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REPORT OF A MEETING

22 October 2010

The standing committee on Justice on 28 September 2010 met with the Commissioner for Human Rights of the Council of Europe, Mr Thomas Hammarberg.

Chairman of the standing committee on Justice,
Van de Beeten

Clerk of the standing committee on Justice,
Kim van Dooren

Chairman: Van de Beeten

Present are ten members of the Senate: Van de Beeten, Bemelmans-Videc, Broekers-Knol, Van Bijsterveld, Franken, Kox, Quik-Schuijt, Strik, De Vries, Westerveld,

and Mr Hammarberg, who is accompanied by Ms Paulina Polowniak and Ms Isil Gachet.

Opening: 14.00 hours

Chairman: Dames en heren, ik wil starten met onze bijeenkomst.

Mr Hammarberg, a warm welcome to you. We are very pleased to have you here with us today, for the second time in a rather short period, to discuss the very important issue of human rights in Europe and the endeavours of our national governments, particularly the Netherlands' government, in this field, and also the role of our chamber and of parliament on the whole in this respect. We have a rather generous framework of time. We can start now and may continue until 15.50 hours. At 16.00 hours we will have a meeting with the Council of State. Our secretary general has asked me to make sure that we will stop in time, so that will be my primary task today.

I have a few more practical points to put before you. I ask the members of the Senate and Ms Westerveld to take a seat in the front row, as this is the most practical thing to do. In view of the report that will be made of this meeting, I ask anyone who takes the floor to state his or her name clearly. Please also use a microphone when speaking, so that your input can be recorded and reported on as accurately as possible. If we keep in mind these rules, this afternoon will be very useful, I think.

Mr Hammarberg, we already received a very impressive report. This is what all the members of the Senate got. As chairman of this meeting, I did not have to read it myself, but you can be assured that the members did. It also contains the report on the Netherlands you made in 2008 and the response of our then government to that report. Both contain the subjects that will be addressed by the members of this chamber.

To start with, I would like to give you the floor for your opening statement, Mr Hammarberg. Thank you very much again for being here. Please give your exposé now.

Mr Hammarberg: Thank you for having me here. As you said, it is not the first time; it is the second. The first time we had a discussion in connection with the 60th anniversary of the Council of Europe. At the time, we mainly discussed the human rights situation in Europe as a whole. By that I mean *greater* Europe, and not only the EU area. At the end of that discussion, a number of you said: we did not have time to discuss the situation in the Netherlands, should we not have a discussion on just that? I responded positively to this, which may be the background to the invitation I received this time around.

We were here, as the chairman said, in September 2008 and tried to understand the situation in this country. To that end, we talked with non-governmental organisations, with the Ombudsman, with the equality body and with other experts. Of course we also spoke with the authorities and representatives of the government itself. The Council of State in fact was one of the bodies that we listened to quite carefully. We summarised our findings in a report that was published in the spring of 2009. Of course the then government received that report and wrote what must have been the most extensive response we have ever received from any government, commenting upon our analysis and recommendations. I am glad that this is made available.

For this meeting, I have tried to prepare myself very carefully with the support of Paulina Polowniak and Isil Gachet, who are sitting here with me. There is a text of about seven pages, but I am not going to read that to you because that would be boring. I don't think we would have a good exchange if I just read it to you. Instead, I thought I would highlight some of the points which we, in far-away Strasbourg, feel should be discussed here with you as politicians, in order to respond to what we define as key human rights standards in Europe today. That would be my aim. I will try to keep it short, so that we can actually have an exchange of ideas. It goes without saying that I will try to answer all your questions.

I would like to make one reservation from the very beginning. It is not easy for someone coming from outside the country, to understand the situation in complicated countries like the Netherlands, for instance in areas such as asylum policy and migration. There are realities, there are laws, there are procedures and complaints from various organisations and individuals, as well as responses from the authorities. To bring all these into one cohesive whole and to really understand what the key issues are is really difficult for someone coming from the outside. So I apologise if I have not understood certain aspects or if I was not up to date on certain reforms. I may have missed pieces of information. On the other hand, I think it could also be interesting for you to hear how someone from abroad who tries to follow matters here, who focuses on human rights standards and who is full of good intentions, has understood the situation here. It may reflect something.

When we were here last time, we focused on the question of how to prevent racism in society. This is one of the issues I want to come back to now. Another issue discussed in the report was the field of migration and refugee policies, as well as how one implements a policy in that field so that it both works in practice and is in compliance with our standards. Another issue that we took up during our last visit was the situation of children and what we call children's rights. That also I would like to address here. For this time, I have excluded other issues which came up in the report. Counterterrorism measures for instance are a very important area as well, of course, but due to the limited time available to us, I will not go into that, at least not in this presentation.

I will start with a few words on the threat of racism in society. This is, in my opinion, one of the major problems in Europe today, and by that I mean greater Europe. We have problems with hate speech, with the stigmatisation of certain groups and we have an ongoing discussion about the Roma in many European countries. We have of course freedom of speech, which is one of the key articles in the European Convention, but we have problems with racism and the question is how we deal with that. In the report, I mentioned that a new plan of action had to be proposed on racism here in the Netherlands. I think the plan you had has expired. That plan was in force until 2008 and since then, no new action plan against racism has been introduced, to our knowledge.

According to our experience, it is useful to have such a plan, not in the least because discussions about it have turned out to be quite fruitful in some countries. The debate puts issues on the agenda that otherwise would have been swept under the carpet, for reasons of political convenience among others. From our point of view, we hope that it will be possible to consider whether or not it would be worthwhile to discuss the introduction of another comprehensive, national plan of action in order to prevent racism. We do not only have legislation in mind, which is clear about hate speech, but also pre-emptive measures that could be taken in order to keep people informed about realities, so that prejudice and misunderstandings are not spread. Unfortunately, we have seen that in a number of European countries today there is an undercurrent of racism which is taken advantage of by xenophobic extremist groups for political

or similar purposes. That is one aspect covered in our previous discussion that we would like to follow up here today.

We did notice that there was a discussion about the Netherlands in the latest session of the UN Committee on the Elimination of Racial Discrimination in Geneva, in March. It was said there that when the committee analysed public opinion and the conversations here, it was found that there were problems related to extremist tendencies in the common discussion here.

I have also been informed that in at least two municipalities here in the Netherlands, there is an ongoing discussion about the presence of Roma, in the sense that decisions had been taken on a local level to start collecting information systematically about Roma from various types of social, health care and educational authorities and to put all that information together in some kind of database. I assume that the intention behind that measure is positive. However, we know from experiences in other European countries that it is quite sensitive and can sometimes even be dangerous to collect data about specific ethnic or cultural groups and to store that data in a specific database, when the decisive criterion for being registered in such a manner is the belonging of a person to a particular group. A warning light should flash in view of the risks connected to that kind of data registration and collection.

However, we do realise that there is a need to have a thorough and in-depth discussion about social problems which exist among many of the Roma communities in Europe. There are deep social problems all over Europe when it comes to the Roma. They lag behind in education, they lag behind in employment. Many adult Roma are unemployed. There are problems with health standards and health care. The life expectancy of the average Roma today is generally much shorter than that of the average person in various European countries. There is a real problem there. Of course the Roma also have a problem when it comes to political representation. They are really quite absent from political discussions and political assemblies.

Partly thanks to the reactions in France, we are now on the verge of a hopefully constructive discussion about this problem. Of course we have emphasised the need to go back in history and clarify the quite horrific repression which has been directed against this group of people in Europe for many generations, including what the Nazis did during the Second World War in an effort to exterminate the Roma. We have also emphasised that there is a need to try and stop the stigmatisation and discrimination of the Roma. I lived quite close to Roma for many years and know quite deeply how the spirit within the Roma community is affected by prejudices from outside. As long as this kind of discrimination goes on, as long as the Roma are openly called a criminal group et cetera, it will be very difficult for Roma communities – I say it in plural, because there are different groups among the Roma – to start up a discussion within their own groups about the reforms that are necessary in these communities. In my opinion, the continued stigmatisation of this group has a very negative effect on any possibility for them to break free from this social stigmatisation and of all the dilemmas that have come with it. I will follow with some interest the discussion that goes on here, because in many areas I see the Netherlands as a very interesting model in problem resolution. Especially when it comes to the two municipalities in question, it will be interesting to see whether one could develop a constructive discussion.

I have seen a circular which was sent by the Minister for Housing, Neighbourhoods and Integration in June last year. In it, the Minister tried to summarise the problems. I felt that there were some obvious misunderstandings in his text, but of course it was also an attempt to come to grips with an existing problem. Your voice in this will be important and this is a European problem. At this time, the EU appears to be a bit stuck in this

discussion. The Council of Europe is taking the initiative to organise a major meeting in Strasbourg on 20 October 2010, to which representatives of all 47 member states will be invited to discuss how we can move forward in putting an end to the discrimination against this group, to address the social problems which are definitely there and to see to it that this definite underclass in Europe gets a chance in our societies.

A couple of words on the difficulties in the areas of refugee policy and migration. There are quite detailed suggestions in our report on this. In fact, some reforms have been passed since the report appeared, including a change in the legislation itself. You have introduced a faster procedure for dealing with asylum requests. I think the idea is that most cases should be dealt with within eight days. We are in favour of fast procedures, but the procedures must also give a chance to people with a complicated background to argue their case. It is a question of creating a balance between rapid procedures and giving the asylum seeker a real chance to make his or her case. We do put a question mark when it comes to the possibilities for cases which are such that it is not obvious that they should be heard. There should be clear exceptions from the basic rule about the eight days treatment. At the moment, that type of discussion is in fact going on in quite a number of countries and the balance is absolutely crucial.

In our report, we also discussed the possibility to appeal against a decision taken by the migration agency, the IND. We welcome the idea that there would be a possibility for judicial review of decisions taken by the IND. However, we also find it very important that if such a judicial review is made, it needs to be possible for the judge or the court to look at the substance of the case and not only at the formalities, at whether or not the procedures have been followed. In my opinion, that is not clear in the present situation. That is one of the questions we find very important. Then the question of detention. We have concluded that there is an overuse of detention in migration policy all over Europe, that too many refugees and migrants are detained in prisonlike conditions. We feel that this should be avoided. We are talking about those who arrive here and are under scrutiny because of their applications, and about those who have received a negative decision and are about to be sent back to their country of origin, or to another country within Europe under the Dublin Regulation. There are quite a number of people in detention in the Netherlands currently. Our hope is that this number would be reduced as much as possible and that the holding conditions would be such that they are not experienced as prisonlike.

In particular we believe that it is crucial that children are protected from being detained, either alone or together with their parents. This requires quite some thinking and creative work by the authorities in order to create circumstances in which the family can be kept, awaiting their final decisions, without their freedom being taken away from them. I think that we have quite a lot to learn from one another. We are disappointed about the EU directive on the detention issue, which in reality allows for 18 months of detention for those who are to be sent back. We think that this is absolutely too long. I discussed this matter with Mr Brice Hortefeux, the French Minister of the Interior, in Paris. In that discussion, I asked him how long a government would really need to keep someone detained for preparing the expulsion to the home country. He replied: if we have not found the facts – it is often a matter of identifying the home country and sometimes the personal identity of the individual – within four, five weeks, then we will probably not find them if we have people stay here much longer. So the six or twelve or eighteen months would in many cases in reality be completely unnecessary for the purpose of obtaining the type of information needed. I would really like the EU to reconsider that whole approach. After all, we are not talking about criminals here. We are talking about people who come here to try and start a new life, people who are

refused that possibility and end up being kept in prisonlike conditions. For me, this is not up to standard when it comes to human rights. Then the Dublin II Regulation. The purpose of that regulation within the EU was to avoid the situation in which an asylum seeker comes to one country, tries to get asylum there, gets a no and goes on to the next country within the EU and tries it again there. It was to avoid «asylum shopping», as it were, by people who try to get a good result somewhere along the way. The idea is that there should be only one procedure in one country. Under the Dublin Regulation, the country to which the refugee came first will be the country responsible for completing the asylum procedure of the said individual.

In reality, the system has broken down entirely, partly because of the very specific problems of Greece. We have been to Greece a couple of times to look at the situation there. We visited the border area, we talked to many refugees, we were in Patras, where people line up in order to try and get from Greece to Italy or another country in the EU. We have visited the centre close to Athens where asylum applications are dealt with and it is clear to us that the Greek system has completely broken down. It doesn't work. In the office close to Athens, people are only received on Saturdays. So on Saturdays, large numbers of people line up in the street outside the office, in the hope that they will be given a card that says that they may come back on another Saturday in order to have the interview. It takes an enormous amount of time. When we were there, there were twelve officers in that whole building, dealing with so many applications. It was frankly a situation of a sleeping office. It just didn't function.

If you look at the statistics, the first thing you notice will be the enormous waiting time before people can even make their case. This is followed by a long waiting time until they receive a decision. The decision statistics show that of all the applications that were submitted, 0.04% got a positive decision. In reality, if you manage to get a decision at all, it will practically always be «no asylum». The system has broken down and this cannot be ignored by the rest of the EU, in our opinion. Still, governments continue to send people back to Greece, with the result that the asylum seekers in question get stuck there. They wait and some of them give up, of course. It is not a good situation.

In May this year, an agreement was concluded between Turkey and Greece, in which Turkey has agreed to Greece returning some 2000 refugees per year in the future. Turkey is currently trying to build up a more professional system for handling asylum requests, but it has not yet ratified the international convention for those arriving from outside of Europe. This means that a refugee from Afghanistan who is returned to Greece, by the Netherlands for instance, runs the risk of being returned to Turkey and Turkey may return the said person to home country, because Turkey has not ratified the refugee convention for people outside Europe. So much for the safety of these people. Mind you, they did not leave their home country for fun. They are either under a real threat, in Iran, Iraq, Afghanistan, Somalia, that type of country, or they may be absolutely destitute and see no other future than coming to the EU in order to try and earn some money they can send back to their families. I feel that the empathy has begun to disappear in Europe when it comes to the actual situation of these people. They are not terrorists and they are not dangerous criminals, the majority of them. The majority are people in very desperate situations. Where is our compassion for these people today?

Now a few other points in the field of migration and refugee policy. I mentioned the rights of the child. Of course we are very much inspired by the United Nations Convention on the Rights of the Child. We raise two points in our report. One of them relates to what I already mentioned; the detention of children as migrants. We should avoid that. Actually, when I was here I had some talks at Schiphol with young unaccompanied

migrants. I think most of them were from Afghanistan. There were a couple of Africans among them as well, from Darfur and from Somalia. Again, I hope that we could instil a bit more understanding for what these children – they are mainly boys – have gone through. That is not nothing. They really have quite horrific backgrounds and the trip they made was full of dangers and difficulties. They come here, they meet the authorities and many of them are afraid of the authorities, because they have had bad experiences with the police from their home countries. They don't know the language, they are confused, they feel the pressure from home, the parents have paid a lot of money in order to pay for traffickers to bring them to Europe et cetera. They are not in a very relaxed situation and I am not sure that we always meet these unaccompanied minors in the best and child-friendliest manner. Those I talked to complained that they did not understand what people had told them, what would happen next and how they should apply for asylum. When I talked to those responsible for the care at Schiphol, I was told: we have tried, but it's not that easy to explain the procedures here. I think we should at least try to agree that we should limit as much as we can the detention of minors. The principle we have is that detention should not be allowed when it comes to children.

We also went into some detail when it comes to young law offenders in the Netherlands and how to treat those – often boys – who have gone astray, broken the law and committed crimes. Again the policy that we feel should be used is in the spirit of the United Nations convention, which says that one should not deprive a child of its liberty, unless under very extreme circumstances and with the clear purpose being to protect the child from being hurt him- or herself or from hurting others badly. Of course we notice that there are quite a number of children in detention here in the Netherlands. We see that as a signal that one should look at the juvenile justice system again. Admittedly, this is not easy. There are many problems in this field and many countries are wrestling with this issue. I feel there is a need for more discussion, in order to ensure that we live up to more humane treatment standards for these unfortunate children. It must be stressed that these children are almost always victims themselves. When one talks with these young boys in those institutions, they almost always have a very negative, bad, dysfunctional family behind them. They are not being well treated and many of them have been abused sexually or with violence, from very early ages; they did not get a good start at school, they had no support from home when it comes to schooling and the teachers are often overburdened with the care of too many difficult children. To just put them in detention is not a solution. We know from experience in the United Kingdom that the recidivism among those who have been put in detention at 15 or 16 years of age is very high. They tend to start misbehaving again after they leave the detention facility and are put into prison again, which often is the start of a criminal career. Again, I think this is something to reflect upon in more depth. These were some points that we raised in our report. On some of them, action has been taken since. We know that. We may not have fully understood the further discussions and we probably missed a few points, but as I said, it is not easy to grasp everything from the outside. We feel that our role is to try and be a partner in the discussion and when we publish a report like this one, we do that not because we think we have found the truth. On the basis of experiences from other countries and of course the standards that governments have agreed upon, we challenge the authorities and want to have a dialogue. I see today's discussion as another step in that dialogue. If you want to make further points here or later on, we would be glad to receive them and discuss them further. Remember also that every time we come to this country and look around, we want to pick up good ideas and solutions that we can bring to other

countries. There is an ongoing exchange of ideas that we would like to promote through our activities.

Thank you.

Chairman: Thank you very much, Mr Hammarberg. Let me correct an omission on my part. I forgot to introduce Ms Isil Gachet, the Director of the Office of the Commissioner for Human Rights, as well as Ms Paulina Polowniak, who is from Polish origin, as you may gather. She is particularly interested in the Netherlands and she is observing us from the office of Mr Hammarberg. So she is the really important person on this side of the table, I think, and I welcome her to our chamber as well.

Mr Hammarberg, you addressed two issues from your report. May I ask the members of this chamber whether they have other issues they would like to address? If that is the case, I would like to make a note of that, so that we can divide the time available to us among the various issues to be addressed.

I see that Ms Westerveld would like to raise an issue other than the ones already mentioned. Which issue would that be, Ms Westerveld?

Ms **Westerveld** (PvdA): Mr Hammarberg's resumé was pretty grim, although the end was pretty cheerful and encouraging. During the debate I was wondering whether Mr Hammarberg has any good practices to share with us.

Chairman: That is an ongoing issue, I think.
The floor is to Mr Franken.

Mr **Franken** (CDA): Mr Hammarberg talked about the action plan as a kind of must-have. I would like to discuss that point. Moreover, I have a number of specific questions, about the recommendations of the September 2008 report, about the stateless children and the review of the anti-terrorism measures.

Chairman: One of these issues has already been addressed. We can come back to that, but I understand that you would like to add to that the anti-terrorist measures.

Mr **Franken:** I also have a question about the stateless children.

Mr **De Vries** (PvdA): In addition to what has been discussed already, I would like to ask a question about the position of illegal immigrants, who stay in the country, but never become citizens in their full rights. Their children, too, will stay illegal for ever. Does Mr Hammarberg have an opinion on that?

Ms **Bemelmans-Vidéc** (CDA): The upcoming assembly in Strasbourg will pay attention to the «division de travail» between the EU Fundamental Rights Agency and the institutions of the council of Europe. I am interested to hear from you, Mr Hammarberg, about the degree of cooperation between your office and the fundamental rights agencies, in terms of complementarity et cetera, as laid down in the Convention.

Ms **Strik** (GroenLinks): I would like to add the topic of family reunification, especially the integration test to be taken abroad, and that of the follow-up by the government of decisions of the European Committee of Social Rights.

Chairman: I suggest that we deal with this issue when discussing the issue of the refugees, that has been addressed already by Mr Hammarberg. I suggest that we first talk about discrimination, the

refugees, including family reunification, and the position of children. After that there will be room for questions about those three issues. Subsequently, we will deal with the position of illegal people, anti-terrorist measures and the relation between the EU-agency and the Council of Europe.

Ms **Westerveld** (CDA): Maybe I did not make myself clear enough, but my questions relate to the approach of the Human rights commissioner to human rights issues as such. So, I have a number of concrete questions on specific subjects, but I would like to pose them in the context of the method of approach and assessment.

Mr **Kox** (SP): Has the Commissioner already formed an opinion on the nouveauté that we, in the Netherlands, import prisoners from abroad, from Belgium to be more precise?

Chairman: Let us address our first subject: discrimination.

Mr **Franken** (CDA): Mr Hammarberg made a clear recommendation on the drawing up of national action plans in this field, but how should this be carried out? Our government has replied to your report in a letter to our parliament. The government will take your recommendation into consideration. So far, we have not seen any result. Mr Hammarberg could probably help us and make suggestions about possibilities, provisions and the steps to be made. Do you think that we have to try to define a millennium development goal in the field of human rights, with concrete criteria?

Ms **Broekers-Knol** (VVD): Mr Hammarberg spoke about the Roma. Their situation is a big problem: no education, no jobs, poor health care and no political acceptance. All these factors lead to their being discriminated, in France, in Spain, in the Netherlands; wherever. To what extent should the Roma adapt to our way of life, in terms of having education and trying to get jobs, in order to be accepted? There must be a balance between the Roma and the people who discriminate them, in order to get them more involved in our communities. Do you have an opinion on that?

Mr **Kox** (SP): What happened to all the money spent on the Roma, for example in Romania? I heard some worrying information that a lot of the money from the EU is not spent or badly spent on the Roma. What could the Council of Europe do, in order to improve these programmes? Mr Hammarberg spoke of several communities of Roma. It is not always clear who are Roma and who are not. In the Netherlands, the figures vary from 2,000 to 20,000 people. The number of 20,000 includes travellers, who are anything but Roma, in my opinion. It is not easy to analyse the problem and to come up with clear solutions, due to the fact that there is no clear definition.

Mr **Hammarberg:** When it comes to action plans, there is no treaty stating that the government must establish such plans. The idea has emerged in order to take political measures, to ensure that the standards are implemented in reality. Different governments have tried different models. One model that we have somewhat promoted is a comprehensive action plan, that would cover all human rights issues, rather than just racism, for instance. This would be based in the first place on what we call a baseline study, in jargon. It starts with a mapping of the situation. What are the problems? We should try to make a common analysis of what human rights problems we actually face in our societies nowadays. We have to listen to non-governmental organisations and to

politicians from different parties, local politicians – very important in this respect – and others who would be able and willing to take part. Once we have established this analysis, we should try to be systematic about steps to be taken on a time schedule, in order to address these problems. Where this has already been tried in a more systematic manner, the result was that the obligations of the local authorities were better clarified than usually. Local authorities often do not really feel obliged to implement international treaties, such as the European Convention. They feel this is something for the capital city people and parliament, but not for them, in spite of the fact that many human rights problems are actually local issues. In these cases the approach has also led to a more systematic relationship with the non-governmental organisations and to a sort of continuous dialogue between them and the government representatives. It has also led to a better co-ordination between the ministries. There are sometimes gaps between ministries when it comes to human rights problems. It is not always that easy to say that a particular ministry is in charge of a specific problem, because human rights problems tend to cover several ministries. A more systematic implementation of human rights policy and the availability of benchmarks have had some positive impact. The recommended time frame has been four to five years for such a plan. It should not take too long, nor should it take too short a time.

The need to educate the relevant professionals when it comes to human rights issues has to be emphasised. I would like to mention teachers, police officers, social workers, health care personnel and lawyers, of course, although the latter have been involved from the beginning. That is the basic idea. There is no magic about it. It is an attempt to be more systematic in realising what we promise in Strasbourg, when we go to meetings there.

As far as the Roma are concerned, I had to answer questions on the issue online from the readers of a newspaper, recently. It turned out that about 80% of the respondents asked the same question you just asked me: Do the Roma themselves not have some responsibility to secure that something is beginning to move? Yes, they have, but the pressure put on the Roma from outside, stigmatisation and the fact that they are ill seen by so many people in society, threatens the possibilities of the more active opinion makers *inside* the community to raise issues. When we discuss informally with Roma who represent many Roma and who are experienced in taking part in this kind of discussion, they make very clear that there is a need to raise some issues inside their communities, such as the view of women and women's roles in society. Other issues are how they relate to the «Gadje», the non-Roma people, and education. There are quite a number of Roma within the various groups who are willing to take up the discussion. But the message we get is: can you not try to stop this discrimination? Because it makes the Roma communities very conservative. It does not create an atmosphere in which one can begin to question oneself. It makes the Roma very defensive. We should be aware of this.

In Germany, about 90% of the Roma were killed during the war. They have gone through an enormously harsh history in Europe. They suffered slavery in Romania, for instance. Many Roma remember this. Not so much in writing, but through oral transmission. The bitterness is deeply rooted in many Roma communities. Go through the Nuremberg trial records: What was said about the execution of the Roma? Nothing. What compensation did the survivors get? Mengele focused on Roma children in his experiments. Many Roma were sterilised during this period, but they did not get any, or just very little, compensation. Finally, but after very long delays, a lump sum was allocated, but the distribution of the money caused a lot of irritation inside the community because it was not clear who should get compensation. So, there is a deep bitterness, not

least in the Eastern European countries. If we do not realise that, we cannot not understand why they leave Romania and go to France, not understand why their communities tend to be closed to outsiders. The question is pertinent, but I think we have to realise that it is a huge task to establish trust.

In many countries they live in slums. Women in particular have problems in coping with the situation. There is no water. There is no electricity. They are under pressure to send their kids to school tidy. Many Roma women we talked to said: how can I send my kids to school tidy, if we do not even have water?

I hope that the politicians will take the pain to really try to understand what the background is and how enormously big the challenge actually is. We have to stop the kind of prejudices which are so widespread. I hope that some politicians will stand up and say: this is not right!

As a matter of fact, much of the EU money has not reached the Roma, especially in Hungary, Bulgaria and Romania. I really hope that the spending of this money will be scrutinised. The Roma themselves complain a lot: there are headlines in the newspapers saying that we have got so much money, so where is it? That is what they say.

Chairman: Let us turn to the second topic, which is migration.

Ms Strik (GroenLinks): Mr Hammarberg, you mentioned the topic of family reunification in your report. You are worried about the integration test that people have to take abroad, before they can enter the Netherlands. Last summer, an evaluation of the effect of the test was carried out. It turned out that the number of applications has dropped by one third. We do not know the cause and we do not know what these family members are doing. Are they separated for years or do they enter the country illegally? We do not have a clear view of the effect of the test. What we do see now is that the government has proposed to raise the level of the test when it comes to knowledge of the language and to extend the test to written skills. Initially, there was only a low-level oral test, because the government did not want to deter low-educated, illiterate people and refrain them from family unification. The worry now is: will the next step refrain people from family reunification? The government has carried out an assessment to find out whether the level could be raised, without excluding large groups. The conclusion was that this would not be possible. The introduction of written tests would lead to the exclusion of large groups. Nevertheless, this will be the new policy. What is the Commissioner's opinion on this development? This occurs in other countries as well. The Netherlands has set a good example, you could say, but we are the only country that does not support people in preparing for these tests. Germany has its Goethe Institute, with an infrastructure of integration courses. We do not have such a thing. So, there is this combination of raising the level, without introducing some kind of support system, which makes it possible for people to pass this test. The point of view of the Council of Europe is, I believe, that there is a shared responsibility for the integration policy. There is the responsibility of the migrant, but the authorities have the responsibility to support the migrants in becoming integrated. I am curious to know about your view of this subject.

Mr Kox (SP): You said, Mr Hammarberg, that our government's reply to the report was probably the most extensive reply you ever got from any government. But what was the quality of the answers? Was it also the best reply you ever got from a government? Do you really think that the problems you mentioned are adequately dealt with by the Dutch government? That is important for us, because it is not so easy to check

whether the reply from the government, on this subject of migration and refugees, was to your satisfaction.

Chairman: I would like to add a question about the specific issue of the detention of refugees whose application for asylum has been rejected. You said, Mr Hammarberg, that 18 months is far too long. You quoted the French minister of the Interior, who talked about a period of four to five weeks, but the argument of the Dutch government has regularly been that it is very difficult to obtain sufficient cooperation, either from the government of the country of origin of the people who have to be sent back, or from the people themselves, or both. That makes it difficult to send these people back to the country of origin. What would be your answer to that?

Mr Hammarberg: As far as family reunification is concerned, there are fairly clear standards at international level. I often refer to the United Nations Convention on the rights of the child, because often children are involved. This convention says that children have the right to live with their parents. This is sometimes used as an argument to send back unaccompanied minors. The Danish government has used this argument a couple of times in meetings I had with them. In such particular cases, however, the background has to be taken into consideration: the children are here with the support of their families, not because they have run away from them. The family has invested in a particular boy from Afghanistan, for instance, in order not to have him recruited by the militias. He should be protected. They collect all the money they have, in order for him to go to another country and start a life there, instead of being drawn into these hopeless military adventures in Afghanistan. Sending children back is not an implementation of the idea of family reunification which is in the interest of the child. In situations where parents are in European countries, I think that there are very strong reasons for the child to come to their parents. We know how dependent younger children are on their parents who are close to them. Even some months' delay is a loss, when it comes to the reaction in the child. There has been a discussion in several European countries about how closely related one should be in order to be seen as a member of a family. Several countries have introduced rather strict rules. They talk about the core family, which in some cases excludes the possibility to bring in the old mother, for instance. Perhaps the father has died and the mother is alone. The children are here and she has difficulty in coping with the situation. When the children want the mother to come here, too, there are problems with the authorities. I think that there should be some room here for looking at the individual case, and being humane in the judgment of who belongs to the family or not. In some countries rather rude methods, such as DNA tests, are applied to see whether people are cheating, by trying to help someone from the home country, who is not really related, to come here. This excludes the possibility for adopted children to come. DNA tests may also be quite an intrusion into the integrity, if the child is born or conceived outside marriage, for instance. DNA tests are not always a good method to clarify relationships. In fact, all this is done in the spirit of trying to avoid too many coming. The whole spirit of the rules is to keep people away if possible and only allow them to come if it would not be morally acceptable to keep them away. This attitude leads to complicated bureaucracy and delays of two years or more for people who belong together. We think of this as something that must be avoided, with all due respect. Several countries now also apply tests in family reunification cases. On the way here I read an article about the United Kingdom, which is now making stricter rules with regard to these tests, including the requirement to speak English. These rules prevent families from reunification, because

the one who is not in Britain does not speak sufficient English. I cannot see the humane rationality behind this. If somebody's wife comes to Britain and has a normal life there, I am sure that she will pick up the English language after some time. Why should the capacity to speak a language be the criterion for obtaining the right to live together in a family, a right which is internationally agreed? Again, I see this as a spirit of trying to keep out as many people as possible. The human rights attitude to this would be to look into each case and to do this with some concern for the spirit of the family itself. If one finds it logical that families live together, one should be generous in the decision making.

A question was asked about illegal immigrants. Usually, we avoid the term illegal, because we think that this is understood to mean that the person in question is illegal. The situation is irregular: they do not have the right to be in the country. We call that «irregular». It is a huge problem. We have thousands and thousands of people hiding in Europe today. For obvious reasons there are no statistics on this. A couple of years ago it was estimated that at least five million people in EU countries are irregular. In Eastern Europe there are even more irregular people. Russia is believed to have eight million irregular migrants. I come from Sweden and I know that the refugee lawyers estimate that in this small country 8,000 people are underground. They overstay their permit to stay or they stay in the country after their application has been rejected. They are dependent on landlords and employers, who are sometimes rather unscrupulous and exploit them. They are easily drawn into activities they should not be drawn into. These are extremely vulnerable people. We need to find a way to resolve this. Some countries, like your country did once, decided to regularise and sent out the signal: come up, report to the authorities and you will be allowed to stay. Most recently this was done in Spain a couple of years ago. People are afraid of that, because it sends the signal that if you stay on for a while, you will get your permit. On the other hand, these people are suffering; they are vulnerable. There is a need to tackle this in a systematic manner. The human rights standard does not deprive the state of the right to decide who may stay in the country. The state has the right to decide who will be inside the country and who will have to cross the border. At the same time there are certain basic human rights standards which should also be respected, including people who do not have their papers in order. I am talking about health care and education for the children. Some parents are afraid of encouraging the children to go to school, because they feel that they will be detected by the authorities and sent away. In other countries they are quite generous when it comes to not reporting that. Italy is one of the countries where the school system also works well for irregular migrants. It is a huge problem and it has to be tackled, of course within the human rights approach.

Mr De Vries (PvdA): Love to hear that, but what should be done about it?

Mr Hammarberg: I cannot give advice on concrete situations. I represent the Council of Europe and the standards that we have adopted. There is a sort of general policy on this. What I noticed is that it is very important for the authorities to maintain close relations with the groups – mainly the non-governmental organisations – who are trusted by the migrant communities. Take for instance churches, who could talk with them. Many people who go underground get stuck in the situation and they are suffering. In some cases it may be better for them that they go back or that they go to another country. In some cases, of course, it would be better for them to get the permit to stay in the country where they are. We cannot continue to ignore that these people exist and that they are vulnerable.

Mr De Vries (PvdA): This is a structural problem, as you outlined yourself. There are millions of people living in these conditions. It would be helpful if you could come up with a kind of approach for governments to deal with the problem and maybe put an end to the irregularity after some time. It is more or less the same problem as locking up people. They do not want to go away and they cannot be sent away. What should the government do? Should it continue not to accept that it is not the master of its own territory and lock people up for ever? Or should the government say: maybe we loose here, but there are other values, we take this little loss and try to accommodate the people in question. I think you ought to come up with an answer there.

Chairman: There are other questions about this issue. I hope that they do not add to the enormous burden that Mr De Vries just put onto Mr Hammarberg's shoulders, when he asked him to come up with the solution all the governments have not yet found.

Ms Broekers-Knol (VVD): Mr Hammarberg, in your presentation you said that in Europe the empathy for refugees is disappearing. This is a bad signal. Have you carried out any research on the origins of this disappearing empathy? Why is it disappearing? I think that governments could do something to bring back the empathy. In many European countries, even in Sweden, right-wing politicians win votes because the empathy is disappearing. And it is disappearing quickly. Is this because there are so many refugees? Is it because the rules of law are not always adapted as they should be? Is it because the great number of refugees cost a lot of money, as they often live on social security et cetera? Research into this issue would be helpful to all governments.

Ms Quik-Schuijt (SP): I read that Belgium has a good practice. It provides housing to people who have to go back and helps them understand what the alternative is if they do not go back. In Belgium many people leave voluntarily, without being put in detention first. Perhaps Mr Hammarberg could collect good practices from around Europe and inform us about them.

Ms Strik (GroenLinks): Mr Hammarberg, I support your view that the Council of Europe should have basic norms regarding irregular migrants that governments must comply with. But until now it is quite reluctant to adopt such norms. We also have the decision of the European Committee of Social Rights. The government was reluctant to comply with it and to say that all minors should have reception and be provided with good conditions. The national courts took it up and now governments are obliged to provide reception facilities, but not for parents. So families are separated because of the decision of the court on minors. It takes a lot of political support to reach the political decision that there should be basic norms for all irregular migrants. We give these people access to health care, allow minors to go to school, but still put asylum seekers who got their final decision from the court out on the street and pretend they leave the country.

I draw your attention to the resolution on readmission agreements which the Parliamentary Assembly adopted this summer. There is a tendency to shift the responsibility to countries outside of the EU. Especially Third World country nationals are being transferred to transit countries – countries they only travel through – to which they have no access. Irregular migrants can be transferred to a country where they have no rights and no access. It is not even possible for them to travel onwards to their own country.

One of the recommendations in the resolution was that countries may only enforce a readmission agreement if they have the guarantee that

people have access to basic rights in another country. But how can countries safeguard this if they themselves do not grant basic rights to irregular migrants? I think an initiative for access to such basic rights from within the framework of the Council of Europe would be a good start.

Mr Hammarberg: The root of this problem is of course inequality. I think almost everyone wants to stay at home. As I said, people do not leave their homes for fun. As long as the standard of living in Afghanistan and Europe is so completely different, there will be Afghans who want to come to Europe. They will continue to do so until there is at least a bit more equality. Of course, the international community, UNHCR and others, pointed at the need to invest much more money in development aid et cetera in order to avoid unemployment and to improve the quality of life in North Africa, the Middle East, and Asia, but this will take a long, long time. Until the situation is changed – if it will change at all – people will come to Europe. And they will get through. Some will drown in the Mediterranean, some will be killed in the minefields along the borders in the North East, but they will come. We must find a way to cope with that. I do not think that having a punitive approach alone will help the situation. There is a notion among, I think, all the governments in Europe today that it is best not to give a signal that it is better here, that it is easier to get permission here, and that the situation is more liberal here. So they avoid sending a positive signal. Many of the more repressive actions taken are meant as a negative signal. In fact, you do not have to study government statements very carefully to sense this notion.

At the same time we see increasing xenophobia in Europe today. This is reflected in politics in Europe as well, as you know and others know. How can we prevent xenophobia and create an atmosphere in which people feel they can afford to welcome people? Some philosophers and demographers say Europe needs migrants, immigrants, because it has an aging population et cetera. But this seems not to be the notion among the majority of the population, or at least among many people in our societies. And there, again, lies a challenge for politicians to start a discussion.

We could, of course, try to collect examples of good practices. There are still differences within Europe. More differences than we would like, actually. A harmonised, co-ordinated EU policy would be better, also for the migrants, than the present situation where some governments try to send a negative signal to keep people from coming to their particular country. Harmonisation would be a positive thing in my opinion.

What to do with those who have gone underground, the irregulars? The Parliamentary Assembly of the Council of Europe adopted a resolution some years ago which included a reference to the possibility of regularising the presence of people who are already in the country according to certain criteria: if children are involved, if they stayed in the country so and so long et cetera. It is possible to define criteria which would enable at least some irregulars to leave the underground and join the rest of society. But, again, I think governments are afraid of sending signals.

«Just go to Spain and stay there until there will be another decision about regularisation.» When the Spanish government regularised the irregulars last time, they were scolded by the French government, which said Spain set a very bad example. After all, the people who come to Spain may come to France after a while because of the freedom of movement within the European Union. France asked Spain not to do this again. Of course, Spain had to listen to that type of advice as well.

So it is an enormous challenge for Europe to get control over the situation. I have no right and am not able to question the right of governments to control their borders and who is inside them. But at the same time basic human rights standards should be respected. Children

should be protected. Family cohesion, family unification is another extremely important principle.

Something must also be done to avoid people being trafficked and continuing to be in a trafficking-like situation, exploited by employers and landlords, and recruited by criminal gangs, as also happens in Europe today. I also think there are too few people with a migrant background in the police corps of many European countries. So it is not a question of taking one measure, but of taking a number of measures.

Chairman: Ms Broekers asked for your analysis of the fading empathy.

Mr Hammarberg: There have been many attempts to answer that question, including by academics. They point at the scapegoating element. Fear and unemployment tend to be a problem. People fear they will lose their jobs and tend to see newcomers as competitors. They say: «they take our jobs» et cetera. This often is not the case, because newcomers in many European countries are taking up jobs nobody wants. But of course there are also situations where newcomers do compete for jobs. The distance between some groups in society and politicians is another aspect. This makes it possible for extremist groups to gain votes. So to a large extent it is a matter of unfulfilled hopes among people. One reaction to this is to turn against migrants. But you cannot knock on doors and say: be nice to migrants.

I have often said that in my opinion, politicians have a role in this. They must try to be better teachers and to convey a broader perspective than just the narrow «are we competing on the same ground?» They should try to highlight the positive things that come with migration and newcomers, because new ideas and new cultures also bring something to our societies. That is very seldom said and illustrated, because there is an atmosphere of contraction and fear that something is wrong. I think migrants have been victims of a general unease about developments in our societies. In our global society things change so quickly and our economies are so vulnerable, not only internally but also externally. To believe that the atmosphere in Greece today would be very welcoming to foreigners is rather naive.

Mr De Vries (PvdA): Firstly, I gather from your answers that countries have a right to control their borders and to decide who is allowed in. Secondly, you grant countries the right to send people back who are not legally admitted to the country. But thirdly, I think you say: granted that countries do not signal to the outside world that when you are in, you will eventually stay in, it would be very wise of governments to act in a way that tries to at least address the problem of those who are not allowed in, even to an extent that maybe they will be regularized without public announcements. Is that a correct summary of your view?

Mr Hammarberg: Yes, more or less. I think most governments realise it would be better to regularise the situation of those who are inside the country now, because there is an underground they have no real control over. We don't even know how many irregulars there are. People are being exploited. Their situation probably also encourages crime. But governments do not decide on regularisation because they are afraid to send a positive signal and that more people will come. If they could find a way to both accept irregulars in our society and at the same time prevent more people coming in, they probably would buy that. But no one believes that there is a method to completely stop further immigration. That is why some people – but this is very much in the future – begin to think that we have to resolve the problem out there. Not by having Libyans acting as a police for Europe, but by securing that for example the Eritreans and the Somalis have a future in their own country. That

requires conflict prevention, economic assistance, trade agreements that make it possible for them to sell their products et cetera. But this is 20, 30, 40, 50 years away.

Chairman: I suggest we go on to the next topic, assuming Ms Van Bijsterveld does not want to address this topic but the one on the working methods of the Commissioner. We can then also add the question of Ms Bemelmans about the relation between the Council of Europe and the Agency of the European Union.

Ms **Van Bijsterveld** (CDA): My question starts on a somewhat different topic, but also ties into the discussion we just had. From the discussion so far it is clear that we are dealing with structural, complex problems. Certainly there are human rights aspects, but it is also clear from what we know in general and from the discussion we had, that the problem also ties in with general policy questions. Sometimes they are even integrated in larger policy questions about how to deal with particular issues. One of my questions is the following. How can you, Mr Hammarberg, as a Human rights commissioner, really focus on human rights, and at the same time avoid being entangled in policy issues? Or do you also give a sort of general policy advice to countries about complex issues? How far into governance issues or political issues do you go when you deal with particular issues?

Furthermore, even if we abandon the very strong structural issues that most European countries are dealing with and look a little closer at the more concrete issues that you also addressed in your report on the Netherlands, we see that Europe is working on the development of common human rights standards. I can very well imagine that for a European accord on human rights it is sometimes difficult to make a rule, but we do have a very concrete case at hand. However for you as a Human rights commissioner who deals with human rights and laws in the abstract, it becomes much more complex.

I will explain this further. Sometimes different policy issues or even conflicting human rights issues are at stake, and sometimes, from a human rights perspective, you can have various legitimate ideas about a possible solution. I give you a few examples. I see, for instance, that you made recommendations on certain phrases in our equal treatment act, and you said something about abolishing blasphemy. Apart from what one may think about this concretely, in theory it is possible to have different ideas on those topics, also from a human rights perspective. Therefore I am very interested in how you deal with such issues in your work and in your country reports.

Sometimes issues not only touch upon the balance between human rights or more general policy concerns, but also upon constitutional mechanisms. I read very carefully and saw that you made no recommendation on the introduction in the Netherlands of the constitutional review of parliamentary legislation. However you did recommend or comment on pending legislation in that field. Of course you can think differently about this. The same is true about what you say about the interpretations of various courts in the Netherlands of international human rights standards. It might be bad. But from the point of view of separation of powers within the judicial system, you could also say that checks and balances might be good. So how far do you go in your country assessments? Do you have a general idea of what human rights in Europe should look like?

I come to my third question, which is slightly more abstract. I know from the court rulings of the European Court of Human Rights that especially in cases where there is no convergent view in Europe on what the standards are, there is a margin of appreciation allowed. What margin of appreciation do you use in your work, in the abstract, when it comes to country reports? In your recommendations for the Netherlands, some issues may

from your perspective be urgent, while others are refinements or discussion points. So how direct is your assessment or how much difference do you allow?

I come to my fourth and last question. In your introduction and in the discussion you hinted at the fact that in some countries the human rights situation is worse, or better, if one can say that. From the point of view of the margin of appreciation, how strict are you? Are you stricter with the Netherlands because it is on a higher level? Do you make such remarks to countries which may have worse problems to solve first? Or do you say: let's see what the situation in a country is, and from there we first address the worst things and don't talk about the rest? You mentioned, for instance, Greece just now. When it comes to the Netherlands, do you say: Okay, those issues are fine, so we dive a little deeper into the situation in this country? How do you view this on a Europe-wide level?

Mr Hammarberg: I think I would need at least an hour to answer. You touched upon issues that I am thinking about all the time. These are real challenges. First of all, the relationship between politics as we know politics and human rights as we know human rights is very complicated. And they intersect, of course. A human rights discussion is only interesting when it comes to major political problems. How do you protect an impartial clear human rights approach and still contribute to an ongoing political discussion which touches upon human rights problems? That is one of the challenges.

It became more complicated and more difficult when economic and social rights became more clearly part of the human rights package. We now recognise economic and social rights as human rights. This means that you go into issues like the right to housing, the right to jobs, decent work situations et cetera. These issues are a question of resources to some extent, but they are also clearly ideological, as there are differences between political parties on at least some of those issues.

How do you contribute to the discussion with an impartial human rights approach, without at least being perceived to take a political stance on ideological matters? It is very difficult. We try to protect ourselves against being seen as partial, unbalanced, ideological, to the left or to the right or whatever. To go into the methodology, one of the major considerations I have is: do not link up with any political ideology or political party, because then you are lost. The only thing that matters for me is that we achieve some results in improving basic human rights. That is very important.

How the various problems are resolved may differ between countries and their cultures. As became clear when I tried to answer the question about action planning, we do not have one model we think would fit every country. That would be unrealistic. The same goes for the judicial system. There are different legal systems. We can only look at the effect of an existing judicial system on the individual in the country and on the basic human rights which are hopefully enumerated in the European Convention. We have no concept of any one ideal system, but the system as it functions should fulfil the requirements of the European Convention. That is how we reason.

We have had a lot of discussion about the Ombudsman, for instance, and that type of institution. It is good to have an impartial monitoring body of that kind, but there are different models in different countries. The discussion here was whether the Children's Ombudsman should be in the other Ombudsman's office, whether a human rights institute should be created, what the nature of the equality board will be et cetera. We have no opinions about what is the best system. We just try to see whether it really functions to the benefit of the individual. That is basically how we argue.

The Strasbourg court in its wisdom uses the term «margin of appreciation», which basically allows governments to take certain more refined decisions within their own culture and traditions, as long as the basic idea behind the Convention is fulfilled. That is a good approach. It prevents the court from being drawn into ideological conflicts.

We probably just do not raise an issue if we feel that we have nothing to contribute. We are very careful to avoid grading countries or governments. If there is a change of government, we do not say this government is worse than the previous one. That would be counterproductive. We try to respond to the situation as it is.

This means that we may be perceived as being more critical towards the Netherlands than we are to Azerbaijan in the report. But if one reads carefully and looks at the nature of the problems we raise in Azerbaijan and the nature of the problems we raise in the Netherlands, one sees that the Netherlands have more experience in protecting human rights than Azerbaijan does. However, one needs to read the reports carefully to understand this. It is not the length of the report which counts; it is the type of problems addressed. The only thing that is really important for us is whether we are able to raise issues which will be of interest to those who take the decisions and the population behind them. If we do not do that, we are failing.

Does this answer some of your four, five questions?

Ms Van Bijsterveld (CDA): Yes, absolutely. May I just ask one more question? At the start of your introduction you said you would like to be seen as partners in a dialogue, in a discussion, and that you would not come up with the truth or impose the truth on particular countries. I can imagine that sometimes when you make «recommendations», you really say that perhaps something should be changed, whereas sometimes a recommendation might be meant to raise an issue as part of a dialogue. How can you make clear, also in your report, that sometimes it is really your firm point of view that something must be changed, while at other times, you would merely like to continue a dialogue?

Mr Hammarberg: I am not sure we are always precise enough in our language use to make a distinction between the two. We are really concrete. We try to make references to the European Convention or to other agreed standards, in order to show that there is a more principled backing. When we ask: «why do you not try this?» there is no such reference, because we have no reference to make on that. But I think you have a point about using more varied language or classifications when it comes to different types of recommendations.

We actually have a good relationship with the Fundamental Rights Agency. We exchange information all the time. There is no war between us and them, if that was what someone thought.

Chairman: Mr Hammarberg, thank you very much. It was very good to have you here and to discuss your report about the Netherlands and the Dutch response to it. You spoke about partnership in this respect. Our Senate appreciates your openness and your willingness to be a partner to our chamber, which is part of the legislative body in the Netherlands, a part that addresses specifically the issues of human rights every time that new legislation is put forward by the government that has to be approved by us.

We appreciate very much your willingness to come a second time to The Hague to meet us. I hope it will not be the last time, not for you personally nor for you in the position of Commissioner of the Council of Europe. I am certain that this chamber, which will have a new composition after the elections next year, will be open to frank discussions like this with you or

your successor, as the Senate has a long tradition on human rights and constitutional law in general.

So thank you very much for being with us this afternoon, also to your director and Ms Polowniak. We have some small souvenirs for you to remember this visit by. Thank you very much again!

(applause)

Closing 15.50 hours