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

**20th Meeting**
**Strasbourg, 12-13 September 2000**

# 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)**

# RECOMMENDATION 1458 (2000) TOWARDS A UNIFORM INTERPRETATION OF COUNCIL OF EUROPE CONVENTIONS: CREATION OF A GENERAL JUDICIAL AUTHORITY AND REPORT OF THE PARLIAMENTARY ASSEMBLY

Secretariat memorandum prepared by the
Directorate General of Legal Affairs

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**Foreword**

The agenda for the 19th meeting of the CAHDI (Berlin, 13-14 March 2000) included consideration of a proposal by the Czech Republic for the possible establishment of a "General" Judicial Authority of the Council Of Europe.

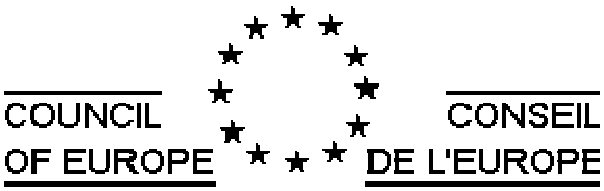
In the context of this point's discussion, the Director General of Legal Affairs informed the CAHDI that, in the Parliamentary Assembly of the Council of Europe, a report was in preparation and that it was expected that this report would be adopted by the Parliamentary Assembly together with a recommendation relating thereto.

Therefore, the CAHDI decided to postpone consideration of this item until the 20th meeting in order to benefit from the report and possible recommendation of the Parliamentary Assembly.

At the last April session the Parliamentary Assembly adopted Recommendation 1458 (2000) *towards a uniform interpretation of Council of Europe conventions: creation of a general judicial authority* and a report relating thereto.

These texts are included in the present document, which completes document CAHDI (2000) 9 submitted to the last meeting of the CAHDI.

Finally, it should be recalled that the CAHDI has not been asked to consider this item by the Committee of Ministers and that the item is considered at the CAHDI's own initiative in accordance with its specific terms of reference.




Assemblée parlementaire
Parliamentary Assembly

**Recommendation 1458 (2000)**[1]
**Towards a uniform interpretation of Council of Europe conventions: creation of a general judicial authority**

1. The Assembly recalls that the aim of the Council of Europe is to achieve a greater unity between its members, and considers that this aim may be pursued *inter alia* by the conclusion of international treaties.

2. There are now more than 175 conventions and protocols concluded within the Council of Europe.

3. The existence of a large corpus of legally binding texts requires efficient and effective mechanisms of monitoring and control.

4. There is also a need for uniform interpretation and application of the Council of Europe conventions in the different member states and among the different legal instruments.

5. The Assembly is therefore convinced that it is necessary that the member states of the Council of Europe should agree on a procedure that would ensure a uniform interpretation of legal texts commonly agreed by them.

6. The Assembly is aware of the fact that a certain number of Council of Europe conventions - such as the European Convention on Human Rights and the revised Social Charter, and others - already provide for mechanisms to ensure control as well as uniform interpretation and application.

7. A large number of conventions have no such mechanism, however.

8. In addition to the increasing number of conventions, there is also an increasing number of member states, and it is more difficult to speak of a common legal tradition among them than it was in the past. Therefore a power on the part of the "general" judicial authority to give - as well as legally binding opinions - advisory, non-binding legal opinions could become a more practical and more frequently used competence.

9. For these reasons the Assembly recommends that the Committee of Ministers set up a "general judicial authority" of the Council of Europe which would provide the mechanism for the uniform interpretation of Council of Europe treaties starting with those still to be concluded and with a selected number of the existing conventions. The competencies of the "general judicial authority" would be three-fold:

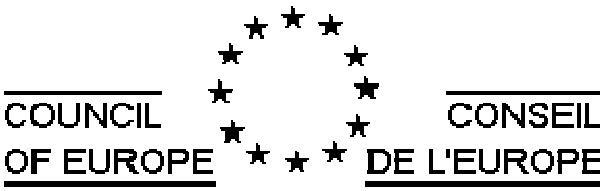
i. to give binding opinions on the interpretation and application of Council of Europe conventions at the request of one or several member states or at the request of the Committee of Ministers or of the Parliamentary Assembly;

[1] 1. *Assembly debate* on 6 April 2000 (15th Sitting) (see Doc. 8662, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Svoboda).

*Text adopted by the Assembly* on 6 April 2000 (15th Sitting).

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

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




Assemblée parlementaire
Parliamentary Assembly

# Towards a uniform interpretation of Council of Europe conventions: creation of a General Judicial Authority

**Doc. 8662**

14 March 2000

Report[1]

Committee on Legal Affairs and Human Rights

Rapporteur: Mr Cyril Svoboda, Czech Republic, Group of the European People's party

Summary

It is clear that the 175 or more conventions and protocols concluded within the Council of Europe require efficient and effective mechanisms of monitoring and control. Some of the Council of Europe conventions provide such a mechanism, such as the European Court of Human Rights, which guarantees respect for the European Convention on Human Rights. It would, however, be useful if a "general judicial authority" were to be set up for all those conventions which do not have such a mechanism. This "general judicial authority" would make binding and non-binding opinions on the interpretation and application of the Council of Europe's conventions and should also be allowed to make preliminary rulings at the request of a national court, on similar lines as the European Court of Justice in Luxembourg does in respect of the treaties and other legal texts of the European Union.

[1] *Reporting committee*: Committee on Legal Affairs and Human Rights

*Budgetary implications for the Assembly*: none

*Reference to committee*: Doc 8234 and Reference No. 2353 of 25 January 1999

*Draft recommendation* adopted by the committee on 6 March 2000 with 15 votes in favour, 1 vote against and 6 abstentions

*Members of the committee*: MM *Jansson* (*Chairperson*), *Bindig*, *Frunda*, Mrs *Err* (*Vice-Chairpersons*), Mrs *Aguiar*, MM *Akçali*, Arzilli, Attard Montalto, *Bal*, *Bartumeu Cassany*, Bruce, Bulic, *Clerfayt*, *Contestabile*, *Demetriou*, *Derycke*, *Enright*, Mrs Frimansdóttir, MM Fyodorov, *Holovaty*, Mrs *Imbrasiene*, MM *Jaskiernia*, Jurgens, Kelemen, Lord *Kirkhill*, Mr *Kresák*, Mrs Krzyzanowska, Mr Le Guen, Mrs Libane (alternate: Mr *Cilevics*), MM Lintner, Lippelt, *Loutfi*, *Magnusson*, Mrs Markovic-Dimova, MM *Marty*, *McNamara*, Mertel, Moeller, Mozetic, Mrs Näslund, Mr *Nastase*, Mrs *Ninoshvili*, MM *Pavlov*, Pollo, Polydoras, Mrs Pourtaud, MM Robles Fraga, Rodeghiero (alternate: Mr *Provera*), Mrs Roudy (alternate: Mr *Michel*), MM Serafini (alternate: Mr *Lauricella*), *Shishlov*, *Simonsen*, *Solonari*, *Spindelegger*, *Svoboda*, Symonenko, Tabajdi, *Tallo*, Vera Jardim (alternate: Mr *Lacão*), Verhagen (alternate: Mr *Dees*), Verivakis, Mrs Vermot-Mangold (alternate: Mrs *Nabholz-Haidegger,* Mr Vyvadil, Mrs *Wohlwend*, MM Yáñez-Barnuevo (alternate: Mrs *Calleja*), Zhirinovsky (alternate: Mr *Kovalev*)

*N.B. The names of those members present at the meeting are printed in italics.*

*Secretaries to the committee*: Mr Plate, Ms Coin and Ms Kleinsorge

## I. Draft recommendation

1. The Assembly recalls that the aim of the Council of Europe is to achieve a greater unity between its members, and considers that this aim may be pursued *inter alia* by the conclusion of international treaties.

2. There are now more than 175 conventions and protocols concluded within the Council of Europe.

3. The existence of a large corpus of legally binding texts requires efficient and effective mechanisms of monitoring and control.

4. There is also a need for uniform interpretation and application of the Council of Europe conventions in the different member states and among the different legal instruments.

5. The Assembly is therefore convinced that it is necessary that the member states of the Council of Europe should agree on a procedure that would ensure a uniform interpretation of legal texts commonly agreed by them.

6. The Assembly is aware of the fact that a certain number of Council of Europe conventions already provide for mechanisms to ensure control as well as uniform interpretation and application, such as the European Convention on Human Rights and the revised Social Charter, and others.

7. There is, however, a large number of conventions which have no such mechanism.

8. In addition to the increasing number of conventions there is also an increasing number of member states and it is more difficult to speak about a common legal tradition among them than it was in the past. Therefore a power to give advisory, non-binding legal opinions could become a more practical and more frequently used competence of the "general" judicial authority next to legally binding opinions.

9. For these reasons the Assembly recommends that the Committee of Ministers set up a "General Judicial Authority" of the Council of Europe which would provide the mechanism for the uniform interpretation of Council of Europe treaties starting with those still to be concluded and with a selected number of the existing conventions. The competencies of the "General Judicial Authority" would be three-fold:

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

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

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

## II. Explanatory memorandum by Mr Svoboda

### A. Introduction

1. In 1997, following the 2nd Summit of Heads of State and Government of the Council of Europe, the Czech Republic, stressing the need to strengthen and develop the Organisation's structures, proposed the establishment of a judicial authority with general jurisdiction within the Council of Europe. The Parliamentary Assembly was also informed of this initiative. Mr Schwimmer, together with several colleagues, then submitted a motion to recommend that the Committee of Ministers set up the proposed judicial body.

2. The Committee on Legal Affairs and Human Rights considered this proposal at several of its meetings. At its meeting on 27 April 1999 it held an exchange of views on the matter with Mr Mucha, Permanent Representative of the Czech Republic.

## B. Previous work of the Assembly

3. Possibly encouraged by the success of the Human Rights Convention and its supranational supervision machinery, the Assembly, in the first fifteen years of the Council of Europe's existence, adopted a number of recommendations aiming at the uniform interpretation of its conventions. Among these recommendations and proposals I noted:

- Recommendation 22 (1951) on the establishment of a single European jurisdiction, adopted on 11 December 1951;
- Recommendation 36 (1952) on the establishment of a European Court of Justice and of a European Act for the Peaceful Settlement of Disputes, adopted on 27 September 1952;
- motion for a recommendation on the establishment of European Supreme Court (Doc. 737 of 22 October 1957);
- Recommendation 231 (1960) on the uniform interpretation of European treaties and its report (Doc. 1062 of 24 November 1959);
- Recommendation 372 (1963) on the uniform interpretation of European treaties and its report (Doc. 1650 of 13 September 1963);
- Recommendation 454 (1966) on the uniform interpretation of treaties and its report (Doc. 2005 of 4 January 1966).

4. Recommendation 231 (1960) contains the text of a draft European agreement on the competence of the European Court of Human Rights to render advisory opinions on the interpretation of European treaties, which still may be considered valid today and which, for that reason, is reproduced as an appendix to the present document.

5. For more than 30 years no further initiatives were taken by the Assembly or its members – discouraged as they may have been by the lack of success of these proposals.

6. The only action taken by the Committee of Ministers was the adoption of Resolutions (69) 27 and 28 on 26 September 1969, which called upon the Secretariat to collect and distribute information on the application and interpretation of European treaties. These resolutions followed on the third Conference of European Ministers of Justice, held in Dublin from 26 to 28 May 1964, which expressed the hope that a uniform interpretation of European treaties could be achieved. But the two resolutions were never applied on account of their inherent shortcomings: absence of a committee to consider possible divergent interpretations and lack of resources.

## C. The proposal by the Czech Republic

7. In early 1998 the Czech Republic launched the discussion on the possible establishment of a "general" judicial authority of the Council of Europe. I shall summarise the main lines of this proposal below, taking also into account the subsequent revised proposals of the Czech Republic.

8. The Council of Europe has two main organs: the Committee of Ministers (the executive body) and the Parliamentary Assembly (the consultative body) in accordance with the Organisation's Statute of 1949. 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.

9. 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 cooperation between the states of Europe must be regarded as one of the main things which constitute the Councils 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.

10. In 1949 there was no compelling and serious reason to establish a permanent judicial body at the Council. Today, however, 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 the human rights instruments, which are the 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.

11. 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 which, therefore, can only be resolved politically.

12. 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 rather slight. This was why the need for a judicial body was objectively minimal. From 23 states in 1990, the Council's membership has now increased to 41, and 17 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 – but also 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.

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

14. The proposed court's main function should be to give binding judgments on disputes rising between States party to the various instruments in the Council of Europe 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 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.

15. The proposed court might be empowered to decide 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, if it were provided for in a special jurisdiction clause covering possible disputes.

16. 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.

17. 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.

18. 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 former European Court of Human Rights, which sat at regular intervals and whose judges were also professionally active in their own countries. The disadvantage of this solution are its radical interference with the structure of the Council of Europe, the extra costs associated with the setting-up of a new body and with its functioning and possible fears of undesirable competition between a "general" Council of Europe court of this kind and the new European Court of Human Rights.

19. A legally less straightforward, but politically more feasible solution would be to extend the jurisdiction and powers of the European Court of Human Rights. In legal terms, it would be enough to conclude a corresponding international treaty. Such a reform would both respect existing structures more and would cost less. In the European Court of Human Rights powers not concerned with human rights could be entrusted to a special chamber, consisting of judges experienced in international law. It would make the Human Rights Court the third pillar in a "Trias Politica" of the Council of Europe and avoid the dangers of duplication, contradiction and rivalry.

## D. The present situation

### 1. The existing machinery

20. With the notable exception of the European Convention on Human Rights, no Council of Europe convention provides for the supervision of the implementation of its substantial or other provisions by a supranational and independent judicial body.

21. Most Council of Europe conventions do not contain any machinery for the friendly settlement of disputes and/or interpretation of their provisions. Others merely commit the States parties in very vague terms. For example, Article 4 of the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (ETS No. 106) states that "each Contracting Party shall endeavour to resolve any legal, administrative or technical difficulties liable to hamper the development and smooth running of transfrontier co-operation and shall consult with the other Contracting Party or Parties concerned to the extent required".

22. Representing an intermediate category between the introduction of machinery and their absence, a number of European treaties provide for a procedure depending essentially on action by the Committee of Ministers. The national authorities must communicate a report on measures taken at national level. On the basis of these national reports, a committee of experts set up under and appointed by the Committee of Ministers prepares a consolidated

report containing a legal assessment of the national situation with regard to the obligations stemming from the accepted provisions; the report is then submitted for political review to the Committee.

23. This machinery can be equated with a monitoring procedure rather than a procedure for the settlement of disputes and interpretation.

24. A typical example of this procedure is the European Charter for Regional or Minority Languages (ETS No. 148). Exceptionally, the European Code of Social Security (ETS No. 48) provides for action by another body, namely the International Labour Organisation, which is to comment on the national reports.

25. At this stage, reference should be made to the hybrid and very comprehensive machinery set up under the European Social Charter (ETS No. 35) – and the 1996 revised version of it which entered into force on 1 July 1999 -, the sole Council of Europe convention to make provision for systematic verification at regular intervals of all the commitments entered into by the States Parties. It provides for a legal review by an independent committee of experts, followed by a governmental committee and finally by the Committee of Ministers which may address recommendations to the Contracting Parties.

26. Moreover, the Additional Protocol to the European Social Charter (ETS No. 158), which entered into force on 1 July 1998, permits collective complaints in cases of allegations of violation of the Charter. Complaints may be submitted by international organisations of employers and trade unions and by international non-governmental organisations which have consultative status with the Council of Europe. Recently the European Committee of Social Rights, set up under the Charter, ruled admissible a complaint submitted against Portugal by the International Commission of Jurists on illegal work by children under the age of 15.

27. Under these circumstances it seems preferable that this treaty should not be submitted to the jurisdiction of a newly created body in order not to jeopardise the equilibrium between the different control organs and the different mechanisms.

**2. The existing judicial procedures**

28. A consideration of all the Council of Europe conventions shows that – with the exception of the Human Rights Convention - a judicial procedure for the settlement of disputes and interpretation remains largely under-developed. A distinction must be drawn between judicial procedures proper and the more common arbitration procedure.

29. In several Council of Europe conventions one finds a special reference to the jurisdiction of the International Court of Justice. This Court – on the condition, of course, that the states have recognised its discretionary jurisdiction in conformity with Article 36 of its Statute – has jurisdiction in respect of disputes that arise in connection with the interpretation or application of international treaties, including Council of Europe conventions. Regional procedures are however preferable to a complaint before the International Court in view of the development of European law.

30. However, only two Council of Europe conventions provide for submitting a complaint to a judicial body of our Organisation.

31. One is the additional protocol to the European Convention on State Immunity (ETS No 74 (1972)) which establishes the European Tribunal in Matters of State Immunity. This tribunal consists of the members of the European Court of Human Rights.

32. Article 34 of the convention states that "any dispute which might arise between two or more Contracting States concerning the interpretation or application of the present Convention shall be submitted to the International Court of Justice on the application of one of the parties to the dispute or by special agreement unless the parties agree on a different

method of peaceful settlement of the dispute". Thus, the European Tribunal's jurisdiction is very broad.

33. It should be noted that this does not involve using the European Court of Human Rights but making use of its existing structure in order to set up another court on an *ad hoc* basis. To date, the Tribunal has never had to rule on a dispute, and its sittings have always been of an administrative nature.

34. The Convention on Human Rights and Biomedicine (ETS No. 164, 1997 — not yet in force) contains a provision which has the effect of conferring advisory jurisdiction on the European Court of Human Rights. This provision (Article 29) is so infrequent that it is worth quoting it in full:

"The European Court of Human Rights may give, without direct reference to any specific proceedings pending in a court, advisory opinions on legal questions concerning the interpretation of the present Convention at the request of:

- the Government of a Party, after having informed the other Parties,
- the Committee set up by Article 32, with membership restricted to the Representatives of the Parties to this Convention, by a decision adopted by a two-third majority of votes cast".

35. Attention should be drawn first of all to the related nature of the rights protected by and principles embodied in the Convention on Human Rights and Biomedicine and the European Convention on Human Rights, and the importance of the machinery set up in this connection. However, a right to submit an individual complaint, as in the procedure under the European Convention on Human Rights, has not been granted.

### 3. Arbitration procedures

36. A number of treaties make provision for arbitration procedures to settle disputes in connection with their interpretation or application:

- European Interim Agreements on Social Security Schemes (ETS Nos. 12 and 13, 1953, Article 11);
- European Convention on Social and Medical Assistance (ETS No. 14, 1953, Article 20);
- European Convention on Consular Functions (ETS No. 61, 1967, Article 56.1);
- European Convention for the Protection of Animals during International Transport (ETS No. 65, 1968, Article 47);
- European Convention on the Suppression of Terrorism (ETS No 90, 1977, Article 10);
- Convention on the Conservation of European Wildlife and Natural Habitats (ETS No. 104, 1979, Article 18);
- European Agreement on Transfer of Responsibility for Refugees (ETS No. 107, 1980, Article 15.2);
- European Convention on Transfrontier Television (ETS No. 132, 1989, Article 26);
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141, 1990, Article 42);
- Agreement on illicit traffic by sea, implementing Article 17 of the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances (ETS No. 156, 1995, Article 34);

- Convention on the Protection of the Environment through Criminal Law (ETS No. 172, 1998, Article 19.2);
- Criminal Law Convention on Corruption (ETS No. 173, 1999, Article 42);
- Draft Civil Law Convention on Corruption (Doc. 8341, Article 21).

36. Under these conventions the arbitral tribunal is usually composed of members appointed by each of the parties to the dispute. The members of the tribunal or the President of the European Court of Human Rights then appoint the Chairperson.

37. The European Convention for the Peaceful Settlement of Disputes (ETS No 23 (1957)) provides for reference to the International Court of Justice, arbitration, conciliation and mediation. Until now this Convention has not been very effective due to the small number of ratifications and the reservations made which quite often exclude reference to the International Court of Justice and arbitration. When one looks at it from a positive side it can also be said that in the relations among Council of Europe member States practically all problems are solved through negotiation without recourse being needed to judicial or quasi-judicial measures.

### 4. Monitoring by intergovernmental and other committees

38. It is important to distinguish between conventions which use the existing steering committees and conventions which establish their own committees.

#### a. Steering committees

39. Article 17 of the Statute of the Council of Europe states that "the Committee of Ministers may set up advisory and technical committees or commissions for such specific purposes as it may deem desirable". Pursuant to this provision, the Committee of Ministers has set up several steering committees, including the European Committee on Legal Co-operation (CDCJ), the European Committee for Social Cohesion (CDCS), the Steering Committee on Local and Regional Democracy (CDLR), the European Committee on Crime Problems (CDPC), the Steering Committee for Human Rights (CDHH) and the Steering Committee on the Mass Media (CDMM).

40. Of particular importance is the role of the CDPC, given the large number of conventions (14) whose application and interpretation it supervises, giving it considerable experience in these areas.

41. Some conventions expressly assign the CDPC a dispute-settlement role: "In case of a dispute between Parties as to the interpretation or application of this Convention, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their choice, including submission of the dispute to the European Committee on Crime Problems, to an arbitral tribunal whose decisions shall be binding upon the Parties, or to the International Court of Justice, as agreed upon by the Parties concerned" (Criminal Law Convention on Corruption, ETS No. 173, 1999). In June 1998 the CDPC conducted its first formal dispute settlement procedure.

#### b. Convention-based committees

42. The rules governing convention-based committees are very diversified, except as concerns the status of its members, who are without exception the appointed representatives of governments. This fact is a considerable obstacle to recognising that the opinions given and recommendations made have force of authority, albeit a moral one, especially in cases of dispute.

43. The powers of the convention-based committees vary from a simple monitoring of the application of the convention concerned to the offer of good offices in the event of a dispute. Such committees may also make recommendations to facilitate and improve application of

the convention. Some instruments assign their committees a role in assisting national authorities. For example, the European Convention on the Exercise of Children's Rights authorises its committee to "provide advice and assistance" to certain national bodies (ETS No. 160, 1996, Article 16.2).

44. The questions treated in the committees are usually of a general nature, in keeping with their terms of references, and the committees do not monitor the application of the convention at national level, with two exceptions. The committees adopt their own rules of procedure and often draw up, sometimes on an informal basis, guidelines for considering complaints. Committee opinions, recommendations and resolutions can be published, either in a compendium or separately.

45. Committee recommendations, resolutions and opinions may be general, in keeping with their general programme of activities, or specific, following consideration of a case by the committee; they must be followed up, because they may eventually become customary international law. This is true above all when interpretative recommendations or resolutions are adopted. It should be borne in mind that as with the entire procedure, these resolutions, recommendations and opinions are subject to disconnecting clauses.

### 5. Conclusions

46. The following conclusions can be drawn regarding the implementation of these interpretation and dispute-settlement procedures:

- judicial settlement procedures are purely hypothetical and have never been used;
- the same may be said of arbitration;
- although they do considerable work, the steering and convention-based committees are neither consistent, uniform nor visible in their efforts.

## B. The Committee of Wise Persons

47. After the Council of Europe's Second Summit of Heads of State and Government in October 1997 the Committee of Ministers set up a "Committee of Wise Persons" which reported to the Committee of Ministers at the end of 1998. In this report the wise persons considered "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 involve the creation of a new and relatively elaborate structure.

48. At the same time, the Committee of Wise Persons stated 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."

## C. Making use of existing machinery

49. Of course, before proposing any new machinery one should look whether existing machinery might be usefully applied for the purpose. In this respect one could think of existing steering committees and conventional committees, the Venice Commission for Democracy through Law and the European Court of Human Rights.

50. There are two reasons why one should exclude from the outset the existing steering committees and conventional committees. The first reason is that among the myriad of these committees it will be very difficult to reach a system of uniform interpretation of our conventions. It must not be forgotten that many conventions contain similar provisions, for

instance on reservations, their entry into force and the way they are applied and it will certainly not be desirable if everyone of these committees (some 40 in all!) gave their own interpretation of these clauses. A single body must therefore be found which might perhaps be one of the steering committees in the legal field, but then there would still be the question which one to choose in this respect.

51. The second reason militating against these committees is that they are practically all made up of governmental experts – in many cases civil servants of the national ministries concerned – and that they are not independent from their governments. As we are looking here for judicial proceedings to decide on legal issues one must strive for a clear separation of powers in which the judiciary must be independent from the executive. Furthermore these committees lack the transparency which is essential for impartial justice. This, of course, should not prevent their use for friendly settlement procedures.

52. The second proposal is that one invites the Venice Commission for Democracy through Law – as has been suggested by the Committee of Wise Persons – to give non-binding legal opinions. If one drops the idea of a general judicial authority of the Council of Europe this might be the second-best solution. In fact our Assembly frequently invites the Venice Commission to give its opinion on politico-legal problems with which it is confronted. More than once the Assembly's committees have had the benefit of the wise and well-documented opinions of the Commission. Yet, it would seem to me that as a judicial body the Venice Commission would be less appropriate. It has now become a huge body in which not only our member states – in fact not all of them - but also the two organs of the Council of Europe, i.e. the Committee of Ministers and the Parliamentary Assembly, and also representatives of the Congress of Local and Regional Authorities and of a number of other international organisations, of applicant and of observer states and of far-away countries like Argentina and South Africa take part. In addition to this the members of the Venice Commission are not only government-appointed, but some of them are high-ranking officials. Two or three members of the Commission who regularly take part are Ministers of Justice in their country. However, these problems may be overcome. In this respect it is a positive sign that the Venice Commission itself, at its meeting on 18-19 June 1999, decided in favour of the proposals by the Committee of Wise Persons.

53. A third solution which seems preferable to the two others would be to ask the European Court of Human Rights to function as the general judicial authority of the Council of Europe. This solution, which certainly should not be rejected too quickly, would have the advantage of having the benefit of the experience of a highly competent body with judges on the spot who have a considerable competence and experience in international law. A condition would, however, be that the Court itself would be prepared to take up this assignment.

54. Finally, I would like to add in this respect that inviting the Court of Human Rights would also have the advantage that one could guarantee the uniform interpretation of <u>all</u> Council of Europe conventions including the Convention on Human Rights and its Protocols.

**Conclusions**

55. After having celebrated its 50th Anniversary nobody will be able to claim that the Council of Europe has not reached the stage of adulthood. It has now more than 40 member states and concluded more than 170 conventions. It covers a much larger geographical area and a much greater variety of civilisations and traditions than it did in its early years of existence and the prudent, diplomatic and intergovernmental approaches which were applied from its beginning seem no longer to be appropriate. Thus a real single Court of Human Rights was established in 1998 replacing the existing Commission and Court of Human Rights and even the Committee of Ministers as a "judicial body".

56. In its Recommendation 1361 (1998) our Assembly proposed a real system of co-decision on Council of Europe conventions between the Committee of Ministers and the Assembly. Thus both main organs of the Council of Europe would be able to play fully their legislative roles. In respect of the uniform interpretation of Council of Europe treaties it is also in need of a clear, transparent and independent body which can give legal decisions on the interpretation and application of Council of Europe conventions. Here the Council of Europe – which is so heavily insisting on the respect of pluralist democracy, the rule of the law and the separation of powers in its member states – should not accept a watered-down solution which would dishonour its own principles. The proposal made by the Czech government is therefore to be warmly welcomed and a general judicial authority of the Council of Europe should be set up. This could be done in two ways. A first solution might be to set up a new Council of Europe body, another would be to ask the European Court of Human Rights to perform this task. There are good reasons for both solutions and this report does not give any preference in this respect.

57. Having said this one should, however, add that, when speaking of a general judicial authority of the Council of Europe – one should not immediately think of a huge new institution to be added to the existing structures of the Organisation. On the contrary! The general judicial authority could easily be set up on an ad hoc basis with judges or members elected by the Assembly on the proposal of the Committee of Ministers who would only meet in Strasbourg when there was necessity to do so. At the beginning at least the conflicts on the interpretation of our conventions are likely to be rare, not exceeding one or two a year. After consulting the Secretary of the Committee on Legal Affairs and Human Rights, he thought that it might take him not more than a third of his time to assure the Secretariat of such a body – at least at the beginning.

58. On the other hand, a general judicial authority of the Council of Europe in such a modest form would certainly not make redundant any of the existing Council of Europe steering committees or any of the conventional committees, but could reduce their workload enabling them to meet less or for shorter periods of time in Strasbourg. For conventions to be concluded it may in some cases no longer be necessary to provide for any special conventional committees. Thus a considerable amount of savings could be made which would easily compensate the minimal costs of a general judicial authority as described above.

59. As to the competencies of the new general judicial authority they could be three-fold:

i. making binding opinions on the interpretation and application of Council of Europe conventions at the request of one or several member states or at the request of the Committee of Ministers;

ii. making non-binding opinions at the request of one or several member states or Council of Europe bodies;

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

60. Introducing a "General Judicial Authority" in the Council of Europe for all of its conventions would imply the necessity to amend existing treaties and would raise the problem of the coexistence of the new mechanisms with the existing ones (intergovernmental and judicial). In the Committee on Legal Affairs and Human Rights it has therefore been suggested to start with, for instance, all new conventions and a selection of some 20 other conventions, especially those without any special committee or application mechanism. Once established the "General Judicial Authority" could be gradually extended to the near totality of all Council of Europe conventions.

APPENDIX

Draft European Agreement on the competence of the European Court of Human Rights to render advisory opinions on the interpretation of European treaties

The Governments signatory hereto, being Members of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its Members, one means of attaining which is the conclusion of international treaties;

Considering that such international treaties cannot be fully effective unless their application rests on a uniform interpretation;

Being resolved to take steps to this end at European level without prejudice to the constitutional systems of the Contracting Parties;

Considering that it is fitting that the European Court of Human Rights, set up by the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (hereinafter referred to as the European Convention on Human Rights), should be competent to render advisory opinions on the interpretation of European treaties.

Have agreed as follows:

**Article 1**

1. The High Contracting Parties shall recognise, in accordance with the provisions set out below, the competence of the European Court of Human Rights to interpret any convention concluded under the auspices of the Council of Europe (hereinafter referred to as "European Convention"), or any other international treaty concluded between two or more Member States of the Council of Europe, insofar as the provisions of those conventions or treaties are applicable by national courts.

2. The procedure for interpretation provided for in this agreement shall not be applicable in respect of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950, or to its Protocol, signed on 20 March 1952.

**Article 2**

1. Each Contracting Party may at any time notify the Secretary-General of the Council of Europe of the international treaties to which it is a Party and in respect of which it agrees to the procedure for interpretation set out in the present Agreement.

2. Such notification may be for a limited or unlimited period.

3. The Secretary-General of the Council of Europe shall forward to the Contracting Parties copies of notifications received.

**Article 3**

When a matter of interpretation concerning any of the treaties mentioned in the notification made by a Contracting Party pursuant to the foregoing Article is raised before the competent judicial authority of the said Contracting Party, that authority shall, if its decisions are not subject to judicial appeal in municipal law, ask the European Court for an advisory opinion before rendering a decision which departs from an interpretation given in the matter by a higher court of another Contracting Party which has mentioned the same treaty in the notification made under the foregoing Article.

**Article 4**

1. The European Court shall immediately notify any request for an advisory opinion to the Contracting Parties to the present Agreement, and to the other Parties to the international treaty in respect of which the opinion is requested.

2. Any State thus notified may submit comments in writing within a period of time to be fixed by the Court. The Court may also request a State to give oral explanations.

**Article 5**

1. The European Court shall express its views in the form of advisory opinions.

2. *Alternative A*

The Contracting Parties shall take the necessary steps to ensure that, under their municipal law, the authorities which have referred a question to the European Court will act on the Court's advisory opinion.

**Alternative B**

If the authority which has referred a question to the European Court decides that it cannot act on the Court's opinion, it shall give reasons for its decision.

**Article 6**

The European Court shall notify its advisory opinions to all the Contracting Parties to this Agreement and to the other Parties to the international treaty in respect of which an advisory opinion has been rendered.

**Article 7**

The European Court shall draw up its rules and determine its procedure for the exercise of the functions conferred on it by this Agreement.

**Article 8**

1. The Agreement shall be open for signature by Members of the Council of Europe which have signed the European Convention on Human Rights. It shall be ratified. Instruments of ratification shall be deposited with the Secretary-General of the Council of Europe.

2. The Agreement shall enter into force on the day when it shall have been ratified by all the signatories who, at that date, have ratified the European Convention on Human Rights.

3. As regards any Contracting Parties to the European Convention on Human Rights, which ratify the Agreement subsequently, this Agreement shall enter into force on the date of the deposit of their instruments of ratification.