Sir Leigh Lewis KCB
Commission on a Bill of Rights
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26 October 2011

Dear Sir Leigh

As advocates engaged in litigation and advocacy before the Council of Europe, we write to share with you some comments and observations concerning the Commission's interim advice to the UK Government on reform of the European Court of Human Rights ("ECtHR" or "Court") as well as your parallel letter on this issue of 28 July 2011. Also, we would like to highlight the crucial issue of implementation of ECtHR judgments, which we feel merits the attention of both the Commission and Government in advance of the United Kingdom's assumption of the Chairmanship of the Committee of Ministers of the Council of Europe in November of this year.

We welcome the emphasis that the Commission's recommendations place on the principle of subsidiarity, according to which the primary responsibility for ensuring respect for the Convention lies with States, with the Court intervening only where the domestic authorities fail in that task. We agree that it is essential to ensure that Member States and their national institutions assume their primary responsibility for securing the Convention rights. The responsibility of States to make Convention rights a reality at the national level is therefore central to the idea of subsidiarity and it is clear that better implementation of the Convention at national level would mean greater respect for human rights throughout Europe. Importantly, it would also reduce the need for individuals to apply to the Court for redress. This was acknowledged by the Interlaken Declaration, which referred 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."[1]

* The signatories of this letter wish to note that a member of the Commission on a Bill of Rights, Lord Lester of Herne Hill QC, serves on the Board of Directors of the Open Society Justice

Just as Member States bear the primary responsibility for the protection of human rights, ensuring the existence of accessible and effective remedies for violations and alleged violations rests with them as well. Unfortunately, as the Court's growing docket attests, many Member States are not meeting that duty. A recent publication by the Open Society Justice Initiative notes that the non-implementation of judgments has been a growing concern of the European system for some time, with the figure of cases awaiting satisfactory implementation rising from 12.5 percent in 1996 to more than 60 percent ten years later.[2] Fifteen percent of the Court's "leading" cases have now been pending before the Committee of Ministers for five years or more; moreover, of those cases pending before the Court, five States – Russia, Turkey, Romania, Ukraine, and Italy – account for over 60 percent of the Court's workload.[3] While we share the concern over the Court's backlog, it must be recognized that the "voluminous and ever-growing case-load" to which the Commission refers is symptomatic of the failures of the Council of Europe Member States, not the Court itself. Simply stated: if States fully and effectively implemented the judgments against them, fewer cases would be brought to the Court on issues about which its case law is clear.

In light of this, we regret the absence of any discussion by the Commission of the diminishing implementation record of European Court judgments, which is crucial for ensuring greater compliance by States with their obligations under Article 46 of the Convention and for the effective functioning of the Convention system as a whole. As the Commission returns to these issues later in its work programme, we urge that it considers more closely what actions might be required at the national level to ensure better implementation of judgments of the European Court of Human Rights. Similarly, if States Parties established systems for regular review of the jurisprudence of the Court with regard to other Member States, and took appropriate measures at national level to ensure that this review informed the work of relevant Government departments and public bodies, the Court's workload would likewise decrease. Indeed, the United Kingdom's own Joint Committee for Human Rights has been a model institution for ensuring parliamentary scrutiny of the implementation of judgments and might well serve as an example for the Commission to highlight in its later recommendations. The proposal raised in the Commission's parallel letter to expand the powers of the Court to

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Initiative and as President of INTERIGHTS; Lord Lester and Baroness Kennedy of the Shaws QC also serve as member and Chair, respectively, of the JUSTICE Council. However, neither Lord Lester nor Baroness Kennedy took any part in the development of this submission.

[1] Interlaken Declaration, para. PP 6.

[2] As the volume of applications reaching the Court has outstripped its capacity for speedy determination, the Committee of Ministers' ability to supervise the implementation of judgments has diminished as well. In January 2007, over 5,000 judgments were still listed as pending before the Committee of Ministers; by the end of 2009, that figure had risen to nearly 8,000. *See From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (Open Society Foundations, 2010), pp. 35-37.

[3] *See* Committee of Ministers, *3rd Annual Report – Supervision of the Execution of Judgments* (2009).

provide Advisory Opinions on Convention issues at the request of Member States' highest national courts could also contribute to better implementation at the national level.

In addition to the above considerations concerning subsidiarity and implementation, we submit the following brief comments on other specific recommendations raised by the Commission in its interim advice:

Interim Recommendation 1: Admissibility and the Right of Individual Petition

The right of individual petition is at the heart of the Convention's protection system and calling upon the Court to "only address a limited number of cases" overlooks the fact that a large number of the applications coming before the Court already raise serious interpretive questions and grave allegations of human rights abuse. The Commission's recommendation that the ECtHR address only "a limited number of cases that raise serious questions" therefore risks excluding any number of grave human rights violations from the Court's jurisdiction and, indeed, goes much further than the more modest proposal that the Court be "given a means of rejecting applications that raise[] issues of minor or secondary importance". While we endorse the Commission's recommendation that Member States and their national institutions "assume their primary responsibility for securing the Convention rights," it would be wrong to treat the number of applications submitted to the Court as the cause of the challenges faced by the Court, rather than the reason for its existence.

Interim Recommendation 2: Time-Bound Programme

We welcome the Commission's proposal that the Government use its Chairmanship as an opportunity to address reform of the Convention system; however, we would caution that the Government's six-month tenure, and the call for a "time-bound programme," not be used as an opportunity to rush reform proposals, without sufficient consultation and deliberation with civil society, the Court, and other relevant stakeholders.

Interim Recommendation 3: Screening Mechanism

We agree, as the Commission's letter suggests, that the main challenges facing the Court are two-fold: 1) screening applications quickly and effectively in order to weed out the high proportion (90 percent or more) of applications received which are manifestly inadmissible under the current criteria, and 2) handling in an effective and efficient manner admissible applications that raise issues about which the Court's case law is clear (manifestly well- founded "repetitive" cases). As noted above, many of these repetitive cases – which have been variously estimated to make up more than 50-60 percent of the ECtHR's case load – come before the Court as a result of Member States' failure to implement earlier judgments. At the same time, the right of individual application is, as both the Interlaken and the Izmir Declarations reaffirmed, a "cornerstone" of the Convention system[4] and we oppose proposals for a screening mechanism that would impose additional admissibility criteria designed to curtail effective access to and redress by the Court for violations of Convention rights. Any future revisions to a Court screening mechanism must ensure that the substance of the right of

[4] Interlaken Declaration, para. A(1) and Izmir Declaration, para A(1).

individual application is preserved. Furthermore, given that the current admissibility criteria and institution of the one-judge screening mechanism introduced by Protocol 14 have only been in place for little over a year, we believe that any revision or establishment of additional admissibility criteria would be premature and unadvisable at this stage. We would, however, welcome regular and periodic studies that, as the Interlaken Action Plan provides, assess the range of impacts of the present admissibility criteria.[5] We would further urge that Member States ensure that the budget of the Court includes sufficient resources for such studies.

Interim Recommendation 4: Relief and 'Just Satisfaction'

We are of the view that permitting the Court to remit Article 41 decisions back to the State concerned would only increase the likelihood of further and lengthy delay in the determination of compensation decisions, and possible further litigation. Moreover, reverting such decisions back to States raises the risk of different standards being applied to awards of just satisfaction (and for those whom the Court would, as the Commission suggests, compensate "in certain cases"). We remain supportive, however, of an earlier proposal made in 2005 by Lord Woolf, who recommended that a specialist unit be created within the Court's Registry, which could carry out the task of assessing Article 41 claims consistently and expeditiously.[6]

Interim Recommendation 5: Enhancing the Nomination and Appointment of Judges

We agree that the selection procedures for candidates for election of ECtHR judges are of critical importance. It is vital that judges have the necessary qualifications to serve on the Court, as well as "sufficient standing and authority to command the full respect of national judges." Like the Commission, we welcome the creation of a panel of experts to advise on the candidates for election as judges; however, we regret that the Contracting Parties 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 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. We also support, and would encourage the Commission to support, the proposal of the Ad Hoc Working Group (CDDH-SC) 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.[7]

Finally, with respect to the letter that appends the Commission's interim recommendations, we wish to register our strong objection to any proposal that would permit a 'democratic override'

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[5] Interlaken Declaration, Implementation, para. 6

[6] *See* Review of the Working Methods of the European Court of Human Rights, December 2005, pp. 40-41, *available at* http://www.echr.coe.int/NR/rdonlyres/40C335A9-F951-401F-9FC2-241CDB8A9D9A/0/LORDWOOLFREVIEWONWORKINGMETHODS.pdf.

[7] Council of Europe, Steering Committee for Human Rights, *Ad Hoc Working Group on National Practices for the Selection of Candidates for the Post of Judge at the European Court of Human Rights*, CDDH-SC(2011)R1, para. 14.

of Court rulings. As an initial matter, the independence of the European Court, and its capacity to issue binding judgments that can ensure the observance of the Convention obligations undertaken by Member States, are principles fundamental to the European Convention of Human Rights. As those members of the Commission opposed to this concept rightly note, preserving this independence is an essential protection that the Convention system affords. Furthermore, such a proposal finds no support in the text of the European Convention itself; Article 46 makes clear that Contracting Parties "undertake to abide by the final judgment of the Court in *any case* to which they are parties."[8]

Moreover, 'democratic override' would imperil the very fabric of the Convention system itself, built as it is on the vision of a European continent where rights are protected and guaranteed. Indeed, even as these proposals unfold from the perspective of the United Kingdom's Chairmanship, it should be recalled that both the Court and Convention have played a crucial role in expanding the protection of human rights far outside the country's borders, from the democratic transitions of the 1970s to the post-Cold War ratification of former Soviet bloc States. In this process the Court has served as a catalyst to increase standards in a number of emerging democracies, ensuring the equal treatment and participation of minorities in public life, upholding the principle of fair trial rights, and protecting those at risk of torture and ill-treatment. The 'interventionism' of the Court should therefore not be seen as an obstacle to reform, or an opportunity to put forward grievances against particular aspects of its jurisprudence; rather, these discussions should be an occasion for States to affirm their commitment to a strong and independent Court for all of Europe, as was the case in the Interlaken Declaration.

We would be grateful if you would make this letter available to all the members of the Commission on a Bill of Rights. In the meantime, should you or other Commission members have any questions on the above comments we would welcome the opportunity to provide further information or to discuss our views in greater detail.

Yours sincerely,

AIRE Centre
Amnesty International
European Human Rights Advocacy Centre
INTERIGHTS
International Commission of Jurists
Human Rights Watch
JUSTICE
Open Society Justice Initiative

[8] European Convention on Human Rights (CETS No. 194), Art. 46(1) (emphasis added). Where a State refuses to abide by a final judgment, the Convention further provides that the Committee of Ministers may, by a majority vote of two thirds, refer to the Court the question whether that Party has failed to fulfill its obligations.