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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

ESTABLISHMENT OF A GENERAL JUDICIAL AUTHORITY

OPINION
adopted by the Venice Commission
at it 45th Plenary Meeting
(Venice, 15-16 December 2000)

Introduction

At its 707th meeting (26 April 2000), the Committee of Ministers forwarded Recommendation 1458 (2000) entitled "Towards a uniform interpretation of Council of Europe conventions: creation of a general judicial authority" to the Venice Commission for an opinion.

This recommendation forms part of a process of reflection which began some years ago. Following the 2nd Summit of Heads of State and Government of the Council of Europe, the Czech Republic drew up a proposal for a general judicial authority. Following this, Mr Schwimmer, then a member of the Parliamentary Assembly, tabled a motion, along with a number of colleagues, with a view to recommending to the Committee of Ministers that such a judicial body be set up. It was as a result of this motion that the Parliamentary Assembly adopted the recommendation in question.

The Committee of Wise Persons, in its final report to the Committee of Ministers (CM (98) 178), suggested that the Venice Commission might be consulted by the Committee of Ministers on the interpretation of conventions and other Council of Europe legal instruments lacking specific interpretation mechanisms.

This document will begin by defining the concept of a general judicial authority (I), then examine the main questions that would be raised if such an authority were set up: choice of the appropriate body (II), its decision-making powers and the procedures by which matters would be referred to it (III), and its jurisdiction *ratione materiae* (IV).

The Venice Commission will not express an opinion on the expediency of setting up a general judicial authority. It simply notes that the creation of a flexible mechanism, which has some chance of being achieved, may be considered desirable, even if it is not absolutely necessary, inasmuch as Council of Europe conventions have been applied until now despite the absence of such a mechanism. Nor does such a mechanism exist within the framework of The Hague Conference on Private International Law or the Red Cross Conventions. The Commission will, however, examine the alternative to the establishment of a general judicial authority, which would be to make systematic use of its own expertise in interpreting conventions (V).

I. A general judicial authority: the principle and the implications of such a choice

The value of having a general mechanism for interpreting the Council of Europe's conventions should be stressed from the outset. Such a mechanism would have to be clearly differentiated from the supervision machinery provided for under a number of conventions (cf. the distinction between paragraphs 3 and 4 of Recommendation 1458 (2000) and Mr Svoboda's explanatory memorandum (Doc. 8662, point II.D.1, p.7)).

This says nothing about the actual *nature* of the body responsible for interpreting conventions or its *powers*. In other words, two questions arise:

- Is it necessary to set up a *judicial authority* or would a non-judicial body be more appropriate?

- If a judicial authority is set up, should it be empowered to interpret only a limited number, or a large number, of conventions? In other words, should it be a *general* judicial authority?

1. Recommendation 1458 (2000) recommends the establishment of a general *judicial* authority. According to the explanatory memorandum this could be the European Court of Human Rights or a new body. In both cases, the aim is to set up a fully-fledged judicial authority, in other words a body with binding powers. The binding nature of this body's decisions would greatly facilitate the uniform application of conventions. However, it would be inconceivable to set up a general judicial authority without adopting new treaties or revising existing texts.

2. Although it does talk of a general judicial authority, the recommendation does not insist that the mechanism should be of a general nature right from the outset; it would be possible to start with treaties "still to be concluded and a selected number of the existing conventions" (paragraph 9). However, in the longer term, the authority should cover most of the Council of Europe conventions, failing which it would not be truly general in nature (cf. last paragraph of the conclusions of the explanatory memorandum).

3. The question of the extent of the jurisdiction of the general judicial authority will be dealt with in more detail below (section IV). However, it should be borne in mind that the establishment of a judicial authority would involve *an extensive process of change* in the first two of the following cases:

- The gradual extension of the authority's jurisdiction, on a case-by-case basis, one convention at a time, would require many successive amendments to conventions.

- Adopting a mechanism applying only to certain conventions would make it possible, on the other hand, to adopt a single treaty, but there is a risk that states would be reluctant to ratify it and that this would delay its entry into force. If all the member states were required to ratify, this would be likely to delay the whole process for many years. As an interim measure, the general judicial authority could have jurisdiction only in respect of those states which had ratified the new treaty.

- A third approach, namely the establishment of the jurisdiction of the "general" judicial authority for new conventions only, would have the merit of not increasing the number of new treaties to be adopted. However, it would have the major drawback of not meeting an existing need.

The following sections of this opinion will assume that the choice has been made in favour of a general judicial authority and will examine the options available. It will then go on to examine a scenario in which the idea of a general judicial authority with binding powers has been rejected in favour of an advisory role for the Venice Commission.

II. The appropriate body to exercise general judicial authority

Recommendation 1458 (2000) does not specify which body should exercise general judicial authority. The explanatory memorandum, on the other hand, concludes (in section II.G) that there are two possible solutions: (i) assign general judicial authority to the European Court of Human Rights; or (ii) create a new body. It does not take a stance in favour of one or other of these solutions.

1. The Venice Commission considers that assigning the role of a general judicial authority to the *European Court of Human Rights* could have advantages, in view of the judicial experience of this institution. However, it would be for the Court itself to express an opinion on this matter. As pointed out in the explanatory memorandum (section II.F), the Court itself would have to be prepared to take on the task; the Committee of Ministers has put the question to the Court. The Venice Commission would like to reiterate that the granting of new powers to the Court should not hamper it in the performance of its existing functions and in particular should not prevent it from delivering judgments within a reasonable time. Considering that the President of the Court has drawn the attention of the Council of Europe organs to the growing difficulties in this area, any extra workload would require the necessary human and material resources to be made available. Assigning new functions to the Court, thereby enabling a single authority to interpret conventions, whether or not they relate to human rights, would lead to a more systematic approach in the application of Council of Europe conventions.

2. The advantage in creating a *new, specialised judicial authority* would be that such a body would have exclusive powers to interpret Council of Europe conventions. However, this would not necessarily mean setting up a permanent body. The extent of the activities of such a body should in fact depend on the extent of its powers, i.e. the conventions in respect of which it would have jurisdiction, and the arrangements for the referral of matters to it. The number of matters referred to this authority should be relatively small, at least, that is, if the general judicial authority only had jurisdiction in respect of a small number of conventions or if it could not have matters referred to it by the national courts. The drawback of this approach is that different bodies would be called on to interpret the Council of Europe's conventions. In any case, if the specialised judicial authority were to take into account the case law of the European Court of Human Rights and if a co-ordination procedure between the two jurisdictions were to be applied, such inconvenience could to a significant extent be avoided.

A specialised judicial authority of this type might be composed of seven to nine part-time judges chosen. They could be chosen from national judges or law professors specialising in public international law. They might be appointed by the President of the European Court of Human Rights.

III. Decision-making powers and referral procedures

Recommendation 1458 (2000) proposes that three types of competencies could be assigned to the general judicial authority:

"i. [giving] binding opinions on the interpretation and application of Council of Europe conventions at the request of one or several member states or at the request of the Committee of Ministers or of the Parliamentary Assembly;

ii. [giving] non-binding opinions at the request of one or several member states or of one of the two organs of the Council of Europe;

iii. making preliminary rulings, at the request of a national court, on lines similar to those of Article 177 of the Rome Treaty of 1956 establishing the European Economic Community."

Two questions therefore arise: (i) should the opinions of the general judicial authority always be binding? and (ii) which bodies should have the power to refer matters to it?

A. Decision-making powers

The Parliamentary Assembly's proposal leaves open the question of whether the legal opinions of the general judicial authority should be binding.

The Commission believes that, if it is decided to establish a new judicial body, it should be able to adopt *binding decisions*. If, on the other hand, only non-binding opinions are to be given, then the idea of setting up a new general judicial authority should be abandoned, for at least the two following reasons. Firstly, it is difficult to imagine how an authority could really be regarded as "judicial" if it only had advisory powers. Secondly, and above all, the creation of a general judicial authority would imply, as mentioned above, the adoption or amendment of treaties.

If it is decided that the general judicial authority will issue both binding decisions and non-binding opinions, then the type of document adopted (judgment or opinion) should depend on the referring authority. On the model of the system adopted at the International Court of Justice (and the European Court of Human Rights in cases other than individual applications), binding judgments could be delivered on matters referred to the authority by a state and non-binding opinions on matters referred to it by one of the statutory organs. Furthermore, any referral by the national judicial authorities should also give rise to a binding decision, which would be in keeping with the Assembly's recommendation. However, the Commission considers that it would not be wise for the decisions of the authority to be binding for some conventions and not for others.

If the European Court of Human Rights were turned into a general judicial authority it would be entirely conceivable for it to act in an advisory capacity. The combined power to issue both judgments and non-binding opinions would not be anything new in the area of international courts.

- The European Court of Human Rights has the power both to deliver binding judgments (Article 46, ECHR) and to give advisory opinions (Article 47, ECHR). However, the latter power is only of very secondary importance and arises not from an application by an individual or a state, as the Court's ordinary power does, but from a request by the Committee of Ministers.

- The Court of the European Communities also mostly delivers judgments. However, at the request of the Commission, the Council, or a member state, it can also give opinions on the compatibility of a proposed agreement with the provisions of the Treaty of Rome; these opinions are binding (Article 300.6 of the Treaty of Rome).

- Advisory opinions form a much larger proportion of the case-law of the International Court of Justice. However, here again, the bodies empowered to refer matters to the Court differ according to whether it is a binding judgment or an advisory opinion that is sought (see, on the one hand, Articles 34 et seq. of the Statute of the Court and in particular Article 59, and, on the other, Articles 65 et seq.): states may ask the Court to deliver a judgment, whereas the General Assembly, the Security Council, other organs of the United Nations and specialised agencies may only request an advisory opinion (Article 96 of the Charter of the United Nations).

In any case, if it were necessary that the European Court of Human Rights in its role of judicial organ were to acquire powers in a new domain, it would seem appropriate to empower it also to render mandatory decisions and not just consultative opinions.

B. Bodies empowered to refer cases to the authority: practical implications

Two types of referral are proposed, firstly referral by political bodies, either the organs of the Council of Europe or member states (sub-paragraphs (i) and (ii)), and secondly referral by national judicial authorities (sub-paragraph (iii)).

Whatever the case, there would be some significant innovations, particularly if the general judicial authority were assigned binding powers.

1. If provision were made for *referral by political bodies* only, it is likely that this would take place only rarely, as is shown by the infrequency of requests to the Legal Adviser for interpretative opinions on conventions. States, in particular, might be reluctant to refer to this authority on cases which are pending before national courts or in which their interpretation differs with that of other states. On the latter point, it is worth quoting the conclusions of the explanatory memorandum, according to which, under existing law:

- "judicial settlement procedures are purely hypothetical and have never been used";
- "the same may be said of arbitration" (paragraph 46, page 13).

Even if the hypothetical possibility of referral by a political body were to increase in the event of a general judicial authority being set up, it is likely that the actual number of cases brought would remain limited. The practical significance of the mechanism would therefore be somewhat limited.

2. *If national courts were allowed to refer cases to the general judicial authority*, it would have to deal with a larger number of cases. For example, the system of preliminary rulings established in Article 177 of the Treaty of Rome- which became Article 234 after the Treaty of Amsterdam - has been very successful, even if we exclude cases of compulsory referral. However, there is a considerable difference between the situation of a supranational community and an international organisation such as the Council of Europe, both in terms of the number of texts which might form the subject of a referral to a judicial authority and in terms of the number of cases in which they are applicable. The introduction of compulsory preliminary rulings (cf. Article 234.1 of the Treaty of Rome) should not be considered the exclusive preserve of supranational communities and might form the subject of an optional declaration on the part of states. In fact, article 3 of the draft European Agreement on the competence of the European Court of Human Rights relating to the production of consultative opinions regarding interpretation of European Treaties foresees that national courts of the highest instance have the obligation to refer to the European Court for a consultative opinion before rendering a decision which departs from an interpretation given in the matter by a higher court of another Contracting Party. The conditions relating to obligatory referral that imply an obligation on the courts to take into account the case law of judicial organs of other states would clearly however require revision, due to difficulties that domestic courts would experience in taking foreign case-law into account.

IV. The jurisdiction *ratione materiae* of the general judicial authority

The recommendation of the Parliamentary Assembly leaves open the question of the jurisdiction *ratione materiae* of the general judicial authority; it does not specify which conventions it would be entitled to rule on. It merely states, in paragraph 9, that it should start with treaties still to be concluded and a selected number of existing conventions.

Consideration might be given to the possibility of introducing a new judicial mechanism for a limited number of conventions on a trial basis, but one should not lose sight of the possible future extension of the system (cf. the last paragraph of the conclusions of the explanatory memorandum). Once the need for such an authority has been established, it should be truly general in nature, and not just a new mechanism among many others. The Commission would therefore be in favour of assigning *general* powers to the *general* judicial authority.

If this general judicial authority were distinct from the European Court of Human Rights it would not of course have jurisdiction in respect of the European Convention on Human Rights and its protocols. Neither should it have jurisdiction in respect of the European Social Charter (ETS No. 35), which is the only Council of Europe convention to provide for systematic reviews, at regular intervals, of the commitments entered into by the Contracting Parties and whose Additional Protocol (ETS No. 158) authorises collective complaints in cases of allegations of violations of the Charter (cf. explanatory memorandum, para. 26, p. 8).

Apart from human rights texts, it is the conventions on *criminal matters*, in particular the European Convention on Extradition (ETS No. 24) and the European Convention on Mutual Assistance in Criminal Matters, which, of all the Council of Europe conventions, give rise to the largest number of judicial decisions. These conventions could be brought within the jurisdiction of the general judicial authority; another approach, suggested by the Legal Affairs Directorate, would be to set up a flexible system for the settlement of disputes in this area and possibly also a non-permanent European Criminal Court (document GR-J (99) 12, para. 21). However, the Venice Commission considers that the Council of Europe's supervisory systems and the power to interpret its treaties should not become too complex and that any new supervisory powers should be assigned to the European Court of Human Rights or a general judicial authority.

Once human rights were excluded, the workload of a general judicial authority covering all the other conventions should be relatively small. If this were the case, it would seem appropriate for it to be able to give rulings on conventions which already have a monitoring system (cf. explanatory memorandum, section II.D.1, p. 7, particularly the reference to the European Charter for Regional or Minority Languages (ETS No. 148) and the European Code of Social Security (ETS No. 48) as well as section II.D.4, pp. 11-13). Where there are already procedures for the settlement of disputes, be they judicial or arbitration procedures (cf. explanatory memorandum, pp. 9-11), the most simple solution from the point of view of logic would be to transfer such to the general judicial authority, yet from the judicial and political points of view, such would be far more complicated. Indeed, the fact that such procedures have hardly ever been used limits the scope of choice of the competent jurisdiction, as any case of referral would in all respects be a rare occurrence. On the other hand, referral of a case to the general judicial authority by the statutory organs or the national courts could be provided for within the field of application of conventions which already have a procedure for the settlement of disputes at the request of states.

V. An alternative: interpretation of conventions by the Venice Commission

If it were decided not to establish a general judicial authority but a system of non-binding opinions, the *Venice Commission* could be assigned the task of interpreting Council of Europe conventions lacking their own interpretation mechanisms. This is what was proposed by the Committee of Wise Persons in its final report to the Committee of Ministers (CM (98) 178, para. 59). The Commission confirms its willingness to issue non-binding opinions on conventions. Although the Commission is not a judicial body and cannot give binding opinions on the basis of existing texts, its statute does empower it to give non-binding opinions, particularly at the request of the statutory organs, the Secretary General or any member state of the Council of Europe (Article 2.2 of the Statute of the European Commission for Democracy through Law). Governments are also entitled to refer questions that are pending or have been raised before national authorities. Furthermore, international law is a traditional area of activity for the Commission and, on two occasions, Parliamentary Assembly committees have asked it for such opinions (an opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by the Contracting Parties (CDL-INF (96) 3) and an opinion on the interpretation of Article 11 of the draft protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly (CDL-INF (96) 4).

The advantage of this solution is that it *would not require the amendment of any conventions*, and that it could be set up immediately because it would involve the systematic application of an existing procedure rather than the creation of a new one. It is unlikely that it would result in a major increase in the Commission's workload.

From the practical viewpoint, the Commission could designate a limited number of its members (for example, seven) to render non-binding opinions on the interpretation of conventions. Once made, the appointment would have a duration of four years. Where necessary, a member of state from which the request for the consultative opinion originated will be added to the group. Such an individual would have the status of ad hoc member in cases where the member of the State concerned does not sit on the sub-commission.

To sum up, interpretative opinions on Council of Europe conventions, which already fall within the remit of the Venice Commission, could be entrusted to it as part of its statutory responsibilities. This approach would not require any amendment of conventions, but neither would it allow the adoption of binding opinions.

Conclusion

When discussing a general judicial authority, the prime consideration should be the need to have machinery for interpreting Council of Europe conventions. A choice then has to be made between the judicial and the non-judicial approach. The *judicial* approach makes it possible to adopt binding decisions, but could only be applied after treaties have been adopted or amended. The role of this authority - whether it is the European Court on Human Rights or a new body - will depend on the conventions in respect of which it has jurisdiction and the bodies empowered to refer cases to it. If a general judicial authority were set up, it would be advisable to assign it the power, at least in the long term, to interpret most of the Council of Europe's conventions. The creation of a judicial authority seems to be the best way of achieving in the long term the aim pursued, namely the binding interpretation of conventions.

The use of the Venice Commission as a *non-judicial* interpretative body is possible however within its current remit without having to undertake conventional amendments. A limited group of members appointed by the Commission under conditions yet to be defined could undertake the task of interpretation of conventions.