

ESF Exploratory Workshop on

**Preventing and Sanctioning the Hindrances  
to the right to apply before  
the European Court of Human Rights**

Strasbourg (France), 1-2 July 2010

**Convened by:**  
**Dr Elisabeth Lambert Abdelgawad**  
**(CNRS Director of Research)**

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**SCIENTIFIC REPORT**

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## 1. Executive summary

The exploratory workshop was held at the MISHA (Maison Interuniversitaire des sciences de l'Homme d'Alsace) over 2 days. Participation numbered 21 people from 13 countries, all European.

Surroundings permitted very opened and generous exchanges between practitioners on their own experience and revealed how situations are diverse among European countries. General atmosphere was very productive; all members seemed concerned working as a team. There was a real input from each participant. There was an open and realistic sharing of progress and problems.

The workshop was organised on 4 sessions.

Session 1 was dedicated to the convenor's introduction and the presentation of the European Science Foundation by Prof. Volkmar Lauber. It was then the occasion for an opened exchange on the methodology proposed by the convenor and what each topic should cover. Following this presentation, four working groups of three to six persons, each addressing a specific topic, were organized. The first group evaluated the national legal landscape issues, the second one analyzed the access to applicants and the transfer of applicants, witnesses and lawyers to Strasbourg issues, the third one discussed the administrative, tax and financial hindrances against NGO's and lawyers. It was decided to broaden topic 4 initially titled "The criminal prosecutions against lawyers and applicants" to the whole measures of protection against lawyers, applicants, NGOs and witnesses. The disciplinary measures should also be included.

The main objectives of the workshop as defined by the proposal for funding were:

- ▣ To establish the state-of-art in European and national legislations on several types of hindrances to bring a case before the European Court of Human Rights (hereinafter ECtHR),
- ▣ To determine the factors/the environment which may contribute to the development of such hindrances;
- ▣ To discuss the gaps in European and national legislations and practices in this matter;
- ▣ To determine the good practices and give examples of effective legislations in that regard,
- ▣ To illustrate with case studies (lawyers' own experience of representing applicants);
- ▣ To decide the opportunity of having a sort of publication and of the follow-up of this meeting.

The following methodology was suggested and approved: to find guidelines to be addressed to:

- ▣ The applicants and their defenders: (what to do to avoid such hindrances/ how to reply to hindrances or attempts to avoid an application to be sent to Strasbourg);
- ▣ The authorities or non-state actors which are responsible for such actions: examples of good legislations, or good practices;
- ▣ The ECtHR (and its Registry): the measures to prevent and sanction such hindrances (addressing the cost issue, measures to protect witnesses & applicants after the request has been communicated to the Defendant Government, interim measures, class actions, etc...); local offices of the Court; etc.

During Session 2, the participants met in small working groups to reflect on their own topic and prepare recommendations.

Session 3 was dedicated to the presentation in plenary of the results of the discussions in small groups and to fruitful exchanges with other participants. Some recommendations have been prepared and will be included in the final book to be published in June 2011.

During session 4 the follow-up to be given to the workshop was discussed. Three main actions will be prepared and the organisers intend to apply to the call of the ESF on Public Conferences for 2012 (deadline 15<sup>th</sup> September 2010).

## **2. Scientific content of the event**

The provision of the ECHR concerned is Article 34, which states that “[t]he High Contracting Parties undertake not to hinder in any way the effective exercise of this right”. As the ECtHR said, this right is “distinguishable from the rights set out in Section I of the Convention or its Protocols” (Klyakhin v. Russia, 3<sup>rd</sup> section, partial decision as to the admissibility, Appl. no46082/99, 3 April.2001). After meeting in small working groups, the participants set out their conclusions and recommendations which were then discussed in plenary session.

### **Topic 1: The national legal landscape**

Mrs Anne Weber presented the axis of the discussion, stressing that the group focused on the situation of potential applications in the Member States of the Council of Europe (hereinafter CoE) taking the examples of Romania and Poland. The following three points were examined: the applicant’s access to information and to lawyers, and Rule 39 issues.

*As regards the applicant’s access to information*, the need to disseminate the right to information about acceding before the ECtHR, by highlighting the Warsaw Project, a pilot project created in Poland aiming to advise the potential applicants before the ECtHR, and the legal clinics system, created within universities was stressed. It was emphasized *inter alia* that no uniform approach existed concerning the dissemination bodies and about the difficulties of the applicants to have access to information in a mastered language. In that regard, it was underlined the need to have both publications on the admissibility criteria and regular translations of the ECtHR’s jurisprudence pertaining to each Defender State as well as the leading cases of the ECtHR in local languages. Currently, the Registry of the ECtHR is working on a brochure on the admissibility criteria designated to the applicants. The National Human Rights Institutions as well as ombudsmen could be useful tools in that regard. The information to vulnerable groups (specially prisoners) is also a great concern; some brochures on how to bring a case before the ECtHR should be available in all the prison libraries.

*As regards the applicant’s access to lawyers*, it was emphasized the need of raising awareness among the legal profession by organizing trainings sessions, by creating a good network of human rights specialists and by allowing interesting financial conditions in human rights cases. It is highly important to mention that participants (half of them being practitioners) agreed on the fact that lawyers are not interested in bringing cases before the ECtHR, as it is not prestigious, it doesn’t bring money and in sensitive matters, it’s even source of troubles (for instance, cases regarding abortion in Poland).

*As regards Rule 39 of the Rules of the Court*, it was noted that the interim measures have been requested (until now) only in respect of some very few countries (United Kingdom, France, Belgium, the Netherlands, Nordic countries) and, consequently, it was concluded that the lawyers were not aware of the conditions of use of this tool. Trainings on Rule 39 were strongly recommended.

*Further plenary discussions* focused mainly on the Warsaw Project as there exists no public document on the impact of that programme; many questions were raised to Hanna Machinska who explained that 4,500 applicants (including prisoners and very poor people) had benefited from that Project which was not at all expensive (the salary of a part-time lawyer amounting to 800 euros per month). She emphasized the real positive impact of that Project regarding the current concern of preventing and sanctioning hindrances to bring a case before the ECtHR.

The discussions also focused on the necessity to approach vulnerable groups while disseminating information, the importance that lawyers and other human rights defenders shall attach to their reputation in order to give confidence to potential victims and to be well trained. It was observed that NGOs acting in human rights field enjoy a better image than lawyers in that regard. In addition, the attendees noted the difficulties to operate in certain areas, namely to accede to documents and evidences in Transnistria and Chechnya. The importance to cooperate with local lawyers was highlighted. The participants doubted whether the ECtHR is aware of these hindrances.

The possibility to bring cases before the ECtHR in a group way as “class cases”, the extension of application of Rule 39 to protect applicants and their legal representatives, the creation of similar projects as Warsaw project in other Member States of the CoE were proposed.

## **Topic 2: The access to applicants and the transfer of applicants, witnesses and lawyers to the ECtHR**

Mr Vladislav Gribincea presented the conclusions and recommendations pertaining to this topic stressing that the group focused on two points, the access to applicants and the possibility to bring their cases before the ECtHR. The group did not cover the persons under custody.

*Firstly*, it was highlighted the emergency for Members States of the CoE to implement Recommendation (2004)5 of 12 may 2004 on the European Convention on Human Rights in university education and professional training, and Recommendation (2002)13 of 18 December 2002 on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the ECtHR, in order to ensure that the applicants are properly represented before the ECtHR and their representatives may offer quality legal advice in that regard. It was also emphasized the necessity to improve lawyers’ language education in one of the CoE’s official languages.

*Secondly*, the ECtHR shall encourage the national authorities not to challenge the lawyers’ power of attorney and do not make any distinction between members of Bar and the “out” Bar members, in order to avoid various problems of applicants’ legal representation.

*As regards the expulsion and extradition issues*, it was highlighted the utility of establishing mutual contacts between legal representatives at the international level and of not interpreting too broadly Article 37 pertaining to the lack of contacts between applicants and lawyers, and

the lack of correspondence between the ECtHR and applicants or their lawyers should not be sufficient reasons to strike the application out of the case.

*Another issue relates to the access of documents.* It was stressed as well the emergency that lawyers shall have access to all documents and evidences concerning the applicant, and to the applicant itself in all circumstances even if he/she is detained. In the Republic of Moldova, establishments of facts issues are very problematic, namely the practice of confidentiality of evidences during the investigation procedure which is hindering the applicant's right to be effectively represented.

*As regards the transfer or witnesses,* applicants and lawyers to the ECtHR from non European Union Members States, it was underlined their difficulties to accede to the Court in getting visas; for example, the Moldavian rules prohibit to a charged person to leave the country.

*Further plenary discussions* focused on the complementarities between the Court and other CoE's bodies in establishing facts issues (the Commissioner for Human rights met applicants during his missions on the ground, for instance in Georgia), the anonymity practice before the ECtHR and travel issues. It appears that anonymity and confidentiality are primordial in children cases. As regards travel issues, it was observed that the legislation and lawyer's practice is different from one country to another. In Bulgaria, any person who has contractual debts to private persons or the State is not allowed to leave the country. For example, the Aire Centre never requested a hearing in cases pertaining to irregular migrants. However the main concern is the access for applicants and their representatives to relevant documents in order to prove the violations of the ECHR.

### **Topic 3: The administrative, tax and financial hindrances against NGO's and lawyers**

Mrs Nuala Mole presented the debates and conclusions of the working group distinguishing each of three types of hindrances: administrative, tax and financial ones.

*As regards administrative hindrances,* the question of access for legal representatives to persons and documents pertaining to (migrant) detainees in (foreigners') detention centers and of applicants' representation issues in that regard, were raised. For example, NGOs' access in foreigners' centers in Greece is limited; in Romania, Moldova and Bulgaria, national NGOs see their right to see the applicants and to get documents needed for their representation before the ECtHR restricted. As regards the communication with Registry sections, no uniform practice between sections and even within the same section was noticed. For example, in cases lodged against the United Kingdom or Belgium, the contacts between the Registry and legal representatives are allowed only by means of fax or post, whereas concerning Moldavian cases, from 2008, mailing the Registry *inter alia* by submitting additional observations is the regular rule. It was discovered as well that the information provided by the Registry pertaining to the rules and means of submitting the applications were different from language to another. It was stressed as well the need to create a Rule 39 special fax line in each Registry Unit (to be made public in each detention center). Very serious concerns about delays in receiving post letters from the Registry were mentioned. For all these issues the hindrances essentially result from a not transparent practice of the Court itself. The impossibility for many applicants and their lawyers to use the e-mails (whereas the States are allowed to communicate through e-mails) should also be reconsidered by the Court itself. A secured communication system at the disposal of NGOs' and lawyers should be set up.

*As regards tax issues*, in some Members States, tax proceedings were initiated against lawyers and applicants, in others, tax allowances (United Kingdom) were granted to donors giving financial aid to NGOs. It's important to keep in mind the fact that NGOs act *pro bono*. It is important to keep in mind that although many NGOs act on a *pro-bono* basis, they still incur costs. In countries where conditional fee arrangements are illegal lawyers are either in a position of having to charge their clients (which is in itself a hindrance) or to act on a *pro-bono* basis in which case they cannot recoup costs from the Court.

*As regards the costs to bring cases before the ECtHR*, participants realized once more that the practices among States are very diverse. It was observed that national legal aid to litigate before the ECtHR was granted in limited form in several States (Belgium, Moldova, Romania and Bulgaria). Distinctions between public legal aid to provide advice and information, in comparison with legal aid to represent the applicant, are made. In that regard; it was agreed that legal aid should be awarded to lawyers for any provided advice. According to Alexis Deswaef, lawyers bringing cases before the ECtHR are less paid in comparison with taking cases before other international bodies. Other costs needed to be taken into consideration, such as interpretative and expertise fees. As regards the legal aid granted by the ECtHR, it was observed that it was awarded only when the case was communicated to the Defendant Government, that the granted amount was the same for all the cases and it seemed that it was awarded only with respect to serious violations such as article 3 ECHR (Moldavian cases). In addition, issues relating to the taxation of legal aid and to exchange rates were discussed. However, the most controversial questions debated refer to the charging fees to bring cases before the ECtHR and punitive damages for abusive claims.

Finally, it was recommended that applicants' access to the Court shall be free (the project of the CDDH is a very bad idea and will cause more problems than it would resolve, and it would be devastating for the image of the Court among European citizens), that applicants' access to legal advice and representation shall be ensured, that legal aid has to cover legal advice and all real costs, that facilities and standard rules on the communication with the ECtHR shall be created, that mutual communication between applicants and lawyers shall be secured, that Court's criteria to prioritize applications shall be made public and that NGO's members representing cases before the ECtHR shall be recognized as legal representatives before the national jurisdictions.

#### **Topic 4: The protection and safety of lawyers, witnesses and applicants before the ECtHR**

Mrs Kamala Laghate presented the group's recommendations on these issues: to set up protection programs for vulnerable applicants, witnesses and lawyers acting before the ECtHR by providing them with special police protection or granting them temporary protection or political asylum in an unbureaucratic way; to improve legal provisions in order to investigate effectively all cases concerning criminal or disciplinary proceedings initiated against applicants, their lawyers and members of their families following their attempt to bring a case before the ECtHR; to put threatened applicants, lawyers and members of their families on permanent observation by national human rights bodies, ombudsmen, NGOs' and establish criteria on receiving protection in that regard; to set up a diplomatic corp aiming to raise public attention on hindrances cases. The utility of this last recommendation was acknowledged in political or sensitive cases where NGOs have no power of influence. Some participants seem to doubt about the feasibility of setting up the special police protection.

It was suggested as well that applicants and lawyers shall notify the CoE Commissioner for Human Rights or international NGOs such as Amnesty International and Human Rights Watch about potential hindrances. By approaching many leading actors playing an important role in the protection of human rights at the international level and by making public the existence of some difficulties faced by applicants and lawyers, the public attention on hindrances cases would be raised and, in consequence, it is expected that States would abandon the undue pressure and influence. Mrs Nuala Mole emphasized the importance to notify the CoE Commissioner for Human Rights about potential risks occurred to applicants and their legal representatives.

It was also recommended that the ECtHR makes use of interim measures and extends Rule 39 of the Rules of the Court to protect and resettle applicants and their families (the experience of using interim measures before other international human rights bodies, namely the Inter-American system of human rights, was served as an example) and creates a special unit in each section aiming to give priority to cases where emergent issues of undue pressure would exist. Some participants expressed doubts on the practical consequences following the setting up of such a unit within the Court.

Finally, it was recommended to introduce the option of “class actions”, which would be initiated only in exceptional cases. Discussions concerning the type of cases that would be covered by these actions and its functioning followed. Some participants expressed doubts on the means at the disposal of the ECtHR to deal with such cases.

### **3. Assessment of the results, contribution to the future direction of the field, outcome**

The workshop was the first meeting of this kind in Member States of the CoE, allowing broad and detailed exchanges between lawyers of their own experience and academics.

The experience of lawyers, members of NGOs’, practitioners among the Council of Europe and academics was very informative. Some very important information was gathered specially in regard :

- with the hindrances to communicate with the registry of the Court and the diverse practise of the Court itself,
- with the hindrances to the access to documents,
- with the lack of confidence between lawyers and victims and the reluctance of lawyers to bring cases before the Court (for financial or other reasons).

The comparative approach was also very rich as lawyers from various countries could show that some types of hindrances are very particular to some countries (difficulties to go out of the country, etc...).

New research objectives were identified:

- the importance of the comparative approach,
- the approach from the European Court itself as it seems to have different practice according to the countries,
- the difference of treatment by the Court with the applicant and his/her representative, on the one hand, and with the Government, on the other hand,
- the difficulties for lawyers at the national level to bring cases with success before the Court and even to have access to documents and to victims,

- the importance of analysing the position of other Courts (the Interamerican Court of Human Rights) to hindrances in order to protect applicants and their representatives.

During the fourth session, concrete actions were planned as a follow-up. Three main actions were agreed:

- **Prepare an academic publication** reflecting the types of hindrances in Europe, the practical measures to be adopted to prevent and sanction them; this publication, to be written in English, **and to be translated in other Eastern European languages and broadly disseminated** among human rights practitioners, namely lawyers, NGOs', judges, civil servants, etc. The networks to which belong some of the participants will be used in order to facilitate such dissemination. The English version will be published on June 2011.
- **Organize a Press Conference** at the CoE (Palais des Droits de l'Homme) **to present the publication and the results of our research.** That event should involve 3/4 contributors of the book, about 2/3 judges of the ECtHR, the Commissioner for Human Rights and one or two members of the Parliamentary Assembly of CoE ; it will be held on 24th June 2011. Journalists specialised in the human rights field will be also convened to that event.
- **Organize a high-level research Conference** (leading to another publication) on the hindrances to justice regarding serious violations of human rights: besides the lessons from the ECtHR, some comparative studies on the European Committee on social rights would be included, as well as on the Inter-American Court/Commission of Human Rights, the African Commission/Court on Human Rights, the UN Committees, the International Criminal Court and some concrete experiences at the transnational level. This event will allow academics, judges, lawyers and NGOs' to exchange on their own experiences. This conference will be addressed to students junior and senior researchers, academics, lawyers, judges, NGOs members, CoE's functionaries and officials, and Permanent Representatives to the European Institutions in Strasbourg. Mrs Elisabeth Lambert Abdelgawad and her assistant Mrs Lucia Bieules Bînzaru project to apply to the call of the European Science Foundation on Public Conferences (deadline 15<sup>th</sup> September).

#### 4. Final programme

##### Wednesday 30 June 2010

*Afternoon/evening*                      *Arrival*

##### Thursday 1 July 2010

09.00-09.20                      **Welcome by Convenor**  
**Elisabeth Lambert Abdelgawad** (PRISME-SDRE, CNRS-Univ. of Strasbourg)

09.20-09.40                      **Presentation of the European Science Foundation (ESF)**  
**Volkmar Lauber**, Professor, University of Salzburg (ESF Standing Committee for Social Sciences - SCSS)

09.40-10.00                      *Coffee Break*

#### **10.00-13.00                      Morning Session: Working groups meetings**

*Room "Table Ronde"* **Item 1: The national legal landscape:**

**Radu Chirita**, Lawyer, Assistant Professor, University « Babes-



Bolyai », Cluj- Napoca  
**Hanna Machinska**, Lawyer, Information Office of the Council of Europe, (Presentation of the Results of the Pilot project in Poland)  
**Basia Namyslowska-Gabrysiak**, Doctor in Law, Junior Researcher, University of Warsaw  
**Anne Weber**, Lawyer, Commissioner for Human Rights, Council of Europe

*Room “Délibérations”* **Item 2: The access to applicants (language, culture, physical access, etc...) & the transfer of witnesses, applicants and other persons to the ECtHR**

**Marie-Bénédicte Dembour**, Professor of Law and Anthropology  
**Magdalena Forowicz**, Post-Doctoral Researcher, University of Zurich  
**Vladislav Gribincea**, Director, Public Association, Lawyers for Human Rights  
**Kirill Koroteev**, PhD student, University of Paris 1

*Room “Antarctique”* **Item 3: The administrative, tax and financial hindrances against NGOS’ and lawyers**

**Emilie Becue**, PhD student, University of Strasbourg  
**Alexis Deswaef**, Lawyer, Bruxelles  
**Dilyana Giteva**, Lawyer, Bulgarian Lawyers for Human Rights  
**Jeremy McBride**, Practising barrister (Monckton Chambers, London)  
**Nuala Mole**, Director of The Aire Centre  
**Catriona Vine**, Legal Director, Kurdish Human Rights Project

*Room “Amériques”* **Item 4: The protective measures against lawyers, applicants and witnesses**

**Lucia Bieules Bînzaru**, Post-doctoral Researcher, University of Strasbourg  
**Zdravka Kalaydjieva**, Judge at the European Court of Human Rights  
**Kamala Laghate**, Project Manager, Netherlands Helsinki Committee  
**Fernando Piernavieja Niembro**, Lawyer, Chairman of CCBE

13.00-14.15 *Lunch Room “Europe”, MISHA*

**14.15-16.30** **Afternoon Session: Working groups meetings**

16.30-16.45 *Coffee Break*

**16.45-18.00** **Plenary Discussion on Item 1, Room “Table ronde”**

19.30 *Dinner, Restaurant (town center)*

**Friday 2 July 2010**

**09.00-13.00**                    **Plenary session: discussions on Items 2 & 3**

*13.00-14.15*                    *Lunch, Room Europe, MISHA*

**14.15-15.30**                    **Plenary session: discussions on Item 4**

*15.30-15.45*                    *Coffee Break*

**15.45-17.30**                    **Follow-up of the seminar; recommendations: discussions in plenary chaired by **Lucia Bieules Bînzaru**, Post-doctoral Researcher, University of Strasbourg & **Elisabeth Lambert Abdelgawad**, Director of research, CNRS, University of Strasbourg (PRISME)**

*17.30*                              *End of Workshop and departure*

## **5. Final list of participants**

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**6. Statistical information on participants**

1. Number of attendees

<b>Attendees / Number of participants</b>				
	Convenor	Local organizers	ESF representative	Participants
	1	2	1	17
<b>Total number</b>	<b>21</b>			

2. Countries of origin of attendees

<b>Countries of origin / Number of participants</b>												
Austria	Belgium	Bulgaria	France	Ireland	Lebanon	Moldova	The Netherlands	Poland	Romania	Russia	Spain	United kingdom
1	2	2	3	1	1	2	1	3	1	1	1	2

3. Sex repartition of attendees

<b>Sex repartition</b>	
F	14
M	7

4. Professional repartition of attendees

	<b>Professional repartition / Number of participants</b>
Researchers and academics	10
Practitioners	11

5. Age bracket of attendees

<b>Age bracket / Number of participants</b>	$\leq 35$	36 - 50	$51 \geq$
	10	5	6