AI Index: 61/016/2010

Committee of experts on a simplified procedure for amendment of certain provisions of the European Convention on Human Rights (DH-PS)

Initial Comments of Amnesty International and the International Commission of Jurists

October 2010

Introduction

Amnesty International and the International Commission of Jurists (ICJ) welcome this opportunity to provide comments at the outset of the work of DH-PS. The organisations welcome the establishment of the Committee of Experts as an important element of follow-up to the Interlaken Declaration.

Amnesty International and the ICJ support in principle the proposal to create a Statute or simplified amendment procedure including certain organisational provisions of Part II of the European Convention on Human Rights.

In the view of the two organisations, the overriding purpose of any such reforms must be to facilitate flexibility of amendments to the organisational and operational procedures of the Court so as to allow the Court to respond effectively and quickly to address changes in its case load. Any changes to the founding and regulating instruments of the Court – no matter what their form – should serve this purpose and this purpose alone, given the importance which was attached to it in the Interlaken Declaration.

Ultimately, the new measures proposed by the Committee should be designed to ensure a strong and effective Court, able to address the current backlog of cases and to cope with changes to its caseload in the long term, while maintaining and strengthening its role in the protection of human rights. They should be consistent with and reinforce the responsibilities of the Court under Article 19 ECHR, which are to "ensure the observance of the engagements undertaken by the High Contracting Protocols in the Convention and the Protocols thereto". Any reforms to instruments related to the Court should ensure that the Court can continue to rule effectively and promptly on questions of violation of the Convention rights, and deliver justice to individual applicants in fulfilment of its role as a guarantor of the Convention rights, and in accordance with the right of individual petition under Article 34, which as the Interlaken Declaration has reaffirmed is a cornerstone of the Convention system.[1]

[1] Paragrph 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."

Changes proposed to the instruments related to the Court and/or its procedures will need to protect the role and independence of the Court within the Convention system. In addition, the role of the democratic institutions of the Member States and of the Council of Europe itself will also need to be protected,. The process of discussion such amendments as well as the amendment procedures themselves should ensure transparency and inclusiveness. Any such amendments must make provision to compensate for any democratic deficit that may arise if the usual national[2] and international procedures for approval of amendments to the Convention are dis-applied in regard to some existing Convention provisions.

The Architecture for the establishment and operation of the Court: Scope of the Convention, Statute and Rules

Recommendations of this Committee on a Statute and/or simplified amendment procedure could result in either a two- or three-tier legal basis for the establishment, organisation and operation of the Court. This would be composed of:

1. the Convention (possibly including some provisions subject to a flexible/simplified amendment)
2. (possibly) a Statute (some of which may be subject to a simplified amendment procedure)
3. The Rules of Court.

The Convention should retain provisions on the essential elements of the Court's establishment; jurisdiction regarding individual petition, state complaints and advisory opinions; and provisions guaranteeing the independence and the appearance of independence of the Court (and its judges) and ensuring the effectiveness of the court in fulfilling its role under Article 19 ECHR.

A Statute, in principle, could regulate the organisation of the Court, drawing on organisational provisions currently in Part II of the Convention. Its provisions could be subject to more flexible amendment than the Convention; it could also contain some provisions not subject to flexible amendment.

The Rules of Court should retain their current scope, regulating the detail of the Court's procedures. The development and adoption of the rules should remain within the competence of the Court.

Amnesty International and the ICJ agree, however, that consideration could be given, in any amending protocol on the procedure and organisation of the Court, to elevation to the Convention of certain especially significant elements of the Rules of Court, in particular Rule 39 on Interim Measures, provided that they are neither amended in substance in the process of such elevation nor made subject to flexible amendment.

[2] In this regard, as noted by Jakub Wolasiewicz in his paper presented to the 4th Warsaw Seminar, it should be recalled that the Constitutional systems of some member states of the Council of Europe require that any having amendments having a material impact on human rights have to be subject to domestic legislative procedures. (see Some Remarks on Concepts of the Statute of the European Court of Human Rights and/or a Simplified Procedure for Amending Certain Provisions of the European Convention, at page 4).

Scope of Simplified Amendment Procedures

Convention Articles

Irrespective of whether provisions subject to simplified amendment are contained within the Convention or a Statute, Amnesty International and the ICJ consider that they should not include those provisions of the Convention which are fundamental to the Court's capacity to protect Convention rights and the right of individual petition to the Court. We agree with the Group of Wise Persons that "provisions defining key institutional, structural and organisational elements of the judicial system of the Convention, namely the establishment of the Court, its jurisdiction and the status of its judges" should remain subject to the normal procedures for amendment to the Convention.[3]

In our view, Articles 19-23, 27-29, 33-37, 45-46, 49 and 51 of the Convention as amended by Protocol 14 should be excluded from a simplified amendment procedure, which could apply to other provisions of Part II. This model follows the proposals of the Group of Wise Persons,[4] except that in addition to the proposals for exclusion made by the Group of Wise Persons, we propose that the following Articles should not be subject to modification by any simplified amendment procedure:

- **Article 28** (Declarations of inadmissibility by committees) and **Article 29** (decisions by Chambers on admissibility and merits). It is important that these provisions remain in the Convention to secure judicial as opposed to administrative decisions at crucial early stages in the Court's consideration of cases.
- **Article 37** (Striking out applications) should remain in the Convention since the terms of this provision are fundamental to the right of individual petition. We consider that the inclusion of Article 37 among the Articles which could be subject to amendment though a simplified procedure could potentially lead to the striking out of applications without the judicial consideration necessary to protect the right of individual petition and respect for the Convention rights.
- **Article 3**6, (Third party intervention), **Article 45** (Reasons for judgments and decisions) and **Article 49** (Reasons for advisory opinions) should also remain in the Convention. Third party interventions have become an important feature of the system; this is acknowledged by the fact that the Reflection Group has considered how to encourage additional interventions. The provisions in both Articles 45 and 49 that judges may deliver separate opinions should not be alterable by simplified procedure, as they significantly contribute to the Convention jurisprudence.

Rules of Court

In general we consider it appropriate that the Rules of Court should retain their current scope. First, removing significant elements of the Rules of Court to a Statute could erode the independence of the Court by removing its competence to regulate the detail of its own operating procedures guaranteed under Article 25 of the Convention. Second, elevating elements of the Rules of Court to a Statute will not assist in achieving the aims of the Interlaken Declaration: quite the reverse, it will make changes to the Court's procedures more inflexible and difficult to adjust to changing circumstances.

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[3] Report of the Group of Wise Persons to the Committee of Ministers, CM (2006) 2-3, 15 November 2006, para.50.

[4] ibid, para.49.

Interim measures (Rule 39)

We are particularly concerned at proposals that Rule 39, on interim measures, should be included in the Statute. Rule 39 has been used effectively by the Court in ways essential to ensure the effective protection of Convention rights, for example to prevent the removal of an individual from a member state pending a decision by the Court on respect for the prohibition of torture and other ill-treatment. The Grand Chamber of the Court has recognised the binding nature of interim measures under Rule 39 and their vital role in allowing the Court to secure the effective protection of Convention rights to applications in certain cases.[5] In *Mamatkulov v Turkey*, it held that 'a failure to comply with interim measures will undermine the effectiveness of the right of individual application guaranteed by Article 34 and the State's formal undertaking in Article 1 to protect the rights and freedoms set forth in the Convention."[6] In light of this, the adoption of a simplified procedure that would facilitate changes to Rule 39 could be inconsistent with Article 34 and significantly impair the Court's authority and effectiveness in protecting Convention rights.

Pilot Judgments and unilateral declarations

Neither do we consider it necessary or appropriate to include within a Statute or new provision of the Convention subject to a simplified amendment procedure rules on pilot judgements or unilateral declarations. Both these procedures are still relatively new and in their formative stages. The Court has recently consulted the High Contracting Parties and civil society prior to drafting Rules for the pilot judgement procedure, an initiative that has been welcomed by the GDR.[7] Indeed, the Interlaken Declaration recognised the need for the Court to develop the procedure further and to evaluate its effects.[8]

We consider that at least for the foreseeable future the Court should retain the flexibility to develop Rules on the pilot judgment procedure (a procedure which is still under development)[9] and the relatively recent mechanism of unilateral declarations, without the additional constraints that elevation to a Statute would entail.

Procedures for amendment

Preliminary discussions to date have focussed on whether agreement to amendments through the simplified process should require either a unanimous vote or at least a vote of a majority of two-thirds of the High Contracting Parties to the Convention.

Whatever the scope of the amendment process, any amendment procedure must build in sufficient checks and balances to allow for transparency and adequate scrutiny of proposed amendments. It is particularly important that the Court should be able both to propose amendments (along with Member States) and that any amendment should be subject to its

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[5] *Mamatkulov and Askarov v Turkey*, judgment of the Grand Chamber of the European Court of Human Rights, 4 February 2005 available at http://cmiskp.echr.coe.int////tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=9835&sessionId=20040294&skin=hudoc-en&attachment=true.

[6] *Mamatkulov and Askarov v Turkey*, Applications nos. 46827/99 and 46951/99, para.125

[7] Committee of Experts on Reform of the Court (DH-GDR) Report, 3rd Meeting, 5-7 May 2010, DH-GDR (2010) 008, para,5.

[8] Interlaken Declaration para.D.7.c

[9] Responding to Systematic Human Rights Violations, An Analysis of Pilot Judgments of the European Court of Human Rights and their Impact at National Level, by Philip Leach, Helen Hardman, Svetlana Stephenson and Brad K Blitz (2010).

approval (as stipulated in the report of the Group of Wise Persons).[10] The flexible amendment procedure should also entail a transparent consultation process, with comments sought and considered from the Parliamentary Assembly of the Council of Europe (PACE), other Council of Europe institutions,[11] National Human Rights Institutions, NGOs and lawyers who regularly practice before the Court. Particular consideration should be given to the role of PACE within a flexible amendment procedure. The proposal, put forward at the recent Warsaw seminar, for a PACE veto on proposed amendments through a simplified procedure could help to address the democratic deficit resulting from the reduced role of national Parliaments in a simplified process.

[10] Report of the Group of Wise Persons to the Committee of Ministers, para.46.

[11] For example, amendment of the Statute of the European Court of Justice requires consultation with the European Parliament and Commission. (if the Proposal for amendment has not been initiated by the Commission) as well as with the Court (if the proposed amendment is not at the initiative of the Court) except in relation to Title I and Article 64 of the Statute. Treaty on European Union, Article 281.