AI Index: IOR 61/006/2011





# Comments of Amnesty International, the International Commission of Jurists, the AIRE Centre and Interights on the Draft Declaration for the Izmir High Level Conference (Draft of 22 March 2011)

Amnesty International, the International Commission of Jurists (ICJ), the AIRE Centre and Interights welcome the Turkish Presidency's initiative to host the Izmir Conference on the Future of the European Court of Human Rights. We recognise the importance of the Presidency's commitment to implementation of the Interlaken Plan of Action and to assuring the future of the European Court of Human Rights.

Amnesty International, the ICJ, the AIRE Centre and Interights appreciate this opportunity to respond to the Draft Declaration of the Izmir High Level Conference (Draft of 22 March 2011), and to discuss it at the consultation meeting. **We urge the organisers of the Izmir Conference to conduct additional and wider NGO consultation on the draft, bearing in mind the emphasis given in the Interlaken Declaration to the involvement of civil society.** We trust that as the process of development of the Izmir Declaration and Plan of Action continues, NGOs will have the opportunity to comment further on drafts, as well as to have their position papers included in the official papers and the Proceedings of the Conference.

Amnesty International, the ICJ, the AIRE Centre and Interights welcome several elements of the draft declaration and follow up plan, including its emphasis on national implementation of the Convention, and its support for further consideration of advisory opinions, means of addressing repetitive applications, and recognition of the need to consult with civil society. In this document we wish to highlight several of our principal

concerns with the current draft of the Declaration and Plan of Action. We will make further and more detailed drafting suggestions on the text as it continues to develop.

**General Principles**

A guiding principle for development of any recommendations for reform of the European Court of Human Rights, including those of the Izmir Conference, must be respect for the independence and impartiality of the Court and its essential role in ensuring the observance of the engagements undertaken by States Parties. In this regard, we are concerned at some of the language of the current draft, which could be seen as placing inappropriate political pressure on the Court in regard to its interpretation and application of the Convention. **We urge that the language of the text be reviewed to ensure that nothing in the text undermines the authority and credibility of the Court.**

**It is also crucial that the Court reform process as a whole, including any recommendations in the Izmir declaration, protect the right of individual petition to the Court, which as the Interlaken Declaration recognised, is a cornerstone of the Convention system.** In this regard we are particular concerned at the proposals in the current draft on fees, and on revision of the admissibility criteria.

We share the view expressed in the draft Declaration that the principle of subsidiarity is of key importance to the Convention system. We note however that this principle is subject to varying interpretations. Amnesty International, the ICJ, the AIRE Centre and Interights share the understanding of subsidiarity advanced in the recent paper by the Court's jurisconsult, which noted that according to this principle "the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than with the Court. The Court can and should intervene only where the domestic authorities fail in that task."[1]

In our view, it is central to the idea of subsidiarity that it is the responsibility of states to ensure that the Convention rights are protected at a national level. This was acknowledged by the Interlaken Declaration, which referred, in regard to the subsidiary nature of the Convention mechanism, to "the fundamental role which national authorities, i.e. governments, courts and parliaments, must play in guaranteeing and protecting human rights at the national level."[2] **We urge that that the Izmir Declaration affirm the fundamental role which all national authorities play in guaranteeing and protecting human rights and that States use the opportunity presented by the Izmir Conference, Declaration and Plan of Action to increase their efforts towards effective implementation measures at national level.**

In its preamble, the Interlaken Declaration reaffirmed key principles, some of which are reflected in the draft Declaration for the Izmir Conference. However, two of the most essential points are not reflected: those set out in PP1 and PP2 of the Interlaken Declaration, which express the strong commitment of the States Parties to the

[1] Note by the Jurisconsult, Principle of Subsidiarity, 8 July 2010, page 2.
[2] Interlaken Declaration, PP6, see also introduction para.2.

Convention and recognise the extraordinary contribution of the Court to the protection of human rights in Europe. **We recommend that the preamble to the Izmir Declaration reaffirm States' commitment to the Convention and recognise the role of the Court, in the same terms as the Interlaken Declaration.**

**Key Concerns**

**<u>Admissibility Criteria</u>: para.4 of the Declaration and para.F1.a and c Follow-up Plan.**

Amnesty International, the ICJ, the AIRE Centre and Interights would oppose any proposals for revision of the admissibility criteria under Article 35 ECHR which would restrict the right of individual petition to the Court. The admissibility criteria have already been subject to extensive review during the negotiation of Protocol 14 ECHR, and the implementation of the new admissibility criteria is still in its first year. We note that the President of the Court, at the November 2010 meeting of the Steering Committee on Human Rights, stated that although the Court had not yet had many opportunities to rule applications inadmissible on the basis of the new criterion, it expected to use it increasingly in future.[3] We consider that further review of the admissibility criteria by the Committee of Ministers would be premature. **We therefore consider that the Declaration should not contain any immediate recommendation for a review of the admissibility criteria by the Committee of Ministers. Furthermore, any such review should be limited by the principle that, in light of the independence of the Court, the interpretation and application of the present admissibility criteria under Article 35 is a matter for the Court alone. We therefore propose the deletion of the final sentence of para.4 of the Declaration and of para F.1.c of the Follow-up Plan.**

**<u>Right of Individual Petition</u>: para A.1 Follow-up Plan**

We consider that there is a need for a stronger affirmation of the right of individual petition in the draft, in light of the importance of this principle and its prominence in the Interlaken Declaration. Both the Izmir Declaration, and the Follow-up Plan, should contain a strong affirmation of the commitment of States Parties to this principle, and to protection and strengthening of the Court's role under Article 19 ECHR. We note that the Interlaken Declaration reaffirmed "the commitment of the States Parties to the Convention to the right of individual petition;" and in its Action Plan emphasised "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."[4] **Given that the Izmir Conference and Declaration, is intended as a follow-up to the Interlaken Declaration, it is important that it reaffirm the commitments made at**

[3] Steering Committee for Human rights, Report, 71st meeting, Strasbourg, 2-5 November 2010**,** CDDH (2010) 003, Para.10

[4] Interlaken Declaration, Action Plan section A.1.

**Interlaken to the right of individual petition, in both the Declaration and the Follow-up Plan.**

**<u>Fees</u>: para.A.2 and C.2 Follow-up Plan, para.2 Implementation**

Amnesty International, the ICJ, the AIRE Centre and Interights oppose the introduction of a system of fees, which we consider would significantly undermine the right of individual application to the Court, and would involve serious practical and administrative difficulties. Imposing a fee on applicants to the European Court of Human Rights may deny victims of human rights violations access to justice, based on their ability to pay. This view is shared by more than two hundred and forty human rights NGOs active in Council of Europe Member States, which have signed a petition against fees to be presented to both the CDDH and the Izmir Conference.

We note that it has not been established that a system of fees would not deter well-founded applications, which the Interlaken Declaration viewed as a condition to the introduction of any such system.[5] There is no consensus among Member States on the desirability or otherwise of the imposition of a fees system or the form any such system should take. The eventual political decision on whether to proceed with introduction of a fees system must be informed by the detailed and comparative analysis which is still underway in the GDR and CDDH. Notably, at the last meeting of the Committee of Experts on Reform of the Court (DH-GDR), a significant number of delegations highlighted problems in the comparative expert study on national court fees, including with regard to the accuracy of the representation of some national systems, and the relevance of the particular national courts selected for comparison. Therefore, further discussion of the costs and benefits of a fees system, as well as its desirability in principle, is required before an unequivocal political decision, such as that set out in para.A.2, can be taken. **Amnesty International, the ICJ, the AIRE Centre and Interights believe that it would be inappropriate for the participants of the Izmir Conference to take a political decision to impose fees at the current stage of the discussion of this proposal, and therefore propose that para.A.2 be deleted**

**<u>Interim Measures</u>: para.A.3 and B.3 Follow-up Plan and para.3 Implementation**

Amnesty International, the ICJ, the AIRE Centre and Interights have a number of concerns with the text on Interim Measures and the right to individual petition in **para.A.3**:

- We note that interim measures were introduced by the Convention organs in order to preserve the situation of the parties pending consideration of the admissibility and merits of the case by the Court to prevent potential irreparable harm to their rights.
  We recall that the Court has frequently found that Article 3 would be violated if a measure whch was proposed were to be implemented. Only where the Court assesses that it has received sufficient factual information, does it determine that a Rule 39 indication is essential to preserve the effectiveness of the right of

[5] Interlaken Declaration, Action Plan section A.3

individual petition under Article 34 as well as the protection of Convention rights under Article 1 ECHR. This does not denote any inappropriate interference in national legal processes or the usurpation of the role of national courts. The prior exhaustion of available domestic remedies rule already applies to such decisions. We are therefore concerned at the reference in para.A.3 to the need for Interim Measures to "take place in full conformity with the principle of subsidiarity". Similarly, while we understand that the reference in para.3 to the Court's acting as an Immigration Appeals Tribunal reflects language used by President Costa in his recent statement,[6] we do not consider it appropriate for inclusion in the Declaration. Since the Court has itself emphasised that it does not see itself as serving the role of a national tribunal in regard to interim measures, and has taken steps to guard against this in its practice direction on the matter, no steps by the Court, other Council of Europe institutions or the Member States are required to prevent it exercising such a role. **We suggest that the references to subsidiarity and to the Immigration Appeals Tribunal role of the Court be deleted. Instead, reference to the need for compliance with the Court's recent practice direction should be sufficient to address the need for proper use of interim measures.**

- **We consider it important that section A.3 on the right of individual petition should also refer to the obligations of states to comply with Interim Measures, since this is essential to effective protection of rights by the Court in cases of individual petition**.

- As regards reasons for Interim Measures, we consider that this matter requires fuller consideration by relevant CDDH bodies as well as discussion with the Court, before it can be the subject of a clear recommendation. We consider that there are serious practical difficulties with providing immediate reasons for interim measures, and that any requirement for the Court to do so could result in unacceptable delays which would inhibit effective protection of the Convention rights. **We suggest that the text be changed to "invite the Court to consider the feasibility and desirability of providing" brief reasons for the application of interim measures.**

Amnesty International, the ICJ, the AIRE Centre and Interights welcome the text of **para.B.3,** which emphasises the importance of national remedies with suspensive effect, which are effective in ensuring respect for the principle of *non-refoulement* in accordance with Convention oblgiations. We consider however that this paragraph should also set out the important principle recently reaffirmed by President Costa that "Where a lead case concerning the safety of return to a particular country of origin is pending before the national courts or the Court of Human Rights, removals to that country should be suspended." The experience of NGOs litigating before the Court suggests that failure to comply with this principle may be a significant cause of the high volume of applications for interim measures.

[6] Statement issued by the President of the European Court of Human Rights concerning requests for interim measures (Rule 39 of the Rules of Court), February 2011

We are also concerned at the expectation voiced in the **Implementation plan** that, as a result of measures taken under para.A.3 of the Follow-up Plan, there will be a speedy reduction in the number of Interim Measures granted by the Court in the next year. The points made in para.A.3 relate primarily to the submission of requests for interim measures by applicants. In our view, a reduction in the number of interim measures indicated by the Court is largely dependent on the national implementation measures noted in section B.3 of the Follow-up Plan, in particular effective national remedies with suspensive effect. In the absence of measures at a national level to provide more effective protection of the Convention rights, in particular the principle of *non-refoulement*, a reduction in the number of interim measures indicated by the Court could not be achieved in conformity with the Court's obligations under Article 34 and Article 1. **We therefore propose that para.3 of the Implementation plan should express the expectation that "the implementation of the approach set out at B3 will lead to a significant reduction in the number of interim measures indicated by the Court …"**

**Repetitive Applications: para.E.3**

The meaning of para.E.3, which refers to the factors that should be taken into account by the Court when considering its "well-established case-law" is not clear. We are concerned that it may be perceived as attempting to interfere with the independence of the Court in its interpretation and application of the Convention. **We recommend that para.E.3 be deleted.**

**Jurisdiction of the Court: para.F.b.**

We are concerned that the current wording of para.F.b could give the impression of attempting to direct the Court in its interpretation and application of the Convention, including in relation to the Court's jurisdiction, the interpretation of the Convention on these matters being a question for the Court alone, in accordance with the principle of judicial independence. The meaning of "expansive" is a relative and vague term, which will obscure the meaning of this paragraph. **Therefore, we urge deletion of the phrase in para.F.b "and which are not of the same nature as the substantive provisions of the Convention and its Protocols and should not be interpreted expansively".**

**Meetings with government agents: para.F.g**

In light of the need to protect judicial independence, including the appearance of such independence, we do not consider the recommendation for more frequent meetings with government agents appropriate, when not accompanied by a recommendation for regular meetings with lawyers and NGOs who represent applicants and their interest. The purpose of holding more frequent meetings is not clear from the Declaration. **Since meetings of the Court with both government agents and NGOs already take place, we suggest that no specific recommendation on this subject be included in the declaration.**

**Statute or Simplified Amendment Procedure: para.G**

Paragraph G refers to ongoing work on a Statute of the Court or other simplified amendment procedure for certain provisions of the Convention. We note that

discussions in the Committee of experts on a Simplified Procedure for Amendment of Certain Provisions of the European Convention on Human Rights (DH-PS), in which Amnesty International and the ICJ participate, as observers, have not yet resolved the question of which model of simplified amendment should be proposed: a Statute for the Court, or a clause of the Convention allowing for simplified amendment of some articles in Part II ECHR. We consider that it would be premature for the Izmir Conference to take a political decision on the form of a simplified amendment procedure, at a stage when the expert group mandated to consider a simplified procedure of certain provisions of the Convention relating to organisational issues, as part of the follow-up to the Interlaken Conference,[7] has yet to make its recommendations on this point. **We recommend that the text of para.G be amended to refer to "elaboration of a Statute or other simplified procedure for any future amendment".**

**<u>Filtering:</u> para C.1 Follow-up Plan and para.2 Implementation**
Amnesty International, the ICJ, the AIRE Centre and Interights consider it important that, in any new filtering mechanism that is introduced, the principle of judicial decision-making at admissibility stage is preserved. **We propose that a new point be added to the list in para.C.1, to specify that any new provision must be put in place "without compromising the principle of judicial decision-making on admissibility."**

**<u>Role of Civil Society</u>: para.4 Implementation**
We welcome the draft Declaration's acknowledgment of the need for representatives of civil society – including lawyers and NGOs who regularly represent applicants before or make interventions to the Court – to participate in the current reform discussions. We consider that the Declaration should also reflect the need to include them, from the outset, in the long-term strategic thinking about the future of the Court, in recognition of the fact that applicants of the Court have an interest at least equal to that of governments in ensuring its long-term effectiveness. **We propose that the recommendation para.4 of the Implementation plan be amended to invite States Parties and the Committee of Ministers to consult with civil society on effective means to implement the Follow-up Plan, as well as to involve civil society, from the outset, in long-term strategic thinking about the future of the Court."**

[7] Interlaken Declaration, para.G.12