COUNCIL OF EUROPE CONSEIL DE L'EUROPE

CDDH(2018)04

31/05/2018

STEERING COMMITTEE FOR HUMAN RIGHTS

(CDDH)

Recommendations of the Parliamentary Assembly transmitted by the Ministers' Deputies to the CDDH

Texts of the Recommendations and elements suggested by the Bureau for possible CDDH comments

Introduction

1. Following the decisions of the Ministers' Deputies adopted at their 1306th meeting (7 February 2018), the texts of the following Recommendations of the Parliamentary Assembly, adopted at its Winter Plenary Session (22-26 January 2018), have been transmitted to the CDDH for information and possible comments:

- 2121(2018) – "The case for drafting a European convention on the profession of lawyer";

- 2122(2018) – "Jurisdictional immunity of international organisations and rights of their staff";

- 2123(2018) – "Strengthening international regulations against trade in goods used for torture and the death penalty".

2. Furthermore, at their 1316th meeting (9 May 2018), the Ministers' Deputies decided to transmit to the CDDH, for information and possible comments by 29 June 2018, the texts of the following Recommendations adopted by the Parliamentary Assembly at its Spring Plenary Session (23-27 April 2018):

- 2125 (2018) – "State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights";

- 2126 (2018) – “Humanitarian needs and rights of internally displaced persons in Europe”;

- 2129 (2018) – “Copenhagen Declaration, appreciation and follow-up”.

- 2130 (2018) – “Legal challenges related to hybrid war and human rights obligations”.

3. The present document contains the texts of these Recommendations as wel as elements suggested by the Bureau at its 99th meeting (Andorra La Vella, 17-18 May 2018) for possible CDDH comments. These elements will be examined by the CDDH at its 89th meeting (19-22 June 2018).

I. RECOMMENDATION 2121(2018) – "THE CASE FOR DRAFTING A EUROPEAN CONVENTION ON THE PROFESSION OF LAWYER"

Text of the Recommendation

1. The Parliamentary Assembly concurs with the view of the European Court of Human Rights that the specific role of lawyers gives them a central position in the administration of justice, as protagonists and intermediaries between the public and the courts. They play a key role in ensuring that the courts, whose mission is fundamental in a State based on the rule of law, enjoy public confidence. For members of the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation.

2. The Assembly subscribes to the minimum standards set out in Committee of Ministers' Recommendation No. R (2000) 21 to member States on the freedom of exercise of the profession of lawyer. It recalls that these standards, although non-binding, are intended to elaborate upon and give practical effect to principles flowing from binding obligations, notably those of the European Convention on Human Rights (ETS No. 5).

3. It is therefore a matter of utmost concern that harassment, threats and attacks against lawyers continue to occur in many Council of Europe member States and are even increasing in some of them, where they have become widespread and systematic and are apparently the result of deliberate policy. These include, amongst other things: killings, which are sometimes inadequately investigated by the authorities; physical violence, including by public officials; threats, unjustified public criticism and identification of lawyers with their clients, including by leading politicians; abuse of criminal proceedings to punish lawyers or remove them from certain cases; violation of legal professional privilege through unlawful monitoring of clients' consultations with their lawyers, search and seizure in the course of unlawful investigations, interrogation of lawyers as witnesses in their clients' criminal cases; abuse of disciplinary proceedings; and various structural and procedural failures to establish and implement effective guarantees of lawyers' independence.

4. The Assembly considers that this situation shows the need to reinforce the legal status of Recommendation No. R (2000) 21 by translating its provisions into a binding instrument in the form of a convention, with an effective control mechanism. Such a convention could also become a source of binding standards on the wider international level by allowing non-member States to accede to it.

5. Given the role of lawyers in the day-to-day protection of individual rights, including in ongoing judicial proceedings, the Assembly considers that there is also a need for an early-warning mechanism to respond to immediate threats to their safety and independence and to their ability to perform their professional duties effectively. It recalls the Council of Europe's existing Platform to promote the protection of journalism and safety of journalists and considers that a similar mechanism would be of equal practical effectiveness, procedural efficiency and technical feasibility in the present context.

6. The Assembly therefore calls on member States of the Council of Europe to fully respect, protect and promote the freedom of exercise of the profession of lawyer, including by effective implementation of Recommendation No. R (2000) 21.

7. The Parliamentary Assembly calls on the Committee of Ministers to:

7.1. draft and adopt a convention on the profession of lawyer, based on the standards set out in Recommendation No. R (2000) 21, and in doing so;

7.1.1. take account also of other relevant instruments, including the Charter of Core Principles of the European Legal Profession of the Council of Bars and Law Societies of Europe, the Turin Principles of Professional Conduct for the Legal Profession in the 21st Century of the Union internationale des avocats and the Standards for the Independence of the Legal Profession, the International Principles on Conduct for the Legal Profession and the Guide for Establishing and Maintaining Complaints and Discipline Procedures of the International Bar Association;

7.1.2. ensure that guarantees in relation to fundamental issues such as access to a lawyer and lawyers' access to their clients, legal professional privilege, civil and criminal immunity for statements made in the course of their professional duties and the confidentiality of lawyer–client communications are reinforced as necessary in order to respond to developments in the surrounding legal and regulatory context, including measures introduced to counter corruption, money laundering and terrorism;

7.1.3. include an effective control mechanism, giving particular consideration to the option of a committee of experts examining periodic reports submitted by States parties, with the possibility for civil society organisations, including lawyers' associations, to make submissions;

7.1.4. consider opening the convention to accession by non-member States;

7.2. establish an early-warning mechanism to respond to immediate threats to lawyers' safety and independence and to their ability to perform their professional duties effectively, modelled on the Platform to promote the protection of journalism and safety of journalists. In this connection, the Assembly reiterates the call made in its Recommendation 2085 (2016) "Strengthening the protection and role of human rights defenders in Council of Europe member States" to establish a platform for the protection of human rights defenders, which would include lawyers;

7.3. set up activities, including bilateral co-operation activities, to enhance implementation of Recommendation No. R (2000) 21 pending ratification of a new convention by member States;

7.4. fully implement Recommendation 2085 (2016).

Draft comments

1. The Steering Committee for Human Rights (CDDH) takes note of Parliamentary Assembly Recommendation 2121(2018) - *"The case for drafting a European convention on the profession of lawyer".* It fully shares the concerns regarding threats, in certain national contexts, to the security and independence of lawyers as well as to their ability to perform their professional duties effectively. Like the Assembly, the CDDH stresses that the free exercise of the profession of lawyer is indispensable to the full implementation of the fundamental right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights. In this context:

(i) the possibility to establish an early-warning mechanism to respond to immediate threats to lawyers' safety and independence and to their ability

to perform their professional duties effectively deserves detailed examination[1];

(ii) training activities concerning Recommendation No R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer and other relevant instruments[2] need to be carried out in the framework of bilateral co-operation. These activities could aim at raising awareness of State representatives about the role played by lawyers in a democratic society and about the need to respect and protect the free exercise of their profession[3];

(iii) finally, the current work regarding the implementation of Recommendation 2085(2016) on "Strengthening the protection and role of human rights defenders in Council of Europe member States" should fully consider including the situation of lawyers.

2. As for solutions and replies to the issues of threats and harassment mentioned in the Recommendation, the CDDH considers that:

(i) for short-term solutions and immediate replies, establishing an early-warning mechanism could indeed be useful;

(ii) for long-term solutions, the European Convention on Human Rights system, notably through binding judgments of the Court in the fields, in particular, of Articles 2, 3, 6 and 8 and 10 of the Convention, constitutes an effective and sufficient framework.

3. The CDDH wonders whether a binding international legal instrument would be the appropriate framework to address situations which may concern only certain countries to varying degrees. In any event, it would be necessary to ensure that the new control mechanism to be established in the framework of a new convention would have a real added value compared to the aforementioned early-warning mechanism, in terms of competence, effectiveness and transparency.

4. The CDDH would be ready, if appropriate, to contribute to the work of the competent bodies on this matter which the Committee of Ministers would deem necessary.

* * *

[1] This examination should be carried out notably in the light of the experience acquired by the current Platform to promote the protection of journalism and safety of journalists, by the Working Group on Human Rights Defenders set up within the Human Rights Committee of the Conference of INGOs of the Council of Europe and by the action carried out by the Commissioner for Human Rights in favour of human rights defenders.

[2] These instruments comprise, *inter alia*, the Charter of core principles of the European legal profession of the Council of Bars and Law Societies of Europe, the Turin Charter on the exercise of the profession of lawyer in the twenty-first century of the International Association of Lawyers, as well as the Standards applicable to the independency of the profession of lawyer, International principles of ethics of legal practice and of the Guide for the establishment of complaint and disciplinary procedures of the International Bar Association.

[3] These activities would also aim at reminding that numerous provisions of Recommendation No R(2000)21 represent already binding standards under the European Convention on Human Rights.

II. RECOMMENDATION 2122(2018) – "JURISDICTIONAL IMMUNITY OF INTERNATIONAL ORGANISATIONS AND RIGHTS OF THEIR STAFF"

Text of the Recommendation

1. Referring to its Resolution 2206 (2018) on jurisdictional immunity of international organisations and rights of their staff, the Parliamentary Assembly calls on the Committee of Ministers to:

1.1. encourage the international organisations to which the member States of the Council of Europe are Parties to look at whether "reasonable alternative means of legal protection" are accessible in the event of disputes between international organisations and their staff;

1.2. invite those international organisations to bring about greater transparency of their staff policies and ensure that information on employment disputes is available to their staff;

1.3. initiate reflection on:

1.3.1. ways to ensure that the Administrative Tribunal of the Council of Europe is also accessible to trade unions;

1.3.2. whether the Administrative Tribunal of the Council of Europe should be complemented by an appellate judicial body, either within the Council of Europe itself or by pooling resources with other international organisations in order to create a joint appeals body for several administrative tribunals;

1.4. carry out a comparative study of the extent to which the internal remedy systems in international organisations are compatible with Article 6 of the European Convention on Human Rights (ETS No. 5) and with other relevant human rights (including social rights), and, where appropriate, make recommendations on how these systems can be improved with a view to attaining a higher level of protection of these rights.

2. The Assembly welcomes the work carried out by the Council of Europe's Committee of Legal Advisers on Public International Law (CAHDI) on the jurisdictional immunity of international organisations and encourages it to look into these issues in greater detail, in particular in the context of disputes between international organisations and their staff.

Draft comments

1. The Steering Committee for Human Rights (CDDH) takes note of Parliamentary Assembly Recommendation 2122 (2018) - *"Jurisdictional immunity of international organisations and rights of their staff"*.

2. The CDDH notes that appropriate legal instruments have been developed by the most important international organisations regarding their accountability for human rights violations towards their own staff[4]. It concurs with the Assembly on the need of providing access to an effective remedy to staff members of international organisations concerning their labour rights since such a remedy is not available under the national legal systems of member States.

[4] https://rm.coe.int/accountability-of-international-organisations-for-human-rights-violati/1680761005

3. Concerning the Council of Europe, its Staff Regulations[5] show that the Administrative Tribunal of this Organisation has been set up to decide upon appeals against decisions taken in the administrative complaints procedure. The CDDH considers that, in the light of relevant practices existing in member States or in other international organisations, the Secretariat of the Council of Europe could analyse in which cases it would be appropriate for trade unions to have *locus standi* before the Administrative Tribunal.

4. In its previous comments on Parliamentary Assembly Recommendation 2037 (2014) about *Accountability of international organisations for human rights violations*[6]*,* the CDDH already shared the approach of the Committee of Legal Advisers on Public International Law (CAHDI) regarding conflict resolution mechanisms between international organisations and their staff. The CDDH agrees with the Assembly that the CAHDI remains the body best placed to discuss, on a regular basis, the extent to which internal remedies in international organisations are compatible with human rights.

* * *

III. RECOMMENDATION 2123(2018) – "STRENGTHENING INTERNATIONAL REGULATIONS AGAINST TRADE IN GOODS USED FOR TORTURE AND THE DEATH PENALTY"

Text of the Recommendation

1. The absolute prohibition of torture and inhuman or degrading treatment or punishment in all circumstances is a peremptory norm of international law, incorporated into numerous treaties including Article 3 of the European Convention on Human Rights (ETS No. 5, "the Convention"), Article 7 of the International Covenant on Civil and Political Rights and the United Nations Convention Against Torture. This prohibition is so strict as to require States to take into account consequences of their actions that may occur in other countries.

2. The death penalty is now unlawful in all Council of Europe member States. Protocol No. 6 to the European Convention on Human Right (ETS No. 114), which abolishes the death penalty in peacetime, has been ratified by all member States except the Russian Federation, whose Constitutional Court has nevertheless instituted a moratorium; and Protocol No. 13 to the European Convention on Human Rights (ETS No. 187), which abolishes the death penalty in all circumstances, has been ratified by all member States except Armenia, Azerbaijan and the Russian Federation. Recognising and building on this progress, in 2010, the European Court of Human Rights ruled that the death penalty amounted to inhuman or degrading treatment and thus fell within the prohibition set out in Article 3 of the Convention.

3. The Parliamentary Assembly considers that on the basis of these existing legal obligations, Council of Europe member States are required to take effective measures to

[5] Part VII of the Staff Regulations of the Council of Europe sets out the system of dispute settlement between staff members and the organisation; in this regard, Article 59 sets out the so-called "complaints procedure" and under Article 60 an appeal procedure can be launched before the Administrative Tribunal "in the event of either explicit rejection, in whole or part, or implicit rejection of a complaint lodged under Article 59".

[6] Recommendation 2037 (2014) was adopted by the Assembly on 31 January 2014.

prevent activity within their jurisdictions that might contribute to or facilitate capital punishment, torture and inhuman or degrading treatment or punishment in other countries, including by effectively regulating the trade in goods that may be used for such purposes.

4. The trade in goods used for the death penalty, torture or inhuman or degrading treatment or punishment can contribute to the incidence of capital punishment and torture or serious ill-treatment by providing those responsible with the means to act. The European Union's prohibition of sales of pharmaceutical products that could be used for capital punishment to third countries where it is known that the products will be used for that purpose, for example, has seriously hampered the ability of several States of the United States of America to execute the death penalty.

5. The Assembly cannot accept that companies or other individuals or entities in Council of Europe member States are involved in the trade in goods used for the death penalty, torture or inhuman or degrading treatment or punishment. It is concerned that the trade in goods used for the death penalty, torture or inhuman or degrading treatment or punishment continues to take place in some member States.

6. The Assembly takes note of the Council of the European Union's Regulation (EC) No. 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, as amended by Regulation (EU) No. 2016/2134. This regulatory regime is the most advanced and effective in the world. It represents an approach that can and should be applied by all Council of Europe member States. Since information sharing and technical co-operation, which are fundamental parts of any international regulatory mechanism, depend on normative and procedural compatibility, it is important to harmonise the regulatory systems of all the Council of Europe member States.

7. The Assembly welcomes and fully supports the Global Alliance to end trade in goods used for capital punishment and torture (the Global Alliance), launched by the European Union, Argentina and Mongolia on 18 September 2017, and its Political Declaration adopted by 58 countries, including 41 Council of Europe member States, and the European Union. The Declaration recalls the essential principles of international law, condemns the trade in goods used for the death penalty, torture or inhuman or degrading treatment of punishment, commits States to taking regulatory action at national level and to co-operating at international level, and establishes a basic framework to facilitate this.

8. For the purposes of the present recommendation, the expression "goods used for the death penalty, torture or inhuman or degrading treatment or punishment" should be considered to cover items falling within the following categories, as defined in Annexes II, III and III.*a* of Regulation No. 1236/2005, as revised in 2014 and 2016:

8.1. goods which have no practical use other than for the purposes of the death penalty, torture or inhuman or degrading treatment or punishment, the trade in which should be prohibited, including:

8.1.1. goods specifically designed for the execution of human beings, and certain of their components;

8.1.2. goods designed to restrain human beings but which are not suitable for such use by law-enforcement authorities;

8.1.3. portable devices which are not suitable for use by law-enforcement authorities for the purpose of riot control or self-protection;

8.1.4. certain types of whips;

8.2. goods designed for legitimate use by police or security forces but which could be abused for the purpose of torture or inhuman or degrading treatment or punishment, the trade in which should require authorisation, including:

8.2.1. certain goods designed for restraining human beings;

8.2.2. certain weapons designed for the purpose of riot control or self-protection;

8.2.3. certain weapons and equipment disseminating incapacitating or irritating chemical substances for the purpose of riot control or self-protection and certain related chemical substances;

8.2.4. products which could be used for the execution of human beings by means of lethal injection.

9. The term “trade” in goods used for the death penalty, torture or inhuman or degrading treatment or punishment should be considered to cover the following activities, as defined in Regulation No. 1236/2005, as amended in 2016:

9.1. import and export of regulated goods;

9.2. transit of regulated goods through national territory;

9.3. brokering of transfers of regulated goods between third countries;

9.4. provision of technical assistance in relation to regulated goods;

9.5. training in the use of regulated goods;

9.6. promotion of regulated goods at trade fairs;

9.7. buying from or selling to parties in third countries any form of advertising for regulated goods.

10. The Parliamentary Assembly invites the Committee of Ministers to call on the member States of the Council of Europe, insofar as it is not already done, to:

10.1. introduce legislation regulating the trade in goods used for the death penalty, torture or inhuman or degrading treatment or punishment, prohibiting trade in goods defined in paragraph 8.1 and requiring authorisation of trade in goods defined in paragraph 8.2, such authorisation to be withheld when there are reasonable grounds for believing that they might be used for capital punishment or torture or inhuman or degrading treatment or punishment in a third country;

10.2. take full account of information from a range of sources, including the reports of international and regional human rights mechanisms and independent civil society bodies, on the situation regarding the death penalty, torture and inhuman or degrading treatment or punishment in third countries when examining requests for authorisation of trade in relevant goods;

10.3. publish annual reports on their regulatory activities in this area, including details of decisions given on requests for authorisation of trade in specific goods and the reasons for those decisions;

10.4. on the basis of such annual reports and through direct contacts, take account of other member States' decisions on requests for authorisation of trade in specific goods, especially refusals to grant such authorisation;

10.5. join the Global Alliance, make full use of and contribute to the global network of Focal Points for sharing information, including on decisions on requests for authorisation of trade in specific goods, and best practice, and where necessary seek the technical assistance of other members of the Global Alliance for the design and implementation of relevant legislation;

10.6. ratify Protocols Nos. 6 and 13 to the European Convention on Human Rights and request that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) make public any unpublished reports concerning them.

11. The Parliamentary Assembly invites the Committee of Ministers to call on the European Union and its institutions, as appropriate, to:

11.1. encourage its member States that have not yet done so to publish the annual reports required of them under Regulation No. 1236/2005, ensuring that the European Commission's own future annual report is a comprehensive review of the situation across the European Union;

11.2. consult independent civil society bodies with particular expertise in the field when preparing the European Commission's review of implementation of Regulation No. 1236/2005, including with respect to possible amendment of the Regulation and revision of its Annexes II and III;

11.3. continue promoting the Global Alliance throughout the world, and co-operate with the Council of Europe to this end as regards the latter's member States.

12. The Council of Europe is a global pioneer in abolition of the death penalty and enforcement of the prohibition on torture and along with its member States should continue to play a leading role in this field. The Parliamentary Assembly therefore calls on the Committee of Ministers to:

12.1. encourage those Council of Europe member States that have not yet done so to join the Global Alliance;

12.2. provide technical support in relation to implementation of paragraph 10 of the present recommendation through co-operation activities with those member States that request it;

12.3. consider adopting a recommendation to member States setting out technical guidance on how to establish and implement an effective regulatory regime, whose effect would be to extend the scope of the approach taken by Regulation No. 1236/2005 through harmonised national systems in non-European Union member States, and which should include a mechanism to monitor progress made in implementing the recommendation;

12.4. co-operate with the European Union to these ends.

Draft comments

1. The Steering Committee for Human Rights (CDDH) takes note of Parliamentary Assembly Recommendation 2123(2018) – *"Strengthening international regulations against trade in goods used for torture and the death penalty"*.

2. It takes note of the legal and political instruments that have already been adopted in different fora in this respect as well as the call of the Assembly that member States put in place a legislation regulating trade in goods used for the death penalty, torture and inhuman or degrading treatment or punishment.

3. In respect of this last point, the CDDH recalls that paragraphs 24 and 27 of the Appendix to Recommendation CM/Res(2016)3 of the Committee of Ministers to member States on human rights and business already contain specific provisions for member States aimed at preventing business enterprises domiciled within their jurisdiction from trading in such goods and at informing business enterprises of potential human rights consequences of their operations[7].

4. Furthermore, it notes that the Council of Europe already recognised the need to exchange information between the States on the existing best practices on combating the trafficking in goods used for torture and the death penalty. Indeed, an online Platform on Human Rights and Business is currently being put in place within the departments of the Organisation in charge of cooperation in the human rights field (HELP Programme).

5. The CDDH believes it important that this Platform, which it initiated, becomes a powerful tool for:

(i) raising awareness of member State authorities about international and regional mechanisms for the protection of human rights and about the reports of independent organs of the civil society as regards the situation of the death penalty, torture and inhuman or degrading treatment or punishment in third countries which they should take into account when examining requests for authorisation of trade in relevant goods;

(ii) providing periodic reports on the States' regulatory activities in this area, including decisions given on requests for authorisation of trade in specific goods and the specific reasons for those decisions.

---

[7] *Paragraph 24:* "In order not to facilitate the administration of capital punishment or torture in third countries by providing goods which could be used to carry out such acts, member States should ensure that business enterprises domiciled within their jurisdiction do not trade in goods which have no practical use other than for the purpose of capital punishment, torture, or other cruel, inhuman or degrading treatment or punishment";

Paragraph 27: "Member States should be in a position to inform business enterprises referred to in paragraph 20 on the potential human rights consequences of carrying out operations in conflict-affected areas, and in other sectors or areas that involve a high risk of a negative impact on human rights, and provide assistance to these business enterprises, in line with relevant international instruments, such as the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones or the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. Member States should facilitate business enterprises' adherence to sector-specific standards, such as the Voluntary Principles on Security and Human Rights and the International Code of Conduct for Private Security Providers. Member States should consider performing a sector-risk analysis in order to identify the sectors in which activities are most at risk of having a negative impact on human rights".

6. Finally, the CDDH supports the call for ratification by all member States of the Council of Europe, of Protocols Nos. 6[8] and 13[9] to the Convention.

* * *

IV. RECOMMENDATION 2125(2018) – "STATE OF EMERGENCY: PROPORTIONALITY ISSUES CONCERNING DEROGATIONS UNDER ARTICLE 15 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS"

Text of the Recommendation

1. The Parliamentary Assembly refers to its Resolution 2209 (2018) "State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights".

2. The Assembly recommends that the Committee of Ministers examine State practice in relation to derogations from the European Convention on Human Rights (ETS No. 5), in the light of the requirements of Article 15 and the case law of the European Court of Human Rights, the requirements of international law and the Assembly's findings and recommendations in Resolution 2209 (2018), with a view to identifying legal standards and good practice and, on that basis, adopt a recommendation to member States on the matter.

Draft comments

1. The Steering Committee for Human Rights (CDDH) takes note of Parliamentary Assembly Recommendation 2125 (2018) – "*State of emergency: Proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights".* It considers that the Assembly addresses therein an important challenge which the system of protection of human rights as guaranteed by the Convention is currently facing.

2. Indeed the CDDH notes with concern that States increasingly need to consider having recourse to their right of derogation. It draws attention to the update, in April 2018, of the factsheet "Derogation in time of emergency", published by the European Court of Human Rights[10].

3. The CDDH recalls that:

(i) Under Article 15 of the Convention, any High Contracting Party has the right, in time of war or public emergency threatening the life of the nation, to take measures derogating from its obligations under the Convention, other than those listed in paragraph 2 of that Article, provided that such measures are

[8] To date: 46 ratifications and 1 signature not followed by ratification.

[9] To date: 44 ratifications and 1 signature not followed by ratification.

[10] European Court of Human Rights, Press Unit, Factsheet "Derogation in time of emergency", April 2018.

strictly proportionate to the exigencies of the situation and that they do not conflict with other obligations under international law[11].

(ii) Even if in this matter the European Court of Human Rights has recognised a margin of appreciation to the States to decide on the application of Article 15, this margin is subject to the supervision by the Court. In determining whether a State has gone beyond what is strictly required, the Court gives appropriate weight to factors such as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation[12]. Even if there is such situation as to justify derogation from obligations under the Convention, the derogating measures have to address it adequately and rationally and must not be disproportionate[13].

(iii) [With regard to the assessment of the proportionality of measures restricting the exercise of rights or freedoms under the Convention, it is to be noted that, as recalled in the recent Copenhagen Declaration[14], 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.[15]]

4. The CDDH further recalls that in its opinion CDL-AD(2016)010 on "The Legal Framework Governing Curfews", adopted at its 107th Plenary Session (Venice, 10-11 June 2016), the European Commission for Democracy Through Law (Venice Commission) also pointed out (§ 95) that although it was a state's duty to muster all its resources to combat the terrorist threat and protect its citizens from such attacks, it was also crucial in a democratic society to strike the right balance between security needs and the exercise of rights and freedoms, showing due regard for the requirements of the rule of law.

5. The CDDH does not consider it necessary to examine the State practice in relation to derogations from the Convention in order to identify legal standards and good practice and, on that basis, adopt a recommendation to member States on the matter. According to the CDDH, the aforementioned Court's factsheet, as updated in April 2018, provides sufficient information.

* * *

[11] See, e.g., *Şahin Alpay v. Turkey*, no. 16538/17, 20 March 2018, § 74.

[12] See *Brannigan and McBride v. the United Kingdom*, nos. 14553/89 and 14554/89, 25 May 1993, § 43; *A. and Others v. the United Kingdom* [GC], no. 3455/05, 19 February 2009, § 173.

[13] Compare *A. and Others v. the United Kingdom*, cited above, § 174.

[14] Adopted at the High Level Conference on 12 and 13 April 2018 at the initiative of the Danish Chairmanship of the Committee of Ministers.

[15] See § 28 (c) of the Declaration.

V. RECOMMENDATION 2126(2018) – "HUMANITARIAN NEEDS AND RIGHTS OF INTERNALLY DISPLACED PERSONS IN EUROPE"

Text of the Recommendation

1. Recalling Committee of Ministers Recommendation Rec(2006)6 on internally displaced persons and the judgments of the European Court of Human Rights concerning the human rights of internally displaced persons (IDPs), the Parliamentary Assembly refers to its Resolution 2214 (2018) on the humanitarian needs and rights of internally displaced persons in Europe and recommends that the Committee of Ministers ensure that such judgments of the Court be executed as a matter of priority and urgency, using Article 46.4 of the European Convention on Human Rights (ETS No. 5) in cases where a respondent State refuses to execute a judgment.

2. The Assembly recommends that the Committee of Ministers step up its efforts and practical action to ensure that all respondent States abide by the decisions of the European Court of Human Rights regarding compensation awarded in respect of the denial of the use and ownership of IDPs' property and other non-pecuniary losses.

3. Recalling Articles 7 and 8 (2.b.xiii) of the Rome Statute of the International Criminal Court, the Assembly recommends that the Committee of Ministers ask the Committee of Legal Advisers on Public International Law (CAHDI) to establish, in accordance with Article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property and the general principles of international law, guidelines for the recognition and enforcement by domestic courts in other member States of judgments of the European Court of Human Rights awarding financial compensation to IDPs, if a respondent State refuses to execute such a judgment.

Draft comments

1. The Steering Committee for Human Rights (CDDH) takes note of Parliamentary Assembly Recommendation 2126 (2018) – *"Humanitarian needs and rights of internally displaced persons in Europe"*.

2. The CDDH recalls that the European Court of Human Rights has recognised that the arbitrary displacement of persons from their habitual place of residence is in breach of the European Convention on Human Rights[16], and that it is crucial to guarantee their human rights[17] and to execute judgments regarding them.

3. The 11th Annual Report of the Committee of Ministers on the supervision of execution of judgments and decisions of the Court[18] mentions a number of pending cases

[16] See *Loizidou v. Turkey (GC),* no. 15318/89, 18 December 1996 and *Sargsyan v. Azerbaijan (GC),* no. 40167/06, 16 June 2015.

[17] In particular the right to life, the prohibition of torture, the right to liberty and security, the right to respect for private and family life and the protection of property (Articles 2, 3, 5 and 8 of the Convention and Article 1 of Protocol No 1 to the Convention). Recommendation Rec(2006)6 of the Committee of Ministers to member States on internally displaced persons recalls that "the national authorities of the member States on the territory of which internal displacement is taking place are primarily responsible for the protection and assistance of the internally displaced persons, notwithstanding the rights and obligations of other states or appropriate international organisations under international law".

[18] https://rm.coe.int/annual-report-2017/16807af92b

concerning internally displaced people[19]. These cases reveal important and complex structural problems, related, for many of them, to situations in post-conflict regions, demanding time and efforts in many respects. In this context, the recent Copenhagen Declaration[20] has strongly encouraged 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 these procedures would be used sparingly and in exceptional circumstances respectively. [21]

* * *

VI. RECOMMENDATION 2129(2018) – "COPENHAGEN DECLARATION, APPRECIATION AND FOLLOW-UP"

Text of the Recommendation

1. The Parliamentary Assembly takes note of the Declaration adopted at the conference on the European human rights system in the future Europe, organised in Copenhagen on 12 and 13 April 2018 by the Danish chairmanship of the Committee of Ministers.

2. The Assembly recalls its own previous work on the reinforcement and reform of the system of the European Convention on Human Rights (ETS No. 5, "the Convention"), notably Resolution 1726 (2010) "Effective implementation of the European Convention on Human Rights: the Interlaken Process", Resolution 1856 (2012) "Guaranteeing the authority and effectiveness of the European Convention on Human Rights" and Resolution 2055 (2015) "The effectiveness of the European Convention on Human Rights: the Brighton Declaration and beyond".

3. The Assembly welcomes the reaffirmation in the Copenhagen Declaration by the States Parties of their commitment to the Convention, to the fulfilment of their obligations thereunder and to the right of individual application as a cornerstone of the system. It shares their recognition of the fact that the Convention has made an extraordinary contribution to the protection and promotion of human rights and the rule of law in Europe and continues to play a central role in maintaining democratic security and improving good governance.

4. The Assembly is also appreciative of the fact that the Copenhagen Declaration as adopted largely reflects the approach advocated by the Assembly in its declaration adopted by the Standing Committee on 16 March 2018. In particular, it fully agrees that ineffective national

[19] See e.g. *Mirzayev v. Azerbaijan* (group), no. 50187/06 (non-enforcement of final judicial decisions ordering the eviction of internally displaced persons who were unlawfully occupying the applicant's apartment), *Chiragov and Others v. Armenia* (GC) (group), no. 13216/05, 16 June 2015 (impossibility for displaced persons to gain access, in the context of the Nagorno-Karabakh conflict, to their homes and properties in Nagorno-Karabakh and the surrounding territories), *Sargsyan v. Azerbaijan (GC)*, no.40167/06, 16 June 2015 (impossibility for displaced persons to gain access, in the context of the Nagorno-Karabakh conflict, to their homes and properties and relatives' graves in the disputed area near Nagorno-Karabakh on the territory of Azerbaijan) or *Xenides-Arestis v. Turkey* (group), no. 46347/99 (continuous denial of the applicants' access to their properties).

[20] Adopted at the High Level Conference meeting on 12 and 13 April 2018 at the initiative of the Danish Chairmanship of the Committee of Ministers.

[21] See § 24 of the Declaration.

implementation “remains the principal challenge confronting the Convention system” and that the caseload of the European Court of Human Rights (“the Court”) “still gives reason for serious concern”. It also welcomes the States' reaffirmation of their “strong commitment to the full, effective and prompt execution of judgments”.

5. The Assembly is nevertheless greatly concerned about the fact that a founding member of the Council of Europe saw fit to submit a draft declaration that would have put in question some of the fundamental principles on which the Convention system depends. This is all the more disappointing for the fact of apparently being motivated by purely domestic considerations, regardless of their consequences for Europe’s core human rights protection mechanism. The Assembly trusts that future chairmanships of the Committee of Ministers will take a more constructive and supportive approach towards the Convention and the Court.

6. Despite the significant progress made in refining the initial draft text in order to arrive at the final, adopted version, the Assembly nevertheless has certain concerns with regard to the Copenhagen Declaration, in particular the following:

6.1. whilst recognising that ineffective national implementation and inadequate execution of Court judgments are still the main problems facing the Convention system, the Declaration proposes very little that can be called new by way of solutions;

6.2. the Declaration still contains vaguely defined and conceptually problematic ideas about “dialogue” between the States Parties and the Court, including on the interpretation of Convention rights, which could be developed in ways that would threaten the Court's independence;

6.3. the Declaration fails adequately to appreciate and encourage the role and contributions of other stakeholders and actors, including the Assembly, national parliaments, the Council of Europe Commissioner for Human Rights and civil society.

7. The Assembly therefore calls on the Committee of Ministers to:

7.1. take concerted and effective action to address the problems of ineffective national implementation of the Convention, including inadequate execution of Court judgments, notably on the basis of recommendations contained in Assembly Resolutions 1726 (2010), 1856 (2012) and 2055 (2015) and Recommendations 1991 (2012) and 2070 (2015), and in the intergovernmental expert reports prepared in the course of the Interlaken reform process;

7.2. avoid any statements or actions that might undermine the independence of the Court when exercising its jurisdiction under Article 32 of the Convention, and call on States Parties to seek to influence the Court's interpretation of the Convention only in the course of judicial proceedings, including through third-party interventions;

7.3. engage fully all stakeholders in the Convention system, including the Assembly, in the reform process, and ensure that their roles and contributions are recognised and encouraged as part of the overall package of measures intended to reinforce the Convention system.

8. The Assembly resolves to continue following the process of reform of the Convention system, with a view to protecting its fundamental principles, including the independence of the Court, reinforcing the role of national parliaments and holding States Parties to account for the fulfilment of their obligations.

Draft comments

1. The Steering Committee for Human Rights (CDDH) takes note of Parliamentary Assembly Recommendation 2129(2018) - *"Copenhagen Declaration, appreciation and follow-up"*.

2. It notes that, at its 128th ministerial session (18 May 2018) the Committee of Ministers endorsed the Declaration adopted on 13 April 2018 and invited the various stakeholders to implement it.

3. The CDDH is convinced that the Committee of Ministers will continue to take concrete and effective measures for addressing problems relating to the ineffectiveness of national implementation of the Convention, including the insufficient execution of the judgments of the Court. It also welcomes the willingness of the Assembly to continue its commitment in the process of the reform of the Convention system, in order to protect its fundamental principles, in particular the independence of the Court, to reinforce the role of national parliaments and to compel member States to account for the respect of their obligations.

4. In this respect, the CDDH considers it crucial that the Assembly continues ensuring that national parliaments effectively implement Recommendation CM/Rec(2004)05 of the Committee of Ministers to the member States on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights.[22]

5. Indeed, as it is stated in the Copenhagen Declaration, the CDDH considers it of outmost importance that national parliaments are appropriately involved in ensuring 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[23]. Furthermore, the CDDH recalls the importance of the involvement of national parliaments in the process of the execution of judgments, as it has been highlighted in the Brussels Declaration.[24]

6. Finally, the CDDH considers that the Copenhagen Declaration, which stresses the importance of an effective protection of the Convention standards at the national level and of a full, effective and prompt execution of the judgments of the European Court of Human Rights, and which develops, in the light of Protocol No. 15 to the Convention, the ideas concerning the principle of subsidiarity and the margin of appreciation of national courts, provides useful elements to the reflection that the Committee of Ministers must conclude before the end of 2019 on whether the measures taken until now are sufficient to ensure sustainable functioning of the Convention's control mechanism or whether it is appropriate to envisage more significant changes.

---

[22] Adopted by the Committee of Ministers on 12 May 2004 at its 114th Session.

[23] See § 16 (b) of the Declaration.

[24] Adopted at the High-level Conference on 26 and 27 March 2015 at the initiative of the Belgian Chairmanship of the Committee of Ministers. See in particular § 2 (h) of section B of the Action Plan appended to the Declaration.

VII. RECOMMENDATION 2130(2018) – "LEGAL CHALLENGES RELATED TO HYBRID WAR AND HUMAN RIGHTS OBLIGATIONS "

Text of the Recommendation

1. The Parliamentary Assembly refers to its Resolution 2217 (2018) on legal challenges related to hybrid war and human rights obligations.

2. The Assembly recommends that the Committee of Ministers:

2.1. conduct a study on hybrid war threats, with a special focus on non-military means, in order to identify key vulnerabilities and specific hybrid-related indicators, potentially affecting national and European structures and networks and to identify legal gaps and develop appropriate legal standards, including considering a new Council of Europe convention on this subject;

2.2. develop principles for regulatory reform of social media platforms to ensure transparency in the conduct of free and fair elections;

2.3. examine State practice in countering hybrid war threats, with a view to identifying legal standards and good practice and ensuring compliance of this practice with the safeguards provided for by the European Convention on Human Rights (ETS No. 5);

2.4. step up co-operation with other international organisations working in this field, in particular the European Union and the North Atlantic Treaty Organisation (NATO);

2.5. promote the ratification by member and non-member States of the Convention on Cybercrime (ETS No. 185).

Draft comments

1. The Steering Committee for Human Rights (CDDH) takes note of Parliamentary Assembly Recommendation 2130 (2018) – *"Legal challenges related to hybrid war and human rights obligations"*.

2. The CDDH shares the concerns of the Assembly concerning in particular cyber-attacks and mass disinformation campaigns and notes that the Council of Europe[25] combats the threat of cybercrime through different legal instruments, while respecting and encouraging freedom of expression and activity of the media and internet users.

3. In this context, the CDDH recalls that its Drafting Group on Freedom of Expression and links to other Human Rights is addressing misinformation in order to identify good practices to combat it in culturally diverse societies.

4. As to the development of legal standards to combat the threats of hybrid war, the CDDH stresses the importance of the Budapest Convention on Cybercrime[26], the only binding international instrument on this issue, and notes that an adequate monitoring is

[25] See the work of its Information Society Department within the Directorate General of Human Rights and Rule of Law.

[26] https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680081561

carried out on a regular basis[27] to guarantee compliance with its provisions. Further ratifications of this instrument would be preferable rather than drafting any new binding legal instrument on the issue.

5. The CDDH would be ready, if appropriate, to contribute to the work of the competent bodies on this matter which the Committee of Ministers would deem necessary.

* * *

[27] Article 46 of the Budapest Convention sets out that the Parties shall, as appropriate, consult periodically with a view to facilitating the effective use and implementation of this Convention, including the identification of any problems thereof, the exchange of information on significant legal, policy or technological developments pertaining to cybercrime and the collection of evidence in electronic form and consideration of possible supplementation or amendment of the Convention. In order to do this the Cybercrime Convention Committee (T-CY) is the Committee of the Parties to the Budapest Convention.