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(VENICE COMMISSION)

The Role of the Council of Europe in the New European Architecture and its Competence in the Field of Human Rights

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Ladies and gentlemen,

I would like to submit to you some reflections on the role of the Council of Europe in its Pan-European context and about its competence in the field of human rights. In doing so, I would like first to recall what the reasons were for creating the Council of Europe and what its original mandates were. Secondly, I would like to refer briefly to the development of the Organisation, in order, thirdly, to arrive at its present position and the role it is playing and must play vis-à-vis its member States in particular in the field of human rights.

The origin or the "raison d'être" of the Council of Europe can be found in two important factors. On the one hand, looking back, it was founded in the aftermath of World War II in the light of the commitment of European States never again to allow people to be treated in the way they were treated under Nazi rule. On the other hand, looking to the future, the Iron Curtain had just been put up and the Cold War had begun. For 40 years it divided Europe into two camps: one in the West, which was committed to democracy and human rights, and one in the East, which claimed also to be committed to democracy and human rights, but what was understood by these were in no way what we consider today to be democracy and human rights.

The Council of Europe can only be "explained" if one keeps these two historical factors in mind. Many of the peculiarities of the Organisation, but also its great strength, which lies in its concentration on moral convictions and spiritual values, rather than on economic or military power, can be explained by that.

It is the aim of the Council of Europe "to achieve greater unity between its members for the purpose of safeguarding and realising the ideas and principles which are their common heritage and facilitating their economic and social progress" (Article 1a of the Statute). This same Article (paragraph b) also points out that "this aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action, and also in the maintenance and further realisation of human rights and fundamental freedoms". And in the Preamble to the Statute, the States reaffirm "their devotion to the spiritual and moral values of the Organisation, which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy". All activities of the Council of Europe have this conviction and aim as their basic principle. Everything is oriented towards the spiritual and moral values of our society.

The conditions for membership, which is of course voluntary, are clearly defined and have been practised in respect of new members. They comprise:

- adherence to the Statute and to the values of the Organisation as they have developed over the years;
- bringing in line State institutions and legal systems with basic principles of democracy, the rule of law and respect for human rights;
- choice of people's representatives by means of fair and free elections based on principles of universal suffrage;
- respect for freedom of expression and of the press including thoughts and speech which shock;
- respect for and protection of national minorities.

Obviously, acting on the notion that nobody is perfect, States have been admitted to the Council of Europe even before conditions for membership have been fully satisfied. This has given rise to some controversy and even polemic within the Council of Europe members. Some considered that it was better to keep States on the long leash and demand prior fulfilment of conditions for membership, because the Organisation had to assert its principles and it was more likely that they would be satisfied by States outside the Organisation, than by States who have already been admitted. Others considered that it would be easier and more effective to impose the Organisation's standards on members than on non-members, and therefore approved of the declared policy of the Council of Europe to admit States even before all the conditions are satisfied, on the understanding of course that all efforts be made by the Governments of these States to bring their laws and practices in line with the standards of the Organisation.

I personally have always belonged to the latter group, but for yet another reason. I firmly believe that the rights of citizens to bring complaints before the Court of Human Rights set up under the European Convention on Human Rights is one of the best guarantees for the compliance of States with their commitments. This has been tested during the last 50 years with great success. The possibility for citizens to bring such complaints presupposes, however, that the State concerned is a member State of the Council of Europe.

As a corollary to accession in the absence of full-compliance with the standards States must fulfil certain obligations. These include:

- adherence to various Human Rights treaties and observance of human rights in general;
- faithful execution of the judgments of the Court of Human Rights;
- cooperation in the monitoring exercises, both in the Parliamentary Assembly and in the Committee of Ministers.

I am turning now to the development of the protection of human rights in Europe. Like everything else, the protection of human rights in Europe has developed to an exceptional extent in recent years. In historical terms, it is not so long ago that the Berlin Wall still stood. The eastern bloc still existed, although glasnost and perestroika had already arrived, and there was still martial law in Poland, the tough Ceaucescu regime in Romania and the Enver Hoxha regime in Albania. That is all now history. The political system in the east and in the centre of Europe has changed fundamentally in an extremely short time. The values of pluralist democracy and the rule of law have almost everywhere inspired comprehensive reforms, which cannot, of course, be realised overnight.

The Council of Europe and other international organisations, such as the Organisation for Security and Co-operation in Europe - OSCE - as well as the European Union, are providing a broad measure of what might be called development assistance to build up the new democratic order encompassing the rule of law. A particular effort is being made to pass on to them the west European states' experience in the sphere of national and international protection of fundamental rights on the basis of the European Convention on Human Rights. These states had for decades based themselves on a different interpretation of fundamental rights which, rather than centring on the rights of individual citizens, focused on the rights of society which existed under the communist system.

The question arises, however, of whether the existing institutions in their present form are in a position to perform this task satisfactorily. The fact must not be overlooked in this context that the European system for the protection of human rights was itself in a dynamic phase of development at the time when radical change began in eastern Europe. The system was operating at maximum capacity, even without the new challenges, and this is why efforts had begun to reform it. Before looking at the latest developments, it will therefore be useful to recall the origins of the European Convention on Human Rights and briefly to review its successful path.

The Convention was devised at a turning point similar to the one we have reached now. That may be the only reason why the west European states were ready to make far-reaching concessions and to subject themselves to international supervision in an area which had indisputably been an internal matter for them up to that point. One aim was, through international protection of human rights, to prevent these states from returning to the barbarity which had hallmarked the fascist regime, while the other was to forestall any further progress of Stalinist totalitarianism in Europe. The Statute of the Council of Europe contains a commitment to democracy, the rule of law and the protection of fundamental rights. This protection then very rapidly became, and has remained, central to the activities of the new organisation. As early as 1950, so only 18 months after the Council of Europe was set up, the European Convention on Human Rights had been drawn up. It came into force in 1953 and is now in force in all 44 member States of the Council of Europe. Ratification is expected of all new members of the Council.

There is a link between the Convention and the Universal Declaration of Human Rights, adopted by the United Nations on 10 December 1948, to which a reference is made in its preamble. As it was initially impossible within the United Nations framework to convert the Universal Declaration into a treaty binding in international law, the European states opted for a regional solution. But here, too, difficulties arose. There was no unanimous agreement to the original proposal to set up a single Court of Human Rights with compulsory jurisdiction to deal with complaints by states and complaints by directly involved citizens, which are known as individual petitions. Ultimately a compromise was reached on a complex mechanism involving several examining bodies. In addition to the European Court of Human Rights, a European Commission of Human Rights was set up, and provision was made for the Committee of Ministers of the Council of Europe, a political organ, to be competent to take final decisions on the merits of human rights applications. The Court was not given any compulsory jurisdiction, and even the competence of the Commission to examine individual petitions was made conditional on the making of additional declarations by the States concerned.

Not all the signatory States ratified the Convention immediately, and many which did ratify it took their time to make the optional declarations recognising the individual right of petition and the jurisdiction of the Court. Thus some initial delays occurred. Not until 1955 did the system of individual petitions to the Commission, which is the cornerstone of the European protection of human rights, begin to function. The Court was not set up until 1959. Subsequently, however, the Convention system rapidly asserted itself. The Convention was ratified by increasing numbers of states, which all eventually made the optional declarations, so that, by 1989, all the "old" member States of the Council of Europe, totalling 23, were fully subject to international supervision by the organs of the Convention, the complaints machinery being available to both citizens and Convention States.

Thus, as far as the protection of fundamental rights is concerned, a unified legal area stretching from the North Cape to Sicily and from Portugal to Turkey was created. Over the years, extensive case-law on human rights issues developed in Strasbourg, encompassing practically every area of government activity. For one thing, there have been complaints by states against the background of politically explosive questions, such as the 1967 removal of the protection of fundamental rights in Greece by the Colonels, the restrictions of fundamental rights imposed by the Turkish military regime in 1981, the treatment of alleged terrorists in both South Tyrol and Northern Ireland and Turkey's intervention in northern Cyprus. And for another, there has been a huge and rising number of individual petitions, now totalling more than 10000 per year, the number of which is constantly increasing.

The number of successful applications is of course much lower. But several thousand complaints have still been accepted for decision, some of these being settled, while over two thousand have culminated in judgments of the European Court of Human Rights. In many cases, compensation has been paid to applicants, decisions have been set aside or revised, pardons have been granted, proceedings have been discontinued, and so on. Apart from settling the respective individual cases, states have frequently also taken general steps as a result of the proceedings under the Convention, amending their legislation, and even their constitutions, for example, or altering judicial or administrative practice. There is hardly a European country which has been spared a finding of violation of the Convention. Of course, European citizens in most of our states are fortunately not very often subjected to torture or to inhuman treatment or punishment, although even here there have been justified complaints in some European states. The complaints made by European citizens are much more frequently about the length of court proceedings, the lack of fairness of such proceedings, the length and conditions of detention and state interference in family and private life, in the form of searches of homes or telephone tapping, for example, and applications often relate to the deprivation of parental authority over children. There are also numerous applications by foreigners who are under an order of being deported to their countries of origin, where they allege that they will be mistreated, or with which they have long had no contact, but of which they have remained citizens. There are no limits to the variety of the complaints received on a daily basis in Strasbourg.

The huge increase in the numbers of applications placed a considerable burden on the organs of the Convention, which were no longer able to cope with their workload within reasonable periods of time using the resources available to them. The duration of proceedings in Strasbourg came in for even more criticism from many sources because it is one of the tasks of the organs of the Convention to monitor the reasonable nature of the length of time taken to complete domestic court proceedings. Action thus had to be taken to simplify and accelerate the procedure under the Convention.

There nevertheless remained a structural problem of overloading of the organs of the Convention, one aggravated by the expected further growth in the numbers of applications following the increase in the number of member States. As more use has been made of the complaints system, the cases to be heard have become more complex and more significant. Discussions had thus begun some time previously, in 1983, on fundamental reform of the whole applications machinery under the Convention.

These reform efforts have borne fruit. Protocol No. 11 came into force four years ago, on 1 November 1998, and the new permanent European Court of Human Rights, in Strasbourg, was inaugurated on 3 November 1998. Thus the decision-taking machinery has

been made simpler and smoother. Any citizen who feels that his or her fundamental rights have been violated by state action may apply directly to the Court. As well as taking over the functions of the previous Court, the new Court will also be responsible for the main functions of the previous Commission. It became easier to find a solution along these lines when the universal acceptance of the full set of obligations under the Convention largely removed the justification for the complex organisational structure originally based on a compromise.

In any case, the result of this reform is that the protection of human rights on the basis of the European Convention on Human Rights is now exclusively judicially organised. What is now lacking is the political element, which in a certain sense was provided by the Commission, and, of course, was very much present in the decision-taking power of the Committee of Ministers in the case of applications not forwarded to the Court. The removal of these powers has created a gap which needs to be closed. In this context there are two important matters which should be mentioned.

The office of the European Commissioner for Human Rights was created on 5 May 1999, 50th anniversary of the Council of Europe, following the Summit of Heads of State and Government in October 1997. This non-judicial body is responsible for promoting, within the member states, education, awareness-raising, as well as true respect and full enjoyment of human rights, such as emanate from the Council of Europe instruments, and plays a complementary and essentially preventive role.

The other matter is that the importance of the Committee of Ministers, as the organ responsible for supervising the enforcement of the judgments of the Court, will increase significantly. For care must be taken to ensure that the verdicts of the new Court are acted upon by the states concerned, in the sphere of both legislation and practice, and that any compensation determined by the Court is paid. I regard this task as actually the most important challenge facing the protection of human rights in a changed Europe.

As I have already said, the complete acceptance of all the commitments under the Convention by every member State of the Council of Europe was only achieved in 1989, just as the great changes took place in central and eastern Europe which brought the states concerned closer to the Council of Europe. That was when the demand was heard for the Convention and the other two major human rights instruments of the Council of Europe, namely the European Social Charter, of 1961, and the Convention against torture and inhuman treatment, of 1987, also to be opened to states which were not members. Council of Europe member States were not ready for this. In order to preserve the standard already achieved, it was decided in principle to keep the European Convention of Human Rights, in particular, as a "closed treaty", open only to member States of the Council of Europe. This was taken further, as a willingness to accept the Convention, with all its obligations, was declared to be a political condition for accession to the Council of Europe.

Comprehensive preparation at the domestic level is understandably necessary before ratification of the Human Rights Convention in the new member States. The Council of Europe provides assistance with this under its programme of co-operation with central and eastern Europe. In particular, this includes advice from international experts on constitutional legislation. The Venice Commission plays a very important role in this connection, and so does the Parliamentary Assembly, giving advice on electoral legislation and observing elections. It also asks experts, which in practice has meant members of the European Commission and Court of Human Rights, to draw up reports during the accession procedure

on the compatibility in principle of the respective legal systems with international human rights standards.

With so many states requesting accession to the Council of Europe - the possibility of membership exceeding 45 states is not excluded - the question frequently arises of where the boundaries of Europe lie. Geographically speaking, the Urals are often considered to mark the limit of Europe. But that would exclude a large part of Russia, which is politically quite out of the question. Others, however, define Europe in terms of its spirit and its culture, thus pushing the boundaries much further. The question has not yet been resolved.

New states may only be regarded as having passed their human rights test, however, when not only has their legislation been brought broadly into line with European human rights standards, but also this new legal position has been reflected in everyday practice. It is required that that practice be systematically monitored to make sure that it conforms to human rights standards. It may involve supervision by bodies within the states concerned, or, better still, international monitoring. The problem is permanently on the agenda of the Committee of Ministers of the Council of Europe.

Nevertheless the role of the Council of Europe is not to act as a "fireman" in Europe, nor to take urgent action to resolve crises. It is its duty, as a Pan-European organisation, guardian of the fundamental principles of our continent, to make sure that these principles are fully applied in its member states as well as in other parts of Europe – the latter being less and less numerous – which all have the underlying vocation to join our Organisation.

It is in this spirit that the Council of Europe is playing an active role, for instance in Kosovo, side by side with the United Nations, to which the difficult task has been given to provisionally handle the administration of this region, a region which has been badly affected. Thus the Council of Europe contributes to the reinforcement of the structures responsible for the encouragement and respect of human rights, training of judicial and police staff, local administration, the fight against organised crime and corruption in that region. Our experts also work towards the organisation of the judicial system, the setting up of civil registers and on the legislation of penal matters or in the more delicate field of the right to ownership. It is also in this spirit that the Council of Europe is an indispensable partner in the field of education and social cohesion.

These new structures for human rights protection for the reforming states of central and eastern Europe necessitate co- ordination with OSCE activities in the field of human rights protection. We should not forget that the reform movements there were in many cases first started by human rights groups such as Charter 77 or the Helsinki Committees, which issued reminders about the effective compliance of their respective governments with the international human rights commitments into which they had entered. The achievements of the OSCE, extending in particular to the politico-diplomatic machinery for intervention in the event of serious violations of human rights through its Human Dimension Office in Warsaw have been extremely important. The partnership is working well. Some of the member States of the OSCE cannot accede to the Council of Europe or do not wish to do so. The United States and Canada, in particular, take part in the OSCE, as do the Central Asian republics of the former Soviet Union, which are endeavouring to co-operate with the Council of Europe to some extent, but not to join it.

This division of responsibilities between the OSCE and the Council of Europe also applies to one of the most important and explosive areas of human rights protection, that of the protection of national minorities. Some preparatory work has been under way in this sphere at the Council of Europe for a long time, and two pieces of protective machinery now exist in the form of multilateral agreements of the Council of Europe: one is the European Charter for Regional or Minority Languages, and the other is the Framework Convention for the Protection of National Minorities.

The Council of Europe is in the process of reflecting about its new role. It has changed substantially in the course of time and, as we have seen, particularly during the last decade of this century. The changes must be absorbed and the Council of Europe must adapt to the new situation.

I personally hope that the role of the Council of Europe will be strengthened as it has developed into the Pan-European Organisation that it is today. It is true that the Council of Europe is perhaps not the centre of European integration, but it is complementary in an important way to other European organisations pursuing the same or similar aims as those that are defined in our Statute. The Council of Europe remains an organisation representing the "conscience" of Europe, operating close to the needs of the European citizen. Its whole purpose is to improve the living conditions of ordinary people. This is its historical mission, which it continues to perform through its organs, being the Parliamentary Assembly and the Committee of Ministers, as well as through its Secretariat.

The Council of Europe Secretariat, which is not an organ of the Organisation, is unique among traditional international organisations. It is committed solely to the Organisation, plays an independent, but also an impartial, role vis-à-vis the member States of the Organisation, and is often the motor of the Organisation in the sense that it initiates activities and carries them out through partners in the member governments rather than vice versa. States, which newly join the Organisation and acquaint themselves with its working methods, are often surprised by the role, which the staff plays. Unlike the staff whom they meet in national or international bureaucracies, the members of the Council of Europe Secretariat – sometimes referred to as "faceless bureaucrats" – are of considerable influence and importance and again the result of the historical origins of the Organisation.

In the years to come, the Organisation will continue to concentrate essentially on three main areas:

- democracy, the rule of law, and human rights;
- social cohesion, in particular the fight against poverty and social exclusion;
- protection of our cultural heritage in all its diversity.

The Council of Europe certainly finds itself at the beginning of this century in a new situation. Its membership has grown significantly; its population has extended to some 850 million people, and the territory that it covers reaches from the Atlantic to the Pacific. New tasks will have to be accomplished at a time when resources are scarce. I am convinced, however, that – with the help of its members – it will continue to play an important role in safeguarding the principles to which it is committed and that it will continue to help its members to realise these principles in their domestic environment.

At the Council of Europe's Second Summit, held in Strasbourg on 10-11 October 1997, the Committee of Ministers instructed a Committee of Wise Persons, chaired by Mr

Mario Soares, former President of the Republic of Portugal, to consider these questions. It submitted its report, "Building Greater Europe without Dividing Lines", in November 1998 and made recommendations on:

- the political role of the Council of Europe and co-ordination with other organisations, above all the European Union and the OSCE;

- relations between the Council of Europe's statutory bodies - particularly the Committee of Ministers and the Parliamentary Assembly, but also the Congress of Local Authorities, the Secretary General, the Venice Commission and the Social Development Fund;

- the structures of the Secretariat and intergovernmental co-operation procedures;

- procedures for monitoring compliance with commitments, and
- ways of raising the Council of Europe's profile.

Most of these recommendations have been accepted by our member States and are in the process of being implemented.

Before I conclude, I should like to make two further comments.

The first concerns the situation in Chechnya, where the Council of Europe has been obliged to take a firm stand on human rights issues. It is important to realise that both parties to the conflict - Chechnyans and Russians – have been guilty of human rights violations. It is up to the Council to help both sides to put an end to them. A number of international experts have accordingly been attached to the office established in the region by the Russian President, Mr Putin, and are helping to investigate violations brought to their attention. The assistance of foreign experts is necessary and welcome. It must be realised that the fight against terrorism, as important as it is, must go hand in hand with the respect for human rights. It cannot be a combat at all costs. Here the Principles of the Council of Europe, adopted by the Committee of Ministers in June of this year, are of fundamental importance.

My second comment concerns the European Union and its Charter of Fundamental Rights, adopted in Nice in 2000. A Convention, comprising representatives of European Union member governments, national parliaments and the European Parliament, had been set up in 1999 in Brussels to prepare it. The Council of Europe was associated with this work via two observers - Judge Fischbach of the European Court of Human Rights and myself.

The Charter covers three types of fundamental rights:

- political and civil rights, comparable to those guaranteed by the European Convention on Human Rights,

- economic and social rights, comparable to those guaranteed by the Social Charter, and

- rights inherent in European citizenship, such as the right to vote and the right to freedom of movement.

The Council of Europe's attitude to the Charter has two aspects. It is convinced, first of all, that the European Union needs to be bound by respect for human rights, as all Europe's countries are already - by their own laws and constitutions, and by the European Convention on Human Rights. But the Council must also ensure that the protection offered by the European Union complements that which the Convention has been providing throughout Europe for the last 50 years, and in no way contradicts or competes with it.

The Council takes the view that European Union accession to the European Convention on Human Rights would be the best solution, adding external, international protection under the Convention to internal protection within the European Union. This is also the position of the Council of Europe's Parliamentary Assembly, the European Parliament and the European Commission. It seems also to be the position of the Convention on the Future of Europe, presided by Mr Giscard d'Estaing, former President of France.

In conclusion, I should like first to associate myself with a suggestion made by the late lamented Judge Pettiti in the speech to which I have already referred. He said: "If, in the face of ever-increasing migration, and of natural and industrial disasters, human rights Europe wishes to stay faithful to its great tradition of looking to the future, and of safeguarding human and fundamental rights, then it will have to concern itself increasingly with protecting the rights of future generations, while continuing to protect the rights of individuals today";

I would also like to quote a passage from a report by the Comte de Menthon, which reflects his faith in Europe: "We want a united Europe, regardless of how international relations develop, and regardless of any considerations concerning tension or détente between East and West… We must emphasise, firstly, that achieving European unity is one of the prime demands of the nations grouped within the Council of Europe, and, secondly, that this must be a fundamental contribution to international peace."

We have come a long way since 1989. With the help of all law-abiding nations we shall continue on this road.