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Draft Protocol No. 14 bis to the Convention for the Protection of Human Rights and Fundamental Freedoms

Request for an opinion
Committee of Ministers

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Letter from the Chairman of the Ministers' Deputies to the President of the Assembly dated 21 April 2009

Dear President,

At the 1054th meeting of the Ministers' Deputies (15-16 April 2009, item 4.3), the Committee of Ministers decided to invite the Parliamentary Assembly to give an opinion on the draft Protocol No. 14 bis contained in document CM(2009)58 during its forthcoming part-session in April 2009, under the urgent procedure provided for in Rule 50 of the Rules of Procedure of the Assembly. The request to resort to this urgent procedure is made in order to allow for the draft Protocol to be finalised by the Deputies at their last meeting (1056th, 6 May 2009) prior to the 119th Ministerial Session in Madrid on 12 May.

In enclose a copy of the draft Protocol CM(2009)58 and of its draft Explanatory Report (CM(2009)58 add). I should stress that work on the draft Protocol is still ongoing within the Committee of Ministers. In this respect, I would draw your attention in particular to Article 7 of the draft Protocol which relates to the provisional application of the Protocol. This question – as well as the modalities of such a possible provisional application – remains to be considered further.

I am confident that an early opinion of the Assembly will greatly assist the Committee of Ministers in the finalisation of this important text.

Yours sincerely,

(signed) Marta Vilardell Coma, Chair of the Ministers' Deputies

Mr Lluís Maria de Puig, President of the Parliamentary Assembly of the Council of Europe

Appendix 1 – Draft Protocol No. 14 bis to the Convention on the Protection on Human Rights and Fundamental Freedoms[1]

Preamble

1. The member states of the Council of Europe, signatories to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

2. Having regard to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature by the Committee of Ministers of the Council of Europe in Strasbourg on 13 May 2004;

3. Considering the urgent need to introduce certain additional procedures to the Convention in order to maintain and improve the efficiency of its control system for the long term, in the light of the continuing increase in the workload of the European Court of Human Rights and the Committee of Ministers of the Council of Europe;

4. Considering, in particular, the need to ensure that the Court can continue to play its pre-eminent role in protecting human rights in Europe,

Have agreed as follows:

Article 1

For Parties to the Convention which are bound by this Protocol, the Convention shall read as provided in Articles 2 to 4.

Article 2

1. The title of Article 25 of the Convention shall read as follows:

"Article 25 – Registry, legal secretaries and rapporteurs"

2. A new paragraph 2 shall be added at the end of Article 25 of the Convention, which shall read as follows:

"2. When sitting in a single-judge formation, the Court shall be assisted by rapporteurs who shall function under the authority of the President of the Court. They shall form part of the Court's registry."

Article 3

1. The title of Article 27 of the Convention shall read as follows:

"Article 27 – Single judge formation, committees, Chambers and Grand Chamber"

2. Paragraph 1 of Article 27 of the Convention shall read as follows:

"1. To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time."

3. A new paragraph 2 shall be inserted in Article 27 of the Convention, which shall read as follows:

"2. When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected."

4. Paragraphs 2 and 3 of Article 27 of the Convention shall become paragraphs 3 and 4 respectively.

Article 4

Article 28 of the Convention shall read as follows:

"Article 28 – Competences of single judges and of committees

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1. See document CM(2009)58 of the Committee of Ministers (16 April 2009). This document was declassified at the 1054th meeting of the Ministers' Deputies ((15-16 April 2009) (see CM/Del/Dec(2009)1054/4.3).

1. A single judge may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, where such a decision can be taken without further examination.

2. The decision shall be final.

3. If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a committee or to a Chamber for further examination.

4. In respect of an application submitted under Article 34, a committee may, by a unanimous vote,

a. declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; or

b. declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court.

5. Decisions and judgments under paragraph 4 shall be final.

6. If the judge elected in respect of the High Contracting Party concerned is not a member of the committee, the committee may at any stage of the proceedings invite that judge to take the place of one of the members of the committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 4.b."

Article 5

1. This Protocol shall be open for signature by member states of the Council of Europe signatories to the Convention, which may express their consent to be bound by

a. signature without reservation as to ratification, acceptance or approval; or

b. signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. The instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 6

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which three member states of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 5.

2. In respect of any member state which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of signature or of the deposit of the instrument of ratification, acceptance or approval.

[Article 7

Pending the entry into force of the Protocol according to the conditions set under Article 6, a Party to the Convention having signed or ratified the Protocol may, at any moment, declare that it will apply it on a provisional basis. Such a declaration shall take effect on the first day of the month following the date of its receipt by the Secretary General of the Council of Europe.]

Article 8

1. From the date of the entry into force [or application on a provisional basis] of this Protocol, its provisions shall apply to all applications pending before the Court with respect to all High Contracting Parties for which it is in force [or being applied on a provisional basis].

2. This Protocol shall not apply in respect of any individual application brought against two or more High Contracting Parties unless the Protocol is in force [or applied on a provisional basis] [or the relevant corresponding provisions of Protocol No. 14 are applied on a provisional basis] in respect of all of them.

Article 9

This Protocol shall cease to be in force [or applied on a provisional basis] from the date of entry into force of Protocol No. 14 to the Convention.

Article 10

The Secretary General of the Council of Europe shall notify the member states of the Council of Europe of:

a. any signature;

b. the deposit of any instrument of ratification, acceptance or approval;

c. the date of entry into force of this Protocol in accordance with Article 6; [and]

d. [any declaration made under Article 7; and

e.]any other act, notification or communication relating to this Protocol.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Protocol.

Done at …, this … day of … 2009, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member state of the Council of Europe.

Appendix 2 – Draft Explanatory Report to Protocol No. 14 bis to the Convention for the Protection of Human Rights and Fundamental Freedoms

Introduction

1. The urgent need to adjust the control mechanism of the 1950 European Convention on Human Rights (hereinafter referred to as "the Convention") was cited as a principal reason for the adoption of Protocol No. 14 to the Convention in 2004. The continuing non-entry into force of Protocol No. 14, however, has made the situation faced by the European Court of Human Rights (hereinafter "the Court") deteriorate yet further in the face of an ever-accelerating influx of new applications and a constantly growing backlog of cases. This unsustainable situation represents a grave threat to the effectiveness of the Court as the centre-piece of the European human rights protection system.

2. Pending the entry into force of Protocol No. 14, therefore, the High Contracting Parties have agreed to adopt a Protocol No. 14 bis, limited to those procedural measures contained in Protocol No. 14 that would be most rapidly effective in increasing the Court's case-processing capacity, as a provisional interim measure.

I. The preparation of Protocol No. 14 bis

3. At the 14 October 2008 meeting of the Committee of Ministers' Liaison Committee with the European Court of Human Rights (CL-CEDH), the President of the Court drew attention to the extremely serious situation facing the Court, and raised the issue of urgent implementation of certain procedural provisions of Protocol No. 14, particularly the single judge procedure and the three-judge committee for repetitive cases, which could increase the efficiency of the Court by 20-25%. The President noted that such an improvement, though not providing a definitive answer to the Court's problem, would be an extremely useful contribution.

4. Following this meeting, on 19 November 2008 the Ministers' Deputies requested the Steering Committee on Human Rights (CDDH) to give, before 1 December 2008, a preliminary opinion on the advisability and modalities of putting into practice certain procedures which are already envisaged to increase the Court's case-processing capacity, in particular the new single-judge and committee procedures. It also requested the Committee of Legal Advisers on Public International Law (CAHDI) to give, by 21 March 2009, an opinion on the public international law aspects of the matter. Finally, it requested the CDDH to give a final opinion by 31 March 2009.

5. The CDDH and the CAHDI subsequently issued the various opinions as requested[2]. Both committees concluded that the seriousness of the threat to the control mechanism of the Convention meant that significant steps had to be taken at the earliest opportunity to enable the Court to respond effectively to its caseload. They both also concluded that, whilst the best solution remained entry into force of Protocol No. 14, implementation of the two procedures by means of a Protocol No. 14 bis, pending entry into force of Protocol No. 14, would be fully compatible with the principles of public international law.

6. The Committee of Ministers' Rapporteur Group on Human Rights (GR-H), having examined the issue on the basis of the CDDH and CAHDI opinions', elaborated the draft text of this Protocol in April 2009. On 16 April the Ministers' Deputies decided to transmit a working draft text of the protocol to the Parliamentary Assembly for opinion; [this opinion was subsequently adopted at the Assembly's April 2009 part-session. On 6 May 2009, the Ministers' Deputies, having examined the Parliamentary Assembly's opinion, approved the text of draft Protocol No. 14 bis and agreed to transmit it, accompanied by an Explanatory Report, for adoption to the 119th Ministerial Session of the Committee of Ministers (Madrid, 12 May 2009). The protocol was then formally adopted and it was decided to open it for signature on […].]

II. Procedural measures introduced by Protocol No. 14 bis into the control system of the European Convention on Human Rights

7. Intended only as a provisional, interim measure pending entry into force of Protocol No. 14, Protocol No. 14 bis is deliberately limited to the introduction of two procedural elements taken from Protocol No. 14 that will have the greatest and most immediate effect on the Court's case-processing capacity: the introduction of the

2. See documents CDDH(2008)014 Addendum I for the CDDH Preliminary Opinion, CM(2009)56 add for the CAHDI Opinion and CM(2009)51 add for the CDDH Final Opinion. The CDDH's Reflection Group (DH-S-GDR) also contributed to the analysis in the period between December 2008 and March 2009.

single-judge formation and the extended competence of three-judge committees. Whilst during preparatory work there was some discussion of the possibility of including other measures, the conclusion was soon reached that this would risk delaying adoption of the Protocol No. 14 bis.

8. The content of the following section is based on the Explanatory Report to Protocol No. 14, unless indicated otherwise. Further explanation of the background to Protocol No. 14 can be found in its Explanatory Report.

III. Comments on the provisions of the Protocol

Article 1 of the protocol

9. The text of this article is based on that of Article 1 of Protocol No. 9 to the Convention. As the Explanatory Report on Article 1 of Protocol No. 9 explains, this provision, although not strictly speaking necessary, serves to underline the distinction between this new optional Protocol and other earlier Protocols introducing changes of a procedural nature, the entry into force of which has been subject to ratification by all Parties to the Convention.

Article 2 of the protocol

Article 25 – Registry, legal secretaries and rapporteurs

10. A new paragraph 2 is added to Article 25 so as to introduce the function of rapporteur as a means of assisting the new single-judge formation provided for in Article 27. While it is not strictly necessary from a legal point of view to mention rapporteurs in the Convention text, it was none the less considered important to do so because of the novelty of rapporteur work being carried out by persons other than judges and because it will be indispensable to create these rapporteur functions in order to achieve the significant potential increase in filtering capacity which the institution of single-judge formations aims at. The members of the registry exercising rapporteur functions will assist the new single-judge formations. In principle, the single judge should be assisted by a rapporteur with knowledge of the language and the legal system of the respondent Party. The function of rapporteur will never be carried out by a judge in this context.

11. It will be for the Court to implement the new paragraph 2 by deciding, in particular, the number of rapporteurs needed and the manner and duration of appointment. On this point, it should be stressed that it would be advisable to diversify the recruitment channels for registry lawyers and rapporteurs. Without prejudice to the possibility to entrust existing registry lawyers with the rapporteur function, it would be desirable to reinforce the registry, for fixed periods, with lawyers having an appropriate practical experience in the functioning of their respective domestic legal systems. Since rapporteurs will form part of the Court's registry, the usual appointment procedures and relevant staff regulations will apply. This would make it possible to increase the work capacity of the registry while allowing it to benefit from the domestic experience of these lawyers. Moreover, it is understood that the new function of rapporteur should be conferred on persons with a solid legal experience, expertise in the Convention and its case-law and a very good knowledge of at least one of the two official languages of the Council of Europe and who, like the other staff of the registry, meet the requirements of independence and impartiality.

Article 3 of the protocol

Article 27 – Single judge formation, committees, Chambers and Grand Chamber

12. The text of Article 27 has been amended in several respects. Firstly, a single-judge formation is introduced in paragraph 1 in the list of judicial formations of the Court and a new rule is inserted in a new paragraph 2 to the effect that a judge shall not sit as a single judge in cases concerning the High Contracting Party in respect of which he or she has been elected. The competence of single judges is defined in the amended Article 28. In the latter respect, reference is made to the explanations in paragraph 15 below.

13. Adequate assistance to single judges requires additional resources. The establishment of this system will thus lead to a significant increase in the Court's filtering capacity, on the one hand, on account of the reduction, compared to the old committee practice, of the number of actors involved in the preparation and adoption of decisions (one judge instead of three; the new rapporteurs who could combine the functions of case-lawyer and rapporteur), and, on the other hand, because judges will be relieved of their rapporteur role when sitting in a single-judge formation and, finally, as a result of the multiplication of filtering formations operating simultaneously.

Article 4 of the protocol

Article 28 – Competence of single judges and of committees

14. Article 28 contains new provisions defining the competence of the new single-judge formation and extending the powers of three-judge committees.

15. Paragraphs 1-3 of the amended Article 28 set out the competence of the single-judge formations created by the amended Article 27, paragraph 1. It is specified that the competence of the single judge is limited to taking decisions of inadmissibility or decisions to strike the case out of the list "where such a decision can be taken without further examination". This means that the judge will take such decisions only in clear-cut cases, where the inadmissibility of the application is manifest from the outset. Besides, it is recalled that, as was explained in paragraph 10 above, single-judge formations will be assisted by rapporteurs. The decision itself remains the sole responsibility of the judge. In case of doubt as to the admissibility, the judge will refer the application to a committee or a Chamber.

16. Paragraphs 4 and 5 of the amended Article 28 extend the powers of three-judge committees. Hitherto, these committees could, unanimously, declare applications inadmissible. Under the new paragraph 4.b of Article 28, they may now also, in a joint decision, declare individual applications admissible and decide on their merits, when the questions they raise concerning the interpretation or application of the Convention are covered by well-established case-law of the Court. "Well-established case-law" normally means case-law which has been consistently applied by a Chamber. Exceptionally, however, it is conceivable that a single judgment on a question of principle may constitute "well-established case-law", particularly when the Grand Chamber has rendered it. This applies, in particular, to repetitive cases, which account for a significant proportion of the Court's judgments (in 2008, over 70% of the Court's judgments were identified as having a low importance level; these are essentially repetitive cases). Parties may, of course, contest the "well-established" character of case-law before the committee.

17. The new procedure is both simplified and accelerated, although it preserves the adversarial character of proceedings and the principle of judicial and collegiate decision-making on the merits. Compared to the ordinary adversarial proceedings before a Chamber, it will be a simplified and accelerated procedure in that the Court will simply bring the case (possibly a group of similar cases) to the respondent Party's attention, pointing out that it concerns an issue which is already the subject of well-established case-law. Should the respondent Party agree with the Court's position, the latter will be able to give its judgment very rapidly. The respondent Party may contest the application of Article 28, paragraph 4.b, for example, if it considers that domestic remedies have not been exhausted or that the case at issue differs from the applications which have resulted in the well-established case-law. However, it may never veto the use of this procedure which lies within the committee's sole competence. The committee rules on all aspects of the case (admissibility, merits, just satisfaction) in a single judgment or decision. This procedure requires unanimity on each aspect. Failure to reach a unanimous decision counts as no decision, in which event the Chamber procedure applies (Article 29). It will then fall to the Chamber to decide whether all aspects of the case should be covered in a single judgment. Even when the committee initially intends to apply the procedure provided for in Article 28, paragraph 4.b, it may declare an application inadmissible under Article 28, paragraph 4.a. This may happen, for example, if the respondent Party has persuaded the committee that domestic remedies have not been exhausted.

18. The implementation of the new procedure will increase substantially the Court's decision-making capacity and effectiveness, since many cases can be decided by three judges, instead of the seven currently required when judgments or decisions are given by a Chamber.

19. Even when a three-judge committee gives a judgment on the merits, the judge elected in respect of the High Contracting Party concerned will not be an *ex officio* member of the decision-making body, in contrast with the situation with regard to judgments on the merits under the Convention as it stands. The presence of this judge would not appear necessary, since committees will deal with cases on which well-established case-law exists. However, a committee may invite the judge elected in respect of the High Contracting Party concerned to replace one of its members as, in some cases, the presence of this judge may prove useful. For example, it may be felt that this judge, who is familiar with the legal system of the respondent Party, should join in taking the decision, particularly when such questions as exhaustion of domestic remedies need to be clarified. One of the factors which a committee may consider, in deciding whether to invite the judge elected in respect of the respondent Party to join it, is whether that Party has contested the applicability of paragraph 4.b. The reason why this factor has been explicitly mentioned in paragraph 6 is that it was considered important to have at least some reference in the Convention itself to the possibility for respondent Parties to contest the application of the simplified procedure (see paragraph 17 above). For example, a respondent

Party may contest the new procedure on the basis that the case in question differs in some material respect from the established case-law cited. It is likely that the expertise of the "national judge" in domestic law and practice will be relevant to this issue and therefore helpful to the committee. Should this judge be absent or unable to sit, the procedure provided for in Article 27, paragraph 2 *in fine* applies.

20. It is for the Court, in its rules, to settle practical questions relating to the composition of three-judge committees and, more generally, to plan its working methods in a way that optimises the new procedure's effectiveness.

Final and transitional provisions

Article 5 of the protocol

21. This article is one of the usual final clauses included in treaties prepared within the Council of Europe. This protocol does not contain any provisions on reservations. Like Protocol No. 14, this protocol excludes the making of reservations.

Article 6 of the protocol

22. The text of this article is taken from Article 7 of Protocol No. 9 to the Convention. It is based on the model final clauses approved by the Committee of Ministers and contains the provisions under which a member state of the Council of Europe may become bound by the Protocol. The number of states whose expression of consent to be bound is required for the protocol to enter into force was set very low (at three), in order to allow the protocol to enter into force as quickly as possible.

[Article 7 of the protocol

23. Article 7 of the protocol provides for a mechanism whereby a High Contracting Party may "opt in" to its provisional application pending its entry into force in respect of that High Contracting Party. It is intended to facilitate the earliest possible application of the protocol with respect to the largest possible number of High Contracting Parties, since domestic procedures prior to expression of consent to be bound may be lengthy.]

Article 8 of the protocol

24. The first paragraph of this provision confirms that, upon entry into force [or provisional application] of this protocol, its provisions can be applied immediately to all applications pending with respect to High Contracting Parties for which it is in force [or being applied on a provisional basis]. This is so as not to delay the impact of the system's increased effectiveness which will result from the protocol.

25. The second paragraph is intended to cover the situation in which an application is brought against two or more High Contracting Parties, in respect of one or more of which the protocol is not in force [or being provisionally applied] [or in respect of which the relevant corresponding provisions of Protocol No. 14 are not being applied provisionally]. Since such an application could not be dealt with under two sets of procedures simultaneously, it was decided that it should be treated under the existing procedures (i.e. excluding the possibility of the single judge procedure or the new competence for three-judge committees).

Article 9 of the protocol

26. This article reflects the fact that the protocol is intended only as a provisional, interim measure pending the entry into force of Protocol No. 14. Since the two procedures introduced by the protocol are taken from Protocol No. 14, entry into force of the latter will in practice make no difference as regards the treatment of applications brought against states in respect of which Protocol No. 14 bis had been in force [or provisionally applied].

Article 10 of the protocol

27. This article is one of the usual final clauses included in treaties prepared within the Council of Europe. [Its paragraph d. refers to the procedure established under Article 7 of the protocol for "opting in" to its provisional application (see paragraph 23 above)].