HUMAN RIGHTS IN EUROPE: AN INSIDER'S VIEWS

Andrew Drzemczewski
Visiting Professor, Middlesex University School of Law, London[1]; formerly Head of the Legal Affairs & Human Rights Department, Parliamentary Assembly of the Council of Europe, Strasbourg.

1. INTRODUCTORY REMARKS

Ladies & gentlemen,

It is somewhat strange to find myself in Hendon, this evening. As some of you are aware, my parents, both Polish, bought a house, here in Hendon, back in 1947, on Audley Road, after demobilization - having spent the War Years in Siberia and then in the Middle East. Most of my childhood years were spent in Hendon, with a stint, as of the age of 10, at a Polish boarding school near Henley-on-Thames… Later on, when studying at the LSE, I often hid myself away - over the Christmas and Easter holidays - at the Hendon municipal library, next to the Town Hall at the Burroughs, a stone-throw away from where we are right now. Today, I am at Middlesex University, in Hendon, within a few minutes walking distance of the primary school I attended as of the age of 5 and that was over 60 years ago!

The title of my talk is "Human Rights in Europe: an insider's views." I am to speak to you about specific, selected, human rights issues dealt with by the Council of Europe. When I left the U.K. to start my career as a 'Eurocrat' in Strasbourg - over 31 years ago - the world was so different. Those were exciting times. We lived through an optimistic, indeed a 'euphoric' decade, subsequent to the rise of the *Solidarność* movement and the fall of the Berlin Wall.[2] The situation is very different today: major human rights violations still occur in a number of member states, for example, with respect to the situation in Ukraine and in the North Caucasus. There is a terrorist threat which has led to abusive use - by state authorities - of Article 15 of the European Convention on Human Rights (ECHR); look at what is happening in Turkey right now.[3] We are also confronted with renewed challenges: Europe - the cohesion of which was already weakened by the financial crisis and austerity measures - needs to absorb a major inflow of migrants, refugees and asylum-seekers; there is an unhealthy upsurge of populism, intolerance, and Islamophobia; the rule of law has been undermined in countries like Hungary and Poland, and certain parts of Europe are becoming increasingly unstable, reminding us of the 1930s and developments which led to the atrocities of the Second World War.

... And here I am, not to speak about these major challenges confronting us, but rather to provide you with an in-house view of a selected number of issues I have been involved in: I had the privilege of being intricately involved in the drafting of Protocol 11 to the ECHR (which led to the creation of a full-time European Court of Human Rights (Court or ECtHR) in Strasbourg);[4] I helped set-up a confidential Committee of Ministers' (CM) monitoring mechanism, which an informed insider has recently called a 'failed enterprise'; and, since 2005, until my departure from the organisation last year, I was in charge of the Legal Affairs and Human Rights Department of the Parliamentary Assembly (the Assembly or PACE). It is principally this in-house experience, or at least certain aspects of it, which I will speak to you about this evening.

2. THE COUNCIL OF EUROPE, NEW DEMOCRACIES AND THE DRAMATIC RESIGNATION – IN JUNE 1997 – OF THE DEPUTY SECRETARY GENERAL

Let us be honest and accept the premise that the Council of Europe is no longer a privileged club of relatively sophisticated and economically – more or less – comfortable states which reflect liberal-democratic (Western) European standards and achievements of the early 1980s, when there were just over 20 member states. After the initial euphoria of the late 1980s and

early 1990s we witnessed – on the perimeters of the organisation – the tragedies of Bosnia and Kosovo. And even within the Council of Europe, major human rights violations had occurred in South East Turkey, and several years later in Chechnya, compounded by conflicts principally, but not exclusively, in the countries of the former Soviet Union.

We have not rid ourselves of barbarities which, back in the 1950s and 1960s, we considered to be confined to the annals of history of our 'civilised' European continent.

Yet the Council of Europe is the moral guardian of human rights in Europe. We have our cherished Court of Human Rights, the Committee for the Prevention of Torture (CPT), the European Commission against Racism and Intolerance (ECRI), an effective, independent Human Rights Commissioner, the European Social Charter with its collective complaints mechanism, and well over 200 conventions, many of which reinforce and consolidate the three pillars upon which the organisation is based: genuine pluralistic democracy, rule of law and the protection of human rights.[5]

When countries, principally from Central and Eastern Europe, the so-called 'new democracies,' indicated their desire to join the Council of Europe, the decision to include them could not be refused. In this respect, key roles were played not only by the Committee of Ministers, but also the Parliamentary Assembly which, at the time, invented 'special guest status' for parliaments of the applicant states, and whose 'Opinions' were essential for the Committee of Ministers to take into account before inviting a state to join the organisation.

Many of us also remember the 'safety net' – set-up by the European Community – with its so-called 1993 Copenhagen Criteria,[6] resulting in EU enlargement, with ten new member states, as of May 2004.

Were these decisions taken too precipitously? I obviously cannot speak for the EU. However, as a staff member of the Council of Europe, working closely with Peter Leuprecht, the then Director of Human Rights and later Deputy Secretary General, we were of the view that the 'new democracies' certainly ought to be invited to join the democratic club of 'Western European states' possessing a long, and hopefully strongly-anchored rule of law traditions. The door must definitely not be slammed in the face of countries wishing to join a democratic club.

But we were also of the view that ratification of the ECHR ought not be taken too hastily.[7] Why? Simply because major legislative and administrative changes take time. There is a need to train law enforcement officials and the legal profession. To change a law or two can often be a relatively simple matter, but to ensure that ECHR standards, and the case-law of the Strasbourg Court are actually impregnated into 'legal thinking' and daily practice may be another matter. Changes must often be thoroughly thought through, implemented carefully, and take root in the very fabric of society and not be simply cosmetic.[8]

We were in the minority. This is now history. Decision-makers in member State capitals thought otherwise, with the result that today the ECHR has been ratified by all 47 member states.

That said, permit me to recall that – after having set-up the Committee of Ministers' confidential monitoring mechanism – Peter Leuprecht, then Deputy Secretary General, resigned from the Council of Europe in June 1997 as N°. 2 in the organisation, having found as unacceptable the Committee of Ministers' decision to invite Russia (during the war in Chechnya) and Croatia (with President Tudjman's refusal to co-operate with the Ex-Yugoslavia Tribunal). His logic: yes, states should be welcome to the Council of Europe, but only if they 'have clean hands' and are really willing and able to abide by the principles upon which the organisation is based. Leuprecht thought that these states fell woefully short of the mark as concerns the three Council of Europe basic pillars *"…values were being watered down. That's why I left. I don't believe you can be a dissident and stay in government."*[9]

You may or may not agree with Leuprecht's stand, but his resignation was a dramatic event which had a profound impact in Strasbourg and beyond. It also confirmed, to me, that enlargement to the East – from just over 20 to now 47 states – may have been too precipitate but appeared, at the time, to be politically inevitable.

It was recognized by political leaders at the time, in State capitals, that 'monitoring' *par excellence*, by a newly created full-time Human Rights Court in Strasbourg, supplemented

by other key (human rights) monitoring mechanisms, would *not* suffice. Hence the need to ensure serious *political* monitoring so that basic values and standards of the organisation not be diluted.[10]

3. THE COMMITTEE OF MINISTERS' CONFIDENTIAL POLITICAL MONITORING

As a detailed overview of the organisation's core monitoring mechanisms, including that of the Parliamentary Assembly, will shortly be published by Oxford University Press in a book entitled *The Council of Europe. Its Laws and Policies*,[11] I will limit my observations to the less known monitoring carried out by the Committee of Ministers, the executive organ of the organisation – in effect, the Foreign Ministers of member states, represented by their ambassadors based in Strasbourg.

States, principally the 'new democracies' "*willing and able*" to abide by Council of Europe standards – to quote from Article 4 of the 1949 Statute – became members of the Organisation on the understanding that they remedy shortcomings in their legal orders as part of the membership package. This would be overseen, in particular, by the Committee of Ministers' confidential, non-discriminatory, consensus-based monitoring procedure based on its 1994 *Declaration on Compliance with Commitments accepted by member states of the Council of Europe*.[12] Unlike the monitoring work of the Parliamentary Assembly, which is made public, the Committee of Ministers' procedures – based on the Declaration – was and has remained confidential, and has relied on persuasion, peer pressure and diplomatic negotiation.[13]

When I moved from the then Directorate of Human Rights and was requisitioned to take charge of the Secretary General's Monitoring Unit, I was convinced that this confidential monitoring was an artificial mechanism, a mere 'fig leaf' created to justify, retroactively, the precipitated decision to invite a number of countries with suspect democratic credentials to join the Council of Europe. But was it a mere 'fig leaf'? The fact that this confidential procedure was taken seriously by the organisation's executive, and the fact that it started functioning in very tense and difficult circumstances, back in 1996, might suggest that I was wrong. However, as the 30-year rule of secrecy still applies to documents issued at the time, and with my '*devoir de reserve*', I cannot – as frustrating as it may be – provide you with a detailed overview of how the system functioned, and in the eyes of some informed observers, has now apparently ground to a halt.

I nevertheless wish to make a few comments on this subject. The first relates to the manner in which the 'secret' secretariat documents were issued: they initially – before the introduction of thematic monitoring – took the form of 'factual overviews' in which 'areas of concern' were highlighted in respect of specific countries. In my view – and with all due respect to the incumbent Secretary General and his excellent staff – when one compares those 'old' reports with the recent set of annual reports by the Secretary General, the last one issued in May 2016, entitled *State of democracy, human rights and the rule of law. A security imperative for Europe*,[14] the latter is a far cry from what was done back in the late 1990s! In the old monitoring CM documents, 'areas of concern' were clearly pinpointed in specific countries, indicating exactly what the problem was in country X or country Y. Hence, to say, as is written in the Secretary General's report of May of last year, that in nearly 20 countries '*judicial independence is unsatisfactory due to corruption, political interference and inadequate funding,*' without indicating in which countries this is happening, may leave one somewhat perplexed.[15]

The contemporary reports of the Secretary General are obviously of a different nature, and do not concern Committee of Ministers' monitoring. But should the Committee of Ministers not undertake some form of more pro-active 'state-specific' political monitoring, with the help of the Secretary General, or to revert back to the procedure in which 'areas of concern,' in specific countries, are actually clearly, unequivocally specified?[16]

In this respect, it may be worth recalling a rare positive example of solid, effective monitoring on the subject of 'freedom of expression', based on work undertaken by two teams of experts in 1997-2000 and 2001-2002. The latter group of seven independent experts, nominated by the then Secretary General, undertook *in situ* fact-finding monitoring missions on the theme of freedom of expression prior to determining "very serious concern"

with respect to the situation in Moldova, Russia, Turkey and Ukraine, as well as "serious concern" with respect to the situation in five 'new democracies' (Albania, Azerbaijan, Bosnia-Herzegovina, Georgia and Romania) concerning, at that time, 44 member states of the Council of Europe.[17] These 'confidential' Committee of Ministers documents have now found their way into the public domain but are still little known to persons outside the organisation, despite the devastatingly negative conclusions reached by the experts, based on conclusions drawn up in a key document issued in 1997 – in which it was specified that: "Where, according to this report, a situation gives rise to very serious concern under Article 10 of the [ECHR], it is difficult to confirm that the freedom of expression of the press really exists in any meaningful sense [and that …] it cannot be said that a democratic system is fully established in these countries."[18]

One of the distinguished experts who had taken part in the *in situ* fact-finding missions, David Anderson, has honoured me with his presence today. The other experts were Denis Barrelet, Jochen Frowein, the late Karol Jakubowicz, Marie McGonagle, Monica Macovei and Andrzej Rzepliński.

Permit me to provide you with another good example of how the Committee of Ministers' monitoring worked, when the Committee accepted the setting-up of an *ad hoc* monitoring procedure – with the appointment of three independent experts, Stefan Trechsel, Evert Alkema and Alexander Arabadjev – in respect to a promise made by the Azerbaijani authorities to the Parliamentary Assembly: that, upon joining the organisation, they would release or re-try those prisoners regarded as 'political prisoners' by human rights protection organisations.[19] This initiative set in motion, in February 2001, an incredibly complex and protracted procedure that consisted in assessing two separate lists of 716 and 212 alleged political prisoners – which took over three years of intensive work to complete. More importantly, it resulted in the release and re-trial of very many persons.[20]

Those of us with a legal background may find political monitoring – including 'naming and shaming', as the Parliamentary Assembly often does – as not the most appropriate bedfellow in an Organisation which credits itself with sophisticated legal mechanisms to prevent or determine human rights violations. Yet, when questioning or criticizing the utility of such political monitoring, one must take into account *realpolitik* – what can realistically be achieved. Permit me to use the analogy of an elastic band to suggest that political monitoring does have its rightful place in the Council of Europe – be it in the Committee of Ministers or in the Assembly. The opportunity must be seized to 'stretch' a member state to the limits of what is possible at a given moment of time, so as to ensure compliance with its human rights commitments, without the elastic band snapping! In other words, if the elastic band snaps, and a state is excluded from the democratic club, the state concerned will no longer have an interest in abiding by the Council's human rights standards. If you had been one of the persons freed by the Azerbaijani authorities, or a family member of a person released from prison, would you complain? If, for different reasons, Azerbaijan or Russia were suspended from membership of the organisation, would such a step be beneficial or detrimental to the populations of the countries concerned?

Food for thought.

Just let me add a *post scriptum* to my comments about Azerbaijan: many of you are aware of the 'Caviar Diplomacy' publications of the European Stability Initiative.[21] But not necessarily of the Azerbaijani Foreign Minister's inaccurate, not to say devious, reply to a question about political prisoners in his country which he made before the Parliamentary Assembly back on 2 October 2014, when he said "*When the Parliamentary Assembly of the Council of Europe creates criteria to define political prisoners, I can respond to your question, otherwise it is very hypothetical.*" His answer was, of course, completely wrong, as such a definition had already been adopted by the Assembly two years earlier.[22]

But what makes matters worse, is the position taken by the Committee of Ministers: when the CM was asked to ensure that its, at the time, Azerbaijani chairperson provide a full answer to a written question posed in this connection, the reply of the organisation's executive organ was that "*owing to a lack of consensus*" the Assembly would not get a reply to the question posed. In other words: as we have no unanimity – the question will simply remain unanswered![23]

Let me summarise what I have said so far. The Council of Europe effectively doubled after the end of the Cold War. There were hesitations as regards some candidates, but in the end the political choice was made to admit all.[24] In order to make up for the potential dilution of Council of Europe standards, new forms of monitoring were created. Some of these were quite successful, but one cannot deny that it has been an uphill struggle and the result, in certain cases, is still far from satisfactory.

This is where we stand today.

4. THE PARLIAMENTARY ASSEMBLY

The Assembly, composed of national parliamentarians, elects judges to the European Court of Human Rights and the Council's Commissioner for Human Rights. Apart from these important tasks, as one of the principal organs of the organisation, it is nevertheless often perceived as a deliberative body of little relevance: from time to time, it 'names and shames' states which violate human rights; but it lacks the backbone to undertake serious, thorough investigations. This is a simplistic and erroneous perception of the way it functions.

Actually, its reports can, and often do have a profound effect on human rights standards in Europe. Suffice to recall its work – over the years – on the implementation of Strasbourg Court judgments (the effectiveness of which Alice Donald and Philip Leach have recently analysed in their excellent book: *Parliaments and the European Court of Human Rights*[25]). In addition, to illustrate the Assembly's potential impact, I'd like to provide you with examples of a number of outstanding inquiries led by Dick Marty, the Swiss Senator.

Take, for example, the Assembly's Resolution of January 2011 on inhuman treatment of people and illicit trafficking in human organs in Kosovo,[26] which led directly to a four-year in-depth criminal investigation conducted by the EU's Special Investigative Task Force. The evidence investigated – based on Senator Marty's report – was of sufficient weight to permit the filing of an indictment, and merited the recent creation of the Kosovo Specialist Chambers and Prosecutor's Office, whose Seat Agreements, at The Hague, have come into effect as of 1 January 2017.[27]

Another example is the 2007 report relating to UN and EU Terrorist Blacklists.[28] UN Security Council Chapter VII measures, including the use of 'smart sanctions,' are obviously effective and important tools in combatting international terrorism. Yes, but what if, by imposing such measures on individuals, ECHR standards are infringed? Is it acceptable for persons to remain on terrorist blacklists for more than 10 years, in a situation in which prosecuting authorities have not found a shred of evidence against them?

If indeed this happens, how can one call into question Security Council resolutions that appear to flout basic human rights norms, in the light of Article 103 of the UN Charter which clearly specifies that in the event of a conflict between Charter obligations and other international agreements, the Charter obligations must prevail?.[29]

This is an issue which has been litigated in a number of fora: suffice for me to cite the Luxembourg Court's *Kadi* case of 2008,[30] as well as the Strasbourg Court's judgments in *Nada*[31] and *Al-Dulimi.*[32]

But what you may *not* be aware of is the Strasbourg Court's President's refusal, back in 2010, to permit the Assembly's Committee on Legal Affairs and Human Rights to make a Third Party Intervention in the *Nada* case. We were rather puzzled by this refusal, but this did not prevent us from putting into the public domain a letter, addressed by the Swiss authorities to the Chairperson of the Security Council's Al-Qaida's Sanctions Committee, announcing the Swiss Parliament's decision not to apply the relevant Security Council sanctions if, after a three-year period, an individual concerned has not been brought before a judicial or independent authority.[33] Just before coming here to Hendon this evening, I checked the website of the Swiss Parliament to see what follow-up was given to this decision: the decision was to *"prorogé d'un an"* (defer by a year) the said decision.[34] So it appears that the Swiss Parliament, at least, stands firm on its decision not to be bound by Security Council decisions which flout basis human right standards.

An astute listener to what I have just said may, understandably, point out that I have completely deviated from presenting an Assembly report to that of discussing legal issues relating to blacklisting, and that this

is not a convincing example of an important PACE initiative. After all, what we have here is a failed Third Party Intervention before the Strasbourg Court! Yes, but the point I make here is that PACE members are also national parliamentarians, wearing a '*double casquette*', as the French say. Hence, this specific initiative can be cited as an example of a principled position taken by the Swiss Parliament, to give notice to the UN Security Council that the country will not tolerate UN measures that are not human rights compliant, which was initiated, within Parliament, by Swiss parliamentarians from the Assembly's delegation.

One more example of a Marty report. Some of you may remember "*the global 'spider's web' of secret detentions and unlawful inter-state transfers*" – a compelling graphic representation of CIA rendition flights that were prominently displayed in *Le Monde, The Financial Times, BBC News Online* and several other major media outlets around the world. This graphic was taken from the first of two reports Dick Marty presented to the Assembly back in 2006 and 2007, addressing secret detentions of terrorist suspects in Council of Europe member states. Dick Marty revealed that in at least two cases, Poland and Romania, states had hosted 'secret prisons' on their soil, and that the governments of these states, acting through their intelligence services, had been complicit in and aware of such illegal practices.[35]

Marty's investigative reports on this matter were ground-breaking, headline-making publications that have stood the test of time. They were based on an approach that Dick Marty himself described as being akin to intelligence-gathering – essentially taking on the CIA at their own game! Information was obtained from Eurocontrol, the EU's Satellite Agency, lawyers representing many of the persons detained, thousands of flight records from different national and international sources, *in situ* investigations and interviews with scores of sources – many of them confidential – in countries including Belgium, Germany, Italy, Macedonia, Poland, Romania, Sweden, the UK and of course the US. These revelations were also followed-up by an ECHR Article 52 inquiry by the Secretary General and a report on the legal implications from the Venice Commission. The European Parliament considered itself duty-bound, as did several national parliaments, to set-up special committees to look into this matter. Senator Marty also submitted an unsuccessful *Amicus Brief* before the US Supreme Court in September 2007.[36]

More importantly, perhaps, was the admission, by President Bush, on 6 September 2006, that <u>*there had*</u> indeed existed such a network of secret prisons run by the CIA – an extraordinary admission that vindicated the work of Senator Marty. Indeed, when in December 2014 the US Senate released the Executive Summary undertaken by its Select Committee on Intelligence – the so-called Feinstein Report – it was striking to see just how many of Marty's findings had been accurate eight years earlier and without access to the six million or so classified documents the Senate Committee relied on.

The European Court of Human Rights, in the cases of *El-Masri v The former Yugoslav Republic of Macedonia*,[37] *Abu Zubaydah and Al Nashri v Poland*,[38] *Nasr and Ghali* v *Italy* (relating to the abduction of Imam Abu Omar),[39] has developed a robust set of judicial findings against the participating European states. In all these cases – in addition to two others still pending before the Strasbourg Court against Lithuania[40] and Romania[41] – the defendant states had all (initially) denied their involvement in, or knowledge of, the existence of secret detentions and illegal renditions on their territory. What Marty prophetically called "*la dynamique de la verité*" – the dynamics of truth – has slowly but surely caught up with them.

The CIA secret prisons reports have thrown light on a dark chapter in European history and will, so it is hoped, ensure that European governments are never again complicit in torture.

Contrary to widely-held suppositions, this work was not undertaken by a team comprising of 20 or more full-time lawyers and investigators. Actually, only three Secretariat staff members worked closely with Dick Marty on these reports, while simultaneously juggling all their other professional duties within the Assembly's Department on Legal Affairs and Human Rights. The going was tough; we had to learn how to deal with current and former secret service officials and intelligence agencies; we had to find ways of guaranteeing confidentiality of sources, and to hold meetings and store highly sensitive information in 'safe places' (thankfully, we could rely on Dick Marty's considerable previous

experience as a prosecutor in the context of the Italian mafia *mani pulite* investigations). We endured many sleepless nights, and regularly had cause to look over our shoulders, anxious that we might have come to know just a little *too much*… Indeed, I was especially relieved that this *dossier* had reached closure… after having picked-up a colleague from the airport, on his return from a fact-finding trip to Romania, to find that his flat had been broken into and that "visitors" had been busy installing or removing some sort of device in a cavity in the wall when they had been disturbed by a noisy neighbour … *'Ceci n'était pas un cambriolage normale'* was the comment of the somewhat baffled policeman who came to look into this rather unusual 'burglary' … a mysterious occurrence we may possibly be able to shed more light on once all the litigation on the subject has come to a close before the Strasbourg Court.

5. AN IN-HOUSE SUCCESS STORY

The in-house 'success story' is a rare example of how two eminent human rights experts, Antonio Cançado Trindade, former President of the Inter-American Court of Human Rights, and now a judge on the International Court of Justice at The Hague, and Jochen Frowein, at the time Director of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, and previously First Vice-President of the European Commission of Human Rights, were able to nip-in-the-bud, as it were, the newly created Commonwealth of Independent States (CIS) Convention on Human Rights, adopted in Minsk on 26 May 1995 and in force since 11 August 1998.

This Minsk Human Rights Convention was perceived as a surreptitious attempt to undermine the effectiveness of the European Convention on Human Rights. Why? Because, if principally Russian-speaking individuals were to bring their applications before the Minsk CIS Human Rights Commission, their (subsequent) applications before the Strasbourg Court could simply be time-barred.

In the summer of 1995, in *less than six months* after the adoption of the CIS Human Rights Convention, the then Secretary General of the Council of Europe, Daniel Tarschys, was able to obtain, from the experts, two separate highly critical analyses of the CIS Convention's control mechanism, indicating the total lack of independence of the CIS Human Rights Commission, the body designated to monitor States Parties' human rights obligations under the Convention. As Judge Cançado Trindade wrote: "*The fact that the CIS Human Rights Commission… is composed of 'representatives of the Parties', who are appointed (not even elected) … is [to me] a cause of great concern*".[42]

The experts' reports had a significant political impact: the Parliamentary Assembly was alerted in time, permitting it to add appropriate 'provisos' into texts relating to membership applications of countries from the ex-Soviet Union, who were also members of the CIS.[43]

As to whether the experts' views had an influence on the Strasbourg Court's decision to refuse, nine years later, in June 2004, the Committee of Ministers' request for an Advisory Opinion to determine whether the CIS Human Rights Commission can be regarded as "*another procedure of international investigation or settlement*" within the meaning of Article 35 § 2 (b) of the Convention, I simply do not know.[44]

Nowhere, as yet, have I seen comments indicating the key role these two experts played in safeguarding the organisation's *acquis*.[45] But one thing is certain: since the issue of their reports back in 1995, over 20 years ago, the CIS Human Rights Commission does not function. Mention of it has even disappeared from the CIS's official website … and the Minsk Convention now appears to be a dead letter.[46]

6. CHALLENGES FOR THE FUTURE

I wish to complete my presentation by highlighting – from the perspective of an outgoing "insider" – certain challenges which face the Council of Europe and its member states.

The need to ensure the election, by the Assembly, of judges of the highest calibre onto the Court in Strasbourg is of the utmost importance. Hence the need to ensure an appropriate procedure leading up to their election.[47] A drafting group of experts[48] within the Council of Europe is presently looking into this subject, and I understand that they are likely to focus their work on states' national selection procedures.[49] As concerns the Parliamentary Assembly, its procedures have been tightened-up in recent years. Here, credit must be given to its special committee on the election of judges. Look at, for instance, what happened during the

Assembly's session in October 2016: the judge in respect of Azerbaijan was elected, but only after *two* previous lists of inappropriate candidates had been rejected by the Assembly. At the same sitting, in October, the Assembly – again upon the recommendation of its special committee – rejected lists submitted to it by the governments of Albania and Hungary since national selection procedures, in both countries, had not been fair and transparent.[50] As you can see, the Assembly is taking its work very seriously. Also, as the rules governing its procedure for the election of judges are scattered over a number of Assembly resolutions and recommendations, these texts are now to be consolidated into one single resolution.[51]

We know that negotiations with respect to EU accession to the ECHR will need to be re-opened after the Luxembourg Court's negative Opinion.[52] But if the EU and its member states – who have other matters on their mind right now - come up with a pre-cooked made-to-measure package to 'appease' the Luxembourg Court's objections – do not be surprised if, in the new set of negotiations, the Council of Europe's *non* EU member states, in particular Norway, Russia, Switzerland and Turkey (joined by the UK, perhaps?), may not be as accommodating as they had been until now. [53]

Of interest also is an Assembly report which referred to the issue of states using international organisations as a tool to escape accountability – which they actually have succeeded in doing in a number of instances before the Court in Strasbourg by not being held accountable for (alleged) human rights violations perpetrated while undertaking, for example, peacekeeping and military interventions; this is also tied to complex immunity issues.[54] Of interest to note, in this connection, is the Dutch Supreme Court's judgment of 2013, in the *Stichting Mothers of Srebrenica* case, in which the Supreme Court retained the notion of 'dual attribution', permitting the relatives of those killed in Srebrenica to pursue their claims against *both* the UN *and* the Dutch authorities.[55]

Another subject worthy of special attention is the European Commission's use of its 'Rule of Law Framework' with respect to the crisis of 'constitutional democracy' in Poland, and the role played, in this connection, by the Council of Europe's Venice Commission.[56]

In this presentation I have not ventured into territory of my *prédilection*: the domestic status of the ECHR, the supervision of the Strasbourg Court's judgments by the Committee of Ministers,[57] and the ever-increasing role that the Parliamentary Assembly plays in this respect. There already exists a substantial literature on these subjects.[58] But I do feel obliged to mention, in this connection, that repeal of the Human Rights Act, in this country, must be resisted; all is not yet lost.[59]

What must, above all, be vigorously countered is gratuitous 'Strasbourg Court-bashing' as well as destructive legislative initiatives, such as those taken in Russia, which have empowered the Russian Constitutional Court to determine, *inter alia*, whether the findings of the Strasbourg Court are compatible with the Russian constitution norms.[60]

My last comment is no longer that of an '**in**sider,' but rather one of an '**out**sider.' It concerns the report on the human rights situation in the North Caucasus adopted by the Parliamentary Assembly's Committee on Legal Affairs and Human Rights on 18 April 2016. Yes, back in April 2016, nine months ago.[61] Why was this report not placed on the Assembly's plenary agenda in June or October 2016? Or in January 2017? Why has it only recently been put on the Assembly's draft agenda for April 2017, a year after its adoption? I am puzzled and somewhat worried by this development.

7. CONCLUDING REMARKS

I wish to thank, in particular, Joshua Castellino and Philip Leach, for the honour bestowed upon me by my appointment as a Visiting Professor, and to stand before you this evening and make, what has been my very first public lecture in front of human rights personalities of the caliber of David Anderson, Nicolas Bratza, Bill Bowring, Philip Leach, Bill Schabas and many others.

I also wish to express my admiration to those of you in the audience, who work hard – behind the scenes - for the European Human Rights Advocacy Centre. The case-work and litigation which you undertake, in particular with respect to Russia, Georgia, Azerbaijan, Armenia and Ukraine, are having a profound impact – believe me! It reminds me of the

pioneering work undertaken by the late Kevin Boyle and Françoise Hampson, in Essex, without whom very, very many victims of human rights violations in South East Turkey would not have won their cases in Strasbourg. Middlesex University is playing a key, active role in the protection of Human Rights in Europe, and I am truly deeply touched to be associated with an institution that has become an outstanding center of excellence in the human rights field.

I have not spoken about many, many important human rights issues this evening, on the understanding that I will commence my 'real' return to academia as of tomorrow, at a roundtable with staff and students – to discuss other challenges which face the Council of Europe.

As indicated at the beginning of my presentation, there are major human rights issues facing us today: one cannot but look with concern, at the situation here, in the UK, a mature democracy, with Brexit and the possible repeal of the Human Rights Act, including the dangers that a withdrawal from the ECHR system may entail … which would put into jeopardy the existence of the ECHR. I cannot but reiterate the fact that the challenges before us are enormous, be it here in the UK or in other parts of Europe.

The Council of Europe is not a perfect organisation. It does not have economic clout or military power. *But it is the moral and legal guardian of human rights standards in Europe.* Those of us who have had the privilege of working for the organisation – be it in its statutory bodies, in its core human rights monitoring mechanisms, as outside experts, or staff members – must, in my humble opinion, defend its work vigorously, and when so doing not forget the words of Pastor Martin Niemöller, a German cleric:[62]

> First they came for the Jews, & I did not speak out – because I was not a Jew.
> Then they came for the communists, & I did not speak out – because I was not a communist.
> Then they came for the trade-unionists, & I did not speak out – because I was not a trade-unionist.
> Then they came for me - & there was no-one left to speak out for me.

These phrases encapsulate well, in my view, the essential role of the Council of Europe and for what it stands, as the moral guardian of human rights in Europe.

NOTES

1. This is a slightly revised version of the author's Inaugural Professorial Lecture given at the School of Law of Middlesex University in Hendon, London, on 17 January 2017. A shortened version of the lecture was published in the European Human Rights Law Review, 2017, issue 2, at pp. 134 -144.
2. See D. Huber *A Decade which made History. The Council of Europe 1989-1999* (Council of Europe Publishing, 1999).
3. See, e.g., M. O'Boyle "Emergency Government and Derogation under the ECHR" [2016] 4 E.H.R.L.R. 331 and Parliamentary Assembly (PACE) document AS/Pol (2016)18 rev., Report on fact-finding visit to Ankara (21-23 November 2016) of the Committee on Political Affairs and Democracy's *ad hoc* Sub-Committee on recent developments in Turkey, 15 December 2016 http://website-pace.net/documents/18848/2197130/20161215-Apdoc18.pdf/35656836-5385-4f88-86bd-17dd5b8b9d8f.
4. See, e.g., "A major overhaul of the European Human Rights Convention control mechanism: Protocol No. 11", in Collected Courses of the Academy of European Law, Vol. VI, Book 2 (Martinus Nijhoff, 1997), pp. 121-244. See also *Ten Years of the 'New' European Court of Human Rights 1998-2008* (European Court of Human Rights, 2008), testimony on pp. 63-64 available at http://www.echr.coe.int/Documents/10years_NC_1998_2008_ENG.pdf.
5. Article 3 of the Council of Europe's Statute of 1949, ETS Nº. 1.
6. For details see EUR-Lex website: http://eur-lex.europa.eu/summary/glossary/accession_criteria_copenhague.html.
7. C.f., the delay in which, for example, France, a founding member of the organisation, which ratified the ECHR in 1974 and accepted the right of individual application (which was then optional, addressed to the now defunct European Commission of Human Rights) only in 1981. See "Ensuring compatibility of domestic law with the ECHR prior to ratification: The Hungarian Model' in Vol. 16 HRLJ (1995), pp. 241-260.
8. When, during the period of 'enlargement,' I was asked to express my views on the subject which, if provided, might well have been at variance with decisions taken in the capitals of member states, I refrained from so doing. Instead, when asked about the speed with which important political decisions had been taken, I often cited what Vaclav Havel had said in October 1992 (Le Monde, 29 October 1992, discours à l'Académie des sciences morales & politiques, page 4.). My translation of the French original: "I realized with horror that my impatience with respect to the reestablishment of democracy had something communist in it.… I wanted History to advance in the same manner as a child pulls at the stem of a plant to try and make it grow faster. I believe one has to learn to wait, as one does to create. One has to patiently sow the grains, water the earth diligently – where they have been planted – and give them the time that they need to grow. One cannot fool a plant, no more than one can fool History. But one can continue watering. Patiently, every day. With comprehension, with humility, certainly, but also with love."
9. See "Reflections on a remarkable period of eleven years: 1986 to 1997" in *Liber Amicorum Peter Leuprecht* (Bruylant, 2012, Texts collected by O. Delas and M. Leuprecht), pp.105-115, at pp. 114-115.
10. Obviously, the Court in itself does not carry out monitoring, but the term is here used generically to encompass functions entrusted to the Committee of Ministers in supervising the Court's judgments: Article 46 §2 ECHR. '[S]erious political monitoring' also includes monitoring carried out, in particular, by the Parliamentary Assembly, whose work in this respect merits separate and in-depth analysis. See, in this connection, B. Haller "*L'Assemblée parlementaire et les conditions d'adhésion au Conseil de l'Europe'*" in *Law in Greater Europe. Towards a Common Legal Area. Studies in honour of H. Klebes* (Kluwer Law International, 2000, edited by B. Haller, H.-C. Krüger & H. Petzold), at pp. 27-79 and recent texts issued on this subject by the Assembly, Resolution 2149 (2017), of 26 January 2017, based on the annual report of its Monitoring Committee's activities from September 2015 to December 2016, document 14213, of 6 January 2017 http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileID=23246&lang=en.

All Assembly documents cited in this Opinion can be accessed on http://assembly.coe.int

11. *The Council of Europe. Its Laws and Policies*, Oxford University Press, 2017, edited by S. Schmahl & M. Breuer. See, in particular, chapter 7 on the Parliamentary Assembly, written by P. Leach, at pp.166-211.

12. Text available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168053661f.

13. For further discussion on this subject see A. Drzemczewski "Monitoring by the Committee of Ministers of the Council of Europe: a Useful 'Human Rights' Mechanism?", in Vol.2 *Baltic Yearbook of International Law* (Kluwer Law International, 2002, edited by I. Ziemele), pp. 83-103, and *"Le 'monitoring' du Comité des Ministres du Conseil de l'Europe: un aperçu de son* évolution" in *Libertés, Justice, Tolérance Mélanges en hommage au Doyen G. Cohen-Jonathan*, vol. I (Bruylant, 2004), pp.707-725.

14. An analysis based on the findings of the Organisation's monitoring mechanisms and bodies, presented at the 126th Session of the Committee of Ministers, in Sofia, 18 May 2016, accessible at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680646af8, at p.16.

15. See also PACE Resolution 2098 (2016) Judicial corruption: urgent need to implement the Assembly's proposals, of 29 January 2016, § 7, as well as comments by Rapporteur K. Sasi in PACE document 13824, § 23, accessible at http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=21798&lang=EN.

16. This, in the eyes of certain informed observers, may be a somewhat naïve hope, indeed wishful thinking, given the prevailing situation in Russia, Turkey and Ukraine, and taking into account the difficulties the EU has with 'Rule of Law monitoring' in respect of Poland. But the point I am trying to make is this: in many quarters the credibility of the Council of Europe is being put into question which necessitates - now - a more focused form of political monitoring by the Organisation's executive organ.

17. Documents CM/Monitor (2002)25 and CM/Monitor(2003)8final2, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805dfa38.

18. Document CM (97) 219, § 92 (cited in Appendix II of document CM/Monitor (2002) 25).

19. Opinion No. 222 (2000), § 14 iv b, of 28 June 2000, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16816&lang=en

    Azerbaijan acceded to the Council of Europe on 25 January 2001 and ratified the ECHR on 15 April 2002.

20. For more details see Council of Europe documents SG/Inf (2001) 34 & Addenda and SG/Inf (2004) 21 and Addendum, as well as S. Trechsel "The notion of 'political prisoner' as defined for the purpose of identifying political prisoners in Armenia and Azerbaijan" in vol. 23 HRLJ (2002), pp.169-176.

21. Accessible at http://www.esiweb.org/ (two reports on 'caviar diplomacy': http://www.esiweb.org/pdf/esi_document_id_131.pdf, of 24 May 2012, and http://www.esiweb.org/pdf/ESI%20-%20The%20Swamp%20-%20Caviar%20Diplomacy%20Part%20two%20-%2017%20December%202016.pdf, of 17 December 2016). See also the Assembly's Bureau decision to set up an external independent investigation to look into allegations of corruption within the institution, at http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=6514&lang=2&cat=13, decision taken on 27 January 2017.

22. Resolution 1900 (2012): the definition of political prisoner, adopted on 3 October 2012, accessible at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19150&lang=en

23. See Assembly document 14089 "Unanswered questions by the Committee of Ministers on […] political prisoners in Azerbaijan," of 18 June 2016, accessible at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22828&lang=en

24. With the exception of Belarus.

25. Oxford University Press, 2016.

26. Resolution 1782 (2011) Investigation of allegations of inhuman treatment of people and illicit trafficking in human organs in Kosovo, of 25 January 2011, based on document 12462, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17942&lang=en

27. See website https://www.scp-ks.org/en

28. Resolution 1597 (2008) and Recommendation 1824 (2008) United Nations Security Council and European Union Blacklists, adopted on 23 January 2008, based on document 11454, available at http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileID=11749&lang=en.
29. The full text reads: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."
30. *Kadi and Al Barakaat v Council of the European Union* [2008] ECHR I- 6351, of 3 September 2008.
31. *Nada v Switzerland,* Grand Chamber judgment of 12 September 2012. All judgments of the European Court of Human Rights can be consulted in HUDOC – http://echr.coe.int.
32. *Al-Dulimi & Montana Management v Switzerland,* Grand Chamber judgment of 21 June 2016.
33. Assembly document AS/Jur/Inf (2010)05, of 7 December 2010, available at http://www.assembly.coe.int/CommitteeDocs/2010/07122010_blacklists.pdf.
34. See the Swiss Parliament's website https://www.parlament.ch/en/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20093719 on which the text of the latest decision on this subject, dated 29 September 2016, can be found.
35. Resolution 1507 and Recommendation 1754 (2006), Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states, adopted on 27 June 2006, based on document 10957, and Resolution 1562 (2007) and Recommendation 1801 (2007), Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report, adopted on 27 June 2007, based on document 11302 rev. See also Resolution 1838 (2011) and Recommendation 1983(2011), Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations, adopted on 6 October 2011, based on document 12714. All these texts are available on the Assembly's website http://assembly.coe.int.
36. For a comprehensive overview, with hyperlinks to documents and most initiatives enumerated in this Opinion piece, see *Timeline: the Council of Europe's investigation into CIA secret prisons in Europe,* of 24 July 2016, accessible at http://assembly.coe.int/nw/xml/News/News-View-en.asp?newsid=5722&lang=2 (this timeline is regularly updated).
37. Grand Chamber judgment of 13 December 2012.
38. Judgments of 24 July 2014.
39. Judgment of 23 February 2016.
40. *Abu Zubaydah v Lithuania* (Nº. 46454/11).
41. *Al Nashiri v Romania*, (Nº. 33234/12).
42. *Analyses of the Legal Implications for States that Intend to Ratify both the European Convention on Human Rights and its Protocols and the Convention on Human Rights of the Commonwealth of Independent States (CIS)*, by A.A. Cançado Trindade and J.A. Frowein, Council of Europe document SG/INF (95) 17, of 20 December 1995, § 98 of analysis of Cançado Trindade, also published in Vol. 17 HRLJ (1996), pp. 157- 184, at p.179.
43. See, in particular, § 11 (e) of Opinion 188 (1995) with respect to Moldova, of 27 June 1995; § 12 (iii) of Opinion 190 (1995) with respect to Ukraine, of 26 September 1995, and § 10 (xv) of Opinion 193 (1996) with respect to Russia, of 25 January 1996 (available on the Assembly's website and in Vol. 17 HRLJ (1996), at pp. 157-159).
44. The Court considered that it had to leave this matter open, as the adoption of an advisory opinion might prejudice, at a future date, an examination of an individual or inter-state application which could entail an analysis of, *inter alia,* the independence and impartiality of the CIS Commission, the nature of this Commission's proceedings and the effect of its decisions. It therefore decided, on 2 June 2004, that it had *no* competence to give an opinion on the matter referred to it.
45. The Minsk Convention had been ratified by four Member States of the CIS: Russia, Belarus, the Kyrgyz Republic and Tajikistan (Russia being the only state – as a member state of the Council of Europe - to have ratified the ECHR). Georgia withdrew from CIS in 2008; Ukraine is an Associate Member.
46. See Article 33 of the CIS Statute of 1993, and Article 34 of the Minsk Convention and the Commission's regulations attached thereto (English translation of the latter in Vol.17 HRLJ (1996), at pp.162-164). See also Assembly Resolution 1249 (2001) and Recommendation 1519 (2001), Coexistence of the Convention

on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European

Convention on Human Rights, of 23 May 2001, based on document 9075, available on the Assembly's website http://assembly.coe.int.

47. See Assembly website: http://website-pace.net/en_GB/web/as-cdh/main. See also, A. Drzemczewski "The Parliamentary Assembly's Committee on the Election of Judges to the European Court of Human Rights, Council of Europe" in Vol. 35 HRLJ (2015), pp.269-274.
48. Full title: Drafting Group I on the Follow-up to the CDDH Report on the Longer-Term Future of the Convention (DH –SYSC-I).
49. And perhaps also on the appropriateness of updating the Committee of Ministers' Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights, of 29 March 2012: document CM (2012)40 addendum final.
50. Non-compliance with '*standards required by the Assembly and the Committee of Ministers*': see PACE document 14150 Addendum II of 5 October 2016. For more details, see the Assembly's website: http://website-pace.net/en_GB/web/as-cdh/main.
51. See, in this connection, motion for a resolution, Election of Judges to the European Court of Human Rights, Assembly document 14250, of 25 January 2017, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23401&lang=en.
52. CJEU Opinion 2/13 of 18 December 2014.
53. See J. Polakiewicz "Accession to the European Convention on Human Rights – an insider's view addressing one by one the CJEU's objections in Opinion 2/13" in Vol.36 HRLJ (2016), pp. 10-22. For background information consult, in particular, "EU accession to the ECHR: the negotiation process" and "Election of EU judge onto the Strasbourg Court" in *The EU Accession to the ECHR* (Hart Publishing, 2014, edited by V. Kosta, N. Skoutaris andV. Tzevelekos), at pp. 17-28 and pp. 65-72.
54. As concerns the Strasbourg Court's case law: see, e.g., *Behrami and Behrami v France & Saramati v France, Germany and Norway,* Grand Chamber decision on admissibility of 31 May 2007, and *Mothers of Srebrenica v the Netherlands,* judgment of 11 June 2013.
55. See Assembly Resolution 1979 (2014) and Recommendation 2037 (2014), Accountability of international organisations for human rights violations, of 31 January2014, based on document 13370 – see, in particular, footnote 25 in the latter document which specifically refers to the Dutch Supreme Court's judgment of 6 September 2013.
56. See the European Commission's website http://ec.europa.eu/justice/effective-justice/rule-of-law/index_en.htm and that of the Council of Europe's Venice Commission http://www.venice.coe.int/webforms/events/. See also, e.g., comments regularly made by specialists on this subject on the *Verfassungsblog* as well as *How to Resolve the Crisis of Constitutional Democracy in Central Europe? (forthcoming)* http://www.evro-pf.si/media/website/2016/11/Ljubljana-conference9-10Dec2016-jlc-1.pdf.
57. Article 46, § 2, ECHR: see website http://www.coe.int/en/web/execution.
58. See A. Drzemczewski and J. Lowis "The role of Parliaments in relation to human rights: the work of the Parliamentary Assembly of the Council of Europe" in *Parliaments and Human Rights. Redressing the Democratic Deficit* (Oxford University Press, 2015, edited by M. Hunt, H. Hooper and P. Yowell,), pp. 309-327, and the select bibliography in *Impact of the European Convention on Human Rights in States Parties: Selected Examples* (Council of Europe publications, 2016), also accessible, as PACE document AS/Jur/Inf (2016) 04, at http://website-pace.net/documents/19838/2008330/AS-JUR-INF-2016-04-EN.pdf/12d802b0-5f09-463f-8145-b084a095e895.
59. See, e.g., D.Grieve 'Can a Bill of Rights do better than the Human Rights Act?' (2016) *Public Law* pp. 223-235.
60. See Venice Commission Opinion No. 832/2015, document CDL-AD (2016) 016, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)016-e and reactions, in PACE and elsewhere, to the Russian Constitutional Court's finding in the Yukos case on 19 January 2017, http://assembly.coe.int/nw/xml/News/News-View-en.asp?newsid=6484&lang=2.
61. Assembly document 14083 Human Rights in the North Caucasus: what follow-up to Resolution 1738 (2010)? - issued by the Assembly on 8 June 2016 http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22771&lang=en.
62. Pastor Martin Niemöller who – and many have forgotten this – initially welcomed Hitler's

accession to power back in 1933; quotation taken from *The Human Rights Handbook. A Practical Guide to Monitoring Human Rights*, K. English and A. Stapleton (Human Rights Centre, University of Essex, 1995), p.14.