Conference report
High-Level Expert Conference

Implementing the Copenhagen Declaration – An Informal Meeting on the Convention System

Wednesday 31 October to Friday 2 November 2018
Kokkedal Castle, Denmark

Conference report

Implementing the Copenhagen Declaration – An Informal Meeting on the Convention System

Wednesday 31 October to Friday 2 November 2018, Kokkedal Castle, Denmark

Introduction

As foreseen in the Copenhagen Declaration, Denmark hosted a High-Level Expert Conference in Kokkedal on 31 October to 2 November 2018. The Conference provided an opportunity for the States Parties and other stakeholders to follow up on the points agreed in the Copenhagen Declaration and to discuss general developments in the jurisprudence of the Court, with respect for the independence of the Court and the binding character of its judgments (see para. 41 of the Copenhagen Declaration).

At the Conference, representatives of the Council of Europe Member States met with representatives of the European Court of Human Rights (the Court), including the President and the Registrar, officials of the Council of Europe, national judges, as well as leading legal experts from academia and civil society.

The overall purpose of the Conference was to explore ways to build a common human rights culture and to facilitate discussions on the caseload challenge and European supervision.

Main issues discussed at the Conference include:

- Building a common human rights culture: Political dialogue, judicial dialogue and third party interventions
- The caseload challenge of the Court
- European supervision concerning *inter alia* developments in the fourth instance principle and the doctrine of evolutionary interpretation

Context

The current Interlaken reform process, including the results of the High Level Conferences in Interlaken (2010), Izmir (2011), Brighton (2012) Brussels (2015) and Copenhagen (2018), has brought notable progress, *inter alia* through strengthening subsidiarity, improving the efficiency of the Court and addressing the need for more effective implementation. The Convention system, however, continues to face considerable challenges.

The Copenhagen Declaration underlines the need for dialogue and good interaction between the national and European levels of the Convention system for a system of shared responsibility to be effective (see para. 33 of the Copenhagen Declaration).

The goal of the Conference was to build further on the constructive dialogue established at the 2017 High-Level Expert Conference in Kokkedal where representatives of Council of Europe Member States met with representatives of the Court, officials of the Council of Europe, national parliamentarians and judges, as well as leading legal experts from academia and civil society, to address both the immediate problems facing the Convention system and develop ideas for the long-term future.

The member states have agreed that by the end of 2019, the Committee of Ministers should decide on whether the measures already adopted within the existing reform agenda have proven to be sufficient to assure sustainable functioning of the control mechanism of the Convention or whether more profound changes are necessary.

The Conference Report

This report provides summaries of the speeches and discussions at the Kokkedal Conference. It has been elaborated by the organisers in consultation with the speakers. The report reflects the organisers understanding of the views expressed during discussions, which took place under the Chatham House Rules. Any mistakes remain the responsibility of the authors.

Keynote speeches

- Opening speech by **Søren Pape Poulsen, the Danish Minister of Justice** (abstract):

[The last Conference in Kokkedal was held during the Danish Chairmanship of the Council of Europe in 2017, and it laid the foundation for what was later to become the Copenhagen Declaration.

It was in many ways not a safe play to place the continued reform of the Convention system at the forefront of the Danish Chairmanship, and the push for an open dialogue on the jurisprudence of the Court was met with a great deal of scepticism. It was questioned what the agenda was and if the push was in fact a reflection of a less strong commitment to a system of European human rights. Hopefully, the past year has shown that Denmark truly is a committed and strong supporter of the Convention system.

A balanced, focused and effective European human rights system will benefit all. If the development of human rights is not anchored solidly in European democracies, there is ultimately a risk of undermining the credibility of the Court. The Court must be in a position to ensure the highest protection of fundamental rights, and this is a shared focus and responsibility. It is our responsibility to secure the vital role of the Court while ensuring the full support and ownership amongst the citizens of all member states.

The goal is to ensure a strong and effective European human rights system for future generations, with broad support and feelings of ownership. There is a need to continue the dialogue and follow the reform process that was already started in Interlaken in 2010. There are important stepping-stones on the way in the right direction, as for example just recently where the Court has underlined the principle of subsidiarity in several rulings. However, this is a shared journey to be continued together.

The Copenhagen Declaration contains a number of elements to be followed up on in these discussions at Kokkedal. The Declaration underlined 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 (para. 36). Furthermore, it was highlighted that a key tool for Member States to engage in a dialogue with the Court is through third party interventions (para. 34). As part of an overall ambition to build a common human rights culture, the topics of the conference will thus focus on

political and judicial dialogue, as well as supporting dialogue through third party interventions.

Additionally, following up on the Declaration para. 54, this will be an opportunity to revisit the caseload challenge and its possible solutions. Finally, we have provided for a forum to discuss general developments in the jurisprudence of the Court as promised in the Declaration para. 41, where focus will be on the European Supervision of the Court, including developments in the fourth instance principle and the doctrine of evolutionary interpretation.

It is the ambition that the gathering at Kokkedal Castle will be of benefit to all and possibly an inspiration for future Chairmanships. Our hope is that you will all follow us on this continued journey. We need it and Europe deserves it.]

- Keynote speech by **Guido Raimondi, President of The European Court of Human Rights** (abstract):

This Conference is a mean of following up on the Copenhagen Declaration and it reflects the need for increased shared responsibility, as well as developing new ideas for the long-term future of the Convention system. The emphasis that the Copenhagen Declaration places on the Member States as well as the pivotal role of the Court in this process are positive elements that can serve as basis for the development of the Convention System in the years to come.

In today's turbulent political climate, such reaffirmation is important. This was also evident when recently a large number of delegations expressed their commitment to the Convention.

This does not just include the work of the Court and the rule of law in Europe. It was also highlighted by a recent project on the Impact of the Convention. The project has developed a new online communication tool aimed at citizens, teachers, journalists, human rights defenders and government officials, and was made possible thanks to the support of the governments of Finland, Ireland and Norway. If we are serious, we should all devote more time to evaluate the impact of the Convention.

The Copenhagen Declaration also recognises the progress and success of the Court and its efforts to live up to the requirements laid down in the reform process. There are now fewer than 60.000 pending cases before the Court. The achievements of the reform process also includes the simplified application procedure and other ways to explore the facilitation of a smooth handling of the applications. But, more can be done. Prioritising cases is another way of dedicating sufficient time to important and complicated cases and in that way maximising the Court's efficiency. However, there is only so much the Court can do within its current framework and more voluntary contributions to the Convention system would be welcomed as well as distributing additional lawyers, judges and resources to the Court in order for the system to make full use of its tools.

Subsidiarity is at the heart of the Copenhagen Declaration as well as enhanced dialogue, which is something that the Court has always valued. The establishment of the Superior Courts Network, where courts exchanges relevant information on Convention caselaw and related matters, is evidently a path of judicial dialogue. Another path consists of supporting third party interventions, which is something the Court

pays emphasis on and values greatly. This is particularly so in cases before the Grand Chamber.

Protocol 15 now only need a few ratifications, but as is evident from the caselaw the Court has not waited for its entry into force. Protocol 16 entered into force on 1 August 2018, and the Court has now received the first formal request for an advisory opinion.

In conclusion, the Convention system and the Court is crucial for the European legal order in which binding judgments are not called into question.

- Keynote speech by **Hans-Jörg Behrens, Chair of CDDH** (abstract):

In the introductory remark, the role of the CDDH and the framework of the reform process way was laid out. CDDH will play a pivotal role in the follow up to the reform process and important work lay ahead. CDDH are expected to deliver a report on the process and will as a natural consequence be heavily involved.

- Keynote speech by **Armin von Bogdandy, Professor of Law at the University in Frankfurt and Director of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg** (abstract):

Under the heading 'In the name of the European club of liberal democracies – The European club as the vanishing point for evaluating the Strasbourg jurisprudence', professor Armin von Bogdandy deliberated on the role of the Court and the democratic anchorage of the Convention system.

Addressing the focus of the conference Bogdandy firstly stated that, when evaluating the Strasbourg jurisprudence and examining how to anchor the development of human rights in European democracies, one could argue that the European club of liberal democracies is the vanishing point.

Focussing on the source of legitimacy and authority of the Court, i.e. *'in whose name?'*, this is central to any court. In relation to the European Court of Human Rights an automatic reply would be that, it is the 'contracting states' that bears anchorage to the system and the Court. Authority stems from the national ratifications of the treaty. Thus, the source of legitimacy would be in the name of the contracting parties arguing at court.

However, this makes little sense with regard to the Convention system, as one of the parties before the Court, the applicant, is not a contracting party to the Convention. Instead, Bogdandy argued that in the Convention system the answer to the question 'in whose name?' is *the European Club of liberal democracies.* The club consists of all contracting parties, and Member States are qualified by their membership of the Council of Europe. It is a community function for all of us. A liberal democracy is a presumption for membership of the club. Characteristics are the rule of law and pluralist democracies, where the majority are constrained by the separation of power. The legitimacy of the Court thus rests on a pooled legitimacy – the club.

The election of judges plays an important role in this connection. The election by the Parliamentary Assembly gives the judges democratic legitimacy. Article 22 of the Convention is a breakthrough in this regard, as it marks a democratic process at an

international level. The process of election is important, and should be a true choice of the majority. But the process needs 'citizens' that observe its letter and its spirit. It is the responsibility of the Member States that all candidates fulfil the criteria for office in Article 21. If they do not live up to it, any critique is tainted by reference to the 'nemo potest venire contra factum proprium'- argument.

The Copenhagen Declaration illustrates an important development in the functions of the Court. *A court in search of a role.* Early on in the Court's history, the Court had no true function – it had to find a role of its own.

In the 1970s, something happened with western liberal democracies, where qualified human rights protection was needed. The Court found a role in *advancing rights revolution in settled democracies.* Individual rights had become truly important and the Court spotted the need for qualification. There was a *European embedding of constitutional courts*, that were functional and proud, which strengthened liberal rights in particular. New challenges for the Court was later brought on by *supporting democratic transitions.* When central and eastern democracies became part of the European club, support was needed to aide them in becoming good members of the club. This also prompted new tools for the Court, such as pilot judgments.

The distinction between times of normalcy and times of crisis is important for the life of the European club. A deep crisis entails further functions of the Court. But what are the implications for the club? What is at stake?

According to Bogdandy, the very identity of the club is at risk: *To be or not to be a club of liberal democracies.* Certain members start now to question the club. How is the club seen from outside? How will the club evolve? The club could remain as it is now. Alternatively, the members – the 'dissident members' – could start taking ownership of the club. The latter could prove useful.

These times of crisis call on a *need for red lines and structural measures.* There is a need for red lines, which tell what is still within the liberal democracies. In this regard, the caselaw on Article 18 as well as on the limitation on use of restrictions on rights is important in defining the core of rights. Structural measures are also important. Moreover, standards are to be applied equally in old and new democracies.

Addressing the 'success' of the Court Bogdandy appealed: *Do not judge the Court on compliance rates.* Here, one can learn from the Inter-American Court of Human Rights. That court has low compliance rates, but shows how to address structural problems and deficits.

The procedural margin of appreciation offers a potential to anchor the development of human rights more solidly. Domestic courts ought to concern themselves deeply with the caselaw of the Court, which is now also institutionalised with the new advisory opinion procedure. The price of the Court? The Court will be less visible. And the meaning in a situation of crisis? It provides a path to the extent that it responds to good faith arguments, such as diversity, identity and national democracy.

- Keynote speech by **Lord Jonathan Mance, Former Deputy President of the Supreme Court of the United Kingdom** (abstract):

The main safeguard of the Convention system is the Court itself. But judicial dialogue

is crucial to ensure that the system is in touch with the realities of domestic jurisdictions and to promote the quality of Convention jurisprudence, domestically and in Strasbourg.

There are many examples of judicial dialogue between the Court and domestic courts. Domestic courts not only apply Strasbourg caselaw, they interpret and analyse it in a way, which may influence future Strasbourg thinking. The Court of Human Rights also looks the other way at domestic caselaw and reasoning. Thus, the Court of Human Rights is, rightly and to its credit, prepared in an appropriate case to change or modify its direction in the light of further insights gained from domestic sources: compare for example *Osman v United Kingdom* (app. no. 23452/94, 28 October 1998) with *Z v United Kingdom* (app. no. 29392/95, 10 May 2001) or the UK case of *R v Horncastle* [2009] UKSC 14 with *Al-Khawaja v United Kingdom* (app. no. 26766/05 and 22228/06, 15 December 2011) or *Ostendorf v Germany* (app. no. 15598/08, 7 March 2013) with *S, V and A v Denmark* (app. no. 35553/12, 22 October 2018) in which the Court of Human Rights cited extensively from the UK case of *R (Hicks) v Commissioner of Police for the Metropolis* [2017] UKSC 9.

As the last two sets of cases illustrate, disagreement by a domestic court can lead to fruitful dialogue. Of course, the clearer and the more consistent the Court of Human Rights' caselaw, the less likely that disagreement will be fruitful or appropriate. Whether the Strasbourg caselaw is at Grand Chamber level, and how significant the issue is for the domestic system will also be important factors for a domestic court, when deciding how far to go.

Dialogue is important to enable the Court of Human Rights to appreciate differences in culture, procedures and values, which it may be appropriate to recognise by reference to the principle of subsidiarity and the margin of appreciation. In *A, B and C v Ireland* (app. no. 25579/05, 13 December 2010), the Court accepted Irish abortion law as compatible with the Convention, despite a consensus among a substantial majority of other states in favour of wider grounds for abortion. This did not prevent the UK Supreme Court from concluding that Northern Irish abortion law (which, like Irish abortion law, only permitted abortion on very limited grounds) was inconsistent with the Convention: see *In re an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27. In doing this, the Supreme Court also disagreed with the Court of Human Rights' view that the possibility of travel to England for an abortion was an acceptable palliative.

Domestic judges are faced today, increasingly, with problems, which raises issues not only under pure domestic law, but also under the Convention, under European Union law and under public international law. The Court of Human Rights' expansion of the concept of jurisdiction under article 1 of the Convention and of the scope of other articles, such as article 2 has contributed to this. The borderline between *Al-Skeini v United Kingdom* (app no. 55721/07, 7 July 2011) and *Bankovic v Belgium* (app. no. 52207/99, 12 December 2001) continues, for example, to be obscure. Courts should bear in mind the burden that overlapping legal regimes can place not only on domestic courts, but also on domestic litigants. Lord Mance mentioned *Hassan v the United Kingdom* (app. no. 29750/09, 16 September 2014) in this connection, as an example of a case where the Court, very understandably, took a step back from previous, rigid application of article 5 in the context of international armed conflict, but thereby left open a further range of issues relating to, for example, the position in the event of non-international armed conflict.

Courts should above all ensure as far as possible that their jurisprudence is clear and consistent. This is of particular importance with both European courts. The Strasbourg caselaw tends to be voluminous, statements can sometimes be repeated from case to case, without regard for differing contexts, different sections of the Court can sometimes adopt different reasoning, or appear to distinguish on slender grounds, or even simply depart from, prior Grand Chamber decisions. This makes it particular important, that the jurisprudence of the Court is simple, clear and consistent. With an increased number of cases also being dealt with at the inadmissibility stage, it is of corresponding importance that they should only be declared inadmissible on grounds, which the complainants and their lawyers have had appropriate opportunity to address.

The challenge for the Court was, in Lord Mance's view, to continue to take effective steps to master its caseload, and at the same time to strive to make its jurisprudence simple, clear and certain, The one will aid the other. Constant expansion of competence, reshaping and evolution of the jurisprudence present potential problems. They are a particular risk in a court, which focuses on only one area. It is also relevant to bear in mind that any expansions are also practically irreversible. There is no real mechanism by which they could democratically be reconsidered.

In general, Lord Mance concluded, dialogue is today in a good place. There is a much greater feeling of mutual cross-fertilisation. This is due to determined efforts on both sides. In large degree, it is due to the Court's willingness to engage explicitly with domestic jurisprudence. Another advantage that the Court enjoys is its acceptance of the benefits of concurring and dissenting judgments, which can throw into relief the other judgments, and so assist domestic courts.

- Keynote speech by **Roderick Liddell, Registrar at the European Court of Human Rights** (abstract):

The main focus of this contribution was the possibility for States to intervene as third parties under Article 36 § 2 of the Convention.

State intervention can make an important contribution to the Convention system by enhancing the quality of the Court's judgments in terms of their content, by helping to clarify legal issues of importance to Contracting States and by, in effect, prompting the Court to clarify its own caselaw. They can also promote a form of erga omnes effect.

States are for example able to explain international or EU law obligations imposed on them to the Court. This in turn ensures that the Court has a more knowledgeable basis upon which to make its decisions and can better understand the consequences of its judgments for Contracting States.

State third-party interventions can also contribute to the substance of Court judgments by providing the Court with accurate information on the existence or lack of a European consensus between States Parties on a particular issue. Knowledge of consensus or divergence on issues is essential to the Court's assessment of the margin of appreciation.

State interventions also make it possible for States to seek clarification of important legal issues, which may have ramifications for them.

State interventions may have a role to play in fostering a wider implementation of the Court's Judgments at national level. As intervening States feel they are more involved in the process at the European level, they are more willing to implement the resulting judgments in their own jurisdiction and therefore greater compliance is achieved.

As to how to encourage more State third party interventions, the Court could use Article 36 § 2 ECHR more proactively by inviting States to intervene and thus facilitate the type of dialogue that has proven to be beneficial for its judgments. However, the Court cannot be seen to be favouring the Governmental side and therefore where it did so it would need to consider carefully whether NGO interventions would also be useful.

The Court could further encourage States to intervene by engaging more explicitly and thoroughly with their interventions in its reasoning. One of the criticisms that has been levelled at the Court is that whilst it never rejects State requests to intervene, it could engage with the arguments more convincingly.

On a practical level, the Court is currently developing a webpage, which will be dedicated to Governments. There, in a special section devoted to the Grand Chamber, the Court intends to post clearly its press releases on referrals (published the day after the Grand Chamber Panel decisions). The Court also issues a press release when a Chamber relinquishes jurisdiction under Article 30 of the Convention and that too can be published on the Governments' webpage.

As regards the proposal in the Copenhagen intervention to allow States to intervene to support referral requests, there were both practical and legal obstacles. However, there would be nothing to prevent a requesting State from referring in its request to representations from other Governments in particular in respect of the potential impact of a possible case-law development within their jurisdiction. This would help to ensure that the Court was aware of all the ramifications of the issue raised in the referral request.

In conclusion, third party interventions by States are to be encouraged. They can be considered a win-win situation for the Court and for the Contracting States. For the Court, they enable it to better informed, and the better informed the Court is, the more likely its judgments are to be convincing for the national authorities and legal commentators, as well as acceptable for the general public. For Contracting States, third party interventions allow them to be involved more actively in the judicial process, to feel more ownership of the Court's judgments and the direction of the Court's caselaw.

Governments through their Agents have a responsibility to better coordinate their efforts, to better communicate between each other where they see a case raising issues of general importance and this should be part of a broader general cooperation between Government Agents. Shared responsibility requires assuming a more proactive role in different aspects of the functioning of the Convention system. Third party interventions by States reflect engagement with the system and must therefore be welcomed.

- Keynote speech by **Hans-Jörg Behrens, Chair of CDDH** (abstract):

Touching upon the interlink between theory and practice Hans-Jörg Behrens started with a brief overview of the caseload challenge. There is still a huge backlog for the Court. 47.000 cases pending including both normal and pilot procedures. 15.000 of these cases are category 5 cases. Issues of detention constitutes more than 17.000 cases. Also, emergency/urgent cases takes up a large share of the number as does the influx of cases stemming from the same matter. The numbers speak for themselves.

However, theory does nothing to aid in this connection as the question of the caseload challenge is – in reality – more of a practical nature. That is also the reason why the caseload challenge should and could be improved within the existing framework.

From an analytical point of view the numbers show, that there has been a change of nature in the backlog. There are tools within the existing framework making it possible to come up with procedural solutions to these challenges, e.g. fast track of repetitive cases in simplified and grouped form. There has also been fundamental changes in some Member States with regard to repetitive cases. Conflict situations are especially difficult to deal with politically and financially and they may result in an added influx.

Looking forward to the follow up on the Copenhagen Declaration the question '*can we do more?*' was put forward. Would it for example be possible to do more within the framework of friendly settlement for individual and groups of cases? Or would we have to live with some concessions with regard to the level of access to justice?

Underlining that procedural problems should of course be properly addressed the overall impression is that the existing framework does still present relevant and practical solutions.

- Keynote speech by **Laurence Burgorgue-Larsen, Professor of Law at the Sorbonne Law School** (abstract):

Enshrined in the Convention itself the Court's caselaw circles around the overall aim of finding a fair and accurate balance – or equilibrium – between maintenance of rights on the one side and further realisation (or evolutionary interpretation) on the other (see the wording of the preamble). The two approaches are in constant co-existence – or one could argue: interdependence, and there is no clear preference in the caselaw of the Court. Even today.

Giving an overview of the different methods of interpretation, the notion of further realisation and maintenance of rights were explored. Under the notion of further realisation we are faced with: 1) The targeted technique of interpretation, where interpretative meaning are found inherent in rights, and 2) the cosmopolitan technique where globalisation, hard and soft law, as well as present day conditions influence the interpretation. Whereas, the interpretative method of maintenance of rights are characterised by well-known elements of subsidiarity and margin of appreciation. Interestingly both of these concepts (subsidiarity and margin of appreciation) could be subdivided in both a classical and an evolving understanding. For example subsidiarity is often perceived as a rather new or 'current' notion but is actually rather an old, well-known principle of international law. Its procedural aspects is clear from the criterion of exhaustion of effective remedies and Article 13 of the Convention. The

margin of appreciation determines not only the limitation of rights but also the applicability.

The historic background of the Court affects the trending approach. In *Golder v. the United Kingdom* (app. no. 4451/70, 21 February 1975), the Court had to interpret the Convention in a system of old, settled democracies. The new more 'fragile' democracies resulted in an increased backlog of the Court and today Protocol No. 15 marks a present focus on the margin of appreciation and the principle of subsidiarity.

So what are the main trends of the caselaw of the Court? Evolutionary interpretation is one, e.g. *Magyar Helsinki Bizottság v. Hungary* (app. no. 18030/11, 8 November 2016), which has also been a focus in the Interlaken process. In this connection, Article 19 and 46 of the Convention should be mentioned.

Following the adoptions of Protocol No. 15 there is the same trend of judicial restraint at the Grand Chamber as in the chambers. However, the margin of appreciation is a vague instrument used to trigger regression and not further realisation nor maintenance. An example thereof is *S., V. and A. v. Denmark* (app. no. 35553/12, 36678/12, 36711/12, 22 October 2018). The test of proportionality is reduced to a formal review because of the margin of appreciation. This proceduralisation – or process based review – risks to undermine the concrete case of the individual application leading to an impediment of certainty and legitimacy. A development that is problematic and could lead to a regression of individual rights.

The existence of a 'European consensus' can be used to widen (if absence of consensus) or narrow (if present consensus) the scope of the margin of appreciation, but there are conceptual uncertainties: how and when for instance to determine a European consensus? The Court has controversially recognised an evolving trend, as in *Stummer v. Austria* (app. no. 37452/02, 7 July 2011) and *S.H. and others v. Austria* (app. no. 57813/00, 3 November 2011). Moreover, the delimitation between international consensus and European consensus is not clear.

There is a structural uncertainty in the caselaw of the Court, and the Court does often not respect its own methodological approach. The approach is rather an open one, like the cosmopolitan technique where international consensus and European consensus is combined, but not in a consistent manner.

In times of democratic backsliding, *conventionality control*, as known from the Inter-American Court of Human Rights, could prove an important effort in tune with shared responsibility. It could prove not just a limitation to the Court, but a positive way for the executive and legislative branch to get involved. Strict scrutiny on behalf of the Court is needed. This is the heart of subsidiarity. Well-functioning human rights mechanisms and protection is a presumption of subsidiarity. If domestic human rights protection is incapacitated, there is no subsidiarity – there will only be the Court to turn to. If there are no domestic mechanisms and scrutiny, there is no margin of appreciation and no subsidiarity.

In conclusion, time has come for the Court to focus on maintenance rather than further realisation, in order to get the countries truly involved in the protection of human rights and to avoid any backlash.

Panel discussions

- **Political dialogue post Copenhagen – anchoring the development of human rights more solidly in European democracies**

The Copenhagen Declaration underlined 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 (para. 36). The panel discussion focused on identifying ways of improving the dialogue and interaction between the national and European levels of the system, as well as how to best support and develop such interaction in a balanced way. Participants were generally positive towards the idea of political dialogue and pointed to misconceptions of dialogue in the past. A number of participants thus agreed on the value of political dialogue, as a way to encounter questions of common concerns especially in times of crisis. The dialogue may occur at multiple levels and through multiple channels, with all stakeholders or in specialised forums. Some participants pointed out, that interaction needs trust to be meaningful, and it was questioned whether the problem now is in fact mistrust in several countries. It was also questioned, whether civil society is in fact invited into the Convention system and the dialogue. Some participants asked if the European club should be exclusive to maintain its identity, or if it could be more open. It was also discussed whether the club demanded too much of less evolved states. Some participants believed that political dialogue is essentially concerned with how the Convention system is perceived by the populations that need to buy into it. A number of participants felt dialogue was an important element of the Interlaken process, and it was questioned what comes after the conclusion of the process in 2019, as there was felt a need for continuing reform. What form should dialogue take then?

- **Judicial dialogue - interaction between the Court and the highest domestic courts**

The panel discussed how judicial dialogue is best supported and what challenges may be identified. The value of judicial dialogue was discussed, including if the implementation of judgments should not be left to national parliaments. A number of participants emphasised that there is a need for dialogue. It was also noted, that the proper interpretation of the Convention cannot be left to the Court alone, and that domestic courts should always be prepared to explain how they have applied the Convention. Language can be an obstacle, as well as lack of clarity, which undermines the impact of the Convention in domestic systems. It was discussed how this could be improved, and how the Court could make sure that any change of position is clear in its reasoning as well as changes in wordings. A participant asked whether the term 'dialogue' is an adequate metaphor, or whether the term indicated a more free form of interaction than is the case – it was suggested, that it was rather different forms of engagement. It was also questioned whether there is a 'right' way to use dialogue, where national courts should be presumed 'loyal students' of the Court? Is compliance a presumption for judicial dialogue? It was also questioned whether there is a duty to engage in the forum of pushbacks, e.g. in the case of Protocol No. 16? In general, participants were in favour of dialogue as an indicator for a system constituting something in between a rigid presumption of authority and the old dualism of international law.

- **Supporting dialogue through third party interventions**

In this panel discussion, dialogue through third party interventions was discussed as

well as ideas for the most efficient ways of intervening. In general, third party interventions were perceived as useful. However, some expressed concern about the politicisation of the Court. Some participants highlighted that state interventions should not interfere with the principle of the equality of arms, and that state inputs should not be the only ones included in the dialogue, but that also civil society should be included. Other participants noted, however, that although a broad dialogue is important, the role of the state is unique because of the nature of international legal obligations. State interventions remain the minority of third party interventions. In general, it was noted that the exchange of views is important no matter whether the Court finds in favour an intervention. The current time limits for intervention was also discussed, as were methods for identifying relevant cases and accepted languages. Some participants questioned whether the Court had brought about any change in its procedures for interventions after the Copenhagen Declaration, and whether the Declaration was in fact ignored. In this regard, the need for transparency and sharing of information was underlined.

- **The Caseload Challenge Revisited: A framework for the analysis of a balanced caseload**

Following up on the Copenhagen Declaration para. 54, this panel explored the causes of the caseload challenge and potential solutions. Some participants highlighted the historical perspective of the backlog, and the work that the Court has already done to overcome the challenge. It was noted that the process has been influenced by a number of countries ratifying the Convention before actually having a compliant system, and that a large number of cases can only be dealt with by structural changes at the domestic level. It was also noted that the combat of influx cases is also about preventing human rights violations in general. It was discussed whether the efforts of the Court until now has focused on 'picking the lower hanging fruit', meaning, in particular, that a large number of complex and individual cases now remain, which makes the current challenge more difficult. Some participants asked whether the high efficiency of the Court was in fact healthy and if such a high number of cases should be handled by one court. Some participants found that friendly settlements could be a solution in some cases, where the Court could introduce mediation services to that end. Furthermore, some participants asked whether the new doctrine on subsidiarity would in fact deduce the caseload in general or create an increased pressure on the Grand Chamber, as a way of a needed legal counterbalance for the doctrine. It was argued that such a potential increased pressure on the Grand Chamber should be taken into account.

- **European Supervision: Developments in the fourth instance principle and the doctrine of evolutionary interpretation - finding the proper balance**

In the panel discussion, participants were encouraged to examine and elaborate on general developments in the Court's interpretative methods and doctrines. It was discussed, *inter alia,* whether the right balance has been struck with regard to European Supervision and the Court's judicial restraint in recent caselaw. Some participants noted that the restraint is nothing revolutionary and that for the applicant, national anchoring of human rights might offer more and better protection, although taking the case to Strasbourg might seem like the ideal. Many of the participants were optimistic on the current developments in the caselaw and agreed on the value of dialogue in finding the right balance. Some participants thought that the current

proceduralisation might be better in terms of more people having their rights protected, albeit at a lower level, but thus overall providing a higher level of protection. Other participants questioned whether a checkbox-approach to human rights would not be dangerous. This could of course pose a danger, others agreed, but then the Court would be able to correct. It was highlighted that the above would of course apply to situations of normalcy, rather than crises. It was also discussed whether the current method of *ex nunc* evaluation is fair in terms of the first instance court being able to know what happens after its ruling – and if the Court should 'warn' states of such evaluation in these cases? Some participants felt such warning could help transparency and clarity, others that it would be too prescriptive – the issue instead being a question of execution, because as long as the proceedings are sufficiently fast, there is no need for such evaluation. The declaratory nature of the Court was highlighted in this respect. Participants also discussed if 'no violation'-judgments could be seen as binding, imposing obligations on states enforceable as violations of 'no violations'-judgments. Finally, participants discussed issues of implementation of judgments and the formation of the European Union and the Court's caselaw.

Appendix

- Programme, High-Level Expert Conference '*Implementing the Copenhagen Declaration – An Informal Meeting on the Convention System*', 31 October to 2 November 2018, Kokkedal Castle

- List of Participants, High-Level Expert Conference '*Implementing the Copenhagen Declaration – An Informal Meeting on the Convention System*', 31 October to 2 November 2018, Kokkedal Castle