Conclusions of the 5th Andalusian Forum on Social Rights, held in co-operation with the Academic Network on the European Social Charter on the occasion of the 50th anniversary of the European Social Charter

General points

1. Social rights will be more effectively guaranteed when they are placed in the framework that is needed to protect fundamental rights at all levels, taking account of the interaction of protection standards at international and national level and always favouring the most appropriate means of ensuring that they will be applied.

2. The European Social Charter of 1961 (ESC), which was revised in 1996, is still the most comprehensive European treaty in the sphere of social rights. As such as it serves as a kind of "European Social Constitution" or "European Covenant of Social Democracy". Together with the European Convention on Human Rights of 1950 (ECHR), to which it is an essential counterpart, it forms what might be termed the Council of Europe's "Constitutional Charter". Convincing evidence of this is provided by the fact that the Charter of Fundamental Rights of the European Union was drawn up on the model of the two Council of Europe treaties. It is a sign that the regular progress of social rights protection at European level calls for the European Union to sign up not only to the ECHR but to the Social Charter.

3. It is not enough to get states to ratify the Charter for it to be effective. States Parties also have to respect the provisions of the Charter as they are interpreted by the European Committee of Social Rights (ECSR), which is the body with the authority to check that the states are applying the Charter properly and hence to interpret its content at European level. We are convinced that the beneficial effect of this principle of *pacta sunt servanda* and the proper fulfilment of the obligation to act in good faith which this principle implies means that it is not just the text of the Charter that needs to be taken into account but also the case-law of the ECSR.

Conclusions and proposals concerning the application of the Charter at national level

4. The international obligation to comply with the Charter and the ECSR's case-law is enhanced in some States Parties, where it is also considered a constitutional obligation. This is the case in Spain, as the Charter's binding force is strengthened here by the obligation to apply international treaties set out in Articles 94 and 96 of the Constitution and the obligation to interpret law in accordance with such sources established by Article 10, paragraph 2.

5. Given these circumstances, it has to be regarded as paradoxical that while on the one hand there has been a major growth in social legislation in Spain, reflecting the constitutional demand for a welfare state, on the other there is a clear lack of political will on the part of the government where it comes to accession to the revised Charter of 1996 and the Collective Complaints Protocol of 1995.

6. The refusal to ratify the revised Charter of 1996 despite the fact that Spain signed it in 2000 seems all the more strange now that the Lisbon Treaty of 1 December 2009 has come into force, as the EU Charter of Fundamental Rights, whose source material

includes the Social Charter, now has binding force in all the EU member states. In this connection, it is regrettable that the Autonomous Communities – in the form of the regional governments, through their political decision-making tasks, and the regional parliaments, through their motions to the Spanish Government and Parliament – and the national and regional ombudsmen are not doing more to try to make the Spanish authorities ratify. They can only be encouraged to do so, as the implementation of a large number of the rights enshrined in the revised Charter falls within the competence of the regions. The adoption of the 1996 Charter would therefore be a means of bringing these competences into play. It is equally regrettable that the social partners and NGOs do not call more strongly for ratification.

7. Spain's failure to ratify the collective complaints procedure is all the more difficult to understand in the light of its decision to ratify the recent Optional Protocol of 2008 to the UN Covenant on Economic, Social and Cultural Rights establishing a system of individual communications. There is no need for formal ratification for a State Party to the Charter to take part in the collective complaints procedure. Since Spain has not yet signed the 1995 Protocol (unlike neighbouring countries such as Portugal, France and Italy), we propose that, in accordance with Article D of the revised Charter of 1996, it should accept the procedure through a simple statement when ratifying the revised Charter. Apart from anything else, taking part in the collective complaints procedure can only foster increased involvement by Spain in the framing of the Charter's case-law. Since the ECSR case-law established in the context of the collective complaints procedure is applied to Spain by means of the reporting procedure, Spain would benefit from being a party to the discussions before the ECSR during the initial proceedings. This would enable it to express its views on the legal issues raised by collective complaints.

8. The social deficit of the Spanish state and of all the other member states who have adopted neither the revised Charter of 1996 or the 1995 Protocol is the reflection of an unacceptable multiple-speed approach to the development of a social Europe. This is also the Council of Europe's responsibility (or possibly its member states') for just as states are expected, in the name of democracy, to accept the ECHR and the jurisdiction of the European Court of Human Rights to become members of the Council of Europe, they should also be required to accept the revised Charter of 1996 and the compulsory jurisdiction of the ECSR to hear collective complaints. This is a prerequisite both for establishing social democracy in Europe and for the spread of genuine democracy on the world stage.

9. We also believe that acceptance of the revised Charter and in particular of the collective complaints procedure will make it possible to attach more meaning to any reference to the Social Charter in the latest reforms of the autonomous communities' statutes or in national or regional legislation on human rights issues – and in the judgments of ordinary courts or the Constitutional Court. For if the collective complaints procedure were ignored, the reference to the Charter would be purely rhetorical, superficial or *ad abundantiam*, because it would not make it possible to grasp the genuine scope of the Charter as established by the ECSR's case-law.

Conclusions and proposals concerning the application of the Charter at European level

10. **Appointment of the members of the ECSR.** As you will know, this is one of the matters dealt with by the Protocol amending the Charter of 1991, which has still not come into force. However, the Committee of Ministers has shown the way by taking up some of the provisions of the Protocol in unanimous decisions including one adopted in 1991 at the same time as the Protocol.

11. The only item of the 1991 Protocol that has not been adopted in this way is the provision on the election of the members of the ECSR by the Parliamentary Assembly along the same lines as the judges of the European Court of Human Rights. The 50th anniversary of the Charter would be an appropriate time for the Committee of Ministers to adopt a new unanimous decision on the status of ECSR members, divided into the following three points:

(a) Firstly, the election by the Parliamentary Assembly would be preceded by the establishment of a shortlist of candidates based on criteria such as qualifications and independence (the way in which judges at the ECJ are selected could be a useful model). This would make it possible to avoid politicisation of the procedure as well as some of the regrettable problems that have arisen with the selection of the judges for the European Court of Human Rights.

(b) Secondly, without detracting from the previous measure, the current system, whereby members are appointed for a term of six years, renewable once, would be replaced by a system based on a single nine-year term, as has been the case with the judges at the European Court of Human Rights since the entry into force of Protocol No. 14. Besides the fact that this seems a more reasonable length of time, this approach would enable ECSR members to gain in independence and no longer be exposed to the political risks that arise from the requirement for national governments to present members for a second term.

(c) Third, in view of the ECSR's growing workload and the increase in the number of States Parties (currently 43, 30 of whom are parties to the revised Charter of 1996 and 13 to the 1961 Charter), the ECSR would be wholly or at least partly (in the Bureau for example) made up of permanent or semi-permanent members and the number of members would be increased from 15 to 18.

12. **Control mechanisms** Although the possibility of introducing a system of individual petitions to the ECSR should not be ruled out, the current priority should be to strengthen the two existing mechanisms to make them more efficient:

(a) With regard to the reporting system, experience shows that the four-year interval adopted for the examination of national situations under the provisions of the Charter (in keeping with the division of the Charter's articles into four thematic groups) is too long, and is no longer geared to the rapid changes in national legislation, regulations and practice in the areas to which the Charter applies. The current system should therefore be reviewed in this respect. We propose that the original system of biannual cycles should be restored, with certain adjustments. The main change would be to stipulate that States Parties would no longer be expected to submit reports on all the

articles of the Charter but merely on those which pose the most problems with regard to implementation at national level. This would mean that the ECSR would have to identify these articles, possibly dividing them into a specific set for each state (determined by unremedied situations of non-conformity) and a shared set for all the states (selected in the light of the main obstacles currently restricting the effective enjoyment of certain social rights).

(b) As to the collective complaints procedure, its results so far are unquestionably very positive. The strong adversarial nature and reasonable length of the proceedings before the ECSR (according to the most recent activity report (2010), admissibility proceedings took four to five months and the examination of the merits took less than 11) have already made this the most authoritative means of securing the rights enshrined in the Charter. Among its merits are the fact that it has given both the Charter and the case-law a higher profile – and hence made them more accessible – and that it has put the ECSR in a position to keep abreast of changes in national laws and to assess in due time whether they are compatible with the Charter and, where necessary, encourage the rapid adoption of measures to prevent and remedy these violations. In this connection, the delay of four months before the ECSR's decisions can be published should be abolished. This is made all the more necessary by the fact that the delay slows down the procedure at the vital stage when decisions on the merits of complaints should be enforced and, at any rate, is inconsistent with the decision, taken with a view to making the proceedings more transparent, to publish all the case documents for all collective complaints on the Social Charter website (www.coe.int/socialcharter).

For similar reasons, the Committee of Ministers should play a more active part in the enforcement of decisions on the merits of complaints (and in the implementation of the conclusions adopted during the reporting procedure). This implies that the Committee of Ministers should systematically make specific recommendations to states found wanting by the ECSR.

Seville, 28 April 2011