



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

Comment from the Court on the report of the CDDH on the longer-term future of the Convention system

1. This comment on the CDDH report¹ has been prepared at the request of the Committee of Ministers². It should be viewed as part of the ongoing dialogue between the Court and the Committee of Ministers, and is presented without prejudice to positions or statements that the Court may adopt in future regarding the issues discussed and the conclusions drawn by the CDDH, or other issues that pertain to the future of the Convention system in the longer term.

2. As a preliminary remark, the Court commends the CDDH for the manner in which it conducted the exercise. It was characterised by openness, inclusivity and transparency, very much in keeping with the high public importance of the subject-matter. The decision to involve seven independent experts in the process has been appreciated by the Court. It takes the opportunity to record its gratitude to the person that it nominated to take part in the exercise, the former President Sir Nicolas Bratza. His involvement, along with that of another former member of the Court, Mr Giorgio Malinverni (nominated by the Venice Commission) ensured that the process benefitted from a wealth of experience and expertise in the functioning, development and reform of the Convention system. Likewise, the decision to invite submissions from interested parties tapped the strong and widespread interest that exists in many quarters, across Europe and beyond, in how human rights can be effectively safeguarded through the Convention system.

3. There is a strong and quite natural concordance between the CDDH report and the Brussels Declaration, adopted earlier in 2015. This is particularly true of Chapter II of the report on national implementation, which is justly described as one of the principal or even the biggest challenge (paragraph 34 of the report) that faces the Convention system at the present time and into the future. One aspect of this is reflected in the large number of repetitive applications currently pending. Even though the Court managed to deal with many such cases in 2015, at the end of the year there were still more than 30,000 of them on the docket. The Court can only endorse the report's encouragement to States to prevent future violations through taking due account of the principles of case-law contained in judgments concerning other Contracting Parties ("preventive anticipation of possible violations" see paragraphs 41 and 72(i) of the report). The Court made a similar point in its own contribution to the preparation of the Brussels conference a year ago³. Among the practical means to achieve this that are described in the report, the Court would lay emphasis on the importance of maintaining, at the very least, the current efforts to translate the case-law in many more languages (paragraphs 43-45 and paragraph 72 (ii)b of the report). The great value of this initiative is beyond question, and should come to be seen as an integral aspect of the operation of the Convention system. Other points of concordance between this part of the CDDH report and the Court's views concern the development of domestic remedies as necessary, the

¹ CDDH report on the longer-term future of the system of the European Convention on Human Rights, document CM(2015)176 add1.

² See record of 1246th meeting, 3 February 2016, Item 4.2abd.

³ http://www.echr.coe.int/Documents/2015_Brussels_Conference_Contribution_Court_ENG.pdf

importance of parliamentary consideration of human rights principles in the legislative process, and training in human rights law for judges and other legal professionals (see the various points listed in paragraph 72 of the report). These are indeed the issues that, properly addressed, can be expected to strengthen the protection of human rights at the domestic level. It is to be underlined that, as the CDDH has stated, these are all points arising within the framework of existing structures. No treaty amendment or new treaty is required to address them.

4. In Chapter III the report assesses the situation of the Court from two main angles. As regards the first of these, the challenge of the caseload, the report sets out an accurate description of the challenges before the Court towards the end of 2015. It correctly points to the large number of priority cases, along with the numerous cases pending at Chamber level, as the main challenges. As the Court has had occasion to indicate in various contexts recently, it will devote as much of its resources as it can to dealing with cases of this sort so that, as the CDDH warns, the logic of the protection system is not “reversed” (see paragraph 76 (vi) of the report). It was with this in mind that the Court’s Registrar put forward, during the discussions within the CDDH, an estimate of the additional resources that would be needed over an eight-year period to completely clear the Court’s backlog (at paragraph 82 of the report). The Court appreciates that the CDDH has included this point among the conclusions that it has presented to the Committee of Ministers (paragraphs 130 (iii) and 204). It likewise appreciates the CDDH’s openness to developing the potential of the existing methods and procedures applied by the Court so as to deal more effectively with cases arising out of systemic issues. Already in 2016 the Court will move ahead with this, and counts on the co-operation of the States concerned in doing so. The CDDH’s conclusion that current challenges can be met within the existing framework is shared by the Court.

5. In the Section concerning the authority of the case-law, the report takes up a number of issues that certainly bear upon the future of the Convention system, namely those related to the post of judge at the Court: the procedures at national level for selecting candidates; the electoral process; the attractiveness of the post and potentially dissuasive factors; and the professional situation of judges when they have completed their term of office (paragraphs 106-109 of the report). The Court notes the conclusion that a thorough analysis of all these points is needed (paragraphs 117 and 131 (i)), and expresses the wish to be closely associated with such an exercise. The experience that sitting judges have had with the procedure, and their thoughts on improvements, will be an important element in the review.

6. Regarding Registry staff, the Court takes note of the CDDH’s position on the desirability of Registry lawyers having appropriate practical experience of the relevant domestic legal system (paragraphs 110 and 131(ii)). It considers this a valid point, that can be given emphasis in future recruitment procedures.

7. Coming to the case-law itself, the Court is struck by the number of ideas and proposals that were put forward regarding its function, but which were not retained by the CDDH (see paragraphs 121-129, and also paragraph 112). The report here prefers to remain with the existing framework, within which certain developments are envisaged (paragraphs 111, 113-116). The CDDH reiterates certain points that have been addressed to the Court in the Brussels Declaration (providing reasons when the Grand Chamber Panel declines to refer a case, and for the indication of interim measures) – see paragraph 111 of the report. The Court will respond these points at a later date when it informs the Committee of Ministers of the measures it has taken to give effect to the Brussels Declaration. The importance of judicial dialogue is emphasised (paragraphs 115-116 of the report). In this respect the Court marks its agreement with the CDDH. As to the latter’s point that the Court “should be more responsive to the considered interpretation of the Convention by national courts”, there are many

relevant examples in the case-law, such as *Lambert v. France*⁴ and *Animal Defenders International v. United Kingdom*⁵. The significance placed on dialogue with the domestic courts is also shown in the case-law; see for example *Kronfeldner v. Germany*⁶, and also *Al-Khawaja and Tahery v. United Kingdom*⁷.

The Court takes particular note of the CDDH's conclusion regarding the value of "more clear general interpretative guidance concerning the understanding of the rights and freedoms protected by the Convention" (paragraph 131 (iv)). As regards the Network of Superior courts, the Court would make clear that its purpose is to allow exchanges of relevant information. It is not intended to detract from the primary role of the parties to proceedings in making submissions to the Court about domestic law (paragraph 116). The point is made in the same passage that the parties to a case should be permitted to see and make submissions on all the documents the Court has in relation to the case. The Court recognises the merit of the point, and will give consideration to it.

8. In Chapter IV, on the execution of judgments, the Court welcomes the CDDH's reaffirmation of the relevant parts of the Brussels Declaration, especially its emphatic statement on the duty to abide by the judgments of the Court (see paragraph 169 (ii) of the report). It notes the suggestion (at paragraph 169 (iv)) for clearer indications in judgments as to the cause or source in the domestic legal order of a violation of the Convention. This is in fact becoming increasingly common in the Court's practice, with regular reliance in judgments on Article 46 of the Convention. In the same paragraph, the report manifests the CDDH's reserve as regards the giving of specific indications to the respondent State regarding the measures that might be taken to put an end to the violation of the Convention. The Court would emphasise that the formulation of judgments is an exclusively judicial competence. It is exercised within the framework set by the Convention, in keeping with the role and function of each Convention organ, and respecting the right of the respondent State to choose the measures needed to abide by a final judgment. In its contribution to the Brussels conference, the Court addressed this point, stating its willingness to explore with States and other parties possible refinements to its present practice of applying Article 46⁸. Since the execution phase of proceedings remains a major focus of the reform process, the Court reiterates this idea.

9. Concerning just satisfaction, the Court notes the CDDH's wish for more transparency in relation to the criteria applied (at paragraphs 148 and 169(v)). As is already well known, the Court makes its awards to applicants by reference to internal guidelines, which serve to ensure a consistent practice in the application of Article 41. Since these guidelines serve to aid the Court in taking what are essentially decisions in equity, it has not so far considered it necessary to communicate them. It may be added that, especially as regards repetitive cases, there is a clear pattern to its awards that can be discerned without great difficulty. What is also apparent from the Court's practice is that it does take account of the economic circumstances of each respondent State and purchasing power data based on information obtained from the relevant international organisations.

10. In its fifth chapter, the report addresses new issues in the reform discussions, grouped into four points (see the summary at paragraph 187). The second of these concerns the European Union and refers to a risk of the two main European legal systems drifting apart in the event of delayed accession by the EU to the Convention. The Court notes here that its dialogue with the Court of Justice of the European Union will resume in 2016. As regards the third and fourth points raised, concerning other international human rights instruments and other branches of international law, the CDDH's analysis remains at a preliminary stage, its intention being to study them in greater

⁴ *Lambert and Others v. France* [GC], no. 46043/14, ECHR 2015.

⁵ *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, ECHR 2013.

⁶ *Kronfeldner v. Germany*, no. 21906/09, 19 January 2012

⁷ *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, ECHR 2011.

⁸ At paragraph 14 of that document.

depth in future. At this juncture, the Court would already make the point that in its case-law it has regard to the relevant principles and rules of general international law. It has often stated that the Convention forms part of the international legal order.

11. The Court considers that States' thinking about the longer-term future of the Convention system should in any event take into account and enhance the independence of the Court as an international judicial body.

12. Subject to the point made in the previous paragraph, the Court finds persuasive the CDDH's conclusion that, with the exception of the procedure for selecting and electing judges, the challenges discernible at the present time for the Convention system in the longer term can be met within the current framework. That such a conclusion has been reached well within the timeframe originally set down in the Interlaken Declaration attests to the success – greater than anticipated – of the reforms implemented in the period 2010-2015. This may be regarded with some satisfaction, and encouragement may be taken from it for facing the challenges ahead, as they have been identified in the report.