CHAIRMANSHIP OF CROATIA
Council of Europe
May - November 2018

PRÉSIDENCE DE LA CROATIE
Conseil de l'Europe
Mai - Novembre 2018

The reform and current challenges in the work of the European Court of Human Rights

by
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First of all I would like to warmly thank the organizers and the HELP Programme for their kind invitation.

I appreciate very much the possibility that is offered to me to contribute to the 2018 HELP Annual Network Conference: all the more so that, as you are certainly aware, the training of legal professionals is a high priority for the strengthening of the Convention system.

The Copenhagen Declaration, adopted last April by the High level Conference, calls upon the States Parties to continue strengthening the implementation of the ECHR at the national level, in particular by "giving high priority to professional training, notably of judges, prosecutors and other public officials, and to awareness-raising activities concerning the Convention and the Court's case-law, in order to develop the knowledge and expertise of national authorities and courts with regard to the application of the Convention at the national level."

In other words, the HELP Programme fits squarely within this high priority as defined by the Copenhagen Declaration.

The same Declaration refers to reforms and to challenges for the Convention system, but my purpose today is not to give a presentation or an analysis of the Declaration. I rather intend to give you my personal approach from the viewpoint of a judge of the Court.

I. The Reform of the Court

The reform of the Court is not a one-off exercise. It is a **continuous process**.

The 11th Protocol, which created the "New Court"; the 14th Protocol which simplified and accelerated the procedure before the Court; and the 16th Protocol which regulates the new advisory competence of the Court; all those Protocols introduced major reforms of the Convention's system, decided by States parties.

But these major reforms entail a series of other reforms within the Court.

According to Article 25 of the Convention, the Court adopts its own Rules. In other words, the Court is the master of its own procedure (as it is generally the case for international Courts, with the exception of the International Criminal Court and the Court of Justice of the European Union).

This means that we can and have to change the Rules in order to put into practice – to implement – the major reforms decided by the High Contracting Parties.

Methodology. - In order to do that, we have mainly two standing Committees: the Committee on the methods of work (CMW) and the Rules Committee.

I have the pleasure of being a member of the CWM since 2014 and its President during the years 2016-2017.

This is a thrilling exercise.

We are dealing with many of the reforms within the Court. Those proposals are submitted to the Bureau and then to the Plenary Court for approval. For those reforms which necessitate a change of the Rules, the Plenary gives a mandate to the Rules Committee to draft the relevant amendments.

In other words, the CWM is a laboratory of ideas. The Rules Committee is an executive Committee, responsible for putting into practice, for implementing and translating the reforms into the Rules of the Court.

To give you some **examples**: the 14th protocol established the **Single Judge** (SJ) formation. The SJ can only reject a case as being inadmissible. He or she cannot find a violation. If he or she believes that the case raises serious issues to be examined on the merits, he or she can propose to submit the case to a Committee of three or to a Chamber of seven judges.

It sounds simple, but it is not.

This accelerated procedure has greatly contributed to the considerable reduction of the backlog of cases from 161 000 to less than 60 000 today. We have absorbed more than 100 000 cases in 7 years.

In order to put this procedure into practice we had to create a methodology, a typology, as well as a synergy between the Registry and the Judges.

Further to the Court's commitment in view of the Brussels Conference, in 2015, we have established a methodology permitting to give a short reasoning for each and every decision of this kind. It is only since last year that this reform of the 14th Protocol has been fully implemented in all its practical details.

The other major reform of the 14th Protocol is the attribution of the competence to the **Committees of three judges** to issue judgments, finding violations of the Convention when there is a "Well established case law". Those judgments can be adopted without the participation of the "national judge", i. e. the judge elected in respect of the respondent State.

Up to last year, most of those judgments concerned length of proceedings cases.

Last year the CWM released a Report proposing to fully implement the notion of "Well established case law" (WECL).

It sounds simple, but it implies a change of paradigm – a change of philosophy within the Court.

The Court has a well-established case law in relation to most articles of the Convention.

If we fully take advantage of the Convention on this issue, this means that the Committees of three judges can decide cases concerning an important number of the issues brought before the Court.

We are moving progressively into this direction. We have put into place the notion of the so-called "Broader WECL" cases. In practice this means that Committees of three judges are dealing also with conditions of detention cases, cases concerning non-execution of domestic judgments, some property cases etc.

The Copenhagen declaration says that "a core challenge lies in bringing down the large backlog of Chamber cases".

The solution to this – or at least a partial solution of the problem – is to send more and more straightforward cases – manifestly *well* founded or manifestly ill-founded cases – to Committees. And this is what the Court is doing progressively with the cooperation of States.

In the next few years the Committees will be the "normal formation", so to say. They will progressively replace the Chambers in a large number of cases.

In the future, the Chambers of seven judges will deal mainly if not only with really difficult cases.

The so-called "**Immediate and Simplified communications**" (IMSI) form another example of the continuous reform of the Court. This means in practice that a large number of cases can be communicated to the governments by the presidents of Sections on the basis of a very short report which states the object of the case and the questions submitted to the parties. It is up to the parties to present their respective version of the facts and assist the Court in establishing the final version of them.

This method could entail more work for governments and less work for the Court. The resources of the Court are thus directed towards the drafting of decisions and judgments, instead of long communication reports, as it was systematically the case until last year.

Other examples concern the **drafting of judgments** – a major Report adopted recently by the Plenary on the proposal of the CWM which will most probably begin to be implemented next October. You will see the difference – more visibility, keywords, a small summary at the beginning of each judgment, a new structure, more focused judgments, and so on.

I would also like to announce that the Court is ready for the **entry into force of the 16th Protocol.**

We have already adopted a new chapter in the Rules of Court, regulating this new procedure.

The Court has also adopted Guidelines to be sent to all Supreme Courts, which will have the right to ask for an advisory opinion and, finally, on the 2nd of July, the Plenary will adopt a Report regulating all practical details of the new procedure.

A final example of continuous reform is the Report adopted by the Plenary on 18 June 2018, i.e. last Monday, again on the proposal of the CWM, concerning a series of measures for a "**more efficient processing of inter-States cases**".

This report could be seen as a first reaction to the Copenhagen Declaration, inviting the Court to contribute in exploring the ways to handle more effectively cases related to inter-State disputes.

Interstate conflicts are of course a major challenge to the Court – and this brings me to refer to some of those challenges.

<u>II. Challenges ahead</u>

To quote again the Copenhagen Declaration: "The challenges posed to the Convention system by situations of conflict and crisis in Europe must be acknowledged".

It seems evident. Yet, I believe it is the first time in a document like this that the High Contracting Parties acknowledge the obvious: that the armed conflicts and various aspects of the crisis in Europe constitute major challenges for the Court.

The **magnitude of the issues raised in relation to conflicts** brings the system to its limits.

It is extremely difficult to establish the facts on the ground, especially during active hostilities. And this affects the key issues of jurisdiction and attribution, not to speak about the question of the applicability of the international humanitarian law.

Furthermore, each inter-state application is followed by thousands of individual applications raising the same issue or deriving from the same underlying circumstances.

Many cases, concerning many States (Greece, Portugal, Romania, Bulgaria, Lithuania, Hungary an even the Netherlands) relate to the **economic crisis.**

Only the "haircut" of the Greek bonds entailed a series of applications with approximately 7000 applicants.

The general approach of the Court in respect of those cases is that it recognizes a wide margin of appreciation to States when it comes to large-scale decisions reflecting major choices in economic matters. At the same time, however, the Court is vigilant so as to ensure protection of non-derogable rights despite economic difficulties. The same is true for the protection of rights related to the concept and values of the rule of law, or the principle of non-discrimination.

Regarding the **migrant and refugee crisis**, the main pillars of the Court's case-law are: a) strengthening of the 1951 Refugee Convention; b) highlighting the pan-European dimension of the issue; and c) providing guidance for migratory policies, especially in respect of conditions of detention and conditions of subsistence of asylum-seekers; lawfulness of detention; and collective expulsions. These are the main issues directly related to the current migrant and refugee crisis on which the Court has developed clear positions.

Furthermore, an increasing number of cases relate to the **institutional crisis** in a number of States parties: attacks on the judiciary, interferences with the freedom of the media or the freedom of association, etc. The Court has repeatedly condemned such attacks on democratic principles and institutions by reaffirming the independence of the judiciary and the freedom of expression or association as core aspects of pluralist democracy.

Cases concerning **terrorism and antiterrorist measures** are yet another challenge for the Court.

The case-law related to "terrorist cases" is both prudent and balanced: the Court has shown understanding for states when they are faced with the sometimes quite extreme difficulties of the combat against terrorism, without abandoning the principles of its case-law, which have, on the contrary, been restated and strengthened. It has even succeeded in adopting a more in-depth and focused approach through its dynamic interpretation of the Convention.

Another challenge identified by the Copenhagen Declaration related to the previous ones, is the **ineffective national implementation of the Convention**, in particular in respect of serious systematic and structural human rights problems.

The Court has successfully applied the pilot judgment procedure so as to cope with some of these problems. Recently, in the ***Burmych*** *and Others* case the Court has decided to transmit a number of cases to the Committee of Ministers of the Council of Europe in order to be dealt with in the framework of the general enforcement measures set out in a previous pilot judgment.

It is evident that in order to resolve such issues a firm political will is needed. Without such a commitment the problems will remain and will have a negative impact on the effectiveness of the system.

In conclusion, I would like to stress once more the importance of the HELP Programme in improving the national implementation of the Convention and, thus, its contribution to the effectiveness of the whole system.

The Court needs the efforts of all stakeholders in order to meet the challenges that I have highlighted and to implement effectively the reforms I mentioned before.