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

Amnesty International, the European Human Rights Advocacy Centre (EHRAC), Interights, the International Commission of Jurists (ICJ), JUSTICE, Liberty and REDRESS take note of the first draft of the Brighton Declaration on the Future of the European Court of Human Rights (hereafter the "Draft").

We warmly welcome the continuing focus on the importance of more effective national implementation by national governments, legislatures and Courts and the recognition that the right of individual application is a cornerstone of the Convention system. We support the states' "deep and abiding" commitment to the Convention and concur that the Court has made an "extraordinary contribution to the protection of human rights in Europe for over 50 years".

Against this background we are deeply concerned that some measures at the heart of this Draft have the potential to marginalise and undermine the functioning of the Court without the evidence having been produced to establish that such radical change is needed and with little recognition of the damage they could do to the Convention system in the long-term.

The co-signing organizations, recalling their position on the main reform proposals discussed at the Council of Europe's Steering Committee for Human Rights (CDDH)[1], would like to make

[1] *Council of Europe: Comments on Follow-up to the Interlaken and Izmir Declarations on the Future of the European Court of Human Rights*, January 2012, http://www.amnesty.org/en/library/info/IOR61/001/2012/en. See also, *Council of Europe: Comments on follow-up of the Interlaken Declaration*, December 2010, http://www.amnesty.org/en/library/info/IOR61/018/2010/en.

the following comments on the first Draft, which contains very positive sections on the implementation of the Convention and the Court's case law, but gives rise to serious concerns regarding access to the Court, its integrity and authority. We are particularly concerned at two aspects of the draft Declaration:

- The proposal to incorporate the principle of subsidiarity and the doctrine of the margin of appreciation – broadly defined – into the text of the Convention (paras.17 and 19(b)).
- The proposals to amend the admissibility criteria (paras.23(b) and 23(c)).

I.- Positive aspects of the first version of the Draft

a - National implementation

The co-signing organizations welcome the strong emphasis in the Draft on the need for effective national implementation of the Convention and the Court's case-law, in particular:

- The Draft affirms the "strong commitment of the States Parties to fulfil their primary responsibility to implement the Convention at national level" (**para. 12(a)**), recalls the past Committee of Ministers recommendations on these issues, and lists specific and indeed critically important measures that states shall take to enhance the implementation of the Convention at national level (**para. 12(c)**).

  We welcome "[…] the determination of the States Parties to ensure effective implementation of the Convention at national level by taking the following specific measures, so far as relevant […]". This marks a positive strengthening of the level of commitment by states parties in comparison to past High-Level Declarations.

- The Draft underlines the important role the Council of Europe plays in assisting and encouraging better national implementation, notably through technical assistance, and invites the Secretary General of the Council of Europe to make proposals to the Committee of Ministers to better assist states in this regard (**para. 14**).

- With regard to the implementation and execution of judgments, the Draft contains important elements, in particular with regard to the possibility of sanctions for states who fail to implement judgments of the Court in a timely manner. Importantly, the possibility of having sanctions imposed by default if certain criteria are met (**para. 36 (c)**), as well as financial penalties "where a failure to implement a judgment leads to a significant number of repetitive applications to the Court" (**para. 36 (d)**) would be influential incentives for states to comply more effectively with their obligations under the Convention.

b - Filtering and additional judges

The co-signing organizations welcome the Draft's acknowledgement of the recent progress the Court has made in reducing the backlog of clearly inadmissible cases, a backlog which it plans to clear by 2015 (**paras 25 and 28(b)**).

However, with regard to the support the Court needs both to ensure sustainable filtering and to achieve its goal of clearing the current backlog, the Declaration should contain a stronger commitment from states to provide the necessary contracted and seconded Registry staff.[2]

[2] According to information from the Registry, in order to achieve a balance in filtering between cases coming in and cases going out, the Court needs the equivalent of 1.5 A-grade lawyers and 21 B-grade

The co-signing organizations broadly welcome the proposals contained in the Draft regarding the possibility of allowing for additional judges if certain circumstances are met. The alternatives laid out in **paragraph 28(f)** include:

- additional judges for clearly inadmissible and repetitive cases,
- additional judges for other types of cases as well (Chamber cases, in addition to Single-Judge and Committee cases).

However, both proposals are subject to relatively strict contingency conditions. In particular, the proposal for additional judges for a broader category of cases could only be considered if the Court "cannot by any other means" respond to applications pending before the Chambers of the Court in a reasonable time **(para. 28(f))**. This wording would render recourse to the appointment of such additional judges very difficult to achieve in practice.

c - Relinquishment to the Grand Chamber

The co-signing organizations welcome the proposal to remove the ability of one of the parties to object when a Chamber seeks to relinquish jurisdiction to the Grand Chamber (**para. 33(e)**).

II.- Our key Concerns

We welcome the decision to leave aside many problematic proposals discussed at the CDDH and which we opposed, including: a) fees for applicants; b) any "sunset clause"; c) sanctions in futile cases; d) compulsory legal representation; and e) passing the role of filtering to Registry lawyers instead of judges. However, the text of the draft under consideration causes us significant concern that this round of negotiations will take the process begun at Interlaken in an unintended direction, undermining the Court by changing its role from an authoritative international adjudicative body to an advisory commission.

a - Margin of appreciation

The Draft proposes that the doctrine of the **margin of appreciation** be expressly written into the text the Convention **(para. 19(b))**. The margin of appreciation doctrine has been developed by the Court in its case-law and it should be left to the Court to continue to do so. Moreover, in addition to posing many challenges as to the precise contours of its definition, including such a doctrine in a binding treaty text risks seriously hindering its evolution and adaptation to meet varying and changing circumstances. The margin of appreciation is a tool of judicial interpretation which, as such, is not appropriate for inclusion in a treaty; rather, it is for the Court to interpret and apply the doctrine.

The co-signing organizations are particularly concerned about the statement in the Draft that "each State Party enjoys a considerable margin of appreciation in how it applies and implements the Convention" **(para. 17).** The language used misstates the doctrine of the margin of appreciation and constitutes a very dangerous extension of the current doctrine as applied by the Court. This doctrine as developed by the Court does not by any means allow a "considerable" margin of appreciation to states in all circumstances and in relation to all rights. While in some instances the margin of appreciation will be wide, the Court has always accepted that there are circumstances in which states' margin of appreciation is narrow, and that the margin of appreciation does not apply at all in respect of some rights or aspects of rights.

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assistant lawyers. The A-grade lawyers would be required for Russia and Turkey, as are the 13 B-grade lawyers. The remainder of B-grade lawyers would be for Bulgaria, Hungary, Italy, Moldova and Serbia. Moreover, in order to clear the backlog by 2015, the Court would need 12 seconded lawyers for 3 years: one for each of Turkey, Romania, Poland, Ukraine, Moldova, Italy, Bulgaria, Serbia, Germany, France, Slovenia and Croatia; and 2 lawyers for 1 year (1 for Montenegro and 1 for Bosnia & Herzegovina).

We are also concerned that the final sentence of paragraph 17 ("the role of the Court is to review decisions taken by national authorities to ensure that they are within the margin of appreciation") significantly misrepresents the role of the Court under article 19 of the Convention. Under article 19, the role of the Court is to ensure the observance by states of their obligations under the Convention. While in certain cases, that may include a consideration of the margin of appreciation, in others, it does not. In all cases, the fundamental role of the Court is to adjudicate on whether the national authorities have violated Convention rights.

The co-signing organizations therefore propose the deletion of paragraph 19(b) and paragraph 17. If paragraph 17 survives negotiation, then it should be amended to reflect the limits of the doctrine of the margin of appreciation

b - Principle of subsidiarity

The Draft proposes amending the Convention in order to include what is referred to as the **principle of subsidiarity (para. 19(b))**. This principle already derives from articles 1 and 19 read together and the Court has further developed this concept in its case-law. We do not see the necessity of including a rigid definition of this principle in a binding treaty. As already mentioned, we propose the deletion of paragraph 19(b). In addition, the co-signing organizations would like to draw the attention of states parties to the following:

- The principle of subsidiarity, according to which the primary responsibility for protecting Convention rights lies with the member states, puts the onus on states to implement their Convention obligations, and gives to the Court the competence to address gaps in the effective protection of all Convention rights. It must not be misused to limit the Court's substantive jurisdiction.

- An interpretation of the principle of subsidiarity that sought to limit to such a significant degree the Court's mandate to assess states' compliance with their Convention obligations would run counter to the whole role of the Court. Its sole object and purpose is to ensure the observance of their engagements by the contracting states, as is expressly stated in article 19 of the Convention.

  Where states have effectively respected and implemented their obligations under the Convention, an analysis of the merits of the case will necessarily lead the Court to conclude that no violation of the Convention has taken place. Therefore, the principle of subsidiarity will be respected. In line with the importance of respecting the Court's independence and mandate under the Convention, the Declaration should recall that the question of determining whether states have effectively respected and implemented their obligations under the Convention is for the Court, and for the Court alone, to decide.

In addition, and contrary to **paragraph 16** and **paragraph 42 (d)(ii)**, the Court does not merely provide "*an* authoritative interpretation of the Convention", but "*the* authoritative interpretation of the Convention". These paragraphs should be amended accordingly.

This language, together with the use of the expression "subsidiary jurisdiction" of the Court, in **paragraph 3**, suggests that the purpose of the Draft is to change the nature of the function of the Court. The traditional description of the Court's jurisdiction is "supervisory". The adoption of the term "subsidiary" is inappropriate and gives the impression that the Court has a marginal role to play when it comes to ensuring respect for the Convention rights. Quite the contrary, the role of the Court and the scope of its jurisdiction under article 19 ECHR are fundamental in this regard. Therefore, the term "supervisory" role and jurisdiction better reflects the present system of protection of human rights in Europe and, also, how it should remain. We call for paragraph 3 to be amended accordingly.

c - Right of individual application

With regard to the **right of individual application** to the Court, the Draft contains some problematic wording:

- In some instances, the Draft says the right of individual application "is a key component" of the machinery for protecting the rights and freedoms set forth in the Convention **(paras 2 and 38)**. The right of individual application is not only a "key component"; it lies at the heart of the system of human rights protection in Europe. It constitutes a fundamental guarantee of the effectiveness of the Convention's protection system and as such it must be fully preserved. Therefore, the Brighton Declaration must reaffirm the fundamental importance of fully preserving this right which constitutes, in the words of the Interlaken and Izmir Declarations, a "cornerstone of the Convention mechanism".

- Importantly, the paragraph on the right of individual application **(para. 20)**, which does use the Interlaken and Izmir wording ("cornerstone of the Convention system"), goes on to say that:

  > *"In principle, any person may apply to the Court on the basis that their rights and freedoms as set forth in the Convention have been violated. The right to present an application to the Court should be practically realisable, and States Parties must ensure that they do not hinder in any way the effective exercise of this right."* **(para. 20 – emphasis added)**.

  The expression "in principle" must be removed from the text, as it undermines the nature and fundamental importance of the right of individual application to the Court.

d - Harmful reform proposals undermining and marginalising the role of the Court

The co-signing organizations are deeply concerned that some **particularly harmful proposals** have been included in the text of the Draft, including:

- New admissibility criterion **(para. 23 (c))**
- Removing a safeguard to the "significant disadvantage" criterion **(para. 23(b))**
- The so-called 'pick and choose' proposal, which has been included for longer-term discussions **(para. 42 (e)(i))**

These proposals have to various extents been discussed at the CDDH and we have repeatedly expressed our opposition to their adoption. The detailed arguments against these proposals can be found in the following joint NGO submission issued in January 2012: *Council of Europe: Comments on Follow-up to the Interlaken and Izmir Declarations on the Future of the European Court of Human Rights,* http://www.amnesty.org/en/library/info/IOR61/001/2012/en. We oppose their inclusion in any Declaration. We make a few specific additional comments, below.

i) Curtailing the jurisdiction of the Court: a new admissibility criterion

The Draft dangerously frames the issue of admissibility in a way which uses the admissibility criteria as a tool to provide that the Court will deal with only a limited number of issues: "The admissibility criteria should provide the Court with practical tools to ensure that it adjudicates only those cases in which *the principle or the significance of the violation warrants consideration by the Court*. They should also help regulate the number of cases before the Court." **(para. 21 – emphasis added)**. Admissibility criteria must never be used to adversely

restrict the substantive jurisdiction of the Court. Moreover, doing so could, in practice, undermine the universal application of the Convention rights across the Council of Europe region and the long-term credibility of the Convention.

The co-signing organizations strongly oppose the proposed **new admissibility criterion (para. 23 (c))** for the following main reasons:

- The proper interpretation and implementation of the Convention rights by the domestic tribunals must be analysed by the Court at the merits stage, not at the admissibility stage.
- This proposal would result in the Court's mandate to assess compliance with the Convention being significantly limited and would run counter to the very purpose of article 19 of the Convention.
- This proposal would significantly limit the Court's substantive jurisdiction, which is at odds with the principle of subsidiarity.
- In practice, this proposal is likely to undermine significantly the universal application of the Convention and could create a twin-track approach to its application and further development.
- As the Court has recognised, tinkering with its admissibility criteria cannot improve either the effectiveness of the Convention or the efficiency of the Court, if it is to meet its responsibility under article 19.

Moreover, the co-signing organizations note that the wording has been modified from the initial UK/Swiss proposal and that the first amendment ("a national court *taking into account* the rights guaranteed by the Convention", whereas the initial UK/Swiss proposal mentioned "a national court *applying* the rights guaranteed by the Convention") further widens the scope of the criterion for declaring an application inadmissible, making the proposal even more problematic.

ii) Reduction of time limit for applying to the Court

With regard to the proposal in **paragraph 23 (a)** to reduce the **6 months time limit** for applying to the Court, we would like to emphasise that this proposal has been suggested only very recently, without proper discussions of its purpose or added value in the light of the Court's current case-law and practice on this issue. It is premature to move immediately to drafting an amendment. Such a reduction may unduly restrict individuals from applying to the Court and more time should therefore be given to study the reasons and potential effects of this proposal.

iii) Independence and authority of the Court

We would also like to draw attention to the infringements made on the independence and authority of the Court by the proposals mentioned in **paragraphs 23 (f) and 23 (g)**.

e - Advisory opinions

In principle, the co-signing organizations consider favourably proposals to empower the Court to give opinions at the request of national courts against whose decisions there is no judicial remedy under national law. However, in any event the applicant must retain the right to bring his/her case to the Court under article 34 ECHR.

Regarding the proposal for national courts to be able to request **advisory opinions** from the Court **(para. 19(d))**, the Draft anticipates that following such an option, the national court will be left to apply the advisory opinion to the facts of the case **(para. 19(d)(iii))**, and that "when [the advisory opinion is] applied by the national court the individual in whose case the opinion was sought should ordinarily have no further right to make an application to the Court on the

same matter" **(para. 19(d)(iv))**. The combined effect of these two aspects risks an adverse impact on the right of individual application to the Court. We consider that the applicant must always retain the right to bring his/her case to the Court under article 34 ECHR, including in order for the Court to review the proper interpretation and application of its advisory opinion.

f - Financial implications

The co-signing organizations are concerned that **paragraph 44** on **financial implications** of the measures envisaged in the Draft is framed in a way which seeks to limit to the maximum possible extent any potential increase in funding of the Court. In addition, no particular commitment is made. The Court, including its Registry, will need to be adequately resourced to fulfil its fundamental role in effectively ensuring the protection of human rights in Europe and member states must properly commit to providing the necessary resources to address those needs.

g - Longer-term future of the Court

The co-signing organizations are concerned that the second sentence of **paragraph 40** may be misunderstood as implying that in order for the Court to deal with fewer cases, access to the Court shall be restricted. We agree that the Court should in the future be dealing with fewer cases, but only because effective national implementation of the Convention will reduce the necessity for applicants to go to the Court. In sum, the root cause of the problem which results in individuals having to apply to the Court must be addressed, not access to the only remedy available when states default.

The co-signing organizations take note of the proposal to establish a Commission to consider the future of the Convention and the Court and welcomes the proposed inclusion of representatives of applicants to the Court and of civil society (**paragraph 42 (c)**). We are concerned that the proposals appear to establish a semi-permanent form of rolling review for the Court. There is no evidence that there is a need for further review, despite the impact of commitments and reforms made in Protocol 14, Interlaken and Izmir. We consider that time is needed to allow the Court to fulfil its role and for these measures to take effect and that the proposals for a new Commission are pre-emptive.

If, however, a more permanent commitment for review is made, the Brighton Declaration should not seek to pre-empt the options to be potentially discussed in this process, should it be established. Therefore, the list mentioned in **paragraph 42 (e)** should be removed.