COMMISSIONER FOR HUMAN RIGHTS

COUNCIL OF EUROPE

Strasbourg, 08 February 2008

CommDH/Speech(2008)1
Original version

Protection and Promotion of Human Rights by International Structures – dilemmas and lessons learned

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Conference on "*Human Rights in the international arena: means of protection and prevention*", organised by The British Institute of International Comparative Law and Raoul Wallenberg

Institute of Human Rights and Humanitarian Law

London, 7 February, 2008

It is now widely recognised that the protection of human rights is an *international* concern. This has been one of the greatest achievements of our time and one that was certainly not obvious when the Universal Declaration of Human Rights was drafted sixty years ago.

Though the United Nations Charter 1945 made the promotion of human rights one of the major purposes of the world organisation, it stated that nothing in the Charter should authorize the United Nations to intervene in matters "which are essentially within the domestic jurisdiction of any state" (Art. 2:7).

This formulation became the refrain of governments unwilling to allow any outside monitoring of their human rights performance. This was of course not surprising: after all, a major purpose of human rights is to establish limits to the exercise of power.

However, the principle that the United Nations and other international organisations have a right - and indeed a duty - to act in defense of human rights has gradually been established. The adoption of the human rights treaties with their monitoring structures - and their ratification by states - have decisively contributed to this development.

The international reach of the human rights protection is an obvious part of the principles that all human beings have the same inherent value and that the rights are universal. Those who cannot defend their rights themselves need and deserve support from the outside. They must not be left unprotected. This is a question of very basic solidarity.

A number of governments have also learnt that violations of human rights in other countries, particularly in the neighborhoods, do affect themselves, not least when refugees come across the

border. There is growing awareness that human rights violations undermine peace and stability which in turn affect economic and other relations.

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The international protection of human rights has been tremendously important for non-governmental organisations. It has given further legitimacy to groups like Amnesty International and been both an inspiration and a protection for those who defend human rights in their own countries. It has given hope to many people who long for safety and better lives. Herein lies an essential part of the *moral* strength of the human rights cause.

Since the UN Charter and the Universal Declaration were adopted, many global and regional treaties and declarations on human rights have been agreed upon, and mechanisms have been created in order to ensure their enforcement. But are they effective and do they meet expectations?

This is indeed a good time to evaluate the functioning and effectiveness of the international human rights system - and not only because of the 60th anniversary. In the UN, the Human Rights Council has had a difficult start and is now trying to move forward on the idea of a universal periodic review of all member states.

In Europe, the European Union is establishing a Fundamental Rights Agency based in Vienna to monitor compliance by its member states. Within OSCE there is a discussion about the mandate, in particular in relation to election monitoring and the Council of Europe is wrestling with funding problems and the need to focus on core activities of which human rights have to be key.

While the Inter-American system is well established, the mechanisms within the African Union and the League of Arab Nations both need more resources and a recognition by governments of their genuine independence. There is still no similar regional human rights structure in Asia though ASEAN did last year decide that such a body should be established.

Another development which ought to be evaluated is the move in recent years towards "mainstreaming" of human rights into the programmes of international bodies which traditionally have not been seen as human rights actors.

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The major problem in both national and international human rights work is that too many governments are less than serious about human rights. The agreed standards are just not implemented in reality, at least not fully. It has therefore been necessary to focus much of the international efforts on the distance between pledges and reality – *the implementation gap*.

This has added to the moral dimension of human rights work and made critical reports particularly sensitive as they tend to reveal hypocrisy. In turn, this may give negative publicity and also be used by opposition forces.

Though the monitoring mechanisms have been agreed by international assemblies, the fact is that very few governments appear to welcome the help of such outside experts in defining the problems. When working as UN representative on Cambodia I soon realised that the hope of the regime was that my mandate, and that of the UN human rights office, would end as soon as possible.

Some governments try to ignore the messengers, others attack them as biased or incompetent and there are those who do not allow recognised rapporteurs access at all or try to delay their missions with all sorts of excuses. In this regard, I am presently in a privileged position. It is established within the Council of Europe that the Commissioner is always welcome and will be received by the government leaders.

The custom that international observers should be formally invited before arrival has created a genuine obstacle in the UN as a number of governments refuse to make blanket statements that all rapporteurs or treaty body representatives are welcome. The refusing governments tend certainly to be those deserving thorough scrutiny.

The political sensitivities also affect decisions within the international organisations themselves. The previous UN Commission of Human Rights could never take a decision to appoint a rapporteur on China or the Soviet Union/ Russia. The lobbying power of these governments was just too strong.

In fact, some of the most serious human rights situations could never be addressed in the Commission, for instance the case of Cambodia while the Khmer Rouge ruled or of Chechnya during the worst period of repression. No resolution has been adopted by the Commission or the new Council on Guantanamo or on the US renditions, secret places of detention and illegal interrogations methods.

This selectivity has undermined some of the credibility of the UN human rights system and was one of the arguments for the reform leading to the Human Rights Council. This body still has to prove that it is more objective in its approach.

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To expect assemblies composed of government representatives to be impartial to political considerations would be unrealistic. However, what has been achieved through pressure, not least from non-governmental organisations, are decisions about monitoring committees and rapporteurs, the appointment of which should be based on objective, non-partisan criteria. The idea is that *these bodies should be politically independent and impartial.*

In the UN a distinction is made between charter-based procedures (for instance, the rapporteurs) and those that are treaty-based (the committees monitoring the implementation of the treaties). The UN High Commissioner for Human Rights could also use her own good offices for concrete action.

In the Council of Europe there are treaty committees as well, for instance the Committee for the Prevention of Torture and the European Committee on Social Rights. As a “special procedure” there is also the Commissioner for Human Rights with an independent mandate. The Court in Strasbourg is the judicial authority in the European human rights system.

The genuine and recognised *independence* of these structures is decisive for the credibility of the international or European human rights work. They should be organised and funded in a manner which supports their independence. There should be a fire wall between them and the political bodies when it comes to fact-finding and reporting.

In most human rights treaties it is specified that the members of the committee in question should be independent and competent for the task as well as be recognised as a person of high moral standing. It

is recognised that the ambition should be similar in the case of other mechanisms, such as the rapporteurs.

Unfortunately, governments do not always nominate persons of that kind. A serious problem is the unofficial trading of votes in the elections and appointment procedures: governments support candidates when votes for their own nominations to totally different positions are promised in return. This corrupt practice should be criticized and done away with, it undermines quality and credibility.

The result is that the human rights mechanisms are less competent than they could be. This is particularly unfortunate as positive impact so much depends on whether the office-holders are serious and up to the task. We know that even minor factual errors can undermine the credibility of reports, and that some governments are not late to exploit mistakes to divert attention from the critical points.

For the key positions in the system, personal integrity is of particular importance. These office-holders should not have to - and be allowed to - seek reappointment when their mandate period is up. The mandates should be for only one term, but these should be reasonably long. The refusal to prolong Mary Robinson as UN High Commissioner – due to US pressure – was most unfortunate. In my own case I sense that the fact that the mandate cannot be prolonged beyond the six years is a protection of the independence of the office.

Another problem is that the budgets for the agencies and mechanisms – not least in the UN and the Council of Europe – are minimal. Also, committee members and individual rapporteurs are usually only paid per diem and the honoraria, if any, are very low. In reality, this makes the office-holders dependent on whether they belong to a law firm, a university or other institution which can subsidize their activities.

Those who do not have such possibilities may abstain from nomination or be handicapped in their ability to contribute to serious work. The secretariats can usually not compensate for this problem. They are often understaffed, or lack sufficiently qualified staff, which leads to insufficient support to those elected.

The disproportion between the tasks and responsibilities and the resources at hand is striking. It leads to amateurism and raises questions as to whether member states were serious when they set up the mechanisms. I myself asked the same question when I moved to Strasbourg to take over as the Council of Europe Commissioner.

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Governments complain about what they see as a proliferation of treaty bodies, rapporteurs and other human rights mechanisms. Some countries in Europe are particularly frequented with such visitors. In particular, some smaller and not so developed countries have genuine problems to cope. They and others talk about a “reporting fatigue”, not least in relation to the various UN treaty bodies.

I believe there is indeed a real problem here. Though most of these procedures have been agreed by governments, the overall picture begins to be complicated, especially for countries in Europe which have to relate to:

- the UN treaty bodies and special procedures, including the country and theme rapporteurs;

- the OSCE institutions such as the High Commissioner for National Minorities, the media freedom representative, the representative on trafficking, as well as to the different ODIHR procedures;
- the Council of Europe institutions and procedures, including the Commissioner, the European Committee for the prevention of torture and for inhuman or degrading treatment or punishment (CPT), the European Commission against Racism and Intolerance (ECRI), the European Committee of Social Rights (ECSR) and the Advisory Committee on the Framework Convention for the Protection of National Minorities.

Council of Europe is also conducting an extensive parliamentary monitoring of democracy and human rights in member states. Furthermore, some governments have to spend considerable time in responding to the procedures in the Court of Human Rights in Strasbourg – and then take mandatory action to execute its judgments.

It is my experience that a number of governments are not well organised to cope with these obligations and are often unable to integrate the recommendations into concrete policies, a consequence of which is repetitions from one mission or report to the next one. These shortcomings are often used as an excuse as well.

It might be tempting to discuss major structural reforms like merging OSCE and the Council of Europe. I am convinced such endeavors would be a waste of time, strong interests would oppose such changes. We should also recognise that the different bodies have their own particular mandates – for instance, OSCE is based on the concept of conflict prevention, rather than human rights *per se*.

This does not mean that the international actors should plod on as before. There is an obvious need of much better information sharing, rational division of labor and coordinated actions. Confusing overlap should be avoided and a principle of subsidiarity be established.

It is absolutely essential that the various mechanisms avoid giving conflicting messages. A “soft” approach in one report could totally undermine the impact of one which is more critical. This has indeed happened, though fortunately not very often, at least in the case of Europe.

For the moment there is a good atmosphere of cooperation between the European human rights institutions, including with the relevant parts of the United Nations. I myself spend quite a lot of time on such coordination and feel that it is worthwhile in order to maximize our combined impact. Usually, we do build on one another’s findings in a meaningful manner.

The coordination between the monitoring mechanisms and the assistance bodies has also improved. For instance, UNICEF is analyzing the Concluding observations of the Committee on the Rights of the Child when designing its programmes and the European Union has helped to fund some of the follow-up reports of my Office.

Though problems have been reduced by the good will and cooperation of the actors involved, I would recommend a very critical attitude towards suggestions of new international or European human rights mechanisms. Many of the newly defined issues can be tackled within the existing structures.

There are symptoms of political opportunism here. Individual politicians, but sometimes also governments, are attracted by the possibility to be seen as the initiator of a new human rights institution or a treaty. Proposals are put forward without sufficient examination or consultation on what can be

done by existing structures and it is not easy for the political assemblies to say no – thereby risking to be seen as negative towards human rights in general.

The same problem can be seen in discussions about new treaties. On the European scene, for instance, it would be wise to analyze whether there might already exist a United Nations structure or treaty before saying yes to proposals.

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In my work I have noticed that the procedures in the European Union and the Council of Europe to condition membership on the fulfillment of defined standards of democracy and human rights have had an immense effect. The shortcoming in the EU system – as different from the Council of Europe - is that the scrutiny ends when membership is gained.

The UN is not able to establish such membership requirements. However, there have been efforts in recent years to mainstream human rights into all existing programmes of the organisation. Several UN agencies have now taken a rights-based approach. UNICEF has integrated the Convention on the Rights of the Child into its major activities. UNDP which for years resisted any discussion about the link between development and human rights is now running programmes which are rights-based and has also employed human rights advisors to its country offices.

The World Bank still tends to resist the term human rights but did, at least under James Wolfenson, broaden its vision to include concerns related to social and economic rights as well as the rule of law, however narrowly understood. As the EU has opened its the door to the *social dimension*, human rights have become a higher priority also for its Commission. Likewise, it seems to have been realised in Brussels that it is not possible to develop common policies on migration and refugees without considering their human rights dimension and consequences.

Progress in this area is also the fruit of a broader recognition of economic and social rights as full rights on par with the civil and political rights. The UN Commission did appoint several thematic rapporteurs on these rights and, for instance, the one of the right to health has clearly contributed to a deeper understanding of the value of a rights-based approach in all programmes promoting health.

However, there are also signs that some governments see this mainstreaming as a softer alternative to the critical reporting from the human rights mechanisms. Groups on gender and the rights of women have been highly critical of the results of the gender mainstreaming efforts so far within UN agencies.

It is essential that international work for human rights should not sacrifice monitoring and accountability for the easiness and popularity of assistance. Aid without a clear picture and understanding of the problems – which can only be established through effective monitoring – is doomed to fail.

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The key aspect in any analysis of the international human rights bodies has to be whether they have a *real impact* and genuinely protect and improve the concrete situation of people. This is what it is all about. This requires a clear mandate, necessary resources and an approach which is strategic – again, recognizing the enormous difficulty of the task and its political sensitivity.

A critical point is *how the international actors relate to actors at the national and local levels* – the authorities but also the media and the civil society, including representatives of the victims. On this, I believe we must be self-critical.

The international community has too often been represented by people who have not been up to the task – who lack the necessary experience to grasp the real problems and to give useful advice. Such shortcomings can of course not be successfully disguised behind an attitude of arrogance. A good dose of humility is much more becoming and appropriate.

This is not only a question of good appointments and sending the right delegates, it also touches on basic approaches. It is essential that the international actors avoid being seen to "take over" the role of national forces and institutions. International monitoring should to a large extent focus on whether there are national capacities to spot problems and address them – to "monitor the monitors". Our advisory services should focus on strategic points like the work of the ombudsmen and the functioning of the judiciary.

Advice may be given on, for instance, education and training but international bodies should avoid taking over such functions and thereby steal the space from domestic actors, who know better the local possibilities and problems, and how to address them. We have to scrap the idea that the international institutions are at top of a hierarchy – we are rather at the service of the members or supporters of these bodies.

The role of the international actors should therefore include an ambition to share knowledge about successful approaches in other countries. For the moment I am trying to promote good models of how independent and credible investigations should be conducted into alleged misconduct by the police – using models from Northern Ireland and the Republic of Ireland.

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The organisers of this conference asked me to define successes and failures. I believe I have focused more on the failures and the problems – which is typical for human rights activists. However my main point has been that the international dimension of human rights work is absolutely essential – especially for those defending the rights in their own countries. That is why the international bodies should be self-critical and constantly try to learn and improve.

We need to go deeper than merely asking for laws and formal procedures to be adopted. The sad truth is that those individuals most in need of protection very often have no access to the system of justice. They tend not to have organisations of their own, lack economic and other means to be heard and have few contacts in the circles of power. The exclusion of the disadvantaged is an enormous challenge for the human rights institutions, including the international ones.

As I have said, I do believe there is a need now for a broader evaluation of the international human rights system. A task force could be set up in cooperation between the leading agencies. It should invite independent experts, among them persons with genuine experience of working for human rights in their own societies– persons we have in mind when we talk about Human Rights Defenders.

Questions which could be addressed would include:

- How can the independence and integrity of the monitoring mechanisms be protected and upheld? What measures could be taken to ensure that offices in the various human rights agencies and mechanisms are filled with people of highest competence and integrity?

- What further steps are needed to facilitate coordination and a rational division of labour between the agencies and the monitoring mechanisms on different levels?

- What more could be done to relate constructively the results of effective international monitoring and concrete advice and support to the national level?

- What should be done to ensure sufficient financing of international human rights work, and the recruitment of competent staff?

- What is the experience of mainstreaming of human rights into development and security programmes? How should these efforts be pursued?

Such evaluations should of course also draw lessons from the successes – and there have been successes. Let me mention the extraordinary influence of the European Court of Human Rights in Strasbourg. Yes, it is overloaded and has difficulties to deliver judgments within a reasonable time, but one has to recognise its immense importance as the final authority in interpreting the European Convention – which is now national law in all 47 Council of Europe countries.

I have seen prisons rebuilt to the better after criticism from *CPT* and new laws against racism adopted after recommendations from *ECRI*. Within my office a document has been issued listing concrete changes in national policies after visits by my predecessor and myself. I am sure that colleagues in OSCE and the UN could issue similar documents, while we all, of course, recognise that changes are usually the result of multiple forces.

However, there is no place for complacency. Instead we should constantly remind ourselves about the enormous responsibility that comes with the fact that so many people all over the world have put their trust into our serious efforts.