

Amnesty International and the International Commission of Jurists

Longer-term future of the system of the European Convention on Human Rights and the European Court of Human Rights: response to call for views

Introduction: Future challenges to the Convention system

Amnesty International and the International Commission of Jurists (ICJ) welcome the opportunity to contribute to the discussion of the Steering Committee on Human Rights (CDDH) on the long-term future of the European Convention on Human Rights (ECHR) protection system. Following the adoption of Protocols 15 and 16 to the Convention, and the other reforms agreed at the high-level conferences of Interlaken, Izmir and Brighton, this is an opportune moment to consider how the Convention system can best meet current and future challenges, and be further strengthened as an effective mechanism for the protection of human rights.

The implementation of the Convention, in particular through the judgments of the European Court of Human Rights, has over the last 55 years been successful in advancing the protection of the human rights of people in Europe, including some of the most marginalised. The Convention system has operated to develop strong and consistent protection of Convention rights in diverse European legal systems and societies. It has led to changes to law and practice throughout the region, in a manner that ensures enhanced respect and protection of the range of rights secured under the Convention, including in times of crises, conflict and emergency in Council of Europe Member States. The Court has been essential to ensuring that victims of human rights violations can secure reparation in the many and varied cases where national systems have been incapable of providing redress. Beyond Europe, the Convention standards and the jurisprudence of the European Court of Human Rights have been highly influential and the Convention system remains a model of good practice for the legal protection and enforcement of human rights.

Amnesty International and the ICJ consider it essential that the strengths of the present Convention system are preserved for the future. At the same time, weaknesses in the system's capacity to prevent violations of the Convention rights, to deliver reparation for violations that do occur, and to enforce judgments of the European Court of Human Rights, should be addressed.

In any new reforms undertaken, the guiding principles must be that the reforms serve to enhance the protection of human rights, and in particular to ensure better implementation of the Convention at national level; that they enhance access of individuals to justice for violations of the full range of Convention rights; that that they ensure more effective reparation for violation of the rights guaranteed under the Convention.

Furthermore, following the reforms in Protocol 14, and subsequently in Protocols 15 and 16 ECHR, any more profound changes to the Convention system, aimed at reducing the number of cases that come before the Court, should not be undertaken unless such measures are demonstrably necessary to strengthen the Convention system, based on an assessment of the impact of existing reforms.

The Convention system, and in particular the Court, has already faced and adapted to great challenges, in particular as regards the management of its caseload. However the most serious challenge it faces, which shows no sign of abating, is that of political attacks on the Court from some governments of Council of Europe Member States. Amnesty International and the ICJ are concerned that these attacks seek to deter the Court from performing the functions with which it is charged under Article 19 of the Convention, and which the State Parties have a collective duty to protect and support. **A strong Convention protection system and respect for the rule of law requires that the States Parties to the Convention consistently and publicly demonstrate their support for the institutions of that system, and acknowledge the shared responsibility for the protection of Convention rights by both national and Council of Europe institutions.**

Implementation of the Convention at National Level

The continued success of the Convention system is based on this shared responsibility for the protection of Convention rights. Better implementation of the Convention by national governments, legislatures, judiciaries and public authorities must remain the highest priority if the long-term future of the Convention system is to be secured. In particular, every effort must be made to assist national courts in taking ownership of the Convention and in developing their own human rights jurisprudence, informed by and respecting the Convention rights and the jurisprudence of the Court. A mature and successful Convention system should mean consistent protection of the Convention rights at national level, through national courts – but there is much work to be done to achieve this consistently across all Council of Europe Member States, and in relation to all the Convention rights. **Effective national implementation could be greatly enhanced by States adopting the policy of consistently taking any measures necessary to bring their law, policy and practice into line with judgments of the Court regarding other Member States, in addition to general measures of execution following cases against the State itself (see below). Good practice in this regard should be highlighted and encouraged by the Council of Europe institutions.**

The Role of the Court: Mechanisms to ensure effective protection of rights and authoritative interpretation of the Convention

Any new reforms must respect the central role and the independence of the European Court of Human Rights, which is essential to an effective system of human rights protection under the Convention. The Court must have adequate powers and jurisdiction to ensure consistency in standards for the protection of Convention rights across the Council of Europe region, in fulfilment of its role under Article 19 ECHR. For the Court to be effective for the long term, it must also be able, through its interpretation of the Convention rights in its jurisprudence, to respond to changes in society and to new technological

developments. Above all, it must be capable of providing real and consistent protection and remedies to individuals whose rights are violated or are under threat. The Court needs to have sufficient powers at its disposal to act effectively to protect Convention rights, including powers to order interim measures under Rule 39 of the Rules of Court, which are binding on states and which must be respected in all cases.

Respect for the independence of the Court also requires that the Court must retain its powers over matters regarding its organization and functioning that are currently within the scope of its Rules.

The right of individual petition

Amnesty International and the ICJ support the preservation of the system of individual petition to the Court in its current form and oppose any measures which would further restrict individual petition and thereby deny access to justice to the many victims of violations of Convention rights who are unable to secure redress through national systems. A system based on discretion of the Court as to which applications to adjudicate on would undermine effective human rights protection by the Convention system.

The necessity of individual petition to ensure real access to justice for victims of human rights violations, is clear from the subject matter of the cases that come before the Court. The numbers of well-founded cases, including repetitive cases, coming before the Court, demonstrates that national systems are not operating effectively to protect Convention rights, on issues such as the non-enforcement of domestic court decisions, the length of proceedings before domestic courts, compensation for confiscation of property, and the length and conditions of detention.¹ On these issues, on which there is well-settled jurisprudence of the court, the exercise of the Court's supervision remains necessary in order to ensure the observance of States' obligations under the Convention. At the same time, the Court continues to adjudicate on numerous applications that relate to issues including torture, disappearance and extra-judicial killings, and the failure to investigate such acts - cases which often raise few novel legal issues, but in which applicants have been unable to obtain effective investigation or redress in their national system. A court of individual application remains necessary in all of these cases.

Furthermore, the argument for deeper reform of the Court to do away with the right of individual petition is not justified by administrative necessity. According to the Court's figures, the number of applications pending before the Court is now decreasing – by 21% between July 2012 and July 2013.² This is largely due to the single-judge procedure introduced by Protocol 14, and to reforms introduced by the Court itself, resulting in more efficient case management and prioritisation. As is highlighted below, the most serious case management problem facing the Court now relates to well-founded "repetitive" cases concerning systemic human rights violations. In regard to these cases, the solution is not to be found in excluding them from the Court's consideration, since this would be to deny any remedy for clear violations of the Convention

¹ CDDH, Report containing conclusions and possible proposals for action on ways to resolve the large numbers of applications arising from systemic issues identified by the Court, June 2013, CDDH(2013)R78 Addendum III, Paras.6-7

² European Court of Human Rights, The Interlaken Process and the Court, 2013 Report, August 2013, page 3

rights. Rather, the solution lies in better execution of judgments procedures at national level, and strengthened procedures for the supervision of judgments in the Committee of Ministers.

Addressing systemic Convention violations: “repetitive” applications

For the long-term future of an effective and credible Convention system to be assured, it is essential that the systemic human rights problems which lead to numerous similar applications to the Court are addressed. These cases now amount to 41% of the caseload of the Court.³ Although the Court has streamlined its procedures for dealing with these cases, the number of such applications continues to rise. The failure by Member States to take general measures following leading judgments, or their delay in doing so, means that potential applicants in similar cases apply to the Court as the most effective means of obtaining redress.

The numbers of admissible applications on issues in which the court’s case law is clear demonstrate failures on the part of the Member States to take effective measures to prevent violations of the Convention rights and to establish effective national implementation mechanisms to provide redress for violations of Convention rights. They also indicate significant failures in national procedures for the execution of judgments. The majority of repetitive applications are cases that can and should be addressed and remedied at national level. These cases would not have come before the Court, had national execution procedures operated effectively. They therefore not only impose an unnecessary burden on the Court, but also burden victims of Convention violations by compelling them to resort to an international procedure in circumstances where the obligation of the national authorities to provide a remedy has already been established. Indeed, the Court has stated that it considers that “the examination of such large numbers of repetitive complaints is not compatible with the functioning of an international court.”⁴

The primary solution to this problem lies in enhancing national procedures for execution of judgments and strengthening the Committee of Ministers’ powers of supervision, as discussed below. Some measures can also be taken by the Court itself. The Court has raised the possibility of a default judgment procedure, under which the Registry would refer a list of repetitive cases to the government, requesting provision of redress by a specified date; failure to provide such redress in this period would lead to a default judgment in favour of the applicant. The Court has indicated that it is already pursuing a system similar to this within the current framework of the Convention.⁵ **For the long-term, consideration should be given to formally introducing a default judgment procedure to expedite the resolution of cases concerning systemic human rights violations.**

Execution of judgments and supervision of execution

³ ECtHR, *The Interlaken Process and the Court*, 2013 Report, *ibid*.

⁴ European Court of Human Rights, *Preliminary Opinion of the Court in preparation for the Brighton Conference*, 20 February 2012, para.35.

⁵ CDDH report containing conclusions and possible proposals for action on ways to resolve the large numbers of applicants arising from systemic issues identified by the Court, *op cit*, paras.26-30.

The numbers of judgments awaiting execution have risen in recent years, in part due to changes in case processing in the Court.⁶ This is despite the implementation by the Committee of Ministers and the department for the execution of judgments of a more efficient, twin track procedure for the supervision of the execution of judgments since 2011. As noted above, the most significant difficulty lies in securing prompt and full execution of judgments that relate to systemic violations, including pilot judgments. In light of the serious impact which failures to execute such judgments cause for the Convention system as a whole, there now needs to be equal attention and commitment to the execution and supervision of execution of judgments process, as there has previously been to reform of the Court. **More effective processes for execution of judgments and supervision by the Committee of Ministers needs political and financial commitment by Member States. Consideration should also be given to increasing resources available to the department for the execution of judgments.**

Within the Convention system, the failure to ensure effective implementation of judgments is a serious one, since the Convention rights are binding on States Parties, and the judgments of the European Court of Human Rights are binding in respect of the State Party they concern. Execution of a judgment of the Court promptly and fully is necessary to uphold the rule of law and the credibility of the Convention system, just as execution of the judgments of national courts is a necessary element of respect for the independence of the judiciary and the rule of law in the national system. Failure or delay in the execution of judgments undermines the rule of law within the Convention system; affects the right to reparation of the victim in the case; and, in cases involving systemic violations of the Convention rights, leads to repetitive applications to the Court which overburden it unnecessarily.

The importance of strengthening measures for the enforcement of judgments was recognised in the Brighton Declaration,⁷ but regrettably, in the most recent phase of the reform process, Member States were not able to agree on any significant reforms in this regard.⁸ To secure the long-term future of an effective Convention system, further steps to ensure more expeditious and effective execution of judgments by national authorities are essential. This will require strong political commitment by all governments to respect the rule of law through the full execution of judgments of the Court, even in regard to judgments with which the government may profoundly disagree.

The procedure introduced under article 46(4) of Protocol 14, whereby “infringement” proceedings may be brought against a state that refuses to execute a judgment, has not to date been applied, despite attempts to invoke it in cases where it would seem in principle to be applicable. Amnesty International

⁶ CDDH, Report on whether more effective measures are needed in respect of states that fail to implement Court judgments in a timely manner, November 2013, CDDH(2013)R79 Addendum I, para.2

⁷ Brighton Declaration para.27: “the Committee of Minister should be able to take effective measures in respect of a State Party that fails to comply with its obligations under Article 46 of the Convention. The Committee of Ministers should pay particular attention to violations disclosing a systemic issue at national level, and should ensure that State Parties quickly and effectively implement pilot judgments”.

⁸ CDDH, Report on whether more effective measures are needed in respect of states that fail to implement Court judgments in a timely manner, op cit.

and the ICJ are concerned that article 46(4) is seen as a measure of last resort – indeed the recent report of the CDDH referred to the need for “especial caution” in invoking it. Furthermore, for as long as article 46(4) remains untested, there is political reluctance to develop other enforcement measures which are seen as equally or more punitive.

Although it represents a serious step in the enforcement process, article 46(4) is of its nature not a final resort, but is designed to be part of a process, since a reference to the Court will result in a new judicial process and to further debate in, and measures by the Committee of Ministers following the judgment of the Court. **Consideration should now be given to how article 46(4) can become operational. This could be facilitated by an independent expert review providing advice to the Committee of Ministers on a group of pending cases – rather than just one - in which application of article 46(4) proceedings would be appropriate. It could also be helpful for either the Committee of Ministers or the CDDH to develop more precise guidance as to the circumstances in which the provision could apply.** Despite the explanatory report to Protocol 14 stating that the provision applies where a State’s conduct demonstrates a refusal to abide by a decision, as well as in cases where the State expressly refuses to do so, there is currently some uncertainty as to when this threshold is reached in practice.

Alternatively, if article 46(4) remains dormant, despite cases in which it would be appropriate to apply it, where governments have clearly demonstrated their lack of intention to execute a judgment, consideration should be given to amending article 46(4) to ensure its practical application. Consideration could be given, for example, to the initiation of infringement proceedings under article 46(4) by an independent Council of Europe body other than the Committee of Ministers.

As a further step in cases where a state refuses or seriously delays in the execution of a judgment, especially where the case involves a systemic violation of human rights, further consideration should be given to a system of financial penalties. Although proposals for such penalties have repeatedly been raised and have consistently failed to attract consensus, a recent report of the CDDH contained a useful analysis of the various options and practical issues that need to be further explored.⁹ These questions should be addressed in more detail, with a view to developing a range of options for possible implementation in the longer-term, if the rate of prompt and effective execution of judgments does not improve significantly.

In parallel or as an alternative to measures to strengthen the execution process at national level and the supervision process in the Committee of Ministers, some measures can be taken by the Court on its own initiative to encourage and facilitate prompt and full execution of judgments. These include more directive indications in Court judgments of the measures necessary to remedy a violation, a practice which the Court has

⁹ CDDH report on whether more effective measures are needed in respect of states that fail to implement court judgments in a timely manner, op cit, paras.25-31

already begun to apply in some cases. As the CDDH report noted, lack of clarity as to the full range of measures which need to be taken to execute a judgment is one reason for failure to execute judgments promptly.¹⁰ As noted above, formalising a default judgment procedure could also be considered.

¹⁰ CDDH, Report on whether more effective measures are needed in respect of States that fail to implement court judgments in a timely manner, op cit, para.6.