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### **Summary of the main points**

We are concerned with three aspects of the Convention system, namely compulsory membership of the European Convention on Human Rights, time limits and the future role of the Commissioner. With respect to the Commissioner, we argue for an enhanced role in three key areas: compliance, education / outreach, and better enforcement of court judgments.

## **CONTRIBUTION:**

### **Introduction**

1. We welcome the opportunity to comment on the long-term future of the European Convention on Human Rights (ECHR) and its legal system. Our response focuses principally on the role of the Commissioner for Human Rights but we would like to make two further comments before suggesting him/her to take on a more prominent role working with and alongside the European Court of Human Rights (ECtHR).

### **Ratification of the European Convention on Human Rights as a Criterion for Membership of the Council of Europe**

2. The Article 3 of the Statute of the Council of Europe should be amended to the effect that contracting states are required to ratify the ECHR and its protocols. (E.g. 'Every party to this to Statute shall also become and remain a party to the Convention for the Protection of Human Rights and Fundamental Freedoms, and its Protocols.') We believe it is more appropriate to enshrine this duty in the Statute rather than leave it to the Parliamentary Assembly of the Council of Europe (PACE) to include it into each resolution relating to a new member of the Council. Moreover, it would also make withdrawal from the European Convention on Human Rights more politically difficult as it would involve simultaneously withdrawing from the Council of Europe, a step we believe few States would ever contemplate, let alone take. Moreover as the ECHR is now a part of the *ordre public* of Europe its status should be properly reflected in the constitutional document of the Council.

### **Time-Limit for Applications to the European Court of Human Rights**

3. We are concerned that the new time limit for lodging applications before the Court is too strict (four months). We question whether this limit is compatible with the rule of law, and indeed the right of access to court (as the European Court itself has said with respect to overly strict procedural rules). We urge the Council to monitor carefully the impact of the new limit to ensure that justice is not being denied with a view to a re-examination of it in due course.

### **A New Role for the Commissioner**

4. We strongly believe that the role of the Commissioner should be developed beyond its current role to act as a more effective institution supporting and complementing the work of the Court. The office of Commissioner is now sufficiently well established, and the time has come for its role to be expanded.

5. Without doubt the most pressing problem of the ECtHR system is the backlog of pending applications. While several measures have been put in place to ameliorate this situation there nevertheless remains considerable scope for improvement. At the same time we are concerned that some Contracting States are failing to comply with their obligations under the Convention, either by neglect or deliberately, and are thereby undermining the international rule of law and the reputation of the Convention as a system for the effective protection of human rights.

### **The New Commissioner**

6. We propose that the office of Commissioner be reformed so that it becomes an effective watchdog for European human rights. To this end we would like to see the role of the Commissioner placed on a formal footing in a protocol to the Convention. In order to ensure that the Commissioner's remit is not limited to the scope of the rights listed in the ECHR and its Protocols the Protocol should empower PACE to enlarge his jurisdiction in such cases as it thinks fit. In this way the broader existing remit of the Commissioner would be preserved, formalised and indeed enhanced through the approval of PACE. In this enhanced role we envisage that the office of the Commissioner would have three aspects to it: compliance, education/outreach and enforcement of ECtHR's judgments.

### **The Commissioner: Compliance (Mediation)**

7. The Commissioner should be empowered to undertake a mediation role to facilitate friendly settlements in place of the Court. This role is currently undertaken by the Court itself (Article 39 ECHR). The time has come now for the Court to act exclusively as judicial body. In devising this role the experience of the old Commission and the EU Commission (in relation to the enforcement procedure under Article 258 TFEU) should be taken into account. Friendly settlements should continue to be negotiated in private in order to facilitate the smooth functioning of the mechanism. The Commissioner should take a pro-active role in this regard, especially in the context of repetitive judgments.

8. We would envisage that Contracting States would be able to refer other parties to the Convention to the Commissioner in such cases. This would be particularly useful when Contracting States would like to join cases lodged by their nationals but prefer not to be publicly involved in the case (via the third party intervention mechanism).

9. Moreover, in order to avert future applicants the good offices of the Commissioner could be used in situation where a Contracting State is proposing to take action (executive or legislative) that may be incompatible with the Convention. We would envisage that anyone within the jurisdiction of the Court may lodge a complaint with the Commissioner in such circumstances. A complainant need not be a 'victim' for these purposes. The Commissioner would be able to decide whether or not further action should be taken on a complaint.

### **The Commissioner: Compliance (Proceedings)**

10. The Commissioner's role as a third party intervener before the Court, either on his/her own volition or as a response to a Court's invitation, should be preserved.

11. In order to facilitate the smoother functioning of the pilot judgment mechanism the Commissioner should be empowered to screen and marshal applications so as to assist the court in dealing with the cases in an efficient and expeditious manner (shepherding function).

12. The Commissioner should also be empowered to bring cases on his/her own initiative in the interest of the protection of human rights in Europe. This will be particularly useful when individuals are unable to act in their own cause for physical (e.g. outside the jurisdiction through unlawful rendition) or legal (e.g. lack of legal personality) reasons or in cases where the exhaustion of domestic remedies is impracticable or impossible. We believe this role to be all the more important as the compliance mechanism has come to rely on the activity and support of NGOs in bringing actions before the Court. It is clear that in several jurisdictions the activities of NGOs are being actively curtailed if not extinguished (e.g. Memorial in Russia). This will undoubtedly create a chilling effect on the enforcement of legal rights. This new function can only be specifically created by a protocol that deals with the Commissioner and the Court.

13. The Commissioner should be specially vested with the duty and power to protect European minorities (e.g. Roma or persons with disabilities). In this situation the Commissioner should be empowered to lodge applications to protect such groups. Again this is all the more important if NGOs are not anymore in a position to support cases brought by individuals belonging to such groups. Whilst this moves the character of litigation away before the Court from individual applications towards general measures we believe this to be a trend that has already been set by the adoption of the pilot judgments procedure.

14. We would also like the Commissioner to be able to make recommendations to the governments of Contracting States with respect to the adoption of appropriate national measures for both the observance and further realisation of human rights.

### **The Commissioner: Education and Outreach**

15. The enhanced role for the Commissioner should build on the excellent work that has already been undertaken by his office and others within the Council of Europe. We are particularly heartened by the current Commissioner's public engagement through the use of social media and the internet. This is something that must be continued.

16. The Commissioner should continue to develop an awareness of human rights amongst the citizens of the State parties to the Council of Europe as well as the workings of the human rights system, especially the Convention. In particular, the Commissioner should promote an understanding of the Court and how citizens may bring applications before the Court. This is particularly important as Protocol No 15 has set a tighter deadline for applications. Taken with the growing uncertainty over the existence and role of NGOs in some contracting States this function will become ever more important.

### **The Commissioner: Better Enforcement of Court Judgments**

17. The current enforcement mechanism for court judgments is arguably in need of further support, as the British prisoners' right voting case demonstrates. The apparent lack of good faith, as required in international law, in implementing court judgments is a matter of concern, and may pose a serious threat to the developing European *ordre public*. At this critical juncture in the constitutional development of Europe we argue that a robust response is necessary to strengthen the European constitutional order of which the Convention is an integral part.

18. Therefore, we propose that in cases where implementation of the judgment of the Court is problematic the Commissioner could use his good offices to assist the States with compliance. This could include meeting with the relevant authorities, referring the authorities to relevant literature on the topic, suggesting alternative phrasing in legislation, etc. Moreover, should a State persist in refusing to comply with a particular judgment and refuse to engage in a meaningful dialogue with the Commissioner, then the Commissioner should be empowered to recommend to PACE the suspension of the voting rights of that State.