Dear Ministers

REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS

OUR INTERIM ADVICE TO GOVERNMENT

INTRODUCTION

1. The Commission is invited, by its terms of reference, to provide advice to the Government on the Interlaken process for reform of the European Court of Human Rights, including in advance of the assumption by the United Kingdom of the Chairmanship of the Council of Europe.

2. This letter sets out our interim advice as a first step in fulfilling our terms of reference. It sets out our preliminary advice on the need for reform and the priorities that might guide the Government. The main thrust of our advice is that the United Kingdom is uniquely well-placed to set the ball rolling on fundamental reforms and that it should do so, with a view to achieving the well-being and effective functioning of the Court over the long term.

3. In particular, we believe there is a need to ask two basic questions:

(i) what is the central purpose of the European Court of Human Rights for the 800 million citizens of the 47 Member States; and

(ii) how is that purpose most likely to be achieved?

4. It is evident that the current structure and functioning of the Court, as it struggles with a voluminous and ever-growing case-load, places it in an impossible situation. From this,
three areas of fundamental reform appear to us to be particularly pressing and cannot be addressed by mere tinkering at the edges:

first, the need to reduce very significantly the number of cases that reach the Court, by introducing new screening mechanisms;

second, the need to reconsider the relief that the Court is able to offer by way of just satisfaction; and

third, the need to enhance procedures for the selection of well-qualified judges of the Court.

BACKGROUND

5. By way of background, it is appropriate to mention that the Commission has taken account of the considerable literature and advice that already exists on the subject of Court reform, and all but one of its members visited Strasbourg on 4 and 5 July. During that visit we met with many individuals closely involved in the working of the Court, including the current President, the President-elect, other judges of the Court, the Secretary General of the Council of Europe, the Registrar and Deputy Registrar of the Court, and a number of officials from the Court and Council of Europe. We were also able to discuss Court reform informally with a number of the Permanent Representatives to the Council of Europe from other Member States. In this context, we would like to record the Commission’s considerable thanks to the UK’s Permanent Representative to the Council, Ambassador Eleanor Fuller, for hosting and facilitating our visit. We should also note that following our visit, several members of the Commission met with the Leader and other members of the UK Delegation to the Parliamentary Assembly for a similarly wide-ranging and helpful discussion. We anticipate that our meetings and discussions with individuals closely involved with the operation of the Court will form part of a continuing dialogue in the course of our work.

6. It is clear that a considerable programme of reform has already been undertaken. In particular, the adoption of Protocol 14 to the European Convention on Human Rights has allowed a number of reforms to be introduced, including the new procedure whereby a single judge can decide on the admissibility of an application. The Court has also introduced a pilot judgment procedure to deal with systemic and structural weaknesses in national systems and repetitive applications. In addition, the Court has introduced a system of prioritisation of the cases coming to it, so as to allow the Court to hear urgent and substantial cases more quickly. These and other reforms have improved the Court’s working and efficiency.

7. These reforms are not, however, sufficient to tackle the serious problems facing the Court. This was a common theme amongst all of our interlocutors. Whilst recent reforms may slow the rate of increase in the backlog of cases, which now stands at over 150,000, no one believes that they offer any real prospect of addressing the underlying issues. As a consequence, the number of well-founded cases that are not urgent and that have been awaiting a decision for many years is continuing to increase. The absence of any real prospect of grappling with this growing problem raises the most serious concerns about the well-being of the Court and must be a central part of the Government’s proposals for reform.
8. These challenges mean that fundamental reform is required. Over the next year, we would like to revisit the various modalities for achieving necessary reforms, whether by way of amendment of the Convention or otherwise. We were encouraged in that view by many of those whom we met in Strasbourg who are clearly looking to the Interlaken process and to the forthcoming United Kingdom Chairmanship of the Council for renewed impetus to be given to the reform programme. The core of our interim advice, is to urge that the necessary will be found among the governments of the Council of Europe to reform the system so as to enable the European Court of Human Rights to focus on its essential purpose: as the judicial guardian of human rights across Europe. As the Court itself has explained, “the machinery of protection established by the Convention is subsidiary to the national systems protecting human rights”\(^1\), and “by reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions”\(^2\). It is essential for the Court to be able to address cases involving serious questions affecting the interpretation or application of the Convention, and serious issues of general importance, where the Court’s intervention is justified. The Court should be a court of last resort, and not a first port of call for all human rights issues. It should be adjudicating hundreds of cases a year, not thousands, and certainly not tens of thousands, and ensuring that the principle of subsidiarity is observed by national institutions with the primary responsibility for the protection of human rights and the provision of effective remedies for violations of the Convention rights.

*Interim Recommendation 1*: the Government should vigorously pursue the need for urgent and fundamental reform to ensure that the European Court of Human Rights is called upon, as an international court, only to address a limited number of cases that raise serious questions affecting the interpretation or application of the Convention and serious issues of general importance. It is essential to ensure that the Member States and their national institutions – legislative, executive and judicial – assume their primary responsibility for securing the Convention rights and providing effective remedies for violations. Failure to put in place the necessary machinery for compliance should itself constitute a violation of the Convention.

*Interim Recommendation 2*: the Government should use its Chairmanship to initiate a time-bound programme of fundamental reform.

9. We believe that a number of fundamental changes need to occur.

(1) **Subsidiarity and screening**

10. First, the Court must be able to decline to address cases that raise no serious violation of the Convention or any issues of significant European public importance. This change was recommended by the 2001 Evaluation Group to the Committee of Ministers and it needs to be adopted as a matter of urgency.

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\(^1\) *Handyside v United Kingdom* (1976) 1 EHRR 737, para. 48.
11. The exponential increase in the Court’s caseload, arising from a particular group of defaulting Member States, is unsustainable and poses a serious threat to the Court’s viability and effectiveness. In 2001, the Court’s backlog stood at only 18,000 cases. The Evaluation Group established by the Committee of Ministers concluded that:

“...the system is seriously overloaded and, with the relatively limited resources available to it, the Court’s ability to respond is in danger. ....Immediate action is indispensable if the Court is to remain effective and retain its credibility and authority.”

12. By 2006, the backlog stood at 86,000 cases. A Group of Wise Persons established by the Committee of Ministers reported that:

“...the explosion in the number of cases...is now seriously threatening the survival of the machinery for the judicial protection of human rights and the Court’s ability to cope with its workload. This dramatic development jeopardises the proper functioning of the Convention’s control system.”

13. Against this background, the situation is even more serious today, with a backlog of 150,000 cases, increasing at a rate of 20,000 per annum. The Government should use as a springboard for urgent reform the work of the Evaluation Group and the Group of Wise Persons that sought to reinforce the founding aims of the Convention and its cornerstone principle of subsidiarity. They recommended, inter alia, fundamental reforms of the Court’s role which would allow the Court to return to its essential role as final arbiter of human rights.

14. In 2006, the Group of Wise Persons recommended a number of reform measures, including the pilot judgment procedure which the Court has since instituted. In so doing, they pointed out that:

“(t)here is a fundamental conflict between the size of the population who have access to the Court...and the Court’s responsibility as the final arbiter in human rights matters for so many different states. No other international court is confronted with a workload of such magnitude while having at the same time such a demanding responsibility for setting the standards of conduct required to comply with the Convention.”

15. In 2001 the Evaluation Group made similar observations and affirmed that one of the founding intentions of the Convention was to place “…primary responsibility for securing the rights and freedoms....with the domestic authorities and particularly the judiciary (of each Member State)”. The Strasbourg court, as the Group reported, should play a subsidiary role, and particularly not the role of “court of appeal from national courts”. The Commission respectfully endorses this approach. One of the principal recommendations of the 2001 Evaluation Group was that the Court be given

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5 2006 Report, paras. 35-36.
7 2001 Report, para. 22.
a means of rejecting applications that raised issues of minor or secondary importance. The Group recognised the objection that such a measure would deprive some victims of a decision from the Court, but recognised that “the primary responsibility for applying Convention standards lies with domestic courts and authorities.” The Evaluation Group noted that:

“either the Court continues to attempt to deal in the same way with all the applications that arrive (in which event it will slowly sink), or it reserves detailed treatment for those cases which, in the light of its overall object and purpose, warrant such attention.”

16. The Commission agrees with the observations of the Evaluation Group and the Group of Wise Persons about the Court’s essential function, and believes that the eight-fold increase in the size of the Court’s caseload in the 10 years since it reported confirms the irrefutable merit of this fundamental reform and the pressing need for urgent action by the Committee of Ministers of the Council of Europe.

17. We note that the Interlaken and Izmir Declarations invite the Court to take fully into account its subsidiary role in the interpretation and application of the Convention. The Interlaken Declaration invites the Committee of Ministers to consider measures that would enable the Court to concentrate on its essential role of final arbiter of human rights and to adjudicate upon well-founded cases with the necessary speed, in particular those alleging serious violations of human rights.

Interim Recommendation 3: the Government should ensure that an urgent programme of fundamental reform addresses the need to give practical effect and meaning to the essential role of the Court, by establishing a new and effective screening mechanism that allows the Court to decline to deal with cases that do not raise a serious violation of the Convention.

2) Relief and ‘just satisfaction’

18. The second area for fundamental change concerns the way in which successful Applicants are afforded financial redress. A considerable part of the Court’s work relates to the calculation and award of ‘just satisfaction’ under Article 41 – i.e. financial redress – in cases where a breach of a Convention right has been found: some 1,500 such awards were made in 2010. In many cases the amounts awarded are small, in some cases as low as €100. We understand that many cases brought before the Court are motivated by a desire to obtain such compensation, rather than to remedy any alleged serious violation of a Convention right.

19. The Commission recognises that the subject of relief and remedies raises important and sometimes complex issues for any court. At this preliminary stage we wish to raise an expression of doubt as to whether it is properly the function of an international court of last resort to be entrusted with the task of calculating and awarding just satisfaction, since Article 41 provides that it should only be awarded “if necessary”.

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8 2001 Report, paras. 92-93.
20. We do not now express a concluded view as to how to address this issue, although one option, as recommended by the Group of Wise Persons in 2006, would be for the Court to remit such decisions to the Member State concerned but to retain the power to award just satisfaction in certain cases. This could include cases of gross violation. However, we recognise that it will continue to be important for the Court to order defendant States to pay the assessed legal costs and expenses of successful applicants so as to facilitate effective access to justice.

**Interim Recommendation 4**: the Government should ensure that a programme of fundamental reform addresses the need to revisit the meaning and effect of Article 41 of the Convention and the role of the Court in awarding ‘just satisfaction’.

(3) Enhancing the nomination and appointment of judges

21. A third area of reform is reflected in the Interlaken Declaration, calling on Member States and the Council of Europe to ensure, if necessary by improving the transparency and quality of the selection procedure at both national and European levels, full satisfaction of the Convention’s criteria for office as a judge of the Court. The Commission acknowledges that the Convention system recognises the role of national courts, and that a mutually respectful relationship between national courts and the Strasbourg court is essential to the proper functioning of the system. This observation is closely connected with President Costa’s statement that the Court, as the ultimate arbiter of human rights issues, must be composed of persons of sufficient standing and authority to command the full respect of national judges.

22. The Commission welcomes the establishment by the Council of Europe of an Advisory Panel of Experts to consider judicial nominations from Member States. We believe that this will assist in ensuring that judges have appropriate experience and standing. It does not, however, go far enough: for example, it is indefensible that the Panel cannot interview all nominees before giving its advice to the Parliamentary Assembly, apparently because of a lack of sufficient funds to support the Panel’s work. We believe that the Advisory Panel provides only a first step, and its role should as a matter of urgency be enhanced and upgraded. It is urgent because a number of senior members of the Court will retire in the near future, and it is vital for their places to be taken by worthy successors. In addition, we believe that there is an urgent need to ensure throughout the Member States that national systems are in place involving the advertising of vacancies and a process of independent scrutiny and recommendation by a well-qualified nominating panel, applying objective criteria.

**Interim Recommendation 5**: the Government should seek to ensure that a programme of fundamental reform establishes agreement on appropriate objective and merit-based principles and rules, and adequate resources, for the selection of

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9 Paras. 94ff.
10 Letter from Mr Jean-Paul Costa, President of the European Court of Human Rights addressed to Member States’ Permanent Representatives (Ambassadors) on 9 June 2010, appended to Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, National procedures for the selection of candidates for the European Court of Human Rights, Doc. 12391, 6 October 2010.
judicial candidates at the national level, and for the appointment process at the European level.

CONCLUSION

23. In accordance with your request to the Commission to provide advice to the Government in advance of the UK assuming the Chairmanship of the Council on the ongoing Interlaken process to reform the Strasbourg court, we hope that this interim advice will be of assistance in focusing on a number of key issues.

24. We are intending to publish this interim advice – when Parliament returns in September – so that others are able to comment upon it if they so wish.

25. Finally I should note that, as you might expect, a number of other areas for potential reform of the Court have either been raised with the Commission by those with whom we have discussed these issues or have been raised by individual members of the Commission themselves. These include some further suggestions to address the Court’s backlog; and a number of suggestions intended to address concerns regarding the respective roles of the judiciary and the democratic institutions of the Council of Europe and the Member States; and concerns regarding the case law of the Strasbourg court which have been expressed not only in this country but in others. We will be returning to these issues amongst many others in our work programme. I am writing to you separately – on my own behalf rather than on behalf of the Commission as a whole – simply to set out the main such areas which have been raised with us, some of which we will undoubtedly wish to consider in greater depth at a later stage in our work programme. However, because we have not yet been able to do so, and because some of the proposals which have been raised with us are ones which we may well decide not to pursue at all, we have not included a discussion of them in this letter.

26. I am sending a copy of this letter to the Foreign Secretary and Lord McNally.

Yours sincerely

Sir Leigh Lewis KCB
Chair of the Commission

cc Rt Hon William Hague MP, Secretary of State for Foreign and Commonwealth Affairs

cc Rt Hon Lord McNally, Minister of State for Justice and Deputy Leader of the House of Lords