The Annual Regional Rule of Law Forum for South East Europe

Executive Summary

The aim of the forum was threefold. Firstly, to promote the implementation of the European Convention on Human Rights (ECHR) in the region, secondly, to encourage regional cooperation over the continued development of the Rule of Law and Human Rights, and thirdly, to assist the process of EU integration across the region.

This is the first time countries of the region have cooperated in this way. The Vice President of the Government of Montenegro and Minister of Justice, Dusko Markovic, and the President of the Supreme Court of Montenegro, Vesna Medinica, opened the event. The Forum also hosted four judges from the European Court of Human Rights (ECtHR) in Strasbourg. The invited participants were from Albania, Bosnia and Herzegovina, Croatia, Kosovo*, Macedonia, Montenegro and Serbia. The Forum brought together Presidents and Judges of Supreme Courts and Constitutional Courts from the region, Directors of Judicial Training Academies and Institutions, Government Agents before the Strasbourg Court, representatives of NGOs and prominent legal experts in the field.

The agenda included: (1) The AIRE Centre's presentation on the European Human Rights Database for SEE; seminars by ECtHR judges and open panel discussions on: (2) new developments in ECHR jurisprudence relevant to the region and (3) the importance of national implementation of judgments. Participants were invited to attend small working groups to further develop discussion points brought up in seminars. Finally, the forum finished with a short presentation by the Council of Europe's (CoE) representative on the cooperative activities and programmes initiated in the region and a closing discussion.

The forum was a successful product of inter-regional cooperation and sharing of best practises in the field of judicial reform in the context of European integration and the organisers intend to host this regional event annually.

General conclusions reached:

- The task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than with the Court. National courts are better placed to apply the Convention and should not wait for Strasbourg for an answer.
- The database is an essential tool that will provide Judges and legal professionals in the region with access to translations and publications on ECtHR jurisprudence, human rights handbooks and other literature. This will facilitate capacity building in the region by helping better interpret and implement ECHR caselaw at national levels.
- The evaluation, maintenance and funding of the database project are fundamental to its success. It was decided that a joint sustainability plan would be created to maintain the project and that the evaluation stage would be key to identify the practical use and success of the database in order to further its development.
- To maintain an annual forum where interested parties can meet and discuss best practises and select good examples of national application. This forum would serve to improve the skills and raise awareness of Judges and legal professionals on the ECHR, enabling harmonisation of national human rights legislation and practice with European legal norms.
- For EU integration to go forward, particular attention needs to be paid to the requirements of Chapter 23.

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* *This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.*

THE AIRE CENTRE
Advice on Individual Rights in Europe

GOVERNMENT OF MONTENEGRO

Foreign & Commonwealth Office

CIVIL RIGHTS DEFENDERS

annual regional
RULE OF LAW FORUM
for south east europe

REPORT

1. The European Human Rights Database for SEE

1.1 *Background*

The Database project was born a year and a half ago with the goal to develop an online Pilot - Database of ECHR jurisprudence in regional languages (bcms/Albania/Macedonian). The purpose was to create a 'one-stop shop' to assist national Judges in better applying the ECHR. The project has since expanded and interested beneficiaries of the database include JTC and Academies, NGOs and law students.

1.2 *Development of the Database*

In order to develop the project it was first necessary to identify the gaps in information and caselaw available in the local languages in the Western Balkans. The purpose was to tailor a database that would meet the current needs of its future users and avoid repeating already available information. Caselaw was translated and organised in a way that is easy to access and an online test Pilot for two Articles, Article 1 and Article 5, was developed to test the methodology of the project. Discussions were later initiated with HUDOC and the CoE HELP to find support with translations and links to other resources and training materials.

1.3 *What does this Database contain?*

The Pilot database contains translations of ECtHR caselaw in local languages, reports on jurisprudence against each of the countries, broad materials of ECHR case law, short narratives, overviews per Article, and comprehensive 'factual situations.' A handbook on how to use the database will also be published in July 2014 in both written and electronic versions.

1.4 *Who is it for and when will it be available?*

The database is free and available to everyone: National Courts, Judicial Training Centres and Academies, NGO's, legal practitioners and students. It will be launched in May 2014 in each country respectively with a tailored approach. We believe the launch will open avenues for the project to expand, to work with JTC and National Courts. Once launched, there will be opportunities to evaluate the database and assess what the users find most useful or most difficult and what can be improved or added.

1.5. *The future of the Database*

The forum gave the opportunity to participants to begin thinking about the future of the database and its maintenance. Discussions and questions of ownership and maintenance were raised.

1.6 *Conclusions*

Some conclusions included: the evaluation, maintenance and funding of the database project. It was established that further discussions were needed to elaborate a joint sustainability plan and to start thinking how to have a smaller format to care for the database. The quality of the database is fundamental. This year's forum will become a model to establish subsequent forums, where interested parties can meet and discuss best practice and select good examples of national application. It was acknowledge that other than being a much-needed practical tool, the database is also a project that, consequently, increases regional cooperation and communication. Finally, it was recognised that the development and maintenance of the database will depend on the funds and support available for it. The AIRE Centre has agreed to support the project and monitor its evaluation stage for the coming year in order to ensure quality control.

2. Identifying common problems and discussing new developments in ECHR jurisprudence relevant to South East Europe

The first panel and open discussion focused on identifying some of the main issues in the region and discussing possible solutions. Some of the countries in the region have exceptionally high numbers of applications per capita before the Strasbourg Court. Many of these cases are similar, indicating systemic problems in the domestic legal systems. The following is a brief overview of some of the issues discussed during the forum and their conclusions:

2.1 *Length of Proceedings*

Many countries have introduced laws to amend the problems of length of proceedings. In Serbia, the Italian model – the pinto model – was first adopted. Under this model, the proceedings were not expedited but instead applicants were being compensated for moral damage suffered due to the length of the procedure. This was a major problem as the only body authorized to compensate used to be the Constitutional Courts, which consequently became overloaded with those types of cases and was forced to undertake judicial reform. The reform resulted in adopting another model, the Austrian model. This model was introduced recently, thus making it hard to evaluate its results.

ECtHR Judges stressed that it is fundamental to think about national solutions in practical terms and not just as theoretical models. Often times enacting new laws does not solve the practical problems that exist and, in fact, these new laws often compound problems exponentially. It is important to recognize that the best solution is not always to enact new legislation. Increasing the number of Judges in national courts would help shrink the problem. Without an increase in these numbers, it is very hard to reduce the amount of backlog in the courts. There may be financial constraints, which may prove difficult to overcome.

2.3 *Social Enterprises*

"Social enterprises" have huge debts with its employees: non-payment of salary, contributions, pensions, etc. and have a huge number of cases against them. The problem is that these judgments have never actually been enforced and have no effective remedy. This is due to the fact that the government lacks funds and is unable to pay. There are hundreds of cases on social enterprises a week, which is a major problem. Some enterprises were ordered to pay the debts to their employees but could not do so as the enterprises have no funds to even pay current wages.

No conclusions were met for this subject, but the issues were carefully discussed. The panel of ECtHR Judges discussed this issue looking at the approach taken with former foreign currency accounts. In the case of the foreign currency accounts, payments were being made in regular instalments until 2016. It was approached in a systemic way. The government could have done the same for social enterprises but, unfortunately, did not.

2.4 *Lack of harmonization of judicial decisions*

There are structural problems that lead to lack of harmonization in judicial decision-making. For example, in Serbia, the four Courts of Appeal have contradictory judgments. Very few cases can reach the Supreme Court and only cases of very high importance meet the threshold (e.g. *Vincic and Others v Serbia*). This is a main procedural problem. The Courts of Appeal organise conferences to come to agreements on how to act, instead of having cases go to the Supreme Court. The Constitutional Courts have a different approach as they are almost in constant dialog with Strasbourg. As a consequence the practice is not harmonised.

It was suggested that some small legislative intervention would be necessary to correct the issue. Strasbourg Judges believe it could be solved without much financial assistance but rather some legislative intervention, particularly for cases involving Article 6.

2.5 *Length of detention*

A major problem for all countries in the region is prolonged and unjustified pre-trial detention. Amongst the cases discussed was *Rehbock v Slovenia*.

Some pointers given and conclusions reached were: a person must be brought promptly before a judge to determine the validity of the deprivation of liberty; it is fundamental that the judge sees the person in question not just his case file. Detention can never be established and/or determined in abstract terms, but must be individualized and properly justified. It is also very important that there is an automatic review for pre-trial detentions in order to ensure that a detention that may have been justified at the beginning continues to be justified.

2.6 *Re-opening of cases and the problem of repetition*

In order to allow for case law in Strasbourg to be incorporated, the Albanian Parliament (as of December 2006) made changes in the penal code regarding the re-opening of procedures. This new practice posed a circular problem. Decisions were coming from Strasbourg, then being passed to the Commission of Ministers but then returning back to Strasbourg because they were not implemented properly nationally (e.g. *Cyprus v Turkey*).

This is a reoccurring problem. ECtHR Judges highlighted that national Courts need to be careful about re-opening these cases. The ECtHR should not deal with repetitive cases. It should be part of the internal Courts to implement the order.

2.7 *The principle of subsidiarity*

There is the problem that often the reaction of national courts comes after the reaction of Strasbourg.

The task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than with the Court. The Court can and should intervene only where the domestic authorities fail in that task. However, it is clear that those who can apply the principle more efficiently are the national courts, as they are in the 'field' and can do it quicker. Better application of the ECHR at local level is also a more efficient application of the Convention. Strasbourg should not be used to decorate local decisions.

Some questions addressed to the Strasbourg panel included single judge decisions, the lack of reasoning published in inadmissibility decisions and the 6-month rule:

2.8 *Single Judge decision*

The practice of 'single judge decision' started in June 2010. Being a single judge is the most difficult task there is at the Court. First, you are alone. Secondly, the decision is final, there are no remedies after it, and it finishes there. A single judge can decide to declare inadmissible an application – and his/her decision is final. A judge can also decide to refer the case to a Chamber. It is also possible to refer it to a committee of three Judges if it does not deserve a full panel. There are some cases where a single Judge refers a case to a committee and the committee refer it to the Chamber. There are some examples of cases that perhaps should have been dismissed but end up being referred to the Grand Chamber.

2.9 *Lack of reasoning in single judge decisions*

Lack of reasoning for single judge decisions has been identified as one of the problems of the system.

Some of the applications generally don't deserve reasoning. In some instances, single Judges refer cases to a committee to ensure *some* reasoning. Just because a case does not meet the admissibility criteria it does not mean that the Judge has not given it serious consideration. ECtHR Judges base their decisions on very precise references to caselaw, although many look to prima facie ECHR cases when making their decisions.

2.10 *6 – month deadline*

Strasbourg judges have to be very careful about the 6-month deadline. When the countdown starts is fundamental. *Haxhia v Albania* and *Jovanovic v Serbia* were identified as two of the most important 6-month rule cases for the region.

2.11 Finally, each Strasbourg Judge was asked to discuss one new issue coming up before the Court.

a) Conflict and counter-terrorism: There have been some interesting cases in relation to the relationship between Europe and third countries (USA) conflict and counter-terrorism.
b) The rights of persons with disabilities: Mental health and mental capacity in the light of the adoption and ratification of the convention was discussed as a new issue.
c) The development on the right to receive information: Although the court had always previously said that Article 10 of the ECHR only gave you the right to receive information that other people wanted to give you, there has been a new development that now gives you the right to get information from people who do not want to give you information. (*Youth Initiative v Serbia*).

3. The importance of national implementation of judgments by the European Court of Human Rights

National courts have found difficulties in interpreting and applying judgments of the ECHR. Part of the reason for this forum was to work together to make that task simpler and more effective. This section focuses on two aspects of national implementation: 3.1) the importance of understanding the Convention rights and the Court's jurisprudence, and 3.2) the execution of judgments in accordance with Article 46 of the Convention.

3.1 *The importance of understanding the Convention rights and being familiar with the Court's jurisprudence*

Firstly, there is the issue of implementation at the national level of the corpus of ECHR judgments, which depends on a general knowledge and understanding of convention rights, and familiarity with the Court's jurisprudence. This is very important, as National judges are only able to give effect to the protected rights at national level if they are familiar with and understand the content of those rights. That content is found in the caselaw of the Court.

Article 1 of the ECHR is very simple. It states that "*High contracting parties shall secure to everyone within their jurisdiction the rights and freedoms in this Convention.*" To 'secure' means exactly what it says: contracting states must take all the legislative, judicial and practical steps necessary to ensure that the rights are fully guaranteed and applied.

For EU integration to go forward, particular attention needs to be paid to the requirements of Chapter 23. There must be concrete evidence that effective guarantees of the rule of law have been achieved in the candidate countries. In EU law, this is described as *effective legal protection.* EU law places a very great emphasis on what under the ECHR is referred to as "securing" the rights and requires Member States to have in place laws which will ensure that there are also national rules, administrative procedures, and judicial practices that will guarantee the effectiveness of the law in practice. This obligation comes before the right to an effective remedy, which is guaranteed in Article 13 of the ECHR.

Indeed the most important message to take away is that if the rights were properly "secured" at national level to begin with, we would not need Article 13 and even less need to take cases to Strasbourg. This is the dream.

As we know, the text of the ECHR is just the skeleton. To understand the ECHR, we must see the flesh and clothing on the bones, which is found in the caselaw. An educated judge is the prerequisite for ensuring a good judiciary. One of the many problems this region faces is that the decisions of the Strasbourg Court have largely remained inaccessible because they are not available in national languages. This poses a paradox, how are individuals to become these

"educated judges" if they do not have the resources to do so. The initiative that the AIRE Centre has taken with the database to make translations of the cases available is to help ensure that the most important judgments are available and easily accessible in the languages that the judges speak. So we hope the database will increase familiarity. You cannot criticise a judge for failing to give effect to a judgment if he/she does not have the possibility to familiarise him/herself with the case law.

3.2) *The execution of judgments in accordance with Article 46 of the Convention*

The second issue of national implementation is the execution of judgments in accordance with Article 46 of the Convention. Under the ECHR States have agreed to be bound by the judgments delivered by the ECtHR against them and to execute those judgments. But, even with the best political and legal will, this is not always easy. Sometimes it is difficult to know if the solution you are devising in order to comply with a judgment may itself give rise to future findings of a violation. It is not always clear how to find an ECHR-compatible mechanism for executing a judgment that has been delivered. The administrative bodies in Strasbourg have dedicated themselves to finding better ways to help contracting States execute judgments.

The fact that the CoE's Department for the execution of judgments is understaffed and overwhelmed with its workload makes it harder for it to provide the necessary expertise and assistance to States who are, in good faith, seeking to execute the judgment of the Court. However, it is imperative that judgments are duly executed, because a judgment at European level, like a judgment at national level, that remains unexecuted to the detriment of the injured party has only reached the midpoint in the judicial proceedings. Its execution is essential for the proceedings to be completed.

Last year, the Committee of Ministers adopted a new protocol, to the Convention - Protocol 16 - which, when it comes into force soon, will enable national courts to send questions to the ECtHR in order to clarify the answer they should give on the interpretation of the Convention. This is intended to make it easier for national courts to apply the Convention correctly. This is a system used for 50 years in the Court of Justice for the EU in Luxembourg and has proved very effective in assisting national courts across the EU to apply particular principles consistently, enhancing legal certainty.

When we look through the judgments in cases that are coming from this region to Strasbourg, we see many recurring issues, some discussed above, we also see a more general problem of lack of effective remedies and the difficulties in respect of the consistency of judgments, all which are necessary for legal certainty.

3.3 *Some conclusions*

Better national implementation of the Convention is in everyone's interest. Justice delayed may become justice denied. First, it is in the interest of individual citizens, who seek prompt redress for the violation of their rights, in particular where prolonged violation brings about irreversible consequences, for example in family cases. Second, it is in the interest of States, who avoid the embarrassment and costs involved in losing cases in Strasbourg. And finally, it is in the interests of the Strasbourg Court itself, which is wrestling with its backlog of cases – a backlog that would logically be reduced should the national implementation of Court judgments become more effective. For EU integration to go forward, particular attention needs to be paid to the requirements of Chapter 23.