



**AS/Per (2018) 03**

16 March 2018

## **Declaration on the Draft Copenhagen Declaration on the European Human Rights system in the future Europe**

Adopted by the Standing Committee on 16 March 2018<sup>1</sup>

The visionary statesmen who rebuilt Europe from the ruins of the Second World War understood the importance of making states share responsibility for human rights. The system they designed, that of the European Convention on Human Rights, ensures that all States Parties protect the uniformly defined rights of everyone within their jurisdictions, with harmonised national protection mechanisms and a common European control mechanism. The effectiveness of the overall system depends on the proper functioning of each of its constituent elements. This in turn depends primarily on the attitude and conduct of the States Parties.

On 12-13 April 2018, in Copenhagen, the Danish chairmanship of the Committee of Ministers will hold a High Level Conference on the European Human Rights system in the future Europe. A first draft declaration was issued on 5 February 2018. Whilst this draft contains welcome expressions of commitment to the Convention system, its negative tenor risks undermining human rights protection in Europe. As detailed in the attached comments, the draft declaration puts into question:

- The universality of the rights protected by the Convention;
- The independence of the European Court of Human Rights, free from political influence;
- The scope of the Court's jurisdiction over all matters concerning interpretation and application of the Convention;
- The States Parties' unconditional obligation to implement the Court's judgments.

The Committee of Ministers should continue to focus on the main challenges to the Convention system, namely the Court's case-load and its principal cause, which is inadequate national implementation of the Convention in many States.<sup>2</sup>

---

<sup>1</sup> Submitted by the Committee on Legal Affairs and Human Rights.

<sup>2</sup> The Danish chairmanship of the Committee of Ministers issued a revised draft declaration on 6 March 2018. As this document has been classified as "restricted", its contents are not known and it is not possible to comment upon them.

## Comments on the draft Copenhagen Declaration

1. The visionary statesmen who rebuilt Europe from the ruins of the Second World War understood the importance of making states share responsibility for human rights.<sup>3</sup> The system they designed, that of the European Convention on Human Rights (the Convention), ensures that all States Parties protect the uniformly defined rights of everyone within their jurisdictions, with harmonised national protection mechanisms and a common European control mechanism. These essential goals are achieved through a primary obligation on States Parties to respect the rights of everyone within their jurisdiction (article 1) and provide remedies for violations (article 13); under the supervision of an independent European Court of Human Rights (the Court) (article 19), competent in all matters of interpretation and application of the Convention (article 32), adjudicating on cases brought by states (article 33) or individuals claiming to be victims (article 34) on a subsidiary basis, following exhaustion of domestic remedies (article 35); with the States Parties bound to implement the judgments of the Court, under the collective supervision of the Committee of Ministers (article 46). The effectiveness of the overall system depends on the proper functioning of each of these constituent elements, which in turn depends primarily on the attitude and conduct of the States Parties, whose joint creation this system was and to whose overall advantage it operates.

2. On 12-13 April 2018, in Copenhagen, the Danish chairmanship of the Committee of Ministers will hold a High Level Conference on the European Human Rights system in the future Europe. A first draft declaration was issued on 5 February 2018. Whilst this draft contains welcome expressions of commitment to and support for the Convention system, its negative tenor and much of its content risk damaging the system's core structure and undermining human rights protection in Europe.

3. One of the purposes of the Convention is to establish a catalogue of universal human rights, derived from the 1948 Universal Declaration on Human Rights, for special, regional protection according to uniform interpretation and application. Certain provisions of the draft Copenhagen Declaration, however, may undermine this universality, allowing for rights to be relativized by reference to national considerations,<sup>4</sup> including the vagaries of political interest and influence,<sup>5</sup> and permitting incoherent implementation of the Convention across States Parties.<sup>6</sup>

4. Uniform interpretation and application of Convention rights and collective enforcement of decisions on complaints hinge upon the Court's role as an independent judicial decision-making body. Several provisions of the draft declaration are inconsistent with proper respect for the Court's judicial function,<sup>7</sup> in particular that it decides cases on the basis of submissions made by parties to proceedings and the applicable law, and not of political views expressed by various loosely defined actors in other fora.<sup>8</sup> The proper way for a non-respondent State or any other actor to seek to influence the Court's judicial decision-making is through the existing possibility of third-party intervention.

5. The draft declaration appears to suggest limitations on the jurisdiction of the Court that are inconsistent with the provisions of the Convention. Through repeatedly highlighting one aspect of subsidiarity, the draft declaration gives the impression that the Court's role should be essentially deferential, or even subordinate to that of national authorities.<sup>9</sup> It also purports to state as legal fact an unduly limited approach to definition of Convention rights, with the apparent intent to restrict the Court's exercise of its

<sup>3</sup> See the preamble of the Convention: "The Governments signatory hereto..., Being resolved ... to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration"

<sup>4</sup> "... rights being protected predominantly at national level by State authorities in accordance with their constitutional traditions and in light of national circumstances" (paragraph 14)

<sup>5</sup> "In matters of general policy, on which opinions in a democratic society may reasonable differ widely, the role of the domestic policy-maker should be given special weight" (paragraph 23)

<sup>6</sup> "Consistency in the application of the Convention does not require that States Parties implement the Convention uniformly" (paragraph 57)

<sup>7</sup> "an ongoing constructive dialogue between States Parties and the Court on their respective roles in applying and developing the Convention" (paragraph 31). Compare article 32(2) of the Convention: "In the event of dispute as to whether the Court has jurisdiction, the Court shall decide."

<sup>8</sup> "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" (paragraph 32); "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" (paragraph 41); "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" (paragraph 42)

<sup>9</sup> "The Court ... 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" (paragraph 22); see also paragraph 24.

interpretative jurisdiction.<sup>10</sup> The States Parties should scrupulously respect the Court's supervisory jurisdiction over application and interpretation of the Convention.

6. Several provisions of the draft declaration seek to place particular restrictions on the Court's jurisdiction in relation to certain types of case. This is especially so in relation to immigration and asylum cases, whereas there is nothing in the Convention to suggest they should be given special treatment; indeed, such an approach may encourage or facilitate discriminatory treatment at national level, which is prohibited under article 14.<sup>11</sup> The draft declaration even appears to suggest that inter-state cases, which historically have addressed some of the most serious and widespread violations, and cases arising from conflicts between States Parties, despite the maintenance of peace being a core concern of the Convention,<sup>12</sup> should no longer be dealt with by the Court.<sup>13</sup> In other respects, the draft declaration appears inconsistent, at one point implying that widespread, structural or systemic problems are 'core business' for the Court,<sup>14</sup> whilst at another suggesting that the Court is inherently unable to provide individual justice in such cases.<sup>15</sup>

7. If the Court's judgments are not respected by the States Parties, the Convention control mechanism becomes ineffective and the Convention system loses most of its added value. States have accepted an unconditional obligation to implement Court judgments, yet the draft declaration seems to make this core principle subject to their 'acceptance' by national actors, including the governments that represent the state in the Convention system.<sup>16</sup> National authorities must implement Court judgments as a matter of basic respect for the rule of law, including the principle *pacta sunt servanda* ('agreements must be kept').

### **Recommendations to the Committee of Ministers**

8. The Committee notes that the forthcoming Copenhagen Conference forms part of a series, beginning at Interlaken (2010) and continuing at Izmir (2011), Brighton (2012) and Brussels (2015). Until now, the main focus of the resulting declarations has been the Court's case-load and its principal cause, which is inadequate national implementation of the Convention in many States. These should remain the targets of inter-governmental work, which should build on the many expert reports adopted over the past eight years by promoting implementation of their recommendations, conducting co-operation activities that address the main weaknesses found in Court judgments and ensuring that the Court is sufficiently resourced to discharge its function, including through an extraordinary injection of funds to allow it to absorb its backlog of applications.

---

<sup>10</sup> "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 Treaties" (paragraph 55)

<sup>11</sup> "the Court should not act ... 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" (paragraph 25); "When examining cases related to asylum and immigration, the Court should ... avoid intervening except in the most exceptional circumstances" (paragraph 26)

<sup>12</sup> See the preamble: "Considering that the aim of the Council of Europe is the achievement of greater unity between its members... Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world"

<sup>13</sup> "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" (paragraph 54.b))

<sup>14</sup> "where the Court can focus its efforts on identifying serious or widespread violations, systemic and structural problems" (paragraph 4)

<sup>15</sup> "the number of people affected is such that a solution on an individual basis at international level is unrealistic" (paragraph 13)

<sup>16</sup> "the ensuing acceptance [of the Court's judgments] 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" (paragraph 56)