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(a cura di)

Copenhagen 2018. Una ulteriore tappa nel processo di Interlaken per la riforma della Convenzione Europea dei Diritti dell'Uomo

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Copenhagen 2018: avanti con il processo di riforma della Convenzione europea dei diritti dell'uomo

Dopo l'adozione del protocollo addizionale n. 11, si è aperto in Europa il cantiere per la riforma del sistema della Convenzione europea dei diritti dell'uomo.

Pubblichiamo, qui di seguito, per le cure del nostro direttore, prof. Rosario Sapienza, il testo della dichiarazione adottata nello scorso mese di aprile a Copenhagen corredata da alcuni importanti documenti che esprimono il punto di vista della Corte stessa e del Segretario Generale del Consiglio d'Europa.

Ringraziamo il professor Sapienza, che firma anche una introduzione, per questo ulteriore contributo alla riflessione sul processo di riforma.

La redazione

Indice Sommario

Copenhagen 2018. A prima lettura

Il processo di riforma del sistema di garanzia della Convenzione europea dei diritti dell'uomo è, come si sa, assai risalente e si è concretizzato in una serie di tappe fondamentali.

Nel 1998 il protocollo n. 11 ha abrogato il Sistema basato sull'attività della Commissione europea e ha permesso ai singoli di adire direttamente la Corte.

Anche a motivo di questa riforma, l'arretrato della Corte è aumentato in maniera vertiginosa e di conseguenza altre riforme si sono rese necessarie. Con l'entrata in vigore nel 2010 del protocollo n. 14, sono state introdotte importanti modifiche al sistema di ammissibilità dei ricorsi individuali.

Sempre dal 2010 si è avviato il cosiddetto processo di Interlaken, consistente in periodiche riunioni di rappresentanti ad alto livello degli Stati parti della Convenzione. Si sono fino a questo momento tenuti cinque incontri (Interlaken, Smirne, Brighton, Bruxelles e da ultimo Copenhagen) che hanno prodotto interessanti dichiarazioni finali e nel 2013 due ulteriori protocolli addizionali, non ancora in vigore al momento in cui scriviamo: il protocollo n. 15, che inserisce nel preambolo della Convenzione un riferimento al principio di sussidiarietà e alla dottrina del margine d'apprezzamento e riduce da 6 a 4 mesi dalla decisione nazionale finale il termine per adire la Corte europea; e il protocollo n. 16, che permette alle alte giurisdizioni nazionali di richiedere pareri consultivi alla Corte europea.

Venendo adesso alla dichiarazione di Copenhagen, adottata nello scorso mese di aprile, si può dire da subito che essa costituisce una prudente riaffermazione dell'*acquis* delle precedenti dichiarazioni, redatta con un linguaggio certamente più …diplomatico se paragonato a quello del progetto di dichiarazione che era circolato nello scorso febbraio e che non era andato esente da critiche.

In una logica correttamente definita di "shared responsibilities", si ribadisce l'idea secondo la quale la responsabilità primaria dell'applicazione della Convenzione spetta agli Stati parti, affermazione da cui discende il carattere sussidiario del meccanismo internazionale di tutela, ma si ha cura di sottolineare che

«strengthening the principle of subsidiarity is not intended to limit or weaken human rights protection, but to underline the responsibility of national authorities to guarantee the rights and freedoms set out in the Convention» (par. 10)

Da questa affermazione, però, la dichiarazione trae come conseguenza quanto affermato al punto 28, lettere b) e c) e cioè che

« b) The jurisprudence of the Court makes clear that States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions.

c) The Court's jurisprudence on the margin of appreciation recognises that in applying certain Convention provisions, such as Articles 8-11, there may be a range of different but legitimate solutions which could each be compatible with the Convention depending on the context. This may be relevant when assessing the proportionality of measures restricting the exercise of rights or freedoms under the Convention. Where a balancing exercise has been undertaken at the national level in conformity with the criteria laid down in the Court's jurisprudence, the Court has generally indicated that it will not substitute its own assessment for that of the domestic courts, unless there are strong reasons for doing so».

Per poi esprimere al punto 31 la propria approvazione per questo atteggiamento seguito dalla Corte. Affermazioni che, mi pare, sembrano alludere ad una forte limitazione del ruolo della Corte piuttosto che a un sistema di "shared responsibilities" (R.S.)

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 to the fulfilment of their obligation under the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. They also reaffirm 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 reform process, initiated in Interlaken in 2010 and continued through further High Level Conferences in Izmir, Brighton and Brussels, has provided an important opportunity to set the future direction of the Convention system and ensure its viability. The States Parties have underlined the need to secure an effective, focused and balanced Convention system, where they effectively implement the Convention at national level, and 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.

4. The reform process has been a positive exercise that has led to significant developments in the Convention system. Important results have been achieved, in particular by addressing the need for more effective national implementation, improving the efficiency of the Court and strengthening subsidiarity. Nonetheless, the Convention system still faces challenges. The States Parties remain committed to reviewing the effectiveness of the Convention system and taking all necessary steps to

ensure its effective functioning, including by ensuring adequate funding.

5. It has been agreed that, before the end of 2019, the Committee of Ministers should 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, it is necessary to take stock of the reform process with the goal of addressing current and future challenges.

Shared responsibility – ensuring a proper balance and enhanced protection

6. Throughout the reform process, the term shared responsibility has been used to describe the link between the role of the Court and the States Parties. This is vital to the proper functioning of the Convention system and, as the ultimate goal, the more effective protection of human rights in Europe.
7. In the Brighton Declaration, it was decided to add a recital to the Preamble of the Convention affirming that the States Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the Court. In the Brussels Declaration, the importance of effective national implementation and execution of judgments was given further emphasis.
8. Focusing on the importance of Convention standards being effectively protected at national level reflects the development of the Convention system. The Convention today is incorporated, and to a large extent, embedded into the domestic legal order of the States Parties, and the Court has provided a body of case law interpreting most Convention rights. This enables the States Parties to play their Convention role of ensuring the protection of human rights to the full.

The Conference therefore:

9. Recalls the concept of shared responsibility, which aims at achieving a balance between the national and European levels of the Convention system, and an improved protection of rights, with better prevention and effective remedies

available at national level.

10. Reiterates that strengthening the principle of subsidiarity is not intended to limit or weaken human rights protection, but to underline the responsibility of national authorities to guarantee the rights and freedoms set out in the Convention. Notes, in this regard, that the most effective means of dealing with human rights violations is at the national level, and that encouraging rights-holders and decision- makers at national level to take the lead in upholding Convention standards will increase ownership of and support for human rights.
11. Strongly encourages, without any further delay, the ratification of Protocol No. 15 to the Convention by those States which have not done so.

Effective national implementation – the responsibility of States

12. Ineffective national implementation of the Convention, in particular in relation to serious systemic and structural human rights problems, remains the principal challenge confronting the Convention system. The overall human rights situation in Europe depends on States' actions and the respect they show for Convention requirements.
13. A central element of the principle of subsidiarity, under which national authorities are the first guarantors of the Convention, is the right to an effective remedy under Article 13 of the Convention.
14. Effective national implementation requires the engagement of and interaction between a wide range of actors to ensure that legislation, and other measures and their application in practice comply fully with the Convention. These include, in particular, members of government, public officials, parliamentarians, judges and prosecutors, as well as national human rights institutions, civil society, universities, training institutions and representatives of the legal professions.

The Conference therefore:

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

16. 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 systemic or structural problems;

b) ensuring, with appropriate involvement of national parliaments, 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 in the light of the Court's jurisprudence;

c)giving high priority to professional training, notably of judges, prosecutors and other public officials, and to awareness-raising activities concerning the Convention and the Court's case law, in order to develop the knowledge and expertise of national authorities and courts with regard to the application of the Convention at the national level; and;

d)promoting translation of the Court's case law and legal materials into relevant languages, which contributes to a broader understanding of Convention principles and standards.

17. Notes the positive effects of the pilot judgment procedure as a tool for improving national implementation of the Convention by tackling systemic or structural human rights problems.

18. Reiterates the significant role that national human rights structures and stakeholders play in the implementation of the Convention, and calls upon the 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.

Execution of judgments – a key obligation

19. The 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.

20. A strong political commitment by the States Parties to execute judgments is of vital importance. The failure to execute judgments in a timely manner 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 be confronted in an open and determined manner.

The Conference therefore:

21. Reiterates the States Parties' strong commitment to the full, effective and prompt execution of judgments.

22. Reaffirms the Brussels Declaration as an important instrument dealing with the issue of execution of judgments and endorses the recommendations contained therein.

23. Calls on the States Parties to take further measures when necessary to strengthen the capacity for effective and rapid execution of judgments at the national level, including through the use of inter- State co-operation.

24. 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 (3) and (4) of the Convention keeping in mind that it was foreseen that they would be used sparingly and in exceptional circumstances respectively.

25. Encourages the Committee of Ministers to consider the need to further strengthen the capacity for offering rapid and flexible technical assistance to States Parties facing the challenge of implementing Court judgments, in particular pilot judgments.

European supervision – the role of the Court

26. The Court provides a safeguard for violations that have not been remedied at national level and authoritatively interprets the Convention in accordance with relevant norms and principles of public international law, and, in particular, in the light of the Vienna Convention on the Law of Treaties, giving appropriate consideration to present-day conditions.

27. The quality and in particular the clarity and consistency of the Court's judgments are important for the authority and effectiveness of the Convention system. They provide a framework for national authorities to effectively apply and enforce Convention standards at domestic level.

28. The principle of subsidiarity, which continues to develop and evolve in the Court's jurisprudence, guides the way in which the Court conducts its review.

a) The Court, acting as a safeguard for individuals whose rights and freedoms are not secured at the national level, may deal with a case only after all domestic remedies have been exhausted. It does not act as a court of fourth instance.

b) The jurisprudence of the Court makes clear that States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions.

c) The Court's jurisprudence on the margin of appreciation recognises that in applying certain Convention provisions, such as Articles 8-11, there may be a range of different but legitimate solutions which could each be compatible with the Convention depending on the context. This may be relevant when assessing the proportionality of measures restricting the exercise of rights or freedoms under the Convention. Where a balancing exercise has been undertaken at the national level in conformity with the criteria laid down in the Court's jurisprudence, the Court has generally indicated that it will not substitute its own assessment for that of the domestic courts, unless there are strong reasons for doing so.

d) The margin of appreciation goes hand in hand with supervision under the Convention system, and the decision as to whether there has been a violation of the Convention ultimately rests with the Court.

The Conference therefore:

29. Welcomes efforts taken by the Court to enhance the clarity and consistency of its judgments.

30. Appreciates the Court's efforts to ensure that the interpretation of the Convention proceeds in a careful and balanced manner.

31. Welcomes the further development of the principle of subsidiarity and the doctrine of the margin of appreciation by the Court in its jurisprudence.

32. Welcomes the Court's continued strict and consistent application of the criteria concerning admissibility and jurisdiction, including by requiring applicants to be more diligent in raising their Convention complaints domestically, and making full use of the opportunity to declare applications inadmissible where applicants have not suffered a significant disadvantage.

Interaction between the national and European level – the need for dialogue

33. For a system of shared responsibility to be effective, there must be good interaction between the national and European level. This implies, in keeping with the independence of the Court and the binding nature of its judgments, a constructive and continuous dialogue between the States Parties and the Court on their respective roles in the implementation and development of the Convention system, including the Court's development of the rights and obligations set out in the Convention. Civil society should be involved in this dialogue. Such interaction may anchor the development of human rights more solidly in European democracies.

34. An important way for the States Parties to engage in a dialogue with the Court is through third-party interventions. Encouraging the States Parties, as well as other stakeholders, to participate in relevant proceedings before the Court, stating their views and positions, can provide a means for strengthening the authority and effectiveness of the Convention system.

35. By determining serious questions affecting the interpretation of the Convention and serious issues of general importance, the Grand Chamber plays a central role in ensuring transparency and facilitating dialogue on the development of the case law.

The Conference therefore:

36. Underlines the need for dialogue, at both judicial and political levels, as a means of ensuring a stronger interaction between the national and European levels of the

system.

37. Welcomes:

a) the future coming into effect of Protocol No. 16 to the Convention;

b) the Court's creation of the Superior Courts Network to ensure the exchange of information on Convention case law and encourages its further development;

c) an ongoing constructive dialogue between the Government Agents and the Registry of the Court ensuring proper consultations on new procedures and working methods; and

d) the use of thematic discussions in the Committee of Ministers on major issues relating to the execution of judgments.

38. Invites the Court to adapt its procedures to make it possible for other States Parties to indicate their support for the referral of a Chamber case to the Grand Chamber when relevant. Expressing such support may be useful to draw the attention of the Court to the existence of a serious issue of general importance within the meaning of Article 43 (2) of the Convention.

39. Encourages the Court to support increased third-party interventions, in particular in cases before the Grand Chamber, by:

a) appropriately giving notice in a timely manner of upcoming cases that could raise questions of principle; and

b) ensuring that questions to the parties are made available at an early stage and formulated in a manner that sets out the issues of the case in a clear and focused way.

40. Encourages the States Parties to increase coordination and co-operation on third-party interventions, including by building the necessary capacity to do so and by communicating more systematically through the Government Agents Network on cases of potential interest for other States Parties.

41. Appreciates the Danish Chairmanship's invitation to organise and host, before the end of 2018, an informal meeting of the States Parties and other stakeholders, as a follow up to the 2017 High-Level Expert Conference in Kokkedal, where general developments in the jurisprudence of the Court can be discussed, with respect for the independence of the Court and the binding character of its judgments.

The caseload challenge – the need for further action

42. 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.

43. When the Interlaken process was initiated, the number of applications pending before the Court amounted to more than 140,000. Since then, the Court has managed to reduce this number considerably despite a continuous high number of new applications. This development testifies to the high ability of the Court to reform and streamline its working methods.

44. Despite notable results, the Court's caseload still gives reason for serious concern. A core challenge lies in bringing down the large backlog of Chamber cases. Having regard to the Court's current annual output in respect of such cases, this may take a number of years.

45. The challenges posed to the Convention system by situations of conflict and crisis in Europe must also be acknowledged. In this regard, it is the Court's present practice, where an inter-State case is pending, that individual applications raising the same issues or deriving from the same underlying circumstances are, in principle and in so far as practicable, not decided before the overarching issues stemming from the inter-State proceedings have been determined in the inter-State case.

46. The entry into force of Protocol No. 16 is likely to add further to the Court's workload in the short to medium term but should ultimately reduce it in the longer term perspective.

The Conference therefore:

47. Welcomes the efforts of the Court to bring down the backlog, including by continuously reviewing and developing its working methods.

48. Recalls that the right of individual application remains a cornerstone of the Convention system. Any future reforms and measures should be guided by the need to enhance further the ability of the Convention system to address Convention violations promptly and effectively.

49. Expresses serious concern about the large number of applications still pending before the Court. Notes that further steps will need to be taken over the coming years in order to further enhance the ability of the Court to manage its caseload. This will require a combined effort of all actors involved: the States Parties in reducing the influx of cases by effectively implementing the Convention and executing the Court's judgments; the Court in processing applications; and the Committee of Ministers in supervising the execution of judgments.

50. Notes 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. Encourages the Court, in co-operation and dialogue with the States Parties, to continue to explore all avenues to manage its caseload, following a clear policy of priority, including through procedures and techniques aimed at processing and adjudicating the more straightforward applications under a simplified procedure, while duly respecting the rights of all parties to the proceedings.

51. Calls upon the Committee of Ministers to assist the States Parties in solving systemic and structural problems at national level and to consider the most effective means to address the challenge of a massive influx of repetitive applications arising from the non-execution of pilot judgments, which can place a significant burden on the Court without necessarily helping to resolve the underlying issue.

52. Acknowledges the importance of retaining a sufficient budget for the Court, as well as the Department for the Execution of Judgments, to solve present and future challenges.

53. Calls upon the States Parties to support temporary secondments of judges, prosecutors and other highly qualified legal experts to the Court and to consider making voluntary contributions to the Human Rights Trust Fund and to the Court's special account.

54. Invites the Committee of Ministers in consultation with the Court, and other stakeholders, to finalise its 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) conducting a comprehensive analysis of the Court's backlog, identifying and examining the causes of the influx of cases from the States Parties so that the most appropriate solutions may be found at the level of the Court and the States Parties;

b) exploring how to facilitate the prompt and effective handling of cases, particularly repetitive cases, that the parties are open to settle through a friendly settlement or a unilateral declaration; and

c)exploring ways to handle more effectively cases related to inter-State disputes, as well as individual applications arising out of situations of inter-State conflict, without thereby limiting the jurisdiction of the Court, taking into consideration the specific features of these categories of cases inter alia regarding the establishment of facts.

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

55. A central 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.

56. As part of the current reform process, the Committee of Ministers has addressed this challenge, *inter alia,* by the 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.

57. As concluded by the Steering Committee for Human Rights in its 2017 report, addressing the entire process of selection and election of judges, although progress has been made, there is still room for improvement in several areas.

The Conference therefore:

58. Welcomes the advances already made towards ensuring that the judges of the Court enjoy the highest authority in national and international law.

59. Calls on the States Parties to ensure that candidates included on the lists of three candidates for election as judge to the Court all are of the highest quality fulfilling the criteria set out in Article 21 of the Convention. In particular, the national selection procedures should be in line with the recommendations set out by the Committee of Ministers in the above-mentioned guidelines on the selection of candidates.

60. 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 selected and elected to the Court with a view to ensuring that the process is fair, transparent and efficient, and that the most qualified and competent candidates are elected. The 2017 report of the Steering Committee for Human Rights should serve as a source of reference for this exercise.

61. Underlines the importance of the States Parties consulting the Panel within the agreed three-month time-limit 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 the States Parties not to forward lists of candidates to the Parliamentary Assembly where the Panel has not yet expressed a view, and if the Panel has expressed a negative opinion in relation to one or more of the candidates, to give this appropriate weight; and

b) encourages the Parliamentary Assembly to refuse to consider lists of candidates unless the Panel has had the full opportunity to express its view, and to fully consider the opinions expressed by the Panel.

62. 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.

Accession by the European Union

63. The States Parties reaffirm 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 Treaty of the European Union to be completed as soon as possible. In this connection, they welcome the regular contacts between the European Court of Human Rights and the Court of Justice of the European Union and, as appropriate, the increasing convergence of interpretation by the two courts with regard to human rights in Europe.

Further measures

64. 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 the States Parties, the Court, the Committee of Ministers, the Parliamentary Assembly and the Secretary General to secure the future effectiveness of the European human rights system, building on the results achieved and meeting new challenges as they arise.

65. 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:

66. Calls on the Committee of Ministers, as a follow-up to the 2019 deadline and without prejudice to the priorities of upcoming Chairmanships of the Committee of Ministers, to prepare a timetable for the preparation and implementation of any further changes required, including an examination of the effect of Protocols Nos. 15 and 16.

General and final provisions

67. The Conference:

a) Invites the Danish Chairmanship to transmit the present Declaration to the Committee of Ministers;

b) Invites the States Parties, the Court, the Committee of Ministers, the Parliamentary Assembly and the Secretary General of the Council of Europe to give full effect to this Declaration, and follow up as appropriate on measures they have taken; 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.

Opinion on the draft Copenhagen Declaration

Adopted by the Bureau in light of the discussion in the Plenary Court on 19 February 2018

Introduction

1. At the request of the Chairman of the Committee of Ministers, the Court has considered the initial draft[1] of the declaration drawn up for the high-level conference taking place in Copenhagen on 12-13 April 2018. It welcomes the opportunity to contribute to the preparation of this fifth conference on the reform of the Convention system, and recalls that it made similar contributions in advance of the Brighton and Brussels conferences.

2. The Court wishes to acknowledge the efforts of the Danish authorities, begun well before they took on the Chairmanship of the Committee of Ministers, to prepare for the conference, with consultation of the various stakeholders, including the Court.

3. Before setting out its comments on the draft declaration, the Court wishes to make the following general points.

4. Firstly, it wishes to recall the distinct roles of the different actors in the system set up by the European Convention on Human Rights. Article 1 sets out the obligation of the Contracting States to secure to everyone within their jurisdiction the Convention rights and freedoms. Article 19 enshrines the Court's mission of ensuring the observance of the engagements undertaken by the Contracting States. Article 32 defines the scope of the Court's jurisdiction as extending to all matters concerning the interpretation and application of the Convention and specifies that, in the event of a dispute as to jurisdiction, it is for the Court to decide. Finally, Article 46 establishes the binding nature of the Court's final judgments and the supervisory function of the Committee of Ministers in respect of the execution of those binding judgments. Underpinning the distribution of these different roles, as in any system governed by the rule of law, are the fundamental principles of judicial independence and respect for the lawful authority of

[1] Dated 5 February 2018

the judiciary. It is against that backdrop that any discussion of the Convention mechanism should be conducted.

5. The second point is that the reform process, now running for eight years, can be regarded as a positive exercise that has seen significant developments in the Convention system. This is particularly apparent in relation to the Court, whose situation at the outset of the reform process was a cause of great concern. By virtue of many changes and innovations, both as a result of the amendment of the Convention (Protocol No. 14) and internal efforts to rationalise and increase its efficiency, the Court's situation has improved since then. It is vital to consolidate that progress.

6. The third point is the crucial issue of the Court's resources. The draft declaration acknowledges the scale of the challenges that the Court faces at present (an increased number of applications, a substantial backlog, problems associated with interstate cases and the duration of proceedings, to name but a few). There is recognition too that Protocol No. 16 is likely to lead to a potentially significant additional workload for the Court (at least in short- and medium-term). The Court recalls that the Brussels Declaration (B.1.f)) recognised the need to supplement the Court's resources and called on States to consider making voluntary contributions to the Court's special account. In light of the current budgetary situation of the Council of Europe, the Court considers that a similar call could be included in the draft declaration.

Commentary on the draft declaration

7. Given the nature of the exercise, coinciding with the first stages of the discussion of the draft within the Committee of Ministers, the Court's approach has been to concentrate mostly on the substance of the document, examining its themes, ideas and proposals, rather than to comment in detail on its current wording.

8. For ease of reference, the Court has structured its opinion so as to reflect the structure of the draft declaration. For the sake of brevity, this document will not reproduce in full any relevant points or information that appear in documents recently issued by the Court. Instead, cross-references will be made as appropriate.

Shared responsibility – better balance, improved protection (paras. 7-15)

9. The Court notes the prominence given in the draft declaration to shared responsibility and the principle of subsidiarity, which is to be understood as the responsibility of States to comply with their human rights obligations subject to the supervision of the Court. These have been key notions in the reform process, clarifying and affirming the role of each level and each actor in the overall Convention system.

10. However, the Court has concerns in particular in relation to the wording of paragraph 14 of the draft declaration. It considers that the references in this context to "constitutional traditions", and even more so to "national circumstances", may give rise to confusion. While both elements may be relevant in assessing whether a State has complied with the Convention in a particular case, that is ultimately for the Court itself to determine, as it has constantly stated in its case-law.

National implementation – the primary role of States (paras. 16-21)

11. The Court welcomes the clear reaffirmation at paragraph 19 of the strong commitment of States to fulfil their primary responsibility to implement and enforce the Convention domestically. It is relevant to refer here to the positive effects of the pilot judgment procedure. It has by now been applied in many different circumstances, and has supported the States concerned in improving national implementation of the Convention by tackling systemic or structural violations of human rights.

European supervision – the subsidiary role of the Court (paras. 22-30)

12. The subsidiary nature of the Convention machinery has been recognised from the earliest stage of the Court's jurisprudence and has been restated in numerous cases since. It continues to be affirmed in present case-law. The Court has consistently recalled this in the various documents it has presented throughout the reform process.

13. In paragraphs 22 to 26, the draft declaration makes a series of points about the limits of the Court's review, each one linked to statements that the Court has made in various contexts. To the extent that this seeks to derive a general proposition from the case-law, the Court observes that the significance of subsidiarity in any given case will depend on factors including the Convention provisions involved, the exact nature of the complaints raised, the particular facts of the case and its procedural background. It is therefore a matter for the Court to assess each time as it performs its function in accordance with Article 19 of the Convention, and in light of the relevant case-law. Considerations of subsidiarity do indeed affect the nature and the intensity of the Court's supervision in a given case, but it retains the power to give the final ruling on whether there has been a breach of Convention rights. This is precisely reflected in the wording of Article 1 of Protocol No. 15. Insofar as it is appropriate to single out one particular aspect of the Court's case-law – that of asylum and immigration cases – the Court observes that the ability and commitment of the domestic authorities to apply Convention standards is of particular importance in situations such as those arising in that particular field.

14. It is true that among the cases decided in recent years there have been many in which the Court was satisfied that there had been effective respect for human rights at domestic level, rendering it unnecessary to intervene at the European level. This shows the national authorities concerned performing more effectively in their primary role under the Convention, in other words, evidence of shared responsibility, as pursued by the reform process. Such cases must be contrasted, however, with the many others in which it is clear that such progress is simply absent, and that reveal instead a failure to engage effectively not only with the reform process, but with the Convention itself.

Interplay between national and European levels – the need for dialogue and participation (paras. 31-42)

15. The place of dialogue within the Convention system is underlined in the draft text, although in a broader sense and with a different emphasis than in the past. What the Court can already welcome here is the reference to judicial dialogue, to which it is strongly committed and which previous declarations have supported. The Court has long regarded it as essential to have different means of interaction with the highest national courts, and it looks forward to intensifying dialogue through the advisory opinion procedure. It appreciates the positive mention, in paragraph 37(b), of the establishment of the Superior Courts Network, as this has been a development of real significance for the Court's practical co-operation with domestic courts[2].

16. The Court would underline, however, that in relation to the development of its case law, the appropriate mechanisms for dialogue take the form of domestic court decisions and third party interventions before the Court. The latter mechanism, which is provided for under Article 36 of the Convention and Rule 44 of the Rules of Court, can be relevant to different stages in the examination of a case by the Court, including the admissibility stage, the stage of seeking referral of a case under Article 43 of the Convention, and ultimately that of the Grand Chamber's consideration of the case. Used well, interventions by third parties in proceedings are helpful for the Court, giving it the benefit of additional perspectives on the issues to be decided in the case. The Court would note that this mechanism of engagement by States with the Court's judicial function does not appear to be used to its fullest potential and that, once Protocol No. 16 has entered into force, this mechanism may become even more significant.

17. As regards the proposals in paragraphs 38 and 39 of the draft, the Court would be open to examining them in greater detail if accepted at the Copenhagen conference. It supports paragraph 40 of the draft, encouraging greater coordination and co-operation among States in this connection.

[2] Over the course of 2017, the membership of the Superior Courts Network increased from 23 courts in 17 States to 64 courts in 34 States

18. Reference is also made in the text to the possibility of ongoing dialogue at a political level among States about the development of the Court's case-law in certain areas. It is not for the Court, as a judicial institution, to comment on such a proposal, apart from noting that it is presented subject to the important provisos of respect for the Court's independence and the binding character of its judgments.

The caseload challenge – the need for further action (paras. 43-54)

19. This part of the draft notes the progress that has been achieved while detailing the scale and the nature of the challenges that still face the Court. Further efforts from all involved actors will be required over the coming years, as paragraph 45 recognises. The Court recalls that in spite of the pressure of its case-load, in 2017 it successfully introduced a system for providing more extensive reasons for single judge decisions, as requested in the Brussels Declaration.

20. The Court appreciates in particular the explicit acceptance and encouragement of the use of summary procedures to deal with straightforward applications. It welcomes the clear support that is given to the strategies applied so as to focus resources on the cases of most importance and those with the most impact, and to increase the institution's capacity to process and decide applications.

21. The Court refers in this connection to the information recently provided to the Committee of Ministers concerning the fast-track WECL procedure, the broader WECL procedure and the immediate and simplified communication of applications ("IMSI")[3]. Taken together, these measures are both a concrete demonstration of the Court's full commitment to achieving the goals of the reform process for greater efficiency in the supervisory machinery of the Convention, and a practical expression of shared responsibility.

22. The Court also appreciates the text's general encouragement to explore all avenues to bring down the caseload. Building on the measures referred to in the previous paragraph, it will continue to seek ways to work more efficiently, and counts on the active co-operation of all its interlocutors.

23. The Court has already highlighted the question of resources in paragraph 6 above. While paragraphs 52 and 53 of the draft declaration, referring to the Court's budget and temporary secondments to the Registry, are to be welcomed, the Court must once again stress the serious challenges that it is already facing. It would therefore wish to see a stronger message in the declaration on the subject of resources.

[3] See the document "Follow-up to the CDDH report on the longer-term future of the Convention system of the European Convention on Human Rights: Information from the Court", circulated to all delegations on 19 January 2018 with the reference DD(2018)60

24. The Court is prepared to examine the suggestion made in paragraph 50 concerning repetitive applications in the context of non-executed pilot judgments.

25. Regarding paragraph 54(a), the Court is receptive to the idea of consultation by the Committee of Ministers on the subject of increased use of friendly settlements and unilateral declarations as an avenue to reduce the backlog of cases.

26. Concerning paragraph 54(b), raising ideas relating to inter-State disputes and individual applications arising out of situations of State conflict, the Court considers it important to acknowledge in the declaration the challenges posed to the Convention system by such situations in Europe. While noting the mention in the draft of "separate mechanisms" for dealing with such cases, the Court considers that clarification of this idea is required before it can be analysed.

Interpretation – the need for clarity and consistency (paras. 55-61)

27. The Court is pleased to see under this heading acknowledgment of the constant efforts to ensure the requisite level of clarity and consistency in its judgments.

28. It further notes the remarks about stability in the case-law and the weight that should be accorded to precedent. It is relevant to recall that there is no formal doctrine of precedent in the Convention jurisprudence. Nevertheless, the Court has recognised – and reiterates here – the need for a high degree of consistency in the interpretation and application of the Convention. The Court has long considered that "it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases"[4]. It makes appropriate use of the mechanisms established by the Convention for avoiding inconsistency in the case-law, i.e. the relinquishment or the referral of cases to the Grand Chamber. As already indicated in paragraph 16 above above, the Court welcomes the idea of increased participation in Grand Chamber proceedings.

The selection and election of judges – the importance of co-operation (paras. 62-69)

29. The Court welcomes the recognition in the draft of the important role played by the Advisory Panel. It gives its full support to the points that are proposed in paragraph 68 to ensure that the Panel, which is composed of persons with substantial judicial

[4] See among many such references the case *Chapman v. the United Kingdom* [GC], no. 27238/95, § 70, ECHR 2001-I

and/or Convention experience, is placed in a position to perform its important function and that its assessments are fully taken into account.

30. Constant efforts are required to ensure that each stage in the electoral process offers the best possible guarantees that the most suitable candidate is selected after a fair and thorough appraisal of the professional merits and qualifications of all those involved. The Court welcomes the reminder in the draft declaration that all three candidates included on national lists must be of the highest calibre, capable of exercising the functions of an international human rights judge.

31. The Court also emphasises the link between the objective of attracting high quality candidates and the career prospects available to judges after their term at the Court. This question has been the subject of consideration by the Committee of Ministers (2014) and in the CDDH (2015, 2017), but concrete results have yet to be attained. In the Court's view, the issue should remain on the agenda of the reform process.

Execution of judgments (paras. 70-78)

32. It has been the consistent message of the Court throughout the reform process that the implementation phase of the procedure is in need of improvement. Even if the Court has devised more efficient ways to process the repetitive cases that derive from a failure to adequately execute a previous judgment, its docket still includes an excessive number of applications of this sort. Effective execution is also central to the notion of shared responsibility, as it ensures the Court is not called on to address numerous repetitive complaints resulting from dysfunctions in national human rights protection which have already been identified. The Court therefore considers that the critical importance of effective execution for the overall functioning of the Convention system calls for special emphasis in the declaration. It invites the Conference to explicitly reiterate the States Parties' strong commitment to the full, effective and prompt execution of judgments of the Court, referred to in paragraph 71.

33. In terms of proposals, the Court welcomes the reaffirmation at paragraph 74 of the recommendations that were adopted in the Brussels Declaration.

34. The idea in paragraph 76 of exploring possible synergies between the Registry and the Department for the Execution of Judgments is noted with interest.

Paragraphs 79-84

35. The Court makes no comment on these final paragraphs of the draft declaration.

High-Level Conference

Continued Reform of the European Court of Human Rights Convention System – Better balance, improved Protection

Speech by Mr Guido Raimondi, President of the European Court of Human Rights

Copenhagen, 11 – 13 April 2018

Ministers,

Ladies and Gentlemen,

Firstly, I would like to express my sincere thanks to our hosts for organising this fifth high- level reform conference of the Convention system and for having placed the European Court of Human Rights at the heart of their presidency of the Committee of Ministers. Next, my thanks go to all delegations present for their hard work in coming up with this final text, reaffirming your deep and abiding commitment to the European Convention on Human Rights.

In the spirit of Interlaken, Izmir, Brighton and Brussels, the Copenhagen draft Declaration is first and foremost a **political** declaration of commitment to the European Court of Human Rights and the Convention system, as well as the right of individual application. The important number of Ministers present today testifies to this commitment.

It is a **practical** declaration, with a strong message acknowledging the importance of retaining a sufficient budget for the Court to do its job properly (calling on States to support temporary secondments and consider making voluntary contributions), and recognizing that appointing judges of the very highest quality will play its role in ensuring the long-term effectiveness of the system.

It is also a **dynamic** declaration which, building on the Brussels declaration, affirms an increased State participation in the Convention process: starting from effective national

implementation of the Convention through to systematic execution of Court judgments. Sharing responsibility entails action, and not merely reaction, on the part of Member States.

The draft Declaration recognises the hard work and the notable results achieved by the Court during the course of the Interlaken process. It acknowledges the Court's sustained efforts to reduce its backlog, through continually **reforming and streamlining working methods**: currently there are under 56,000 pending applications before the Court. This is approximately a third of the number of applications which were pending before the Court on the eve of the Interlaken conference. The current figure is therefore impressive, but we have to recognise that significant challenges remain. There are still too many cases raising important issues which take too long to adjudicate.

That being said, the Court has successfully exploited the tools provided by Protocol no. 14 and continues to develop new working methods particularly for dealing with the most straightforward cases. It has also invoked the notion of shared responsibility in introducing more streamlined procedures and sharing more of the burden of case processing with Governments – I refer here to the so-called immediate simplified communication. More generally the Court is interested in exploring new ways of cooperating with Governments with a view to furthering the common goal of making the Convention system more effective. A starting point is greater transparency as to the substance of pending cases so that Governments are aware of issues and thus are in a position to address them proactively. I am pleased to mention the encouragement and assistance that we have received from Government Agents, who play an important role as actors in the Convention system.

The draft Declaration welcomes the Court's efforts to continue developing its working methods. It also notes the positive effects of the Court's pilot judgment procedure as a tool for improving national implementation by tackling systemic or structural human rights problems. The recent judgment of the Grand Chamber in the case of *Burmych* testifies to the fact that once the Court has established the principles in the pilot judgment, it will be for the State concerned to legislate or take the necessary measures, and it will do so under the supervision of the Committee of Ministers.

The draft Declaration encourages the Court's initiatives to enrich judicial dialogue through the Superior Courts Network which was created in 2015. There are now 67 member courts from 35 States. There is certainly an appetite for dialogue and exchange of information to which the Court is responding. Another way to promote interaction between the national and the European level, as underlined in the draft Declaration, is through increased third- party interventions brought by Member States, particularly in Grand Chamber cases. The Court will now explore ways in which it can support this call for increased dialogue.

Indeed, the Court has always sought to respond quickly and efficiently to the challenges laid down each step of the way along the Interlaken process: from the swift implementation of Protocol No. 14 and the reduction of the backlog of manifestly inadmissible cases, to the strict and consistent application of the admissibility criteria, to now preparing to receive requests for Advisory Opinions when Protocol No. 16 comes into force, which we now know will be later this year.

Today is an important day in the history of the Convention. The French Minister of Justice, Nicole Belloubet, will ratify this morning Protocol No. 16 to the Convention with the Secretary General of the Council of Europe. This brings the number of ratifications to 10, which is the number required for the Protocol to come into force. In the spirit of the Copenhagen Declaration, this new competence which extends the Court's advisory jurisdiction, aims to foster an institutionalized dialogue between courts and to reinforce domestic implementation of the Convention in accordance with the principle of subsidiarity. Although the coming into force of this Protocol may initially generate more work for the Court in the short term, we are confident that in the long term it will ensure that more cases are dealt with satisfactorily at the national level.

The Court and the Member States are together in a partnership with a common goal as I have said, yet they have distinct roles. In recognising their separate missions in this context, it is worth stressing the fundamental principle of judicial independence and the need for respect for the lawful authority of the judiciary, which underpins the Court's role. "The authority of the Judiciary" was the theme of this year's Judicial Seminar, which marked the opening of the Court's judicial year. It proved to be a very relevant and popular topic with the Court's guests. It is also a theme which the Secretary General has put at the forefront of the agenda of the Council of Europe. While it is, of course, open for Member States to discuss the development of the Court's case-law, this must be done in a way that is consistent with full respect for the Court's independence and the binding nature of its judgments.

You may rest assured that post-Copenhagen and in the run-up to the fast approaching 2019 deadline, the Court will continue to use its creativity and expertise to respond to the challenges ahead, streamlining working methods and improving judicial policy and case management.

The Convention and its control mechanism remain crucial for the stability and security of the community of Council of Europe States and beyond. In these difficult times where the values which underpin the Convention and the whole Organisation are increasingly challenged, it becomes even more important to have an independent judicial body offering redress to victims and maintaining a clear line of principles to remind States of their commitments, thereby relentlessly pursuing the steady work of consolidation and repair of the twin and mutually interdependent foundations of European society, that is democracy and the rule of law.

The draft declaration to be adopted today confirms the full support of the State Parties to the Convention and to the Court. No doubt it will assist the States and the Court in the forthcoming years in their joint effort to ensure an excellent level of protection of human rights on our continent.

Speech by Mr Thorbjørn Jagland, Secretary-General of the Council of Europe

Prime Minister, distinguished guests,

It is a pleasure to be here.

The Danish Government made clear from the outset of its Chairmanship that strengthening our Convention system would be a priority.

And I thank them for that.

I was equally clear from the beginning of my first mandate that strengthening that system – and the European Court of Human Rights – would be a priority for me.

The current reform process began at Interlaken, with milestones at Izmir, Brighton and Brussels.

It was agreed that the Committee of Ministers would take stock of our progress by the end of 2019 and decide how to move ahead.

And here in Copenhagen we have the opportunity to consider what has been achieved so far, and the challenges that remain.

Certainly, the progress to date has been impressive.

For example, when I took office the Strasbourg Court had a large and increasing backlog of cases.

But from a high water mark of 152,000 applications pending in 2011, that number receded to 56,000 last year.

This is because we took deliberate action.

Protocol 14 streamlined procedures.

And a constant and concerted effort to increase the efficiency of working methods has delivered.

The same can be said for cases pending before the Committee of Ministers:

Where the total number has fallen from 10,000 in 2016 to 7,500 in 2017.

Again, this is no accident.

Repetitive cases are now closed as soon as the individual applicants' situations are resolved.

We took a series of initiatives to ensure better dialogue between the Committee of Ministers and national authorities.

And, consequently, member states too have done a lot.

Structural problems are being remedied in many countries – concerning, for example, prison conditions and the length of judicial proceedings.

Domestic capacities have been improved, and effective remedies put in place.

And new structures have been adopted by parliaments and governments to better monitor the implementation of the Court's judgments against their own country.

So in the areas in which the Convention system has been most widely challenged – the efficiency of the Court and the execution of its judgments – progress has been made.

But there are areas in which further work must be done.

They have already been identified in the Steering Committee for Human Rights report on the Convention system's future:

In particular, strengthening the authority of the Court, its judges, its case law.

But also preserving the Convention's coherent and paramount place within European and international law.

Together, we must consolidate the authority of the Strasbourg Court and the Convention system as a whole.

This means working hard to ensure acceptance of the Court's judgments – all judgments – by all Convention actors.

This is the backbone of our "shared responsibility".

I have heard it said that the Court lacks the democratic legitimacy of national parliaments.

This is wrong-headed.

The separation of powers is part of the checks and balances found in healthy democracies.

Sometimes politicians will not like judgments handed down by a court.

But that is the nature of the legal process.

Those courts – our Court – are there to protect people against the arbitrary use of state power.

Politicians cannot set aside constitutional provisions by simple majority vote because they do not like them.

The same is true for human rights in Europe.

The Convention and the Court's judgments are part of a collective guarantee set up by the member states under international law.

There are also those who claim that the Court can go too far in its interpretation of the Convention.

This too is wrong.

We have to keep in mind that the Convention is a living instrument which must be interpreted in the light of present day conditions and of the ideas prevailing in democratic States today.

This is fundamental.

As a consequence, for example, we have witnessed the decriminalisation of same sex relationships in Europe following the 1981 Dudgeon judgment.

Who among us would now argue against this?

And years after, in 2015, in *Oliari and Others v. Italy*, the Court recognised same-sex partnership taking into account a trend among member states towards the legal recognition of same-sex couples.

Of course our Organisation must continue to work closely with member states to ensure that we have a shared understanding of the law –

And how it can best be implemented.

Indeed, all Convention actors have a say in the interpretation of the Convention in response to modern challenges.

Together, we have already developed various tools for joint working, which should be used to their fullest.

These include judicial dialogue, which will be enhanced by Protocol 16, most recently ratified by France.

But also dialogue between the Strasbourg Court and other national authorities, with –

Observations and third party interventions –

Exchanges of view between the Court's President and the Committee of Ministers –

And close contact between the Court Registry, the Department for the execution of judgments and domestic government agents and other authorities.

Similarly, our standard-setting activities facilitate meaningful dialogue with the high contracting parties.

And we must also strengthen co-operation with member states to help them implement the Strasbourg Court's judgments.

Because the efficient execution of judgments remains central to the judiciary's credibility.

So too is the authority of the judges who serve on its bench.

This means that lawyers of only the highest ability should be selected and elected as judges.

Overall, what more can be done –

While respecting the separation of powers –

With a fully independent European Court of Human Rights that maintains the right of individual petition?

In order to meet this challenge, the Court will need sufficient resources.

Equally, it will require the principle of shared responsibility to be upheld, with member states demonstrating the political will to implement the Convention.

Because the reality today is that the biggest problems are not in fact due to the Strasbourg Court per se.

Rather, they are because too often countries still have laws or practices that are not in line with the Convention.

Or they are too slow to implement judgments from the Strasbourg Court.

The Council of Europe will be supportive of further efforts to change this.

But primary responsibility for rectifying these issues rests at the national level.

This, after all, is what the principle of subsidiarity is about.

This has long been a source of consensus.

And on this subject I warmly welcome the most recent ratifications of Protocol 15 to the Convention.

I know that the four countries that have yet to sign or ratify will do their utmost to move quickly.

I also hope that progress will soon be made on the European Union's accession.

This should help ward off the danger of fragmentation of human rights protection in the European and international legal space.

More broadly, that risk is being examined by the Committee of Experts on the System of the European Convention on Human Rights.

And I look forward to hearing its conclusions.

It is easy to take for granted what the Convention system has given to Europe in its near 70 year history –

But the reality is that human rights, democracy and the rule of law are not inevitable.

We need the institutions, laws and political will to uphold these things.

Eroding them would undermine the common legal space that safeguards Europe's unity and peace.

But together we can not only prevent this; we can strengthen our Convention system further still.