

5 February 2018

## Draft Copenhagen Declaration

The High Level Conference meeting in Copenhagen on 12 and 13 April 2018 at the initiative of the Danish Chairmanship of the Committee of Ministers of the Council of Europe ("the Conference") declares as follows:

1. The States Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") reaffirm their deep and abiding commitment to the Convention and their strong attachment to the right of individual application to the European Court of Human Rights ("the Court") as a cornerstone of the system for protecting the rights and freedoms set forth in the Convention.
2. The Convention system has made an extraordinary contribution to the protection and promotion of human rights and the rule of law in Europe since its establishment and today it plays a central role in maintaining democratic security and improving good governance across the Continent.
3. The current reform process, which was initiated at the High-Level Conference in Interlaken in 2010 and continued at the Izmir, Brighton and Brussels High-Level Conferences, has provided an important opportunity to set the future direction of the Convention system and ensure its viability. Bringing together actors capable of engaging the responsibility of their country at the political level, it has reaffirmed States Parties' commitment to the Convention system, including the right of individual application, while at the same time clarifying the relationship between the national authorities and the Convention machinery.
4. States Parties have underlined the need for a more effective, focused and balanced Convention system, where the Court can focus its efforts on identifying serious or widespread violations, systemic and structural problems, and important questions of interpretation and application of the Convention. Great emphasis has been placed on the principle of subsidiarity, by which the protection of human rights takes place primarily at the national level.
5. Notable results have been achieved, in particular by strengthening subsidiarity, improving the efficiency of the Court and addressing the need for more effective implementation. Nonetheless, the Convention system still faces serious challenges. States Parties remain committed to periodically reviewing the effectiveness of the Convention system and taking all necessary steps to ensure its effective functioning.
6. States Parties have agreed that, before the end of 2019, the Committee of Ministers must decide whether the measures adopted so far are sufficient to assure the sustainable functioning of the control mechanism of the Convention or whether more profound changes are necessary. Approaching this deadline, the Conference takes stock of the reform process with the goal of addressing current and future challenges and preparing for the 2019 deadline.

### Shared responsibility – better balance, improved protection

7. The current reform process has enabled the creation of a workable model for the respective roles of the States Parties and the Court, based on a shared responsibility: a major achievement upon which future reforms can build.
8. It reflects that States Parties and the Court share the responsibility for realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity.
9. The principle of subsidiarity affects both the way in which States fulfil their obligations and the way the Court performs its functions. As stated in the preamble to the Convention, as amended by Protocol No. 15, it is the States Parties which, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the Court.

10. Emphasising the importance of human rights protection being secured and determined at national level is consistent with the object and purpose of the Convention. It is also a natural step in the evolution of the Convention system. It reflects the fact that the Convention has been incorporated and, to a large extent, embedded into the national legal systems of States Parties. At the same time, the Court has formulated general principles for the interpretation of the Convention rights. Thereby, the conditions have been created for increasingly bringing human rights home.

The Conference therefore:

11. Welcomes and encourages the concept of shared responsibility, by which a better balance may be found between the national and European levels of the Convention system, and an improved protection of rights may be ensured.
12. Welcomes and encourages that subsidiarity is increasingly playing an influential role in the Court's case law and as an organising principle for the Convention system.
13. Notes that the most effective means of dealing with human rights violations (ultimately) is at the national level, in particular when the number of people affected is such that a solution on an individual basis at international level is unrealistic.
14. Affirms the importance of securing the ownership and support of human rights by all people in Europe, underpinned by those rights being protected predominantly at national level by State authorities in accordance with their constitutional traditions and in light of national circumstances.
15. Strongly encourages the immediate ratification of Protocol No. 15 to the Convention by those States which have not done so.

#### **National implementation – the primary role of States**

16. Inadequate national implementation of the Convention, in particular in relation to serious, systemic and structural human rights problems in some States, remains among the principal challenges confronting the Convention system. The overall human rights situation in Europe depends primarily on States' actions and the respect that they show for Convention requirements.
17. By creating the conditions for proper adjudication of alleged violations at national level, the right of an effective remedy under Article 13 of the Convention embodies the principle of subsidiarity.
18. Effective national implementation requires the effective involvement of and interaction between a wide range of actors, including members of government, parliamentarians and the judiciary, as well as national human rights institutions, civil society and representatives of the legal professions to ensure that legislation, and other measures and their application in practice, comply fully with the Convention standards.

The Conference therefore:

19. Affirms the strong commitment of the States Parties to fulfil their primary responsibility to implement and enforce the Convention at national level.

20. Calls upon the States Parties to continue strengthening the implementation of the Convention at the national level in accordance with previous declarations, especially the Brussels Declaration on “Implementation of the European Convention on Human Rights, our shared responsibility” and the report of the Committee of Ministers’ Steering Committee for Human Rights on the longer-term future of the Convention system; in particular by:
  - a) creating and improving effective domestic remedies, whether of a specific or general nature, for alleged violations of the rights and freedoms under the Convention, especially in situations of serious structural or systemic problems;
  - b) ensuring that policies and legislation comply fully with the Convention, including by checking, in a systematic manner and at an early stage of the process, the compatibility of draft legislation and administrative practice;
  - c) giving high priority to professional training on and awareness-raising activities concerning the Convention and the Court’s case-law;
  - d) in addition to their obligations under Article 46(1) of the Convention, taking better into account the general principles found in the Court’s judgments in cases against other States Parties.
21. Reiterates the significant role that national human rights structures and stakeholders play in the implementation of the Convention, and calls upon States Parties, if they have not already done so, to consider the establishment of an independent national human rights institution in accordance with the Paris principles.

#### **European supervision – the subsidiary role of the Court**

22. The machinery of protection established by the Convention is subsidiary and complementary to the national systems safeguarding human rights. The Court provides a safeguard for violations that have not been remedied at national level and authoritatively interprets the Convention. It should not take on the role of States Parties whose responsibility it is to ensure that Convention rights and freedoms are respected and protected at national level.
23. States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the rights and freedoms engaged and the circumstances of the case. National authorities have democratic legitimacy and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight.
24. The principle of subsidiarity underpins the way in which the Court conducts its review. If a genuine balancing of interests has taken place at the national level, it is not the Court’s task to conduct the proportionality assessment afresh. Where domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and the Court’s case law, and adequately balanced the interests at stake, it is not for the Court to substitute their assessment with its own, unless it has identified strong reasons for doing so.
25. It is widely accepted that the Court should not act as a court of fourth instance, nor as an immigration appeals tribunal, but respect the domestic courts’ assessment of evidence and interpretation and application of domestic legislation, unless arbitrary or manifestly unreasonable.
26. When examining cases related to asylum and immigration, the Court should assess and take full account of the effectiveness of domestic procedures and, where these procedures are seen to operate fairly and with respect for human rights, avoid intervening except in the most exceptional circumstances.

The Conference therefore:

27. Welcomes that the Court has engaged in a process of more robustly applying the principle of subsidiarity and the margin of appreciation in its case law, thereby supporting the development towards an increased sharing of responsibility for the Convention system and providing important incentives for national authorities properly to fulfil their Convention role.
28. Strongly encourages the Court to continue this development in a coherent way.
29. Welcomes the Court's strict and rigorous application of the formal requirements for lodging an application and criteria concerning admissibility, which is essential for ensuring the subsidiary character of the Convention machinery, including by requiring applicants to be more diligent in raising their Convention complaints domestically.
30. Encourages the Court to make full use of the opportunity under Article 35 § (3 (b)) of the Convention, as amended by Protocol No. 15, to declare applications inadmissible in a consistent and uniform manner where the applicant has not suffered a significant disadvantage.

#### **Interplay between national and European levels – the need for dialogue and participation**

31. For a system of shared responsibility to operate effectively there must be a well-functioning interplay between the national and European levels. This requires an ongoing constructive dialogue between States Parties and the Court on their respective roles in applying and developing the Convention.
32. The case law of the Court develops the Convention and has a significant impact on policy questions of importance to States Parties and their citizens. The development of the rights and obligations set out in the Convention by the Court should go hand-in-hand with an ongoing dialogue in which States Parties and their populations are appropriately involved, including civil society.
33. An increased dialogue on the general development of case law in important areas, which should take place with respect for the independence of the Court and the binding character of its judgments, can give a clearer picture of the general views and positions of governments and other stakeholders, thereby solving some of the challenges of developing the Convention over time. It will also anchor the development of human rights more solidly in European democracies.
34. One way for States Parties to engage in a dialogue and seek to influence the Court's case law is through third-party interventions in cases before the Court. Ensuring appropriate access for States Parties to participate in relevant proceedings before the Court, and giving States Parties further possibilities to state their views and positions, and draw attention to the possible consequences for their legal systems, provide a means for strengthening the authority and effectiveness of the Convention system.
35. In order to ensure transparency and broad participation, important developments in case law, which may affect more States Parties, should most appropriately be determined by the Grand Chamber.

The Conference therefore:

36. Underlines the need for dialogue and participation, at both judicial and political levels, as a means of ensuring a stronger interplay between the national and European arms of the system.
37. Welcomes:
  - a) the coming into effect of Protocol No. 16 to the Convention which may strengthen the interaction between the Court and national courts;
  - b) the Court's creation of the Superior Courts Network to ensure the effective exchange of information on Convention case-law;

- c) the use of thematic discussions in the Committee of Ministers on major issues relating to the execution of a number of judgments, so as to foster an exchange of good practices between States Parties facing similar difficulties and the full implementation of Convention standards.
- 38. Invites the Court to adapt its procedures so that other States Parties may indicate their support for the referral of a Chamber case to the Grand Chamber, and to take such support into account when determining whether the conditions of Article 43 (2) of the Convention have been met.
- 39. Invites the Court to support increased interventions by States Parties, as well as other stakeholders, in particular in important and principled cases before the Grand Chamber, by:
  - a) appropriately informing stakeholders in a timely manner on upcoming cases that could raise questions of principle;
  - b) making the questions to the parties available to States Parties at an early stage;
  - c) ensuring that questions to the parties are formulated in a manner that sets out the issues of the case in a clear and focused way;
  - d) notifying States Parties when the Court is aware that a case raises questions of general interest.
- 40. Encourages States Parties to increase coordination and co-operation on third party interventions, including by communicating more systematically through the Government Agents Network on cases of potential interest for other States Parties.
- 41. Encourages States Parties to discuss the general development of areas of the Court's case law of particular interest to them and, if appropriate, adopt texts expressing their general views. Such discussions, as well as possible texts adopted, may be useful for the Court as means of better understanding the views and positions of States Parties. Such discussions should respect the independence of the Court.
- 42. Decides, therefore, in continuation of the 2017 High-Level Expert Conference in Kokkedal, as a pilot project, to hold a series of informal meetings of States Parties before the end of 2019, where relevant developments in the jurisprudence of the Court can be discussed, with input of other relevant actors, and appreciates the Danish Chairmanship's invitation to organise and host these meetings.

#### **The caseload challenge – the need for further action**

- 43. Improving the Convention system's ability to deal with the increasing number of applications has been a principal aim of the current reform process from the very beginning. Although notable progress has been made, *inter alia* by prioritising cases and streamlining procedures, and the increased use of pilot judgments, the Court's caseload still gives reason for serious concern.
- 44. At the 2017 High-Level Expert Conference in Kokkedal an updated analysis of the caseload challenge was presented. The analysis concluded that the Court has the capacity to deliver judgments in a maximum of 2.000 substantive (Chamber and Grand Chamber) cases per year. The number of pending cases vastly outnumbers that. A core challenge lies in the large backlog of priority cases that are not due to systemic or structural problems and the high number of cases pending at Chamber level. This creates a situation where many applicants, with potentially well-founded complaints regarding serious violations of human rights, have to wait for years for their cases to be resolved. Of particular concern are the many cases stemming from inter or intra-State conflicts, some of them dating back a number of years. Another concern is the major influx of cases seen in recent years due to the situation in some States. This creates significant fluctuations in the caseload challenging the stability of the Court's workload.

45. Given these assessments, further steps must be taken over the coming years in order to enhance the ability of the Convention system to address serious violations promptly and effectively. Solving the caseload challenge will require the combined efforts of all involved actors, the States Parties in reducing the influx of cases by providing a practical and effective implementation of the Convention, the Court in processing applications and the Committee of Ministers in supervising the execution of judgments.

The Conference therefore:

46. Welcomes the efforts of the Court to bring down the backlog, including by increasing the number of cases examined by committees and continuously reviewing and developing its working methods.
47. Recalls that the ambition of the Brighton Declaration was to enable the Court to decide whether to communicate a case within one year, and thereafter to make all communicated cases the subject of a decision or judgment within two years of communication.
48. Endorses the approach taken by the Court in seeking to focus judicial resources on the cases raising the most important issues and having the most impact as regards identifying dysfunction in national human rights protection. In this respect and consistently with the underlying thrust of Protocol No. 14, procedures and techniques aimed at processing and adjudicating the more straightforward applications under a summary procedure are accepted and encouraged.
49. Encourages the Court to continue to explore all avenues to bring down the caseload, including by maximising the exploitation of procedural tools given by Protocol No. 14, as well as Protocol No. 15 when it comes into effect, so the Court can devote sufficient time and resources to the most important cases.
50. Calls upon the Court and the Committee of Ministers to consider together how to address the repetitive applications arising from the non-execution of pilot judgments, having regard to the need for the Court to focus on priorities other than awarding compensation.
51. Expresses serious concern about the large number of applications pending before the Court, noting that the main challenge now is the clearing of the backlog of non-repetitive pending cases, including priority cases, and the reduction and the handling of the influx of cases in particular from large-scale violations as well as serious, structural and systemic issues.
52. Acknowledges the importance of retaining a sufficient budget for the Court to solve present and future challenges. Notes in this regard that the entry into force of Protocol No. 16 will add further to the Court's workload.
53. Calls upon States Parties to support temporary secondments to the Registry of the Court as means of supporting the Court. This allows the Court to benefit from up-to-date knowledge of the national legal system, while providing the opportunity for those concerned to acquire an expertise which they can take back with them when they return to their country of origin.
54. Invites the Committee of Ministers, in consultation with the Court, and the involvement of individual experts, to undertake further analysis, as envisaged in the Brighton Declaration, before the end of 2019, of the prospects of obtaining a balanced case-load, *inter alia*, by:
  - a) exploring how to encourage the greatest possible use of friendly settlements and unilateral declarations, with the advice of the Registry of the Court, to avoid where possible the need for the Court's adjudication;
  - b) considering the establishment of separate mechanisms or other means to deal with inter-State cases as well as individual communications stemming from a conflict between two or more States Parties.

### **Interpretation – the need for clarity and consistency**

55. The scope of the rights and freedoms guaranteed by the Convention is defined within the text of the relevant provisions, as interpreted reasonably in the light of their object and purpose in accordance with the interpretive principles of the Vienna Convention on the Law of the Treaties.
56. The clarity and consistency of the Court's judgments, and the ensuing acceptance thereof by all actors of the Convention system, including governments, parliaments, domestic courts, applicants and the general public as a whole, is vital for ensuring the authority and effectiveness of the Convention system.
57. The Court should take positions which are stable and coherent, and provide solid reasoning for its case law, so that national authorities can apply and enforce the Convention principles at domestic level and rule with certainty on the situations submitted to them without running the risk of subsequent disavowal. As recognised by the Court, it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart without cogent reason from precedents laid down in previous cases. Consistency in the application of the Convention does not require that States Parties implement the Convention uniformly.

The Conference therefore:

58. Welcomes efforts taken by the Court to enhance the clarity and consistency of its judgments.
59. Welcomes the work undertaken by the Committee of Ministers' Steering Committee for Human Rights on the place of the Convention in the European and international legal order.
60. Encourages the Court to ensure that the interpretation of the Convention proceeds in a careful and balanced manner that ensures an appropriate and measured development of Convention standards, including by indicating that an area should be kept under review when relevant.
61. Encourages the Court to be transparent by acknowledging and giving clear reasons when it is revising its existing case-law.

### **The selection and election of judges – the importance of co-operation**

62. A central and well-described challenge for ensuring the long-term effectiveness of the Convention system is to ensure that the judges of the Court enjoy the highest authority in national and international law.
63. As part of the current reform process, the Committee of Ministers has addressed this challenge, *inter alia*, by creation of the Advisory Panel of Experts on Candidates for Election as Judge to the Court ('the Panel') and by the adoption of guidelines on the selection of candidates. The Parliamentary Assembly has also taken important steps to address the challenge, most notably by the establishment of the Committee on the Election of Judges to the European Court of Human Rights (the 'Committee').
64. As concluded by the Steering Committee for Human Rights in its 2017 report, although progress has been made, there is still room for improvement in several areas.

The Conference therefore:

65. Welcomes the advances already made towards ensuring that the judges of the Court enjoy the highest authority in national and international law.
66. Calls on States Parties to make all efforts to ensure that candidates included on the lists of three candidates for election as judge to the Court all are of the highest qualification satisfying the criteria set out in Article 21 of the Convention.

67. Calls on the Committee of Ministers and the Parliamentary Assembly to work together, in a full and open spirit of co-operation in the interests of the effectiveness and credibility of the Convention system, to consider the whole process by which judges are elected to the Court with a view to ensuring that the process is fair and efficient, and that the best candidates are elected.
68. Underlines the importance of States Parties consulting the Panel in good time before presenting to the Parliamentary Assembly lists of three candidates for election as judge to the Court, promptly responding to requests for information from the Panel, and fully considering and responding to the opinion of the Panel; and in particular:
  - a) calls on States Parties not to forward lists of candidates to the Parliamentary Assembly where the Panel has not yet expressed a view, or has expressed a negative opinion in relation to one or more of the candidates; and
  - b) calls on the Parliamentary Assembly to refuse to consider lists of candidates unless the Panel has had the full opportunity to express its view, and to give appropriate weight to the opinions expressed by the Panel.
69. Encourages the Parliamentary Assembly to take into account the suggestions made in the 2017 report from the Steering Committee for Human Rights when amending the Assembly's Rules of Procedure.

### **Execution of judgments**

70. States Parties have undertaken to abide by the final judgments of the Court in any case to which they are a party. Through its supervision, the Committee of Ministers ensures that proper effect is given to the judgments of the Court, including by the implementation of general measures to resolve wider systemic issues.
71. The full, effective and prompt execution of judgments and a strong political commitment by the States Parties in this respect strengthen the authority of the Court and the Convention system in general and have a profound influence on the Court's caseload by preventing repetitive applications.
72. A failure to execute a judgment in good time can negatively affect the applicant(s), create additional workload for the Court and the Committee of Ministers, and undermine the authority and credibility of the Convention system. Such failures must therefore be squarely confronted.

The Conference therefore:

73. Takes note of and commends the progress achieved by States Parties with regard to the execution of judgments so far.
74. Reaffirms the Brussels Declaration as an important instrument dealing with the issue of execution of judgments and endorses the recommendations contained therein.
75. Strongly encourages the Committee of Ministers to continue to use all the tools at its disposal when performing the important task of supervising the execution of judgments, including the procedures under Article 46 of the Convention.
76. Calls upon the Committee of Ministers and the Court to explore the possibility of identifying synergies between the Registry and the Department of Execution of Judgments of the Court with a view to enhancing knowledge sharing and eliminating duplication.
77. Calls upon the Committee of Ministers at its annual meeting at ministerial level each year to take note of and debate a report setting out serious instances of the non-execution of judgments, according to predefined criteria, and to ask for the relevant States' response.



78. Encourages the Committee of Ministers to consider the need to strengthen the capacity for rapid and flexible responses, *inter alia*, by considering the establishment of special task forces for shorter-term deployment in countries facing the challenge of implementation of a pilot judgment with the aim of offering co-ordinated Council of Europe expertise and assistance to secure rapid execution.

### **Accession by the European Union**

79. States Parties reiterate the importance of the accession of the European Union to the Convention as a way to improve the coherence of human rights protection in Europe, and call upon the European Union Institutions to take the necessary steps to allow the process foreseen by Article 6 § 2 of the Lisbon Treaty to progress. In this connection, they welcome the regular contacts between the Court of Justice of the European Union and the European Court of Human Rights and, as appropriate, the increasing convergence of interpretation by the two courts.

### **Further measures**

80. This Declaration addresses the present challenges facing the Convention system. As the current reform has shown, it will require a continued and focused effort by States Parties, the Committee of Ministers, the Court and the Secretary General to secure the future effectiveness of the European human rights system, building on the results achieved and approaching new challenges as they arise.
81. Protocols Nos. 15 and 16 can both be expected to have important and significant effects on the Convention system, and point to a clear direction for its future. Their effects will, however, be seen only in the longer term.

The Conference therefore:

82. Calls on the Committee of Ministers, in fulfilment of the stipulation that it should decide before the end of 2019 whether more profound changes are necessary, to evaluate the effectiveness of each part of the Convention system, taking into account such reforms that remain in train;
83. Thereafter, calls on the Committee of Ministers, before the end of 2020, to set a process for responding to this evaluation and a timetable for the preparation and implementation of any further changes required, including the examination of the effect of Protocols No. 15 and 16 five years after their entry into force.

### **General and final provisions**

84. The Conference:
- a) Invites the Danish Chairmanship to transmit the present Declaration to the Committee of Ministers;
  - b) Invites the States Parties, the Committee of Ministers, the Court and the Secretary General of the Council of Europe to give full effect to this Declaration; and
  - c) Invites the future Chairmanships of the Committee of Ministers to ensure the future impetus of the reform process and the implementation of the Convention.