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MEMORANDUM

OF THE PRESIDENT OF THE EUROPEAN COURT OF HUMAN RIGHTS

TO THE STATES

WITH A VIEW TO PREPARING THE INTERLAKEN CONFERENCE

Switzerland has agreed to organise on 18 and 19 February 2010 in Interlaken, during its Chairmanship of the Committee of Ministers of the Council of Europe, a conference on the future of the European Court of Human Rights. This initiative is both unprecedented and important and it is to be welcomed.

The purpose of the conference, which will bring together State actors capable of engaging the responsibility of their country at the political level, is to reaffirm the commitment of the States to the protection of human rights in Europe. At the same time it should aim to build for the future and to establish a roadmap for the evolution of the European Court of Human Rights, an essential component of this international protection mechanism.

I. THE ACHIEVEMENTS OF THE EUROPEAN CONVENTION AND COURT OF HUMAN RIGHTS

The European Convention on Human Rights which was opened for signature in 1950 was the Council of Europe's first major act. It was also the first successful attempt to give binding legal effect to the ideals embodied in the Universal Declaration of Human Rights. The Convention is an international treaty which sovereign States have freely accepted. They have agreed, as expressed in Article 1 of the Convention, to guarantee the fundamental rights defined in the treaty to all those within their jurisdiction.

The Convention also sets up an international mechanism to ensure that States respect the commitments they have entered into. Since 1998 this function has been performed by a fully independent judicial body, the European Court of Human Rights.

The right of individual petition, proclaimed in 1950, became compulsory and general in 1998. It is the cornerstone of a mechanism of collective guarantee whose reach extends to 800 million persons within the jurisdiction of the Contracting States.

The independence and impartiality of the Court and its Judges (and of its Registry) are the absolutely necessary conditions for an effective review of compliance with Convention obligations. The Court's independence and impartiality must therefore be maintained and indeed reinforced by concrete guarantees.

The Convention system and the Court have achieved remarkable success. They exert considerable influence on the rights and freedoms in the forty-seven States. As a source of inspiration their impact extends even beyond the frontiers of Europe. They have, through the process of protecting and developing rights, contributed to establishing peace and stability and to strengthening democracy, especially in countries where authoritarian regimes had given way to democracy and during the period of transition which followed the fall of the Berlin Wall.

The Court's judgments have far-reaching effects on national legal systems. At the same time the sheer number of its judicial decisions is striking. Since 1 November 1998 alone (when Protocol No. 11 entered into force), the Court has pronounced no fewer than 188,000 inadmissibility decisions and some 10,000 judgments on the merits. In 2008 it disposed of a total of over 32,000 applications, nearly 1,900 by judgment delivered and approximately 30,000 by inadmissibility decision.

II. CURRENT SITUATION OF THE CONVENTION AND THE COURT

Ratified by forty-seven States, the Convention, with its several additional Protocols, occupies a prominent rank in the hierarchy of legal norms applicable in those States, even if the precise level of the rank varies from State to State. While judges, lawyers, academics and the actors of civil society are now much more familiar with it, there is still room for progress.

The Court's situation presents a somewhat mixed picture, however its case load is too heavy.

1. Firstly, the number of new applications has increased substantially over the last ten years (8,400 in 1999, compared with almost 50,000 in 2008), as has the number of cases pending (almost 100,000 at the end of 2008). In ten years the number of pending cases has been multiplied by ten! However, the figures vary considerably from country to country, and not necessarily in proportion to their respective populations: 57% of the cases pending concern only four countries, and about 80% concern only 12 out of 47 States. The consequence of the volume of cases is that the length of proceedings before the Court can be excessive.

Yet applications vary enormously in nature. Broadly speaking three categories can be identified:

- The very numerous applications dismissed as inadmissible even without being communicated to the respondent State. The causes of this phenomenon need to be analysed. One of the reasons lies in the fact that many applicants are not familiar with either the substantive limits of the Convention or the procedural conditions for admissibility.
- Repetitive applications, usually well founded and reflecting a structural problem already diagnosed by the Court and found to be incompatible with the Convention.
- More isolated applications raising new questions, whose level of importance and gravity can be very different.

2. The Court is constantly striving to modernise and improve its methods to be able to adjudicate more cases. In recent years it has created a Fifth Section, opted in most cases to decide on admissibility and the merits at the same time, encouraged friendly settlements and accepted unilateral declarations of violations, developed the “pilot judgment” procedure, simplified the drafting of judgments and drawn up a new order for processing applications based on well-defined criteria. It is also giving thought to the just satisfaction awarded to applicants. Just satisfaction constitutes an important feature of its judgments and their effects. It has substantially improved its data processing tools and developed its Research Division.

In spite of all these efforts, the continuing increase in the volume of new cases means that there is still a large and even widening gap between the number of decisions it delivers and the number of incoming applications.

3. Over the last few years the member States of the Council of Europe have increased the Court’s budget significantly. However, the Court has still had to seek additional reinforcement of the Registry involving the recruitment of 225 staff over three years. Further recruitment, beyond this three-year programme, would create a situation in which the current number of Judges would be insufficient to cope with the work produced by the Registry.

4. Lastly, this Court is bound by numerous regulatory and bureaucratic constraints (as has often been pointed out, for example in the Wise Persons’ Report to the Committee of Ministers in 2006), which hamper its efficacy, be it in the recruitment and management of its staff, its budget or even its internal organisation. One aspect of this is its lack of administrative autonomy within the Council of Europe. Another relates to the organisation of its judicial work. As amended by Protocol No. 11, the Convention makes detailed provision for the Court’s judicial formations and the number of judges that compose them, which explains why another Protocol (No. 14) is necessary to change these purely judicial

mechanisms. The fact that Protocol No. 14 has not been able to enter into force in its entirety has fortunately to some extent been compensated for by the decisions taken at the ministerial meeting in Madrid on 12 May 2009 (Protocol No. 14 *bis* and provisional application of certain provisions of Protocol No. 14). It is nevertheless an anomaly that such provisions appear in the Convention and not in an instrument which is easier to amend, for example the Rules of Court, adopted and amended by the Court itself.

III. WHAT SHOULD THE AIMS AND RESULTS OF THE CONFERENCE BE?

A conference such as is planned for Interlaken should aim to leave its mark in three different areas:

- on the political level;
- in relation to long-term goals (eight or nine years after the conference);
- with regard to short- to medium-term goals.

A. The political level

After fifty years' existence, we now need to look to the future of the Court. To do this the relationship between the Court and the national authorities has to be defined with maximum clarity. In carrying out that exercise it is necessary to identify and respect the roles that both the national authorities and the Court must play within the Convention system. States and the Court have the same objective, namely securing the rights guaranteed under the Convention and its Protocols.

Interlaken should not be perceived merely as an opportunity to provide assistance to the Court unilaterally. It must acknowledge the sharing of responsibility between the States and the Court.

At the Conference the States will be expected to outline how they see the Convention machinery in 2020, with the amendments to the Convention which that would require. They should also indicate what alterations should be made to the system in the short- to medium-term without amending the Convention.

The States should ask themselves the following questions: what sort of Court of Human Rights do they want for the future? What sort of machinery are they prepared to finance? What should it deal with? There can be no question of modifying the substantive rights and freedoms guaranteed by the Convention; the aim is to reaffirm the principle of the right of individual application, while being fully aware that the Court cannot deal with everything in the way that it deals with it today. Yet how can that basic principle be preserved while ensuring that it remains effective, in other words that the Court can process and adjudicate with sufficient speed well-founded and in particular serious allegations of human rights abuses? At the same time it is necessary to ensure that the Court maintains the quality and the coherence of its case-law.

B. The aims of the Conference

B.1 Longer term goals

1. Process

It will obviously not be possible to decide on the detail of such developments at Interlaken, in particular because they are complex and require sophisticated technical studies. However, at the conclusion of the Conference it would be possible:

- (a) to initiate the necessary studies;
- (b) to set a deadline for bringing the changes into force, it being understood that they will almost certainly require a revision of the Convention; the deadline could be set as 2019 (the 60th anniversary of the Court, which began to function in 1959);
- (c) to give terms of reference to the competent bodies instructing them to engage in the process of amendment of the European Convention of Human Rights.

2. What Court for 2019?

The right of individual petition lies at the heart of the Convention mechanism and the Court is of the firm opinion that it must be preserved in principle. The first question to address is whether this right should be maintained in its current form or whether certain modalities should be attached to its exercise.

A second set of issues relates to what is often called subsidiarity. It is perhaps more appropriate to refer to the sharing of responsibility for the protection of human rights between national authorities and the Court.

The basic principle is that it is for the States to guarantee the Convention rights at national level and for the Court to ensure, through the examination of individual applications (or exceptionally inter-State cases), that States do indeed respect their engagements. This means that it is in the first place for the national authorities and courts to prevent or, when they fail to do so, examine and put right any violation of the Convention. It also means that States must comply with the Court's case-law and make sure that judgments of the Court are adequately executed, notably by adopting the appropriate general measures and by taking remedial action in respect of cases which could give rise to similar issues. As regards the Court's role in this context, it must reject applications where the applicants have not properly exhausted domestic remedies and it should apply Article 13 of the Convention so as to ensure that States establish adequate remedies. The Court must pursue a proactive interpretation of Article 13 so as to encourage the introduction of domestic remedies. The high number of repetitive applications before the Court is an indication that the subsidiarity principle does not operate adequately.

3. *Long-term evolution*

(a) **Developing the idea of filtering applications, as suggested in the Wise Persons' Report.**

No matter how much progress is made on subsidiarity, the proportion of inadmissible or manifestly ill-founded applications is unlikely to decrease. It could even increase if action to prevent violations becomes more effective and the States themselves remedy any violations found, in accordance with well-established case-law.

It is possible, therefore, that the single-judge system will not be sufficiently effective, and that it will be necessary to set up special sections, an applications division (whose role and impact would have to be studied), or another filtering body, all within the Court and under its control, the Court proper ruling only on those cases found admissible. In this respect one choice that has to be made is whether all types of cases should be examined judicially, or whether the decision in certain types of case can be delegated to legal secretaries (*référéndaires*).

(b) **Drawing inspiration from the Court of Justice of the European Communities**

This would be a different approach to filtering, based more on a distribution of competence.

In the European Union, the Court of First Instance was added to the Court of Justice (more recently the Civil Service Tribunal has taken over some of the areas of competence of the Court of First Instance). By analogy, one could imagine a Human Rights Tribunal subordinate to the Court. For instance it could be envisaged that – without of course reverting to the pre-1998 system with the Commission and the Committee of Ministers – the Tribunal would deal with admissibility and the Court would rule on the merits.

Since reference has been made to the European Union, it should be recalled that the Union's accession to the European Convention on Human Rights may have far-reaching consequences.

(c) **Reinforcing cooperation between national courts and the Strasbourg Court**

There is nothing to preclude studying a preliminary reference mechanism or possibly an extension of the Court's advisory competence (which is currently very limited). This could enhance the Court's constitutional role, without restricting the right of individual application.

These are just some avenues. It is expected that preparations for the Conference could throw up others.

B.2 Short-term goals

1. Measures that can be taken immediately without amending the Convention

What is crucial in this context is that the States acquire ownership of the Convention for the benefit of the persons within their jurisdiction. The Convention is now part of the domestic law of the States. Citizens must be able to assert their Convention rights before the national authorities. Beyond the need to establish effective remedies, which must be introduced where they do not exist, States must, with the help of the Council of Europe, take initiatives in the fields of training, translation of Strasbourg judgments, preventive action etc.

Many of the problems will be resolved if the States take the necessary preventive and corrective measures at national level (appropriate legislation, domestic remedies, execution of national judgments, solutions for the excessive length of proceedings, reopening of proceedings following Strasbourg judgments), and if they execute the Court's judgments promptly. The Court can and must help them by:

- providing human rights training, including by institutions that may be attached to the Court;
- ensuring better dissemination of the Court's case-law;
- adopting a judicial policy giving more extensive effect to Article 13 which is one of the key elements of subsidiarity and in respect of which Article 35 (the obligation to exhaust domestic remedies before bringing a case to Strasbourg) is the opposite side of the coin.

States should be encouraged to participate in certain methods or procedures initiated by the Court:

- friendly settlements and unilateral declarations;
- pilot judgments and “freezing” of cases of the same type pending a general solution.

More effective implementation at national level and application by the national courts not only have the potential to reduce the case-load. They also make it easier for the Court to maintain an appropriate distance from national proceedings in full compliance with the principle of subsidiarity.

At the conference, in addition to defining the relationship with States, it will be necessary to take steps to ensure that the Court is able to enjoy autonomy with regard to administrative and budgetary management. Steps must also be taken to meet the Court's resource needs.

It is moreover clear that other protagonists have a legitimate role to play in protecting human rights and preventing violations, including Bar associations, NGOs, academia and the media.

2. Other medium-term changes

The Report of the Group of Wise Persons to the Committee of Ministers in 2006 recommended a Statute for the Court which would extract certain provisions from the Convention and could itself be amended by a “simplified” procedure. That idea could perhaps be taken up again and given further thought. The Statute should also include provisions strengthening the independence of the judges, including their social protection. It would also be desirable to reflect upon the processes for the selection of candidates for the post of judge and for their election by the Parliamentary Assembly.

In addition, consensus could make it possible to give binding effect to the Court's judgments in respect of their interpretation of the Convention. This would strengthen the States' obligation to prevent Convention violations. It is no longer acceptable that States fail to draw the consequences as early as possible of a judgment finding a violation by another State when the same problem exists in their own legal system. The binding effect of interpretation by the

Court goes beyond *res judicata* in the strict sense. Such a development would go hand in hand with the possibility for citizens to invoke the Convention directly in domestic law (“direct effect”) and the notion of ownership of the Convention by the States. It will constitute a new step in the evolution of Convention law, whose effectiveness and positive consequences for all concerned should not be underestimated.

3. *New ideas which can be explored immediately*

(a) “Class actions” or collective applications; the Court will study the way in which such applications could operate and their possible impact.

(b) The possibility of referral by the Court of purely repetitive cases to the Committee of Ministers and/or to the States concerned where the cases can be dealt with on the basis of well-established case-law. This is one application of the principle of a better sharing of responsibility between the Court and the States.

IV. CONCLUSIONS OF THE CONFERENCE

The Conference could conclude by the following:

- by a political Declaration of commitment to the Convention system expressing a willingness to give it its second wind; this Declaration would stress the need for States to acquire the necessary ownership of the Convention (notably by establishing effective remedies, execution of the Court’s judgments and recognising their interpretative authority);
- by a Recommendation to the Committee of Ministers to instruct the competent intergovernmental bodies to carry out within a time-frame of one year to eighteen months a study on the long term (8-9 years) modification of the protection machinery (see chapter III, B.1. above);
- by a Recommendation to the Committee of Ministers on the budgetary and administrative issues.

Overall the conference would thus lay down a clear roadmap for both the immediate and the more distant future. This goal is indispensable and it is achievable.