



Ref: TIGO IOR 61/2010.001

BY EMAIL

Ambassador Paul Seger
Ambassador Paul Widmer
Mr Marc Wey
Mr Frank Schurmann

25 January 2010

Dear Ambassador Seger, Ambassador Widmer, Mr Wey and Mr Schurmann,

RECOMMENDATIONS TO STRENGTHEN THE DRAFT DECLARATION FOR INTERLAKEN MINISTERIAL CONFERENCE

Thank you for forwarding the 13 January 2010 Draft of the Declaration for the Interlaken Ministerial Conference. We are most grateful to the Swiss authorities for providing us with an opportunity to review the draft text and for your consideration of the following comments.

As set out in the last recommendation below, we are hopeful that, in this same spirit of inclusion, the Interlaken Declaration will include a call on the Council of Europe and its Member States to ensure that civil society is consulted and that their views are considered, when developing the measures to implement the Interlaken Action Plan..

Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre (EHRAC), Human Rights Watch, Interights, the International Commission of Jurists (ICJ), Justice, Liberty and Redress consider that there is much to welcome in the 13 January 2010 draft Declaration including:

- the reaffirmation of the right of individual petition to the European Court of Human Rights
- the reaffirmation of the principle of subsidiarity, which, in accordance with Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, places the responsibility on the States Parties to secure the rights in the Convention;
- the recommendations aimed at strengthening implementation of the Convention at national level;
- the recognition of the need to ensure transparent and rigorous procedures for the nomination and selection of judges at the national and Council of Europe levels;
- the call for measures to ensure the Court enjoys an appropriate level of administrative autonomy within the Council of Europe;
- the recognition of the crucial role played by the Committee of Ministers in supervising the execution of the Court's judgments, and with a view to strengthening this work, the call for the development of working methods and rules to allow it to carry out this task more effectively and transparently; and
- the invitation to the Committee of Ministers to provide the Court with the necessary budget to determine pending applications within a reasonable time.

RECOMMENDATIONS

The above-named organisations urge the strengthening of the draft Declaration as follows. Please note that all proposed amendments to provisions of the draft Declaration are indicated by text in bold type or in striking out of text.

1) The Preamble:

We urge that **the 1st paragraph of the Preamble** be amended so that it includes not only reference to the strong commitment of the member States to the Convention and the Court but also to their commitment to ensure **the implementation** of the Convention and the commitment to collective enforcement of these rights. This would be consistent not only with Article 1 and the Preamble of the Convention, but also with the wording of paragraph 1 of the Action Plan. To this end we recommend that the **1st paragraph of the Preamble be amended** as follows:

Expressing the strong commitment of the member States of the Council of Europe to **the implementation of** the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) and **to** the European Court of Human Rights (“the Court”);

We also urge that the **6th paragraph of the Preamble** be amended to emphasise the essential role of all branches of the state in the protection of human rights, including the executive, the legislature and the judiciary. In particular we recommend that this paragraph be amended to read as follows:

Stressing the subsidiary nature of the supervisory mechanism established by the Convention and **noting the fundamental role of all branches of the state, including the executive, the parliament, the courts and regional and local authorities,** must play in guaranteeing and protecting human rights;

In addition we consider that some of the assertions in the **8th paragraph of the Preamble are not sufficiently supported by evidence and we urge that they** be amended to simplify the imperative of reform in the following manner:

Considering that this situation **damages the effectiveness of the Court** ~~causes serious damage to the effectiveness and credibility of the Convention and its supervisory machinery, as well as to the quality and the coherence of the case law and the authority of the Court, and that it represents a threat to the judicial protection~~

2) Right of Individual Petition:

We consider that requirements that an applicant be represented by a lawyer *ab initio* and/or communicate with the Court in French or English at all stages of the proceedings would be inconsistent with the effective exercise of the right of individual application. We also consider that lack of funds to pay court or lawyers’ fees should never be an impediment to access to the Court. We therefore recommend that these suggestions be removed from the draft. In particular we urge that **paragraph 3** be amended as follows:

With regard to access to the Court, the Conference calls upon the Committee of Ministers to consider ~~any~~ **measures** which might contribute to a sound administration of justice by reducing the number of manifestly ill-founded (manifestly inadmissible) applications filed with the Court, ~~and to examine in particular under which conditions new rules or practices could be envisaged requiring, for instance, the payment of court fees, compulsory representation by a lawyer or compulsory use of the Court’s official languages, without deterring well-founded applications.~~

3) Implementation at the National Level:

We consider that **paragraph 4** of the draft Declaration should be strengthened to make explicit the commitment of States to take action to ensure the enhanced implementation of Convention obligations.

The need to do so has been repeatedly underscored in documents issued by the Committee of Ministers and is reflected in the fact that some 80% of all of the Court's judgments have found at least one violation of the Convention by the State party. It is axiomatic that better implementation of the Convention at the national level will improve human rights and make it less necessary for individuals to seek redress from the Court in Strasbourg.¹

Furthermore we consider that it could be helpful to remind states of Recommendations which were adopted by the Committee of Ministers in the 2000-2004 reform package with the aim of assisting such action.²

In particular and in line with the Memorandum of the Commissioner for Human Rights³, we recommend amending **paragraph 4** to read as follows:

The Conference recalls it is primarily the responsibility of the States Parties to guarantee at the domestic level the application of the Convention. **The Conference** consequently calls upon the **governments of the State Parties, with the active co-operation and scrutiny of their Parliaments and national human rights institutions, to take the necessary steps and put appropriate systems in place to ensure better implementation of the Convention including by:**

- a) fully executing the Court's judgments ensuring that the necessary measures are taken to prevent further similar violations;
- b) **monitoring the case-law of the Court and** drawing the appropriate conclusions from a judgment finding a violation of the Convention by another State, **particularly** where the same problem of principle exists within their own legal system;
- c) **ensuring** that any person having an arguable claim that their rights and freedoms as secured in the Convention have been violated have available to them an effective remedy before a national authority and, where appropriate, are able to obtain adequate redress;

¹ Declaration "The European Convention on Human Rights at 50: What future for the Protection of Human Rights in Europe?", adopted in Rome on 4 November 2000 by the European Ministerial Conference on Human Rights; Declaration of the Committee of Ministers "Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels" adopted on 12 May 2004; Final Activity Report of the CDDH, "Guaranteeing the long-term effectiveness of the European Court of Human Rights – Implementation of the Declaration adopted by the Committee of Ministers at its 112th Session (14-15 May 2003)", adopted by the CDDH on 8 April 2004, CDDH (2003) 006, at paragraph 15.

² Recommendation Rec (2000)2 on the re-examination or reopening of certain cases at domestic level following a judgment of the European Court of Human Rights; Recommendation Rec (2002)13 on the publication and dissemination in the Member States of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights; Recommendation Rec (2004)4 on the European Convention on Human Rights in university education and professional training; Recommendation Rec (2004)5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights; Recommendation Rec(2004)6 on the improvement of domestic remedies.

³ Memorandum of the Commissioner for Human Rights in view of the High-Level Conference on the future of the European Court of Human Rights (Interlaken, Switzerland, 18-19 February 2010), "Prevention of human rights violations is necessary through systematic implementation of existing standards at national level", CommDH(2009)38, 7 December 2009. Available at: <https://wcd.coe.int/ViewDoc.jsp?id=1555169&Site=CommDH>

d) considering the development and implementation of a comprehensive national human rights action plan.

4) Filtering:

We recommend that **paragraph 6** should be supplemented with a call upon the Committee of Ministers to evaluate the need for a filtering mechanism in the light of an assessment of the new single judge system and to carry out an analysis of the reasons for inadmissible applications and proposals to address the causes. This will help to ensure that any solutions proposed would take account of the impact of reforms that have been implemented and the real causes of the problems.

In particular we recommend that **paragraph 6(b)** be amended as follows:

b) stresses the interest of a thorough analysis of the Court's practice relating to applications declared inadmissible, **including the impact of reforms that have been undertaken, as well as conducting an analysis of the underlying reasons for such a high-percentage of clearly inadmissible cases being submitted to the Court;**

In addition we recommend that **paragraph 6(d)** be amended as follows:

d) calls upon the Committee of Ministers to consider, **in the short term, measures to address the causes of the submission of clearly inadmissible applications including the establishment of projects similar to the Warsaw Pilot projects in relevant states; and,** in the long term **and in the light of the foregoing analyses,** the setting up of a filtering mechanism within the Court going beyond the single judge procedure, including, in particular, a new, separate body of judges within the Court, and the discharge of certain judicial powers by members of the Registry under the control of the Court;

5) Repetitive Applications:

We urge you to ensure that this Section refer back to the duties of states to ensure better implementation at the national level, including to ensure the existence of effective and accessible remedies- as this will go a long way to enhancing respect for human rights, and reducing the number of repetitive cases filed with the Court.

We also consider that **the first bullet point under paragraph 7 (a)** should be amended to reflect the principle that unilateral declarations should be a last resort and should be applied only where a friendly settlement cannot be achieved. To this end, and along the lines of the December draft, we propose the following amendment to the first bullet point under paragraph 7(a) of the draft Declaration:

a) Calls upon States

- to facilitate where possible, and within the guarantees provided for by the Court and eventually with the support of the Court, the adoption of friendly settlements and, **if necessary and appropriate** unilateral declarations;

We consider that **paragraph 7(c)** would be enhanced if it made reference to the impact of the newly implemented three-judge Committee procedure. In particular we recommend that Paragraph 7 (c) be amended to read as follows

c) calls upon the Committee of Ministers to consider:

- **in the light of an evaluation of the impact of the three-Judge Committee ruling on the admissibility and merits of cases in which the Court's case law is well-settled,** whether repetitive cases should be handled by a new category of judges responsible for filtering

6) The Court:

We are concerned that parts of **paragraph 9** are inconsistent with the Convention, encroach on the independence of the Court and risk eroding the right of individual petition. Furthermore there is no reason to believe that the Court will need encouragement to apply Protocol 14 to the Convention, when it comes into force. We recommend that the paragraph be deleted or at a minimum, re-framed as suggested below.

9. The Conference, acknowledging the shared responsibility between ~~the Court and the States~~ **and the Court**, stresses that ~~the Court~~:

a) ~~is not a fourth instance court that should reconsider questions of fact or national law that have been considered and decided by national authorities~~ **The purpose of the Court is to ensure the observance by the parties of their obligations under the Convention;**

b) ~~should apply admissibility criteria rigorously and should take into account its subsidiary role in the application and interpretation of the Convention;~~ **The Court has jurisdiction to adjudicate on all matters regarding the interpretation and application of the Convention, with due regard to the admissibility criteria established in the Convention, (as amended by Protocol 14 once in force) .**

c) ~~should give full effect:~~

- ~~to the new admissibility criterion provided for in Protocol No. 14, once the Protocol has entered into force;~~
- ~~to the principle *de minimis non curat praetor*, on the basis of Article 37 (1)c) of the Convention.~~

7) Procedure for Amendment of the Convention:

To ensure consistency with the CDDH Opinion (paragraph 25) and with the Recommendation of the Group of Wise Persons (paragraph 50), we urge that **paragraph 12** be amended by deleting the words “or procedural issues” so as to exclude from consideration of amendment by simplified procedure any provisions of the Convention that relate to “procedural issues”.

8) Implementation:

We urge that the **section on Implementation** be supplemented by inviting the Committee of Ministers to ensure the resources needed to give effect to this Declaration. In particular we recommend amending **the first paragraph of the section on Implementation** as follows:

In order to implement the Action Plan,
the Conference invites the Committee of Ministers:

- to provide the Court and the Committee of Ministers with the necessary budgetary means to ensure that pending cases can be decided within a reasonable time **and to increase resources for the supervision of the execution of judgments;**
- to issue terms of reference to **and ensure adequate resources for** the competent bodies with a view to preparing, before the end of 2011, specific proposals for measures requiring amendment of the Convention; these terms of reference should include the study of measures making it possible to simplify the amendment of the Convention in the future;
- to follow-up and implement before June 2011, where appropriate, in co-operation with the Court and giving the necessary terms of reference **and resources** to the competent bodies, the measures set out in this Declaration that do not require amendment of the Convention.

9) Consultation with Civil Society:

Finally, we urge that the Section on Implementation be supplemented to include a call on Member States and the Committee of Ministers to consult with civil society on effective means to implement the Action Plan and to consider their views when developing positions on reform of the Convention's control mechanisms.

In particular urge that the following paragraph be added to the final paragraph of the Declaration:
Implementation:

The Conference calls upon:

....

The Committee of Ministers and the Member States to consult with civil society on effective means to implement this Action Plan and to consider their views when developing positions on reform of the Convention's control mechanisms and measures to ensure enhanced implementation of the Convention at national level.

On behalf of the above- named NGOs, we are most grateful for your consideration of these Recommendations.

Yours sincerely,



Jill Heine
Legal Adviser
Amnesty International

cc: Permanent Representatives to the Council of Europe
the Secretary General of the Council of Europe
The Council of Europe Commissioner for Human Rights
CDDH
the President of the Parliamentary Assembly of the Council of Europe
Chair of the Assembly's Committee on Legal Affairs and Human Rights