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***AD HOC* COMMITTEE OF LEGAL ADVISERS**
**ON PUBLIC INTERNATIONAL LAW**
**(CAHDI)**

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# PROPOSAL OF THE CZECH REPUBLIC TO THE COMMITTEE OF MINISTERS FOR THE POSSIBLE ESTABLISHMENT OF A "GENERAL" JUDICIAL AUTHORITY OF THE COUNCIL OF EUROPE

## Consideration by the CAHDI of the proposal at its own initiative

Secretariat memorandum prepared by the
Directorate General of Legal Affairs

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**Foreword**

At its 18th meeting (Strasbourg, 7-8 September 1999) the CAHDI agreed to the proposal by the delegation of the United Kingdom to consider at its next meeting a proposal by the Czech Republic to the Committee of Ministers concerning the setting up of a General Judicial Authority within the Council of Europe.

Document GT-SUIVI (98) 10 of 12 March 1998 entitled Possible Establishment of a "General" Judicial Authority of the Council of Europe (in Appendix 1) contains the original proposal by the Czech Republic. A revised version of the original Czech proposal submitted by the Minister of Foreign Affairs or the Czech Republic appears in Appendix 2.

In accordance with the decisions adopted by the Ministers' Deputies at their 613th meeting, item 1.4, paragraph 4, the Czech proposal was considered by the Committee of Wise Persons of the Council of Europe.

In its Final Report to the Committee of Ministers (document CM(98) 178, 20 October 1998), the Committee of Wise Persons stated:

> *11. In the ongoing process of enlargement the Organisation faces a double challenge: on the one hand, it must ensure that every member and applicant state respects the values and the important system of norms and standards developed by the Organisation over the years; on the other hand, but closely linked to the first aspect, it has to forestall the development of new divisions among its member states, by devising and implementing flexible but non-discriminatory working methods and procedures at all levels and in all its fields of action. In particular, the Council of Europe should maintain a coherent and unambiguous approach to human rights issues, dealing with all countries on an equal footing.*
>
> *12. In order to face these challenges, the standard-setting function of the Council of Europe must be re-affirmed. Given the existence of a large corpus of legally-binding texts, implementation thereof acquires increased importance and requires efficient and effective mechanisms of monitoring and control. The Committee examined in this context the proposal to create a general judicial authority to monitor the implementation of the legally-binding texts. However, this proposal did not meet with its approval – notably because it would amount to the creation of a new and relatively elaborate structure.*
>
> *13. At the same time, the Committee of Wise Persons considers that it would be useful that future Council of Europe conventions include specific provisions concerning their interpretation. The possibility of asking the Venice Commission to give non-binding opinions on the interpretation of existing conventions, for which interpretation mechanisms are not available, could be considered. It should be noted in this respect that in the past the Venice Commission has already replied to several requests for legal opinion from committees in the Parliamentary Assembly.*

The Committee of Ministers' Follow-up Committee of the Second Summit [of Heads of State and Government of the Council of Europe] (GT-SUIVI) considered the Final Report by the Committee of Wise Persons including the Czech proposal.

As a result, the Committee of Ministers adopted a Report on Follow-up Action on the Final Report of the Committee of Wise Persons (included in Parliamentary Assembly document 8398, 28 April 1999). In relation to the Committee of Wise Persons recommendation concerning the *Opinions of the Venice Commission* (Main Recommendation 13 – reproduced above), the Committee of Ministers stated:

> *The Venice Commission could be asked to give non-binding opinions on matters of constitutional importance or of fundamental legal interest for the Council of Europe, and on the interpretation of Council of Europe conventions and other legal instruments devoid of specific interpretation mechanisms. (§59)*

*The Deputies are pursuing consideration of this Recommendation along with a separate proposal for the creation of a general judicial authority at the Council of Europe.*

*A number of delegations questioned the necessity for any sort of body to take on the responsibilities defined. However, if such a demand were to be identified, a majority believed that the Venice Commission would be best placed to meet it.*

Further to that, the Committee of Ministers referred the Czech proposal for consideration to the Group of Rapporteurs on Legal Questions (GR-J).

Two memoranda prepared for the attention of the GR-J by the Secretariat of the Venice Commission (document GR-J(99)10, 3 March 1999) and by the Directorate General of Legal Affairs in this connection (document GR-J(99)12, 12 April 1999) are included in Appendices 3 and 4.

The GR-J did not conclude the examination of the proposal and decided to resume examination of this proposal at a future meeting.

Parallel to that the Parliamentary Assembly considered the proposal and appointed Mr Walter SCHWIMMER (Austria) rapporteur on the subject. Following his election to the post of Secretary General of the Council of Europe, a new rapporteur was appointed, Mr Cyril SVOBODA (Czech Republic). Mr SVODOBA's report will be considered by the Parliamentary Assembly at a future meeting.

Moreover, at its 679th meeting, 15 September 1999, the Committee of Ministers adopted Recommendation No. R (99) 20 concerning the friendly settlement of any difficulty that may arise out of the application of the Council of Europe conventions in the penal field (see Appendix 4).

but did not reach a conclusion.

Finally, it should be stressed that the Committee of Ministers has not requested the CAHDI's opinion on the Czech proposal. The CAHDI is considering at its own initiative in accordance with its the terms of reference which allow the Committee to include in its agenda any item in the field of public international law they so wish.

**Action required**

Members of the CAHDI are invited to consider this proposal and to exchange views about it from the perspective of public international law.

## Appendix 1

## POSSIBLE ESTABLISHMENT OF A "GENERAL" JUDICIAL AUTHORITY OF THE COUNCIL OF EUROPE (PROPOSAL BY THE CZECH REPUBLIC)

By letter dated 25 February 1998 (see Appendix I), the Permanent Representative of the Czech Republic transmitted to the Secretary General "Elements to be considered in discussing the possible establishment of a "general" judicial authority at the Council of Europe" (see Appendix II). The letter and the accompanying text were distributed to all delegations on 3 March 1998.
In conformity with the wishes of the Czech authorities and with paragraph 4 of the terms of reference of the Committee of Wise Persons (see Decision 613/1.4), the Secretary General communicated this proposal to the Committee of Wise Persons for it take it into account in its ongoing consideration of the structural reform of the Council of Europe.

APPENDIX I

TRANSLATION

*The Permanent Representation*
*of the Czech Republic*
*to the Council of Europe*
*Strasbourg, 25 February 1998*

*Mr. Secretary General,*

*On my authorities' instructions, I enclose the "Elements to be considered in discussing the possible establishment of a 'general' judicial authority at the Council of Europe", which I am sending you on behalf of the Czech Republic.*

*In accordance with the decisions adopted by the Ministers' Deputies at their 613th meeting, item 1.4, para. 4, I would ask you to pass this document on to the members of the Committee of Wise Persons.*

*I would also ask you to arrange for its distribution to all the Permanent Representations of the member states to the Council of Europe.*

*I remain, Mr. Secretary General, . . .*

*Jiri Malenovsky,*
*Ambassador*

*Mr. Daniel Tarschys*
*Secretary General*
*of the Council of Europe*
*Palais de l'Europe*

APPENDIX II

Elements to be considered
in discussing the possible establishment of
a "general" judicial authority at the Council of Europe
*(submitted by the Czech Republic)*

### I. The present situation

The Council of Europe comprises three main bodies. The Committee of Ministers (the executive body) and the Parliamentary Assembly (the consultative body) were established by the

Organisation's Statute in 1949, the Congress of Local and Regional Authorities of Europe by statutory resolution in 1994. The Organisation has no judicial authority of its own. The European Court of Human Rights was set up under the European Convention on Human Rights of 1950, and its powers are in principle restricted to that convention and its protocols.

**II. The arguments for setting up a judicial authority**

1. Under its Statute, the Council of Europe's main tasks are to promote pluralist democracy and the rule of law and to defend human rights. Logically, this means that the legal dimension of co-operation between the states of Europe must be regarded as one of the main things which constitute the Council's raison d'être and distinguish it from other European institutions. In making law effective, legal protection is the key element, not just of domestic, but also of international law.

2. The Council of Europe's Statute was approved in 1949. At the time, there was no compelling and serious reason to establish a permanent judicial body at the Council. Today, however, nearly fifty years later, the Council operates a system of some 170 treaties and agreements, with no judicial body behind them to promote and guarantee compliance (apart from ten or so human rights instruments, which are subject to the jurisdiction of the European Court of Human Rights). It is true that a few treaties do rely on (supervisory) machinery for their implementation, but most provide for no such arrangement.

3. This vast system of conventions is usually felt to be lacking in transparency. In cases where several texts contain different rules on the same or related questions, it is not always clear which one should apply. One of the main reasons for the whole system's lack of cohesion is precisely the lack of a judicial body to solve problems of this kind in specific cases. In the meantime, we can only solve them politically and, more specifically, by trying to locate the system's hard core, i.e. the most important conventions (see the Secretary General's initiative of July 1997).

4. Until 1990, the Council of Europe was a harmonious "club" of prosperous democratic states, and the risk that its international treaties would be interpreted in different ways, or that its members would disagree on applying them, was very slight. This was why the need for a judicial body was objectively minimal. From twenty-three states in 1990, the Council's membership has now increased to forty, and sixteen of the new members have become democracies only in the last few years. Similarly, democracy is still very fragile in five or six other states which are expected to join in the next few years. The Council of Europe is, in other words, far more heterogeneous today than it was before 1990 – and so less harmonious. This is why the need for a judicial body empowered to solve the problems referred to above is now felt far more strongly than in the past.

5. It is not unusual for international organisations to have judicial bodies of this kind. They are generally considered one effective way of helping to ensure that their members think the same way. The United Nations Organisation can be taken as an example. Being politically heterogeneous, it established its International Court of Justice from the start, in its 1945 Statute (and spelled out its powers in the Statute of the Court). The European Community also has a court of this kind, although the jurisdiction and powers assigned to it in that supranational context are rather different.

6. A Court is useful only in an organisation with a large membership. It is perfectly logical that the Council of Europe should not have established a court as soon as it was founded since, at the time, it had only 10 members. By the time its fiftieth anniversary arrives, however, it may well have 45 (the UN had 50 founder members).

7. The Council of Europe promotes the rule of law, and one of the main feature of the rule of law is separation of legislative, executive and judicial powers. The Council's own structure should reflect this tripartite division. At present, however, it embodies only the parliamentary (legislative) element, in the Parliamentary Assembly, and the governmental (executive) element, in the Committee of Ministers. The judicial element (disregarding the special functions of the European Court of Human Rights) is lacking.

**III. Proposed jurisdiction and powers**

1. The court's main function should be to give binding judgements on disputes arising between states party to the various instruments in the Council of Europe's treaty system concerning application and interpretation of those instruments. Under the European Convention for the Peaceful Settlement of Disputes of 1957 (ETS No. 23), states may in theory refer such disputes to the International Court of Justice in The Hague, but this solution hardly respects the special features of the European legal area. The principles involved are those of "European" law, and these could and should be promoted by a European judicial body. The Court in The Hague (whose universal nature inclines it towards general international law) is far less suited to doing this. Moreover, there are other reasons why referral to the ICJ is an unrealistic option for European states. Although it has existed for forty years, the European Convention for the Peaceful Settlement of Disputes has only thirteen contracting parties, and indeed Liechtenstein is the only state to have ratified it since 1970. In practice, it has been used only once – to settle the dispute between Austria and Italy over the Southern Tyrol. Many Council of Europe treaties have no procedure for settling disputes to which they may give rise. The proposed court might be empowered to decide such disputes on the basis of a single treaty, listing all the Council of Europe instruments on which contracting parties might ask it to rule. It would have authority to settle specific disputes solely with the consent of the disputing parties. This consent would be either ad hoc, given when an actual dispute arose, or general, provided for in a special jurisdiction clause covering possible disputes. (Authority to give such rulings is also one of the basic powers assigned to the Court in The Hague).

2. The Council of Europe Court could also give non-binding advisory opinions at the request of member states or Council of Europe bodies. This would be useful for the Parliamentary Assembly, which adopts various political texts with a certain legal content. In the past, the Assembly has on several occasions sought opinions from the Venice Commission, but this is not a judicial body, and is not independent, since it partly consists of senior representatives of national governments. This means that its opinions cannot have unquestionable authority. For member states, the Council of Europe court's power to give opinions might well be of practical value in connection with the Assembly's monitoring procedures. The Assembly monitors compliance with legal and political obligations, but the two not always clearly distinguished. (The UN Court also has power to give opinions, but not at the request of member states; they may be requested by certain international organisations, but the Council of Europe is not one of them).

3. Finally, to harmonise application and implementation of the various conventions in specific cases at national level, the Court could give preliminary opinions when requested to do so by judicial bodies in the member states, either directly (following the example of the Court of the European Communities in Luxembourg – the radical solution) or through diplomatic channels (via the Ministry of Justice or the Ministry of Foreign Affairs). Such conventions should be directly applicable in domestic law (self-executing) and not subject to the jurisdiction of the European Court of Human Rights. Conventions on extradition are one typical example.

**IV. The main forms which the proposed court might take**

1. The simplest option in system terms would be to establish a new judicial body. This could be done through an amendment to the Council's Statute, which would have to be ratified by all the member states (a lengthy procedure and politically hard to carry out). The court could also be established by a special international treaty, akin to the Statute of the Hague Court (this would be easier, legally and politically). The court would not necessarily operate full-time, and might follow the example of the present European Court of Human Rights, which sits at regular intervals and whose judges are also professionally active in their own countries. The disadvantages of this solution are its radical interference with the structure of the Council of Europe (possibly even threatening the Organisation's overall stability), the extra costs associated with the setting- up of a new body and with its functioning (at a time of generalised budget austerity in the member states) and possible fears of undesirable competition between a "general" Council of Europe court of this kind and the new European Court of Human Rights, whose profile has not yet been established.

2. A legally less straightforward, but politically more feasible solution would be to extend the jurisdiction and powers of the European Court of Human Rights (ECHR). In legal terms, it would be enough to conclude a corresponding international treaty. Such a reform would respect existing structures more (interference with the Council's organisation chart would be minimal) and would cost less (the additional costs would be negligible). In the ECHR, powers not concerned with human rights could be entrusted to a special chamber, consisting of judges experienced in international law. The drawbacks here would be the danger of overloading the ECHR (overloading of the present Court is in fact the reason for the change from a non-permanent to a permanent body) and lack of staff and time (the ECHR would undertake this as a subsidiary activity).

Taking the long view, however, this might well be a good interim solution, leading on, in due course, to a general Council of Europe court (assuming that the Council itself maintains its function and position in the new Europe).

3. By combining the above elements, it might also be possible to establish a new court to replace the present "Administrative Tribunal of the Council of Europe", whose powers are narrow and "technical", and whose President is, as it happens, a judge in the European Court of Human Rights. The new court could simultaneously exercise its basic powers (see above) and those of the Administrative Tribunal. The advantage here would be that no new body would be created (an existing body would be replaced by another), the disadvantage an obvious disparity between the basic powers of the new court and those of the present Tribunal.

**Appendix 2**

**(facsimile)**

MINISTER OF FOREIGN AFFAIRS
THE CZECH REPUBLIC

Prague, May 15 ,1998
No.: 89.499/98-MPO
Enclosure: 1

Mr. Secretary General,

On February 25, the Permanent Representative of the Czech Republic to the Council of Europe transmitted to you the elements for consideration of possible establishment of a "general" judicial authority of the Council of Europe and asked you to communicate it to the Committee of Wise Persons for its further consideration.

During recent weeks, representatives of the Czech Republic held series of consultations on this subject, in Strasbourg as well as in the capitals of the Council of Europe member states. The result of these consultations is the material you may find enclosed. It reflects the observations and comments put forward by the member states and high officials of the Secretariat of your Organization. Its main ideas were already reflected in the speech by the head of the Czech delegation to the 102nd session of the Committee of Ministers, my First Deputy Jan Winkler. The enclosed material further elaborates these ideas.

Mr. Secretary General, may I ask you to communicate the updated version of the Czech initiative to the Committee of Wise Persons. Please, distribute this version also among all permanent representatives of the Council of Europe member states as a concrete outcome of the 102nd session of the Committee of Ministers.

Please accept, Mr. Secretary General, the assurance of my highest consideration.

Mr. Daniel Tarschys
Secretary General
of the Council of Europe
Strasbourg

# FURTHER ELEMENTS TO BE CONSIDERED IN DISCUSSING THE POSSIBLE EXISTENCE OF A GENERAL JUDICIAL AUTHORITY AT THE COUNCIL OF EUROPE

**(in the light of reactions to GT-SUIVI(98)10 of March 12, 1998)**
(submitted by the Czech Republic)

1. Initiative should be taken in the context of the call for "deepening" the Council of Europe (CoE)

After a period of unusually intensive enlargement, the priority of the CoE after its 2nd Summit is now its *deepening*. The Czech initiative proceeds from the desire to respect this demand.

**a) Deepening of the legal dimension of the CoE.** Under its Statute, the Organization was vested inseparably with the protection and promotion of pluralist democracy, human rights and the *rule of law*. The founding members thus stressed the key importance of the CoE legal dimension. This dimension has materialized inter alia in the tremendous system of 170 treaties (nearly 40 contractual instruments have been concluded since 1989 alone). This increase in number of treaties is however not sufficiently balanced by an dynamic tendency towards deepening. The CoE has thus far largely focused on mere international law-making rather than on the quality of implementation of the treaties concluded. However, the effectivness of law is determined by both law-making and application. Control and monitoring mechanisms for individual treaties necessary for their effective implementation are either completely missing or have only political but not legal nature. This limits to a great extent their capacities and in a way deforms the implementation of treaties.

The notion of law is immanently linked with the request for *jurisdiction*. In order to prevent international law in the CoE treaties from being reduced in practice to mere international policy it is imperative to support it by the existence of a qualified body, handling binding treaties on the basis of adequate legal methods and means.

**b) Deepening in the institutional sense.** Considerations on a "general" judicial body should respect the general desire of the member States not to enlarge and not to complicate CoE structures. The place for such body should thus be sought within the already present institutional framework offering room for its functioning. Should such a place be found, the realization of the initiative would lead to the "deepening" of the existing structures of the Organization, i.e. to their sounder and more profound exploitation as well as to greater rationalization. Such rationalization is also the objective of reflections of the Committee of Wise Persons.

In the light of so reflected desire of states, the most suitable institutional form of the

possible "general" judicial body seems to be under the present circumstances ***a special chamber of the new European Court of Human Rights (ECHR)***. This naturally does not exclude the possibility to advance in the long run to a solution organizationally more ambitious.

2. European Court of Human Rights and the "general" judicial body

The new ECHR with its present body of 40 full-time judges and envisaged 249 legal and administrative staff of its Secretariat is apparently the largest international tribunal in the world of all times. Its competencies *ratione materiae* are relatively very narrow, permitting it, thanks to its huge staffing, to go in great depth in monitoring the implementation of the European Convention on Human Rights and to update its text to reflect the changing reality. This, however, should not become the only sense of existence of the Court.

One of the reasons for elaborating Protocol No. 11 was undoubtedly also to provide for the Court room for further tasks to be entrusted to it. In this connection, consideration was given in particular to the accession of the European Community to the Convention, by which the human rights dimension of the community law would fall under the control of the Strasbourg Court. Its President at that time, Rolv Ryssdal, declared before the Parliamentary Assembly in September 1995 in this connection that "... *on a technical level the difficulties are not insurmountable and this is particularly so in view of the forthcoming entry into force of Protocol No. 11 and the creation of a full-time ECHR*". Given the negative opinion by the 1996 EC Court and in the light of the latest developments in the EU, this seems to be, at least in the short and medium run, much harder to achieve both from the legal and political point of view. The new ECHR could therefore be provided room somewhere else. By acquiring competence also in relation to other CoE treaties, it could in fact at least partially fill in the vacuum in the structures of the Council, i.e. the absence of its third, "judicial" pillar. Under its present shape, the ECHR as it exists naturally cannot be said to be such a pillar. From this point of view, the proposed solution is better than the possible creation of a "general" judicial body existing *alongside* the ECHR. This would in fact lead to the co-existence of two pillars of judicial power which could, in extreme cases (with a view to treaties of the type of the Convention on the Protection of Personal Data), become undesirable rival institutions.

Vesting the ECHR with new competencies can in no way threaten the exercise of its current powers. As a matter of fact, its present and future competencies would in no way overlap or condition each other. On the contrary, additional competencies would only substantially increase the influence of the ECHR on the whole system of values protected by the CoE Statute. The Court could thus also further develop its incontestable huge intellectual capacities.

3. Powers of the "general" judicial body

According to the largely prevailing view, the most practical and politically best

acceptable power is the *power to give advisory opinions*. The general judicial body would give, at the request of the member States or CoE organs, parties to individual CoE treaties or bodies in charge of supervising their implementation, advisory opinions on legal questions related to the interpretation and application of contractual instruments, including the Statute. This advisory activity would become an important tool for preventing disputes between Contracting Parties on the correct interpretation and application of treaties, contribute amply to the harmonization of the implementation of treaties by all Parties and guarantee the respect for the international legal principles of sovereign equality and non-discrimination of the Parties. At the same time, such opinions would not constitute for states an inviolable binding model for further action but rather some sort of guideline based on an impartial legal authority of the judicial body.

In respect of treaties providing for no control mechanisms, the judicial body could act as a body of subsidiary legal monitoring. In respect of other treaties, in which a certain control mechanism is provided for, the judicial body would complement such mechanism without prejudice to the competencies or powers of existing bodies for contractual monitoring. The Contracting Parties as well as the monitoring bodies could submit to it a request for advisory opinion, but it would remain fully up to them to abide by the conclusions in the interest of correct implementation of a treaty. The judicial body would thus act in harmony and complementarity with the monitoring mechanisms of *political nature*, thus giving orientation to their potential and in fact multiplying it.

Other considered powers (judgements and decision-making in prejudicial questions) could perhaps be instituted only after the evaluation of experiences with the advisory opinion activity.

4. Compatibility and complementarity with OSCE and EU

Unlike the Council of Europe, the **OSCE** is an organization based upon political rules of conduct. Like the Council of Europe it pays intensive attention to standard-setting but confines itself to formulating political and not legal rules. Its rules sometimes apply to the same subject matters as those of the CoE (e.g. protection of national minorities). It monitors the respect for these rules by political means. If the CoE does not strive in the future to complement its law-making in international treaties with legal tools promoting an effective respect for these treaties in practice, the difference between the two organizations would in fact fade away: in both cases the respect for and application of the set rules would depend only on political means. Such similarity could then justify the hardly plausible ideas of the future institutional merger of the two organizations, which would be a non-desirable outcome. On the contrary, stressing the legal monitoring mechanisms in the CoE would improve chances for a harmonious and reciprocally increasing cooperation of both organizations even in those areas in which their activities might overlap.

The EU is undoubtedly interested in linking the legal space constituted by the *acquis communautaire* geographically with a wider European legal space of the CoE, whose treaties are based on the same values (protection of democracy, the rule of law and human rights) which - among others - the EU subscribes to. We can therefore well imagine some kind of "division of labour" between the two organizations, which would be in the interest of both. However, to achieve this "division of labour" in a greater extent, the CoE must guarantee effective and foreseeable implementation of its treaties by all Parties. It is probably not able to provide such guarantee by mere *political monitoring* while in combination with complementary legal instruments this would be possible. The said "division of labour" could be introduced in areas of judicial cooperation in criminal matters, extradition of offenders and elsewhere.

## 5. Financial impacts

The establishment of a "general" judicial body in the form of a specialized chamber of the ECHR would mean no new financial burden for the members. On the contrary, its work would make it possible for certain future conventions, whose object and purpose so permit, not to include special monitoring mechanisms which are usually expensive. The work of the judicial body would thus in fact reduce in the future the expenditures of the CoE.

On the other hand, it is necessary to take into consideration the high expenditures of the new ECHR. The judges' expenses alone will drain away 44 million FRF annually and the salaries of the staff, the number of which is likely to increase by one half against the present situation (secretariats of the Commission + the Court), will require an even higher amount *. Under these circumstances the efforts to seek ways of using the potential of this 300-member highly professional body not only in the interest of the protection of rights and fundamental freedoms of an individual but also of the rule of law in Europe and the CoE as such are fully justified.

*) See *Budgetary arrangements of the future single Court to be set up under Protocol No. 11 to the European Convention on Human Rights. Document prepared by the informal Working Party on Protocol No. 11*. 14 March 1997.

## Appendix 4

## RECOMMENDATIONS BY THE COMMITTEE OF WISE PERSONS CONCERNING THE VENICE COMMISSION

**(Memorandum prepared by the Secretariat of the Commission, document GR-J (99) 10)**

1. The recommendations by the Committee of Wise Persons reflect the high esteem of the Wise Persons for the Venice Commission and the Venice Commission is greatly honoured by this. The Wise Persons' positive appreciation of the Venice Commission is all the more apparent since they placed their recommendations on the Commission in their report side by side with those on the Committee of Ministers, the Parliamentary Assembly and the Congress of Local and Regional Authorities of Europe. This highlights and confirms the central place of the Venice Commission as an independent and impartial body at the direct service of the organs of the Council of Europe. To induce the statutory organs of the Council of Europe to make even better use of the expertise of the Commission, the Wise Persons make three major recommendations:

- To use the Commission to give non-binding opinions on matters of constitutional importance or fundamental legal interest for the Council of Europe at the request of the statutory organs and the Secretary General;

- To provide for the possibility that the Commission may, at the request of the Committee of Ministers, interpret Council of Europe legal instruments devoid of specific interpretation mechanisms;

- To reinforce the Commission's impact towards non-European countries, thus promoting Council of Europe values beyond the European continent.

2. It should be recalled that the Venice Commission already earlier made proposals for a revision of its Statute which are partly similar to the recommendations by the Wise Persons. The Rapporteur Group on Partial Agreements last year started examining these proposals but decided to suspend its work pending the recommendations from the Committee of Wise Persons.

### I. Opinions to be provided on matters of constitutional importance or fundamental legal interest for the Council of Europe

3. First, it should be recalled that the Venice Commission already has the mandate for such opinions. The Commission also has the capacity to reinforce this aspect of its work if it were asked to do so. Article 2 of its Statute provides *inter alia* that it shall supply opinions upon request from the Parliamentary Assembly, the Secretary General or any member State of the Council of Europe. Obviously, such opinions have to remain within the field of competence of the Commission. The Statute of the Venice Commission describes the field of action of the Commission as "the guarantees offered by law in the service of democracy" and asks the Commission to give priority *inter alia* to work concerning "the constitutional, legislative and administrative principles and technique which serve the efficiency of democratic institutions and their strengthening, as well as the principle of the rule of law". This mandate does in no way limit the activities of the Commission to national constitutional law. The decisive criterion for a matter to be within the remit of the Commission is not its constitutional character in a technical sense but rather that it is closely linked to fundamental legal principles.

4. Article 3 of the Statute of the Council of Europe links membership in the Organisation with two such fundamental legal principles: respect for the rule of law and for human rights. While the European Court of Human Rights is the competent body to interpret human rights standards within the Council of Europe, for other aspects of the rule of law a similar body is missing. The concept of the rule of law has however been refined and made concrete during five decades of activity of the Organisation. The Council of Europe has an impressive *acquis* in this field which, from the perspective of national law, may be described as the European constitutional heritage.

5. In several of its opinions given to the Parliamentary Assembly in the framework of the monitoring activities of the latter, the Venice Commission has already been able to identify and apply such fundamental legal principles which constitute the common constitutional heritage of Europe and the

*acquis* of the Council of Europe. The proposal of the Wise Persons that the Venice Commission could be asked to give, at the request of the statutory organs, non-binding opinions "on matters of constitutional importance or of fundamental legal interest for the Council of Europe" is therefore not a real innovation but only a shift of emphasis towards subject matters of particular importance for the Council of Europe. It seems to reflect the conviction of the Committee of Wise Persons that the Committee of Ministers and the Secretary General should, as is already the practice of the Parliamentary Assembly, take more advantage of the experience of the Commission by asking it to provide legal opinions on subject matters of particular interest to them. Possible subjects for such opinions would include for example, but this is obviously at the discretion of the requesting bodies, the criteria for free elections, the rights of the opposition or fundamental constitutional rules on the distribution of powers.

**II. Opinions to be provided on the interpretation of legal instruments devoid of a specific interpretation mechanism**

6. The proposal to invite the Commission to give legal opinions "on the interpretation of conventions and other legal instruments of the Council of Europe devoid of specific interpretation mechanisms" remains within the field of competence of the Commission as well. International law is a traditional field of activity of the Commission. The Commission has prepared several studies in this field and its qualifications in this domain are well established. As regards the technical content of the various Conventions, the Commission could gather information from the Parties like any judicial body with a general competence.

7. Past experience shows that demand for such interpretations will probably not be very high but does arise from time to time. Common sense leads to the conclusion that it is advisable to have competencies for dispute settlement made clear well in advance of a concrete dispute. Once a dispute is manifest, establishing mechanisms for its solution may prove difficult. Cost arguments equally militate in favour of using the existing services of the Venice Commission which can deal with such demands in parallel with its ongoing activities.

8. Notwithstanding the well-established competencies of the Legal Adviser, the Committee of Ministers might benefit from the advice of the Venice Commission which is able to deliver not only independent but also collegiate opinions reflecting viewpoints from all member States. The fact that any request for an opinion of the Commission would have to come from the Committee of Ministers would prevent any undue use of this possibility.

9. There remains the issue that, while further accessions are to be expected, not yet all member States of the Council are members of the Partial Agreement establishing the Venice Commission (currently 37 out of 40). It seems possible to settle this issue without difficulty, as already suggested in the report of the Committee of Wise Persons. The countries concerned could designate an independent personality to participate in the work of the Commission when such requests are treated, including the right to vote when the respective opinions are adopted. This may be compared to the customary procedure to appoint *ad hoc* judges for cases in which one of the Parties involved is not represented on a court.

**III. The involvement of the Venice Commission with non-European States**

10. In paragraph 59 of its report, the Committee of Wise Persons proposes that the Venice Commission should be encouraged to promote the awareness of the importance of the rule of law also in non-European countries.

11. The Venice Commission is already co-operating with several non-European countries. Argentina, Canada, Japan, Kazakhstan, Kyrgyzstan, the United States and Uruguay are observers to the Commission; South Africa benefits from a special statute of co-operation accorded by the Committee of Ministers. Given the increasing number of demands for observer status from other non-European countries, the Commission had already proposed an amendment to its Statute which *inter alia* provides for financial contributions from observer States. The Rapporteur Group on Partial Agreements is examining this proposal. The adoption of the proposed amendment to the Statute would constitute a measure of encouragement as proposed by the Committee of Wise Persons.

## Appendix 3

## RECOMMENDATIONS BY THE COMMITTEE OF WISE PERSONS CONCERNING THE VENICE COMMISSION AND CZECH PROPOSAL TO ESTABLISH A JUDICIAL AUTHORITY FOR THE COUNCIL OF EUROPE

**(Memorandum by the Directorate of Legal Affairs, document GR-J (99) 12)**

### A. Introduction

1. There are currently two proposals on the table:

- To give the *European Court of Human Rights* the power to give advisory opinions on legal questions related to the interpretation and application of Council of Europe treaties. Entitled to request such opinions could be member States (and other Parties to individual treaties), the organs of the Council of Europe and perhaps even expert committees (*Czech proposal*).

- To ask the *Venice Commission* to give advisory opinions on matters of constitutional importance or of fundamental legal interest for the Council of Europe, and on the interpretation of Council of Europe conventions and other legal instruments devoid of specific interpretation mechanisms (*Committee of Wise Persons*).

2. The Czech proposal focused on a question of vital importance, the establishment of efficient and effective mechanisms of follow-up and control for the Organisation's large corpus of legally binding texts. It has prompted useful discussions in the Rapporteur Groups (GT-SAGES and GR-J) and the Parliamentary Assembly. During the discussions, some delegations have questioned the necessity to establish any new procedures. Experience has shown that existing procedures of dispute settlement have rarely been resorted to. On the other hand, it has been argued that due to the rapid increase in the number of treaties and in the membership of the Organisation, which has become to a certain extent more heterogeneous, there is a growing need to have adequate procedures to decide questions of interpretation and, if necessary, to settle disputes.

3. The need to give opinions on the application and interpretation of a treaty may arise in different contexts:

- The authorities of a State party preparing implementing legislation may have doubts about the correct interpretation of certain provisions of a treaty and would like to have an “authoritative interpretation”.

- Two or more States parties may have a dispute about the correct interpretation of a treaty provision (e.g. State A alleges that State B has not correctly applied or implemented a certain treaty).

- A court in a State party has doubts about the correct interpretation of a treaty provision which it wants to apply in a case pending before it.

4. It should be noted that the last variant would only concern treaty provisions which can be directly applied by national courts (*self-executing* provisions). In Council of Europe treaties such provisions are not common (one exception being of course the European Convention on Human Rights).

5. In spite of the differences of opinion among delegations, a number of points have emerged from the discussions which may serve as a basis for solutions agreeable to all:

- Any new procedures should take into account the existing interpretation and settlement of disputes mechanisms and avoid any duplication of work.

- Any new procedures should address real problems in an efficient, flexible and transparent way.

- Any new procedures should allow a participation of all member States (and other Parties to particular conventions) on an equal footing.

- The establishment of new procedures should not have any significant budgetary impact.

6. Given the diversity of the treaties and their mechanisms, it would seem impossible to propose the same solution for all of them. While the introduction of such mechanisms into new conventions is relatively easy (B), any such proposals with respect to the existing treaties have to take into account the existing text of the treaty and the legitimate expectations of the States which have already become Parties to it. Human rights treaties (C) and treaties concluded in the penal field (D) constitute special cases where any new solutions should be based on the existing mechanisms. The follow-up mechanisms for other conventions could be strengthened, in particular by providing for settlement of disputes procedures (E). Finally, there are various ways in which the recognised expertise of the Venice Commission may be used (F).

## B. Future conventions

7. The Report of the Committee of Wise Persons emphasised the necessity to introduce specific provisions concerning interpretation into future conventions (§ 13). From a legal point of view, the inclusion of mechanisms of monitoring and control into new conventions is much easier than the establishment of such mechanisms for existing ones. The procedures can be clearly spelt out in the convention so that the Parties will know to what they sign up.

8. The judgment of the German Federal Constitutional Court of 22 March 1995 (2 BvG 1/89) illustrates why the absence of such mechanisms may constitute a weakness. In this case the Court examined *inter alia* the necessity of a Community directive to regulate certain aspects of transfrontier television. The Court had no difficulty to justify this necessity, even in the presence of a Council of Europe convention on exactly the same subject-matter (*European Convention on Transfrontier Television*, ETS 132, 1989). The Court concluded that a convention of the Council of Europe cannot substitute a Community directive because the Council of Europe did not have a judicial instance similar to the Court in Luxembourg which would be capable of ensuring the effective implementation of the engagements undertaken by the member States.

9. Judicial or quasi-judicial procedures might, however, not be indispensable in every new treaty. Depending on the object and purpose of a convention, the choice of the control and interpretation mechanism may vary. In some cases, conventions will only be acceptable provided that they do not provide for a judicial mechanism of control (e.g. the *Framework Convention for the Protection of Minorities*, ETS 157, 1995).

10. Each time a new treaty is being drafted, the introduction of specific provisions concerning interpretation and dispute settlement should be seriously considered. In cases where judicial or quasi-judicial procedures are foreseen, competence to exercise jurisdiction may be given to the European Court of Human Rights, the Venice Commission or an *ad hoc* arbitration tribunal.

## C. The role of the European Court of Human Rights

11. The *European Court of Human Rights* has exclusive jurisdiction as far as the *European Convention on Human Rights and its Protocols* are concerned. Other human rights treaties, such as the *European Social Charter* (ETS 35, 1961) or the *Framework Convention for the Protection of Minorities* (ETS 157, 1995), have each established special monitoring procedures taking into account the nature of the obligations and the political will of the Parties. Since these mechanisms work satisfactorily, there is no need to devise any new procedures as far as these treaties are concerned.

12. Extending the jurisdiction of the European Court of Human Rights to an existing convention, even only in an advisory function, would amount to an amendment of the original text of the convention and would require the consent of the Parties to that Convention and of the Court. For reasons of legal security and certainty, the extension of the Court's jurisdiction should be laid down in a protocol to the convention.

13. During the discussions, some delegations have pointed out that an extension of the Court's jurisdiction should be carefully considered. The new permanent Court has just started to function. Due to the increase in the number of Parties to the Convention and growing awareness of its mechanisms all over Europe, the workload of the Court has increased dramatically (figures for 1998: 16,353 provisional files and 5981 registered applications). There is a serious risk to overburden the Court. Any additional functions of the Court should remain within the purpose for which it has specifically been set up, the interpretation of fundamental rights standards within the Council of Europe. Whenever new treaties in the field of human rights are being drafted, it should be considered to follow the precedent of the *Convention on Human Rights and Biomedicine* (ETS 164, 1997)[1]. Extending the Court's jurisdiction is an important tool to ensure a uniform and harmonious application of all conventions dealing with fundamental rights. Taking into account the object and nature of the treaty obligations in each case, the Court's jurisdiction may either be compulsory or advisory.

14. It may even be considered to extend the Court's jurisdiction to old conventions in this field, such as the *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (ETS 108, 1981). Such an extension would of course require the formal amendment of the convention in question which can only be brought about with the consent of all Parties.

### D. Conventions in the penal field

15. The *European Committee on Crime Problems* (CDPC) is responsible for conventions in the criminal law field[2]. Most of the treaties contain a clause which provides that the CDPC shall be kept informed regarding the interpretation and application of the particular treaty.

16. In 1981, the CDPC established a *Committee of Experts on the Operation of European Conventions in the Penal Field* (PC-OC). This Committee has a double task, namely to examine difficulties that arise out of the application of the treaties, and to develop new instruments if and when necessary.

17. In the event of a dispute between two or several Parties, the CDPC - "shall do whatever is necessary to facilitate a friendly settlement of any difficulty which may arise out of its application". The provision on the friendly settlement of disputes has become a standard feature of European

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[1] The European Court of Human Rights has been entrusted with the task of giving advisory opinions on legal questions concerning the interpretation of the Convention at the request of the government of a Party or the *Steering Committee on Bioethics* (CDBI).

[2] *European Convention on Extradition* (ETS 24, 1957); *European Convention on Mutual Assistance in Criminal Matters* (ETS 30, 1959); *European Convention on the Punishment of Road Traffic Offences* (ETS 52, 1964); *European Convention on the International Validity of Criminal Judgments* (ETS 70, 1970); *European Convention on the Repatriation of Minors* (ETS 71, 1970*); European Convention on the Transfer of Proceedings in Criminal Matters* (ETS 73, 1972*); Additional Protocol to the European Convention on Extradition* (ETS 86, 1975); *European Convention on the Suppression of Terrorism* (ETS 90, 1977); *Second Additional Protocol to the European Convention on Extradition* (ETS 98, 1978); *Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters* (ETS 99, 1978); *European Convention on the Control of the Acquisition and Possession of Firearms by Individuals* (ETS 101, 1978); *European Convention on the Transfer of Sentenced Persons* (ETS 112, 1983); *European Convention on the Compensation of Victims of Violent Crimes* (ETS 116, 1983); *European Convention on Offences Relating to Cultural Property* (ETS 119, 1985); *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS 141, 1990); *Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (ETS 156, 1995); C*onvention on the Protection of the Environment through Criminal Law* (ETS 172, 1998); *Criminal Law Convention on Corruption* (ETS 173, 1999).

conventions in the penal field[1]. In practice, the CDPC was only once formally requested to perform such a task. This happened in 1998, at the request of Italy, in a case involving the application of the *Convention on the Transfer of Sentenced Persons* (ETS 112, 1983).

18. Some treaties provide in addition for *arbitration* (e.g. the *European Convention on the Suppression of Terrorism*, ETS 90, 1977, or the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime,* ETS 141, 1990). In disputes over, for example, money laundering, it may be advantageous to resort to a procedure the issue of which is final and binding, thus clear and certain. Conversely, it can be said that in disputes concerning co-operation in criminal matters in general, values such as good will, the sense of sharing common problems, the recognition that crime cannot be controlled solely within national borders and the practical need to ensure continued co-operation take precedence over the need to have a binding judicial decision.

19. There is an underlying unity both in the realities of life that the different penal conventions address, namely crime, and in the goals pursued by the States in resorting to the conventions. Any new solutions for the conventions in the penal field should therefore be comprehensive and all-embracing. They should be proposed by the CDPC which has a long-standing experience in this matter.

20. In December 1998, the Committee of Ministers already charged the CDPC to develop a fast and effective mechanism designed to facilitate the friendly settlement of any difficulty, including conflicts of jurisdiction, which may arise out of the application of Council of Europe conventions in criminal matters (in particular the *European Convention on Extradition*, ETS 24, 1957; the *European Convention on the Suppression of Terrorism*, ETS 90, 1977; and the *European Convention on the Transfer of Proceedings in Criminal Matters*, ETS 73, 1972) and to examine in general the efficiency of existing mechanisms[2].

21. In this context, it may be appropriate to consider establishing a flexible machinery (or procedures) for the settlement of disputes and possibly a non permanent European Criminal Court to which States could transfer their jurisdiction over (serious) cases in respect of which they cannot or do not wish to continue proceedings.

## E. The role of steering and conventional committees

22. The application of many European treaties is already monitored by intergovernmental committees and committees of independent experts. The committees are composed of experts from member States who have considerable experience as far as the treaties' application and implementation are concerned. Instead of inventing new and costly structures, interpretation or settlement of dispute procedures should build on this practice and use the existing expertise.

23. Introducing judicial procedures *a posteriori*, often many years after the entry into force of a treaty, would in some cases run counter the intentions of the drafters. Member States have ratified the treaties knowing that they would not be faced with an international jurisdiction which interprets the treaty with binding force and may put into question already adopted implementing legislation. Even advisory opinions, though not legally binding, may enjoy considerable persuasive authority in view of the competence and expertise of the body which renders them.

24. The terms of reference of many *steering* committees already provide for a regular examination of the functioning and implementation of Council of Europe treaties coming within their respective field of competence (CDCJ, CDPC, CDLR, CDCS). These and the other steering committees may be given an explicit mandate to give opinions on the interpretation of conventions

[1] Exceptions are some of the early treaties, such as the *European Convention on Extradition* (ETS 24, 1957) and the *European Convention on Mutual Assistance in Criminal Matters* (ETS 30, 1959).

[2] See the *ad hoc* terms of reference for the CDPC adopted at the 653rd meeting of Ministers' Deputies, 16 to 17 December 1998 (item 10.2).

and to facilitate the friendly settlement of any disputes which may arise in this context. Co-operation between disputants and rational compromise may often have advantages over a purely judicial approach.

25. The conventions which have established *conventional* committees usually entrust them with the task to regularly examine the convention's functioning and implementation. Provided that the Parties agree, they may give opinions on the interpretation of the convention and endeavour to facilitate the friendly settlement of any difficulties to which the convention's implementation has given rise.

26. Provided that the Parties agree, procedures for interpretation and settlement of disputes could be organised along the following lines:

a) Any request for an interpretation or a friendly settlement would be forwarded to the Secretariat. The Secretariat would transmit the request to the bureau of the competent committee.

b) Unless they are very urgent, the requests would be considered during ordinary scheduled meetings.

c) In order not to overburden the plenary of a committee with such requests, "*friendly settlement panels*" could be set up. The composition of such panels could include one or more experts from each of the States directly involved plus a fixed number of other experts chosen from a pool/list of experienced experts who could be selected in advance for that purpose by the committee.

d) The panel, assisted by the Secretariat (in particular the Legal Adviser), could act as a sort of "moderator" in order to ensure that the relevant rules apply in a friendly atmosphere and, possibly, to propose an interpretation or a settlement compatible with the object and purpose of the convention.

e) The panels would adopt a report setting out the questions in dispute and stating, as the case may be, either that the Parties have come to an agreement and, if the need arises, the terms of the agreement, or that it has been impossible to reach a settlement.

f) The panel report would be forwarded to the Committee of Ministers which would remain free to decide which further steps to take, if any. In certain cases, the Venice Commission could be asked to give an advisory opinion (see below).

g) Unless particular circumstances call for confidentiality, the reports should be made public. Publicity and visibility are of paramount importance to ensure that the findings are taken into account by the administrative and judicial authorities in the member States which have to apply the conventions.

27. The procedures and competences for dispute settlement should be spelt out well in advance of a concrete dispute. Once a dispute is manifest, establishing mechanisms for its solution may prove difficult. Model rules of procedure for dispute settlement should therefore be prepared which would eventually have to be adopted by the Committee of Ministers. The rules could also provide for the participation of non-member States which are Parties to particular conventions or lay down special procedures for urgent cases.

28. Participation in dispute settlement procedures would in each case require the consent of all Parties involved. The panels would not have any authority to decide a dispute with binding effect for the Parties. Since the activity of the panels would not directly affect the treaties' application, they could be set up without previously amending the treaties in question.

## F. Role of the Venice Commission

29. The Wise Persons recommended *inter alia*

- to use the Commission to give non-binding opinions on matters of constitutional importance or fundamental legal interest for the Council of Europe at the request of the statutory organs and the Secretary General;

- to provide for the possibility that the Commission may, at the request of the Committee of Ministers, interpret Council of Europe legal instruments devoid of specific interpretation mechanisms.

30. As far as *opinions on matters of constitutional importance or fundamental legal interest for the Council of Europe* are concerned, it should be recalled that the Venice Commission already has a mandate for such opinions. Article 2 of its Statute provides *inter alia* that it shall supply opinions upon request from the Parliamentary Assembly, the Secretary General or any member State of the Council of Europe. This proposal of the Wise Persons is therefore not a real innovation, but only a shift of emphasis towards subject matters of particular importance for the Council of Europe. Possible subjects for such opinions would include for example, but this is obviously at the discretion of the requesting bodies, the criteria for free elections, the rights of the opposition or fundamental constitutional rules on the distribution of powers

31. Giving *opinions on the interpretation of Council of Europe conventions and other legal instruments* is not specifically provided for in the Statute of the Venice Commission. Committees of the Parliamentary Assembly have requested such opinions twice[1]. Nothing prevents the Commission to continue this practice.

32. However, any general mandate of the Commission in this field must take into account the existing structures of intergovernmental and expert committees, the established role of the Legal Adviser as well as the experience of 50 years of treaty application. A duplication of work should be avoided. Problems of interpretation and application should therefore first be addressed by the existing committees which are responsible for the follow-up of conventions and recommendations. Being composed of experts from all member States, these committees are particularly qualified to address the practical problems concerning the application of the conventions. As far as legal problems are concerned, they may seek advice from the Legal Adviser.

33. As far as the interpretation of Council of Europe conventions is concerned, action by the Venice Commission would therefore have to be subsidiary, respecting the competences of existing committees. The Commission should only be requested to intervene where, by reason of its recognised expertise, it can be expected to make a meaningful contribution to the solution of problems. It could in particular

- Advise States parties in questions of constitutional and international law concerning the domestic implementation of a particular convention;

- Give non-binding interpretations of treaties if this is required during settlement of dispute proceedings (see above).

34. Requests for such opinions could be addressed to the Commission directly by the State concerned or, when settlement of dispute proceedings have been initiated, by the competent steering committee.

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[1] *Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting States* [CDL-INF (96) 3] and *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].

35. The problem that not yet all member States of the Council of Europe (and other Parties to particular conventions) are members of the Partial Agreement establishing the Venice Commission (currently 37 out of 40), could be settled without difficulty. The countries concerned could designate an independent personality to participate in the work of the Commission when such requests are treated. This person would have the right to vote when the respective opinions are adopted. This may be compared to the customary procedure to appoint *ad hoc* judges for cases in which one of the Parties involved is not represented on a court.

36. The intervention of the Venice Commission would in each case require the consent of all Parties involved. The Commission would only adopt advisory opinions. It would not be necessary to formally amend the conventions in question to give such a mandate to the Commission.

## G. Conclusions

37. The above considerations lead to the following conclusions:

a) Whenever new treaties are being drafted, the introduction of appropriate provisions concerning interpretation and dispute settlement (including the Czech proposal) should be seriously considered.

b) As far as treaties in the field of fundamental rights are concerned, it should be considered to provide in each treaty for the jurisdiction of the *European Court of Human Rights* which may either be compulsory or advisory.

c) As far as the penal conventions are concerned, the CDPC should be encouraged to propose flexible mechanisms for interpretation and settlement of disputes in accordance with the mandate adopted on 17 December 1998, at the 653rd meeting of Ministers' Deputies.

d) Other committees could also be given the mandate to give opinions on the interpretation of conventions falling within their sphere of competence and to facilitate the friendly settlement of any difficulties which may arise in this context.

e) The Venice Commission could be requested by the statutory organs and the Secretary General to give non-binding opinions on matters of constitutional importance or fundamental legal interest for the Council of Europe. As far as the interpretation of Council of Europe conventions and other legal instruments is concerned, its advice should only be sought if the existing procedures are deemed insufficient.

## Appendix 5

## RECOMMENDATION No. R (99) 20 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES CONCERNING THE FRIENDLY SETTLEMENT OF ANY DIFFICULTY THAT MAY ARISE OUT OF THE APPLICATION OF THE COUNCIL OF EUROPE CONVENTIONS INE THE PENAL FIELD

*(Adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.*b*. of the Statute of the Council of Europe,

Having regard to the Council of Europe Conventions in the penal field;

Recognising that through such Conventions it pursues the goals notably of:

- upholding the rule of law;

- promoting human rights;

- fighting for democratic stability in Europe;

- strengthening European legal co-operation in criminal matters

- supporting victims and redressing their rights;

- pursuing the ends of justice by bringing before a court of law those who are accused of having committed a crime;

- promoting the social rehabilitation of offenders.

Desirous of strengthening its ability to pursue such goals in a comprehensive and harmonious fashion;

Convinced that to that effect it is proper to facilitate, in accordance with the guidelines appended, the friendly settlement of any difficulty arising out of the application of any one or more of the Council of Europe Conventions in the penal field;

Recommends the governments of member States:

*a.* To continue to keep the European Committee on Crime Problems (CDPC) informed through the PC-OC about the application of all the Conventions in the Penal Field and of any difficulty that may arise thereof;

*b.* Pending the entry into force of provisions formally extending the CDPC's role in this area to the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters, to accept that the CDPC be called upon to do whatever is necessary to facilitate a friendly settlement of difficulties arising out of the application of those Conventions;

*c.* when experiencing difficulties that may be seen as concerning two or more Conventions simultaneously, to assign them jointly to the CDPC;

2. Instructs the Secretary General of the Council of Europe to transmit this Recommendation to the governments of the non-member States which are a Party to any of the above-mentioned Conventions and to the governments of States invited to accede to any such Convention.

## Appendix to Recommendation No. R (99) 20

## Procedural guidelines for the friendly settlement of difficulties arising out of the application of conventions in the penal field

1. Any request for a friendly settlement should be forwarded in writing to the Secretariat.

2. The Secretariat shall transmit the requests to the Bureau for consideration at the earliest meeting, whether a Bureau meeting or a CDPC plenary session.

3. Where the request is urgent, the Secretariat, in consultation with the Bureau of the CDPC, shall put into motion an urgent procedure.

4. Whenever friendly settlements coincide in time with plenary sessions of the CDPC, they shall be sought within an open-ended working party of the CDPC.

5. Whenever they do not coincide in time with plenary sessions of the CDPC, friendly settlements shall be sought within an *ad hoc* working party of the CDPC set up and convened to that effect.

6. The members of such an *ad hoc* working party shall then be:

*a.* persons appointed by the States involved in the difficulties or disputes under review;

*b.* persons designated by the Bureau of the CDPC, amongst:

the Heads of Delegation to the CDPC, or their substitutes designated to that effect;

persons appointed to that effect by States not members of the Council of Europe yet a Party to one or more of the Conventions in respect of which the difficulties or disputes have arisen;

7. All Heads of Delegation shall be informed of the request and the procedure followed; they shall be allowed to submit written comments;

8. The Chair of the CDPC, or a member of the Bureau, should assume responsibility for and preside over any meetings that might be held in the context of friendly settlements;

9. The number of persons appointed by the States involved, as well as the number of persons appointed by the Bureau of the CDPC, shall be measured against the nature of the difficulties involved and the need to proceed both effectively and efficiently.

10. The State that sets the procedure in motion should put into writing the facts of the case, the difficulties that it is faced with, whether or not it considers the request to be urgent, as well as the aim that it seeks to achieve.

11. The respondent State should likewise put into writing its point of view or any comments that it deems fit.

12. At the end of the procedure, a paper must emerge, stating the facts, the difficulties encountered, as well as suggestions that the CDPC, or in urgent situations the *ad hoc* working party, wishes to submit to the States involved.

13. Finally, States involved in friendly settlements may be invited to feed back information on what happened as a consequence of the procedures, or following the procedures, in particular where such information might be of relevance to the interests of other States.