

DIALOGUES ON THE EUROPEAN CONVENTION  
OF HUMAN RIGHTS, 2012

THE BRIGHTON DECLARATION

PRESIDENT BRATZA'S COMMENTARY IN RESPONSE

These materials, edited by Alec Stone Sweet, serve as background for the chapters that follow.

**The Brighton Declaration**  
High Level Conference on the Future of the European Court of  
Human Rights (April 19-20, 2012)\*

The High Level Conference meeting at Brighton on 19 and 20 April 2012 at the initiative of the United Kingdom 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.

2. The States Parties also reaffirm their 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. The Court has made an extraordinary contribution to the protection of human rights in Europe for over 50 years.

3. The States Parties and the Court share responsibility for realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity. The Convention was concluded on the basis, *inter alia*, of the sovereign equality of States. States Parties must respect the rights and freedoms guaranteed by the Convention, and must effectively resolve violations at the national level. The Court acts as a safeguard for violations that have not been remedied at the national level. Where the Court finds a violation, States Parties must abide by the final judgment of the Court. . . .

7. The full implementation of the Convention at national level requires States Parties to take effective measures to prevent violations. All laws and policies should be formulated, and all State officials should discharge their responsibilities, in a way that gives full effect to the Convention. States Parties must also provide means by which remedies may be sought for alleged violations of the Convention. National courts and tribunals should take into account the Convention and the case law of the Court. Collectively, these measures should reduce the number of violations of the Convention. They would also reduce the

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\*Excerpted from High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, (Apr. 19, 2012), *available at* <http://www.coe.int/en/20120419-brighton-declaration>.

number of well-founded applications presented to the Court, thereby helping to ease its workload.

8. The Council of Europe plays a crucial role in assisting and encouraging national implementation of the Convention, as part of its wider work in the field of human rights, democracy and the rule of law. . . .

10. The States Parties to the Convention are obliged to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, and to provide an effective remedy before a national authority for everyone whose rights and freedoms are violated. The Court authoritatively interprets the Convention. It also acts as a safeguard for individuals whose rights and freedoms are not secured at the national level.

11. The jurisprudence of the Court makes clear that the 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. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.

12. The Conference therefore:

- a. Welcomes the development by the Court in its case law of principles such as subsidiarity and the margin of appreciation, and encourages the Court to give great prominence to and apply consistently these principles in its judgments;
- b. Concludes that, for reasons of transparency and accessibility, a reference to the principle of subsidiarity and the doctrine of the margin of appreciation as developed in the Court's case law should be included in the Preamble to the Convention and invites the Committee of Ministers to adopt the necessary amending instrument by the end of 2013, while recalling the States Parties' commitment to give full effect to their obligation to secure the rights and freedoms defined in the Convention;

c. Welcomes and encourages open dialogues between the Court and States Parties as a means of developing an enhanced understanding of their respective roles in carrying out their shared responsibility for applying the Convention, including particularly dialogues between the Court and:

- i. The highest courts of the States Parties;
- ii. The Committee of Ministers, including on the principle of subsidiarity and on the clarity and consistency of the Court's case law; and
- iii. Government Agents and legal experts of the States Parties, particularly on procedural issues and through consultation on proposals to amend the Rules of Court;

d. Notes that the interaction between the Court and national authorities could be strengthened by the introduction into the Convention of a further power of the Court, which States Parties could optionally accept, to deliver advisory opinions upon request on the interpretation of the Convention in the context of a specific case at domestic level, without prejudice to the non-binding character of the opinions for the other States Parties; invites the Committee of Ministers to draft the text of an optional protocol to the Convention with this effect by the end of 2013; and further invites the Committee of Ministers thereafter to decide whether to adopt it . . . .

13. The right of individual application is a cornerstone of the Convention system. The right to present an application to the Court should be practically realisable, and States Parties must ensure that they do not hinder in any way the effective exercise of this right. . . .

21. The authority and credibility of the Court depend in large part on the quality of its judges and the judgments they deliver.

22. The high calibre of judges elected to the Court depends on the quality of the candidates that are proposed to the Parliamentary Assembly for election. The States Parties' role in proposing candidates of the highest possible quality is therefore of fundamental importance to the continued success of the Court, as is a high-quality Registry, with lawyers chosen for their legal capability and their

knowledge of the law and practice of States Parties, which provides invaluable support to the judges of the Court.

23. Judgments of the Court need to be clear and consistent. This promotes legal certainty. It helps national courts apply the Convention more precisely, and helps potential applicants assess whether they have a well-founded application. Clarity and consistency are particularly important when the Court addresses issues of general principle. Consistency in the application of the Convention does not require that States Parties implement the Convention uniformly. The Court has indicated that it is considering an amendment to the Rules of Court making it obligatory for a Chamber to relinquish jurisdiction where it envisages departing from settled case law. . . .

25. The Conference therefore: . . .

c. Welcomes the steps that the Court is taking to maintain and enhance the high quality of its judgments and in particular to ensure that the clarity and consistency of judgments are increased even further; welcomes the Court's long-standing recognition 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; and in particular, invites the Court to have regard to the importance of consistency where judgments relate to aspects of the same issue, so as to ensure their cumulative effect continues to afford States Parties an appropriate margin of appreciation; . . .

26. Each State Party has 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.

27. The Committee of Ministers must therefore effectively and fairly consider whether the measures taken by a State Party have resolved a violation. The Committee of Ministers should be able to take effective measures in respect of a State Party that fails to comply with its obligations under Article 46 of the Convention. The Committee of Ministers should pay particular attention to violations disclosing a systemic issue at national level, and should ensure that States Parties quickly and effectively implement pilot judgments. . . .

30. This Declaration addresses the immediate issues faced by the Court. It is however also vital to secure the future effectiveness of the Convention system.

To achieve this, a process is needed to anticipate the challenges ahead and develop a vision for the future of the Convention, so that future decisions are taken in a timely and coherent manner.

31. As part of this process, it may be necessary to evaluate the fundamental role and nature of the Court. The longer-term vision must secure the viability of the Court's key role in the system for protecting and promoting human rights in Europe. The right of individual application remains a cornerstone of the Convention system. Future reforms must enhance the ability of the Convention system to address serious violations promptly and effectively.

32. Effective implementation of the Convention at national level will permit the Court in the longer term to take on a more focused and targeted role. The Convention system must support States in fulfilling their primary responsibility to implement the Convention at national level.

33. In response to more effective implementation at the national level, the Court should be in a position to focus its efforts on serious or widespread violations, systemic and structural problems, and important questions of interpretation and application of the Convention, and hence would need to remedy fewer violations itself and consequently deliver fewer judgments. . . .

35. The Conference therefore: . . .

c. Invites the Committee of Ministers, in the context of the fulfilment of its mandate under the Declarations adopted by the Interlaken and Izmir Conferences, to consider the future of the Convention system, this consideration encompassing future challenges to the enjoyment of the rights and freedoms guaranteed by the Convention and the way in which the Court can best fulfil its twin role of acting as a safeguard for individuals whose rights and freedoms are not secured at the national level and authoritatively interpreting the Convention . . . .

e. Envisages that the Committee of Ministers will, as part of this task, carry out a comprehensive analysis of potential options for the future role and function of the Court, including analysis of how the Convention system in essentially its current form could be preserved, and consideration of more profound changes to how applications are resolved by the Convention system with the aim of reducing the number of cases that have to be addressed by the Court.

**Nicolas Bratza**

**Speech at High Level Conference on the Future of the  
European Court of Human Rights  
(April 19, 2012)\***

[A]t a time when human rights and the Convention are increasingly held responsible in certain quarters for much that is wrong in society, it is worth recalling the collective resolve of member States of the Council of Europe to maintain and reinforce the system which they have set up. We should not lose sight of what that system is intended to do, that is to monitor compliance with the minimum standards necessary for a democratic society operating within the rule of law; nor should we forget the Convention's special character as a treaty for the collective enforcement of human rights and fundamental freedoms. It is no ordinary treaty. It is not an aspirational instrument. It sets out rights and freedoms that are binding on the Contracting Parties.

The Declaration also reaffirms the attachment of the States Parties to the right of individual petition and recognizes the Court's extraordinary contribution to the protection of human rights in Europe for over 50 years. In setting up a Court to guarantee their compliance with the engagements enshrined in the Convention, the member States of the Council of Europe agreed to the operation of a fully judicial mechanism functioning within the rule of law. The principal characteristic of a court in a system governed by the rule of law is its independence. In order to fulfil its role the European Court must not only be independent; it must also be seen to be independent. That is why we are, I have to say, uncomfortable with the idea that Governments can in some way dictate to the Court how its case-law should evolve or how it should carry out the judicial functions conferred on it.

I would respectfully submit that these elements must be borne in mind in any discussion of proposals for reform. Convention amendment must be consistent with the object and purpose of the treaty and must satisfy rule of law principles, notably that of judicial independence. . . . Having said that, there is much in this Declaration with which the Court is in complete agreement. I refer in particular to the emphasis placed on steps to be taken by the States themselves,

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\*Excerpted from, Nicolas Bratza, President of the European Court of Human Rights, Speech at High Level Conference on the Future of the European Court of Human Rights, (Apr. 19 2012), available at <http://www.coe.int/20120419-nicolas-bratza>.

the recognition of the shared responsibility for the system requiring national authorities to take effective measures to prevent violations and to provide remedies. . . . It also rightly underlines the important role of the Council of Europe in providing assistance.

Let us be clear: the main issue confronting the Court has been, and continues to be, the sheer quantity of cases. Failure to implement the Convention properly at national level is a primary source of the accumulation of meritorious cases which constitute the most serious problem that the Court has to cope with. It is also a regrettable fact that over 30,000 of the pending cases relate to repetitive violations of the Convention, in other words cases where Contracting Parties have failed to take effective steps to remedy the underlying systemic problem previously identified by the Court. . . .

As to subsidiarity, the Court has clearly recognised that the Convention system requires a shared responsibility which involves establishing a mutually respectful relationship between Strasbourg and national courts and paying due deference to democratic processes. However, the application of the principle is contingent on proper Convention implementation at domestic level and can never totally exclude review by the Court. It cannot in any circumstances confer what one might call blanket immunity.

The doctrine of margin of appreciation is a complex one about which there has been much debate. We do not dispute its importance as a valuable tool devised by the Court itself to assist it in defining the scope of its review. It is a variable notion which is not susceptible of precise definition. . . .

The Court has discussed the idea that superior national courts should be enabled to seek an advisory opinion from Strasbourg and distributed a reflection paper on it; it is not opposed to such a procedure in principle, although there remain unanswered questions about how it would work in practice.

[B]efore concluding, I would wish to reiterate the Court's unequivocal support for the rapid accession of the European Union to the Convention. . . .

[T]he introduction by the Convention of the right of individual petition before an international body changed the face of international law in a way that most people would hope and believe was lasting. We do not have to look very far outside Europe today to understand the continuing relevance of the principle that States which breach the fundamental rights of those within their jurisdiction should not be able to do so with impunity.



It is nevertheless not surprising that Governments and indeed public opinion in the different countries find some of the Court's judgments difficult to accept. It is in the nature of the protection of fundamental rights and the rule of law that sometimes minority interests have to be secured against the view of the majority. I would plead that this should not lead governments to overlook the very real concrete benefits which the Court's decisions have brought for their own countries on the internal plane. At the same time I am confident that they understand the value of the wider influence of the Convention system across the European continent and indeed further afield. It is surely not controversial to maintain that all European partners are best served by the consolidation of democracy and the rule of law throughout the continent. The political stability and good governance which are essential for economic growth are dependent on strong democratic institutions operating within an effective rule of law framework. . . .

[T]he Convention and its enforcement mechanism remain a unique and precious model of international justice, whose value in the Europe of the 21st century as a guarantee of democracy and the rule of law throughout the wider Europe is difficult to overstate. While much has changed in the past 50 years, the need for the Convention and for a strong and independent Court is as pressing now as at any time in its history.