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CONFERENCE ON THE PRINCIPLE OF SUBSIDIARITY

"STRENGTHENING SUBSIDIARITY: INTEGRATING THE COURT'S CASE-LAW INTO NATIONAL LAW AND JUDICIAL PRACTICE"

Skopje, 1-2 October 2010, 10h30.

Address by Mr Christos Pourgourides, Chairperson of the Committee on Legal Affairs, Parliamentary Assembly of the Council of Europe

Ladies and gentlemen,

We have a very important topic to discuss today. The principle of subsidiarity could indeed be the key to saving the Strasbourg Court from drowning in large numbers of repetitive cases. So please allow me to go straight to the heart of the subject-matter.

As a practising lawyer, I should like to be practical: how can we prevent the Court from dealing – again and again - with similar violations occurring in different countries although the meaning of Convention standards is often abundantly clear in the light of previous cases decided by the Court?

The answer resides in a somewhat forgotten principle – that of the "*res interpretata"* authority of the Court's judgments. It means nothing more and nothing less than the duty for national legislators and courts to take into account the Convention as interpreted by the Strasbourg Court – even in judgments concerning violations that have occurred in other countries.

Here are two examples:

The Court held as early as in 1979, in Marckx v. Belgium, that children born out of wedlock must not be discriminated. French law was similarly discriminatory. But the necessary changes were made only after France herself was condemned by the Court in the case of Mazurek v. France, in 2000! It was obvious, already back in 1979, what the Court's position would be. Twenty years lost for the victims of such discrimination, and many years of unnecessary litigation before the Court in Strasbourg.

The second example concerns my own country: whilst the Court had already decided in 1981, in Dudgeon v. the United Kingdom, that homosexual acts between consenting adults must not be criminalised, Cyprus waited until the Modinos v. Cyprus judgment in 1993 to finally decriminalise such acts – and even then, I recall it well, without much enthusiasm.

Such practice is simply unacceptable if we agree that the common objective of all Parties to the Convention, under its first article, is to "secure" the rights and freedoms laid down in the Convention. This means that human rights violations must first and foremost be ***avoided.***

Effective remedies to provide redress when a violation has nevertheless occurred are only second-best. And only when these remedies do not function at the national level must the Strasbourg Court step in. This is what the principle of subsidiarity means.

The successful implementation of this principle, which best serves both the respect of national sovereignty and the protection of human rights, depends on two conditions:

The first is that the national legislatures and courts are aware of, and give due consideration to the case law of the European Court of Human Rights, including cases concerning other countries.

The second condition is that the Strasbourg Court exercises appropriate self-restraint in the interpretation of the Convention, respecting the States Parties' margin of appreciation that the Court has itself stipulated in its well-established case law. This is especially true in sensitive cases concerning fundamental moral issues or deep-rooted national traditions. Here I have in mind cases such as Lautsi v Italy, presently before the Grand Chamber.

This being said, let us be clear that the Strasbourg Court is the one body that is invested with the authority to interpret the Convention. Article 19 of the Convention is clear on this.

This is undisputed among the Contracting Parties. In Interlaken, they clearly reaffirmed their commitment to

> *"tak[e] into account the Court's developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another state, where the same problem of principle exists within their own legal system."*[1]

The UK Human Rights Act of 1998 stipulates that UK "**must take into account**" the Convention as interpreted by the Court.

In Ukraine, a 2006 law even elevates the case law of the Strasbourg Court to the status of a "**source of law**".

For its part, the EU Charter of Fundamental Rights has recognised that it is the role of the European Court of Human Rights to create a "**common European denominator**" – thus not excluding higher standards – for the interpretation of basic rights in Europe. Given that the EU is not yet a Party to the Convention, this is particularly remarkable.

Not surprisingly, the Grand Chamber of Strasbourg Court itself has upheld this position. Let me quote, for example, from the recent judgment in Rantsev v. Cyprus and Russia:

> *"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*

[1] Interlaken Action Plan, para. 4c, http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/texts_&_documents/CAHDI%20_2010_%20Inf%206%20Interlaken%20Declaration_EN.pdf

Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties."

[The path was paved , for the Grand Chamber, by the Chamber judgment in the case of Opuz v Turkey (2009): "…bearing in mind that the Court provides final authoritative interpretation of the rights and freedoms defined in Section I of the Convention, the Court will consider whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, **even when they concern other states**" (§ 163, emphasis added).

We could think of the Convention's protection regime as a "body" of law: the text of the Convention's articles are the bare bones, and the Court's judgments the flesh on those bones.

The "*res interpretata*" authority of the Court's judgments must not be confounded with legally binding effects - "*erga omnes*" - which the Court's judgments do not have. Under Article 46 of the Convention, judgments are binding "*inter partes*". But as we have seen, "*res interpretata"* authority is based on Articles 1 and 19 of the Convention, not Article 46.

[That said, I ask myself the question: are not all Parties to the Convention bound by the findings of the Strasbourg Court in the Mamatkulov & Askerov case against Turkey (Grand Chamber, 2005), to the effect that ignoring provisional measures ordered by the Strasbourg Court leads to a violation of the effective exercise of the right of individual application (Article 35 of the Convention)? Can one not here talk of *"de facto - erga omnes"* effect of Strasbourg Court judgments?]

Having established what could be termed as the "persuasive authority" of the Court's judgments in all States Parties to the Convention, all of which have – without exception – incorporated the Convention in to domestic law, let us have a practical look at how we can improve its implementation.

Firstly, however trivial this may sound, relevant judgments of the Strasbourg Court must be accessible to the legislative and judicial authorities in all countries which are potentially concerned – including in a language understood by those who are expected to take them into account. This is a field where there is still much room for progress – to put it diplomatically. Why not create Strasbourg 'case law monitoring units' in the Executive, perhaps attached to the Government Agent's Office, with a duty to report either to the Government or to Parliament, or to both? This process could be aided by such actors as parliamentary research and documentation services, legal journals, and the like. The Court itself should be given the resources to at least translate key extracts from important judgments into both official languages of the Council of Europe, not just those rendered by the Grand Chamber. Lawyers also have an important role to play: they should not fail to plead pertinent Strasbourg case law that sheds light on the interpretation of the Convention in their pleadings before national jurisdictions, even if the cases cited by them concern other countries. This presupposes that they are themselves properly informed of the Court's case law – which opens a wide field of action for continued legal training bodies, NGO's and well-targeted publications.

Secondly, it is the responsibility of national parliaments, in particular their legal affairs and human rights committees, to follow closely the evolution of the Strasbourg Court's case law in order to detect areas in which legislation and administrative practice in their countries need to be adjusted. Examples of good practice can be found in the United Kingdom and the Netherlands, in which the Strasbourg case law is regularly scrutinised.

[Here, it is important to 'impose' on national parliaments to set-up "specific mechanisms and procedures for effective parliamentary oversight of the implementation of the Court's judgments on the basis of regular reports by responsible ministers": Parliamentary Assembly Resolution 1516 (2009, § 22.1), not only limited to cases involving the countries concerned.]

Thirdly, in my view, the highest national courts have a duty to ensure that lower courts are aware of and respect Strasbourg case law. Here, I can refer to the Russian Supreme Court's Plenum Decree No. 5 of 2003, in which Russian courts are instructed to take into account the case law of the Strasbourg Court. [The text of this provision, as well as a considerable number of other important documents, legal texts and extracts from national court decisions concerning the "*res interpretata"* authority of the Strasbourg Court's judgments can be found in a 'Background Document" in your files which was prepared – upon my request - by the Secretariat of the Assembly's Legal Affairs and Human Rights Department.]

Fourthly, there must exist a constant dialogue between the Strasbourg Court and States Parties (including their highest courts) in the constantly evolving legal landscape of Europe. The necessary dialogue between Strasbourg and national courts could be facilitated by more frequent "third party interventions", which serve to spread "ownership" of the resulting judgments beyond the original parties to a case.

[A good recent example of this is the case of M.S.S v Belgium and Greece, in which not only the UNHCR and the Council of Europe's Human Rights Commissioner intervened as 'third parties', but also the governments of the United Kingdom and The Netherlands.]

Finally, the Committee of Ministers' supervision of the execution of judgments provides ample opportunities for member states' representatives specialising in human rights matters to learn about key cases whose significance often extends beyond the country which has been found in violation. The Hurst judgment concerning prisoners' right to vote in general elections springs to mind in this context. Such knowledge acquired at the executive level should find its way into the legislative process, possibly through the briefings on execution issues at parliamentary level, which I intend to suggest in my forthcoming report on the implementation of the Strasbourg Court's judgments.

These are only some possible avenues to promote the authority of the Strasbourg Court's judgments as *"res interpretata"*. Let us use the next two days to explore what else can be done – for the sake of further strengthening the protection of human rights throughout Europe and preserving the subsidiary character of the Convention system!