COMMISSIONER FOR HUMAN RIGHTS

COMMISSAIRE AUX DROITS DE L'HOMME

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

CommDH/Speech(2011)4
English only

High Level Conference on the Future of the European Court of Human Rights

Izmir, 26-27 April 2011

Contribution by Thomas Hammarberg
Council of Europe Commissioner for Human Rights

Introduction

The number and nature of applications to the European Court of Human Rights ('the Court') give an indication of the status of human rights on our continent today. The number of complaints has increased dramatically; about sixty thousand complaints reached the Court in 2010. Despite its extremely heavy case-load, the Court continued to deliver very important judgments and decisions on varied subjects during the past year: from domestic violence to the disappearance of individuals in armed conflicts; from the right to hold a demonstration to prisoners' voting rights; from discrimination on the basis of health to the treatment of asylum seekers – to mention but a few examples.

The human rights of asylum seekers were also the subject of the third party interventions I made before the Court last year. These interventions followed an invitation by the Court and related to a group of cases concerning the return of asylum seekers to Greece pursuant to the EU 'Dublin Regulation'. On the 1st of September, I intervened orally - for the first time ever - during the hearing before the Grand Chamber of the Court in the case of *M.S.S. v. Belgium and Greece*. Following my visits to Greece, I was able to provide concrete observations on refugee protection in Greece, including asylum procedures and human rights safeguards, as well as asylum seekers' reception and detention conditions. Last January, the Court delivered a landmark judgment in this case, which will have a lasting impact on the protection of human rights of asylum seekers in the European Union.

The fact that, since the entry into force of Protocol No. 14 to the European Convention on Human Rights, I have the right to intervene as a third party on my own initiative highlights this complementarity between the judicial organ of the Council of Europe – the Court – and my non-judicial functions. The Interlaken Declaration, adopted one year ago, actually stressed the need of a cooperative approach, including all relevant parts of the Council of Europe, in order to assist member states in remedying structural human rights problems.

In the context of the Interlaken follow-up process, I would like to focus on three major issues: interim measures indicated by the Court, the discussion concerning introduction of fees for applicants, and the effective implementation of the Convention at national level.

Interim measures indicated by the Court (Rule 39 of the Rules of the Court)

In a Memorandum I presented to the Interlaken Conference a year ago, I argued that *the main question is not why the Court has difficulties to cope, but why so many individuals feel the need to go there with their complaints.*

The same goes for the rise in the number of Rule 39 requests being lodged with the Court: the first question is not the consequences of the overloading of the Court, but why in recent months so many individuals sought to halt their deportations through interim measures. This is partly because the mechanism is now well-known in some of the member states and has proved to be effective. But there are other reasons which explain this increase and should be addressed by member states.

- First of all, member states should respect the advice given by UNHCR concerning international protection to persons in need. The UN Refugee Agency is *the* international expert body on refugee matters with a wealth of experience and competence. It appears however that several of UNCHR's recommendations had recently been ignored by member states. Some European states have for instance decided to expel rejected asylum seekers to Iraq, despite a clear position and guidelines provided by UNHCR to governments that Iraqi asylum seekers originating from certain areas in Iraq should continue to benefit from international protection. As the safety of those forcibly returned to these areas cannot be guaranteed, it is therefore normal that these persons try by all means to stop their planned deportations, including by requesting the European Court to grant an interim measure halting them.

In some cases, applicants whose deportations were suspended on the basis of Rule 39 were eventually recognised as refugees, or given another status allowing them to stay in the country concerned. These decisions acknowledge that the applicants' fears were well-founded and that they would have been put at serious risk if they had been expelled before the Court had had the opportunity to properly examine the merits of their applications.

- Part of the problem also lies in national procedures. The asylum procedures of European countries are still flawed – they need to be improved and better harmonised. In particular, where asylum seekers submit an arguable claim that the execution of a removal decision could lead to a real risk of persecution, torture or other treatments contrary to the Convention, the remedy against that decision should have automatic suspensive effect.

On several occasions, the Strasbourg Court stressed the importance of having remedies with suspensive effect when ruling on the obligations of the state with regard to the right to an effective remedy in deportation or extradition proceedings. Such a remedy should prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible.

In this context, member states should also suspend removals to a particular country once a lead case has been identified by the Court, pending the decision of the Court. Not doing so will inevitably drive applicants in a similar situation to seek interim measures and thus increase the number of requests being made.

- Finally, the application of EU law is also a source of concern. In several cases, applicants have appealed against so-called 'Dublin transfers'. In fact, the Dublin Regulation shortcomings have led to a heavy burden on national courts, including supreme courts and above all the European Court of Human Rights. During 2009-2010 the Court received no

less than 900 requests for interim measures concerning asylum seekers asking for their transfers to be suspended. I would like to reiterate here my position that the 'Dublin mechanism' should be revised and replaced by a safer and more humane system.

All these measures should contribute to a significant reduction in the number of requests for interim measures.

Rule 39 has proven vital for the lives of individual applicants.

Contrary to what is sometimes stated, the Court in fact grants these requests very cautiously. Their binding legal nature is now firmly established in the Court's case-law and member states should abide by them rapidly, fully and effectively.

Fees for applicants

Some may argue that this might discourage inadmissible applications and that this system already exists in certain member states, where applicants to superior courts are requested to pay a fee - it thus seems natural to transpose it at the European level. I do not agree:

- Above all, the issue of fees for applicants raises a general question regarding access to the European Court of Human Rights, while the Interlaken Action Plan emphasised "the fundamental importance of the right of individual petition as a cornerstone of the Convention system". This right should be guaranteed to all persons, irrespective of their financial situation. As a matter of principle, there should be no fees imposed on applicants to a human rights court, which should remain accessible.

- Such a system would also create one more administrative burden and run counter the intended aim to reduce the workload of the Court.

Effective implementation of the Convention at national level

Applicants turn to Strasbourg because they feel unable to find justice at home. Many complaints are not taken up, but still the Court has in its rulings identified a high number of shortcomings in national law and practice. Through my visits and continuous monitoring I am aware that problems such as police brutality, unfair or delayed trials, inhuman conditions of detention are systemic in several countries.

In accordance with the Interlaken Action Plan, I have tried to contribute to improving the awareness of the Convention standards and urged states to remedy structural problems revealed by the Court's judgments, in order to prevent repetitive applications.

During my visits to member states I have however noted that some important judgments were not implemented, sometimes several years after they had been issued, despite clear guidance given by the Court.

The Court has for instance found that Roma children had been discriminated against with respect to their right to education in some member states. Three years after the first major judgment of the Court on that issue, little has changed on the ground. States should take resolute action as a matter of priority, in order to make tangible progress for the transfer of children from special to ordinary education and overall desegregation of the school system. This will not only improve people's life – it will also give a positive signal that the

Court's judgments are taken seriously and that human rights are protected at national level.

It is essential that national authorities assume their responsibilities in the field of human rights protection: national judges should apply the European Convention, as interpreted by the Court, more systematically; national legislation or practices which are incompatible with it should be changed; governments should promptly and effectively implement judgments issued by the European Court.

It is the member states' task to ensure in the first place that the human rights enshrined in the Convention are respected. The more they do so, the less the Court will have to intervene.

Conclusion

In my opinion, there must be two clear points of reference at the outset of our discussion on the reform of the Court if we want to keep intact all its potential to address fundamental human needs in the future.

First, the Court is unique in Europe but it is not alone. Other parts of the Council of Europe, including my own Office, have also a role to play in ensuring the long term effectiveness of the Court. In addition, lawyers and NGOs who regularly represent applicants before or make interventions to the Court, as well as National Human Rights Structures, should more closely be involved in the process.

Second, this process requires *political will* which should be anchored on a principled approach to human rights: stressing that the standards are treaty based and universal; that they are relevant regardless of culture, religion or political systems; that they apply to everyone without discrimination; and – that they exist in order to be *effectively implemented at national level*.