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Dr Hywel Francis MP
Chair, Joint Committee on Human Rights
House of Commons
7 Millbank
London SW1P 3JA

26 April 2011

Dear Dr Francis,

Re: Human Rights Judgment

Thank you for your letter of 5 April 2011, asking me to respond to a few further questions.

I would reply to your questions, as follows.

Given that the Council of Europe has agreed the Interlaken Action Plan for the future of the Court, does this confirm that the Court lacks credibility and needs reform?

I don't consider that the Court lacks credibility. On the contrary, it can still be convincingly argued that the European Court of Human Rights is one of the most (possibly *the* most) effective human rights mechanism in the world. Such a case can be made, for example, in relation to 'take up':- 47 European states have chosen to sign up (the only European exception being Belarus), but the argument can be most convincingly made in relation to the changes to domestic laws, policies and procedures (across Europe) which have resulted directly from decisions of the Court or the application of the Convention within the domestic polity. The Interlaken Declaration recorded Council of Europe States' 'strong commitment' to both the Convention and the Court, and explicitly recognised the 'extraordinary contribution of the Court to the protection of human rights in Europe'.

However, having said that, there are of course aspects of the Court system that do need reform. By far and away the greatest problem for the Court is its excessive case load, which has now reached 149,000 pending cases. There are two particular issues worth highlighting in relation to this. The first is that a very large number of

applications to the Court (around 90%) do not meet the admissibility criteria – but the Court must still dispose of them (through its admissibility processes). The second aspect is the large number of cases which come to the Court which raise the same issue (from the same state) – this is referred to further below. The responsibility for these two issues cannot be laid at the door of the Court. Indeed, it has often been said that the Court is a victim of its own success. It would be more accurate to say (as regards the second issue mentioned here) that the Court is the victim of states' failure to resolve systemic human rights problems (see below).

I have commented on various specific reform proposals in a recent article published in the European Human Rights Law Review, a copy of which is attached.

Does the increased emphasis in the Interlaken Plan on domestic implementation confirm that many States in the Council of Europe are concerned about the expansive interpretation of the ECHR by the European Court of Human Rights?

No - the emphasis in the Interlaken Declaration on domestic implementation reflects the principle of subsidiarity, which has always been an important part of the Convention system. First and foremost, rights should be protected and enforced by domestic authorities (as the Interlaken Declaration itself reiterated). If the national authorities of any Council of Europe state are unable to protect individuals' human rights, then the European Court acts as a vital 'safety net'. The principle of subsidiarity is reflected in the Court's admissibility criteria (the requirement to exhaust effective domestic remedies before applying to the Court) and in the substantive law of the Convention (Article 13 requires states to ensure that there is a right to an effective remedy in respect of any arguable violation of another Convention right).

The increased emphasis on domestic implementation in the Interlaken Declaration results, in the main, from two issues. The first is the fact that an increasingly high proportion of the Court's judgments deal with repeat violation ('clone') cases from the same state – in other words, although the Court has pronounced judgment on a particular issue in a state (such as, for example, the problem of the excessive length of legal proceedings), the national authorities fail to resolve the problem and therefore successive cases are brought to the Strasbourg Court concerning the identical issue – in their hundreds, or even thousands. Better domestic implementation would of course mean that this would not happen. The second issue relates to the burden on the Court: improved national implementation would mean a lower caseload, which would in turn mean that the Court processes would be speeded up.

I am simply not aware of any evidence to suggest that the emphasis on domestic implementation in the Interlaken Declaration results from states' concerns about any 'expansive interpretation of the ECHR' by the Court. Indeed, there is no reference to this in the Declaration. It is also worth noting that the Parliamentary Assembly of the Council of Europe has placed increasing emphasis on the role of national parliaments in overseeing the implementation of European Court judgments. In November 2010, it noted that unless national parliaments start to play a 'much more pro-active role' in the execution of judgments, 'the key role of the Convention, its supervisory mechanism and the Council of Europe as a whole, in guaranteeing the effective protection of human rights in Europe is likely to be put in jeopardy'.

To the extent that a state may be concerned about 'expansive interpretation', the European Court system itself incorporates a review process which allows the parties (the state or the applicant) to challenge a decision. Thus, parties can request that a Chamber judgment (7 judges) be referred up to the Grand Chamber (17 judges) if the case raises a serious question affecting the interpretation or application of the Convention, or a 'serious issue of general importance'. This is a mechanism which can, and does, lead to judgments being overturned. A recent example of this is the case of *Lautsi v Italy* (2009) in which the Chamber found that the display of crucifixes in classrooms in Italian state schools violated the right to education taken together with the right to freedom of religion. The case was then referred up to the Grand Chamber, and, following the intervention of ten other Council of Europe states, the decision was overturned in March this year. Another example, from the UK, is *Hatton*, the aircraft noise case, in which the Chamber found a violation of the rights of residents living near to Heathrow Airport, but the decision was subsequently overturned by the Grand Chamber.

What do you think that the prospects of success would be for the UK to negotiate changes to the Court (a) designed to enhance its influence on the appointment of judges, (b) to reduce the jurisdiction of the Court over the UK; or (c) to introduce an "absolute" margin of appreciation for certain rights?

What would be the practical implications of these proposals for the ECHR and the Council of Europe?

As it is a multi-lateral Treaty, any changes to the Convention itself would require the consent of all 47 states. The recent example of Protocol No. 14 to the Convention illustrates the great difficulties which can arise in trying to introduce any such changes. That Protocol, which dealt merely with procedural changes, was held up for several years because one state (Russia) did not consent to it. Having originally been agreed in 2004, the Protocol did not enter into force until 2010.

To the extent that points (a) and (b) might imply the UK negotiating for itself a particular (or privileged) position, in my view, the chances of success are nil. Changes of that nature have never previously been implemented in the history of the Convention system. Nor do I think they would be seriously contemplated now. This is because the Convention envisages a collective approach to the implementation and enforcement of human rights across the continent. The very limited means of 'opting-out' are very tightly controlled through the processes of 'reservation' (at the point of ratification of the Convention by a state) and 'derogation' – which can only be relevant 'in time of war or other public emergency threatening the life of the nation'.

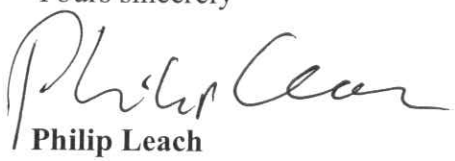
Furthermore, in my view, 'selective tinkering' by any one state would be politically disastrous for the Convention system. This is because it would mean that other states could also seek selectively to 'opt out' of, or weaken, particular aspects of the system. The Convention system has been effective because the same standards apply to all member states - old and new. The extent and gravity of human rights violations do of course vary considerably from state to state – nevertheless it is critical that each state is subject to the same standards. If the UK were allowed to 'opt out', then so too

would other states. This could put in jeopardy the Court's ability to adjudicate effectively, for example, over egregious human rights violations in Russia (Chechnya) or Turkey, or to deal with systemic problems in, for example, Italy, Poland or Bosnia.

There is, in my view, absolutely no prospect of introducing an 'absolute' margin of appreciation for certain rights. This is both because there is no need to do so, and no evidence of any appetite amongst Convention states to try to do so. Furthermore, such a change would mean interfering with the independence of the Court, because it would represent an attempt to 're-mould' the Court's case law, which has been cast through thousands of judgments and admissibility decisions over many years. Such a change has never been implemented in the history of the Court, and there is no prospect of it happening now.

However, as regards the appointment of judges, I would agree that the system needs improvement. I have suggested elsewhere that the authority of the Court continues to be undermined to a certain extent by concerns about the process for the nomination and appointment of its judges, the problem being that not all states are putting forward suitably experienced candidates or they are failing to ensure a gender balance. However, more emphasis is now being placed on the need for prior 'hands-on' judicial experience (accepting, however, that the Court benefits from having judges with a range of backgrounds, including academia, legal practice and civil society), and a working knowledge of both English and French. There have also been legitimate concerns about the fairness, transparency and consistency of national selection procedures. Such problems occur in only a small minority of cases, and the appointment process is being made more rigorous by the Parliamentary Assembly, which will, if necessary, reject a state's list of candidates, and call for a new list. This situation will be ameliorated (under Protocol No. 14) by the appointment of judges for a single, nine-year term. Furthermore, the recently created Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights will have the responsibility of examining proposed candidates, before they are assessed by the Parliamentary Assembly.

Yours sincerely



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