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Human Rights Protection in the Field of Action of the Council of Europe and the OSCE[1]

From Moscow to Sarajevo: An Idea Makes Its Way

In the autumn of 1991, Moscow was the venue of the Third Conference on the Human Dimension held from 10 September to 4 October in the framework of the Conference on Security and Co-operation in Europe (CSCE). The eagerness of the Parliamentary Assembly of the Council of Europe to hold a meeting there on that occasion is brought out by the fact that its Bureau convened no fewer than four different sub-committees in Moscow for a joint discussion on the Conference agenda.

For most of the parliamentarians, this was their first trip to Moscow and much water would continue to flow under the bridges before there was any question whatsoever of Russia's accession to the Council of Europe. Indeed, the Russian parliamentary delegation endowed with "special guest" status was still made up of members of the Supreme Soviet of the USSR. In Moscow, three rounds of talks took place: one with CSCE heads of delegation from Council of Europe member States, a second with a delegation representing Canada and the United States, and a third with heads of delegations from States not members of the Council of Europe. Amongst the many issues discussed, the idea was mooted that the Council of Europe might be able to offer the latter States the benefit of certain legal machinery for the protection of human rights.

Drawn up shortly afterwards under the aegis of the Sub-Committee for Human Rights of the Parliamentary Assembly, the Moscow meeting report contains a passage on the division of labour between the CE and CSCE: "The division of responsibilities between the CSCE and the Council of Europe in the sphere of human rights was discussed in all the rounds of talks. Human rights are clearly so fundamental that no institution ought to be prevented from helping to implement them and put them into effect. This is the first point to be noted. Nevertheless, a basic trend stemming from the structure and history of the two organisations did crystallise in the talks, especially those with the heads of the delegations of Council of Europe member States: the CSCE is making it its business to win acceptance for human rights mainly through the mechanism of

1 The original text was written in German language as a contribution to the *Festschrift* for Heinrich Klebes and was also published in the *OSZE-Jahrbuch 1998*. The version published in the present volume is the official translation which has been done at the Parliamentary Assembly of the Council of Europe, Document AS/Jur (1998) 32 rev 2, 8 July 1998.

politics and political pressure, whereas the Council of Europe's principal task is the realisation of human rights through the process of law. This is a result of the structure and historical development of the two organisations."[2]
Still fresh in our minds these words offer a brief description of the situation we are faced with today, apart perhaps from the fact that, reading between the lines, we can detect signs of politico-legal tug-of-war that has become ever more tangible over the six intervening years. However, more about that later, as we shall first track the course of the idea that emerged in 1991.

Synergies with the Council of Europe

By 5 May 1992 the Parliamentary Assembly had already adopted and put before the Committee of Ministers a number of proposals as to how non-member States might make use of the machinery contained in various Council of Europe conventions. The main thrust of the proposals was that the European Court of Human Rights and the Committee of Experts of the European Social Charter could provide opinions at the request of the countries concerned, and that the latter might also be brought under the remit of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment. The Committee of Ministers referred these proposals for opinion to the bodies concerned and to the European Commission of Human Rights.
With the war in Bosnia having taken a turn for the worse, in February 1993 the Assembly adopted for the benefit of the Committee of Ministers a second, amended, proposal referring to a debate in which Lord Owen, the then co-Chairman of the International Conference for Peace in Former Yugoslavia, had taken part and in which he had put to the Assembly a number of specific proposals concerning protection machinery, no doubt drawing on work done at meetings in Strasbourg where attempts were being made to work out approaches based on the initial proposal.
Also prompted by the debate with Lord Owen, the Committee of Ministers had already called for work to be set in train on the first proposal when it was officially apprised of the Assembly recommendation. Finally, on 9 March 1993 the Committee of Ministers adopted Resolution 93(6) preparing the ground for the putting-in-place of institutions for the protection of human rights in countries not yet members of the Council of Europe. The Committee of Ministers did not follow up the idea set out in the Assembly's original proposal. Nevertheless, the outcome was a protocol to the European Convention on the Prevention of Torture and Inhuman or Degrading Treatment designed to open the latter for signature and ratification by States not members of the Council of Europe.

2 Report on the meeting of the Sub-Committee on Human Rights in Moscow on 30 September and 1 October 1991.

A well-tried Council of Europe recipe had once again shown how effective it could be. What I have in mind is joint action by different bodies such as the Parliamentary Assembly and the Committee of Ministers. Already way back in 1950, shortly after the Organisation was set up, this approach had led to the adoption of the European Convention on Human Rights (ECHR). Suggestions from the Parliamentary Assembly to the Committee of Ministers, with skilled help by the Secretariat and steering committees and the know-how of national ministries, still offer a means of creating synergies enabling the veteran and somewhat tightly structured organisation to tread new paths. A case in point is the emergence of Protocol No. 11 to the European Convention on Human Rights which will entail the merger of the European Commission and the European Court of Human Rights into a single body.
The concept of Council of Europe support for the observance of human rights in non-member countries henceforth had a legal basis. The road to concrete action in Central and Eastern Europe now lay open. In any case, there was no longer much scope for such action in Central Europe, since several countries of that region were already members of the Council of Europe. However, a twist of fate meant that our idea had first moved to the other side of the Atlantic Ocean.

The Path Passes through Washington and Dayton

Shortly after its adoption, consideration was given to the idea of applying Resolution 93(6) in respect of Croatia, but that idea was then abandoned in favour of alternative legal forms. The first echo to the Resolution came from the Washington Agreement of 1 March 1994 which laid down the basis for the creation for the Federation of Bosnia and Herzegovina. The setting-up of the Court of Human Rights provided for in the Agreement had been put on hold pending the outcome of the invitation by the Federation made up mainly of Croats from Bosnia and Bosniacs calling upon the Serbs to join, which implied a need to wait and see how the situation might develop further.[3] However, participation by the Bosnian Serbs did not materialise and the war went on unabated for over one year with the Croats from Bosnia and the Bosniacs joining forces and regaining their territory from the Bosnian Serbs. The Croat-Bosniac Federation finally turned out to be one of the two components of the future State of Bosnia and Herzegovina.
As a result of the Dayton and Paris Peace Accords concluded on 14 December 1995, the ECHR finally became part and parcel of the domestic law of

3 Cf. Communication from the Committee of Ministers - Interim reply to Recommendation 1204(1993) and Recommendation 1219(1993) on establishing a mechanism for the protection of human rights in European States not members of the Council of Europe (Doc. 7113).

the State of Bosnia and Herzegovina. This was the first time that the rights guaranteed by the Convention were directly applicable outside the member States of the Council of Europe. In the matter of discrimination, a whole series of other international law conventions were also directly applicable. The ECHR could not be ratified by Bosnia and Herzegovina which was not a member State of the Council of Europe whose bodies were not able to operate in that country. However, Annex 6 of the Peace Accord provided for two institutions particularly responsible for dealing with the application of international legal instruments, namely an Ombudsperson and a Human Rights Chamber.

Based on Resolution 93(6) of the Council of Europe, the Human Rights Chamber comprised six Bosnians and eight international members, the latter being appointed by the Committee of Ministers of the Council of Europe. The Ombudsperson was to be appointed by OSCE after designation by the international community. Although answerable to the international authorities for an initial five-year period, these organs are both institutions of the State of Bosnia and Herzegovina, the Human Rights Chamber coming under the ambit of the Council of Europe, the Ombudsperson under that of the OSCE, thus providing what might be termed a Council of Europe-OSCE joint venture between the two bodies which began its work at the end of March 1996.

Experience in Sarajevo

The terms of reference of the Human Rights Chamber are comparable to those of the organs of the ECHR. The Ombudsperson has a very broad remit including not only the publication of reports on individual applications along the lines of what is done by the European Commission of Human Rights, but also the traditional role of mediation and the publication of special reports on matters selected by the Ombudsperson *proprio motu*. However, in the initial phase, the Ombudsperson concentrated on the first of the above items. For informal mediation to be able to take place between complainants and the public authorities there was a need for at least some degree of viable administrative procedures, which meant that in 1996 the country was not yet ready for an ombudsperson of the traditional type.

The Ombudsperson's activity was largely focused on the somewhat formal processing of individual applications, along the lines of the European Commission of Human Rights, and the effect of this was to flesh out the combined role of the two bodies as set out in Annex 6, i.e. that of a Council of Europe-OSCE joint venture, in that, when processing such applications, the Human Rights Chamber and the Ombudsperson followed the procedures of the Strasbourg organs of the ECHR. A further consequence of this was that it speeded up the incorporation of the new international legal instruments into legal life in Bosnia.

One interesting feature is that many staff from international agencies on human rights assignments in Bosnia were somewhat taken aback - at least initially - by this highly legalistic approach of the two institutions set up under Annex 6, as well as by the direct application of the pre-eminent international law. Not only Americans and Canadians, but also Europeans, had this reaction, which is quite understandable, since this was the first time that the ECHR was being directly applied outside the membership of the Council of Europe through bodies specially set up for that purpose. What was surprising, however, is that international officials on human rights monitoring duties sometime betrayed total ignorance of the Strasbourg machinery and the associated case-law. Indeed, many of them seemed unable to grasp the fact that norms of international law could be directly applicable and especially the corollary of that fact, namely the inapplicability of domestic legal norms at variance with them.
It might be useful, against this background, to give a brief outline of the various stages in the development of human rights protection. Slowly but surely, international protection of human rights is gaining strength. In the initial phase we have the declarations and policy statements of international organisations that serve as a frame of reference for political action. In the following stage these policy statements are translated into international treaties, signed and ratified by States but whose implementation - at least at international level - remains a political matter. In the third stage, to these treaties there is added a possibility of individual petition to a body which makes recommendations to the State concerned. Finally, in a fourth stage, there emerges a remedy of individual petition leading to judgments having binding force under international law.

Europe in the Van

By what we might term "an upward and downward delegation of jurisdiction", Europe has systematically restricted the influence of national governments in human rights enforcement. Whether or not there has been a breach of rights guaranteed by the ECHR is for the European Court of Human Rights to decide, with the role of the government concerned being confined to that of a party to the proceedings. The decision to institute proceedings lies solely with the potential applicant, which represents a downward delegation of power. Governments' influence is further restrained by Protocol No. 11 to the ECHR, whereby the Committee of Ministers was deprived of its earlier power to judge the issue of the existence of a violation in cases not already referred to the Court.
The fact that such limited powers should have been allocated to governments should be seen in the context of the 1940s. Europeans were still reeling at the time under the horrific human rights violations perpetrated on their continent. It had long since been plain in Europe that democracy alone was no absolute

guarantee of human rights, since individuals who had come to power through the democratic process had had more than a helping hand in these atrocities. So those who drafted the ECHR did not stop at creating a catalogue of human rights but went on to add to it machinery for the lodging of applications. As we have seen, this machinery restricted the role of governments, and its effects that are politically binding on an entire continent still make it unique.

True, the Inter-American Convention on Human Rights does possess similar machinery, although it provides only for reports and for recommendations to the State concerned. In political terms, however, this system has not yet gained full acceptance, as only a number of the signatory States have recognised the principle of individual petition and the Convention has never been ratified by such a country as the United States. In contrast, a political *sine qua non* for any country wishing to join the Council of Europe is the ratification of the ECHR and its built-in protection machinery. Accession to the Council of Europe becomes effective only when States undertake to ratify the ECHR within a specific deadline. Under Protocol No. 11, recognition of the right of individual petition is now compulsory. Independence vis-à-vis governments and the judicialisation of human rights protection have now thus become a constituent element of Europe.

In contrast with this, the activity of the UN Human Rights Commission is based on direct political pressure lying exclusively in the hands of governments. The initiation of any discussion about human rights violations and the way these rights are to be interpreted are matters that are left to the free play of political forces, whereas in Europe such issues have been removed from the political arena. Government delegations to the UN Human Rights Commission are given the task of inciting other governments to respect human rights whilst guarding over their own governments' political or economic interests, and this can lead to questionable *quid pro quo* situations. Be that as it may, the work of the UN Human Rights Commission plays a major part in consolidating human rights throughout the world.

The UN also has machinery independent of governments for the lodging of individual applications with the UN Committee for Human Rights. Established under an optional protocol to the International Covenant of Civil and Political Rights, it provides for the "forwarding of views" to the government concerned and to the applicant. Although it is not a court and is unable to hand down rulings that are binding under international law, the Committee has been doing a useful job and has developed considerable experience in interpreting the provisions of the Covenant.

Once Protocol No. 11 to the ECHR has come into force, the task of the Committee of Ministers will be reduced to that of supervising the execution of judgments. Whether or not to allege a violation will continue to be a matter for the individual to decide, and the interpretation of the rights guaranteed will lie ex-

clusively with a judicial body handing down internationally binding agreements. The significance of this clear-cut division of roles should not be underestimated, for it has enabled the European system for the protection of human rights to take the lead in the slow but steady process of consolidation now observable throughout the world. Subordination of political action by governments to adjudication by an international court on the basis of principles hammered out in common represents a by no means negligible step in the development of civilisation.

Now approaching its 50th birthday, the ECHR has become an instrument of great importance, not only for individual applicants, but also in terms of prevention, as the judgments handed down can lead - as has often been the case - to legislative reform in the signatory countries. The Convention, together with its organs and the Council of Europe, still has to face the acid test, namely the enlargement of its scope to Central and Eastern Europe. However, before turning to the future, let us briefly recall the historical prelude to the situation as it stands at present.

European History: A Curse and a Blessing?

What has happened in Europe may be termed the "judicialisation" of human rights protection. There are of course areas of life when, if it is taken too far, codification of this sort can create problems by eroding the flexibility of social structures. However, this does not apply to human rights. These lie at the very heart of human dignity, so much so indeed that we are duty bound to be totally intransigent when it comes to putting them into effect.

In the Europe of the late 1940s, this perception had taken root in most people's minds. It had grown out of a long European history marked by folly, horror and laden with guilt - notably its dealings with other continents - but also rich in constructive tension and cultural diversity, with the urge to sally forth to meet others, all of which nurtured its philosophy in areas such as the law and the power of the State. Interwoven with present day perceptions, this legacy of the past has enabled Europe to take the lead in implementing human rights, so that the darker and brighter sides of its history sometimes seem to mirror one another.

Europe by no means has a monopoly of this pattern of development. Some dream of a world court of human rights recognised by all Governments. Our awareness that the future often begins with dreams does not mean that we can afford to remain with our heads in the clouds. We have now reached a stage where it has to be said that Europe should no longer lay claim to the role of a model for the rest of the world, for there are too many skeletons in our historical cupboard. For too long now, the use of force has been one of the means

whereby Europe's capacity for innovation has left its imprint on the world. Within our continent itself, the lead we mentioned above is, historically speaking, the outcome of horrors perpetuated against human rights, so a more modest attitude on our part would seem to be in order.
Being modest in this context means that, although Europe's lead in the implementation of human rights should undoubtedly be seen as a contribution to the slow but steady process of consolidation in this field, we should not for all that seek to impose it on other continents. However, there is a downside to this modesty, namely the obligation to preserve the legacy of history and to develop it further. Although Europe's duty to itself is to protect the lead born out of its own historical trials and tribulations, that duty also flows from its historical guilt resulting from the human rights violations it perpetrated on other continents. Should this curse of history finally produce a blessing, it will fall to Europe to preserve that blessing and to hold it at the disposal of those whose history has taken a different course. Histoire oblige.

Structural Differences between the Council of Europe and the OSCE

Let us now revert to the joint venture, to the undertaking which the Council of Europe and the OSCE embarked on together in Bosnia, and let us look at the way they differ from one another in their approach to information and their perception of events as a direct result of their differing structures.
Set up in 1975 as the Conference on Security and Co-operation in Europe and then re-styled OSCE, the OSCE has 55 members, including the USA and Canada. Membership of the Federal Republic of Yugoslavia is currently suspended. To all intents and purposes, Governments alone have any say in the running of the organisation. The Vienna-based secretariat is 120 or so strong. The Organisation's budget (for 1997) amounted to some ATS 340 million (roughly FRF 170 million). However, Governments continually provide the Organisation with temporary staff selected and paid by them. A small number of staff work in the secretariat, although most are allocated to the Organisation's many duties in the field. All activities together with the Organisation's budget are decided upon by the Permanent Council of Government Representatives. Decisions on matters of major importance are taken by the Ministerial Council or at summit meetings. The Ministerial Council is also responsible for the choice of Secretary General as well as for the approval - officially or informally - of appointments to senior posts. The Secretary General implements the decisions of the Ministerial Council. The secretariat has no agenda of its own. The Organisation's operational activity comes under the responsibility of the Chairman-in-office, i.e. the Foreign Affairs Minister of the country holding the Chair.

Founded in 1949, the Council of Europe has 40 member States. Its secretariat numbers some 1200 officials whose statute expressly forbids them to be Government employees or Members of Parliament and who are appointed by the secretariat after competitive examination. The secretariat serves all the Council's organs: the Committee of Ministers, the Parliamentary Assembly and the Conference of Local and Regional Authorities in Europe. The budget (for 1997) amounted to some FRF 1 billion. Responsibility for decision-making is divided among the various organs. For example, the Committee of Ministers adopts the budget, the Parliamentary Assembly at the request of the Committee of Ministers elects the Secretary General and his deputy as well as the judges of the European Court of Human Rights. Delegations from national parliaments must include representatives from both the majority party and the opposition so as to ensure the representation of a broad European political spectrum.

Similar in structure to that of the Council of Europe, the OSCE Parliamentary Assembly, created in the early 1990s, has its own staff and premises distinct from those of the OSCE proper (the Secretariat in Copenhagen; *editorial staff*) and sits for one week a year. It is not empowered to influence OSCE activities, and neither does the Assembly have any specific right of recommendation to Governments, as compared with the Parliamentary Assembly of the Council of Europe which - as we have just seen - makes recommendations to the Committee of Ministers and meets much more frequently. Organised along the same lines as the Parliamentary Assembly, the Congress of Local and Regional Authorities in Europe may also submit recommendations to the Committee of Ministers.

Structurally speaking, the two Organisations could hardly be more different from one another. The OSCE is practically an exclusive preserve of Governments, whereas what characterises the Council of Europe is the way its various organs co-exist and counter-balance one another, and the way they take purchase on the work of the ECHR organs which pervades their activities and from which they draw support. Activity at Government level in the OSCE Ministerial Council is determined in national capitals, mainly in the Foreign Ministries, but also to some extent in Defence Ministries. In contrast to this, the work of the Council of Europe's Committee of Ministers also involves other ministries with emphasis often being placed on Ministries of Justice.

As regards the implementation of human rights, the difference between their positions in the slow four-stage process towards consolidation of human rights in the world can be attributed to the structural differences between the two Organisations. Active so far in the third stage, the Council of Europe will soon be moving definitively on to stage four where all individual applications will lead to an internationally binding judgment. The OSCE is operating in stage one involving the attainment of common policy objectives. The rationale for this difference also lies in the fact that, for the OSCE, human rights are significant

especially when failure to observe them threatens the stability of a region or a State.

Different Working Methods

The OSCE thus works mainly *in situ* with Governments providing staff for specific assignments lasting several months and mainly concentrated at present in Eastern and South-Eastern Europe at sites selected on the basis of their potential risk as sources of conflict and destabilisation. When policy issues are involved, the necessary input normally comes from member States. Among OSCE working methods particularly noteworthy are conferences often involving NGO representation in addition to that of Governments.

Work in the field in the case of the Council of Europe usually lasts only a few days on the basis of planning carried out in Strasbourg. Reference should be made here to the many assistance and development programmes drawn up by the secretariat for the benefit of Central and East European States. Despite a theoretical risk of overlap with the activities of the OSCE Office for Democratic Institutions and Human Rights in Warsaw, in practice efforts are today usually well co-ordinated.

In the Council of Europe great importance is currently attached to monitoring, a process designed to ascertain to what extent new member States are honouring the commitments they entered into when joining the Organisation. Both the Parliamentary Assembly and the Committee of Ministers have introduced procedures for the completion of this task. The competitive edge that seems to have crept in between the two Council of Europe organs will in all likelihood turn out to be a plus rather than a handicap for this exercise and further rather than hamper the attainment of its objectives. Although political in nature, the procedures in question have their foundation in law.

The regular contacts that the Parliamentary Assembly has at political level with the countries of Central and Eastern Europe also have their importance, and their significance for human rights should not be underestimated. Many members of the delegations to the Parliamentary Assembly devote an appreciable part of their time to these contacts, over and above their work in their national parliaments, and are thus able to meet their colleagues in the countries concerned, or to receive them in their home countries. This offers them a means of developing relations of trust and marks a direct contribution to European values.

Finally, mention should be made of the inter-governmental co-operation within the Council of Europe. This regularly brings together senior officials from the national capitals in many specialised committees. There too, relations of trust

are developed and further the dissemination of know-how and associated values which would not otherwise be possible.
However, behind these differences in structure between the two organisations and their differing working methods lies another difference, one that is of a markedly political nature. The OSCE has always been loosely structured, thus enabling Governments to state their requirements and values and to integrate them into the day-to-day business of government. Political aims are set in common with the priorities among them being decided in the changing light of the current political situation.
In the Council of Europe on the other hand, basic values are to a large extent enshrined in Conventions that are legally binding on the signatory States. Since the latter have agreed to submit themselves to the binding judgments of an international judicial body, the application of these fundamental values may go further than the political interests their Governments seek to defend on a day-to-day basis and, on occasions - as in the field of human rights - even run counter to them. So, in our analysis of the structural difference between the two organisations, we are led back once again to differences in substance in the ways in which they implement human rights.

Judicialisation - A Decisive Achievement

The Council of Europe and the OSCE differ not only in legal but also in political terms, the main difference between them being in the field of legal policy. Ever since its inception, the Council of Europe has stood for that step forwards civilisation makes when moving from the political to the legal order, and not only in the human rights field at that. Nowadays, we often tend to forget that, in many areas, the supra-national community law of the European Union was the offspring of the harmonisation of law between members of the Council of Europe. Wellspring of its richness and originality, Europe's cultural and national diversity was an incentive to go down the road to harmonisation of law, a forerunner to economic integration bringing in its wake the unification of ever more areas of law within the framework of the European Union.
Once again, Europe has to blaze new trails. Within the European Union, through the integration of nation States, a structure is in the making which in all likelihood will not be headed by an all-powerful central Government comparable to that of the United States, but whose steering bodies will nonetheless need to be capable of action. In the economic sphere, globalisation will perhaps lay down universal limits of its own, but as far as political structures and basic principles are concerned, Europe will continue to plough its own furrow, ever mindful of our continent's diversity in culture and political traditions and of its history.

The achievement represented by judicialisation of human rights thus remains a pivotal point in Council of Europe-OSCE relations. The Council of Europe will continue to steer a steady course over the sea of fundamental values themselves firmly anchored in the law, an approach that may perhaps appear somewhat roundabout when seen through OSCE eyes. As opposed to that, the OSCE will preserve its rapid-response capability stemming from its closeness to the political climate of the day, although the impression gained by an on-looker from the Council of Europe might be one of an unsteady hand at the tiller when it comes to drawing a chart of fundamental values. In the meantime - and precisely because of these differences between them - there has grown up between the two Organisations a constructive and practical form of co-operation nurtured by the assets of each, namely the rapid response of the OSCE and the time-tested skills of the Council of Europe.

A "human rights fire brigade" was the expression used by the head of the OSCE Office for Democratic Institutions and Human Rights in Warsaw when summing up the activity of the Office as being that of an organisation designed for coping with emergencies.[4] This image also very aptly describes the practical co-operation between the two Organisations, with the Council of Europe providing the architect and the OSCE the fire-fighters, both of whose work has to be co-ordinated, despite differences in know-how, procedures and materials. In other words, the judicialisation of which the Council of Europe has now become the symbol is today acknowledged by the OSCE in the field of practical co-operation.

The Moment of Truth

Over recent months, voices from outside the organisation, but also sad to say occasionally from within, have bemoaned what was alleged to be a betrayal of its own values when it accepted new members from Eastern Europe. Such hand-wringing is misplaced and shows that two aspects of the question have been lost sight of: firstly, the very structure of the Council of Europe and, secondly, the lead time resulting from its pre-eminent position when it comes to implementing human rights.

In contrast with other international organisations where Governments alone determine what activities are to be carried out, the Committee of Ministers of the Council of Europe does not hold the key as regards the Council's capacity to absorb new members. As a result of its particular structure imposed on its by its role of guardian of the flame of judicialisation in Europe, events in that organisation tend to follow a somewhat different pattern. The critical hurdle in determining whether the Council of Europe can admit new members is the European

4 Neue Zürcher Zeitung of 15 October 1997.

Court of Human Rights which hands down its judgments independently of any political pressure from Governments. Given the extensive case-law of the organs of the ECHR, there is hardly any likelihood of a *volte face* in the near future.

The moment of truth will come when the first judgments finding against the respondent States are referred to the Committee of Ministers for the supervision of their execution. So far, all judgments of the European Court of Human Rights have eventually been accepted, and even though the enforcement may be long-drawn-out and laborious, it continues its course and thus keeps developments on the right path in the country concerned. What would happen if the member States were to try and opt out of this process? Under the ECHR procedure, it is a matter for applicants to denounce violations of human rights, and once Protocol No. 11 has come into force it will remain up to the European Court of Human Rights to rule on applications, so that the only question that arises is what steps the State concerned will take to execute the judgment.

The outcome of this will be to lend a fresh quality to the human rights debate at governmental level, which will also benefit from a renewed impetus that other international organisations not fulfilling the relevant legal policy requirements are unable to imitate. Thus, it would be a mistake to assume that this European approach to the implementation of human rights would eliminate the need for political pressure, for under that approach the political echelon is given a part to play, albeit more limited and therefore more concentrated, namely that of supervising the execution of judgments that are binding under international law.

At this juncture we should revert to the various stages in the development of human rights protection and to the slow but steady progress towards the strengthening of that protection throughout the world. This process should be seen as a whole, hence the need, whenever possible, to interlink the various stages so as to foster its further development. There seems therefore to be a clear case for looking for synergies in supervising the execution of judgments. In the Council of Europe itself, co-operation between the various bodies would be important on this subject which could well be placed on the agenda of the Parliamentary Assembly and the Congress of Local and Regional Authorities in Europe, as well as on that of the various steering committees. It could also well be the subject of personal contacts.

However, the concrete fall-out of all this would mainly occur at governmental level. The revigorated debate on the execution of judgments handed down by the ECHR should not be confined to the meetings of the Committee of Ministers. Debate on the execution of judgments by the European Court of Human Rights should also take place in the UN Human Rights Commission. Then again, greater use could be made of the bilateral framework with regular bilateral discussions on enforcement between national capitals.

National Institutions for the Protection of Human Rights

There remains a further topic from which conclusions may be drawn concerning the co-ordination of the activities of the different international organisations and which should be seen in the light of experience gained in Bosnia.
In Central Europe and even more so in Eastern Europe, the enforcement machinery of the ECHR will not suffice to secure observance of human rights in all the countries concerned. Some of these States will take additional measures to set up national institutions for protecting human rights, such as commissions, ombudspersons and the like.
The way in which national institutions for the protection of human rights are set up in future States Parties to the ECHR and in States unable to ratify the ECHR because they are not members of the Council of Europe will necessarily differ. Although theoretically possible, parallelism in this respect would not make much sense. In the former category of States there would be a need *inter alia* for an ombudsperson able to advise individuals involved in a dispute with the authorities whether to seek a friendly settlement or to initiate proceedings before the organs of the ECHR. In order to be able to give such advice, the ombudsperson must be familiar with the ECHR and have some knowledge of the case-law or at least be able to access the necessary information. Ombudspersons will also require these insights in their dealings with the authorities to which they would submit appropriate recommendations as to how breaches of human rights might well be avoided in specific cases. In any State Party to the ECHR, it is this instrument that is the yardstick against which all critical comment and all cogent claims pertaining to human rights have to be measured in the final analysis.
A practical conclusion to be drawn from these considerations is that, when designing their own machinery for the protection of human rights, States that have ratified the ECHR or are planning to do so should ensure that their level of protection will then dovetail with that provided under the procedures of the ECHR. When planning the introduction of such enforcement machinery, the authorities concerned should seek advice only from experts fully conversant with the organs of the ECHR, and this is a point that should be taken to heart by any international organisation concerned with the setting up of national human rights protection machinery, namely the OSCE Office for Democratic Institutions and Human Rights in Warsaw, the Council of Europe and the relevant UN agency.

Human Rights - A Political Football?

The subject of a debate that was initiated a short time ago was whether or not to the Universal Declaration of Human Rights there should be added a similar

declaration of human duties. In the course of that debate it had been stated that "Today, close on half a century after the Universal Declaration of Human Rights, the over-riding moral imperative it lays on the shoulders of Mankind and its 200 sovereign States is under threat, for the fact is that some Western politicians, especially in the United States, use the expression 'human rights' not so much as a rallying call, but rather as a war cry or an aggressive means of exerting pressure in the field of foreign policy, more often than not in a selective manner (...)[5]" Whether at world level the response to the politicisation of human rights should take the shape of a Declaration of Human Duties is a question that may remain open, although there is every room for doubt and reservations on that score.

What brooks no doubt is the fact that the politicisation of human rights in the international move towards improving their protection is a retrograde step. For Europe to invent a Code of Human Duties would be completely off target when confronted with a regression of this sort, because Europe has already seen off attempts to politicise human rights by another means, namely the enforcement machinery of the ECHR. However, the words quoted above do refer to circumstances of much importance for the subject dealt with in this contribution. I offer two points by way of illustration.

The first concerns the way the media influence what goes on in society. The perceptibility of social phenomena as such is conditional on the extent to which they impinge on the media. Although we may go along with the idea that "jaw-jaw", even political "jaw-jaw", is better than "war-war" and the subsequent absorption of political "jaw-jaw" into law represents progress for civilisation, there is no getting away from the fact that media influence can be a bar to progress. More than any others it is the visual media that tend to find a greater appeal in conflict than in politics. As for legal matters, they evoke even less interest than politics, unless of course there happens to be a show trial in progress.

The second key word is speed. Military action happens at lightning speed, political action takes somewhat longer and legal proceedings often drag on even longer still. The speed of a process and its media impact are clearly inter-related, and these two factors appear somehow to be in inverse proportion to what we have just described as progress of civilisation.

In other words, the factor that reduces media coverage is precisely what Europe has achieved in bringing human rights within the ambit of the law. It is under this heading that our answer is to be found as regards differing levels of information and perception among those involved in Bosnia. Nobody without a professional grasp of Europe's lead in implementing human rights will be able to learn much about these matters from the media. What does produce media impact is direct bilateral diplomatic pressure, as well as political debate in the UN Human Rights Commission, namely all activities stemming directly from gov-

5 Helmut Schmidt in "Die Zeit" of 3 October 1997.

ernment initiative and whose political handling remains entirely in government hands.
A logical sequel to this would be to query whether the Council of Europe should not perhaps see to it that the ECHR implementation machinery achieves a greater media impact. Although this would no doubt prove useful, we need to revert to what we termed the "moment of truth". Not only will government-level discussion of human rights gain in quality, but a fresh impetus will also be given to it. A decisive factor in this connection will be efforts towards extending the political discussion about the execution of judgments of the European Court of Human Rights beyond the Committee of Ministers of the Council of Europe to other bodies such as the OSCE, the UN Human Rights Commission, as well as to various bilateral channels.
Should efforts to this end succeed, improved media coverage would automatically ensue. Granted, this increased impact of human rights on the media would be due to political debate and political pressure, although they would not run any risk of being politicised in the sense mentioned earlier, since the jurisdiction of the Court and the right of individual petition would remain unaffected.

Political Protection of "Judicialisation"

A second area where the political level is decisive for Europe's lead in the implementation of human rights needs to be addressed, for the preservation and, if necessary, the defence of that lead, representing as it does a major achievement in the field of legal policy, is first and foremost a political task.
Europe's leading position in implementing human rights is currently being drawn into the discussion about globalisation and deregulation. In an age of deregulation, the view prevails that, in the economic field, conflicts of interest are better resolved by drawing short-term demarcation lines than by full-scale settlements. However, in the human rights field, there is no talk of deregulation. If there were, what Europe has achieved in the legal policy field would be under threat.
However, as the effects of globalisation have long since spilled over from the economic into the cultural and political spheres, both culturally and politically Europe has found itself a player on the world stage. Hence the usefulness and even the need for European human rights circles to become aware of the differences and to keep a watchful eye on the different stages of development in human rights protection, as well as on the gradual process of consolidation underway throughout the world as a whole. Europe's achievement in the legal policy field with respect to human rights lies in the removal of the protection of those rights from the sphere of day-to-day political bargaining between Governments, whose role is henceforth restricted to supervising the execution of

judgments. In contrast with that prevailing in Europe, human rights protection in its earlier stages relies far more on deregulation or - to express it more correctly in historical terms - efforts in Europe have led to a higher degree of "judicialisation" of human rights, since the process of consolidation has basically been a movement from the political sphere to that of the law.
The reference in the NATO Madrid Declaration of 8 July 1997 to the OSCE as being the body - implicitly the only one - responsible for implementing the democratic and human rights set out at great length in that Declaration is something of an eye-opener. What it in fact shows is that the European government delegates involved in drawing up the Declaration or in its adoption failed to grasp that, measured against the world-wide development underway in the implementation of human rights, the OSCE contribution was less coherent than that of the Council of Europe, so much so that the language used could in fact amount to a step backwards.
What also raised a few eyebrows was the fact that, in the terms of reference of the planned office of the Representative on Freedom of the Media, the OSCE should have deliberately avoided any reference to the ECHR, so that the 34 OSCE States that had ratified the Convention put in an interpretative declaration requiring the Representative on Freedom of the Media also to take into account freedom of expression including freedom of the media in accordance with the ECHR. This brings home the need for a greater awareness of how important it can be to link together various stages in the slow process of world-wide consolidation of human rights protection as a means of furthering its continued progress.

Prospects

Sarajevo, November 1997. Frost flowers make their first appearance on the window of the small flat overlooking the old town where this paper was written. Sarajevo's third post-war winter took hold a few days earlier and the two institutions set up under Annex 6 of the Dayton and Paris Accords will soon be able to look back at two years' activity in which they sought above all to introduce the ECHR into the legal life of Bosnia and Herzegovina. Things got off to a quiet start, almost totally cut off from the omni-present media of the first post-war months. Working procedures had to be devised and the international community needed briefing on the legal foundations underpinning the activity of the two institutions. This proved possible because we knew exactly where we were starting from and that we were continuing a tradition that will soon be 50 years old. It took some time before the first effects of our work made themselves felt and the media began to show interest. Today, it is quite clear that these effects would have gone unnoticed had we mainly directed our efforts to

achieving media coverage. So it is perhaps after all occasionally possible to break that dreaded link between media impact and speed.

Who could have foreseen in August 1991 in Moscow that the road through Resolution 93(6) led from Dayton to Sarajevo? Along the way, a number of things became clear. In States that are not members of the Council of Europe, machinery for the protection of human rights will remain the exception, since most Central and East European States have taken out membership of the Council of Europe. Experience gained in Bosnia is not only significant for the country itself, but will also serve to improve our understanding of how the ECHR and the machinery for the implementation can put down roots in the landscape of European organisations.

L'histoire oblige. More than any other continent Europe is marked by the duty its history has imposed upon it. Until a few years ago, its duty resulted in the main from its pre-1945 history. Strasbourg had become the symbol of that duty and it is in the ECHR that legal policy was to give expression to the historic pledge of "Never again". Today, as the history of the Balkans approaches the end of the century, another pledge of "Never again" emerges. Like Strasbourg, Sarajevo has become a symbol of a duty imposed by history.

Such a duty, however, is indivisible. In the field of human rights, Europe has to shoulder the none-too-light task of extending its achievement in the field of legal policy to the implementation of those rights throughout Central and Eastern Europe. Since that achievement is mirrored in the ECHR, the brunt of the burden of discharging that task falls upon the Council of Europe. The Organisation lost no time in tackling this new historic task, firstly by the rapid admission of Central and Eastern European States, secondly by reforming the enforcement machinery of the ECHR. All European organisations together with all European States will be called upon to contribute to this development by lending their resolute support to the implementation procedures of the ECHR.