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Council of Europe: Comments on the Draft Opinion of the Steering Committee for Human Rights (CDDH) on the issues to be covered at the Interlaken Conference

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Comments on the Draft Opinion of the Steering Committee for Human Rights (CDDH) on the issues to be covered at the Interlaken Conference

Introduction

1. Amnesty International welcomes the opportunity of submitting the following comments on proposals aiming to ensuring better implementation of the European Convention of Human Rights by member states of the Council of Europe and to ensure the long-term effectiveness of the Convention's control systems, including the European Court of Human Rights, which are set out in the Steering Committee for Human Rights' Draft Opinion on issues to be covered at the Interlaken Conference.[1]

2. Amnesty International urges the states which have yet to do so to ensure that they inform civil society about the Interlaken Conference and consult them on the proposals for the future of the Convention's control system, including those set out in President Costa's memorandum and in the CDDH Opinion, once it is adopted.

3. Amnesty International considers that ensuring enhanced respect for human rights should be primary focus and concern of the member states of the Council of Europe, including at the Interlaken Conference. This need is borne out by the fact that in more than 83% of all judgments that the European Court of Human Rights has delivered, it has found at least one violation of the Convention by the respondent state.[2]

4. Amnesty International considers that better implementation of the Convention at national level, in a manner that is consistent with the Court's case-law, will reduce both the need for individuals to apply to the Court for redress and the need for the Court to address applications which raise issues about which the Court's case law is clear (which represent some 50% of the Court's judgments on admissible cases).

5. The organization considers that the challenges currently faced by the Court as a result of the enormous number of individual applications which are being lodged with the Court,

[1] The Interlaken Conference, which is scheduled to take place on 18-19 February 2010, is organized hosted by the Swiss government during its Chairmanship of the Committee of Ministers of the Council of Europe. The Conference will focus on the future of the control system of the European Convention on Human Rights, including in particular the future of the European Court of Human Rights. The Steering Committee for Human Rights' Draft Opinion on issues to be covered at the Interlaken Conference is set out in : DH-GDR(2009)001 Addendum REV, 19 November 2009.

[2] European Court of Human Rights: Some Facts and Figures, at pg 5; available at http://www.echr.coe.int/NR/rdonlyres/65172EB7-DE1C-4BB8-93B1-B28676C2C844/0/FactsAndFiguresENG10ansNov.pdf.

coupled with the backlog of cases pending before it, in the context of the Court's current resources, require addressing.

6. We also consider that attention is required to address challenges faced by the Committee of Ministers and the Department of Execution of Judgments in their work supervising the execution by states of the growing number of Court's judgments finding a violation of the Convention.

7. Amnesty International continues to consider that any reforms to the system itself should be designed to meet the following seven objectives:[3]

i. Better implementation of the ECHR at national level, thereby reducing the need for individuals to apply to the Court for redress, bearing in mind that in the 10 year period between 1998-2008, in more than 83% of all judgments that the Court has delivered, it has found at least one violation of the Convention by the respondent state;[4]

ii. Preservation of the fundamental right of individual petition (the essence of which is the right of individuals to receive a binding determination on admissible cases from the European Court of Human Rights on whether the facts presented constitute a violation of rights secured in the ECHR);

iii. Efficient, fair, consistent, transparent and effective screening of applications received, to weed out the very high proportion (around 90%) of applications that are inadmissible under the current criteria;[5]

iv. The expeditious rendering of judgments, particularly in cases that raise repetitive issues concerning violations of the ECHR where the Court's case law is clear—which represent some 50% of the Court's judgments on the merits—and those that arise from systemic problems;

v. Effective execution of the Court's judgments by Council of Europe member states, including appropriate follow-up by the Committee of Ministers where individual member states are slow to act or respond inadequately to Court judgments;

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[3] See *Council of Europe: Comments on Reflection Group Discussions on enhancing the long-term effectiveness of the Convention system,* Amnesty International, the European Human Rights Advocacy Centre (EHRAC), Interights, Justice, Liberty, the International Commission of Jurists (ICJ) and the AIRE Centre, March 2009.

[4] European Court of Human Rights: Some Facts and Figures, at pg 5; available at http://www.echr.coe.int/NR/rdonlyres/65172EB7-DE1C-4BB8-93B1-B28676C2C844/0/FactsAndFiguresENG10ansNov.pdf.

[5] Paragraph 27 of the Report of the Group of Wise Persons, November 2006.

vi. Adequate financial and human resources for the Court, without drawing on the budgets of other Council of Europe human rights monitoring mechanisms and bodies;

vii. Transparent expert monitoring and assessment of the impact on the workload of the Court of any reforms agreed, and their effect on the right of individual petition.

The following are comments on and an assessment of the proposals set out in the Draft Opinion in the light of above enumerated objectives.

Comments on Section II: The Background

8. **Execution of judgments**: Amnesty International urges the CDDH to **add a paragraph** to the Background Section **which highlights the challenges faced by the Committee of Ministers and the Department of Execution** in their work supervising the execution of judgments. We recommend that such a paragraph, among other things, highlight the increasing number of judgments finding a violation of the Convention whose execution the Committee of Ministers is supervising (standing now at some 8,500), which poses a challenge for the work, including as a result of the number of staff and resources available in the Execution Department. Doing so would ensure that the Background provides information about the major challenges which are addressed by proposed recommendations in Part C of Section IV of the Opinion.

9. Statistics (paragraphs 5 and 6) The organization urges the CDDH to ensure that the Draft Opinion **clarify the sources of the statistics that it cites in paragraphs 5 and 6,** when referring to the magnitude of these challenges, among other things, given the propensity for such statistics to be quoted and relied upon**.**

10. **Repetitive applications (Paragraph 6**) Amnesty International agrees that the issues raised by **repetitive applications** should be addressed at the national level. We are, however concerned about the wording of the statement in paragraph 6:"The Court must be absolved of such functions, which should be carried out by national authorities." **We urge the CDDH to consider amending this sentence to read: "There should be effective remedies at the national level for cases raising issues about which the Court's case law is clear."**

11. **Time and resources for gathering information**: Amnesty International considers that finding durable and effective solutions to the challenges faced by the Court will be facilitated by identifying, through a range of studies, the root causes of these challenges, as well as in evaluating the impact of reforms already undertaken.

The organization therefore warmly welcomes the fact that attention is drawn (in paragraph 45) to the need for time and both human and financial resources for obtaining detailed information, from the Court itself or from independent studies which the Committee commissions on:

- the main reasons for inadmissible applications and repetitive applications;
- the filtering process; and

- the impact, over a reasonable period of time, of the reforms to the Court that have already been implemented - including those related to the implementation of the one-judge and three-judge procedure (with respect to states that have ratified Protocol 14bis or made declarations pursuant to the Madrid agreement for the application of these provisions of Protocol 14) (see paragraph 44).

Amnesty International urges the CDDH to consider the advisability of ensuring greater visibility to the need for such studies and information, and the recommendation that the Conference at Interlaken agree the resources to obtain it and a timeframe for reforms which takes into consideration that such information is being sought and then considered.

Comments on Section III: The CDDH's Long-term Vision for the Convention System

12. Strengthening subsidiarity: the cross cutting theme (paragraphs12 and 14) Amnesty International shares the view expressed in the Draft Opinion that, fulfilment of states' obligations to respect human rights and to provide effective remedies would, more than anything else, help the system function correctly and make it less necessary for individuals to turn to the Court to seek redress (paragraph 14). The organization therefore welcomes the CDDH's recommendation that strengthening subsidiarity should be the central cross-cutting theme at the Interlaken Conference (paragraph 12).

13. The right of individual application: the cornerstone (paragraph 8) In view of the above, the organization also welcomes the view expressed in the Draft Opinion that **the right of individual application to the Court** should remain "the cornerstone" of the Convention's control systems, and the affirmation that alleged human rights violations that are unredressed at the national level should be brought to the Court (paragraph 8).

Amnesty International considers that consideration be given to clarifying the wording of this paragraph to the effect that it clearly stresses that the right of individual petition should remain the cornerstone of the Convention's control systems.

14. Reform of the Court (paragraph 10-11) Given the state of implementation of the Convention in the member states of the Council of Europe, as evidenced by the overwhelming majority of violations found in the judgments that the Court delivers, Amnesty International agrees with the view expressed (in paragraphs 10-11 of the Draft Opinion) that the time is not ripe for changing the Court into one in which would have the power to choose itself which of the applications it decides from among those it receives.

However, the organization is unclear about the meaning and intent of the recommendations in paragraph 10 that

- "the Convention contain more incentives for full protection of rights at national level"; and that

- "[n]ew modalities should be considered to allow the Court to ensure that its protection of individual rights is more efficiently geared toward subsidiary protection, where national protection is not yet fully effective and it can better perform its role of giving interpretive guidance to national courts and other authorities."

Consistent with the principle of subsidiarity and the right to individual application, Amnesty International considers that discussions in Interlaken and action taken thereafter should focus on making it less necessary for people to seek redress with the Court, rather than making it more difficult for people who need it to get redress for violations of their rights, where it was not available at home. Amnesty International would therefore oppose proposals which would have the effect of curtailing of the right to individual application, including new admissibility criteria.

Amnesty International considers that any mention of "new modalities" should be coupled with the clarification that they should be consistent with and ensure the practical and effective exercise of the right of individual application.

In addition, the organization considers that the role of the Court, as set out in Article 19 of the Convention, namely "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto", should be highlighted and emphasised.

Comments on Section IV: The Convention System in 2019

A. Implementation at the National Level

15. Proposals to enhance implementation at the national level (paragraphs 14,15,16 and 20) Amnesty International welcomes the proposals to promote the interpretative authority of the Court's case law in member states, including through legislative measures if necessary, and screening of existing and draft legislation and administrative practice to ensure compatibility with Convention standards, as interpreted by the Court (paragraphs 14, 15 and 16). **We consider that the recommendation to ensure the widest possible publication and dissemination of the Convention and the Court's case law will have little effect, if it is not translated into the languages used in the member states. Amnesty International therefore urges that the element of translation be included in paragraph 20.**

16. New mechanism (paragraph 17) Amnesty International agrees that any discussion of the creation of **any new mechanisms** for assisting member states to improve their implementation of the Convention should take account of and not interfere or duplicate the work of existing mechanisms and Council of Europe bodies, **including but not limited to those set out in paragraph 17.**

17. Advisory Opinions (paragraph 18) Amnesty International agrees that the proposal for **Advisory Opinions** should be explored, notwithstanding the fact that initially they will increase the Court's caseload, as they have the potential, in the long-term of assisting national courts in

ensuring better implementation of the ECHR at the national level and reducing the number of applications submitted to the Court on the issue concerned.

The organization considers that the concept raises a number of important issues that will require further elaboration and development. First, it is currently unclear in what circumstances an Advisory Opinion could be sought.

Second, Amnesty International suggests that the questions posed by the referring court would have to be sufficiently precise to ensure that the process of giving an Advisory Opinion is meaningful and consistent with the overall approach of the Court.

Third, it is vital that would-be applicants be given the opportunity to participate effectively in the process of seeking an Advisory Opinion. Amnesty International would therefore propose that legal aid before the Strasbourg Court should be available to would-be applicants whose cases are submitted for such and Opinion by a national court.

Fourth, Amnesty International also considers that it would be necessary to ensure that third parties are allowed to intervene in such cases, whether or not they had previously intervened in the domestic proceedings.

Fifth, the organization would recommend that an Advisory Opinion should be binding as to the interpretation of the Convention on all member states. Otherwise there is a substantial risk that member states might choose not to follow the Court's opinion and thereby undermine its authority.

Finally, Amnesty International would be concerned if the new inadmissibility criteria set out in Protocol 14 to the ECHR were to be applied to any applications arising related to national court's receipt of such an Advisory Opinion. The organization would consider that such applications would merit a full review by the Court of the manner in which the national court had applied the Advisory Opinion in the case at issue.

18. Third party interventions (paragraph 19) Amnesty International notes the proposal aimed at encouraging **third party interventions** by governments in major cases of principle in order to increase implementation of such judgments. This could increase the number of government interventions in such cases. The organization considers that would make it all the more important for civil society organizations to be alerted to the fact of such interventions , as requests or invitations to intervene, in a timely manner so as to allow them to also request to intervene in a timely manner.

19. Provision of information about Court and admissibility criteria (paragraph 21) Amnesty International welcomes focus on the need to ensure that provision of information to potential applicants about admissibility criteria and applications procedures, and urge the CDDH to consider **strengthening the wording of paragraph 21**.

20. Improving domestic remedies (paragraph 22) Amnesty International welcomes the statement in paragraph 22 that "the need to improve domestic remedies remains a priority". The organization **urges that consideration be given to strengthening this paragraph with**

reference also to the need to ensure the establishment of accessible and effective domestic remedies, where they do not exist.

21. Council of Europe's Commissioner for Human Rights (paragraph 23) Amnesty International welcomes the focus in paragraph 23 on the important role played by the Commissioner for Human Rights, and urge that **consideration be given to strengthening the language in a manner which highlights a proposal for the Commissioner's office to be provided with additional resources for the important work it carries out.**

B Situation of the European Court of Human Rights

22. Filtering mechanism and handling repetitive cases (paragraphs 25 ,26, 28 and 29)

Amnesty International recommends that mention of the need to evaluate the impact of the one-judge and three-judge procedures which have been recently put into place, be made in paragraphs which propose the creation of a new filtering mechanism (paragraphs 25 and 26) **and explorations of alternative formations in which the Court should rule on cases which raise issues about which the Court's case law is clear** (paragraphs 28 and 29).

23. Exceptional measures to deal with pending cases and Budget (paragraph 30) Amnesty International warmly welcomes the proposal for exceptional measures to deal with pending cases. The organization also welcomes the clarification that additional budgetary appropriations to allow strengthening of the Court's case-processing capacity must not come at the expense of the budge for other essential work of the Council of Europe concerning advice, assistance, cooperation and monitoring. **Amnesty International urges the CDDH to consider adding a separate paragraph related to the Budget elsewhere in the Opinion**.

24. Unilateral declarations and application of Article 37(1)(c) (paragraphs 31 and 32) Amnesty International is concerned about the proposal to encourage the striking out of otherwise admissible applications under Article 37(1)(c) based on unilateral declaration filed by a respondent state (paragraph 31). The Convention itself precludes such a measure, if "respect for human rights" requires that the Court continue examination of the application. In this regard, we are concerned at the inconsistent application by the Court of the criteria set out by the Grand Chamber in the case of *Tahsin Acar v. Turkey*.

Amnesty International considers that the expeditious disposal of otherwise admissible repetitive cases through the application of Article 37(1)(c) may in fact not be an effective measure to address the Court's workload, in the absence of an undertaking by the respondent state to implement general measures. Unless the Court requires that the state's unilateral declaration include an undertaking to implement specific general measures which address the underlying causes of the repetitive violation, it is likely that the Court will be faced with more applications highlighting the same systemic problem.

Amnesty International opposes the suggestion that the Court develop its interpretation of the Convention in a way to give effect to the rule *de minimus non curat praetor*. We consider that violations of the Convention are best addressed by ensuring effective domestic remedies, and

that redress should be available through the Court, in the absence of effective domestic remedies.(Paragraph 32).

25. Application fees (paragraph 33) Amnesty International also **opposes** in principle the proposal to introduce **application fees**. **The organization recommends that a cost-benefit analysis should be explicitly included as precondition to any further consideration of this proposal**.

26. Court expenses and punitive damages (paragraphs 34-35) Amnesty International welcomes the proposals to require respondent states to meet the Court expenses and payment of punitive damages in paragraphs 34 and 35.

27. Nomination and selection of judges (paragraph 36) Amnesty International welcomes the acknowledgement that the standing and credibility of the Court depend on the quality of its judges and the emphasis on the need for transparent national selection procedures. The organization urges that consideration be given to strengthening this paragraph by making a concrete proposal that the Council of Europe lay down a procedure for the nomination and selection of judges. Amnesty International considers that the recommendations set out in the report published by Interights in May 2003, "Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights", could serve as the framework for such procedures.[6]

28. Creating a Statute (paragraph 38) Amnesty International considers, in principle, that transferring some provisions of Section II of the Convention setting out some of the Court's operating procedures to a Statute of the Court (which would occupy a position between the ECHR and the Rules of the Court) could obviate the need for the time consuming process of ratification of additional Protocols for such purposes.

The organization believes that the content of a Statute of the Court, if established, should be amendable at the instigation of the Court as well as of member states and only:

i) on the agreement of the members of the Court and

ii) after a transparent consultation process, with comments sought and considered from the Parliamentary Assembly of the Council of Europe and other Council of Europe bodies and mechanisms[7], National Institutions for the Promotion and Protection of Human Rights; NGOs and lawyers who regularly practice before the Court; and thereafter

[6] "Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights", A Report produced by a panel of experts Professor Dr. Jutta Limbach (Chair), Professor Dr Pedro Cruz Villalon. Mr Roger Errera, The Rt. Hon. Lord Lester of Herne Hill QC, Professor Dr Tamara Morschakova, The Rt. Hon Lord Justice Sedley, Professor Dr, Andrzej Zoll, published by INTERIGHTS, May 2003. Available at http://www.interights.org/jud-ind-en/index.html.

[7] For example, amendment of the Statute of the European Court of Justice requires consultation with the European Parliament and Commission (if the Proposal for amendment has not been initiated by the Commission) as well as with the Court (if the proposed amendment is not at the initiative of the Court) except in relation to Title I and Article 64 of the Statute. Treaty on European Union, Article 281.

iii) upon a vote of a majority of two-thirds of the Committee of Ministers.

Amnesty International would oppose any proposal for the inclusion in the Statute of any Article of the Convention or Rule of the Court which is fundamental to the right of individual petition to the Court and the Court's capacity to protect Convention rights.

The organization agrees with the Group of Wise Persons that the Statute should exclude from simplified amendment procedures "provisions defining key institutional, structural and organisational elements of the judicial system of the Convention, namely the establishment of the Court, its jurisdiction and the status of its judges."[8]

C. Execution of Judgments and Supervision of Execution

29. Enhancing the Department of Execution of Judgments and working methods for Supervision of Execution (paragraphs 39 and 42) Amnesty International welcomes the proposals to enhance the resources available to the Department for the Execution of Judgments of the Court and to reflect on adapting the Committee of Ministers rules and working methods for supervision of the execution of the judgments of the Court to reflect present realities and challenges (paragraphs 39 and 42).

30. Supervision of Friendly Settlements and Unilateral Declarations (paragraph 41) Amnesty International agrees that there is a need for the supervision of the execution of undertakings made in Friendly Settlements and Unilateral Declarations, consistent with the amendment to Article 39 set out in Protocol 14 (paragraph 41). Amnesty International considers that such a mechanism could ensure that systemic problems are addressed and do not lead to repetitive applications to the Court.

[8] Report of the Group of Wise Persons to the Committee of Ministers, CM (2006) 2-3, 15 November 2006, para.50.