



**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

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# EXECUTIVE SUMMARY AND RECOMMENDATIONS

## I - National implementation and subsidiarity

The co-signing organizations **welcome and support** the emphasis placed in the Interlaken Declaration on action required at the national level to implement the European Convention on Human Rights (the Convention or ECHR) and the reaffirmation of related calls to state parties in the Izmir Declaration.

National implementation of the Convention rights, including the case-law of the European Court of Human Rights (the Court), is fundamental both to ensure respect for human rights in Europe and to alleviate the workload of the Court. The current large number of applications is largely due to the states' failure to effectively implement the Convention.

National implementation lies at the core of the principle of subsidiarity. In particular, subsidiarity 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 does not seek to limit the Court's substantive jurisdiction.

### Recommendations:

- Effective domestic implementation of the Convention must be the primary concern of all Council of Europe member states.
- Active steps to strengthen national implementation and reduce the high number of repetitive applications coming before the Court should be a necessary precursor to any further concrete steps towards agreement on reform of the Court.
- National reports on implementation must inform an open and transparent reflection by the Committee of Ministers on what further action is warranted at the Council of Europe level to guide and assist states in meeting their Convention obligations.
- Adequate resources should be made available by the Committee of Ministers to provide for the effective analysis and scrutiny of each of the national reports.

## II - Specific proposals for reform of the Court currently under discussion

### 1. Access to the Court

Effective access to the Court and respect for the right of individual application are of paramount importance to ensure proper protection of human rights in Europe. They should be protected at all times.

The co-signing organizations are **seriously concerned** by recent proposals which would severely affect access to the Court, including by way of introducing a new admissibility criterion and a sunset clause, as well as providing a wide discretion to the Court to pick and choose the cases it deems necessary to examine.

## **a. Admissibility criteria and new procedural rules or practices concerning access to the Court**

### ***i. New admissibility criterion relating to cases where national courts have applied the Convention***

The co-signing organizations **strongly oppose** this proposal:

- 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.

### ***ii. Sunset clause***

The co-signing organizations **strongly oppose** this proposal:

- By having his/her case automatically struck out of the Court's list of cases for a reason not pertaining to his/her application, but to the passing of a certain period of time, and prior to any judicial assessment of his/her case, the applicant's right of individual petition guaranteed by Article 34 ECHR would be violated.

### ***iii. Amendment of Article 35(3)(b) ECHR***

The co-signing organizations **oppose** this proposal:

- The "duly considered" safeguard clause constitutes a clear illustration of the principle of subsidiarity.
- The fundamental value of this safeguard clause is to avoid a denial of justice, a fundamental principle of the rule of law.

### ***iv. Discretion of the Court to decide which cases to examine***

The co-signing organizations **oppose** this proposal:

- Although this proposal is only very succinctly elaborated at this stage, it appears that the option envisaged would significantly restrict the right of individual application and adversely change the nature of the current judicial system of protection of human rights established by the Convention.

## **b. Fees for applicants to the Court**

The co-signing organizations **strongly oppose** this proposal:

- On the principle  
The introduction of a system of fees would significantly undermine the right of individual application to the Court and deter well-founded applications.
- On the modalities:  
The principal objective of a possible system of fees has been described as a measure to reduce the number of clearly inadmissible applications while at the

same time not deterring well-founded ones. The analysis of the main aspects and possible options of a system of fees as set out in the Steering Committee for Human Rights (CDDH) report on this issue confirms the impracticability of such an objective. Maximising the deterrent effect on clearly inadmissible applications while minimising the deterrent effect on well-founded applications, the risk of a discriminatory effect between applicants, as well as the administrative and budgetary consequences, cannot be properly reconciled.

### c. Sanctions in futile cases

The co-signing organizations **do not support** this proposal:

- We note that the CDDH report on this issue neither gives an indication of the scope of the actual problem the Court faces with respect to futile applications, nor demonstrates that the proposed sanction scheme would in fact substantially reduce the number of such applications to the Court.
- There may very likely be situations where would-be applicants with well-founded applications may refrain from seeking redress because of the threat of a sanction.
- Most importantly, a system of sanctions as set out in the CDDH report would adversely affect the right of individual application where someone has his/her application rejected on account of his/her failure to pay the penalty for a previous application, rather than for a reason pertaining to his/her new application.
- It would send an unfortunate message about the current challenges the Court faces if sanctions are imposed on applicants who submit clearly unmeritorious cases, while states that persistently fail to execute judgments in repetitive cases are not sanctioned, despite the significant burden the large number of repetitive cases pose for the Court.

### d. Compulsory legal representation

The co-signing organizations believe that the current proposal for compulsory legal representation **cannot be supported**:

- Unless legal aid is available at the national level in all 47 CoE member states for people who do not have the means to pay for a lawyer, and suitably qualified and trained lawyers are available to potential applicants, compulsory legal representation risks denying people with well-founded human rights claims access to the Court.

### Recommendations:

- Any future reforms must ensure that the right of individual application is preserved and individuals seeking redress for violations of any of their rights under the Convention have effective access to the Court.
- The substantive jurisdiction of the Court must be preserved in order not to weaken the Court's mandate under the Convention to ensure the observance of the engagements undertaken by member states in the Convention and its Protocols.

## 2. Filtering mechanism and decision-making capacity of the Court

The co-signing organizations welcome the recent information provided by the Court's Registry, which has shown that very considerable progress has already been made under Protocol 14 in speeding up processing of manifestly inadmissible cases through the use of single judges. The fact that these effects have taken some time to emerge only indicates that the impact of Protocol 14 may yet be even more significant.

### a. Decision-making capacity of the Court

#### *Ad litem judges*

The co-signing organizations **welcome and support** this proposal:

- The judges could be drafted to the Court on a short-term basis to address overloads in the Court's work as they arise.
- They could sit in any formation of the Court other than the Grand Chamber or the Plenary.
- This proposal has the merit of flexibility, and would ensure the most efficient use of resources, adjusting to pressures in the Court's caseload that may change over time.
- It would notably assist the Court in addressing the backlog of Committee and Chamber cases.

### b. New filtering mechanism

#### *i. Power of Registry lawyers to decide on admissibility of applications, including in single-judge cases*

The co-signing organizations **oppose** this proposal:

- Any amendment to the Convention should preserve the principle of judicial decision-making in all cases brought before the Court.
- Public confidence in a decision by a judge who is independent and is bound by judicial obligations of impartiality will be considerably greater than where the decision is made by an official.

#### *ii. Additional so-called "junior" judges responsible for filtering of clearly inadmissible and of repetitive applications*

##### Clearly inadmissible applications (single-judge cases)

The co-signing organizations **welcome** this proposal:

- An additional cadre of judges, recruited specifically to adjudicate on manifestly inadmissible cases could provide a credible and viable means of strengthening the Court's capacity for filtering.

##### Repetitive admissible cases (Committee cases)

The co-signing organizations **oppose** this proposal:

- These cases often arise from serious systemic dysfunctions and are the product of some of the most intractable human rights problems in the Council of Europe region.

- Delegating the power to rule on repetitive cases to less experienced judges of the Court may send a misleading signal that the issue concerned in a repetitive case is of lower priority, whereas in fact such cases are of critical importance to the whole system of human rights protection in Europe.

### Recommendations:

- With regard to the proposal of having *ad litem* judges dealing with Single-Judge, Committee and Chamber cases:
  - i. In any new system of *ad litem* judges, new judges recruited shall be of similar status and experience to other judges of the Court.
- With regard to the proposal of having so-called “junior” judges added to the filtering mechanism:
  - i. Any new panel of judges should be suitably qualified, possessing qualifications necessary for the appointment to judicial office as well as independence, expert knowledge of the case law of the Court and of its two official languages.
  - ii. As far as possible, they should include judges familiar with the languages and legal systems of the states in respect of which the applications are made.
- With regard to resources:
  - i. It is essential, if the Interlaken Declaration’s objectives of eliminating the backlog and preventing its recurrence are realistically to be achieved, that the need for additional resources be acknowledged, and that the Committee of Ministers make a commitment to provide such resources to the Court and the Registry.

## 3. Advisory opinions

The co-signing organizations **welcome** this proposal to empower the Court to give opinions at the request of national courts against whose decisions there is no judicial remedy under national law.

### Recommendations

- Clear deadlines shall ensure that adverse delays in the domestic proceedings are avoided.
- In any event the applicant shall retain the right to bring his/her case to the Court under Article 34 ECHR.

## 4. Simplified amendment procedure/Establishing a Statute of the Court

The co-signing organizations **support in principle** the proposal to create a mechanism allowing for the simplified amendment of certain organizational provisions of Part II of the Convention.

The co-signing organizations **strongly oppose** the transfer of provisions of the Rules of Court to any instrument where they could be subject to a simplified amendment

procedure.

In case provisions related to interim measures (Rule 39), pilot judgment procedure (Rule 61) and unilateral declarations are transferred to the Convention or a Statute, the co-signing organizations **consider** that only the core principles underpinning these procedures may be subject to such a transfer, provided they are neither amended in scope and substance nor subject to any simplified amendment procedure.

### **Recommendations**

- The purpose of any simplified amendment procedure of the Convention must be to maintain a strong Court with enhanced ability to respond flexibly to changes in its caseload, in order to most effectively fulfil its role under Article 19 ECHR.
- Any such instrument should be designed to support the Court in delivering prompt and effective justice to individual applicants in accordance with the right of individual petition.

## **5. Election of judges**

The co-signing organizations **welcome** the creation of a panel of experts to advise on the candidates for election as judges.

The co-signing organizations also **welcome** the preparation of a draft non-binding Committee of Ministers' instrument codifying and clarifying existing norms and standards to better guide national practices for the selection of judicial candidates.

### **Recommendation**

- The Parliamentary Assembly of the Council of Europe should continue to strengthen its procedures in order to ensure a robust and transparent scrutiny of the list of candidates submitted by states, as well as of the quality of nomination processes at the domestic level.



# INTRODUCTION

1. Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre (EHRAC), the Helsinki Foundation for Human Rights (HFHR), INTERIGHTS, the International Commission of Jurists (ICJ) and JUSTICE welcome the opportunity to provide the following comments on the follow-up to the Interlaken and Izmir Declarations on future reforms of the European Court of Human Rights.<sup>1</sup>

2. This document focuses in particular on the various reform proposals which are currently being discussed in the context of the preparation of the Steering Committee for Human Rights' (CDDH) Final Report to the Committee of Ministers on measures requiring amendment of the European Convention on Human Rights.<sup>2</sup> We particularly raise concerns about new proposals raised at a late stage in the work of the CDDH by a number of states. We are concerned that these proposals – which include the introduction of a new restrictive admissibility criterion and of a sunset clause – would severely damage the right to individual petition.

3. Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre (EHRAC), the Helsinki Foundation for Human Rights (HFHR), INTERIGHTS, the International Commission of Jurists (ICJ) and JUSTICE consider that any reforms to the Convention system, including to the European Court of Human Rights, should ensure better implementation of the Convention by the 47 member states of the Council of Europe at national level. The European Court of Human Rights must be a strong Court, accessible to individuals who are victims of violations of their Convention-protected rights and who have had no effective redress domestically. It should be a Court which will give a reasoned decision on whether a case is admissible, or a reasoned judgment on the merits of a case, without undue delay. To these ends we consider that any reforms to the Court should ensure that:

- the role of the Court in protecting all human rights under the Convention is preserved, and its independence and authority are respected;

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<sup>1</sup> See *Interlaken Declaration and Plan of Action*, adopted in February 2010 at a Ministerial level conference on the future of the European Court of Human Rights, [http://www.coe.int/t/dghl/standardsetting/conferenceizmir/INTERLAKEN%20DECLARATION%20final\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/conferenceizmir/INTERLAKEN%20DECLARATION%20final_en.pdf). From 26-27 April 2011 Ministers and other senior officials from the 47 Council of Europe member states met in Izmir, Turkey, to take stock of the reform process launched at the Interlaken Conference and give further directions for the ongoing reform process. The text of the *Izmir Declaration and Follow-up Plan* is available at: <http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Declaration%20Izmir%20E.pdf>.

<sup>2</sup> It draws on previous joint comments our organizations provided in relation to the earlier CDDH report to the Committee of Ministers on measures resulting from the Interlaken Declaration that do not require amendment of the Convention and other joint statements and positions the organizations have issued in the course of the ongoing discussions about the reform of the Court. See Joint NGO document *Council of Europe: Comments on follow-up of the Interlaken Declaration*, December 2010, <http://www.amnesty.org/en/library/info/IOR61/018/2010/en>. See also: *Joint statement for the High Level Conference on the future of the European Court of Human Rights, Izmir, Turkey (26-27 April 2011)*, 19 April 2011, <http://www.amnesty.org/en/library/info/IOR61/008/2011/en>; and *Human rights in Europe: Decision time on the European Court of Human Rights*, December 2009, <http://www.amnesty.org/en/library/info/IOR61/009/2009/en>.

- the fundamental right of individual petition is preserved and not further curtailed;
- there is an efficient, fair, consistent, transparent and effective screening of applications received, in order to identify the admissible applications from the very high proportion (around 90 per cent) of applications that are inadmissible under the current criteria;
- judgments are given within a reasonable time, particularly in cases where time is of the essence, or that raise repetitive issues where the Court's case law is clear and those that arise from systemic problems;
- the Court, including its Registry, is given adequate financial and human resources, without adversely impacting the budgets of other Council of Europe human rights mechanisms and bodies;
- appropriate solutions to the problems faced by the Court are devised, including measures taken by states at national level, on the basis of informed analysis and transparent evaluation of both the root of the problems and recent and future reforms.

## NATIONAL IMPLEMENTATION AND SUBSIDIARITY

4. Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre (EHRAC), the Helsinki Foundation for Human Rights (HFHR), INTERIGHTS, the International Commission of Jurists (ICJ) and JUSTICE have welcomed the emphasis placed in the Interlaken Declaration on action required at the national level to implement the Convention and the reaffirmation of related calls to state parties in the Izmir Declaration.

5. Noting that over 83 per cent of the Court's more than 13,000 judgments over the last 50 years have found at least one violation of the Convention, it is clear that better implementation of the Convention at national level would mean greater respect for human rights throughout Europe. It would also reduce the need for individuals to apply to the Court for redress. Active steps by member state governments to implement the Convention in national law, policy and practice are fundamental to making a reality of the principle of subsidiarity, according to which the primary responsibility for protecting Convention rights lies with the member states.

6. Against this background, we regret the increasing use of the term *subsidiarity* coupled with proposals which, in our view, are designed to limit the substantive jurisdiction of the Court without provision being made for substantive improvements to domestic arrangements for the implementation of Convention rights. The reference in the UK Objectives for its Chairmanship of the Committee of Ministers to the role of the Court as "subsidiary" is particularly regrettable. We consider that effective reprioritisation of reforms focused on subsidiarity must recognise that the primary responsibility for domestic implementation goes hand in hand with the supervisory jurisdiction of the Court, which

must be protected and respected in any future reforms as we have set out above.<sup>3</sup>

7. We have noted that some 50 per cent of the judgments that the Court has issued over the last 50 years are on repetitive issues. It is therefore axiomatic that the way to ensure the reduction of repetitive cases is for each member state to ensure the “full, effective and rapid execution of the final judgments of the Court”<sup>4</sup>. We warmly welcome the encouragement to states to take steps to improve domestic execution of judgments in the Interlaken Action Plan. However, a lot of work remains to be done to encourage national authorities, including parliaments, to play a more active role in ensuring timely execution of the Court's judgments.

8. Effective engagement by national authorities with the positive steps for improving domestic arrangements for national implementation across the Council of Europe is at the heart of the reprioritisation of subsidiarity in the implementation of the Convention. Active steps to strengthen national implementation and reduce the high number of repetitive applications coming before the Court should be a necessary precursor to any further concrete steps towards agreement on reform of the Court.

9. National reports on the implementation of the steps outlined in the Interlaken Action Plan were due to be submitted before the end of 2011. We encourage states to engage proactively in the process of their review, which must be one of genuine scrutiny and engagement with progressive reform towards the improvement of existing mechanisms for domestic implementation of Convention rights. Contracting parties must be ready to engage in reviewing progress across domestic boundaries, to share from positive examples of good practice and to press for further reform to strengthen national implementation where necessary.

10. We reiterate our recommendation that adequate resources should be made available by the Committee of Ministers to provide for the effective analysis and scrutiny of each of the national reports. In this regard, all national reports as well as the findings emanating from their analysis shall be made publicly available and widely disseminated without delay, in order to serve as the basis of an open and transparent reflection by the Committee of Ministers on what further action is warranted at the Council of Europe level to guide and assist states in meeting their Convention obligations.<sup>5</sup>

11. We welcome the draft recommendation of the PACE Committee on Legal Affairs and Human Rights that national parliaments should be engaged with the process of reporting under the Interlaken Declaration. We consider that PACE, and specifically, the Committee on Legal Affairs and Human Rights would be particularly well placed to conduct independent scrutiny of the reporting process and encourage the Committee to allocate time and resources for this purpose.<sup>6</sup>

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<sup>3</sup> See also *Joint statement on the United Kingdom's priorities and objectives for its Chairmanship of the Committee of Ministers of the Council of Europe*, 4 November 2011, <http://www.amnesty.org/en/library/info/IOR61/013/2011/en>.

<sup>4</sup> See paragraph 7 of the Interlaken Declaration.

<sup>5</sup> Joint NGO document *Council of Europe: Comments on follow-up of the Interlaken Declaration*, December 2010, paragraph 16.

<sup>6</sup> AS/JUR (2011) 44, Committee on Legal Affairs and Human Rights, *Guaranteeing the authority and effectiveness of the European Convention on Human Rights*, Report, 4 November 2011, paras 5 (Draft

# ACCESS TO THE COURT

12. As both the Interlaken and the Izmir Declarations reaffirmed, the right of individual application is a “cornerstone” of the Convention system<sup>7</sup>. Any future reforms must therefore ensure that the right of individual application is preserved and individuals seeking redress for violations of their rights under the Convention have effective access to the Court.

## ADMISSIBILITY CRITERIA AND NEW PROCEDURAL RULES OR PRACTICES CONCERNING ACCESS TO THE COURT

13. Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre (EHRAC), the Helsinki Foundation for Human Rights (HFHR), INTERIGHTS, the International Commission of Jurists (ICJ) and JUSTICE have serious concerns regarding recent proposals which would restrict access to the Court for alleged victims of human rights violations. Moreover, some of these proposals have been made at a very late stage in the discussion cycle, i.e. only a few months before the CDDH has to send its final report to the Committee of Ministers. This timing is particularly unfortunate given the adverse impact these proposals would have on the right of individual petition to the Court. Reform proposals need to be carefully and thoroughly thought through during a transparent process of effective consultation with all relevant stakeholders.

### **New admissibility criterion relating to cases where national courts have applied the Convention**

14. According to this proposal<sup>8</sup>, a new criterion would render inadmissible applications that are substantially the same as a matter which has already been examined by a domestic tribunal applying the Convention rights. Very limited exceptions to this criterion would be included, namely where the domestic tribunal had manifestly erred in its interpretation or application of the Convention rights, or where the application raised serious questions affecting the interpretation or the application of the Convention.

15. Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre (EHRAC), the Helsinki Foundation for Human Rights (HFHR), INTERIGHTS, the International Commission of Jurists (ICJ) and JUSTICE strongly oppose this proposal, which would significantly limit the substantive jurisdiction of the Court and could, in practice, undermine the universal application of the Convention rights across the Council of Europe.

16. At the outset, we wish to highlight that this proposal does not address so-called fourth-instance applications. The fourth-instance doctrine, as applied under fourth-instance applications, mainly relates to the question of establishment of the facts of a

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Resolution) and paragraph 18 (Explanatory Memorandum). Adopted by the Committee at its meeting on 16 November 2011, see AS/Jur No 2011/08. The Assembly is due to consider the draft resolution and recommendation at its part-session from 23-27 January 2012.

<sup>7</sup> Interlaken Declaration, para A(1) and Izmir Declaration, para A(1).

<sup>8</sup> DH-GDR(2011)20.

case and/or of interpretation and application of *domestic* law. This issue, which is covered by the admissibility criterion found in Article 35(3)(a) ECHR, is different from what this proposal is addressing, i.e. the question of interpretation and application of the *Convention* rights. While the former situation belongs to the category of fourth-instance applications, this proposal relates to the substantive question of whether the Convention rights have been properly and effectively implemented and whether there are grounds for finding that the Convention rights have been violated. As a general rule, such a question has to be analysed at the merits stage, not at the admissibility stage. Furthermore, cases where the “margin of appreciation” doctrine is an issue<sup>9</sup> often require a particularly delicate assessment of national conditions, comparative European practice, and the circumstances of the case, which is not appropriate for consideration at admissibility stage.<sup>10</sup>

17. Because fourth-instance applications result from a misapprehension on the part of the applicants as to the Court’s role and the nature of the judicial machinery established by the Convention<sup>11</sup>, it is justifiable to have an admissibility criterion precluding such applications from reaching the merits stage. By contrast, the question pertaining to the application of *Convention* rights lies at the core of the Court’s mandate to ensure the observance of the engagements undertaken by the state parties to the Convention (Article 19 ECHR) and therefore clearly demands a formal examination by the Court of the merits of the case.

18. As already mentioned, this proposal includes an exception to this new admissibility criterion where the domestic tribunal had manifestly erred in its interpretation or application of the Convention rights. This exception places a very high threshold – that of arbitrariness – for the Court’s application of Convention rights. As a consequence, the possibility for the Court to assess the merits of an application would be significantly, and unduly, restricted.

19. As regards the second proposed exception, it is important to note that Articles 30 and 43(2) ECHR contain a similar wording. These provisions pertain to the relinquishment of a Chamber’s jurisdiction or a referral of a Chamber’s case to the Court’s Grand Chamber, which may occur where a case “raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto”. Therefore, the second exception suggested in the proposal would imply that the Court would be able to assess the merits of a case only in instances which currently justify the Grand Chamber to deal with a case. Once again, this exception would therefore result in a significant, and undue, restriction of the Court’s jurisdiction.

20. In sum, Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre (EHRAC), the Helsinki Foundation for Human Rights (HFHR), INTERIGHTS, the International Commission of Jurists (ICJ) and JUSTICE oppose this new admissibility criterion for the following main reasons:

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<sup>9</sup> The margin of appreciation doctrine is applied by the Court differently in respect of different aspects of the Convention, and does not apply at all to certain Convention rights or aspects of those rights.

<sup>10</sup> In only very limited instances where a mere preliminary examination of the application already enabled the Court to conclude that the state authorities had clearly not overstepped their “margin of appreciation” in relation to certain Convention rights, the Court has rejected the application as being manifestly ill-founded and declared it inadmissible pursuant to Article 35(3)(a) and 35(4) ECHR.

<sup>11</sup> As the Court underlines in its *Practical Guide on Admissibility Criteria*, para. 345, p. 84.

- As a rule, the issue of 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. If the highest domestic tribunal has properly interpreted and applied 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.
- This proposal would result in the Court's mandate to assess compliance (on the merits) with the Convention being significantly (and unduly) limited. This runs counter to the very purpose of having a Court mandated to ensure respect for the Convention by member states, as stated in Article 19 of the Convention. It is fundamental to bear in mind that the principle of subsidiarity, according to which states have the primary responsibility to effectively implement their human rights obligations under the Convention, 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 does not seek to limit the Court's substantive jurisdiction.

### Sunset clause

21. According to another recent proposal<sup>12</sup>, an application would be automatically struck out of the Court's list of cases after a set period of time if within such a period the Court did not notify the case to the Government and invite it to submit observations. The current proposal suggests that this period be set between one and two years time.

22. We oppose such a mechanism for the following main reasons:

- It is based on an automatic rejection of cases after a set period of time, rather than on a case-by-case judicial assessment.
- It would result in a case being struck out of the Court's list before any judge has given even initial consideration to the case and before any decision has been taken.
- It penalizes the applicant for a reason wholly out of his/her control, i.e. the lack of capacity of the Court to deal with cases in a timely manner. It bars certain applicants' access to the Court for the mere reason that the Court is currently not able to answer their case within a reasonable period of time. In other words, it penalizes applicants – including potentially those with well-founded cases – for delays within the Court.
- By having his/her case automatically struck out of the Court's list of cases for a reason not pertaining to his/her application, but to the passing of a certain period of time, and prior to any judicial assessment of his/her case, the applicant's right of individual petition guaranteed by Article 34 ECHR is violated.
- In addition, the proposal specifically refers to the Court's internal priority policy and seeks to apply in the cases allocated within the Court to the last two categories of that policy.<sup>13</sup> Therefore, it would result from this proposal that, after a certain period of time, an initial administrative process of triage would have consequences that only

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<sup>12</sup> DH-GDR(2011)20.

<sup>13</sup> These are the sixth and seventh categories, namely "applications identified as giving rise to a problem of admissibility", and "applications which are manifestly inadmissible" (the Court's priority categories are available at [http://www.echr.coe.int/NR/rdonlyres/DB6EDF5E-6661-4EF6-992E-F8C4ACC62F31/0/Priority\\_policyPublic\\_communication\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/DB6EDF5E-6661-4EF6-992E-F8C4ACC62F31/0/Priority_policyPublic_communication_EN.pdf)).

a judicial decision should properly have, i.e. a case being struck out or declared inadmissible. Moreover, since the Court's prioritisation criteria are an internal case administration process only, the sunset clause would not guarantee that only manifestly inadmissible cases would be rejected for lapse of time.

23. According to their initiators, this sunset clause would allow applicants to be informed of the outcome of their application more quickly than is the case at present. This suggestion, however, misses a fundamental point: applicants do not need *to be informed* of the outcome of their application more quickly, in particular when this outcome results from an automatic process; they need *to receive a decision* resulting from a judicial assessment from the Court more quickly.

24. We consider that the answer to the lengthy period of time before a judicial decision on admissibility is made should be to reinforce the capacity of the Court to deal with the incoming applications in a timely manner, as well as for the Court to continue reforming its internal procedures, as it is already doing, in order to improve its case-processing capabilities. The answer is certainly not to automatically strike cases out of the Court's list without prior judicial analysis, hence restricting the applicant's right to have a judicial decision by the Court (Article 34 ECHR).

#### **Amendment of Article 35 paragraph 3.b ECHR**

25. Besides adding a new admissibility criterion, another suggestion currently under discussion seeks to amend the current admissibility criteria<sup>14</sup>. In particular, it has been proposed that the second safeguard clause included in Article 35(3)(b) should be deleted.

26. According to the current wording of this provision, an individual application shall be declared inadmissible where:

- the applicant has not suffered a significant disadvantage,
  - a. unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and
  - b. **provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.**

27. The proposal currently put forward is to delete the section in bold, as it is considered that it sets an unnecessarily high requirement given the type of situations this provision seeks to address.

28. At the outset, it should be recalled that:

- This admissibility criterion entered into force on 1 June 2010 and will be fully operational only in June 2012. Until then, this criterion can only be applied by the Chambers and the Grand Chamber. It therefore appears premature to envisage its amendment at this stage.
- In addition, at the moment only a limited number of cases have been decided pursuant to this provision. It follows from this that this criterion does not appear to be a major cause of the current challenges resulting from the Court's case-load.

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<sup>14</sup> DH-GDR(2011)13 and DH-GDR(2011)24.

29. More substantially, Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre (EHRAC), the Helsinki Foundation for Human Rights (HFHR), INTERIGHTS, the International Commission of Jurists (ICJ) and JUSTICE oppose this proposal for the following reasons:

- The “duly considered” safeguard clause constitutes a clear illustration of the principle of subsidiarity, according to which states have the primary responsibility to effectively implement their human rights obligations under the Convention. Specifically, subsidiarity 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. Absence of due consideration by a domestic tribunal of a case involving a Convention right would represent such a gap. Therefore, this safeguard seeks to ensure that if *no* domestic tribunal has duly considered the case, the latter shall be dealt with by the Court on the merits.
- The fundamental value of this safeguard clause is to avoid a denial of justice, a fundamental principle of the rule of law. It indeed seeks to ensure that the case is examined on the merits by at least one judicial body.<sup>15</sup> However minor a case is deemed to be, it remains essential that no denial of justice shall be allowed to occur.

30. Finally, we wish to underline that, precisely because it is an illustration of the principle of subsidiarity, the requirement of exhaustion of domestic remedies necessarily implies in practice that where no such remedy is either available or effective, the case shall be deemed admissible (provided the other admissibility criteria are satisfied). We consider that the same rationale underpins the “duly considered” safeguard clause contained in Article 35(3)(b) ECHR, i.e. to ensure that if there is a gap in protection of Convention rights at the domestic level, the Court shall be able to examine the case on the merits.

#### **Discretion of the Court to decide which cases to examine**

31. Should the package of measures currently under discussion be insufficient to properly address the challenges facing the Court, it has been suggested that longer-term reforms would be needed. In this regard, it has been proposed that the Court be given discretion to decide which cases to consider.<sup>16</sup> The stated aim of this proposal is for the Court to deal only with the cases deemed to be of the highest priority.

32. Although this proposal is only very succinctly elaborated at this stage, it already appears that the option envisaged would not only entail a significant modification of the right of individual application, it would completely and adversely change the nature of the current judicial system of protection of human rights established by the Convention. As such, Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre (EHRAC), the Helsinki Foundation for Human Rights (HFHR), INTERIGHTS, the International Commission of Jurists (ICJ) and JUSTICE oppose such a far-reaching proposal.

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<sup>15</sup> See in this regard the Court’s *Practical Guide on Admissibility Criteria*, para. 379, p. 93.

<sup>16</sup> DH-GDR(2011)20.



## FEES FOR APPLICANTS TO THE COURT

33. Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre (EHRAC), the Helsinki Foundation for Human Rights (HFHR), INTERIGHTS, the International Commission of Jurists (ICJ) and JUSTICE oppose the introduction of fees for individuals who apply to the Court seeking redress for alleged violations of their Convention rights. Together with more than 270 civil society organizations from over 40 Council of Europe countries who signed a petition against the introduction of fees for applicants to the Court, we therefore called on the member states of the Council of Europe to reject the proposal to impose fees.<sup>17</sup> We consider that the introduction of a system of fees would significantly undermine the right of individual application to the Court, and would involve serious practical and administrative difficulties. The Court itself opposes the introduction of fees for applicants, due to objections of principle and because it would give rise to considerable practical and administrative problems.<sup>18</sup>

34. We note that the CDDH report on a system of fees for applicants to the Court does not intend to address the question concerning whether or not the introduction of a system of fees would represent an unacceptable limitation on or barrier to exercise the right of individual application to the Court; but that it seeks to facilitate further examination of the practicality and utility of such a system in order to assist decision-making by the Committee of Ministers on this subject. We consider, however, that the question of principle and the main practical arguments for and against the issue of fees cannot be considered in isolation from each other.

35. Indeed, the principal objective of a possible system of fees has been described as a measure to reduce the number of clearly inadmissible applications while at the same time not deterring well-founded ones. While the Izmir Declaration, which invites the Committee of Ministers to continue to examine the issue of charging fees to applicants, emphasizes that measures must be taken to dissuade clearly inadmissible applications, it stresses that this should be done “without, however, preventing well-founded applications from being examined by the Court”. Likewise, the Interlaken Declaration viewed it as a condition for the introduction of any such system that it would not deter well-founded applications.<sup>19</sup> However, already the CDDH Interim Activity Report acknowledged that in practice “any system would entail at least some risk of deterring well-founded applications”.<sup>20</sup> The CDDH Report on a system of fees for applicants to the Court reaffirms that any system which requires an applicant to make a payment when submitting the completed

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<sup>17</sup> See Civil society petition “Fees: a barrier to justice” (with list of signatories), available at <http://www.amnesty.org/en/library/info/IOR61/005/2011/en>. See also Joint NGO Statement: *Fees: A barrier to justice: Imposing a fee on applicants to the European Court of Human Rights may deny victims of human rights violations access to justice*, 28 October 2010, <http://www.amnesty.org/en/library/info/IOR61/09/2010/en>; and the Recommendation by the Conference of International NGOs with participatory status at the Council of Europe, adopted on 27 January 2011, [http://www.coe.int/t/ngo/Articles/CONF\\_PLE\\_2011\\_REC2\\_Cour\\_en.asp](http://www.coe.int/t/ngo/Articles/CONF_PLE_2011_REC2_Cour_en.asp).

<sup>18</sup> See *Opinion of the Court for the Izmir Conference (adopted by the Plenary Court on 4 April 2011)*, paragraph 10.

<sup>19</sup> See Izmir Declaration and Follow-up Plan, paragraph A.1. The Interlaken Declaration invites the Committee of Ministers to examine “under what conditions new procedural rules or practices could be envisaged, without deterring well-founded applications”; see paragraph A.3 of the Interlaken Action Plan.

<sup>20</sup> Steering Committee for Human Rights (CDDH): *CDDH Interim Activity Report*, CDDH(2011)R72 Addendum 1, paragraph 35.

application form to the Registry “would involve at least some risk of deterring well-founded applications”.<sup>21</sup> In other words: even if provisions were put in place to permit the fees to be waived, for instance, any such scheme would risk deterring, or even preventing, individuals with well founded claims from reaching the Court. A fee on applicants to the Court may therefore deny victims of human rights violations access to justice, based on their ability to pay, and thus represent an unacceptable limitation to the right of individual application. Lack of funds should never be an obstacle to an individual’s access to a remedy for an alleged human rights violation.

36. Moreover, it is questionable whether the introduction of fees would alleviate, and not exacerbate, the administrative burdens on the Court. A system of fees could drain the Court of already scarce human and financial resources. As the *Registry Note on Court fees* states it “seems inevitable that an across-the-board application fee would mean additional processing of single-judge cases compared to today”.<sup>22</sup> In particular in a system which includes compensatory mechanisms (e.g. exemptions, waivers and refunds) the budgetary and administrative consequences can be expected to be significant. At the same time such compensatory mechanisms would be required in order to avoid deterring well-founded applications.

37. The analysis of the main aspects and possible options of a system of fees as set out in the CDDH report on this issue confirms the fundamental tension between the main objective attached to the introduction of a fees system and the practical consequences of operating such a system.<sup>23</sup> Maximising the deterrent effect on clearly inadmissible applications while minimising administrative and budgetary consequences, the deterrent effect on well-founded applications, as well as the risk of a discriminatory effect between applicants of different means, are difficult – if not impossible – objectives to reconcile. The CDDH report concedes that a cost-benefit analysis of the models it discusses is difficult and has not yet been possible.<sup>24</sup>

38. A decision to introduce a system of fees without such an analysis would be political rather than strategic. It would not be based on an informed analysis and transparent evaluation of both the root causes of the problem, the impact of recent reforms and the likely consequences of different models of a fees system. It could drain the Court of human and financial resources while deterring individuals with well-founded human rights claims from seeking redress before the Court.

39. We therefore reiterate our call on member states to reject the proposal of imposing fees on applicants to the Court. Instead of seeking to deter applicants from seeking justice by imposing fees, each of the 47 states should ensure that there are accessible and effective domestic remedies at national level for violations of the rights guaranteed under the ECHR.

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<sup>21</sup> See CDDH Report on a system of fees for applicants to the Court, CDDH(2011)R73 Appendix III, paragraph 6.a.i.

<sup>22</sup> European Court of Human Rights, Registry Note on Court fees, 5 October 2011, Ref #3666425, page 2.

<sup>23</sup> See CDDH(2011)R73 Appendix III, paragraph 7.

<sup>24</sup> See CDDH(2011)R73 Appendix III, paragraph 8.

## SANCTIONS IN FUTILE CASES

40. Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre (EHRAC), the Helsinki Foundation for Human Rights (HFHR), INTERIGHTS, the International Commission of Jurists (ICJ) and JUSTICE take note of the proposal that the Court should be able to impose a sanction on those who make repeated applications “that are manifestly inadmissible and lacking in substance”.<sup>25</sup>

41. We appreciate the burden that applicants who make persistent, completely unmeritorious applications place on the Court. However, we note the CDDH report on this issue does not give an indication of the scope of the actual problem the Court faces with respect to futile applications. Also, while the report lists several operational aspects of a possible system of sanctions<sup>26</sup>, it does not provide a fully-fledged model on the basis of which an assessment of the effects of a sanction system could be made. We therefore consider that further analysis of the practical implications of a sanctions system would be required before a decision on the implementation of such a proposal could be taken.

42. Among our preliminary observations on this issue we would like to point out that the CDDH report does not demonstrate that the proposed sanction scheme would in fact substantially reduce the number of such applications to the Court. The imposition of a financial sanction after the event at the point when the Court rules an application inadmissible cannot directly prevent the ill that it seeks to address, the submission of that futile application. At best, a sanction scheme can have an indirect effect by discouraging applicants generally from making futile applications and by preventing further applications from applicants who have made futile applications in the past. However, assuming that a large proportion of those submitting futile cases are firmly convinced of the merits of their application, few of them might actually be dissuaded from applying by the threat of a sanction. Would-be applicants’ response to the threat of a sanction may therefore be determined far more by their attitude to risk than by an honest assessment of the merits of their case.

43. On the other hand, we consider that there may still very likely be situations where would-be applicants with well-founded applications may refrain from seeking redress because of the threat of a sanction. Hence, such a threat would risk dissuading would-be applicants with well-founded applications but fearful, notably for lack of financial means, about the potentiality of having to pay a fine.<sup>27</sup>

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<sup>25</sup> See CDDH Report on the proposal to introduce a sanction in futile cases, CDDH(2011)R73 Appendix IV, paragraph 2.

<sup>26</sup> See CDDH(2011)R73 Appendix IV, paragraph 3. The proposal envisages a sanction in the form of a fee imposed at the Court’s discretion at the point when it rules an application inadmissible. Provided it did not exceed a fixed maximum, the amount of the sanction would be a matter for the Court. In deciding what sanction to impose, the Court would have regard to the specific features of the individual case. Any sanction imposed should not be so low as to be ineffective. The Court would not be able directly to enforce payment; the applicant would, however, be informed that no further application would be processed until the fee was paid. Still according to the proposal, this might be subject to derogation in respect of applications concerning so-called “core rights” (e.g. Articles 2, 3 and 4.) Higher sanctions might be imposed in respect of further futile applications.

<sup>27</sup> In the latter case, the threat of a sanction may therefore have a similar deterrent effect to the certainty of having to pay a fee for submitting an application to the Court (cf. the proposal to impose a fee on applicants).

44. In addition and most importantly, a system of sanctions as set out in the CDDH report would encroach directly on the right of individual application if someone who has been required to pay a penalty for making a futile application fails to make the payment and has a subsequent application rejected without consideration as a result. It would be unconscionable were his/her application to be rejected on account of his/her failure to pay the penalty for a previous application, rather than for a reason pertaining to the new application. We would therefore oppose any sanction scheme that would unduly encroach on the right of individual application.

45. Furthermore, we consider that it would send an unfortunate message about the current challenges the Court faces if sanctions are imposed on applicants who submit unmeritorious cases, while states that persistently fail to execute judgments in repetitive cases are not sanctioned, despite the significant burden the large number of repetitive cases pose for the Court.

## COMPULSORY LEGAL REPRESENTATION

46. Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre (EHRAC), the Helsinki Foundation for Human Rights (HFHR), INTERIGHTS, the International Commission of Jurists (ICJ) and JUSTICE take note of the CDDH report on compulsory legal representation.<sup>28</sup>

47. Unless legal aid is available at the national level in all 47 CoE member states for people who do not have the means to pay for a lawyer and suitably qualified and trained lawyers are available to potential applicants, compulsory legal representation risks denying people with well-founded human rights claims access to the Court.

48. We therefore believe that the current proposal for compulsory legal representation cannot be supported. Rather than introducing such a requirement, member states should reconsider the previous proposal for drafting and implementing a Recommendation on access to information and legal advice for potential applicants to the Court which, among other things, encourages states to provide legal aid for such individuals.

## **FILTERING MECHANISM AND DECISION- MAKING CAPACITY OF THE COURT**

49. Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre (EHRAC), the Helsinki Foundation for Human Rights (HFHR), INTERIGHTS, the International Commission of Jurists (ICJ) and JUSTICE welcome the work of the CDDH to develop proposals regarding the filtering and decision-making capacity of the Court. These proposals must now be considered in light of the recent information provided by the Court, which has shown that very considerable progress has already been made under Protocol

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<sup>28</sup> CDDH(2011)R73 Appendix V.

14 in speeding up processing of manifestly inadmissible cases through the use of single judges.<sup>29</sup> The Court envisages that if it maintains its current rate of disposal of manifestly inadmissible cases, it will be able to eliminate the backlog of such cases by 2015. We warmly welcome these developments, which demonstrate the success of the single judge process established by Protocol 14. The fact that these effects have taken some time to emerge only indicates that the impact of Protocol 14 may yet be even more significant.

50. In light of the new information provided by the Court, further amendment of the Convention to create new filtering mechanisms for manifestly inadmissible cases does not appear to be urgently needed. At a minimum, progress in addressing the backlog should continue to be monitored over at least the next year, before any decision is taken to further amend the Convention. Therefore, although we understand that the CDDH may wish to include these proposals in its report to the Committee of Ministers, it should not recommend that they be pursued as a matter of urgency. Two other questions do merit attention. First, and most urgently, the question of the resources needed by the Registry if the Court is to maintain and strengthen its disposal of cases by single judges, remains critical. Second, the capacity of the Court to arrive at prompt decisions in Committee and Chamber cases remains an issue, as the Court itself has indicated.<sup>30</sup>

51. As regards the current proposals on filtering, we consider it essential that any amendment to the Convention should preserve the principle of judicial decision-making in all cases brought before the Court. A system giving power to Registry lawyers to decide on the admissibility of applications to the Court would fundamentally change the nature of the right of individual petition and would risk undermining the authority of the Court. Public confidence in a decision by a judge who is independent and is bound by judicial obligations of impartiality will be considerably greater than where the decision is made by an official. Furthermore, as the German government has noted in its paper on filtering,<sup>31</sup> maintaining the judicial character of decision-making in admissibility cases is important in preserving equal treatment between the parties; applicants should be accorded a judicial decision in their case where there is a finding against them, in the same way that states parties are entitled to a judicial decision when there is a finding to their detriment. We therefore do not support the proposal for decision making by Registry lawyers, set out in paragraphs 16 to 19 of the draft CDDH report on filtering.<sup>32</sup> Nor, for the same reasons, do we support the “combined option” of decisions by the Registry, with the possibility of referral to a judge.<sup>33</sup>

52. By contrast, an additional cadre of judges, recruited specifically to adjudicate on manifestly inadmissible cases,<sup>34</sup> could provide a credible and viable means of strengthening the Court’s capacity for filtering. Any new panel of judges should possess qualifications necessary for the appointment to judicial office as well as independence, expert knowledge of the case law of the Court and of its two official languages. As far as possible, they should include judges familiar with the languages and legal systems of the

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<sup>29</sup> CDDH Report of the 73<sup>rd</sup> meeting from 6-9 December 2011, CDDH (2011)R73, 13 December 2011.

<sup>30</sup> Ibid.

<sup>31</sup> DH-GDR(2011)022.

<sup>32</sup> DH-GDR(2011)R8Appendix III

<sup>33</sup> Ibid paras.23-25.

<sup>34</sup> Ibid paras.20 – 22.

states in respect of which the applications are made. The new category of judges should be nominated in open and fair procedures, with approval of nominations by PACE. Provided that their competence is limited to adjudication on manifestly inadmissible cases presently decided by single judges under Article 27 ECHR, it would be acceptable that this new category of judges might be less experienced, and have less seniority, than ordinary judges of the Court. In order to preserve the quality of the Court's decision-making however, it would be important that, following their appointment, judges should have a suitable period of training in the Court. In addition, internal measures should be taken within the Court and the Registry to ensure consistency of the decisions of the new judges with the jurisprudence and decisions of the Court as a whole. The rule established in Article 26.3 ECHR, that judges sitting as single judges do not decide on cases in respect of their own country, should also extend to these new judges.

53. Regarding the competence of any new category of "junior" judges, we believe that this should be limited to adjudication on manifestly inadmissible cases currently dealt with by single judges under Article 27 ECHR. It should not extend to decisions in manifestly well-founded repetitive cases, which raise issues on which the Court's case-law is already clear. These cases are of an entirely different nature to inadmissible cases: they are the product of some of the most intractable human rights problems in the Council of Europe region. Authoritative decisions in such cases, which are promptly and fully implemented by national authorities, are crucially important for the effective operation of the Court in the long term. Delegating the power to rule on repetitive cases to a "junior" judge of the Court could send an unfortunate and misleading signal to the contracting parties that the issue concerned or the implementation of a judgment finding a violation in a repetitive case was of lower priority.

54. In particular, Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre (EHRAC), the Helsinki Foundation for Human Rights (HFHR), INTERIGHTS, the International Commission of Jurists (ICJ) and JUSTICE welcome the proposal of the Norwegian government, for a group of *ad litem* judges who could, under this proposal, be drafted to the Court on a short-term basis to address overloads in the Court's work as they arise, and who could sit in any formation of the Court other than the Grand Chamber or the Plenary.<sup>35</sup> This proposal has the merit of flexibility, and would ensure the most efficient use of resources, adjusting to pressures in the Court's caseload that may change over time. In current circumstances, it would assist the Court in addressing the backlog of Chamber cases, comprised notably of those which have not been assigned the highest priority under the Court's new prioritisation criteria. As noted above, however, it would not be desirable for "junior" judges with lesser experience or status than judges of the ordinary Court to sit in cases such as these, that are well-founded. The organizations therefore urge that in any new system of *ad litem* judges, new judges recruited be of similar status and experience to other judges of the Court.

55. Finally, as noted in the Draft CDDH report on filtering,<sup>36</sup> increased resources for the Registry might, even without further reforms, substantially assist in dealing with the backlog and inflow of inadmissible cases. Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre (EHRAC), the Helsinki Foundation for Human Rights (HFHR), INTERIGHTS, the International Commission of Jurists (ICJ) and JUSTICE consider that it is essential, if the Interlaken Declaration's objectives of eliminating the

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<sup>35</sup> DH-GDR(2011) 019.

<sup>36</sup> DH-GDR(2011)R8 Appendix III, para.34.

backlog and preventing its recurrence are realistically to be achieved, that the need for additional resources be acknowledged, and that the Committee of Ministers makes a commitment to provide such resources to the Court and the Registry.

## ADVISORY OPINIONS

56. We welcome the Norwegian/Dutch proposal to empower the Court to give advisory opinions at the request of national courts<sup>37</sup>. We consider that advisory opinions from the Court could have the potential 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. We agree with the argument mentioned in the CDDH report on advisory opinions according to which the Court would be provided with the possibility to give clear guidance on numerous potential cases bringing forward the same question, thus constituting an additional procedural tool in cases revealing potential systemic or structural problems and thereby contributing to the efficiency of the Court.<sup>38</sup>

57. However, it is currently unclear in what circumstances an advisory opinion could be sought and a number of questions need to be clarified before an assessment can be made of their potential impact on the caseload of the Court. In that respect, we agree with the proposal that a request for an advisory opinion should only be made by a national court against whose decisions there is no judicial remedy under national law.<sup>39</sup> The possibility to submit requests should be limited to the nature of the related cases, particularly cases which reveal a potential systemic or structural problem. Article 43(2) of the ECHR could provide further guidance as to the nature of cases which could be subjected to an advisory opinion. The Court should have a discretion to refuse requests for advisory opinions, however it should be required to give reasons for a refusal. The decision on whether to accept the request could be made by a panel of five judges in order not to overburden the Grand Chamber.

58. Due to different legal systems, it seems vital that member states should be given a possibility to present a list of potential national courts (e.g. Supreme Court, Supreme Administrative Court, Constitutional Tribunal) which would be entitled to present advisory opinions to the Court. It would set clear rules to the applicants, lawyers and non-governmental organizations claiming an advisory opinion before a given jurisdiction.

59. We also suggest 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.

60. Moreover, the Governments of the state from which a national court or tribunal had requested an advisory opinion as well as the would-be applicants, lawyers and non-governmental organizations should all be given the opportunity to participate effectively in

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<sup>37</sup> DH-S-GDR(2009)004.

<sup>38</sup> CDDH Report on the proposal to extend the Court's jurisdiction to give advisory opinions, CDDH(2011)R73 Appendix VI, para. 3(ii).

<sup>39</sup> CDDH(2011)R73 Appendix VI, para. 2(ii).

the process of seeking an advisory opinion. This however implies the need to organize a legal aid system before the Strasbourg Court, which would be available to would-be applicants whose cases are submitted by a national court. We also consider 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. However, the possibility to intervene by third parties and the legal aid scheme should be linked with clear and strict time limits, in order to avoid the delay of domestic proceedings to the detriment of the parties.

61. Finally, we 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. Also, in any event the applicant shall retain the right to bring his/her case to the Court under Article 34 ECHR.

## **SIMPLIFIED AMENDMENT PROCEDURE / ESTABLISHING A STATUTE OF THE COURT**

62. In principle, Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre (EHRAC), the Helsinki Foundation for Human Rights (HFHR), INTERIGHTS, the International Commission of Jurists (ICJ) and JUSTICE support the proposal to create a mechanism allowing for the simplified amendment of certain organizational provisions of Part II of the Convention. The purpose of any such measures, in our view, must be to maintain a strong Court with enhanced ability to respond flexibly to changes in its caseload, in order to most effectively fulfil its role under Article 19 ECHR to “ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto.” Any such instrument should be designed to support the Court in delivering prompt and effective justice to individual applicants in accordance with the right of individual petition under Article 34 ECHR which, as both the Interlaken and the Izmir Declarations have reaffirmed, is a cornerstone of the Convention system.<sup>40</sup> The competence of the Court to regulate its day-to-day business and operating procedures, through the Rules of Court and practice directions, should not be constrained by the re-ordering of the legal framework for the Court.

63. The role of other Council of Europe institutions, in particular the Parliamentary Assembly, will also need to be protected in any new instrument or amendment process, to ensure that there is no democratic deficit if the usual national and international procedures for approval of amendments to the Convention no longer apply to some provisions currently in the Convention.

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<sup>40</sup> Paragraph A.1 of the Interlaken Declaration: “The Conference reaffirms the fundamental importance of the right of individual petition as a cornerstone of the Convention system which guarantees that alleged violations that have not been effectively dealt with by national authorities can be brought before the Court.”



64. As to the modalities for the introduction of a simplified amendment procedure, we would favour a new clause in the Convention, permitting the simplified amendment of certain organizational provisions of Part II (Model I in the Document on Modalities of the Committee of Experts on a simplified procedure for amendment of certain provisions of the European Convention on Human Rights - DH-PS).<sup>41</sup> This model would follow most closely the aims outlined above, of permitting more flexibility to the Court in responding to changes in its caseload, while preserving its competence as regards the Rules of Court.

65. Whatever model is adopted, the existing treaty amendment process must continue to apply to provisions of Part II that are fundamental to the Court's role in the protection of the Convention rights, to the right of individual petition and to the independence or autonomy of the Court. We are broadly satisfied that the list of Convention articles identified by DH-PS as suitable for simplified amendment process comply with these principles.<sup>42</sup> However we are concerned at the inclusion of Articles 42 and 44(2) on the finality of Chamber judgments in the list of provisions potentially subject to simplified amendment, since a prompt and reliable process for establishing the finality of judgments is essential to the effectiveness of the Court.

66. In accordance with the principles outlined above, the organizations consider that the Rules of Court should retain their current scope, amendment of their provisions remaining within the competence of the Court. We do not support the transfer of provisions of the Rules to any instrument where they could be subject to a simplified amendment procedure. In particular, we consider it crucial that any proposal to "elevate" the Court's power to issue interim measures (now set out in Rule 39 of the Court and the Court's case law) must ensure that this power is neither amended in substance nor made subject to a flexible amendment procedure. As has been recognised by the Grand Chamber, Rule 39 measures are binding on states parties, and play a vital role in allowing the Court to secure the effective protection of Convention rights. Restriction of the effect or scope of the Court's competence to issue interim measures, through a Statute or new Convention provision, would raise serious issues of inconsistency with Article 34 and significantly impair the Court's authority and effectiveness in protecting Convention rights.

67. If it is decided to include a provision on interim measures in the Convention or a Statute, then the organizations could accept the current proposals set out in the DH-PS Document on Modalities<sup>43</sup> for Article 34 *bis*. However if this model is adopted we consider it important that the text in square brackets, on extreme gravity and urgency or the need to avoid irreparable damage, is not included, since this unduly constrains the Court's capacity to determine the circumstances in which interim measures may be indicated. We note that the text in square brackets is adapted from Article 63(2) of the American Convention on Human Rights on interim measures. We consider that adoption of this standard would introduce unnecessary uncertainties into the settled law of the Convention on interim measures, as affirmed by the Grand Chamber, which held in *Mamatkulov and Astrakov v Turkey* that, "in practice the Court applies Rule 39 only if there is an imminent risk of irreparable damage"<sup>44</sup>. Such modification of the jurisprudence of the Court on

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<sup>41</sup> Modalities for the introduction of a simplified amendment procedure: possible illustrative models, DH-PS (2011) 002rev2.

<sup>42</sup> See DH-PS(2011)002rev2, Model I.

<sup>43</sup> DH-PS(2011)002rev Model I.

<sup>44</sup> *Mamatkulov and Astrakov v Turkey*, App nos.46827/99 and 46951/99, GC, para.104, emphasis added.

interim measures is not, in our view, appropriate in the context of the current work of the CDDH which aims at re-ordering the Convention instruments in order to increase the flexibility and effectiveness of the Convention system.

68. If it is decided to include a provision on pilot judgments in either a Statute or the Convention, then such a provision should be limited to setting out the basic principle of such judgments, with the detail of the procedures remaining in the Rules of Court. This provision must not be subject to any simplified amendment procedure. Moreover, any new text should not constrain the Court in the development of this relatively new procedure. We would therefore support the text as proposed in Model I of the DH-PS Document on Modalities.<sup>45</sup> We would however object to the inclusion of further text from Rule 61 of the Rules of Court, as this would be unduly restrictive.

69. If it is decided to include unilateral declarations in the Convention or a Statute, then the organizations consider that the provision should likewise be confined to setting out the general principles for such declarations and should be excluded from any simplified amendment procedure. The current proposal for an Article 39 *bis* set out in Model I of the PH-PS Document on Modalities would satisfy these requirements. In particular, we consider it essential to make clear that unilateral declarations should be a subsidiary measure to friendly settlements.

70. With regard to the amendment process, we would to a large extent support the current text put forward in Model I of the DH-PS Document on Modalities, with inclusion of the Commissioner for Human Rights (currently mentioned in square brackets) among the institutions that should be consulted before amendments are adopted.<sup>46</sup>

71. We would like to underline in particular that the simplified amendment procedure which would apply either to certain provisions of the Convention or to a Statute must involve sufficient checks and balances, by including a real role for the Court, the Parliamentary Assembly, and other institutions of the Council of Europe, in addition to a vote of a least a two-thirds majority of the Committee of Ministers. The process must be transparent, and involve consultation with National Institutions for the Promotion and Protection of Human Rights, NGOs and lawyers who practice regularly before the Court.

72. It is particularly important that the Court as well as member states should be able to propose amendments; and that, as stressed previously by the Group of Wise Persons,<sup>47</sup> any amendment should be subject to the Court's approval.

73. A substantial role should also be afforded to the Parliamentary Assembly in the amendment process, with provision for at least consultation with the Assembly; consideration should also be given to allowing the Assembly a power of veto to amendments. Full involvement of the Assembly in the process could help to redress the potential democratic deficit arising from the lesser role of national parliaments in a

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<sup>45</sup> DH-PS (2011) 002rev. Model I, Article 45bis(1).

<sup>46</sup> DH-PS(2011)002 REV2, Model I, New article X of the ECHR, paras 1-4. While the procedure mentioned in the 5<sup>th</sup> paragraph would seem to provide the possibility for a system of checks and balances at the national level, its implementation in practice may prove difficult and undermine the aim underpinning a simplified amendment procedure.

<sup>47</sup> Report of the Group of Wise Persons to the Committee of Ministers, CM (2006) 2-3, 15 November 2006, para. 46.

simplified amendment procedure that dispenses with normal national ratification processes.

## **ELECTION OF JUDGES**

74. The selection procedures for candidates for election of ECtHR judges are of critical importance to maintaining the authority of the Court and ensuring the overall quality of its judgments. In particular, it is vital that judges have the necessary qualifications to serve on the Court.

75. We welcome the creation of a panel of experts to advise on the candidates for election as judges; however, we regret that member states are not required to provide the panel with information about the process for the selection of the candidates at national level and the limited scope of the panel's review. To that end, we consider that the Parliamentary Assembly of the Council of Europe should continue to strengthen its procedures in order to ensure a robust and transparent scrutiny of the list of candidates submitted by states, as well as of the quality of nomination processes at the domestic level.

76. Moreover, we support the proposals to prepare a draft non-binding Committee of Ministers' instrument codifying and clarifying existing norms and standards to better guide national practices for the selection of judicial candidates.