



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Opinion on the draft Copenhagen Declaration

Adopted by the Bureau in light of the discussion in
the Plenary Court on 19 February 2018

Introduction

1. At the request of the Chairman of the Committee of Ministers, the Court has considered the initial draft¹ of the declaration drawn up for the high-level conference taking place in Copenhagen on 12-13 April 2018. It welcomes the opportunity to contribute to the preparation of this fifth conference on the reform of the Convention system, and recalls that it made similar contributions in advance of the Brighton and Brussels conferences.

2. The Court wishes to acknowledge the efforts of the Danish authorities, begun well before they took on the Chairmanship of the Committee of Ministers, to prepare for the conference, with consultation of the various stakeholders, including the Court.

3. Before setting out its comments on the draft declaration, the Court wishes to make the following general points.

4. Firstly, it wishes to recall the distinct roles of the different actors in the system set up by the European Convention on Human Rights. Article 1 sets out the obligation of the Contracting States to secure to everyone within their jurisdiction the Convention rights and freedoms. Article 19 enshrines the Court's mission of ensuring the observance of the engagements undertaken by the Contracting States. Article 32 defines the scope of the Court's jurisdiction as extending to all matters concerning the interpretation and application of the Convention and specifies that, in the event of a dispute as to jurisdiction, it is for the Court to decide. Finally, Article 46 establishes the binding nature of the Court's final judgments and the supervisory function of the Committee of Ministers in respect of the execution of those binding judgments. Underpinning the distribution of these different roles, as in any system governed by the rule of law, are the fundamental principles of judicial independence and respect for the lawful authority of the judiciary. It is against that backdrop that any discussion of the Convention mechanism should be conducted.

5. The second point is that the reform process, now running for eight years, can be regarded as a positive exercise that has seen significant developments in the Convention system. This is particularly apparent in relation to the Court, whose situation at the outset of the reform process

¹ Dated 5 February 2018.

was a cause of great concern. By virtue of many changes and innovations, both as a result of the amendment of the Convention (Protocol No. 14) and internal efforts to rationalise and increase its efficiency, the Court's situation has improved since then. It is vital to consolidate that progress.

6. The third point is the crucial issue of the Court's resources. The draft declaration acknowledges the scale of the challenges that the Court faces at present (an increased number of applications, a substantial backlog, problems associated with interstate cases and the duration of proceedings, to name but a few). There is recognition too that Protocol No. 16 is likely to lead to a potentially significant additional workload for the Court (at least in short- and medium-term). The Court recalls that the Brussels Declaration (B.1.f)) recognised the need to supplement the Court's resources and called on States to consider making voluntary contributions to the Court's special account. In light of the current budgetary situation of the Council of Europe, the Court considers that a similar call could be included in the draft declaration.

Commentary on the draft declaration

7. Given the nature of the exercise, coinciding with the first stages of the discussion of the draft within the Committee of Ministers, the Court's approach has been to concentrate mostly on the substance of the document, examining its themes, ideas and proposals, rather than to comment in detail on its current wording.

8. For ease of reference, the Court has structured its opinion so as to reflect the structure of the draft declaration. For the sake of brevity, this document will not reproduce in full any relevant points or information that appear in documents recently issued by the Court. Instead, cross-references will be made as appropriate.

Shared responsibility – better balance, improved protection (paras. 7-15)

9. The Court notes the prominence given in the draft declaration to shared responsibility and the principle of subsidiarity, which is to be understood as the responsibility of States to comply with their human rights obligations subject to the supervision of the Court. These have been key notions in the reform process, clarifying and affirming the role of each level and each actor in the overall Convention system.

10. However, the Court has concerns in particular in relation to the wording of paragraph 14 of the draft declaration. It considers that the references in this context to "constitutional traditions", and even more so to "national circumstances", may give rise to confusion. While both elements may be relevant in assessing whether a State has complied with the Convention in a particular case, that is ultimately for the Court itself to determine, as it has constantly stated in its case-law.

National implementation – the primary role of States (paras. 16-21)

11. The Court welcomes the clear reaffirmation at paragraph 19 of the strong commitment of States to fulfil their primary responsibility to implement and enforce the Convention domestically. It is relevant to refer here to the positive effects of the pilot judgment procedure. It has by now been applied in many different circumstances, and has supported the States concerned in improving national implementation of the Convention by tackling systemic or structural violations of human rights.

European supervision – the subsidiary role of the Court (paras. 22-30)

12. The subsidiary nature of the Convention machinery has been recognised from the earliest stage of the Court’s jurisprudence and has been restated in numerous cases since. It continues to be affirmed in present case-law. The Court has consistently recalled this in the various documents it has presented throughout the reform process.

13. In paragraphs 22 to 26, the draft declaration makes a series of points about the limits of the Court’s review, each one linked to statements that the Court has made in various contexts. To the extent that this seeks to derive a general proposition from the case-law, the Court observes that the significance of subsidiarity in any given case will depend on factors including the Convention provisions involved, the exact nature of the complaints raised, the particular facts of the case and its procedural background. It is therefore a matter for the Court to assess each time as it performs its function in accordance with Article 19 of the Convention, and in light of the relevant case-law. Considerations of subsidiarity do indeed affect the nature and the intensity of the Court’s supervision in a given case, but it retains the power to give the final ruling on whether there has been a breach of Convention rights. This is precisely reflected in the wording of Article 1 of Protocol No. 15. Insofar as it is appropriate to single out one particular aspect of the Court’s case-law – that of asylum and immigration cases – the Court observes that the ability and commitment of the domestic authorities to apply Convention standards is of particular importance in situations such as those arising in that particular field.

14. It is true that among the cases decided in recent years there have been many in which the Court was satisfied that there had been effective respect for human rights at domestic level, rendering it unnecessary to intervene at the European level. This shows the national authorities concerned performing more effectively in their primary role under the Convention, in other words, evidence of shared responsibility, as pursued by the reform process. Such cases must be contrasted, however, with the many others in which it is clear that such progress is simply absent, and that reveal instead a failure to engage effectively not only with the reform process, but with the Convention itself.

Interplay between national and European levels – the need for dialogue and participation (paras. 31-42)

15. The place of dialogue within the Convention system is underlined in the draft text, although in a broader sense and with a different emphasis than in the past. What the Court can already welcome here is the reference to judicial dialogue, to which it is strongly committed and which previous declarations have supported. The Court has long regarded it as essential to have different means of interaction with the highest national courts, and it looks forward to intensifying dialogue through the advisory opinion procedure. It appreciates the positive mention, in paragraph 37(b), of the establishment of the Superior Courts Network, as this has been a development of real significance for the Court’s practical co-operation with domestic courts².

16. The Court would underline, however, that in relation to the development of its case law, the appropriate mechanisms for dialogue take the form of domestic court decisions and third party interventions before the Court. The latter mechanism, which is provided for under Article 36 of the Convention and Rule 44 of the Rules of Court, can be relevant to different stages in the examination of a case by the Court, including the admissibility stage, the stage of seeking referral of a case under Article 43 of the Convention, and ultimately that of the Grand Chamber’s consideration of the case. Used well, interventions by third parties in proceedings are helpful for the Court, giving it the benefit of additional perspectives on the issues to be decided in the case. The Court would note that this mechanism of engagement by States with the Court’s judicial function does not appear to be used to

² Over the course of 2017, the membership of the Superior Courts Network increased from 23 courts in 17 States to 64 courts in 34 states.

its fullest potential and that, once Protocol No. 16 has entered into force, this mechanism may become even more significant.

17. As regards the proposals in paragraphs 38 and 39 of the draft, the Court would be open to examining them in greater detail if accepted at the Copenhagen conference. It supports paragraph 40 of the draft, encouraging greater coordination and co-operation among States in this connection.

18. Reference is also made in the text to the possibility of ongoing dialogue at a political level among States about the development of the Court's case-law in certain areas. It is not for the Court, as a judicial institution, to comment on such a proposal, apart from noting that it is presented subject to the important provisos of respect for the Court's independence and the binding character of its judgments.

The caseload challenge – the need for further action (paras. 43-54)

19. This part of the draft notes the progress that has been achieved while detailing the scale and the nature of the challenges that still face the Court. Further efforts from all involved actors will be required over the coming years, as paragraph 45 recognises. The Court recalls that in spite of the pressure of its case-load, in 2017 it successfully introduced a system for providing more extensive reasons for single judge decisions, as requested in the Brussels Declaration.

20. The Court appreciates in particular the explicit acceptance and encouragement of the use of summary procedures to deal with straightforward applications. It welcomes the clear support that is given to the strategies applied so as to focus resources on the cases of most importance and those with the most impact, and to increase the institution's capacity to process and decide applications.

21. The Court refers in this connection to the information recently provided to the Committee of Ministers concerning the fast-track WECL procedure, the broader WECL procedure and the immediate and simplified communication of applications ("IMSI")³. Taken together, these measures are both a concrete demonstration of the Court's full commitment to achieving the goals of the reform process for greater efficiency in the supervisory machinery of the Convention, and a practical expression of shared responsibility.

22. The Court also appreciates the text's general encouragement to explore all avenues to bring down the caseload. Building on the measures referred to in the previous paragraph, it will continue to seek ways to work more efficiently, and counts on the active co-operation of all its interlocutors.

23. The Court has already highlighted the question of resources in paragraph 6 above. While paragraphs 52 and 53 of the draft declaration, referring to the Court's budget and temporary secondments to the Registry, are to be welcomed, the Court must once again stress the serious challenges that it is already facing. It would therefore wish to see a stronger message in the declaration on the subject of resources.

24. The Court is prepared to examine the suggestion made in paragraph 50 concerning repetitive applications in the context of non-executed pilot judgments.

25. Regarding paragraph 54(a), the Court is receptive to the idea of consultation by the Committee of Ministers on the subject of increased use of friendly settlements and unilateral declarations as an avenue to reduce the backlog of cases.

26. Concerning paragraph 54(b), raising ideas relating to inter-State disputes and individual applications arising out of situations of State conflict, the Court considers it important to

³ See the document "Follow-up to the CDDH report on the longer-term future of the Convention system of the European Convention on Human Rights: Information from the Court", circulated to all delegations on 19 January 2018 with the reference [DD\(2018\)60](#).

acknowledge in the declaration the challenges posed to the Convention system by such situations in Europe. While noting the mention in the draft of “separate mechanisms” for dealing with such cases, the Court considers that clarification of this idea is required before it can be analysed.

Interpretation – the need for clarity and consistency (paras. 55-61)

27. The Court is pleased to see under this heading acknowledgment of the constant efforts to ensure the requisite level of clarity and consistency in its judgments.

28. It further notes the remarks about stability in the case-law and the weight that should be accorded to precedent. It is relevant to recall that there is no formal doctrine of precedent in the Convention jurisprudence. Nevertheless, the Court has recognised – and reiterates here – the need for a high degree of consistency in the interpretation and application of the Convention. The Court has long considered that “it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases”⁴. It makes appropriate use of the mechanisms established by the Convention for avoiding inconsistency in the case-law, i.e. the relinquishment or the referral of cases to the Grand Chamber. As already indicated in paragraph 16 above, the Court welcomes the idea of increased participation in Grand Chamber proceedings.

The selection and election of judges – the importance of co-operation (paras. 62-69)

29. The Court welcomes the recognition in the draft of the important role played by the Advisory Panel. It gives its full support to the points that are proposed in paragraph 68 to ensure that the Panel, which is composed of persons with substantial judicial and/or Convention experience, is placed in a position to perform its important function and that its assessments are fully taken into account.

30. Constant efforts are required to ensure that each stage in the electoral process offers the best possible guarantees that the most suitable candidate is selected after a fair and thorough appraisal of the professional merits and qualifications of all those involved. The Court welcomes the reminder in the draft declaration that all three candidates included on national lists must be of the highest calibre, capable of exercising the functions of an international human rights judge.

31. The Court also emphasises the link between the objective of attracting high quality candidates and the career prospects available to judges after their term at the Court. This question has been the subject of consideration by the Committee of Ministers (2014) and in the CDDH (2015, 2017), but concrete results have yet to be attained. In the Court’s view, the issue should remain on the agenda of the reform process.

Execution of judgments (paras. 70-78)

32. It has been the consistent message of the Court throughout the reform process that the implementation phase of the procedure is in need of improvement. Even if the Court has devised more efficient ways to process the repetitive cases that derive from a failure to adequately execute a previous judgment, its docket still includes an excessive number of applications of this sort. Effective execution is also central to the notion of shared responsibility, as it ensures the Court is not called on to address numerous repetitive complaints resulting from dysfunctions in national human rights protection which have already been identified. The Court therefore considers that the critical

⁴ See among many such references the case *Chapman v. the United Kingdom* [GC], no. 27238/95, § 70, ECHR 2001-I.

importance of effective execution for the overall functioning of the Convention system calls for special emphasis in the declaration. It invites the Conference to explicitly reiterate the States Parties' strong commitment to the full, effective and prompt execution of judgments of the Court, referred to in paragraph 71.

33. In terms of proposals, the Court welcomes the reaffirmation at paragraph 74 of the recommendations that were adopted in the Brussels Declaration.

34. The idea in paragraph 76 of exploring possible synergies between the Registry and the Department for the Execution of Judgments is noted with interest.

Paragraphs 79-84

35. The Court makes no comment on these final paragraphs of the draft declaration.