by the Court. Today the number is almost 90 000 cases.

At the Court, we are continuously working to find ways to reduce our burden of cases. One way is to make our internal procedures simpler and more efficient. Another way is to improve national implementation of the Convention rights. The theme of this conference is therefore, as the President of the Court underlined this morning, extremely important and supported fully by the Court.

Nevertheless, a more fundamental reform is probably necessary for the longer-term.

The pilot judgment procedure (PJP) is one of the tools which the Court has developed to maximise the effect of its judgments by creative use of its procedures.

What do we mean by PJP?

The PJP combines the familiar with the innovative. The familiar component is that the Court determines that a particular situation in a state constitutes a violation of the Convention. Along with that, it identifies the shortcoming in the legal order – *the systemic problem* – that is the cause of the violation and which affects a whole class of individuals. These persons would in principle be entitled to seek individual justice from the European Court. There may already be many

essentially identical applications pending, or likely to be filed after the pilot judgment.

Rather than deal with these cases in the standard, individual way, the object of the procedure, right from the start, is to help create the conditions at national level in which all of these pending and potential claims can be settled. The specific feature of the PJP is that instead of dealing with each individual case, the Court singles out one or a small number of applications for priority treatment and adjourns all other applications until the pilot case has been decided.

In the judgment in the pilot case, the Court gives advice to the Government on how to solve the systemic problem. One of the main elements is that when implementing the pilot judgment the Government should in particular address the situation of applicants who already have a case pending before the Court. The basic idea is that the Court should be dispensed from dealing with all the follow-up cases, which would be dealt with through a new domestic remedy introduced as a result of the implementation of the pilot judgment.

The origin of the PJP

The PJP has developed through co-operation between the Court, the Committee of Ministers (assisted by the Steering Committee on Human Rights) and the Governments. The Court first described the concept of PJP in 2003 in a document approved by the Plenary Court and submitted to the Steering Committee for Human Rights in the context of the drafting of Protocol No. 14.[74] It proposed that the Convention be amended so as to provide for such a procedure. But the Steering Committee took the view that the Court would be able to apply such a procedure on the basis of the then existing text of the Convention, (i.e. the Protocol No. 11 configuration).[75]

74. The Court said:
(It would be a) procedural tool for dealing with repetitive well-founded applications. (It) would involve empowering the Court to decline to examine cases … where the Court has identified the existence of a structural or systemic violation in a pilot judgment. Such a judgment would trigger an accelerated execution process before the Committee of Ministers which would entail not just the obligation to eliminate for the future the causes of the violation, but also the obligation to introduce a remedy with retroactive effect within the domestic system to redress the prejudice sustained by other victims of the same structural or systemic violation. Whilst awaiting the accelerated execution of the pilot judgment, the Court would suspend the treatment of pending applications raising the same grievance against the respondent state, in anticipation of that grievance being covered by the retroactive domestic remedy. It was stressed in the Court's discussions that, in the event of the respondent state's failing to take appropriate measures within a reasonable time, it should be possible for the Court to re-open the adjourned applications.
75. Steering Committee for Human Rights, Interim Activity Report of 26 November 2003, doc. CDDH(2003)026 Addendum 1 Final, paragraphs 20-21.

The basic concept of engaging in a broader analysis of the roots of a violation was endorsed by the Committee of Ministers in its Resolution DH Res.(2004)3 on judgments revealing an underlying systemic problem. This text was part of the package of measures – adopted at the same time as Protocol No. 14 – to guarantee the future effectiveness of the Convention machinery. After emphasising the interest in helping the state concerned to identify the underlying problems and the necessary execution measures, the CM invited the Court "*to identify in its judgments finding a violation of the Convention what it considers to be an underlying systemic problem and the source of that problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments*".

The Court took up this invitation very quickly in the *Broniowski* judgment, delivered the following month, which was the first PJP applied by the Court. It concerned enjoyment of a property right under a legislative scheme in Poland, the so called Bug River cases.

The Court stated that one of the principal reasons for devising and applying that procedure has been "the *growing threat to the Convention system resulting from large numbers of repetitive cases that derive … from the same … systemic problem*" and said that the role of this procedural tool is "*to facilitate the most speedy resolution affecting the protection of the Convention right in question in the national legal order*".

I have spoken so far mainly about the perspective or interest of the Court. But the procedure actually aims to reconcile **three** important interests: (1) the interest of those whose rights have been violated (cessation of violation and redress); (2) the interest of the national authorities in tackling the underlying problem (guidance from the Court and a certain breathing space); (3) the interest of the administration of justice (Court not required to process large number of identical cases once the legal issues have been clarified).

The PJP is very much a pragmatic response to repetitive cases. As such it needs to be flexible and adaptable. It will not be the solution to all cases, but it has given the Court a new option in the management and resolution of large groups of cases and thus improved the prospects of ensuring effective respect for the Convention.

Critical comments about the PJP

The legal basis for the PJP has been the subject of some controversy. The Court has grounded it on Article 46 of the Convention (binding force and execution of judgments). Paragraph 1 of that Article provides that states must abide by final judgments to which they are party. Paragraph 2 tasks the Committee of

Ministers with supervising the execution of judgments. The PJP in fact combines both provisions in a new way. The state is required to implement a judgment that, while based on a single application, identifies the broader underlying problem. The execution stage ultimately remains under the authority of the Committee of Ministers, but the Court will conduct its own initial assessment of the state's response so as to be able to strike out the remaining pending cases in that group.

The legal context also includes Committee of Ministers' Recommendation 2004:6 on the improvement of domestic remedies, which insists on the need for states to put remedies in place to deal with systemic problems.

There has, however, been criticism, both within the Court[76] and from at least one Government[77], regarding the legal basis of the procedure.

Commentators have moreover drawn attention to potential weaknesses of PJP. It has been argued that the adjournment of cases of applicants in similar situations leaves those applicants in an uncertain position and vulnerable to delays awaiting resolution of the pilot case. But the reality is that even if the Court did not adjourn these cases it would take years before they were individually adjudicated, as the experience with clone cases in the past shows.

It has also been argued that the end result for the applicants will be more proceedings at national level, which, if not effective, could see them returning to the Court some time later, thus extending the length of the proceedings.[78]

Experiences so far of the PJP

It is now almost 4 years since the Broniowski judgment was delivered. The PJP has been applauded by people outside the Court on many occasions. And a lot of hope has been placed in this procedure with a view to helping the Court resolving its considerable caseload.

I would recall that Lord Woolf in his report on the Court recommended that the Court make more use of the PJP. The Group of Wise Persons, in their final report of November 2006, made a similar recommendation. Regarding the legal basis, the Group questioned whether, in the interests of greater effectiveness, the PJP should at some point be explicitly provided for in the Convention.

76. See the partly dissenting opinion of Judge Zagrebelsky in the Grand Chamber judgment on the merits in *Hutten-Czapska*, in which he refers to the "weakness of the legal basis" for the inclusion in the operative provisions of directions to the state to take certain measures.

77. *Sejdovic v. Italy* [GC], § 115.

78. Lambert-Abdelgawad, E., "Le protocole 14 et l'execution des arrest de la Cour europeene des droits de l'homme" in Cohen-Jonathan, G., and Flauss, J.F., "La Reforme du systeme de controle contentieux de la Convention europeenne des droits de l'homme", Droit et Justice, Vol. 61, Bruxelles: Bruylant, 2005, p.102

A year ago the Court set up an internal Working Group to reflect on the PJP and how its potential may be further realised. Its report on the matter is expected before this summer and the Plenary Court will then discuss the issues again.

Four years down the road from *Broniowski*, I think one can say that there have been both encouraging and disappointing experiences.

The **disappointment** lies in the fact that, after all the fanfare that greeted *Broniowski*, there have been so few PJPs. One would have thought that in the light of the many cases of a repetitive nature pending before the Court, the PJP would have been more widely applied. In fact, the only other true or full PJP that was successfully concluded is *Hutten-Czapska v. Poland*, which was struck out last April.

What has been **encouraging** is the positive result achieved in the two Polish PJPs. Thanks to the Government's constructive and co-operative attitude, the follow-up cases have been (or are likely to be) dealt with within a time-frame that compares favourably with the classic case-by-case approach. It is of course early to speak about the result of the *Hutten-Czapska* judgment, where much depends on the future actions of the Polish authorities.

The past 3-4 years have also witnessed the **emergence of variations** of the original PJP template. The common denominator is these cases is that they identify a systemic problem in the state concerned and give advice, even in general terms, to the Government about how to solve it.

One of the reasons why these alternatives have emerged is that under the Court's own procedures the full PJP should normally be done in the Grand Chamber and not in a Chamber of a Section. There is, for obvious reasons, some reluctance on the part of Chambers to refer cases to the Grand Chamber and, since the parties may object to the proposal to relinquish a case in favour of the Grand Chamber, this complicates matters. But given that the implications for the state of a full PJP may be considerable, it is perhaps right that the judgment should benefit from the enhanced authority of the Grand Chamber.

Some examples of variants

In 2005 a judgment was issued in *Lukenda v. Slovenia*[79] concerning excessively long domestic court proceedings. There were some 500 Slovenian "length of proceedings" cases pending before the Court. This was identified as a systemic problem resulting from inadequate legislation and inefficiency in the administration of justice.[80] The Court urged the Slovenian Government either to amend the existing range of legal remedies or to introduce new remedies, in order to

79. *Lukenda v. Slovenia*, No. 23032/02, 6 October 2005
80. Para. 93.

secure genuinely effective redress for such violations. The judgment contains all of the characteristics of the PJP with the exception of formal adjournment of similar cases. In fact, the Court took the opposite approach – as soon as it had delivered the pilot judgment, it rapidly processed approximately 200 further judgments against Slovenia concerning allegations of excessive length of proceedings before domestic courts. This demonstrates the adaptability of the PJP – it would be hard to justify adjourning cases complaining of length of proceedings. In 2006 new legislation was adopted to protect the right to trial without undue delay.[81] By May 2007 there were about 1 700 applications pending at the European Court against Slovenia in which the applicants alleged a violation of the "reasonable time" requirement in domestic proceedings. The Court then decided in the Korenjak case that the new remedy was effective and that therefore the applicants were obliged to invoke the new domestic mechanisms, before lodging a case in Strasbourg.

There isn't enough time to go through the other examples in detail, but one sees elements of the PJP applied to issues such as:

– access to property in Northern Cyprus[82]
– length of proceedings and *de facto* expropriation in Italy[83]
– the system of property restitution in Albania[84]
– compulsory letting and compulsory sale of property in the Slovak Republic[85]
– inadequate procedures in prison discipline regimes in Turkey[86].

These cases show the truly essential features of the PJP – identification of the underlying problem and indications or guidance to the state.

I think it can already be said that the phrase "systemic problem" has acquired a special connotation in Convention proceedings. When the Court uses this expression in a judgment, the state is put on notice that the Court's concerns are not limited to the individual case. With this approach, the Court complies with the Committee of Ministers' request in Resolution Res(2004)3. In accordance

81. The Act on Protection of the Right to a Trial without Undue Delay (*Zakon o varstvu pravice do sojenja brez nepotrebnega odlašanja*, Official Journal, No. 49/2006), which was enacted on 26 April 2006. It came into force on 27 May 2006 and became operational on 1 January 2007.
See: *The effectiveness of the European Convention on Human Rights at national level*, Working document (Rapporteur: Mrs M-L. Bemelmans-Videc), Committee on Legal Affairs and Human Rights, PACE, AS/Jur (2007) 35 rev, 20 July 2007, para. 37.
82. *Xenides-Arestis v. Turkey*, No. 46347/99, 22 December 2005.
83. *Scordino v. Italy*, No. 36813/97, 29 March 2006.
84. *Driza v. Albania*, No. 33771/02, judgment, 13 November 2007.
85. *Urbárska Obec Trenčianske Biskupice v. Slovakia*, No. 74258/01, judgment, 27 November 2007.
86. *Gülmez v. Turkey*, No. 16330/02, judgment, 20 May 2008.

with the CM's own rules of procedure, the execution of the judgment will be supervised as a matter of priority.[87]

Comments

Although it has drawn some criticism, the PJP clearly has the potential to help solving the problem of high numbers of similar applications coming before the Court.

When the Court is faced with a large number of cases raising the same issue, the PJP – in some form – should be tried. It goes without saying that the Court should deal with the case selected as the pilot as a matter of priority and as quickly as possible. All the related cases should be adjourned in the meanwhile, and the applicants informed clearly of the Court's strategy. Hopefully, the procedure will go forward smoothly and produce the desired outcome – an adequate domestic remedy with retroactive effect.

However, what should the Court do in situations where it has already delivered a large number of judgments concerning the same issue and only later does it pinpoint the systemic problem? It is rather difficult to take up a systemic problem in case number 55 for example and use it as a pilot case, while adjourning the remaining cases.

What we face here is in fact the issue of enforcement of the Court's judgments. In the situation I just described, the first 54 judgments will have been referred to the CM for enforcement. The fact that case No. 55 is still outstanding simply shows that the previous judgments have not been fully executed.

To give a concrete example: when the Court delivered judgment in the case of *Burdov v. the Russian Federation* in 2002, the problem of non-enforcement of civil judgments in Russia was apparent and it should have been solved by proper measures at the stage of implementation of the judgment before the Committee of Ministers. Since then the Court has delivered more than 120 similar judgments.[88]

And it is this which makes me question whether in the future reform work we should not embark upon a more radical solution which would see the CM's authority and capacity considerably increased.

What one could envisage is that, instead of delivering judgments in repetitive cases, the Court would simply certify that the case is to be settled in light of the previous decisive judgment. The follow-up cases would be referred directly to

87. Rule 4 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

88. The work programme indicates that this figure will have doubled by the end of the year.

the Committee of Ministers, not as decided cases but certified claims to be enforced on the basis of that existing judgment.

Admittedly, one could object that the Committee of Ministers has neither the competence nor the resources to function in this way. But if, as I argue, these cases should not be processed by the Court, then it is time to look at how the CM could be given the legal competence to take on this role and equipped to do so.

Enforcement issues are becoming more and more judicial and it would seem to me that in the future reform work, one issue that could be taken up is whether the enforcement issues should not be entrusted to a more quasi-judicial organ. This could be a separate body, or one operating under the auspices of the CM. I think a lot could be achieved to solve many enforcement issues if for instance a Panel of five to seven legal/judicial experts were entrusted with that duty.

Concluding remarks

The Court has developed a PJP which has, in its full form, been used in only a few cases so far. But, taken along with the variants, these cases show an increasing willingness on the Court's part to identify systemic problems and give guidance to the respondent states, which is a substantial departure from the purely declaratory approach that the Court has followed for more than four decades. The development so far is perhaps somewhat uneven: there are more variants to the proper PJP than actual PJP.

We are likely to see more variants in the future.

Whatever their exact form, all these cases have the same object: they try to identify systemic problems and try to help the respondent state get to grips with the situation. They also all try to help the Court manage its workload more effectively.

We need to acquire more experience in the operation of the PJP. It has a clear potential which the coming years will certainly show.

Nevertheless, I have argued that the PJP is really an indication of a problem of enforcement and implementation of Court judgments. So instead of making the judicial stage of Convention proceedings the focus of the next round of reform, should we not strengthen the enforcement stage? Ultimately repetitive cases are the symptoms of the failure to take appropriate general measures as part of enforcement process. By giving the Committee of Ministers the mandate and the means to ensure more enforcement, the whole Convention system may function more effectively.

Thank you very much. ★

Pilot judgments: the experience of a Government Agent

Mr Jakub Wolasiewicz

Government Agent of Poland

Excellencies, Ladies and Gentlemen,

I am very pleased that this Colloquy provides us with an opportunity to exchange views on the developments which – as the title of this session implies – concern amplifying the effect of the Court's case-law. It comes as no surprise that the concept of pilot judgments is at the heart of the debate relating to the stronger implementation of the European Convention at the domestic level. This is exactly what the pilot judgment procedure is aimed for: to implement the European Convention in a domestic legal system in a situation of systemic problem underlying the violation of the treaty.

Let me remind that the European Court of Human Rights applied the pilot judgment procedure in two cases against Poland: *Broniowski* and *Hutten-Czapska*. In both cases the underlying causes of the violation of the European Convention of Human Rights were found in systemic deficiencies of the legislation in connection with dysfunctional domestic practice. Having regard to the systemic cause of the violation, the Court held that its consequences concerned not only the applicants in the above mentioned cases, but also the applicants who already lodged their complaints to the Court or could potentially lodges such complaints.

The pilot procedure and the judgment identified the character of the violation and implied that the Government would reach a friendly settlement with the applicants as regards the just satisfaction, however, if the negotiations between the Government and the applicant failed, the Court would have to decide on the just satisfaction on its own motion. The friendly settlement between the appli-

cant and the Government was supposed to include both the individual as well as general measures. Also, the Court decided that until the conclusion of the friendly settlement and its acceptance, the proceedings in similar cases would be suspended. In view of certain difficulties with the procedure of negotiating the friendly settlement in the *Broniowski* case, the Polish Government addressed the Registry of the Court and invited it to mediate between the parties. As a result of mediation, a friendly settlement has been reached which defined the conditions of individual and general measures.

The applicants agreed that they would be concerned by individual measures and would not submit new claims based on general measures. Subsequently, the Court delivered judgments which approved the friendly settlements and struck the main applications out of its list. The applicants in the clone cases were informed by the Registry that they should avail of the domestic measures and the domestic proceedings would be monitored. In that framework the Court was expected to deliver decisions on striking the clone cases out of the list if the applicants in these cases received appropriate relief. In case of the *Broniowski v. Poland* the above procedure has been completed.

Also, please note that the pilot judgment procedure within the European Court of Human Rights was pending irrespective of the proceedings at the Committee of Ministers' Deputies regarding the supervision of the execution of the judgment pursuant to Article 46 § 2 of the Convention.

As a Polish Government Agent before the Court I appraise highly the concept of pilot judgments. Allow me to dwell a little longer on the *Broniowski* cases – in order to draw conclusions from the way agreement was reached between the applicant and the Government side. And so, both the size of the individual compensation for Mr Broniowski and the attempt to define a systemic model of Bug River

compensation for thousands of persons in a similar legal situation, were the subject of negotiations, with the participation of representatives of the Court's Registry. During the Warsaw Seminar "The European Court of Human Rights (June 23-24, 2006) I said *inter alia*:

"*The attainment of a friendly settlement in the pilot case resolved the individual problem of Mr Broniowski, but did not result in the transfer of the other Bug River complaints to the national system. Clearly, the pilot cases need a procedure for achieving legal peace. Such legal peace would have as its objective the negotiation of terms between the Court and the Government for dismissing clone cases and referring them for resolution to national courts. Thus, we are talking about a new negotiating procedure between the Government and the Court Registry. – Let me*

stress: between the Government and the Registry – and not between the Government and the applicant. The participants in such negotiations could also include the Council of Europe Commissioner for Human Rights, representing the interests of the applicants in clone cases, and a representative of the Committee of Ministers, which would subsequently act as guarantor of the correct fulfillment of the terms of legal peace. The negotiations would result in the elaboration of an agreement with the Government on a general remedy to be introduced into internal law to prevent further violations. Such a remedy should also establish a path for settling clone cases , the latter being conditionally struck from the Court's roster of cases. The Government would present a timetable for implementing the remedy. If the Government failed to implement its commitments, the Court would be able to withdraw from the legal peace and issue judgments in the clone cases as in the pilot case".

I should also stress that I welcomed the Court's flexible and friendly approach towards the Government's suggestions regarding this procedure. It is important to note that the Court kindly accepted the need to acquire the consent of the concerned Government to initiate the pilot judgment procedure. I myself advocated such a solution at the Seminar in Oslo in 2004.

The high assessment of the concept of pilot judgments does not mean that I do not discern certain shortcomings which could be eliminated through development of this procedure. In my opinion, one of the main weaknesses of the present concept is its expanded structure. As a consequence, the Court needs a considerable amount of time to reach a judgment within that framework. If we consider the pilot cases already examined by the Court, the period between the communication of the case to the Government and the delivery of the judgment amounted up to four years. If we take into account the period prior to the communication, as well the amount of time necessary to examine the clone cases, the whole procedure may take up to 10 years.

Having analysed very thoroughly the issue of the length of procedure in pilot cases, I presume that it might be possible to shorten it considerably, at least in certain categories of cases. This could be achieved when some steps in the course of the procedure are simplified. At present the pilot judgment procedure consist in three main steps:

– the delivery of a pilot judgment,
– the friendly settlement, and
– the delivery of a judgment approving the friendly settlement.

I would suggest that in certain circumstances the procedure could involve the delivery of a pilot judgment approving a friendly settlement or the Government's unilateral declaration. **In other words, the conclusion of a friendly settlement or submitting a unilateral declaration could precede the delivery of a pilot**

judgment. The simplified pilot procedure would not replace the present one, but would have an optional character.

Along these lines, I would suggest the following *modus precedendi* in applying the simplified pilot procedure:

Step 1. When a systemic problem underlying the violation of the Convention is identified in legislation or domestic practice, a Government can request the Court to initiate the simplified pilot procedure.

Step 2. Among the clone cases communicated by the Court to the Government, the latter choose one or several cases and propose the applicant(s) a conclusion of a friendly settlement involving both the individual as well as general measures. The Registry of the Court would take part in the negotiations as a mediator. **Alternatively, or even as a rule, the mediation between the parties could be undertaken by the Council of Europe Commissioner for Human Rights**. It is my profound belief that the expertise and experience of the Commissioner might be of great value when it comes to conclusion of a friendly settlement in cases revealing a structural problem.

Step 3. In case of adopting a friendly settlement, the Government would not object to the Court's declaring a systemic violation in a judgment, which would be then considered a pilot judgment. If a friendly settlement is approved in a judgment, the other cases from the group would be suspended.

Step 4. In cases the applicant does not agree for a friendly settlement, the Government would have the right to submit a unilateral declaration, including both individual as well as general measures, which would be taken into account by the Court. If the Court accepts the unilateral declaration in a judgment, the latter would become a pilot judgment. Then the other cases from the group would be suspended.

Step 5.A pilot judgment would conclude the simplified pilot procedure. The judgment find a systemic violation and approve the friendly settlement or proposals indicated in the unilateral declaration as to individual and general measures. The Court could also determine the procedure of monitoring the execution of general measures which may influence the determination of suspended cases.

Step 6. When the Government fulfill the individual measures, the case would be struck out of the list.

Step 7. When the general measures indicated in the pilot judgments are implemented in domestic system, the Registry of the Court would inform the applicants whose cases are still pending that they can pursue their claims before domestic courts or competent organs. The applicants would be informed that in case they do not avail themselves of the indicated domestic measures, their cases would be struck out of the list. Also, if the applicants make avail of the existing domestic measures, the proceedings would be monitored by the Registry of the Court. This guarantee would not entail an automatic redress in domestic law, but would rather concern the fairness of procedure provided for by domestic legal system.

Step 8. When the monitoring of domestic procedures with respect to the clone cases is completed, the Court would decide to struck the cases out of the list or would adopt other decisions it deemed appropriate.

I am aware that the simplified pilot procedure may only concern cases where the Government do not deny the existence of a systemic violation and its causes. However, the practice of Polish pilot cases reveals that the lengthy pilot procedure has considerable drawbacks both with respect to the position of the Government, as well as the applicants' status. It also affects the efficiency of the Court.

It is my sincere belief that the simplified pilot procedure could contribute to a more effective implementation of the Convention in situations where the Government concerned declares its willingness to co-operate with the Court in eliminating the problem underlying the systemic dysfunction. Of course, the concept of the simplified pilot procedure require some further thought, however, the idea remains clear: **to strengthen the mechanisms developed in the** *Broniowski* **and** *Hutten-Czapska* **cases in order to secure a more effective way of dealing with systemic violations of the Convention**.

In conclusion, I wish to bring your attention to the fact that the concept of pilot judgments is currently in the agenda of the Reflection Group established by the Steering Committee for Human Rights in November 2007. The Reflection Group is tasked to examine in depth a concrete follow-up that could be given to the recommendations contained in the Report of the Group of Wise Persons as well as other sources. The Polish Delegation to the GDR is particularly interested in the concept of pilot judgments and will support the idea of drafting **rules** governing the use of pilot judgment procedure, with particular reference to:

- the criteria of a "pilot case",
- the procedure of selecting a "pilot case" and decision-making process,
- the role of the Registry of the Court and the Government,

- possible involvement of other actors in the procedure,
- the course of negotiations following a pilot judgment;
- the desired effect of a pilot procedure.

We hope to find allies who share the view that there is an urgent need to clarify and simplify the pilot judgment procedure. Undoubtedly, we should benefit from the experience of the already completed or pending pilot procedures, with particular emphasis on the *Broniowski* and *Hutten-Czapska* cases.

Thank you for your attention. ★

Registry Information Activities

Mr Roderick Liddell

Director of Common Services in the Registry of the European Court of Human Rights

Mr Chairman,

When I joined the Registry nearly twenty years ago, the Registry's information activities were fairly minimal. These were the days before the Court was overwhelmed with caseload. Again at the time the principle of subsidiarity was a much repeated mantra in the Court's case-law but it remained a largely theoretical notion, with one or two exceptions. The Court was still proclaiming that the Convention did not require incorporation into the national legal system, which was of course from a legal point of view perfectly correct. Yet I think we can say now that it made no sense in terms of the practical operation of the principle of subsidiarity. National courts had to have a clear legal basis for applying Convention standards if they were to fulfil their natural role within the Convention system. However, that legal basis alone is not sufficient. National courts must also have access to the Court's case-law. I should like to consider in this brief address how we can work towards that in the light of the Registry's existing information activities.

The Court's information activities can be said to pursue at least four aims.

- The first concerns the direct impact of its judgments. Ensuring an appropriate degree of publicity for findings of violation is part of the deterrent effect of judgments which are essentially declaratory.
- The second is related to the more effective implementation of the Convention at national level and therefore the principle of subsidiarity. If we are serious about the need for national courts to apply the Convention in the light of the Court's case-law, we have to give national courts the means to achieve this. In other words we have to make available to them not just the judgments finding

violations arising out of dysfunctions of their own national systems, but more generally the Court's leading judgments which define the contours of the corpus of European human rights jurisprudence.

- The third concerns the general principle of transparency in the administration of justice. This is reflected in the provisions of the Convention which require the Court to make documents before it accessible to the public.
- The fourth aim relates to the need to dispel misconceptions about the Court's mission with a view, among other things, to reducing the number of clearly inadmissible cases.

In the context of today's discussion I wish to concentrate on the second aspect, that is essentially providing the users of the Convention system with the tools that they need in order to give the rights and freedoms guaranteed therein practical effect in national systems – and in the light of the latest developments of the case-law. The dynamic character of that case-law makes it all the more necessary to make it accessible. Let me just stress in this context, as other speakers have done, the essential importance of the notion of subsidiarity. We often speak of the Court or the Convention system being the victim of its success because of the tens of thousands of applicants who bring their grievances to Strasbourg every year. Yet the system will have been truly successful only when European citizens do not have to come to Strasbourg because they can vindicate their rights before the national courts. The international machinery will always represent a less effective, a more expensive and an altogether more cumbersome means of redress than local remedies.

In this area access to the Court's case-law in a language that is understood by those involved in judicial proceedings at national level is key. You only have to look at the judgments of the United Kingdom courts since the entry into force of the Human Rights Act in 2000 to see how a national judiciary is capable of acquiring ownership of the Convention if it is given access to it. If the United Kingdom courts have given us some of the most detailed and sophisticated analysis of the Convention case-law this is surely at least partly because most, if not all, of the main Strasbourg judgments are available in English.

How does the Court disseminate information about its judicial activities today? In the time allotted to me I cannot go into relations with the media and the more general issues of communication policy. Of course the heart of the Court's information activities is its website. Until 1998 the Court was sending out paper copies of its different information documents. In 1999 the Court brought into operation its HUDOC data base, having decided that the only realistic means of fulfilling its Convention obligation to publish its judgments was to make them available via the web. Today all the Court's judgments are published on the Internet via HUDOC on the day of delivery. We take this for granted in 2008, but nine years ago it was rather radical and quite an achievement. HUDOC

is equipped with a powerful search tool, which in theory enables users to conduct extensive and sophisticated research.

Since last year, other collections have been added to the HUDOC data base of judgments and decisions. These include the case-law information notes, information on communicated cases and press releases. All these collections are searchable. For our purposes perhaps the most relevant is the collection of case-law information notes. These are issued on a monthly basis and seek to identify the most important cases in terms of jurisprudential developments – at different procedural stages.

The Court has recently published on its site a new series of information documents, the "key case-law issues". These consist of different items dealing with the most relevant and recent case-law on specific themes and Articles. Thus there is a section devoted to Article 8 and the various issues arising under that provision. Another section deals with the questions relating to Article 35 in the context of admissibility. Ultimately this series will cover all the Convention rights and freedoms. In so far as it concerns the substantive provisions, this information is not only aimed at applicants and their representatives; it can also be of use to judges and practitioners at national level. It is proposed to make these "key case-law issues" available in different language versions; indeed they have already been translated into Russian and Turkish.

Another new collection that will shortly be made available will be the summaries produced for cases published in the Official Reports. This collection will also be searchable.

The Court also produces a HUDOC CD-ROM which is regularly updated. When we first looked at this idea, we carried out some market research which suggested that there would be significant interest in it. In reality, its added value in relation to the internet version of HUDOC does not appear to have been sufficient and sales have been low. But this can perhaps be attributed to the success of HUDOC via the internet. I am asked to remind you that it is not too late to subscribe to this service.

As I have said HUDOC was ground-breaking when it was introduced nearly ten years ago, but apart from anything else the sheer mass of information which it now contains makes it unwieldy. It currently comprises over 50,000 texts and increasingly performs the function of a repository. We have recently conducted a user survey (completed in April). Whatever the final results of that survey which we are now analysing, it is clear that we need to carry out extensive work on HUDOC and notably with regard to the search functionalities. We are investigating the feasibility of developing a new search engine and there is also work that needs to be done on cleaning up and harmonising the data. Another suggestion that has been made is the creation of a separate case-law data base, which would contain only the most important cases.

This is work in progress, but the real challenge is, as I and other speakers have suggested, to ensure effective access to the Court's key judgments for the national authorities and courts. As the Wise Persons pointed out in their report, national judicial and administrative institutions should be able to have access to the case-law of the Court in their respective language. That of course echoed many other voices over the years going in the same direction, including the Committee of Ministers in its Recommendation (2002) 13 and its Resolution (2002) 58. Certainly no one would contest the value and importance of the Wise Persons' proposition. It is, however, easier said than done.

We should not however overlook that much has already been achieved by different actors: Government bodies, NGOs and the Council of Europe, notably through the Directorate General of Human Rights and Legal Affairs (DGHL). The first task facing anyone wishing to place translation of the Court's judgments into non-official languages on a more formal and co-ordinated basis is to draw up an inventory of what already exists. This the Court is in the process of doing, in collaboration with DGHL. Thus the Council of Europe Field and Information Offices have been asked to inform the Registry of any local translations commissioned by the Council of Europe. Letters will also be sent to Government Agents and NGOs asking them to provide the Registry with any translations into non-official languages and make accessible electronic versions.

The next step will be to contact private publishers and to see to what extent they are prepared to waive copyright or what other arrangements can be made with them.

Once we have established what exists and, where appropriate, verified its quality, it will be necessary to make it accessible via the website, either by creating a separate collection or by inserting links to sites with the different language versions, including private publishers' sites. Ideally it should be possible to discover when you open the official language version in HUDOC the other languages in which the judgment exists and access them. As to the future organisation of systematic translation of the Court's leading judgments, it seems to me that, as the Wise Persons indicated, responsibility for translation, publication and dissemination of the Strasbourg case-law lies with the member states. I know that many of the Government Agents are already overworked and under-resourced, but the logical point of contact and co-ordination would clearly be the Agent's office. It is recognised that Government Agents have an important role to play within the Convention system; this additional mission would be entirely consistent with that role. It will no doubt require extra funding, but Agents should not assume this task in isolation. Government Agents who share a language could liaise with each other. Agents could communicate with each other to identify best practices in this field. I believe that some Agents are particularly active already. In addition it will be necessary to harness the valuable work of NGOs and academics who

make such an important contribution in this respect, not to mention the continuing efforts of the Council of Europe. One thinks in particular of the different judicial training programmes and the potential for co-operation within that framework. It may be that private funds or voluntary contributions can be mobilised for specific programmes of translation.

As regards selection of judgments meriting translation, I would suggest that in the Court's Publications Committee we already have a body whose task is to identify cases raising novel issues of case-law. Their choice of cases is already published on the Internet site but if it were helpful Government Agents could be informed immediately so as to give them as much advance warning as possible about judgments which will need translation. Indeed it might be necessary for the Court to make a more limited selection – to flag the most important cases of principle.

Mr Chairman

In the time available it has only been possible to sketch a brief outline of some of the Registry's information activities. Let me conclude by making the following interlinking points on the specific question of translation into non-official languages: Firstly, however important information activities may be, they are obviously only part of the problem and therefore only part of the solution. Secondly, and notwithstanding what I have just said, this is not a peripheral issue, but one which goes to the effectiveness of the Convention system. Thirdly, providing access to the case-law via translation is essential if national courts are going to play their full role. Fourthly, the Registry does not now and will never have the means to organise and effect that translation itself. Fifthly, this can only be achieved by a collective effort – co-ordinated by the Government Agents. The Convention is a joint venture in this aspect as in others. The mission of implementing it is a shared one as are the values which underpin it. I now look forward to hearing your suggestions and comments for enhancing the Court's and the Registry's contribution in this area.

Thank you for your attention. ★

Theme 3
Assisting member states in implementing the Convention

Keynote Speaker: Mr Roeland Böcker

Government Agent of the Netherlands, Chair of the Reflection Group on the follow-up to the Wise Persons' Report (DH-S-GDR)

Ladies and gentlemen,

Have you ever felt like a movie star? I mean, not just in your dreams or in the loneliness of your bedroom when you were a teenager, while staring at the posters of your childhood heroes, but in real life? I certainly have – not even very long ago – and it had everything to do with human rights and the European Court. Let me tell you how it happened.

Ten years ago, the city of The Hague celebrated its seven hundred and fiftieth birthday. On the initiative of the then president of the District Court of The Hague, the city, which after all claims the title of legal capital of the world, organised an international moot court, where delegations of lawyers from a number of countries presented fictitious court cases according to their national rules and traditions. This event was subsequently repeated at intervals of about three years. Those moot courts were announced in the press and always generated a lot of attention from the public at large. They usually concluded with an equally fictitious but quite realistic hearing by one of the international judicial bodies based in The Hague, usually the International Criminal Tribunal for the former Yugoslavia. Last November, however, the organisers saw fit to close the "international day in court' with a hearing by the European Court of Human Rights. They asked the Dutch judge in the Court and the Government Agent to prepare a case for the hearing. Those of you who know Judge Myjer will not be surprised to hear that he happily rose to the challenge and did not mind twisting reality a bit, to the extent that he personally assumed the role of President of the Court.

The Government Agent appeared as himself, while friends and colleagues, all experienced lawyers, played the roles of judges, applicant and applicant's counsel.

To cut a long story short, after a highly interesting day of oral presentations of court cases from Belgium, Germany, the Netherlands, Romania, Spain, Sweden, Turkey, the United Kingdom and the United States, sometimes with active participation by the audience, the time came late that afternoon for the closing ECHR-hearing. This is where the movie star feeling comes in. A huge crowd of spectators, including judges, lawyers, students and many other interested citizens huddled impatiently outside the court room well before the hearing. When they were finally allowed in and tried to fight their way to the best places as if it were a Rolling Stones concert, it turned out that even the Hague Court of Appeal's largest courtroom was far too small to accommodate them all. At least half of them had to watch the proceedings on a big screen in the hall outside. The actors may not have been asked for their autographs, but they nevertheless received numerous questions by the public after the hearing.

What conclusion can be drawn from this story? Of course that depends in the end on everyone's own interpretation. But for me it was another indication that human rights are a very hot topic and that, even in a country like the Netherlands with a longstanding human rights tradition and a mere handful of ECHR-judgments per year, it is no means cooling down. On the contrary, judging by recent events, we may safely conclude that human rights are more a front page issue now than they have been for decades. Certainly, at the Dutch Foreign Ministry – my employer – human rights have been at the heart of policymaking since at least 1979, when the Ministry issued its first comprehensive human rights policy document. But that document – like its updates and successors, the latest of which saw the light only a couple of months ago – concerned human rights and foreign policy. As if human rights are something alien, only of concern to diplomats stationed in faraway and less developed countries.

Through all those years, awareness in the Netherlands that human rights also require continuous care and maintenance at home was low. It was basically limited to a few lawyers and die-hard Strasbourg watchers, sometimes ominously referred to as "the human rights mafia". The European Court and the former European Commission on Human Rights occasionally found violations of the Convention by the Netherlands, but these rarely attracted attention outside the legal press. I personally still get mostly sceptical reactions and encounter doubts about the size of my workload when I tell people about my work as Government Agent. It is telling that the most active domestic non-governmental organisation monitoring the human rights situation in the Netherlands is a group of lawyers, the Dutch section of the International Committee of Jurists. I have nothing against lawyers, of course; some of my best

friends are lawyers. But human rights are simply too important to entrust completely to one profession.

In this atmosphere, the Court's judgment in the case of *Saïd v. the Netherlands* in July 2005 and particularly its judgment in the case of *Salah Sheekh v. the Netherlands* in January last year came as something of a shock. The Court ruled that the Government's planned expulsion of Mahmoud Mohammed Saïd to Eritrea and of Abdirizaq Salah Sheekh to Somalia would violate Article 3 of the Convention. More than before, this made the public at large, informed by the general press and of course by internet, realise that human rights in the Netherlands are – to put it mildy – subject to discussion and not beyond reproach. It goes without saying that this awareness did not come in unison. There were those who claimed that they had seen it coming – particularly the human rights mafia I mentioned earlier, many of whom felt that the Government got just what it deserved. But there were also large groups in society who were taken by surprise and considered this another example of totally inappropriate interference by "Europe" in domestic affairs, a sort of conspiracy to swell the already uncontrolable influx of migrants into our country.

And there is more evidence of the revival of the domestic human rights debate. You will all have heard of, and probably seen, the film Fitna, recently produced and released by Dutch MP Geert Wilders. Seldom can a publication or release have caused such heated debates throughout society, even before it took place. Interestingly, these debates have frequently been cast in terms of human rights, explicitly or implicitly, sometimes with legal subtlety, sometimes with provocative bluntness. There were those – obviously including the film's producer – who portrayed freedom of expression as the *conditio sine qua non* of our Western democracies, which must prevail over all other rights and freedoms and at all costs. Others – including for example the Secretary General of the Organisation of the Islamic Conference – considered it their divine duty to defend freedom of religion against any unfriendly expression by nonbelievers. Gays and lesbians suddenly saw their right not to be discriminated against and their right to private and family life most passionately defended by an extreme right-wing party. Pious inhabitants of the Bible Belt stood shoulder to shoulder with followers of the Koran in upholding freedom of religion, *bien étonnés de se trouver ensemble*.

The spirit of reconciliation which one might expect from this picturesque description, was not much in evidence, however. Instead, the debates were dominated by widespread misunderstanding and ignorance about the equality, the indivisibility and the interdependence of human rights and about the interaction between them. Many participants in the debate strongly pleaded the cause of human rights, only to conclude that it was first of all *their* human rights which were threatened by, and should take precedence over, those of others. Be that as

it may, the conclusion is clear: there is an intensified human rights debate in my country. I suspect that this is true not only for the Netherlands but also for other countries.

This brings me to the issue which is under discussion here this morning: helping member states implement the European Convention on Human Rights. If I may continue for a moment to speak as a national representative, I would remind you that international instruments are increasingly being used to monitor and improve the human rights situation in my country. This is attracting a lot of attention domestically. This attention may take the form of criticism, with an undertone of irritation about what is sometimes considered inappropriate foreign intervention, but it undoubtedly contributes to the intensified human rights debate I just described. Last year, the European Committee for the Prevention of Torture, the European Commission against Racism and Intolerance and the Committee of Experts of the European Charter for Regional and Minority Languages all visited the Netherlands and reported on the situation there. In April this year, the Netherlands was one of the first UN member states to undergo the Universal Periodic Review under the UN Human Rights Council. The State Secretary for Justice, who led a large interministerial delegation to the UPR, thereby announced that the Government would not wait until the next review before reporting again on the situation and would report in the interim at its own initiative. In the meantime, we are looking forward to the visit to the Netherlands in September this year of the Council of Europe Commissioner for Human Rights. A first co-ordinating meeting took place recently with an advance party from the Commissioner's office.

As long as all these bodies and mechanisms – and I haven't even mentioned the regular reporting under the UN human rights treaties – duly take into account the results of each other's work, I am convinced that they can avoid the pitfall of duplication of effort and in fact can mutually reinforce one another. In recent months, I have sensed among my colleagues at other ministries – Justice, the Interior, Education, Social Affairs, Health – not reporting fatigue, but rather a widespread preparedness to respond to questions from monitoring bodies, as long as these colleagues were sufficiently assured that their responses were being taken into account at all international levels.

Having made these comments from my national perspective, I think it is high time for me to change hats and talk about the work of the Council of Europe Reflection Group I chair on the follow-up to the Wise Person's Report and other reports. I suspect that this was the main reason I was invited to address you this morning. The Reflection Group, which has existed for a year now, was mandated to focus in its first year on measures that do not require amending the Convention. So obviously national measures aimed at implementing of the Convention were an integral part of our discussions. I will briefly sum up the ele-

ments of our discussions that relate directly to today's topic, helping member states implement the Convention.

We spoke at length about access to information and advice for potential applicants to the Court, and considered the possibility of drawing up guidelines for member states. This issue may seem straightforward at first glance, but it is not. Crucial questions came up, such as: Would giving applicants better information and advice lead to an decrease or an increase of the influx of applications to the Court? Who would be responsible for the quality of information and advice? Where is the dividing line between purely factual information on the one hand and legal advice to the applicant on the other? The Group decided that it needed first to acquire better knowledge of the actual situation in the member states, with the "Warsaw pilot project" as a potential major source of information. I am sure that Ms Nuala Mole, who will speak later this morning and has a fund of expertise in this area, will be able to help us answer our questions.

We also considered favourably the possibility of seconding national judges to the Registry of the Court. Although most of my colleagues in the Reflection Group think this would primarily benefit the Court, I personally do not agree. The Netherlands has for many years now been seconding trainee judges to the Registry, for fixed periods of one year, as part of their training. We know the Court greatly appreciates their help, but we also consider these secondments an effective way of enhancing knowledge of the Convention system among our national judiciary. I am sure that Ms Hanne Juncher, who will also speak this morning, will agree.

The Reflection Group joined the Group of Wise Persons in underlining the crucial role of the Council of Europe Commissioner for Human Rights, and particularly of the network of national human rights structures that the Commissioner co-ordinates. There is no need for me to go into more detail here, since Mr Thomas Hammarberg himself will certainly inform us later about the Commissioner's work in this area.

The Reflection Group has also stressed the potential of the HUDOC system to help both applicants and national authorities. HUDOC could be expanded to include links to translations of the Court's case-law into non-official languages, an analysis of patterns in the Court's awards of just satisfaction, and information on admissibility criteria.

Finally, the Reflection Group revisited the crucial issue of domestic remedies for violations of the Convention. We did not, however, take up the fifth proposal from the Group of Wise Persons, recalled at last year's conference in San Marino by the Deputy Secretary General, to elaborate a new convention on domestic remedies. We were influenced by the consideration that a new binding instrument would cast doubt on the scope of current Article 13 of the Convention, which guarantees an effective domestic remedy for any kind of violation of the

Convention. We were much more open to the possibility of developing an additional soft law instrument, building particularly on the existing Recommendation No. (2004) 6 and the ensuing work in the DH-PR.

In the coming year, the Reflection Group will continue its discussions in accordance with its mandate, focusing now on measures that would require amending the Convention. I hope this brief overview has clarified the situation and I look forward to the discussion.

I should not, however, close my presentation this morning before paying tribute to the Norwegian Government for their initiative to create a trust fund to support the implementation of the Convention in the member states. Needless to say that such a fund may play a constructive role in making the Convention more effective at the domestic level. I am therefore happy to confirm that my Government has committed itself to donating a sum of 250 000 euros to the fund.

Till sist vill jag ta tillfället i akt att tacka Svenska regeringen, och då speciellt min kollega Inger Kalmerborn, så hjärtligt för gastfriheten och eran fantastiska organisation av den här kongressen. Det är altid ett nöje att hälsa på i norden, framföralt under perioden då solen aldrig går ner.

Tack så mycket. Thank you. ★

The Commissioner's role

Mr 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 recognise 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 crystallised 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 2007[89], 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

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

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. 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, intergovermental and non-governmental organisations 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 specialised 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 (NHRSs) in implementing the ECHR

Resolution (99) 50 expressly tasks the Commissioner to co-operate with the NHRSs and help them perform their own duties in the best possible way.[90] NHRSs 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 NHRSs 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 NHRSs 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:

The involvement of NHRSs in the implementation of the 2004 Recommendations

Our contact persons in the NHRSs 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 NHRSs 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 NHRSs.

The reaction of NHRSs 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 NHRSs, 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 NHRSs for the implementation of the Court's judgments.

The execution of the Court's judgments

Some NHRSs 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

90. 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."

understand their role under Rule 9[91] of 2006 Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.[92] Working with them on the public documents of the CM website and on the First Annual Report on execution, we have provided the NHRSs with information they had sought. As a result, under the aegis of my Office experts from a number of NHRSs 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.

Training of NHRSs

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 (NHRSs) 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 were 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 NHRSs to convey select information on the legal norms governing priority areas of NHRSs action and to proceed to a peer review of relevant practices used or envisaged throughout Europe. A

91. 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.

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

manual in several languages will be prepared after each workshop for dissemination amongst NHRSs and other relevant actors. The choice of the themes for the workshops takes due account of priorities indicated by the NHRSs. The feedback from the first two workshops was very positive. I do believe that when NHRSs 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. ★

The Council of Europe's support for national capacity-building on the European Convention on Human Rights

Ms Hanne Juncher

Head of Division, Legal and Human Rights Capacity Building Division, Directorate General of Human Rights and Legal Affairs

Excellencies, ladies and gentlemen,

The Council of Europe carries out projects and activities on human rights capacity-building in the widest sense. If I list them briefly, it should give you a sense of the scope of beneficiaries involved and therefore the diversity of approaches needed:

- Training on the Convention for legal professionals constitutes the core of our work. The beneficiaries are judges, prosecutors, lawyers and law enforcement officials. National ombudspersons and their staff are also beneficiaries of these programmes. Separate programmes target prison staff.
- Draft legislation is reviewed for its compatibility with the requirements of the Convention, at the request of member states;
- The implications of the execution of the Court's judgments in cases requiring general measures are addressed in roundtables and meetings between the Execution Department and the relevant national authorities;
- Government Agents benefit from study visits to the Council of Europe and to other Agents' offices, and from seminars with the national authorities on the role of the Agent.
- Case-law, training manuals, handbooks and moot court scenarios are translated into the national languages and distributed, in paper and electronic form;

The projects take as their starting point the ECHR, and all of them aim to improve the ability of key target groups to use the Convention nationally. There are two main objectives: Firstly, to transfer specific knowledge and skills to the direct beneficiaries, and secondly to strengthen the ability of the national structures to carry out training and capacity-building themselves.

The intention is to make the human rights standards real, to do it in a spirit of collaboration rather than monitoring, and of course to improve the level of knowledge. All the training is preventive in nature; it aims at contributing to good human rights protection already at the national level. By increasing the number of cases handled effectively by the national judiciaries, it is hoped that training will also contribute to reducing the number of cases reaching the Court.

We currently have projects underway at a combined value of around €16 million. Bilateral projects cover 14 countries, including Kosovo. Three fourths of the funding is raised from external donors, the most important of which by far is the European Commission. We implement around 250 activities every year, and of those about 150 are training activities. The projects are managed from Strasbourg but they are implemented locally. We employ project staff in 9 different countries in Eastern and South Eastern Europe and in the South Caucasus.

The bilateral projects are complemented by one multilateral programme called " The European Programme of Human Rights Education for Legal Professionals", known as the HELP Programme. I will come back to that in more detail in a moment.

Even if the Council of Europe provides training assistance as I described just now, training on the ECHR remains primarily a national responsibility. This is confirmed by the fact that today – and indeed in many countries for many decades – the direct applicability of the ECHR as domestic law is generally recognised. The judgments of the Court are also frequently accorded direct effect by the national authorities, something which allows their speedy and efficient execution.

But the steady increase of cases to the Court has nevertheless demonstrated the need to reinforce training and capacity-building in general. In line with that, the CM has adopted the Recommendations mentioned by other speakers on important capacity-building aspects, including one on the ECHR in professional and university education, which is the basis of the HELP programme. Professional training on the ECHR has also been identified in CM interim resolutions as one of the steps states can take to comply with the judgments of the Court and prevent new violations of the Convention. Furthermore, you will be familiar with the case of *Scordino v. Italy* in which the Court stated that "the knowledge [of domestic courts of [the] European case-law has to be facilitated by the state in question".

The Council of Europe has trained 7 000 prosecutors and 5 000 judges in Ukraine, using a Training-of-Trainers approach and reaching all the regions of the country. In Turkey, a Training-of-Trainers project is under way and 10 500 lawyers will be trained on the Convention. During a project which ended in November last year, all Ministry of Justice Inspectors in Turkey, as well as 2 500 governors, deputy governors, gendarmerie and police officials were trained on issues such as freedom of assembly, the prohibition of ill-treatment and the positive obligations of an effective investigation, legal grounds of detention, and fighting terrorism while respecting human rights. Two thirds of the prosecutors in Azerbaijan are being trained as part of a project funded by the Government of Sweden. In Serbia, some 1 300 legal professionals have been trained on the Convention during a project funded by the Government of Ireland. Under a three-year programme in Russia, the Council of Europe is continuing the work to train Russian judges, a massive task given the size of the country's judiciary. These are just examples.

Bearing in mind the objective I mentioned at the outset of improving national implementation of the Convention, we have made a number of observations based on the projects carried out as regards in particular effectiveness – in other words the pre-conditions for improving implementation of the Convention at the national level through capacity-building. I would like to summarise a few of them here:

– The principle of subsidiarity is always highlighted as the context for the projects. The same applies to the desirability seen from the perspective of a member state of avoiding cases reaching Strasbourg, and therefore of investing in improving the capacity at home.
– Incorporation of the ECHR as part of domestic law is already an important step to facilitate implementation of the Convention. Still, a clear message from the highest political level in a country to the judges' associations or the prosecution service that there is support for training on the Convention standards is very helpful in motivating participants and it helps add legitimacy.
– Training-of-Trainers can be effective but only if there is a long-term commitment to using this methodology, and only if the national partner agrees to a rigorous selection procedure for those expected to take on the role of national trainers. The Council of Europe monitors the quality of the training carried out in the subsequent cascade training sessions but eventually the trainers will be on their own and here the national training structures have an important role to play in ensuring that the level continues to be satisfactory.

The training activities being carried out as part of Council of Europe projects should be accompanied by the integration of training on the Convention into the curriculum of all judges, prosecutors and law enforcement officials, for initial and in-service training. Likewise, it should be part of the reading provided within law faculties. This has all been stressed in the afore-mentioned CM Recommendation. As far as judges and prosecutors are concerned, this is where the HELP Programme comes in.

The HELP Programme was one of the priorities of the Action Plan adopted at the Summit of Heads of States and Governments of the Council of Europe in Warsaw in 2005. It began in 2006 and is aimed at helping member states integrate the Convention into the curriculum for judges and prosecutors. Whereas the bilateral projects I spoke about earlier comprise actual training, the HELP Programme is about **how** to train on the Convention. The result has been the development of a multitude of concrete tools and materials for the training of judges and prosecutors.

This includes full curricula on each of the ECHR Articles and transversal themes, such as administrative, civil, criminal law, etc.; course outlines containing all relevant concepts and landmark judgments of the Court; PowerPoint presentations on substantive Articles of the ECHR and transversal subjects; 70 case studies and moot court exercises; a manual on the training of trainers, and interactive E-learning courses based on Grand Chamber judgments. These materials are available free of charge in English, French, German, Russian and Serbian on the HELP website (www.coe.int/help).

The HELP Programme has benefited from very strong interest from the member states. 45 countries are currently participating in the working groups, submitting examples of their own curricula, testing courses, and so forth. However, there is no funding envisaged for the HELP Programme beyond December of this year. I would like to take this opportunity to encourage member states to consider making available voluntary contributions to ensure its continuation. This would enable the Council of Europe to meet the many requests from member states for assistance and advice on ECHR training, and to update the tools and materials which would otherwise quickly become out of date. We call this service the HELP-desk. The amount needed is around €200 000.

As mentioned earlier, the Council of Europe regularly benefits from the sponsorship of certain projects by individual member or observer states – Sweden, Norway, Ireland, Denmark, the United Kingdom, Canada to mention a few.

An interesting new development in the same direction was the launch in March this year of the Human Rights Trust Fund. Member states may pay con-

tributions to this new Fund whose aim is to support national efforts to implement the Convention and other Council of Europe human rights treaties.

The Directorate General of Human Rights and Legal Affairs will be responsible for conceptualising projects in fields where the Council of Europe monitoring mechanisms have identified shortcomings, and for their implementation once approved by the Fund.

It should also make it possible for the Council of Europe to provide assistance in fields other than training and human capacity-building and to take on for example institution-building or assistance towards structural changes. We are currently reflecting on the first project proposals to submit for approval by the Fund.

The Council of Europe is by no means the only actor when it comes to capacity-building on the ECHR. The OSCE runs a number of programmes and many NGOs, national and international, organise training events and awareness-raising activities. This is a good thing. As long as there is a reasonable exchange of information at least between the intergovermental initiatives, we should not complain about a surplus of good-quality human rights training. Here too though, the Council of Europe has a particular role to play given our ownership of the Convention, our long experience, and the excellent network of short-term experts we have built up over many years and whose contributions are a guarantee of good quality. The tools produced under the HELP Programme are of course also available to these "outside" training initiatives.

To this should be added the close co-operation and support we enjoy from the Registry of the Court, for which we are very grateful. We are able to draw on the national lawyers and judges within the Registry for the in-country events. Participants very much appreciate these opportunities for direct contact. Likewise, the Execution Department often puts at our disposal their unique knowledge as regards the precise implications of the Court's judgments.

I would like to mention one more issue concerning human rights capacity-building which remains eternally problematic, and that is evaluation and impact. First of all, the two are not the same. We are able to evaluate training events without any problems and we know what to do to improve them. Impact is a different matter. It is difficult to measure or quantify the results in any meaningful way. Just counting the number of persons trained is no guarantee of a long-term result. Yet, donors expect us to be able to point to tangible outcomes and it is also important for us to be able to adjust the methodology.

There are some ways of assessing the impact. One is to look at the quality of the applications reaching the Court. There we see a clear improvement in a number of the countries where the Council of Europe has long-standing programmes. We also noted for example that the lawyers who brought the first successful cases against Russia concerning Chechnya had participated in the Council of Europe training programmes. I should add here that we make a point of training "both sides" as it were, the judiciary as well as the practising lawyers. Still, the connection may be tenuous, we cannot be sure that the improved quality is a direct result of our training.

Another possibility would be to count the number of references to the Convention and the case-law within national judicial decisions. But making this count is difficult in practice and raises the added problem of the quality of the reference. In addition, we have learnt that judges often hesitate to refer explicitly to the Convention but this does not necessarily mean that the Convention principles and case-law have not featured in their deliberations – in which case the training has had an impact.

An examination of the position taken by the domestic authorities in the decisions subsequently brought before the ECtHR may provide important pointers as to the level of knowledge of the ECHR and the Court's case-law. Given that lawyers have to raise their ECHR arguments before the domestic authorities in order to exhaust domestic remedies, they have a clear opportunity to demonstrate their knowledge then. However, whatever method is used, it requires resources which are not presently available.

Ladies and gentlemen,

In my intervention I have focused mainly on training but it is important to stress that this is only one of the avenues to be pursued in order to improve implementation of the Convention. It is equally important to ensure regular and systematic dissemination of the Court's case-law, in the national language, as well as information about the decisions of the CM concerning execution. I would also mention the service offered by the Council of Europe in the form of legislative expertise. Member states can submit draft legislation to the Secretariat for an expert review of its compatibility with the requirements of the Convention.

If I were to attempt to draw any overall conclusions from the work of the Council of Europe in the field of capacity-building on the Convention, it would be that the interest on the part of member states is very high. Furthermore, the level of knowledge of the participants in the training events is increasing all the time. In some cases, especially among the practising lawyers, it is often very good indeed.

Nevertheless, despite several years' of work on Training-of-Trainers, member states still rely heavily on external training providers. The Council of Europe is only meeting part of the needs in this field, and yet in many cases the expectation on the part of the member states who are beneficiaries of the Council of Europe programmes continues to be that the training is prepared for them. This phenomenon confirms the particular value of the HELP Programme.

Training-of-trainers, when it is successful, is the exception to that but even then we see that the outputs are not always used systematically afterwards once a particular project has ended. I would therefore finish here by encouraging member states to attach a very high priority to professional training on the Convention. It goes without saying that they can count on the Council of Europe's continued support for this important work.

Thank you. ★

Professional training on the standards of the ECHR

Ms Nuala Mole

Director of the AIRE Centre (Advice on Individual Rights in Europe)

Introduction

Thank you to the Council of Europe and to our Swedish hosts for the magical evening last night.

This colloquy is about making rights "practical and effective not theoretical and illusory." It is about ensuring that the people of Europe are able to enjoy in practice the rights that are guaranteed to them in theory.

That's what the AIRE Centre and other NGOs – and many others from all branches of Government, the Court, the Secretariat of the Council of Europe and the NGO community in this room – have been striving to achieve for 15 years. Some member states have unfortunately not being trying so hard – almost all Governments have been found in violation of their obligations; some in violation repeatedly and some in violation of a very serious kind.

Before coming here, I looked back over speeches I gave at the first truly pan European Council of Europe Colloquy in Posnan 20 years ago, at the various events hosted by previous presidencies – Rome in 2000, the Netherlands in 2004, San Marino 2007. I first went to Chisinau in the early 1990s, and now have personal experiences of training on the ECHR in 39 of the 47 member states of the Council of Europe.

The Convention was at the end of the 1940s (some would say cynically to give the Council of Europe something to do). Although based on a British draft, it brought together different legal systems and different legal traditions. There were some misconceptions, such as the illusory "homogeneity" of the founding

members; and there were some self deceptions, with the UK and Sweden in particular believing that the ECHR would make no difference at all.

Yet all the parties agreed to their obligation under Article 1 of the Convention to guarantee its rights and freedoms to all those within their jurisdiction. And they further agreed under Article 13 that they would afford a domestic remedy for anyone whose Convention rights were violated.

Since the Convention was drafted, we have witnessed the varied evolution of the role of the rule of law in the 47 member states. These different legal systems are all accommodated within the Convention, and many states have alternatives to the judicial resolution of disputes – from ADR and mediation within the rule of law, to blood feuds and bribery, or simply "my cousin's brother-in-law in the Ministry will fix it" syndrome outside the rule of law.

There are also vast differences in legal education – from the founding of the Ecole de la Magistrature in France as long ago as 1958, to other states where there was no formal legal education. In the 1960s in the UK, judges, and the barristers over whose advocacy they presided, didn't even have to have been to university, but only took a Bar exam.

The history and evolution of the ECHR has witnessed not only the persistent re-offending of the some of the oldest member states, but also the huge difficulties faced by the "new" member states especially. This is partially because of the plethora of new legislation in the "new" member states as they complete the transition to market economies and "western democracy". But it is also because of the need to change a whole different legal and rights culture – and, as they say, Rome was not built in a day.

In 2004, the Committee of Ministers adopted Recommendation (2004)4 on the ECHR in university education and professional training. In particular, it noted the preventive role played by education in human rights principles, and recommended that member states ensure that adequate university education and professional training about the Convention and the case-law of the Court exist at the national level.

This presentation will look at four questions in relation to training: Who? What? When? Where? It will also pose an important question that remains to be answered fully – How are they going to get it?

WHO needs training?

Recommendation (2004)4 talks not only about judges, prosecutors and lawyers, but as well about others involved in law enforcement such as members of the police and security forces, prison and hospital personnel, immigration officials.

Underlying the recommendation is the unwritten yet fundamental importance of getting the key players involved in the day to day protection of human rights convinced of the need for human rights education and training, and of the need for greater awareness of human rights in all sectors of society.

Clearly the list could not be exhaustive, but the 2004 Recommendation has some conspicuous omissions in the candidates for training. We need to talk about them here today. In particular, the public officials and general civil servants, whose decisions are challenged in the courts, are nowhere mentioned. Such training is crucial for getting the right decision initially from a public official. And however hard it is to get that right decision, it is always easier to get it right the first time than trying to get a wrong one reversed. If this happens, there will be less need to involve the judiciary in remedies. As Roeland Böcker said, human rights are far too important to be left to lawyers.

The Recommendation makes no mention of social services or welfare officers who play a crucial role in determining what happens to vulnerable children; in some Council of Europe countries, decisions to remove children from their parents are *still* not taken or reviewed judicially as the Convention requires. Nor are educational decision-makers mentioned, who decide whether children belonging to minorities should be schooled apart from their peers, thus deciding the fate of Roma children among others. These are important issues for this colloquy in particular, with children being one of the priorities for the Swedish Government's Presidency.

Recommendation 2004(4) does not mention the military, but the ECHR does not stop at the barrack gates. There are very important issues surrounding military justice, ranging from courts martial to the application of the Convention to military operations outside the metropolitan territory (which is not yet a closed issued despite the decision in Behrami). There are further questions of vulnerable young conscripts not receiving the care they need, and of conscientious objection and its consequences. My personal experience of training the military, in its senior echelons, is that they really want to know what the ECHR standards are and they want to be applying them. This reflects Hanne Juncher's comment about the request for training that came from the general staff in Turkey.

The 2004 Recommendation does not mention training for civil servants in central governments in general. Nor does it mention parliamentarians; we have heard from other speakers of the important role that parliamentarians can play and their frequent imperfect knowledge or misunderstanding of the ECHR, and it is clear that they need training as well.

Nor does it mention NGOs, who are often committed and enthusiastic but sometimes lacking in knowledge and expertise. Such training is crucial if they are to fulfil their role as watchdogs of their national authorities and unofficial guard-

ians of human rights. The Convention binds states, but it is often the NGOs who make sure that this happens.

Even the press should be candidates for human rights training – and not just on Article 10 and Article 8 issues – but to ensure that they understand the Convention with a view to reporting it more fairly. This is particularly true of the national press when violations by their own state are found by the European Court, and is very important in helping states to create a climate in which they can comply with unpopular judgments.

Perhaps even the members of the Committee of Ministers are candidates for the training that they themselves recommended member states provide. As we heard from Ingrid Siess-Schertz and we who represent applicants know, the Committee may at times be too willing to accept measures from states, especially General Measures, which will only result in repeat violations occurring.[93] Hopefully the new transparency of the system for the execution of judgments will enable the Committee of Ministers to hear voices other than those of Governments in the course of these processes.

The real need if for the mainstreaming of ECHR standards into professional training given to anyone with a role to play in human rights related decision making. It is important that we bring together all the players in a field so that they learn about the ECHR together.

The other *Who* is who is going to do this? We will come to that at the end when we talk about *How*.

WHAT do they need to know?

Training needs to familiarise the participants with the basic provisions of the ECHR and the case-law, but it needs to teach more than that. It should include key concepts, the "sandwich provisions" (Articles 1 and 13), the "invisible" provisions, and positive and negative obligations.

Human rights decision-makers need to become familiar with the case-law relevant to their professional particularity from *all the jurisdictions* – not just from their own. But it must be done properly – they need someone to help make the (alien) ECHR case-law from other jurisdictions relevant to their day-to-day work. The case-law (not even the case-law from their own jurisdictions) cannot simply be translated and disseminated, though it would be a start if all judgments (or at least all important judgments and not just Grand Chamber judgments) were available at least in both official languages of the Council of Europe. But read in isolation, many of the judgments are sibylline and require the application

93. See e.g. *Verein Gegen Tierfabriken Schweiz v. Switzerland* (Grand Chamber judgment to be handed down on 9 July 2008) and *Mehemi (2) v. France* and *Dowsett (2) v. U.K.* (pending).

of modern training methodologies if they are to be understood and applied by those who need to implement the standards they set or confirm. Only when they understand these judgments can officials cultivate the practical tools, such as the keeping of custodial records and the use of particular investigation techniques, necessary to give practical effect to the standards.

But they also need to know how the ECHR fits in with other binding international standards. For example, people should be made aware of Article 53 and especially the decisions of the UN treaty bodies; the HRC is fortunate now to have a former distinguished judge of the ECHR in the person of Elizabeth Palm; soft law such as the European Code of Police Ethics or the European Prison Rules.

They need to know about the work of the Committee of Ministers (and here may I thank them for their excellent first report, which is a marvellous document – many congratulations!) Those being trained need to know that other states have had to react to judgments, change their law and practice and *how* they have done this. The AIRE Centre's experience with Serbia, where we held a seminar to share the experiences of other governments, could usefully be duplicated elsewhere.

WHEN do they need training?

They need it ALL the time. Continuous professional development for all those we have identified in the who section above (and all those we didn't but should have!) is incredibly important. They must be kept properly up to date on ECHR case-law.

Furthermore, they need to know about the applicable standards *before* violations have occurred. There was no training on ECHR and trafficking before *Siliadin* was decided, and even now most of the anti-trafficking initiatives of which I am aware do not focus on the relevance of Article 4.

Training is also important after judgments have found a state to be in violation. Those responsible for the violation will often need to explore *for themselves* precisely what they did wrong so that they can make sure it doesn't happen again. Such training should always include a follow-up element and incorporate the drafting and adopting of best ECHR practice guidelines or check lists. But this must come "from the heart," as the Earl of Onslow said yesterday.

And finally – it is important that states devote as much time and energy to encouraging, nurturing and fostering best ECHR compliant practice *within the existing legal framework*. There is often a tendency just to throw yet more new legislation at the problem and hope it will go away. Too often have I been in states where the existing legislation was fine but was not effectively utilised. The solution adopted was to change the legislation, not the bad practices and attitude.

WHERE should they learn it?

Human rights training should occur in the workplace. People must be trained together with their related professional colleagues in other disciplines. It should take place locally and regionally, with direction and encouragement from the central government and the Supreme Courts. But it is essential to win hearts and minds. Contrary to what we have been hearing in this room, a lot of people in a lot of member states, old and new, are not in favour of Europe as an idea. Nor are they in favour of human rights, especially for terrorists and paedophiles. Politicians don't like this, but a lot of those who hold these views are the very people we have identified in the who section. You can take a horse to water, but you cannot make it drink. (In French, the saying is "On ne saurait faire boire un âne qui n'a pas soif" – but I wouldn't like to suggest that Europe's public officials and judiciary are to be compared to donkeys!)

Training can also occur abroad. Resistance to applying international law is best addressed by exposure to "abroad." Foreign countries and foreign (i.e. international) legal systems seem less foreign once visited. Such "study visits" must be proper study visits. For example, when we took Serbian and Montenegrin judges to visit Strasbourg, we ensured that we had a prior seminar at which we discussed the case we would be seeing, provided the admissibility decision in local languages, and, after the hearing, held a discussion about the procedures and issues raised.

HOW should it happen?

Training should be systematic and mainstreamed; this means properly funded ECHR training.

If local high level dignitaries (such as Supreme Court judges) have the relevant expertise, they are the best to provide the training needed. From a *status* point of view, the national judge in Strasbourg is the very best, and the Council of Europe and the Court needs to ensure (not just permit) that national judges return sufficiently often to their own states for their presence to be felt.

Registry lawyers doing national cases are the next best to provide human rights and ECHR training. The Registry, for obvious reasons, may be reluctant to release them but this reluctance is misguided, as effective training can reduce the Court's caseload.

At this stage, many countries still lack enough of their own real experts and thus need international experts. While this remains necessary, we should work to do away with the "parachuting" of experts who are familiar with the ECHR but unfamiliar with local data. All the internationals sent to a country must be prop-

erly briefed on the relevant aspects of local law and practice and on the problem areas.

In addition, it is important to provide all training materials in local languages. Sadly, recycled English power point presentations add little and distract an audience with a poor or no knowledge of the language.

If foreign speakers must be used, quality interpretation is essential. Where the speakers do not prepare a written text (a time-consuming exercise for busy people who are often asked to attend at short notice and on an expenses only or token honorarium basis) it is important that they talk through problematic language with the interpreters – common Convention phraseology can be a nightmare for an inexperienced interpreter.

Efficient and effective have different meanings in English – but are forever being used interchangeably and with the wrong meaning. "Motivated" does not mean "reasoned". In addition, some common words have very complex technical meanings "criminal," "charge," "arrest," and even "application" and "complaint." And if you think that those are challenging, try translating Convention terms such as "precise and ascertainable" or "dynamic and evaluative" or explaining what "moral and physical integrity" is!!

Training will still need to be done by internationals. Being an expert on the ECHR is necessary but not sufficient. It does not necessarily mean that the person is a good trainer. Training is a skill which often has to be acquired or learnt. As such, the use of expert training methodologies is important. For example, at the AIRE Centre, we produced a methodology for training the trainers for our seminars; we have since adapted and refined this methodology for the Council of Europe, and it is now on the HELP website.

It is always important to deliver ECHR standards in *thematic* contexts – not article by article. Practical situations never arise in neatly boxed ECHR articles. Training which, for example, addresses all the ECHR issues relevant to the pre-trial stage of criminal proceedings will be far more effective that one which treats Article 5 or 6 of the Convention in isolation.

Conclusion

Finally, there is a pressing need for co-ordination – at least at national level. All too often the Council of Europe arranges, or is forced by circumstance to arrange, a seminar which is held ten days or two weeks before a similar event organised by someone else or worse still on the same days as another events.

This year in the first five months alone, I have conducted trainings on the ECHR in Greece, Netherlands, Hungary, Serbia, Montenegro, Turkey, the UK and Ireland. Only one of those was a Council of Europe activity, and that was in Turkey where I was working with the Council of Europe's Counter Terrorism

group. If our target groups are not to suffer ECHR fatigue, greater co-operation and collaboration between human rights bodies at a local level is needed.

In the end, the practical and effective implementation of Convention rights will depend on effective systematic training supported by the necessary political will and the necessary financial support. The Council of Europe HELP programme in particular needs that support.

The need for training runs and runs. Rome was not built in a day. Drip-feed technique is slow, but it is the best. And while the Council of Europe must continue to play a key role, they should continue to support the initiatives of other organisations and institutions. ★

Summary conclusions

Mr Philippe Boillat

Director General of Human Rights and Legal Affairs, Council of Europe

Chairperson, Excellencies, Ladies and gentlemen,

Now we are approaching the end of our work. Allow me first of all to **congratulate the Swedish Presidency** for having chosen the theme of this Colloquy and, more generally, for having given first place amongst the priorities of its presidency to the realisation of the fundamental objective of the Council of Europe: making human rights an effective reality. Strengthening implementation of the European Convention on Human Rights at national level contributes fully to the realisation of this objective.

This **priority of the Swedish Presidency** fits perfectly into the decisions of the Ministers of Foreign Affairs adopted in Rome in 2000, on the occasion of the 50th Anniversary of the Convention, then in the package of measures adopted by the same ministers in 2004 and confirmed by them in 2006. Furthermore, one can only welcome the continuity of this action, after than undertaken by the San Marinese and Slovak presidencies, and express the wish that the following presidencies of the Committee of Ministers pursue the same course.

After two days of presentations and intense discussions, it would be somewhat ambitious, even pretentious of me to want to give a brusque summary of the particularly rich exchanges of views we have had. It will therefore be not so much conclusions, strictly speaking, but rather **non-exhaustive observations** raising the salient points that can nurture reflections during our future work.

If I had to sum up the substance of our work in a single word, I would hold on to "**subsidiarity**." All our reflections have centred on this fundamental notion – a fundamental notion that underpins the whole control system of the Convention and that finds its formal expression, above all, in articles 1, 13 and 35 of the Convention.

The **collective responsibility** of states party to the Convention, as set out in the Preamble thereto, was recalled, in particular in connection with supervision of the execution of judgments. Collective responsibility and solidarity were also quite rightly evoked, however, in connection with the implementation at national level of the package of measures adopted in 2004. It seems to me equally that the last state yet to ratify Protocol No. 14 should find itself called upon to show collective responsibility and solidarity. Indeed, all the states party must show their solidarity and accept their responsibilities in the face of a risk of implosion of the control system of the Convention.

It was recalled most judiciously that collective responsibility is a notion that finds itself applied equally on the **domestic level**: all state authorities – executive, legislative and judicial, including local and regional bodies – are collectively responsible and must show solidarity in the face of the obligations accepted by the state in the name of the Convention. Confronted with a given problem, every authority should ask itself, "What would Strasbourg say?"

In this context, one can note with satisfaction that, for several years, the Convention has been a part of domestic law in all the states party to the Convention. This amounts to a very important factor in permitting full and complete implementation of the principle of subsidiarity.

Similarly, **direct application** of the Convention seems now to be generally accepted in all member states, which allows the Convention to be invoked directly before national authorities, in particular before the courts.

It was pointed out that national judges must find themselves recognised as having the capacity to guarantee the **primacy of the Convention**. Integration of the Convention into domestic law, direct application of the Convention and primacy of the Convention over conflicting national law are decisive elements for ensuring full implementation of the Convention at the national level. But are these principles a reality in all our member states? Can national judges really apply the Convention and the case-law of the Court directly, where necessary, at the expense of conflicting national law? We have heard that even in the oldest states party, misunderstandings or, at least, uncertainties sometimes occur over the status of the Convention and, perhaps more often, the case-law of the Court. It should be possible to overcome these misunderstandings and uncertainties, notably through dialogue between national courts – especially constitutional and supreme courts – and the Strasbourg Court.

From there, I come to the question of execution of judgments. **Full and prompt execution** of the Court's judgments is of the utmost importance for the effective judicial protection of the victims of violations, for the prevention of future violations and for guaranteeing the authority of the Court. In this context, the *erga omnes* effect of judgments was raised repeatedly. One must recognise that the full effectiveness of the principle of subsidiarity is to a large extent

dependent on the *erga omnes* effect of the Court's judgments, in other words going beyond the *res judicata* to a full recognition of the ***res interpretata***. In fact, so far as possible, it is necessary to anticipate possible future violations of the Convention by attacking the very sources that may be found in national legislation and practice. As was underlined during the government Agents' seminar in Bratislava last April, states' best defence is above all the prevention of violations at national level.

It was suggested that the *erga omnes* effect – *de facto* or *de jure* – could be enhanced through more systematic use of **third-party intervention** by states. It is indeed likely that states would thus feel more concerned by judgments and that this would promote the effect.

It was in this context that discussion took place on the introduction into the Convention system of **advisory opinions** – which could also be requested by states and no longer be limited to the Committee of Ministers alone – and **preliminary rulings**. In once again turning to these issues, we must ask ourselves, what would be the consequences on individual applications once the Court's opinion was known? In addition, would these new approaches produce a real gain in effectiveness or, on the contrary, would they further increase the burden on the Court?

Beyond these reflections, the question of introducing preliminary rulings was also linked to the far more fundamental question of the very nature of the Court: should it eventually become a **European Constitutional Court of Human Rights**, limiting itself to addressing issues of principle? Should it be endowed with a discretionary power to choose from amongst the applications, following the model of the *certiorari* procedure as understood by the United States' Supreme Court? We are all aware of the potential consequences of the response to these questions for the very nature of the right of individual petition. These issues were the subject of intense discussions during negotiation of Protocol No. 14. The solution that emerged was clearly rejected, being found not to be politically acceptable. Without doubt, however, it will be necessary to take up these questions anew.

What about the **role of national parliaments**? This role has also been advanced as a key element of subsidiarity. Indeed, parliaments should apply themselves yet more to a close examination of the compatibility of laws and practices with the Convention, an exercise that, undertaken with a view to the *erga omnes* effect, could by all accounts have a particularly beneficial preventive effect. It was also underlined that the contribution of parliaments can prove decisive during the implementation of judgments, insofar as it is sometimes necessary to adopt legislative measures rapidly in order to achieve conformity. Several examples of good practice were put forward to promote this active parliamentary role, which presupposes also an active role for the executive (often

the government Agent). This in fact involves not only informing parliament of the judgments handed down against the state concerned, but also of informing it of judgments that could be of interest to the state. It is clearly strongly desirable that this practice be extended to all states.

Whatever its status in domestic law, the Convention itself obliges states to put in place **effective remedies** that are capable not only of finding a violation but, where necessary, of correcting it, notably by offering adequate just satisfaction to the victim of the violation. Putting in place effective remedies is a complex, ongoing process involving at once the executive, legislative and judicial authorities. It has quite rightly been pointed out that the introduction of new domestic remedies requires negotiation and co-operation between the different actors, and that all possible means should be explored for resolving complaints at the national level, notably by non-binding measures such as mediation.

We have heard with interest that, in certain countries, Supreme Courts have adopted a **creative approach to interpret domestic law in such a way as to avoid violations**, going so far as to establish new remedies, founded directly on the Convention. Could this approach, much more rapid than legislative reform, be generalised in the legal orders of all the member states? More specifically, is this approach being used in those states where it is possible? Should the Council of Europe do more to examine and encourage this possibility? These questions need to be examined.

A possible **new binding legal instrument on domestic remedies** has also been suggested on several occasions. The Reflection Group of the Steering Committee for Human Rights (CDDH) has set aside the idea of a new convention: on the other hand, it has expressed its interest in a possible "soft law" instrument. We await the discussions to come within the CDDH and its subordinate bodies on this issue with great interest, all the more so given that the Court has established criteria for determining the effectiveness of such remedies, at least in the context of excessive length of proceedings in the sense of article 6 § 1 of the Convention. For myself, I would say that the legal instruments are already in place. Article 13 of the Convention is of direct application. What therefore would be the real value added of a new binding legal instrument? What is perhaps missing is a real political will to give full implementation to this Article 13. A new political declaration of the Committee of Ministers to this end could be welcome.

It has been underlined that the **so-called pilot judgment procedure** has allowed the Court, basing itself on a resolution of the Committee of Ministers, to prove its creativity in identifying structural or systemic problems and guiding the respondent states in the execution of the judgment. This procedure has been welcomed by the majority of judges of the Court and also strongly encouraged by the Group of Wise Persons, as well as by Lord Woolf. But as with any novel procedure, it is open to further development and remains subject to discussion.

For example:

- Is it necessary to introduce this procedure formally into the Convention?
- Is it necessary to introduce it into the Rules of Court?
- Is it necessary to regulate better the respective competences of the Committee of Ministers and the Court concerning the execution of these judgments?
- Is there a need to instigate a simplified procedure, before the Court has even pronounced judgment?

All these questions will be the subject of in-depth discussions within the Reflection Group. In any case, to my mind, the **nowadays entirely judicial character of the control system** should in no way be put into question, it being one of the essential achievements of Protocol No. 11, the 10th anniversary of whose entry into force we are celebrating this year.

Beyond the question of procedure before the Court, is it true that the stage of **supervision of execution of judgments by the Committee of Ministers** has become increasingly judicial? And if this is indeed the case, have we reached the point where we must ask whether the Committee of Ministers is fully equipped to address the range of issues that arise at the stage of execution of judgments? Must we confer this task on a body with more judicial character, separate from the Committee of Ministers or under its delegated authority? Would such a reform make the supervision of the execution of judgments more effective, or would it reduce its effectiveness? So many questions which, for the time being, remain without clear answers.

It has been unanimously pointed out that **rapid and easy access to the Court's case-law in the national language** is essential for obtaining an *erga omnes* effect *de facto*. And indeed, anything that enhances the authority of the case-law contributes significantly to guaranteeing the effectiveness of the Convention. It has been rightly emphasised that translation is above all part of the obligations of national authorities, where appropriate – as was suggested notably by the government Agents in Bratislava – in partnership with others and in particular with states that share the same language. That said, the Registry's initiative to compile existing translations and make them available via the HUDOC database would certainly be very useful and much appreciated. It has also been underlined that it would be highly desirable to translate certain judgments that do not involve the respondent states but which would be likely to have a direct or indirect effect on legislation and national practices.

Alongside co-operation between states sharing the same language, **numerous examples of good practice** have been mentioned during both the present colloquy and the seminar in Bratislava. In this connection, I would mention the publication of collections, of manuals or of vademecums concerning the Court's case-law; accompanying judgments, often complex, with explanatory notes; co-operation with the private sector or with NGOs; and finally, making the best use

of the internet and of information technology in general. Furthermore, as was emphasised in Bratislava, how can we develop the potential role of government Agents in selecting judgments that merit being translated and/ or disseminated and in encouraging the translation and dissemination of Committee of Ministers' resolutions concerning execution?

Whilst welcoming the efforts already made to train judges, prosecutors and prison staff in human rights standards, it has quite rightly been pointed out that the **need for training** extends also to other categories, such as the armed forces, civil servants and parliamentarians. Training must extend to all those involved in the defence of human rights, which implies a willingness to receive training. In this area, the member states have a primary responsibility. In order for this training to be effective, the language used must be perfectly exact, which implies high-quality translation and interpretation during the organisation of training courses in the member states. Finally, the need to follow-up and evaluate training, as well as the usefulness of identifying good practices in this field, were underlined.

Of course, the member states are not alone in this task. The Council of Europe's **HELP** programme of human rights training for legal professionals has shown itself to be innovative and extremely useful. I recall that financing for this programme will allow it to continue only until the end of this year. It would therefore be most appreciated if our member states undertook to continue it by allowing its financing through voluntary contributions. And since I am making this call for financial contributions, I would also like to mention the "**Human Rights Trust Fund**," a Norwegian initiative that displays considerable potential for supporting specific efforts undertaken in countries, in co-operation with the Council of Europe, to reinforce the implementation of the Convention at national level. I welcome, with great satisfaction, the fact that a second state has made a contribution to this Fund and invite all the member states to do likewise.

We have heard how both the Court and the Commissioner have established extremely useful and fruitful relations with **civil society, human rights defenders, national human rights institutions and Ombudsmen**. I would especially point out the usefulness, even necessity of putting in place genuine **national human rights action plans**, creating a strategy and timetable for ensuring, in a coherent and effective way, the implementation of human rights at national level.

But is the public really aware of its rights and how to protect them? What more can national authorities do in order to **increase public awareness**, to improve public knowledge of these issues and to encourage public debate? If it is true that human rights are too important to be left to one profession, how do we bring them out of this "ghetto?" What can bodies such as professional associations, NGOs and the media do to stimulate and feed public debate? What

potential might the internet represent in this connection? There we have so many questions to which we will need to give further attention.

From there, I come to the last point, of utmost importance: the **implementation of the recommendations**. The follow-up exercise on implementation of the 2004 recommendations was, without doubt, unprecedented within the Council of Europe and reflected the particular status that the Committee of Ministers had wished to afford to these crucial instruments. Whilst clearly affirming that overall, the member states had "played the game" and responded in good faith to the recommendations, it was also underlined that this response had not always reached the level of proactivity required. We are all aware of the fact that the member states cannot provide replies to questionnaires indefinitely. We know that the Committee of Ministers wished to take a break from collecting information on an intergovermental basis. Nevertheless, it is indispensable to maintain political will in this area. The sixty years of the Council of Europe in 2009 and of the Convention in 2010 were evoked as important occasions for a political reaffirmation of this will.

In the meantime, it is important that the Council of Europe ask itself a number of questions:

- Do we need to review and further develop the competence and the role of the Committee of Ministers in supervising and promoting the implementation of these instruments?
- Do we need a specific body to discharge this task, or can one assume that the Committee of Ministers, together with, for example, the **Commissioner for Human Rights**, the **Venice Commission**, the **European Commission for the Efficiency of Justice** (CEPEJ), the **execution department** and the **capacity building division** are already doing what is necessary? Would enhanced co-operation be enough?

  We cannot avoid giving answers to these questions.

The Secretary General opened this colloquy by setting out a series of questions. I hope that I have not disappointed his expectations, or yours. In fact, not only have I not replied to each of the questions asked, on the contrary, I have added to them. That said, the goal of this Colloquy was not simply to respond to the questions that were already known to us, but to identify those to which it will fall to us to respond in the future. To this end, I believe I can say that our Colloquy has fulfilled expectations.

Those who will continue our reflections and attempt to put them into effect must not lose spirit. They must know that they can count on the full support of the Directorate General for Human Rights and Legal Affairs to complete their task successfully.

I could not allow myself to finish without thanking you all for your active participation in the debates and expressing once again, on everyone's behalf, our

gratitude to our Swedish hosts, who have marvellously honoured their country's tradition for hospitality and generosity. ★

Closing address

Mr Per Sjögren

Ambassador Extraordinary and Plenipotentiary, Chairman of the Ministers' Deputies of the Council of Europe, Permanent Representative of Sweden to the Council of Europe

Mr President of the European Court of Human Rights, distinguished Representative of the Parliamentary Assembly, Mr Commissioner for Human Rights, Colleagues, Ladies and Gentlemen.

First, allow me to express, on behalf of Mr Carl Bildt, Minister for Foreign Affairs and Chairman of the Committee of Ministers, our thanks to you all for your participation here during the past two days. Our discussions have been frank, pragmatic and above all result-orientated. For the Swedish Chairmanship, for whom this is a key priority, there can only be satisfaction in this.

Speakers have identified three facets of human rights protection:

- at national level, member states must ensure that rights and freedoms are properly guaranteed and protected through effective remedies and appropriate laws and practices;
- at international level, the European Court must be in a position to deliver swift and effective justice whenever the national system fails;
- thirdly, returning to the national level, the Court's judgments must be executed in compliance with the Convention, providing redress to the applicant and ensuring that general measures are taken to prevent similar violations in the future. Effective procedures for supervising execution are very important here.

These facets are interlinked and interdependent: for example, more effective execution enhances human rights protection and thus contributes to easing the burden on the Court. This means that we have many fronts on which to advance: for example, in the presence of the growing number of violations arising from

complex, systemic problems, we are seeing greater implication of national authorities in the general process of supervision of execution, which is positive.

We can also call on a variety of actors within the Council of Europe in this respect: not just the Court and the Committee of Ministers, but certainly the Parliamentary Assembly, certainly the Commissioner, and probably the CEPEJ and the Venice Commission and even others.

In fact, you may agree that all the bodies, whether intergovernmental or interparliamentary, which have been involved over the years in improving the European domestic legal order, have been contributing to the end we are met here to pursue.

I think we have all taken note in particular of what the Commissioner said this morning, and what was said yesterday about the particular potential contributions of the Court, the Assembly and the CDDH. There is no lack of pointers to the way forward.

As I said, this is a matter of utmost priority for the Swedish Chairmanship and we are determined to take the matter forward energetically and with the greatest possible coherence. Everyone who has spoken has agreed that reinforcing implementation of the Convention at national level is of prime importance. A wealth of good practice and thought has been laid before us and proposals have been placed on the table.

What has been said for the past two days, and in particular the admirable conclusions just presented by Director General Boillat, will provide us with ample material to work on. Next week he and I will be reporting to the Ministers' Deputies on this colloquy, and the Swedish Presidency will lay before them a plan leading to a concrete and consistent approach to the question.

Before closing, I should like to say a few "thank-you's" on behalf of us all. Thanks to the organising team and to the interpreters. Special thanks to the Directorate General of Human Rights and Legal Affairs of the Council of Europe for their essential contribution. Thanks to all the speakers, both invited and spontaneous who made our debates so rich in reflection. And finally, thanks to you, Mr Chairman, for conducting our proceedings so effectively and purposefully.

To those who are returning home, I wish a good journey and to those who are staying to enjoy Stockholm a little longer, I wish you a pleasant stay. ★

Programme

of the Colloquy

Monday 9 June 2008

8.15 Registration

9.00 *Welcome address*: **Ms Beatrice Ask**, Swedish Minister for Justice

9.20 Chairperson: **Ambassador Carl Henrik Ehrenkrona**, Director General for Legal Affairs, Swedish Ministry for Foreign Affairs

9.25 *Member states of the Council of Europe and their responsibilities under the European Convention on Human Rights*: **Rt Hon Terry Davis**, Secretary General of the Council of Europe

9.45 *National aspects of the reform of the human rights protection system: the expectations of the European Court of Human Rights*: **Mr Jean-Paul Costa**, President of the European Court of Human Rights

10.00 *A reminder of the main elements of the reforms agreed by the Committee of Ministers*: **Ms Deniz Akçay**, Chairperson of the Steering Committee for Human Rights (CDDH)

10.15 *State of implementation of the national aspects of the Reform*: **Mr Vit A. Schorm**, Chairperson of the Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR)

10.30 Coffee break

11.00 Theme 1
Ways and means of strengthening the implementation of the European Convention on Human Rights at national level: **Keynote speaker: Mr Giorgio Malinverni**, Judge at the European Court of Human Rights, Emeritus of the University of Geneva

11.20 *The effectiveness of the European Convention on Human Rights at national level: the parliamentary dimension*: **Ms Marie-Louise Bemelmans-Videc**, Member of the Parliamentary Assembly of the Council of Europe

11.40 *Domestic Remedies: the Austrian experience*: **Ms Ingrid Siess-Scherz**, Head of the Legal, Legislative and Research Service of the Austrian Parliament, former Vice-Chair of the Steering Committee for Human Rights (CDDH)

12.00 *Domestic remedies: the Swedish experiences*: **Ms Anna Skarhed**, Justice of the Swedish Supreme Court

12.20 *Execution of national judgments: the Russian experience*: **Ms Veronika Milinchuk**, Representative of the Russian Federation at the European Court of Human Rights, Vice- Minister of Justice

12.40 Questions and discussion

13.10 Lunch hosted by the Swedish authorities

14.40 Theme 2
Amplifying the effect of the Court's case-law in the states parties: **Keynote Speaker: Ms Elisabet Fura-Sandström**, Judge elected in respect of Sweden to the European Court of Human Rights

15.00 *Screening domestic legislation*: **The Earl of Onslow**, House of Lords Member, Joint Committee on Human Rights, UK Parliament

15.20 *Pilot judgments from the Court's perspective*: **Mr Erik Fribergh**, Registrar of the European Court of Human Rights

15.40 *Pilot judgments: the experience of a Government Agent*: **Mr Jakub Wolasiewicz**, Government Agent of Poland

16.00 Coffee break

16.30 *Registry Information Activities*: **Mr Roderick Liddell**, Director of Common Services in the Registry of the European Court of Human Rights

16.45 Questions and discussion

17.30 End of the Session

18.20 Departure for dinner at the *Vasa Museum* hosted by **Mr Frank Belfrage**, State Secretary for Foreign Affairs at the Swedish Ministry for Foreign Affairs

Tuesday 10 June 2008

9.00 Theme 3
Assisting member states in implementing the Convention: **Keynote Speaker: Mr Roeland Böcker**, Government Agent of the Netherlands,Chair of the Reflection Group on the follow-up to the Wise Persons' Report (DH-S-GDR)

9.20 *The Commissioner's role*: **Mr Thomas Hammarberg**, Council of Europe Commissioner for Human Rights

9.40 *The Council of Europe's support for national capacity-building on the European Convention on Human Rights*: **Ms Hanne Juncher**, Head of Division,Legal and Human Rights Capacity Building Division, Directorate General of Human Rights and Legal Affairs

10.00 *Professional training on the standards of the ECHR*: **Ms Nuala Mole**, Director of the AIRE Centre (Advice on Individual Rights in Europe)

10.20 Questions and discussion

11.00 Coffee break

11.30 General discussion

12.40 *Summary conclusions*: **Mr Philippe Boillat**, Director General of Human Rights and Legal Affairs, Council of Europe

12.55 *Closing address*: **Mr Per Sjögren**, Ambassador Extraordinary and Plenipotentiary, Chairman of the Ministers' Deputies of the Council of Europe, Permanent Representative of Sweden to the Council of Europe

13.00 End of the Colloquy

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Stockholm, 9-10 June 2008/Stockholm, 9-10 juin 2008

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Ambassador, Director General for Legal Affairs, Swedish Ministry for Foreign Affairs/ Ambassadeur, Directeur général des affaires juridiques au Ministère suédois des Affaires étrangères

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Swedish Minister for Justice/Ministre suédoise de la Justice

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Secretary General of the Council of Europe/ Secrétaire général du Conseil de l'Europe

M. Jean-Paul Costa
President of the European Court of Human Rights/Président de la Cour européenne des droits de l'homme

Mme Deniz Akçay
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M. Vit Schorm
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State candidate for membership/Pays candidat à l'adhésion

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