REDRESS

Ending Torture. Seeking Justice for Survivors

LONGER-TERM FUTURE OF
THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND
THE EUROPEAN COURT OF HUMAN RIGHTS

CONTRIBUTION:

I. INTRODUCTION

1. Following the horrors of World War II and the holocaust, Europe led the way in establishing a system of institutions and law that would enshrine and uphold individual rights and the rule of law and ensure regional stability. The European Convention on Human Rights ("the Convention") is at the heart of the European project, and a strong European Court of Human Rights ("the Court") has been central to its success.

2. Although the Court currently faces challenges due to the size of its caseload, implementation of the Convention and systems for its enforcement compare favourably with other regional and international human rights systems, where in many cases remedies for violations are largely illusory in all but a small number of cases.

3. Europe should be proud of the fact that despite the diversity of its member States it has a regional system that both assists and encourages States to implement their obligations and provides individual victims of human rights violations with access to a remedy, including reparation, without discrimination. Future changes to the Convention system must seek to enhance, rather than take away from these two ends.

II. RIGHT OF INDIVIDUAL APPLICATION TO THE COURT/RIGHT TO A JUDICIAL DECISION

4. The ECtHR was established as the first judicial mechanism at the supranational level granting individuals the right and the opportunity to seek a remedy for human rights violations. Member States have consistently recognised that the right of individual application to the Court is a cornerstone of the Convention system.

5. As an organisation that works with individual victims of torture around the world, REDRESS has direct experience of how a broad and consistently-applied right of individual application to the Court is crucial to (i) upholding individuals' rights, (ii) assisting member States in implementation of the Convention, and (iii) upholding the rule of law.

6. At the **individual level**, access to justice and the right to an effective remedy, including reparation, for violations of human rights are key principles of international human rights law. These rights are guaranteed by the Convention,[1] and their importance has been underlined on numerous occasions by the Council of Europe's institutions and the Committee of Ministers.[2] These principles are also enshrined in the European Union Charter

[1] See Art. 6, and Art. 13, which guarantees the right to a remedy before a national authority. The right to an effective remedy is also recognised as inherent in a number of other rights including Arts. 2 and 3: See, e.g on Article 3 ECtHR [GC], *Gäfgen v Germany* (2010) App. No. 22978/05, 1 June 2010, at paras. 116 and 18.

[2] See, eg. Council of Europe (2011), 'Guidelines of the Committee of Ministers of the Council of Europe on Eradicating Impunity for Serious Human Rights Violations', adopted 30 March 2011, preamble; Council of Europe (1978) Resolution (78)8 on Legal aid and Advice, adopted 2 March 1978; Resolution (77) 27 on the compensation of victims of crime, adopted 28 September 1977.

(Art. 47), as well as numerous other human rights treaties applicable to member States and international declarations.[3]

7. Where States fail to provide an effective remedy at the national level the only safeguard for victims under the Convention is the Court.[4] National systems have not yet shown themselves capable of consistently upholding Convention rights: of all judgments on the merits decided by the Court between 1959 and 2012, more than 90% (13,324 cases) found at least one violation.[5] There is therefore clearly a need for this safeguard, through which thousands of victims of violations have obtained a remedy that was not otherwise available to them.[6] Any radical change towards removing or limiting the right of individual application to the Court would therefore deny justice to many such individuals protected by the Convention.

8. For **member States**, the Court's authoritative interpretation of the Convention in individual cases provides an important corrective layer, which assists them to understand their obligations in specific factual contexts and to **implement the Convention consistently at the national level**. Judgments of the Court have led to significant legislative and institutional changes in member States to the benefit of their citizens and those falling within their jurisdiction. As we set out in Part III below, the complaints procedure provides scope for the Court to be even more detailed in its guidance to States, allowing better implementation at the national level and across the Council of Europe member states.

9. Judgments in individual cases have also been instrumental in highlighting underlying systemic problems in member States which undermine Convention rights. Where repetitive applications continue to come before the Court (as to which see further below at para. 13), this shows a failure of State implementation, and underlines rather than takes away from the continuing need for scrutiny by the Court.

10. At both of these levels, providing individuals with broad access to an effective remedy therefore serves to uphold the **rule of law**, one of the fundamental objectives of the Council of Europe. In particular, it ensures a separation of powers, legal certainty and equality of all before the law. Convention rights should be applied equally to all within the jurisdiction of European member States, and disputes about the application of those rights should be decided in a fair, consistent and transparent manner. **The Court can best fulfil this crucial role for both States and individuals by providing broad access to individuals: the right of individual application to the Court must be retained.**

Managing the challenges

11. Assertions that the Court's role is unsustainable without further, more radical, change to limit individual access are not supported by the evidence. Measures introduced by Protocol 14, and new rules and practices developed by the Court in response to the challenges it

[3] For example Article 2 of the United Nations International Covenant on Civil and Political Rights and Article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and as reflected in UN General Assembly (2005), 'UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', UN G.A. Res 60/147, adopted by the General Assembly 16 December 2005 ("UN Basic Principles").

[4] See High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration (2012), para. 3.

[5] European Court of Human Rights (2013), 'Violations by Article and by respondent State (1959-2012)', p. 2, available at: http://echr.coe.int/Documents/Stats_violation_1959_2012_ENG.pdf.

[6] Even where execution of the judgment is lacking, the judgment in itself is a form of remedy and reparation for victims, if incomplete.

faces have already had a significant impact on the number of pending cases and the disposal of cases.[7]

12. Other ongoing procedural and institutional changes – including the introduction of electronic application forms and electronic communication with applicants – have the potential both to assist the Court to manage its caseload through efficient, transparent and fair screening of applications, and to improve the effectiveness of individuals' access to the Court.

13. The Court has also developed successful responses to more systemic issues impacting on its workload and the effectiveness of its judgments, including the prioritisation of cases, and pilot judgment procedure for **repetitive applications**. On the latter, we reiterate the point that, for the long-term viability of the system, **the Court's efforts must be matched by effective implementation by the States of pilot judgments,**[8] **and this should be a priority area for the resources and expertise of the Council of Europe.**[9] At the same time, the Court has proposed the introduction of a default judgment procedure through which the Registry would refer a list of repetitive cases to the government, and redress ordered by default if not remedied in a period of time.[10] **This is a logical next step, and we support further consideration of formally introducing a default judgment procedure for repetitive applications.**

14. The Court has shown that it can streamline its processes and employ methods to manage the increasing workload brought about by its success in establishing itself as a viable mechanism of redress to individuals. **The Court, as the judicial body directly involved in deciding cases and exercising a supervisory role within the Convention system, must maintain control over these changes and procedures.** Any changes to its substantive jurisdiction would be both unwarranted and critically damaging to the balance of responsibilities and supervision under the Convention.

Rules of Court: Interim measures (Rule 39)

15. One procedure of the Court which is vital to ensure effective operation of the right of individual application and the protection of Convention rights – especially in cases concerning particularly serious violations – is the provision of interim measures (Rule 39). This is important in removal cases, but also where applicants, witnesses, family members and/or lawyers are at risk of reprisals or further violence from state authorities and/or private actors.[11] Confidence in the efficacy of such measures is important for victims and witnesses to come forward.[12]

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[7] See further European Court of Human Rights (2013), 'The Interlaken Process and the Court (2013 report)', 28 August 2013, http://www.echr.coe.int/Documents/2012_Interlaken_Process_ENG.pdf. We note that these changes have already been felt to have had a significant negative impact on access to the Court, even for deserving cases. Any further procedural steps need to be considered very carefully to ensure they do not exacerbate this situation.

[8] See, eg. Preliminary Opinion of the court in preparation for the Brighton Conference, adopted by the Plenary Court on 20 February 2012, para. 26.

[9] Ibid., para. 35.

[10] Ibid., para. 21; European Court of Human Rights (2012), 'The Interlaken Process and the Court (2012 report)',16 October 2012, pp. 10-11.

[11] See, eg. *Kurt v Turkey*, (Application No. 15/1997/799/1002), 25 May 1998, paras. 159-160. See also*, Şarli v Turkey*, (Application no. 24490/94), 22 May 2001; *Opuz v Turkey* (Application No. 33401/02), 9 June 2009, paras. 60-69. Note in *Opuz* although correspondence was carried out with the member state concerned, no order was actually issued, leading to what appears in the judgment to have been a period of approximately six months where the applicant held grave fears for her safety. For further information more generally see REDRESS (2009), 'Ending Threats and Reprisals Against Victims of Torture and Related International Crimes - A Call to Action', http://www.redress.org/downloads/publications/Victim%20Protection%20Report%20Final%2010%20Dec%2009.pdf.

[12] See REDRESS (2009), 'A Call to Action', above, p. 35.

16. The Committee of Ministers has repeatedly stressed that member States should enable their own judiciaries to order protective measures,[13] and the same principles apply to the Court. Other international human rights mechanisms also provide interim measures on this ground.[14]

17. Rule 39 has been the subject of recent consideration by the Council of Europe, which shows that the Court has reorganised its procedures for dealing with these requests, and is ensuring that where interim orders are granted communication of the case follows quickly: this is in the interests of both the States and individuals concerned.[15]

18. **To ensure effective access to the Court, Rule 39 should be used by the Court where credible concerns about threats or reprisals are raised by applicants in relation to themselves or witnesses. To give victims and witnesses the security necessary to come forward, further specialised mechanisms should be developed for supervision and enforcement of such orders in protection cases, taking into consideration developments in national and international justice processes.**[16]

III. RESTORING THE POSITION OF THE VICTIM OF A VIOLATION (INCLUDING THE AWARD OF JUST SATISFACTION (COMPENSATION) BY THE COURT)

19. Another way in which the Court can better assist States to implement their obligations under the Convention is through the further development of a more detailed approach to ordering remedies. Where appropriate, such orders should aim to address root causes of violations.

20. The Court has already begun to develop such an approach through its pilot judgment procedure, developed with the endorsement of the Committee of Ministers.[17] In the first pilot judgment it adopted, *Broniowski v Poland* (2004), the Court explained how Article 46 obliges member States "not just to pay those concerned the sums awarded by way of just satisfaction under Article 41 but also to select the general and/or if appropriate individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court".[18] In pilot judgments the Court aims to assist states to identify and correct legislative and administrative causes of deep-rooted human rights issues and to establish national mechanisms to afford redress for those affected by them.

21. **This type of remedial order, which provides more detailed guidance to States on appropriate measures to put an end to the violation found by the Court, should continue to be extended to other cases, particularly those raising systemic obstacles, to assist States with execution of judgments and to avoid future repetition.**[19]

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[13] See, eg. Recommendation Rec(2002)5 on the protection of women against violence, adopted of 30 April 2002; Recommendation Rec(2005)9 of the Committee of Ministers on the protection of witnesses and collaborators of justice, adopted 20 April 2005; Recommendation Rec(2006)8 on assistance to crime victims, adopted 14 June 2006.

[14] See, eg. Inter-Am Ct HR, *Velasquez Rodriguez v. Honduras* (Merits), Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 1, para. 45; UN Human Rights Committee, *Pathmini Peiris v Sri Lanka*, Views adopted 26 October 2011, CCPR/C/103/D/1862/2009, para. 1.2.

[15] CDDH(2013)R77, Addendum III, Report on Interim Measures under Rule 39 of the Rules of Court, 77th meeting, 19-22 March 2013, paras.42-43.

[16] As to which see further REDRESS (2009), 'A Call to Action', above; REDRESS (2010), 'Strategies for the effective investigation and prosecution of serious international crimes: The practice of specialised war crimes units', http://www.redress.org/downloads/publications/The_Practice_of_Specialised_War_Crimes_Units_Dec_2010.pdf, pp. 26-27.

[17] Committee of Ministers, Resolution RES(2004)3, 12 May 2002, 114th Session.

[18] *Broniowski v Poland*, (Application no. 31443/96), 22 June 2004, para. 192.

[19] This is already to some extent being done outside the pilot judgment procedure - see, eg. *Aslakhanova and Others v Russia* (Applications nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10), 18 December 2012, paras. 222-238.

22. **An important prerequisite to addressing systemic issues which should be considered in the crafting of such orders is mechanisms through which States and their institutions recognise the nature of violations found by the Court, and acknowledge responsibility for them.** The experience of those who have brought cases concerning persistent violations suggests that the effectiveness of the Court's judgments in addressing underlying systemic problems could be significantly improved by giving further attention to these two aspects of remedies.[20]

23. An approach to reparation such as this, which seeks to prevent future violations by addressing underlying causes, has been endorsed by States and adopted by other international human rights bodies.[21] Providing more detailed guidance to states does not offend the principle of subsidiarity, but instead helps the Court to exercise its role more effectively by assisting States to respond appropriately to its judgments.

Execution of Court judgments

24. Amendments to Article 46 introduced by Protocol 14 have already recognised a stronger role for the Court in relation to execution of judgments. By providing more specific and detailed guidance through remedies ordered, the Court will in turn assist execution of judgments and supervision of such execution, and reduce the need for, and risk of, further repetitive applications.

IV. CONCLUSION

25. The Council of Europe should be proud of the lead it has taken in developing a human rights framework that is applied consistently across its member States, and under which all States may be held equally accountable. This has given a great number of victims of human rights violations the opportunity and confidence to have their grievances heard, in cases that have contributed to the development of a strong human rights culture in Europe. Although this has brought difficulties, the Court has proved itself capable of responding to systemic challenges facing it, and more can be done to ensure that member States respond appropriately to its judgments to prevent future similar violations. Radical changes to the Court's jurisdiction are unwarranted, and would prove dangerous not just for the Convention system, but for human rights globally.

[20] See Dr Başak Çali, quoted in Ilias Bantekas and Lutz Oette (2013) *International Human Rights Law and Practice*, Cambridge University Press, pp. 234-235.

[21] See eg. Inter-Am Ct HR, *Gómez-Paquiyauri Brothers v Peru*, Inter-Am. Ct. H.R. (Ser. C) No. 110, Judgment of July 8, 2004, paras. 187-90; Committee Against Torture, General Comment No. 3: Implementation of Article 14 by States Parties, CAT/C/GC/3, 13 December 2012, paras. 6-18; Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 16; UN Basic Principles, above n. 3, Arts. 18-23.