



**Dialogue on
Globalization**

Collective Human Rights Protection in Europe – the difficult road to protecting human rights

Report of the FES Panel Discussion in Berlin, May 15th 2006

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I. ABOUT THE PANEL DISCUSSION

The Friedrich Ebert Foundation and the German Foreign Office extended their invitation to a panel discussion on collective human rights protection in Europe. The event focussed on instruments for the implementation of an effective human rights protection. The panellists represented a wide range of eminent intellectuals and political figures persons from the German and European human rights community. The discussion was moderated by **Petra Lidschreiber**, editor-in-chief of Radio Berlin-Brandenburg. The panel was made of the following persons: (in order of their appearance on the agenda)

Gil Robles (former Commissioner for Human Rights of the Council of Europe)

Herta Däubler-Gmelin (MP, former German Minister of Justice)

Günter Nooke (Commissioner for Human Rights Policy and Humanitarian Aid of the German Federal Government)

Heiner Bielefeld (Director of the German Human Rights Institute)

Rudolf Bindig (former MP and former member of the Parliamentary Assembly of the Council of Europe)

Renate Jaeger (Judge at the European Court of Human Rights)

Eckhard Klein (Director of the Human Rights Center / University of Potsdam)

II. OPENING REMARKS

In his opening remarks, **Gernot Erler**, Minister of State in the Foreign Office, recalled the need to create regional structures for human rights protection, based on the Universal Declaration on Human Rights (UDHR). In a world not just of economic globalization but also of globalizing human rights standards, the value of a structure like the European Council, which protects the rights of about 800 million people, was, he noted, steadily gaining in importance. He also reminded the audience of Germany's "historical responsibility" for human rights protection. He pointed out that the emerging problem of human rights protection in the so-called "war against terror" was one of the most urgent topics that need to be addressed by the European human rights organs.

Ernst-J. Kerbusch, Director of the Division for International Cooperation of the Friedrich Ebert Foundation (FES), stressed the need for global human rights protection in the context of global governance. Given the background of economic globalization, the establishment of international human rights structures is, in his opinion, mainly the responsibility of rich nations which profit most from the phenomenon of globalization. He stated that while the FES was not a specialized human rights organization, all its activities were always carried out with the framework of human rights in mind.

III. PRESENTATIONS BY THE PANELLISTS AND DISCUSSION OF THE TOPICS

Gil Robles

Six years as Commissioner for Human Rights

As the first Commissioner for Human Rights of the Council of Europe, Gil Robles was instrumental in giving shape to this position, which was created in 1999. One of the main conclusions he drew from his work was that there has definitely been a need for this institution. In particular, the human rights work for which he was responsible had previously was not carried out by any institution.

He identified as his most prominent tasks country visits and reports on these visits. He stressed two different approaches: visits in emergency situations, where a deployment was possible within 24 hours, and other visits, where preparations and negotiations with the host government might take up to two months.

In his work as Commissioner, he always sought to cooperate and to assume a role complementary to the Geneva-based UN High Commissioner for Human Rights and the European Commission. By his example he shaped the position in such a way as to prevent it from interfering with other institutions.

He pointed out that he had always tried to refrain from any "naming and shaming" of given countries, as he was convinced that a "program which is put on from the outside will never yield results." His aim was

always to engage these countries constructively and to convince those in power to voluntarily change the human rights situation.

The issues he dealt with for the most part were human rights problems arising from migration backgrounds and the cleavage between security and freedom. As regards the field of migration, he referred to his work on trafficking, nationalism, and the current weakening of integration. To illustrate the ambivalence of security and freedom, he pointed to “repressive” British legislation, which, by constricting human rights, has handed a victory to terrorists, because it has shown the weakness of the Western system. He stressed that, whatever the circumstances, even “a little bit of torture” was unacceptable.

As one result of his six-year term, he saw a growing acceptance and appreciation of his work, a fact which he illustrated by referring to reaction of France, where his reports were at first not welcomed, although over time they came to be used and quoted by both major political parties in their election campaigns. He reported that he was also asked for advice by some countries and that his reports continues to be used internationally.

Herta Däubler-Gmelin

Human Rights Protection in Germany – the Role of the German Parliament

Herta Däubler-Gmelin, member of the German Bundestag, explained to the audience the functioning and purpose of the Committee for Human Rights. Opening her presentation, she stressed the importance of the German human rights system as setting an example for European and global human rights protection. She stated that German legislation was internationally accepted and used for standard setting in international tribunals.

Accompanying and monitoring the government’s performance on human rights issues is the main purpose of the Committee for Human Rights. This function, she stressed, is carried out in an integrative approach incorporating all of the government ministries. Decisions of the Committee are usually adopted by consensus by all of the factions in parliament. She stated that the Committee seeks to take up issues that are neglected by the government. As examples she named the issues of human rights for illegal immigrants; the implementation of the facultative protocol on torture; the German reservations on the Convention on the Rights of the Child, which still have not been dropped; the facultative protocol to the Covenant on Economic Social and Cultural Rights, and efforts to strengthen the coherence of the European human rights system.

She recalled the importance of the Committee in providing a link between NGOs and the government. The Committee, she noted, served as a transmission in conveying grassroots knowledge into the arena of national politics.

Günter Nooke

Human Rights Policies of the German Federal Government:

“Human dignity is inviolable.” Günter Nooke opened his speech with this quotation from the first article of the German Constitution,. In his function as the German Federal Government’s Commissioner for Human Rights Policy and Humanitarian Aid, the focus of his work is on foreign policy, but he nevertheless pointed out that the situation at home and knowledge regarding it was the source of his legitimacy.

Germany’s unambiguous vote in favour of the UN Human Rights Council is, he stated, a clear-cut sign of Germany’s international reputation in the field of human rights. While the vote reflects Germany’s engagement, Germany’s external human rights policy is embedded within a unified European position. The advantages of this unified position, Nooke stated, are “a consistent external position and more harmonization internally.” A strong European position is needed, because, as he notes, the principles laid down at the 1993 Vienna World Conference on Human Rights are being weakened by many states, not only due to cultural or religious problems, but on account of the power interests of “questionable governments.”

As regards the situation of human rights in the war on terror, he pointed out that terrorism could only be fought by using “political means that remain aware of human rights” - “not by questioning them.”

He stated that the indivisibility of human rights was is guiding thought in Germany’s human rights policy, economic, social and cultural rights having an importance equal to civil and political rights. But he suggested that it may in any case make sense to prioritize those rights, as, in his perception, “not much

can be achieved by elevating too much to the status of a human right," the main goal being to "ameliorate the situation for individual human beings". He added that "sometimes less could be more..."

In concluding, he came back to the new UN Human Rights Council and expressed his hope that a debate might be initiated which is not dominated by regional blocks and might instead lead to an open and inclusive discussion among all members. The Human Rights Council, he noted, should live up to its expectations and provide a true strengthening of human rights throughout the world. He personally, he noted, intended to work with all his might towards that end.

Heiner Bielefeld

The Role and Responsibility of Europe in the Global Human Rights System:

Concisely and to the point, Heiner Bielefeld, director of the German Institute for Human Rights, presented for discussion seven theses on European human rights policies. To sum up his first four points: Europe's responsibility derives from historical developments, whereas the human rights approach is grounded on universal principles.

His first thesis was that the UN Universal Declaration on Human Rights (UDHR) and the European Convention of Human Rights are the "human rights response to the experiences of National Socialist barbarism." Secondly, he stated that both the UDHR and the European Convention are keyed to the idea of human dignity and the inalienability of fundamental rights. By their nature, he stated, these are part of a normative universalism. In his third thesis he noted a change in the perception of national sovereignty. State borders, he stated, are seen no longer as serving the purpose ensuring exclusivity in political decisions, but rather as lines for coordination in fields of political responsibility. Under a human rights approach, states are therefore also responsible for protecting human rights across their borders and accepting human rights-based criticism from abroad. The universality of human rights, implying, according to his fourth thesis, the opening of cultural and national borders alike. Human rights should not be seen as deriving from a European cultural heritage but as an open learning process in response to historical experiences of injustice.

In his last three theses, Bielefeld addressed the institutional developments and needs of the European human rights system. Over the last decades it is mainly the institutional side of human rights protection that has developed. Especially the European Court of Human Rights (ECHR) has seen both its importance and its workload rise dramatically. Since the European Union's competencies on human rights issues are growing as well, there is an urgent need for further coordination. Additional institutional reforms are needed to deal with the immense number of cases brought before the ECHR. Leaving aside the development of the various European institutions, he noted, the functioning of the European human rights system will have to be measured in terms of the ways in which the Member States incorporate the court's rulings into their national policies.

Rudolf Bindig

Development of Human Rights Protection in Eastern Europe – Monitoring by the Parliamentary Assembly of the Council of Europe:

In his presentation on the monitoring process, its merits and problems, Rudolf Binding used the example of Eastern Europe, as this covers the current accession candidates and the latest additions to the Council of Europe. He outlined the monitoring process and the considerations as to why a country might be placed under monitoring or post-monitoring processes.

The instrument of monitoring, he noted, was created to promote and control the performance of the new member states and accession candidates. It was seen as an option to prepare the candidates and to allow new members to join without first having to fulfil all of the requirements. This accompanying process, he went on, served to strengthen the human rights situation in the respective states while accommodating their wishes for early access to the Council.

Setting up a monitoring process, he said, has led many countries to ameliorate their human rights situation. But soon the question had to be answered whether a country would merely have to remain in a monitoring process or whether it might already be accepted for membership in the Council of Europe without having completely fulfilled the required criteria. The option chosen by the Council was to accept states that are "willing and in the near future able" to fulfil the criteria. A country which is accepted will,

under these circumstances, be obliged to fulfil certain obligations relating to the rule of law, fundamental human rights etc.

Since many countries see it as a shame to be under “monitoring” of the Council, the instrument of “post-monitoring” has been developed. According to Bindig this was initiated to acknowledge a country’s progress in implementing the European standards, but in reality it is more likely to lead to a decline of implementing efforts.

Yet the most difficult issue, as he saw it, was the fact that the possibilities of the Parliamentary Assembly (PA) of the Council of Europe to intervene in intractable conflicts (such as the one in Chechnya) remain very restricted. The observers sent by the PA, he noted, could gain first-hand information and conduct discussions with the politicians involved in the various conflicts; no change in attitude or behaviour of the political actors has been reached concerning those conflicts.

Concluding, he said that the monitoring process of the PA had to be changed. To turn it into a reasonable instrument again, it would need to develop into a systematic procedure which monitors all obligations of all Member States. Therefore a simplified mechanism should be set up to start a monitoring process to make this a regular instrument, a step which would serve to avoid, for the country concerned, the negative connotation of being under observation.

Renate Jaeger

The Role of the European Court of Human Rights (ECHR) within the European human rights protection system

“If there is a right, there has to be a place where you can claim this right,” Renate Jaeger stated in opening her presentation. She added that if a right can not be claimed, it had no legal status. In respect to human rights in Europe, Renate Jaeger works in the place she was referring to, namely the ECHR in Strasbourg. Having noted that this court exists, she stressed its major flaws – lack of publicity on the one hand and excessive caseloads on the other.

As long as rights could only be claimed indirectly (be it through the Ombudsman or diverse procedures at the UN), she noted, they could not be defended effectively. Yet it was the necessary instrument of individual complaints which has led to the present congestion of the court, she said.

The most prominent feature of the ECHR is, according to Jaeger, that the States, many of which do not possess a constitutional court, are subject to the jurisdiction of the ECHR. But how can the ECHR enforce or execute its judgements? According to Article 46 of the Convention on Human Rights, the Committee of Ministers is responsible for the execution of judgements. For this reason, she said, the State party to the case is obliged to implement the court’s decision. The judgements cover changes of national law or address practices that a state is obliged to change. Acceptance of its judgements, she noted, was partly due to the multi-national composition of the court. Therefore the ECHR’s judgements, she concluded, were effective even if the court did not have the possibility to execute them in its own capacity.

Regarding the budgetary independence of the ECHR, an query from the audience highlighted the fact that the judges are not as independent as they should ideally be. A judge who has, due to a decision taken in official capacity, to fear for his or her future national career after concluding his or her mandate at the ECHR might be influenced in her/his decisions. And efforts by national representatives to influence the judges were, according to her, sometimes quite pronounced.

Looking at the huge number of cases brought before the court in recent years, she said that a great majority came from countries without constitutional courts or whose constitutional courts do not function properly, especially Eastern European countries. But this number of cases, which demonstrate the growing importance of the ECHR, was what endangered the court’s very function because: “A legal system which is not implemented destroys itself.”

Eckhard Klein

The Role of EU and OSCE within the European system of human rights protection

“Europe is – worldwide – one of the regions with the highest standards of human rights protection,” Eckhard Klein, Professor for European and international law, stated. This, he added, was due to the three pillars of the European human rights system: the Council of Europe (COE), the European Union (EU) and the Organization for Security and Co-operation in Europe (OSCE). In contrast to the statement by Günter

Nooke, he pointed out that it was wrong to say that if there were more conventions and identified human rights, less would be achieved.

The EU's foremost achievement has been the strengthening of human rights protection and the diffusion of human rights standards among its members. The EU Agency for Fundamental Rights, which is set to be created, should serve again to strengthen this process. Yet, as far as the Agency is concerned, he was as reticent as the other panellists as to the need for it, and he expressed his hope that the future agency's profile would be further focused. He also recalled that human rights had, since 1986, been acknowledged by the EU as a guiding principle in its external relations. EU human rights standards, he noted, could serve as an example for other states and be incorporated into international agreements - he named Lomé as an example. The inclusion of human rights-relevant articles into cooperation treaties has even made it possible, in some cases, to impose sanctions against third parties.

Concerning the OSCE he highlighted the several mechanisms the organization can employ for human rights protection. Including all the major powers (but China), the OSCE has had big successes in human rights protection already during the Cold War. The four important mechanisms are: dialogue, inquiries, field or fact-finding missions and monitoring of elections. The dialogues follow the "Vienna" or "Moscow" mechanisms, which include reporting by the State concerned, question and answer sessions, an expert commission to be deployed with the consent of the host State and field missions to produce information on a specific conflict. Those field missions can be deployed upon request by at least ten OSCE members, without formal consent of the host country.

While the field missions always relate to one specific conflict, he stressed that election monitoring has become a permanent feature of the OSCE's work. As monitoring is not very welcome by many countries, and the OSCE in general has not fulfilled the hopes of several of its member States, it has come in for more and more criticism. Russia and Belarus, Klein noted, criticise the "double standards" the OSCE is, in their opinion, applying, and question the further need for the existence of the organization.

Concluding, he said that EU, OSCE and the institutions of the COE provided a structure which could and should be harmonized. It was, he noted, of the utmost importance not to exaggerate the complexity of the system by creating new institutions but to strengthen the clarity of and to align the existing ones.

IV. BACKGROUND: THE HUMAN RIGHTS PROTECTION SYSTEM

This section will present a description of the European and German human rights system in order to recapitulate the necessary background information.

Human Rights Protection at the European Level

At the European level, a system of human rights protection can be found in the European Union (the "smaller" Europe) as well as in the Council of Europe (the "greater" Europe). Unfortunately, this not only creates confusion in terminology, it sometimes also causes a duplication of work and a fuzzy perception of responsibilities for citizens who are not experts on human rights issues. The development of new institutions, foremost the planned EU Agency for Human Rights, could create better coherence between the two systems – or further duplication and confusion. As for the already existing mechanisms, an overview will be given here, including but not limited to the institutions which were present at the panel discussion:

The European Union (EU)

At present the EU lacks a unified and clear human rights mandate. Human rights protection is dealt with at the European Parliament, the European Court of Justice and by the European Ombudsman.¹ With a view to strengthening coherence and building one institution to deal with human rights, the European Union Agency for Fundamental Rights² is in the process of creation. It is supposed to be operational as of January 2007. One concern about this new office is that it may deal with the same issues as the organs of the Council of Europe, see below.

¹ Extensive information on the human rights policy of the EU can be found in: W.S. Heinz: *The European Union Human Rights Policy*, Eurokolleg No. 47, FES – International Policy Analysis Unit, Berlin, Nov. 2003, and in: Peter Schlaffer, Gabriela Sierck (eds.): *Handbook for Human Rights Work* on: <http://www.fes.de/handbuchmenschrechte/content/s-1-e.htm>.

² The mandates of this new agency will be to collect information and data; provide advice to the Union and its Member States; cooperate with civil society and raise awareness on human rights issues. For further information, visit: http://ec.europa.eu/justice_home/fsj/rights/fsj_rights_agency_en.htm.

European Parliament

Two Committees of the European Parliament dealing with human rights.

The Committee on Foreign Affairs, with its Subcommittee on Human Rights, tackles human rights issues abroad. It is mandated to deal with "issues concerning human rights, the protection of minorities and the promotion of democratic values in third countries. In this context the committee is assisted by a subcommittee on human rights. Without prejudice to the relevant rules, members from other committees and bodies with responsibilities in this field shall be invited to attend the meetings of the subcommittee."³

Mr. Elmar Brok (Germany/Christian Democrats), MEP since 1980, is the chairman of the Foreign Affairs Committee; Ms. Hélène Flautre (France/The Greens) chairs the Subcommittee.

The Committee on Civil Liberties, Justice and Home Affairs is responsible for:

"1. the protection within the territory of the Union of citizens' rights, human rights and fundamental rights, including the protection of minorities, as laid down in the Treaties and in the Charter of Fundamental Rights of the European Union;

2. the measures needed to combat all forms of discrimination other than those based on sex or those occurring at the workplace and in the labour market;"⁴ It is chaired by Mr. Jean-Marie Cavada (France/Liberals)

European Ombudsman

This institution was created to give an opportunity to every individual to file complaints against the bodies of the European Union itself. This right is drawn from Article 43 of the EU Charter of Fundamental Rights: "Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies ..."⁵

Jacob Söderman has been the European Ombudsman since the office was created in 1995. He describes his mandate as follows:

"The European Ombudsman was established by the Maastricht Treaty to deal with complaints about maladministration by the institutions and bodies of the European Community. I was elected the first European Ombudsman in 1995. Since then, I have dealt with over 10,000 grievances from citizens, companies, organisations and public authorities."⁶

European Court of Justice (ECJ), Luxembourg

The ECJ was created in 1957 through the treaties of Rome, which founded the predecessor institutions of the European Union. It is composed of 25 judges and eight Advocates General, appointed by the member states. Among other obligations, this court's jurisdiction extends to social and fundamental rights. Individuals can only appeal to this court if they are directly and individually affected by legally relevant acts.

Standard setting has been condecuted and has entered into force through various EU treaties, especially the Maastricht Treaty of 1993 and the EU Charter on Fundamental Rights, which build upon a succession of treaties since 1977, when protection of human rights was established by the European Council.

The Council of Europe (COE)

The COE has two institutions for human rights protection at its command: the European Court of Human Rights, which deals with individual cases, and the non-judicial institution of the Commissioner for Human Rights, which was set up to approach the field of human rights more broadly.

European Court of Human Rights (ECHR,) Strasbourg

This court should not be confused with the court outlined above. The ECHR was set up under the European Convention on Human Rights of 1950. It is composed of a number of judges equal to that of the Contracting States (currently 45). They are elected by the Parliamentary Assembly of the Council of Europe for a term of six years. They act in personal capacity and not as representatives of their respective states. Therefore there is no restriction as to how many judges may be of the same nationality. The state concerned is responsible for executing its judgements.⁷

The ECHR deals exclusively with allegations of human rights violations. It handles individual complaints on the basis of the European Convention on Human Rights. The load of cases pending is so high that the

³ Responsibilities, point 5 on

<http://www.europarl.europa.eu/activities/expert/committees/presentation.do?committee=1232&language=EN>

⁴ <http://www.europarl.europa.eu/activities/expert/committees/presentation.do?committee=1248&language=EN>

⁵ EU Charter of Fundamental Rights, Nice, 2000, on: http://www.ombudsman.europa.eu/guide/pdf/en/guide_en.pdf.

⁶ *The European Ombudsman, A guide for citizens*, European Communities, 2002, on:

http://www.ombudsman.europa.eu/guide/pdf/en/guide_en.pdf

⁷ For more information on the ECHR, visit: <http://www.echr.coe.int/echr>.

court urgently needs some kind of reform, since it might render itself irrelevant if it is not able to deal with cases in an adequate time span.

Commissioner for Human Rights

This institution was set up in 1999 by the Council of Europe. The Commissioner for Human Rights (Commissioner) is elected by the Parliamentary Assembly for a non-renewable term of six years. The Commissioner is a non-judicial institution which does not accept individual complaints. Its mandate is described as follows:

The Commissioner

- promotes education in and awareness of human rights
- fosters the effective observance and full enjoyment of human rights
- provides advice on the protection of human rights
- identifies possible shortcomings in the law and practice concerning human rights
- assists member states in the implementation of COE human rights standards.⁸

Country visits and reports on them are the most effective tool of the Commissioner. Having no possibility to impose sanctions or the like, the importance of the reports and of the institution itself lies in the amount of public awareness it manages to raise.

Human Rights Protection in Germany

In Germany, the responsibility for human rights issue lies mainly located with the Foreign Office. As the promotion of human rights world-wide is often an issue for development cooperation, the Ministry for Development Cooperation (BMZ) deals with the implementation of human rights programs within development cooperation projects. While decisions are taken by the government through the Foreign Office, the Parliament also deals with human rights issues. In a special Committee for human rights, the ongoing national and international debate is carried on beyond the limitations of governmental responsibilities.

The government

Within the Foreign Office, the federal government has instituted a Human Rights Representative who deals with human rights policies nationally and abroad. His/her mandate is to follow the international political debate and to provide advice to the foreign minister. Additionally, the Human Rights Representative is supposed to be the link between civil society and government. He/she is also the coordination point for humanitarian aid and deal directly with state and international organizations.

At the election to the new Human Rights Council, the great majority acknowledged Germany's commitment to human rights, and this is likely also to provide an incentive for the further work of the Representative and the Foreign Office.

The Parliament

As human rights issues are dealt with in an ongoing process, there is always political debate. It is in this debate that the work of the parliamentary Committee for Human Rights is situated. A subcommittee until 1998, the body was elevated to the level of a Committee by the Social Democratic government of Gerhard Schröder. The Committee can deal with current human rights topics that are still under discussion and in which the government has not yet taken a clear position. The issues the committee is currently concerned with include inter alia: protection of human rights in the "war on terror"; protection of human rights defenders; development of international instruments for human rights protection. Domestically, questions relating to human rights and asylum seekers and minorities are central issues for the committee.

German Institute for Human Rights

The German Institute for Human Rights was founded in 2001 following an initiative of Parliament. It was created as a "think tank" for human rights issues, providing research and information on human rights topics at several levels. Both policy advice and public information are provided by this institution.

Forum Menschenrechte

Although it was not represented at the discussion, the German Human Rights Forum has to be mentioned here as it is an important part of the German human rights system. It is a network of more than 40 NGOs working on human rights issues, which was founded following the 1993 Vienna World Conference on

⁸ http://www.coe.int/T/Commissioner/About/mandate_en.asp.

Human Rights – the FES being one of its founding members. It provides a civil society view of the German government's human rights policies and seeks to create awareness about human rights violations worldwide.

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