

BRIEFING NOTE ON THE EUROPEAN COURT OF HUMAN RIGHTS

1. The European Court of Human Rights was set up under the 1950 European Human Rights Convention. Its origins can be traced back to the 1948 Hague Congress.
2. After a slow start due to the reluctance of Governments to accept the right of individual petition and the jurisdiction of the Court (initially voluntary provisions which only became compulsory in 1998) it has now become a victim of its own success with a large backlog of cases which stood at 152,000 by the end of January 2012.
3. In June 2010, under Protocol 14, a new system came into force in which the number of judges required to make important decisions was reduced in an effort to speed up the court's work.
4. Further efforts to reform and streamline the functioning of the European Court of Human Rights have been under way for a number of years with high-level conferences at Interlaken (2010) and Izmir (2011).
5. The present UK Chairmanship of the Committee of Ministers of the Council of Europe has pledged to advance reform of the Court at a Ministerial Conference in Brighton from 18 to 20 April 2012.
6. Prime Minister David Cameron came to Strasbourg in January to outline the UK's motivations in what appeared to be a speech for domestic consumption playing to the British tabloid media. His Government is under substantial pressure to curb the powers of the Strasbourg Court because the Eurosceptic wing of the Conservative party and, a fortiori, UKIP and the BNP oppose its recent decisions (i) upholding the right for prisoners to vote and (ii) blocking the deportation of the radical cleric Abu Qatada. (No fair trial in Jordan if a conviction is based on evidence obtained under torture).
7. The Draft Brighton Declaration which was leaked to the press at the end of February will be subject to intense negotiations in the run-up to the Brighton meeting because (fortunately) some countries (including Belgium, Germany, and Austria) suspect that under the guise of achieving greater efficiency, the United Kingdom and its allies (including Switzerland, the Netherlands and France) are actually seeking to water down the role of the Court and the Convention.
8. According to lawyers, a number of proposals in the draft appear to curb the right of individual application guarantees under the European Convention and the right to access to the Court.
9. The proposed Declaration seems to question very many aspects of both the Court's adjudicatory role and its relationship with national courts particularly in terms of

subsidiarity, i.e. the principle that decisions should be taken at the national level thereby potentially short-circuiting the Court in Strasbourg.

10. This principle is fine per se provided contentious decisions can be referred to the European Court!
11. The Brighton text also focuses on the so called "margin of appreciation", i.e. the possibility for national governments to have greater leeway in applying the judgments of the court.
12. It proposes making applications stemming from cases considered by national courts inadmissible unless
 - (i) The national court "erred" in interpreting Convention rights; or
 - (ii) The application "raises a serious question" relating to the interpretation or application of the Convention.

This could change the character of the Strasbourg court, and potentially strikes at the heart of what the court is meant to offer and achieve: **access to justice for the adjudication of human rights violations.**

13. The Draft advocates expressly including the principles of subsidiarity and the margin of appreciation in the Convention. However, lawyers are sceptical about what impact this would have since the Strasbourg Court has time and again shown itself to be conscious and respectful of the principle of subsidiarity. The principle of the margin of appreciation which is, of course, already applied by the Court in its case law is, necessarily, **a principle of interpretation.** It is consequently well-nigh impossible to see how such principles could be spelled out in the Convention other than in the vaguest of terms.
14. The Draft suggests a series of measures to strengthen national systems through their implementation of the Convention including internal checks on compatibility of legislation with the ECHR; new domestic remedies where appropriate; greater training for public officials etc. Such proposals are to be welcomed because they are aimed at improving the protection of human rights at national level.
15. The Draft proposes an 'advisory opinion' mechanism which would allow highest national courts to refer questions to Strasbourg, and allow national courts to apply the opinions provided to the facts of the case. However, according to lawyers, the mechanism is set out in imprecise terms. Highest national courts would be free to refer matters to the **ECHR but advisory opinions delivered by the Court would be non-binding!** Above all, **litigants would "not ordinarily" have recourse to the ECHR in the same proceedings** following a national court's application of an opinion to the facts!

16. Other measures proposed in the Draft include reducing the deadline for lodging applications with the Court from the present six months after exhaustion of domestic remedies which would be highly prejudicial to potential applicants particularly in the newer democracies which are less well versed in how to challenge suspected violations;
17. On 20 February 2012 the European Court of Human Rights itself issued an opinion in preparation for the Brighton Conference. The Court did not offer a definition of subsidiarity, but suggested that States must reaffirm their commitment to the system of human rights protection, which requires “**making every effort to secure the Convention rights and freedoms at national level and accepting that these efforts are subject to judicial scrutiny at European level**”.
18. In January the Council of Europe's Conference of INGOs issued a statement voicing alarm that international standards could be diluted in favour of allowing individual states greater leeway on sensitive human rights issues and opposing a range of other proposals.
19. As one of the progenitors of the Council of Europe and the European Court of Human Rights, the European Movement **should reaffirm the right of individuals across Europe to apply to the Strasbourg court** and state categorically that **it is the Court and not national Governments which should decide the cases it needs to review**.
20. It is imperative that we unreservedly **support human rights protection in Europe** and that we **denounce any attempts to dilute the system** for highly questionable ends.
21. The message to the outside world should be: **Hands off the European Human Rights Court!**

Jack Hanning

12/03/2012