Speaking note for the Ministers Deputies

23 February 2012

Madam Chair, excellencies, distinguished representatives,

Thank you for inviting me to meet you today. I understand that this invitation is timed to follow the submission yesterday of the United Kingdom’s proposals for a draft of the declaration to be adopted at the Brighton conference in April. You will no doubt appreciate that I have not had time to discuss these proposals in any detail with my colleagues and therefore that I will not be in a position to respond in other than very general terms. However, as you are aware the Court did at the beginning of this week adopt a preliminary opinion on issues for discussion at Brighton and this text has been distributed to you. While I stress that this opinion is preliminary in so far as it was drawn up without the benefit of the United Kingdom proposals and therefore may evolve in the lights of those proposals and of other contributions to the Brighton process, I can address some of the matters which it raises today with a view to taking the discussion forward.

Let me say first of all that much as I appreciate the commitment of different Governments to the process of reforming the Convention
system in order to make it more effective, I think there is a danger of creating a feeling that each successive chairmanship has to organise a major conference on the Court. Interlaken and Izmir made important contributions to the reform process and I am confident that Brighton will provide a basis for further progress, but I would then plead for a period of respite which would allow us all to take stock of where we are and pursue the lines of reflection identified. So future conferences could perhaps concentrate on how to achieve what has already been agreed upon and in particular on monitoring the follow-up to undertakings given.

As regards what has been achieved, while I have stressed that there is no room for complacency I think that the Court can be proud of what has been accomplished since Interlaken. I will not go into the detail here since this is addressed in the preliminary opinion and I also dealt with it in my speech at the official opening of the judicial year. This includes both the tools that we have developed ourselves, such as pilot judgments and prioritisation, and making the most of certain provisions of Protocol No. 14, and here I refer in particular to the successful exploitation of the Single Judge procedure which has obtained striking results. We have also been active in increasing the information provided in line with recommendations made at Interlaken and Izmir. We have in addition acted upon specific concerns raised at these conferences such as the handling of requests
for interim measures and greater recourse to friendly settlements and unilateral declarations.

All in all I think the Court is in a stronger position than it was before Interlaken. It has developed a clear strategy as to how to approach its case-load, even if it is well aware that this will not be enough. It is conscious that the pressure of the case-load requires it constantly to reassess its working methods and procedures and this is part of an ongoing process conducted in its different committees and working parties. A lot of effort has gone into thinking about how to improve the way we work. Some of this is reflected in the preliminary opinion adopted on Monday.

At the same time we cannot lose sight of our core business which is to deliver judgments on cases raising serious human rights issues. I think we can all agree that a European Court of Human Rights should principally be dealing with cases of this type, cases which disclose grave problems of Convention compliance at national level, cases which take forward our understanding of human rights law, cases where the dignity and/or physical integrity of persons is at stake, cases which gauge the health of the rule of law and democracy in our societies. These are the cases for which the Convention system was set up. But for the drafters this was never to be more than a trickle of
cases which survived the process of domestic exhaustion and the Convention filter.

Yet as we know the system has evolved differently. The right of individual petition coupled with the enlargement of the Council of Europe has produced an enormous inflow of cases, some of which I would argue do not have their place before an international court, even if the grievances voiced are valid ones.

The starting point is rather simple: if Convention rights and freedoms are fully protected at national level and if effective mechanisms for affording redress for their breach are established in domestic legal systems, then the Court will have very little to do. This is clearly the presumption on which the Convention is based. Again we know that the reality is different. In all the States there is scope for more effective action at the domestic level in this respect. I need not go into details here, but we all realise that this is an important part of strengthening human rights protection generally, of easing the Court’s workload and of making the Convention system more effective. We welcome proposals that go in this direction and we also look forward to seeing Governments’ responses submitted in accordance with the Interlaken action plan in this connection. These issues are not controversial in principle; however giving them practical effect is a long drawn-out business.
So we have to turn to what can be done in Strasbourg. You will perhaps have seen that in our Opinion we identify four different categories of cases. These are - in reverse order of priority: inadmissible cases; repetitive cases, non-repetitive, non-priority cases and priority cases. It is clear that different approaches are necessary for each category.

To begin with, efficient filtering is crucial. This comprises prompt disposal of clearly inadmissible cases and rapid and accurate identification of the other categories, with cases being placed on the right procedural track. As I have already suggested the streamlined procedure made possible by the establishment of the Single Judge formation coupled with computerised workflows has allowed us to make substantial progress in this area which is reflected in the statistics. We believe that these methods which require close cooperation between Judges and the Registry make it possible to envisage bringing under control the volume of incoming inadmissible cases. We also believe that with a relatively modest addition of staff, we could eradicate the backlog of these cases within three years.

While we are talking about admissibility I need to address certain issues that have been raised in the context of the reform discussion. Inadmissible cases are indeed a problem for the Court simply because of the sheer volume of such applications. It is however suggested in
certain quarters that the Court is not declaring enough applications inadmissible. Last year it delivered some 47,000 inadmissibility decisions. In general we say that between 80 and 90% of all cases coming into the system are declared inadmissible. That is already a very high proportion and it is difficult to see how it can be significantly and reasonably increased by adjusting existing admissibility criteria or creating new ones. The reality is that the current criteria make it possible to declare inadmissible under a streamlined procedure a very large number of applications and nothing that has been proposed would seem likely to achieve more in this respect. One of the reasons why the new criterion provided for in Protocol No. 14 based on the notion of significant disadvantage has been used, let us say, sparingly is that the great majority of cases which might fall to be dealt with under this provision are declared inadmissible more rapidly and more easily under the existing criteria. Another reason is that, under the transitional provisions, the single judge is not allowed to apply this criterion for a period of two years after the entry into force of the Protocol so we will see from June this year whether that makes a difference.

For a new admissibility criterion to achieve its aim it must therefore be possible to apply it more simply than the present conditions. Looking at what the United Kingdom is proposing, that is a test based on the fact that the national courts have examined the Convention issues without manifestly erring in their application and interpretation
of the Convention, it has to be said that we doubt whether it would be easy to apply. Moreover, as we point out in the preliminary opinion, this test reflects the Court’s practice and how it sees the proper operation of the principle of subsidiarity as expressed in, for example, both the margin of appreciation and the fourth instance rule. That principle and these two distinct doctrines have often been confused in discussions about the Court’s future. Coming back to the obligation of States under the Convention, both Interlaken and Izmir refer to the idea of shared responsibility. It is clear that this entails ensuring that national courts are able to apply the Convention and in fact do so. Where an application has been duly examined under the Convention at national level, the Court will normally have no difficulty in finding that it is manifestly unfounded using the existing criterion.

A different question is whether it may not be necessary at some time in the future to give the Court the possibility of reducing the number of cases coming before it. To be clear, this is not admissibility; this is deciding not to examine cases on other grounds. For such an approach to be acceptable, for the Court, it must not be arbitrary. That is why the Court cannot contemplate a proposal such as the “sunset clause” or indeed a “pick and choose” form of selection. If this were to be necessary, the Court would prefer to use a criterion which already exists in the Convention. It would suggest that the proper measure of whether a case should be taken to judgment on the merits is the existence of well established case-law, in other words the test which
determines the current three-judge Committee competence. I should emphasise, however, that if we do go down this road, firstly it must not be at the expense of the right of individual petition and secondly we should set up mechanisms (international or national) to cater for meritorious cases which the Court is unable to deal with.

Moving on from admissibility to the next category of cases we come to what has long been recognised as a serious problem facing the Court and the Convention system. This the phenomenon of repetitive cases resulting from structural or endemic violations existing in certain countries. I earlier mentioned cases which I felt should not come before an international court and it is these cases in particular of which I was thinking. That is not because the issues are not serious or because the applicants are undeserving, it is because the Court has, by definition, already determined the issue at the heart of the case. The only reason that such cases come to Strasbourg is that adequate measures have not been taken to resolve the situation at national level following a first pilot or leading judgment. Whichever way you look at it, this is a failure of the execution process and therefore ultimately a collective failure of the States responsible for the Convention system. Brighton must take forward reflection on solutions for these situations and especially on harnessing Council of Europe resources and efforts to assist States. We have to find a way of ensuring that the Court no longer has to deal with these cases. I would simply recall that there are currently around 35,000 such cases on the Court’s
docket and 10,000 new repetitive cases came into the Registry in 2011. For its part the Court proposes to pursue pilot judgment procedures in appropriate cases and adopt a new practice of sending back follow-up cases to the respondent States for settlement. The possibility of default judgments where no settlement is achieved is also being considered.

The third category are the substantial cases which are not strictly speaking repetitive, but which do not fall within the top three priority classes. They number 19,000 at present with 4,600 being added last year. In principle these are therefore cases which the Court should make every effort to deal with, but at present lacks sufficient resources to do so. What the Court is proposing here is a broader interpretation of the well established case-law test which I referred to earlier. So far this has been used essentially to adjudicate repetitive cases under the summary Committee procedure. However, the intention of the Protocol 14 drafters was clearly that it should have a wider reach and it is true that many cases can be said to be decided on the basis of the Court’s well-established case-law. It is therefore proposed that the Court should deal with far more cases under this summary procedure with a simplified communication process involving minimum Registry and judicial input. In other words, in the presence of clear case-law it would be for States to show why the case-law does not apply to the case in issue and to offer a friendly settlement or a unilateral declaration if they are unable to distinguish
the case. As with repetitive cases, the burden would be on the Agent’s office rather than the Registry. This is also what shared responsibility means.

There remain the priority cases – that is cases involving particularly vulnerable applicants, cases disclosing new structural situations and cases involving the core Convention rights, right to life, prohibition of torture, prohibition of slavery and prohibition of unlawful and arbitrary detention. These cases are the focus of the Court’s priority policy and must in all circumstances be dealt with, and as rapidly as possible. There are currently some 6,000 such cases on the Court’s list, including 1,500 new ones in 2011. With limited targeted additional resources and provided solutions are found as outlined above, these cases can be managed.

By way of conclusion to this brief statement let me try and sum up the Court’s position in the preparation for Brighton.

First the problems facing the Court require a range of different measures involving all the actors and stakeholders in the Convention system. There is, as has been recognised, a shared responsibility.

The Court must continue to pursue its own goals in this respect, in particular developing further its filtering function and implementing
its prioritisation policy. However, to achieve this will require some extra resources.

This must be accompanied by renewed efforts at national level both with regard to the general obligation to implement the Convention and with a view to resolving specific structural situations. National mechanisms must be established for the cases that the Court is unable to deal with. The Committee of Ministers and the Council of Europe as an organisation have a crucial role to play in assisting states to find solutions to structural phenomena, notably via the execution process.

As regards the longer term the Court has stated that it is not opposed in principle to some form of advisory opinion jurisdiction. It has also indicated an avenue for reflection if it is felt necessary to reduce the volume of cases submitted for examination on their merits.

On all these issues the Court will continue to engage constructively with its different interlocutors.

Finally we believe that Brighton should also provide an opportunity to move forward the EU accession process to speedy completion.