

REMARKS ON ECHR REFORM

James A. Goldston: Remarks on the Copenhagen Declaration on Reform of the ECHR

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Open Society Justice Initiative

The following remarks from James A. Goldston, Executive Director, Open Society Justice Initiative, were delivered to a civil society convening in Copenhagen, Denmark, on the occasion of the Conference of the Council of Europe Chairmanship of Denmark of the Continued Reform of the European Human Rights Convention System. The event was organized by the Faculty of Law of the University of Copenhagen, together with iCourts, Nyt Europa and Amnesty International.

My organization, the Open Society Justice Initiative, litigates and undertakes legal advocacy to advance human rights and the rule of law around the globe. But we have deep roots in, and an unshakeable commitment to, the human rights system in Europe, where Open Society Foundations was born.

We are not only ardent supporters of the European Convention on Human Rights; we are also active users of the European Court, and have litigated a number of its most important cases. We are invested in the Court's independence, effectiveness and long-term well-being. We believe that the strength of the Court, while dependent upon many factors, derives in large part from the quality of its judgments – and the extent to which they are implemented. For this reason, we have insisted on the importance of execution, and have advocated for strong supervision mechanisms within the Committee of Ministers and robust execution efforts at the national level.

As has been noted here, the future of the European Human Rights Convention system has been the subject of continuous, intense intergovernmental scrutiny, with four official declarations and two new Protocols adopted in 8 years.

In each case, with the exception of the Brussels declaration, legitimate efforts to strengthen the Court and the Convention system have coincided with over-reach – that is, inappropriate attempts by some to use the language of “reform” as a mask to narrow the Court's role. The process leading up to the Copenhagen declaration has exhibited a similar dual tendency.

On the one hand, many states have admirably focused on the necessary and laudable aim of assuring the “sustainable functioning of the control mechanism of the Convention” – including by guaranteeing the Court the necessary resources to continue its progress in reducing the backlog of cases.

But on the other hand, there were attempts in the course of the past several months to insert language into the Declaration that would have compromised the Court's independence, unduly constrained its remit, and wrongly signaled that it was “unrealistic” for the Court to address large scale rights violations or that the Court should “avoid intervening” in most asylum or immigration cases.

We and other civil society actors and academics objected to these proposals.

- We warned that efforts to expand the notion of “dialogue” between Member States and the Court beyond the many fruitful opportunities for interaction that currently exist risked “politicizing” the Court and infringing on its judicial authority and independence.
- And we observed that some suggestions to expand the principle of subsidiarity were misguided, insofar as they improperly inserted into a political Declaration guidance for how the Court should interpret concepts such as the “margin of appreciation,” and in doing so,

failed to clarify that states do not always have a margin of appreciation and that the scope of the margin, if any, is to be determined by the Court, not states.

It should be noted that civil society raised these concerns even though most of its representatives were not generally privy to inter-state discussions, and were not given the opportunity to comment on the series of draft declarations that emerged.

Thankfully, many of the most problematic proposals provoked consternation among Council of Europe members as well. Thus, a coalition of 19 states expressed serious reservations about the way one earlier draft:

- a) downplayed the Court’s supervisory functions,
- b) questioned its independence and authority,
- c) revisited well-established principles of dynamic interpretation of the Convention, and
- d) undermined the principle of universality of human rights.

As a result, the final Copenhagen Declaration has emerged in far better shape than some had feared. While brief, the Declaration includes two paragraphs noting the importance of the execution of judgments at the national level, and reinforces the responsibilities of states as first responders in safeguarding, preventing and addressing violations of the Convention.

And while the Declaration clearly points to the need for improved Court functioning (through greater clarity and consistency of judgments, addressing the large caseload and ensuring the highest quality judges), it also recognizes the Court’s ultimate authority to determine whether the Convention has been violated.

The Declaration helpfully affirms the “shared responsibility” of the Court and Member States to fully and effectively implement the Convention at the national level.

However, given that examination of the Court and the Convention system more broadly will continue after Copenhagen—the Brussels declaration envisions an analysis, by the end of 2019, of the prospects of obtaining a balanced caseload—we could all benefit from reflection now on how that process could be improved. Let me identify three areas where we can do better.

First, it’s clear that some of the efforts by states to diminish the Court’s authority have been “politically” motivated—they were designed to appeal to domestic constituencies moved by surging populist and nationalist currents. Human rights are on the defensive across broad swaths of Europe—and in the world at large. In the face of such pressure, it may be tempting to parrot the fabrications of populist figures, such as that rights are an elitist invention for terrorists and immigrants, but not for everyone else.

But the past few years have taught that, rather than succumb, political leaders combat populist nationalism most effectively when they stand up for the core principles of the Convention – including the rule of law, tolerance of difference and equal opportunity. The most successful politicians are able to explain to their citizens in plain terms why rights matter for all.

Just look at the experience of court systems outside Europe. Several years ago, the Southern African Development Community court came under withering attack for some of its initial decisions. No state defended it—and it collapsed.

By contrast, regional mechanisms in Africa and Latin America have experienced severe blowback in recent years. But in both cases, several states—led by courageous politicians—have pushed back and in the process secured broader support for the institutions and political benefit for themselves. Similarly, when, a little over a year ago, the International Criminal Court faced a wave of threatened withdrawals, a number of states, backed by civil society, spoke up in defense of the Court and its mission.

Conversely, when governments who have been longstanding rights champions falter, other states notice—and the impacts resonate across borders. Several years ago, Kenya’s leadership seized upon Britain’s criticisms of the European Court to justify their own self-interested attacks on the ICC.

The lesson is clear—defending rights and the institutions which protect them demands political dedication and courage, not cowardice.

A second insight is that the Copenhagen process might have built more effectively on the Brussels Declaration, which, despite its excellent language, has had little practical impact thus far. The Copenhagen Declaration might have proposed concrete measures to improve the execution of judgments. Thus, it might have

- encouraged the Court to craft judgments identifying specific measures and a timeframe for executing judgments;
- or urged the Committee of Ministers to develop a set of progressive actions to respond to non-execution of judgments, such as public hearings, referring non-implemented cases to the Parliamentary Assembly for debate, in situ missions, and greater use of infringement proceedings under Article 46(4);
- and it could have noted the possibility of financial sanctions for failure to execute judgments.

Future inquiries that succeed Copenhagen should consider taking up these points.

Finally, the Copenhagen process might have broken new ground by ensuring that civil society was seen throughout as an indispensable partner. The Declaration (para 33) makes clear that “civil society should be involved” in the ongoing dialogue between states parties and the Court on their respective roles in implementing the Convention system. But going forward the commitment to engage civil society as a full and equal actor must be translated into concrete measures. So, for example, consultations on new procedures and working methods should involve, not only the Registry and government agents (as para 37C notes), but representatives of applicants and NGOs as well.

More generally, follow-on efforts to achieve full implementation of the Convention must be seen as a “shared responsibility” of not only the Council of Europe and its member states, but of civil society organizations as well.

In short, the Copenhagen process, which once threatened to pose a real challenge to the Court, has ended in a relatively positive place.

But before we congratulate ourselves, it’s essential to take stock of what could have gone better, and of how to ensure that the next round of this recurring examination of Convention system “reform” is aimed more clearly at preserving and strengthening the jewel of regional judicial bodies.

The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. Our staff is based in Abuja, Brussels, Budapest, The Hague, London, Mexico City, New York, Paris, Santo Domingo, and Washington, D.C.
