



PRELIMINARY COMMENTS OF AMNESTY INTERNATIONAL ON PROPOSAL TO ADD A COLLECTIVE COMPLAINTS AND/OR CLASS ACTION PROCEDURE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS CONTROL MECHANISMS

delivered by Jill Heine in Bled, Slovenia on 22 September 2009, during the Round Table on Ways of protection of the Right to a Trial within a Reasonable time- Countries' Experience and on Short-Term Reform of the European Court of Human Rights

I am honoured to be here with you in Bled on behalf of Amnesty International.

We are most grateful to the Slovenian authorities for the invitation to be part of this two day Round Table, and in particular to present some initial comments on the proposal to introduce collective complaints and/or class actions into the Convention's control system.

Amnesty International, and the group of non-governmental organizations (NGOs) with whom we have been working closely on the proposals to reform the Court over the last nine years, attach great importance to reflections on ways to address challenges posed by un-remedied systemic or endemic problems, which have resulted in repetitive violations of the human rights of individuals in Council of Europe member states and repetitive applications to the European Court of Human Rights.

We agree that these challenges require addressing.

Mr Fribergh's paper¹ and presentation indicate the enormity of the challenges. The statistics that he presents indicate that:

- more than 50% of the Court's judgments in the last 50 years have been on repetitive cases;
and that
- more than one quarter of its some 100,000 pending cases are cases that raise issues which are the subject of well-established case law.

¹ Presentation by Erik Fribergh, Registrar of the European Court of Human Rights to Bled (Slovenia) Roundtable, 21-22 September 2009, "Bringing Rights Home or How to deal with repetitive applications in the future." Available at <http://www.echr.coe.int/NR/rdonlyres/F4E1DAB4-9382-4CF1-8407-EE82A92A275A/O/ErikFriberghBledspeech.pdf>

The proposal by President Costa, to explore the idea of Class Actions and Collective Complaints in the current discussions of reform, as possible tools for addressing and potentially lightening the load of repetitive applications to the Court is, indeed, an interesting one.

As we have heard, both of these mechanisms, Class Actions and Collective Complaints, are tools for collective redress.

Proposals to add mechanisms for collective redress into the Convention's control system are not entirely new.

As some of you may recall, and as mentioned by Professor Gattini in his article in 2007, *Mass Claims at the European Court of Human Rights*, during the 2000-2004 discussions on reform, we debated a proposal for the Council of Europe's Commissioner for Human Rights to bring actions in cases revealing a pattern of violations of systemic or transnational character, in the nature of an *actio popularis*.

The proposal was, however, rejected at the time by representatives of the Council of Europe member states for two principal reasons:

- that it would be a major departure from the current system, in which the individual right of action is at the core of the Convention's supervisory mechanisms;
- and
- that it risked changing the nature of the Commissioner's relations with Member States.

Although proposals for adding collective redress mechanisms to the Convention's control mechanisms are not entirely new, we consider that this proposal, and as well as others that were discarded or have not yet been implemented, should be considered anew.

Perhaps representatives of the Council of Europe Member States may be willing to explore in more detail proposals to add tools for collective redress to the system, given the development of the Pilot Judgment procedure, following the 2000-2004 reform discussions.

Class Actions and Collective Complaints procedures have some similarities but differences to the developing Pilot Judgment procedure.

One obvious difference is: who first proposes that the complaint about the particular alleged Convention violation is addressed by the Court in this amalgamated way.

In the early cases of the Pilot judgment procedure, it was *the Court* which proposed the handling of the case in this manner. In contrast, in Class Actions and Collective Complaints it would be *those who bring the case* (on behalf of the class or the collective) who would bring the case in this manner.

Between themselves, Class Actions and Collective Complaints have some notable differences too.

One, among them, being that while Class Actions would presumably seek reparation for violations of the rights of the group of individuals in the class which have already occurred, Collective Complaints may

be more preventative in nature seeking a remedy to prevent future violations of rights of more than one person.²

We consider that this proposal to grant the Court jurisdiction to consider Class Actions and/or Collective Complaints merits further study and discussion.

Each *could* be additional effective tools to seek collective redress for systemic or endemic violations of the Convention, *in addition to*

- the rarely used tool of inter-state cases (under Article 33 of the Convention);
 - the developing mechanism of pilot judgments;
- and,
- cases brought by groups of individuals under Article 34 of the Convention.

Amnesty International recommends that the Reflection Group and the Committee of Ministers Steering Committee for Human Rights (CDDH) familiarise themselves more thoroughly with the nature of both Class Actions and Collective Complaints, with the benefit of information about the operation of these procedures from experts including those on the panel today: Mr David, Professor Gattini and Professor Končar. The study of this proposal, which the President of the Court indicated that the Court would undertake³, will surely also be of great interest and assistance.

The three presentations today about Class Actions and Collective Complaints have been rich and have raised many interesting questions which could be explored during the future reflections on reforming the Convention's control system.

Among them are:

1. What types of cases would be best suited to this type of action?

Perhaps Class Actions might be appropriate, for example, in

- cases about discrimination against Roma children to access to education?
- cases involving a mass violation of human rights, such as a targeting a group of civilians with a bomb in the context of a conflict?

Perhaps a Collective Complaint would be an effective and efficient way to challenge a statute which is discriminatory on its face or in its implementation?

2. In a Class Action how would the Court define and certify the class?

² It should be noted that we would expect however that, in appropriate circumstances, the execution of a judgment finding a violation on a collective complaint would require the establishment of an effective retro-active domestic remedy for individuals aimed at redressing past violation(s) which are the subject of the complaint.

³ *Memorandum of the President of the European Court of Human Rights to the states with a view to preparing the Interlaken Conference*, 3 July 2009 at page 8 (Section III , B.2 (3)) http://www.echr.coe.int/NR/rdonlyres/34D3FB15-BE9E-4095-A68C-B4D60D5C38B4/2792/03072009_Memo_Interlaken_anglais.pdf

3. Who should be allowed to represent the Class or bring the Collective Complaint (NGOs; lawyers?)

4. How would such cases be financed? Who would bear the burden of the costs?

5. Would the Court have the duty in a Class Action to ensure that the Class was adequately represented?

6. How would a Class Action affect the right of an individual who was not part of the Class/case but shared a common grievance?

7. What rules of admissibility should apply to such actions?

- Would the requirements of exhaustion of domestic remedies and the six month rule apply to Class Actions or Collective Complaints under the Convention?
- or would different rules apply, as in Inter-State cases under the Convention or the lodging of a Collective Complaint under the Social Charter?⁴

8. What, if any, other changes would be required to the Convention?

9. Are states prepared to give the Court (more) responsibility not only for adjudicating on the violation but to identifying its cause and devising the remedy?

Would it be necessary and advisable to amend of Article 41 of the Convention more along the lines of Article 63 of the American Convention on Human Rights, which, as Professor Gattini has noted, gives the Inter-American Court of Human Rights broader powers to rule on the remedy required for the violation identified?⁵

⁴ For a Collective Complaint to be admissible under Article 4 of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, it must, *inter alia*, be in writing, made by an organization competent under the Protocol to do so and in the required language, and indicate in what respect a state party to the Charter has not ensured satisfactory application of a provision of the European Social Charter that the state has accepted. See also Rules 23 et seq., of the Rules of the European Committee of Social Rights, available at http://www.coe.int/t/dghl/monitoring/socialcharter/ESCRrules/Rules_en.pdf

⁵ See Professor Andrea Gattini, *Mass Claims at the European Court of Human Rights*, in *Human Rights, Democracy and the Rule of Law*, at page 277.

Article 41 of the European Convention on Human Rights states

“If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party .

While Article 63(1) of the American Convention on Human Rights states :

If the [Inter-American] Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

11. Would such judgments have an extended legal effect in the state concerned?

12. What, if any, legislation would be required in the Member States to ensure implementation of remedies ordered by the Court?

13. Should any required changes to the Convention be included in an amending Protocol? Or should they be incorporated into a separate and Optional Protocol or the Rules of Court or a Statute (if one is drawn up)?

And finally, and perhaps most importantly:

14. Would the addition of either or both of these two tools for collective redress *lessen* the Court's expenditure of time and resources in addressing systemic or endemic problems or be *more* demanding of the Court's time and resources in analysis and decisions on procedural issues (i.e. Class certification) and remedy?

We look forward to discussing these and other questions with you in the time remaining today, in the months leading up to Interlaken, and thereafter.

We urge you to ensure that you hold consultations about reforming the Court in your countries, with people who represent Applicants to the Court, with NGOs, associations of lawyers and other members of civil society. We urge you to do so because we consider that the 800 million people in the Council of Europe Member states have an interest which is at least equal of that of the government representatives, in ensuring the long-term effectiveness of the European Court of Human Rights.

I conclude with the hope that this and other proposals presented aiming to address the problem of systemic and endemic violations, which have been a predominate focus of the Court since its establishment, will be evaluated against four criteria.

Will the proposed reform:

1) result in the fair and expeditious resolution of cases presenting repetitive violations of the European Convention on Human Rights ?

2) lead to a resolution of the root cause of the violation by the state concerned and effective measures to prevent future violations of this kind?

3) ensure a remedy to the individuals whose rights have been violated?

4) preserve the right of individual petition, which lies at the heart of the Convention's enforcement systems?

We consider that our common aims with respect to repetitive applications should be on both addressing the root causes through effective general and ensuring effective domestic remedies; not reducing access to justice (before the Court) for those whose rights have been violated.