



## Joint NGO input to the ongoing negotiations on the draft Brighton Declaration on the Future of the European Court of Human Rights

20 March 2012

### I.- Introduction

Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre (EHRAC), the Helsinki Foundation for Human Rights (HFHR), Human Rights Watch, INTERIGHTS, the International Commission of Jurists (ICJ), JUSTICE and REDRESS take note of the continuing negotiations on the draft of the Brighton Declaration on the Future of the European Court of Human Rights (hereafter the “Draft Declaration”) and recall the NGO comments on the first Draft Declaration.<sup>1</sup>

We welcome many of the proposals in the Draft Declaration, designed to improve national implementation of the ECHR and to enhance the effectiveness of the Court. However, we remain deeply concerned that two proposals in particular - on **admissibility** and **codification of the principles of subsidiarity and margin of appreciation** - could seriously undermine the effectiveness of the European Court of Human Rights in protecting the Convention rights. These proposals should be abandoned.

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<sup>1</sup> *Joint NGO preliminary comments on the first draft of the Brighton Declaration on the Future of the European Court of Human Rights*, 5 March 2012, <http://www.amnesty.org/en/library/info/IO61/003/2012/en>. We have expressed our frustration at the lack of transparency in the current process and the barriers preventing civil society organisations commenting directly as drafts are produced and amended: *Reform of the European Court of Human Rights: Open letter to all member states of the Council of Europe. Consideration of the drafts of the Brighton Declaration must include civil society*, 8 March 2012, <http://www.amnesty.org/en/library/info/IO61/004/2012/en>. Paragraph references in this note refer to the first Draft Declaration.

We have prepared this brief summary of our key positions to assist the ongoing negotiations.

## **II.- The future of the European Convention on Human Rights**

The Draft Declaration clearly recognises that the future of the European Convention on Human Rights must be built around better national implementation of Convention rights at a domestic level. The acknowledgement that the right to individual petition is a “cornerstone” of the Convention system and that the Court has made an “extraordinary” contribution over the past 50 years must be applauded.

There are several matters being discussed which we warmly welcome and strongly support in the Draft Declaration. These include:<sup>2</sup>

- The affirmation that states parties must fulfil their primary responsibility to implement the Convention at home. Encouraging individual states parties to give effect to existing commitments on national implementation will improve individual enjoyment of Convention rights and divert cases away from national and international courts alike.
- The acknowledgement that all three branches of Government, including national parliaments and domestic judges have a responsibility for integrating the Convention into national practice, including through legislation and domestic jurisprudence.
- The recognition that specific measures are necessary to make national implementation work, and the commitment of states parties to take such measures.
- Measures to encourage Council of Europe support for national implementation.
- Affirmation and support of existing measures taken by the Court to help it improve its effectiveness and efficiency, including through the implementation of Protocol 14 and particularly the appreciation of the efforts of the Court to dispose of the outstanding clearly inadmissible cases by 2015.
- Encouraging states parties to engage with the pilot judgment procedure and other proactive measures developed by the Court to dispose of repetitive violations.
- The invitation to consider the potential for representative claims.
- Provision for the promotion of a stable judiciary and transparent terms of appointments.
- Proposals to remove the right of one party to object to a case being referred to the Grand Chamber.
- The appointment of additional judges in some circumstances.
- Measures to improve the execution of judgments of the European Court by states parties, including by the implementation of general measures to deal with systemic issues which lead to violations at home, the possibility of having sanctions effectively able to exert pressure on states failing to implement judgments, and the improvement of the transparency and accessibility of Committee of Ministers’ supervision meetings.
- Encouraging states parties to adopt effective domestic capacity for implementation of judgments, including through the publication of action plans which are made widely accessible.
- Calling for a swift and successful conclusion to the negotiations on the accession agreement for the EU to become a party to the ECHR.
- Making provision for the costs implications of the reform proposals to be assessed as soon as possible.

Unfortunately, we understand that a number of specific proposals on which we have previously expressed concerns, which would change the function of the Court from a supervisory to an advisory one, remain largely unchanged.<sup>3</sup>

## **III.- Adding a new admissibility criterion which would curtail the Court’s jurisdiction**

We are concerned that the states parties continue to discuss changes to the Court’s admissibility criteria which would curtail its jurisdiction. Admissibility criteria must never be used to adversely restrict the substantive jurisdiction of the Court. Moreover, doing so could, in practice, undermine the

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<sup>2</sup> This is not an exhaustive list.

<sup>3</sup> We have a number of concerns about the Draft Declaration. This note summarises our two primary concerns to help inform more focused discussion.

universal application of the Convention rights across the Council of Europe region and the long-term credibility of the Convention.

We object to proposals which would unduly restrict the Court's substantive jurisdiction by preventing an assessment on the merits of the states parties' observance of their engagements under the Convention. The proposal under discussion would either inappropriately shift the burden for a qualitative analysis of compatibility with Convention rights to the admissibility stage or would carve out from its jurisdiction a number of cases which the Court currently hears, bar a minimum form of review for rationality.

We regret that these proposals are still being negotiated and refer to our earlier statement on the long term implications of amending admissibility criteria in order to change the role of the Court from a supervisory to an advisory role.

Moreover, as the President of the Court's recent intervention at the UK Parliament's Joint Committee on Human Rights has shown, these proposals are unworkable in practice and would require the Court to make public, qualitative statements on standards of domestic judicial decision-making which would not be appropriate.<sup>4</sup>

#### **IV.- Codifying principles of judicial interpretation would undermine the Convention system**

States parties continue to discuss amending the Convention to include direct references to the principles of judicial interpretation known as "subsidiarity" and "margin of appreciation" (originally paragraph 19(b), supplemented by paragraphs 15 to 17). We strongly oppose such amendments to the Convention. In particular, we are deeply concerned at the potentially far-reaching consequences of incorporating the margin of appreciation in the Convention.

The principles of subsidiarity and the margin of appreciation are principles of judicial interpretation and as such are ill-suited to codification. Other principles of interpretation, equally important in the application of the Convention rights by the Court, include the principle of proportionality, the principle of dynamic and evolutive interpretation; the doctrine of the Convention as a living instrument; the principle that rights must be practical and effective rather than theoretical and illusory; and the principle that the very essence of a right must never be impaired. These are the principles that the Court uses to apply the Convention standards to the many specific and complex circumstances that are brought before it.

As principles of judicial interpretation, the margin of appreciation and the principle of subsidiarity are not appropriate for incorporation in the Convention, for several reasons, including:

- Such incorporation trespasses to an unacceptable degree on the role and autonomy of the Court in interpreting the Convention. For the states parties to amend the Convention to elevate the status of certain principles of interpretation, and to define the nature and content of those principles, would undermine the interpretative role of the Court.
- To single out the margin of appreciation, along with the principle of subsidiarity, in the Convention text, without reference to other, equally significant, principles of interpretation applied by the Court, misrepresents the role and status of those principles, suggesting that the Court should give them priority in its application of the Convention rights. Since the margin of appreciation is of its nature restrictive of the Convention rights, its elevation to the Convention has potentially far-reaching consequences in skewing the Court's jurisprudence, and undermining the Court's role in ensuring effective protection of the Convention rights.

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<sup>4</sup> Uncorrected transcript of oral evidence to the UK Parliament's Joint Committee on Human Rights, 13 March 2012, Q157, available at <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/publications/human-rights-judgments---uncorrected-evidence---13-march-2012/>. The video of the oral evidence is available at <http://www.parliamentlive.tv/Main/Player.aspx?meetingId=10508>.

- The principle of margin of appreciation is particularly difficult to define. Attempts thus far have not accurately managed to embody the complexity of the Court's jurisprudence. There is much subtle variation in how and when the margin applies. If the Convention were to include any definition of the nature or breadth of the margin of appreciation, or if it were to impose a wide margin of appreciation, this would significantly undermine the Court's capacity to apply the principle with sufficient care, restraint and flexibility to protect Convention rights.

We take note of the Court's reluctance in having these principles codified in the Convention and we support the position of the President of the European Court that their express inclusion in the Convention is not necessary.<sup>5</sup>

## **V.- Time for respite: The way forward?**

In addition to Protocol 14, the Interlaken and Izmir conferences have made important contributions to improvements in the Court's effectiveness. However, we agree with the President of the Court: the time has come for some respite. We are not persuaded that the proposals on admissibility or codification of the margin of appreciation or subsidiarity in the Convention are necessary or justified, or that they will contribute towards alleviating the challenges currently facing the Court.

We are also concerned about recent proposals to limit the Court's ability to afford just satisfaction to the injured party. Such proposals should not be pursued as they would unduly undermine the human rights protection system. With regard to proposals about extending the Court's jurisdiction to enable it to give advisory opinions to national courts of last resort, we agree with the Court's opinion that such a mechanism may in the long run be useful in fostering an effective protection of human rights in Europe. We also agree with the Court that the right of individual application should not be restricted where the Court has issued an advisory opinion.

We welcome the statement of the UK Government that it hopes the Brighton Conference will improve the sustainability of the Court. However, at its best, a part of the current Draft is incapable of supporting that goal. At worst, the proposals on admissibility and codification are capable of derailing the process begun in Interlaken and undermining the work of the Court. We note that it has been argued that these measures appear designed to meet domestic criticism in the UK of a few high-profile cases of the Court.

If, in the long-term, further reform is proved necessary, a more attractive option for addressing substantive burdens on the Court's time would be the use of a summary procedure based on an expanded notion of the "well-established case-law" of the Court.<sup>6</sup> Any further exploration of these options must integrate time for the existing improvements to the work of the Court to be evaluated and a clear opportunity for interested persons, including applicants and those who represent them, national human rights institutions and civil society, to contribute to the debate.

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<sup>5</sup> Uncorrected transcript of oral evidence to the UK Parliament's Joint Committee on Human Rights, 13 March 2012, Q156 and Q159, available at <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/publications/human-rights-judgments---uncorrected-evidence---13-march-2012/>. The video of the oral evidence is available at <http://www.parliamentlive.tv/Main/Player.aspx?meetingId=10508>.

<sup>6</sup> See paragraph 28 (g) of the Draft Brighton Declaration, as well as the Uncorrected transcript of oral evidence to the UK Parliament's Joint Committee on Human Rights, 13 March 2012, Q158, available at <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/publications/human-rights-judgments---uncorrected-evidence---13-march-2012/>. The video of the oral evidence is available at <http://www.parliamentlive.tv/Main/Player.aspx?meetingId=10508>.