INTERNATIONAL COMMISSION OF JURISTS

ICJ-Norge - Den internasjonale juristkommisjon, norsk avdeling

Justis- og politidepartementet
v/fungerende lovrådgiver Audgunn Syse

Via e-post: audgunn.syse@jd.dep.no

Høring: EMD-reformen – Norges holdning til håndhevingen av EMK i Europa

1. Det vises til høringsbrev av 19.10.11, samt til e-postutveksling av 01.12.11, der ICJ-Norge ble gitt forlenget frist for innlevering av høringsuttalelse, til innen utgangen av inneværende uke.

2. ICJ-Norge legger til grunn at Den europeiske menneskerettsdomstolen (EMD) av Stortinget er gitt en rolle i det norske rettssystemet gjennom grunnlovsendringer (vedtagelsen av Grunnloven § 110C i 1994) og menneskerettsloven av 1999. Denne rollen er i dag allment akseptert som en bestanddel av vårt norske rettsstatsbegrep.

3. EMDs praksis har især styrket rettssikkerheten og pressefriheten i det norske samfunnet. Lovgiver og domstoler har lojalt tatt de skritt som kreves av land som deltar i det internasjonale menneskerettssystemet. I politiske organer, i forvaltning og domstoler og i sivilsamfunnet er den generelle oppfatning at dette har ført en styrking av det norske samfunnet som rettsstat og demokrati...

4. ICJ-Norge er klar over de utfordringer EMD står overfor, med hensyn til saksmengde og restanser, som følge hovedsakelig av den store mengde klagesaker mot noen få konvensjonsstater; Russland, Tyrkia, Italia, Romania og Ukraina. ICJ-Norge er også kjent med den pågående prosessen for å finne løsninger de nevnte utfordringene. At domstolens kapasitetsproblemer søkes løst, fortjener støtte fra alle konvensjonsstater. Imidlertid kan dette arbeidet ikke bare finne sted innenfor domstolens eget system.

5. ICJ-Norges hovedsynspunkt, er at kapasitetsproblemene først og fremst må møtes ved at Den europeiske menneskerettskonvensjon (EMK) i større grad blir implementert i

ICJ-Norge
Postadresse: c/o advokat Jon Wessel-Aas, postboks 775 Sentrum, 0106 Oslo
E-post: post@icj.no **Nettside:** www.icj.no

lovgivningen og håndhevet av myndighetene i de enkelte konvensjonsstatene, og at så vel Europarådet som de enkelte konvensjonsstatene, i samarbeid seg i mellom og med relevante organisasjoner i det sivile samfunn, bidrar i dette arbeidet.

6. Videre er det helt sentralt at eventuelle formelle reformer av selve EMDs organisering og arbeidsform, ikke i større grad enn absolutt nødvendig, medfører at individklageretten beskjæres. Individklageretten er selve grunnlaget for den suksesshistorien som EMK-systemet representerer, som det eneste internasjonale systemet med reell og effektiv, rettslig håndhevelse av individuelle sivile og politiske rettigheter.

7. Dersom det skal vurderes innført andre silingsmekanismer enn de som er konvensjonsfestet i dag, er det essensielt at slike ikke innebærer innskrenkinger i EMDs kompetanse til fullt ut å kunne prøve om EMKs materielle rettigheter og friheter er respektert av vedkommende konvensjonsstat i individuelle klagesaker.

8. ICJ-Norge er skeptisk til at eventuelle materielle endringer i konvensjonen gjennomføres under dekke av å søke å løse kapasitetsproblemer ved domstolen. I den forbindelse noterer ICJ-Norge med bekymring særlig de forslag som er fremmet av blant andre Storbritannia, om å innføre et nytt avvisningsgrunnlag som i hovedtrekk vil gå ut på at EMDs kompetanse avskjæres dersom forholdet til EMK har blitt behandlet av vedkommende nasjonale myndigheter i den konkrete klagesaken. Det er jo nettopp dette som er domstolens kjernekompetanse: å sørge for at det materielle menneskerettighetsvernet etter EMK, gir like eller tilsvarende rettigheter i alle konvensjonsstater.

9. Realiteten i et forslag som det britiske, er at man vil undergrave det konstitusjonelle fundamentet i EMK-systemet; at EMD, uavhengig av konvensjonsstatene, som siste rettsinstans skal ha det avgjørende ord i den enkelte klagesak, med hensyn til tolkningen og håndhevingen av EMK.

10. EMK skal sikre enkeltindividene mot at den enkelte konvensjonsstat krenker deres konvensjonsfestede rettigheter. Dette kan over tid bare sikres ved at EMD – som hittil – har full kompetanse til å prøve om konvensjonsstatene faktisk har oppfylt sine forpliktelser i den enkelte klagesak.

11. Dersom nasjonale myndigheter, herunder nasjonale domstoler, *har* håndhevet konvensjonen på en samvittighetsfull og korrekt måte i det enkelte tilfelle, vil EMD – som i dag – enten avvise klagen som «manifestly ill-founded» eller treffe avgjørelse om at konvensjonen ikke er krenket.

12. En konvensjonsstat som under dagens system ikke er villig til å underlegge seg EMDs jurisdiksjon fullt ut, kan således ikke sies å ha noen reell vilje til å respektere og håndheve EMK fullt ut. Det vil raskt undergrave menneskerettighetenes stilling i Europa om man skulle akseptere en slik utvikling.

13. Den internasjonale juristkommisjon har i en fellesuttalelse med en rekke andre NGOer på menneskerettighetsfeltet, uttrykt tilsvarende motstand mot dette forsøket på å

undergrave EMDs rolle.[1] Fra fellesuttalelsen hitsettes følgende avsnitt, som utrykk også for ICJ-Norges syn:

"While seeking "measures to strengthen subsidiarity", we are concerned that the UK Government's call for "new rules or procedures to help ensure that the Court plays a subsidiary role where member states are fulfilling their obligations under the Convention" may be misinterpreted as implying that the Court's mandate to assess compliance with the Convention should be significantly limited. Such an interpretation would indeed run counter to the very purpose of having a Court mandated to ensure respect for the Convention rights by member states, as stated in article 19 of the Convention. Where states have effectively respected and implemented their obligations under the Convention, an analysis of the merits of the case will necessarily lead the Court to conclude that no violation of the Convention has taken place. Therefore, the principle of subsidiarity will be respected. In this regard, in order to avoid any misunderstanding, and in line with the importance of respecting the Court's independence and mandate under the Convention, it will be necessary for the UK Chairmanship to recall that the question of determining whether states have effectively respected and implemented their obligations under the Convention is for the Court alone to decide.

In relation to the above, we are concerned about the UK Government's stated "aim to provide the Court with political support from the Committee of Ministers for the measures it is already taking [...] to provide a wide margin of appreciation to member states' authorities in its judgments". Pressure on the Court to leave a wide margin of appreciation to member states' authorities dangerously affects the independence and authority of the Court as a guarantor of human rights and risks undermining the effective protection of human rights in Europe."

14. Fra flere hold er det i senere år uttrykt stor skepsis til internasjonale menneskerettsinstrumenter innflytelse i det norske samfunn. I følge Maktutredningen fra 2003 bidrar menneskerettighetene til demokratiets forvitring, og især har regjeringsadvokaten har spilt en toneangivende rolle i kritikken mot Norges tilslutning til utviklingen av det internasjonale menneskerettsystemet.

15. Norges historiske engasjement for å fremme internasjonale menneskerettigheter og styrke menneskerettighetene i norsk rett, jf blant annet vedtagelsen av Grunnloven § 110c i 1994 og av menneskerettslovens i 1999, har stått og står i sentrum for statsmyndighetenes politikk. Dette ble på nytt understreket av regjering og Storting ved behandlingen av Maktutredningen i 2004. Samtidig ble menneskerettighetenes bidrag til å styrke demokratiet fremhevet. Regjering og Storting bekreftet ved dette at EMDs praksis ikke med troverdighet kan hevdes å utgjøre et problem i en demokratisk rettsstat som Norge. Å sende andre signaler ut i internasjonale fora, vil gi legitimitet til stater hvor menneskerettighetene virkelig lider av manglende respekt fra myndigheter som fraber seg «innblanding».

[1] Joint statement from Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre (EHRAC), INTERIGHTS, the International Commission of Jurists (ICJ), the Helsinki Foundation for Human Rights (HFHR), Human Rights Watch, JUSTICE and Liberty on the United Kingdom's priorities and objectives for its chairmanship of the Committee of Ministers of the Council of Europe, 4/11-2011: http://www.justice.org.uk/data/files/resources/NGO_joint_statement_on_UK_Chairmanship_priorities.pdf

16. På denne bakgrunn går ICJ-Norge uten videre ut fra at Norge vil uttrykke klar motstand mot forslag som det britiske eller andre forslag med tilsvarende innhold.

17. ICJ-Norge er heller ikke kjent med at regjeringen på noe tidspunkt har gitt utrykk for noe annet overfor Stortinget, jf blant annet Grunnloven § 26 annet ledd, eller overfor offentligheten for øvrig. Det er ikke tilstrekkelig med begrensede høringer hvis Norges forhandlingsposisjon undergraver EMDs rolle slik vår forfatningsordning i dag forutsetter at denne fortsetter. Fremleggelse av en tilleggsprotokoll til ratifikasjon etter at Norge eventuelt har medvirket til en realitetsbeslutning i samsvar med de britiske forslagene, er således vanskelig å forsvare.

18. ICJ-Norge forventer derfor at Norge i de formelle og uformelle internasjonale fora der den videre prosessen i reformarbeidet diskuteres, vil arbeide aktivt for å motvirke at slike forslag får støtte blant de øvrige konvensjonsstatene, samt sørge for det blir utarbeidet alternative reformforslag som kan bidra til å styrke og effektivisere, snarere enn svekke menneskerettighetsvernet i Europa.

Oslo, 7. desember 2011
For ICJ-Norge

Ketil Lund
styreleder

Jon Wessel-Aas
daglig leder

Vedlegg til ICJ-Norges høringsuttalelse av 7/12-2011 om EMD-reform

4 November 2011

JOINT STATEMENT ON THE UNITED KINGDOM'S PRIORITIES AND OBJECTIVES FOR ITS CHAIRMANSHIP OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE

Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre (EHRAC), INTERIGHTS, the International Commission of Jurists (ICJ), the Helsinki Foundation for Human Rights (HFHR), Human Rights Watch, JUSTICE and Liberty take note of the priorities and objectives of the United Kingdom Government with regard to its upcoming Chairmanship of the Committee of Ministers of the Council of Europe, as set out in a document released on 26 October 2011.[1]

We welcome the stated objective of the UK Chairmanship "to play a leading role in the vital work of the Council of Europe in promoting rights, democracy and rule of law across the continent". We welcome in particular the fact that the UK Government chose to have as an overarching theme of its Chairmanship the promotion and protection of human rights, and to that end notably decided to place a particular focus on strengthening the implementation of the European Convention on Human Rights. As part this overarching theme, we also encourage the UK Government to keep the talks on European Union's accession to the Convention moving forward, to ensure that the preservation of the rights of individual applicants remains at the centre of the discussions, and to guarantee an open, transparent and inclusive process, with effective consultation of civil society and all other relevant stakeholders.

With regard to the ongoing discussions on reform of the European Court of Human Rights, we agree with the UK Government that **"[t]he Court is an essential part of the system for protecting human rights across Europe"**. Respect for the role of the Court in protecting human rights under the Convention, and for its independence and authority, must therefore serve as guiding principles for any current and future reform of the Court.

We encourage the UK Chairmanship to actively pursue its stated goal of gathering consensus on proposals and measures aimed at **"strengthening the implementation of the Convention at national level, to ensure that national courts and authorities are able to assume their primary role in protecting human rights"**. This goal is indeed at the core of the principle of subsidiarity,

[1] The UK will take over the 6-month Chairmanship of the Committee of Ministers – the main decision-making body of the Council of Europe – on 7 November. The Chairmanship programme issued by the UK government is available here: http://ukcoe.fco.gov.uk/resources/en/22792210/priorities-281011.

according to which states have the primary responsibility to effectively implement their human rights obligations under the Convention. Crucially subsidiarity puts the onus on states to implement their Convention obligations, and gives to the Court the competence to address gaps in the effective protection of all Convention rights, it does not seek to limit the Court's substantive jurisdiction. Active steps by member states to implement the Convention in national law, policy and practice would not only mean greater respect for human rights throughout Europe, it would reduce the need for individuals to apply to the Court for redress. In this context, a lot of work remains to be done to encourage national authorities, including Parliaments, to play a more active role in ensuring the implementation of the Convention's rights and of the Court's judgments. Moreover, there would be fewer cases at the Court if states implement not only judgments against them, but also standards developed in judgments against other states. While the UK Government recalls the growing backlog of applications, it would be wrong to treat the number of applications submitted to the Court as the cause of the challenges it faces, rather than the very reason for its existence.

We strongly encourage the UK as Chair of the Committee of Ministers to adopt the approach of the Parliamentary Assembly and give priority to the examination of major structural problems concerning cases in which extremely worrying delays in implementation have arisen, currently in nine states parties: Bulgaria, Greece, Italy, Moldova, Poland Romania, the Russian Federation, Turkey and Ukraine.

While seeking **"measures to strengthen subsidiarity"**, we are concerned that the UK Government's call for "new rules or procedures to help ensure that the Court plays a subsidiary role where member states are fulfilling their obligations under the Convention" may be misinterpreted as implying that the Court's mandate to assess compliance with the Convention should be significantly limited. Such an interpretation would indeed run counter to the very purpose of having a Court mandated to ensure respect for the Convention rights by member states, as stated in article 19 of the Convention. Where states have effectively respected and implemented their obligations under the Convention, an analysis of the merits of the case will necessarily lead the Court to conclude that no violation of the Convention has taken place. Therefore, the principle of subsidiarity will be respected. In this regard, in order to avoid any misunderstanding, and in line with the importance of respecting the Court's independence and mandate under the Convention, it will be necessary for the UK Chairmanship to recall that the question of determining whether states have effectively respected and implemented their obligations under the Convention is for the Court alone to decide.

In relation to the above, we are concerned about the UK Government's stated "aim to provide the Court with political support from the Committee of Ministers for the measures it is already taking [...] to provide a wide margin of appreciation to member states' authorities in its judgments". Pressure on the Court to leave a wide margin of appreciation to member states' authorities dangerously affects the independence and authority of the Court as a guarantor of human rights and risks undermining the effective protection of human rights in Europe.

With regard to the UK Government's will to see emerging a **"set of efficiency measures, which will enable the Court to focus quickly, efficiently and transparently on the most important cases that require its attention"**, it should be noted that the Court itself has already adopted various efficiency measures, including a priority policy and a pilot judgment procedure. We would like to underline that any measure of reform must preserve the fundamental importance of having a Court independently and effectively able to ensure the observance of the engagement undertaken by all member states to the Convention and its Protocols. In addition, the right of individual petition to the Court, including access to the Court, in order to seek redress of all violations of the Convention, as enshrined in the European Convention on Human Rights itself, must never be curtailed or hampered in any way.

We welcome the UK Government's aim of **"improving the procedures for nominating suitably qualified judges to the Court"**. The selection procedures for such candidates are indeed of critical importance to maintaining the authority of the Court and ensuring the overall quality of

its judgments. In particular, it is vital that judges have the necessary qualifications to serve on the Court. We welcome the creation of a panel of experts to advise on the candidates for election as judges; however, we regret that member states are not required to provide the panel with information about the process for the selection of the candidates at national level and the limited scope of the panel's review. To that end, we consider that the Parliamentary Assembly of the Council of Europe should continue to strengthen its procedures in order to ensure a robust and transparent scrutiny of the list of candidates submitted by states, as well as of the quality of nomination processes at the domestic level. Moreover, we support the proposals to prepare a draft non-binding Committee of Ministers' instrument codifying and clarifying existing norms and standards to better guide national practices for the selection of judicial candidates.

Concerning the UK Government's intention to have measures **"ensuring that the Court's case law is clear and consistent"**, we reiterate the need to respect the independence and authority of the Court to regulate its own operating procedures. The states should not view the independence of the Court as an obstacle to its reform, and should not allow the reform process to be used to put forward grievances against particular aspects of the Court's jurisprudence. While it is important to have clarity and consistency in the interpretation of the Convention, it is fundamental to ensure that the Court alone retains the competence to ensure clarity and consistency of its case-law while remaining able to adapt it to new and evolving circumstances.

Finally, with regard to the UK Government's intention to have measures adopted by the Committee of Ministers at its annual meeting on 14 May 2012, whilst recognizing the importance of ensuring that the reform discussions are moving forward, we wish to recall that reform needs to be carefully thought through during a transparent process of effective consultation with all relevant stakeholders, including the Court, the Parliamentary Assembly of the Council of Europe and civil society. Respect for the timeline set-up in the Interlaken Declaration must be maintained and reform proposals emerging during the UK Chairmanship should be subject to thorough scrutiny and inclusive debate. Moreover, the need to give the necessary time for recent reforms to deploy their effects must be constantly borne in mind.

Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre (EHRAC), INTERIGHTS, the International Commission of Jurists (ICJ), the Helsinki Foundation for Human Rights (HFHR), Human Rights Watch, JUSTICE and Liberty are committed to supporting the UK Government in ensuring that its Chairmanship is marked by positive progress towards an even more effective system of human rights protection in Europe.