European Network of National Human Rights Institutions (ENNHRI)

Summary of the main points

This submission on behalf of ENNHRI focuses on some key themes in the context of reform of the Convention system. ENNHRI recalls that the Brighton Declaration affirmed the importance of the establishment of national human rights institutions (NHRIs) in each Member State to ensure effective implementation of the Convention at a national level, and therefore NHRIs are clearly core stakeholders in the Convention system. The Brighton Declaration also placed considerable emphasis on effective implementation of the Convention and proper execution of judgments, another theme addressed in this submission.

ENNHRI identifies the main challenge to the Convention system into the future as the ability of the Council of Europe to ensure compliance with the Convention by its Member States. In this light a number of practical recommendations are made which focus on facilitating national implementation first, emphasising that this is the primary responsibility of each Member State under the Convention, and then moves to address problems regarding execution of judgments thereafter. In relation to execution of judgments the most important recommendation is that a more concrete response from the Council of Ministers to non-execution of judgments, including the possibility of imposing sanctions on recalcitrant states. Throughout this Submission ENNHRI illustrates how NHRIs play a critical role in the Convention system, and makes a series of recommendation aimed at encouraging states to have more structured engagements with NHRIs, at both national and European level as one measure in meeting the challenges facing the Convention system at the present time.

Submission to Council of Europe's Committee of experts on the reform of the European Court of Human Rights (DH-GDR) on the longer term future of the system of the European Convention on Human Rights, and the European Court of Human Rights

European Network of National Human Rights Institutions

Introduction

The European Network of National Human Rights Institutions ("ENNHRI") comprises 41 National Human Rights Institutions ("NHRIs") from across wider Europe. NHRIs are state funded institutions, independent of government, with a broad legislative or constitutional mandate to promote and protect human rights. NHRIs are accredited by reference to the UN Paris Principles to ensure their independence, plurality, impartiality and effectiveness. ENNHRI recently established a Permanent Secretariat in Brussels.

NHRIs are critical actors for the implementation of judgments of the European Court of Human Rights ("the Court"). They are legally mandated to advise the executive and legislative branches of state on the application of international human rights standards, and may exercise litigation functions in this regard. Through their promotion mandates, they often perform educational and awareness-raising functions, which can also encourage

implementation. In addition, NHRIs must cooperate with civil society, other national bodies and the international human rights system, which they also use in their efforts to ensure implementation of the Court's judgments.

The recent High Level Conferences have recognised NHRIs' critical role in effective working of the Convention system. For example, the Brighton Declaration '*expresses the determination of the States Parties to ensure effective implementation of the Convention at national level by taking the following specific measures, so far as relevant: Considering the establishment, if they have not already done so, of an independent National Human Rights Institution...*' (at article 9(a)(i)). The Brighton Declaration also placed due emphasis on effective implementation of the Convention and proper execution of judgments.

ENNHRI has been an active stakeholder in discussions and proposals regarding reform of the the Court for a number of years and has observer status at CDDH and its subordinate bodies. We also participated actively at the High Level Conferences on the Future of the Court in Interlaken, Izmir and Brighton. We have also engaged at Wilton Park and other Court reform conferences and seminars through our Legal Working Group.

ENNHRI welcomes the present process to scruntinise the whole European Convention of Human Rights ("the Convention") system. ENNHRI is concerned, however, that the rationale for this ongoing process, beyond the Brighton Declaration, may not be sufficiently clear.[1] ENNHRI considers that the essential objective of this process should be to ensure the efficient working of the Convention system for the vindication of rights for all persons within the Council of Europe Member States's jurisdiction.

There is naturally a risk that the ongoing reform process may undermine the system, if the Court's ability to consider applications is negatively affected. It could be argued that it is in the interest of certain states, including those with a large volume of individual complaints to the Court and those who regard the judgments of the Court as an encroachment on national sovereignty, to seek to limit the Court's ability to adjudicate. ENNHRI therefore considers that it is important that this ongoing process is grounded in a clear rationale, which upholds the fundamental purpose of the Convention in the first place to "*secure to everyone... the rights and freedoms defined in...this Convention*."[2]

Future Challenges to the Convention System

The Convention system is made up of a number of interdependent elements. First, is the Convention itself, which laid down a number of human rights and fundamental freedoms guaranteed to all those within the jurisdiction of the States of the Council of Europe. Thus, there are 47 States within which the human rights in the Convention are accepted, and therefore, must be adhered to. Accordingly, the primary duty lies with Member States to comply with their obligations under the Convention and to ensure that each individual

[1] It is noted that this consultation process is predicated on certain elements of the Brighton Declaration, but the overall rationale for the process is not clear from the open call for submissions.
[2] Article 1, the Convention.

within the Council of Europe area enjoys the rights defined therein in whatever way such rights are secured and upheld within the domestic system.

Furthermore, as with any international treaty to which states commit themselves, there is also need for supervision to ensure that compliance is achieved within each national system. While states have a degree of discretion as to how the rights under the Convention are secured within their national system, the Convention itself, at the next level, dictates a system of accountability through the right of individual application to the European Court of Human Rights, and in turn execution of judgments under the supervision of the Committee of Ministers. [3]

ENNHRI considers that the main challenge to the Convention system into the future is the ability of the Council of Europe to operate as an international organisation to ensure compliance with the Convention by its individual Member States.

This has been the experience particularly over the last fifteen years, when the backlog of cases became of central concern and where there has been a failure by a minority of individual States to address systemic issues regarding compliance with the Convention. This failure in turn has generated a large volume of repetitive applications, while also generating an unsustainable number of routine cases that require ongoing supervision at Committee of Ministers level. This limits capacity for supervision system to deal with significant, complex or novel cases that require particular scrutiny to ensure compliance. While much focus has been placed on the backlog of cases coming before the Court, ENNHRI considers that the Court itself, in implementing Protocol 14, has shown an ability to deal with the problem of delays that was inherent in the Court system itself, and that the measures taken are yielding positive results.[4]

In this context, ENNHRI makes the following specific observations and recommendations regarding a number of non-exhaustive discrete issues that it considers are relevant to the future effectiveness of the Convention system:

Reform of the Court

Noting the efforts made by the Court in reducing its backlog, ENNHRI considers that, from the perspective of access to justice as an inherent component of all human rights, further admissibility criteria do not appear to be merited or desirable There are further measures that might be taken to further reduce the backlog, and ENNHRI **recommends** that consideration be given to the following proposals:

[4] In 2010 the total number of pending cases increased by 10% over 2009, in 2011 the total number of pending cases increased by 8% over 2010, and in 2012 the total number of pending cases increased by 4% over 2011. While the total number of cases pending continues to increase, it is clear that the Court has managed to diminish the incremental increase in its back log year by year, and if these trends continue, would hopefully stem the year by year increase that has been a feature of its operation for so long.

- That national judges (the judiciary being a key organs of the state) be proactively encouraged to read, understand and implement the judgments of the Court – and not leave it to the executive and state agents alone;
- That states send additional *ad litem* judges to the Court;
- That there be deeper engagement between the Court and national judiciaries so both better understand the other; and
- That the Court be in a position to be able to consider applications relating to all Convention provisions, and not prioritise claims under certain Articles over others.

Execution of Court Judgments

In order to enhance compliance with the Convention, ENNHRI **recommends** the following measures regarding the execution of judgments:

- Execution of judgments should be seen as a twin-track process: primarily on the national implementation level (see further below) but also at the Department of Execution of Judgments and Action Plan level.
- Court judgments should be understandable and clear on a general measures issue, in order that a link between general measures and Article 46 will assist the Department of Execution of Judgments in overseeing execution and the national authorities in effecting execution.
- There should be increased synergy between the Court and the Department of Execution of Judgments on how pilot judgments are identified and executed.
- There should be increased synergy between the Department of Execution of Judgments and NHRIs to ensure that the Department of Execution of Judgments receives comprehensive information on the execution of judgments in the state concerned.
- The Committee of Ministers should offer experts (similar to UN missions) to engage directly with a state's national authorities on law reform measures required in cases of concern.
    - The delegates on such missions could include state agents from Member States.
    - The NHRI of the state concerned and other relevant organisations or civil society should be consulted on what is required nationally to execute the relevant judgment(s) of the Court.
    - Such missions should link in with cooperation and assistance programmes run by other organs of the Council of Europe.
- The Parliamentary Assembly (PACE) should use additional measures for holding accountable the state concerned (e.g such as a state report to PACE on implementation), as well as the council of Ministers.

ENNHRI suggests that, following a Court judgment, an effective and efficient manner of execution should include the following:

- The state should designate a coordinating official empowered to ensure that execution occurs.
- The executive, the legislature and the judiciary should be seized of the matter as appropriate to their roles as organs of the state.
- The draft Action Plan should be furnished to the NHRI (where one exists) and civil society, where relevant, for consultation.
- The relevant parliamentary committee should be advised of the judgment and the proposed Action Plan to ensure its execution.
- The legislation or amending practice should be implemented in a timely manner to clearly address the lacunae in the lawor practice, as identified by the Court.

Supervision of the execution of Court judgment: Role of CoM

The role of the Committee of Ministers is crucial to the effective working of the Convention system, as it oversees the measures taken by Member States to comply with Court judgments. However, the Committee of Ministers is by its nature highly politicised, and this is reflected in the unwillingness of the Committee to place political pressure on recalcitrant States.[5] In this regard ENNHRI **recommends**:

- The Committee of Ministers should consider concrete measures in relation to states with repetitive applications, to which the states concerned should respond urgently. Such measures should commence with support for the state concerned, but also have the ability to move from incentives to graded sanctions where the state proves intransigent in relation to execution.
- The Department of Execution of Judgments should be better resourced for its role in supporting the Committee of Ministers.
- Better information on Article 41 compensation and costs should be disseminated to states and to applicants.
- The Committee of Ministers should also find means to highlight important cases which require implementation by states generally, beyond the individual state directly concerned.
- The Committee of Ministers should invoke Article 46 and engage with the Court more effectively regarding the execution of judgments, which may in turn bring greater pressure to bear on the individual state concerned.

[5] See for instance, *CDDH report on whether more effective measures are needed in respect of States that fail to implement Court judgments in a timely manner*, CDDH (2013) R79, Addendum 1, 29 November 2013, wherein a large range of options are examined for more effective measures to ensure states comply with Court judgments, but where no recommendation is made to the Committee of Ministers in relation to any specific measure it might adopt or whether to make any change at all.

- The Committee of Ministers should actively request information from civil society orgnaisations or NHRIs under Rule 9 of its procedures, in those cases where such information would enhance the supervision process.

Subsidiarity

ENNHRI recognises the importance of the principle of subsidiarity but continues to caution against any interpretation of the term which may undermine the right to individual petition. In particular, proposals to further restrict meritorious applications (such as new admissibility criteria) should not be developed in light of Protocol 15. Subsidiarity should be understood in the way in which the concept has been developed in the Court's case law. The Court must retain the ability to manage its own affairs, and no proposals should be considered that may impinge on its independence.

ENNHRI would not support any suggestion to interpret "subsidiarity" narrowly to restrict the Court's oversight of domestic judicial decision-making. The Convention system is based on the fact that all applications must have exhausted domestic judicial remedies to be admissible. Moreover in some cases an overall review of the domestic decision in the light of the Convention without a more thorough examination would not assure the effective protection of the rights and freedoms enshrined therein. To restrict the Court's oversight of how Convention law is interpreted and applied domestically would dramatically reduce the right to individual petition and the scope of the protection afforded by the Convention. This issue goes to the heart of the concept of the rule of law.

ENNHRI opposes the argument, as has been advanced by some states in recent years, that "subsidiarity" means permitting national courts to deal with Convention issues alone without Court oversight. This would amount to the abolition of the core rationale of the European system of human rights protection.

Regarding the role of the jurisprudence of the Court, the rule of law[6]requires that the provisions of the Convention be applied fully and consistently across the Convention system. In addition, the principle of legal certainty would be undermined if the Court does not apply the same standards in the same situations, irrespective of the State concerned. To do otherwise would increase the complexity of the case-law and reduce the foreseeability of national measures being in harmony with the Convention system.

In this regard ENNHRI recommends that:

- No new admissibility criteria, or other restriction on the right of individual application, be introduced under the rationale of "subsidiarity";
- Any discussion of subsidiarity must focus on national implementation of the Convention under Article 1, and provision of effective remedies under Article 13.

Implementation at national level

[6] Regularly cited in the Court's jurisprudence.

As noted above, and as was recognised in the Brighton Declaration, the primary reason for the large number of applications to the Court is the failure by States to implement the Convention effectively, and thereby ensure the protection of individual rights. This means that state officials and parliamentarians do not have Convention obligations sufficiently in mind when devising policies or procedures, when creating new national legislation, or when implementing national laws and policies. Violations that could have been avoided occur, and national courts do not have the powers or the ability to provide an effective remedy to the victims, even where it is clear from existing Court caselaw that a violation has occurred.

Improvements therefore need to be made at each stage of the process so as to implement the Convention effectively at national level, including national authorities having proper regard to developing Court jurispridence. This would then lead to fewer cases being brought overall and in particular fewer repetitive cases, leaving capacity at Court level for those cases which raise issues that are genuinely new or difficult.

ENNHRI considers that existing mechanisms for national implementation should be strengthened, and in particular the work of the Committee of Ministers in ensuring effective implementation of the court's judgments.

Further specific work on implementation at national level that could be taken forward includes:

- Publication and wide dissemination on the Toolkit to inform public officials about states' obligations under the Convention, adopted at the 78th meeting of CDDH in June 2013, and any other measures aimed at increasing awareness of the Convention system;
- Greater assistance to Member States in developing effective domestic remedies, including those states with a federal system, where specific attention should be paid to ensuring the implementation of judgments at all competent levels of government;
- Consideration of the role that NHRIs, and other relevant bodies including civil society, could play nationally to improve implementation of the Convention, and in particular whether further encouragement or assistance in setting up an NHRI could be given to Members States who do not currently have an NHRI;
- Consideration of sanctions against states who fail to implement the court's judgments and thereby create repetitive applications;
- Elaboration of guidelines on drawing conclusions from precedential court judgments against another state (where the same problem of principles exists in a different legal jurisdiction);
- Enhancing the role of the State agent *vis á vis* other state officials, as the primary national focal point to ensure national implementation of Convention provisions; and
- Encourage Member States to translate the judgments of the Convention into their official languages, or at a minimum disseminate a summary of the judgment in their official languages.

Conclusion

ENNHRI will continue its active participation in the ongoing debate on the longer term reform of the Convention system. We remain available to participate in future dialogue on this important subject for the safeguarding of human rights in Europe.

27 January 2014