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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

OPINION OF THE CAHDI ON THE PUBLIC INTERNATIONAL LAW ASPECTS OF THE ADVISABILITY AND MODALITIES OF INVITING THE EUROPEAN COURT OF HUMAN RIGHTS TO PUT INTO PRACTICE CERTAIN PROCEDURES ALREADY ENVISAGED TO INCREASE THE COURT'S CASE-PROCESSING CAPACITY, IN PARTICULAR THE NEW SINGLE-JUDGE AND COMMITTEE PROCEDURES

Introduction

1. On 19 November 2008, at their 1041st meeting, the Ministers' Deputies adopted the following decision:

"The Deputies

1. *recalled the oral report by the Chairman of the CL-CEDH [Liaison Committee with the European Court of Human Rights] on the Liaison Committee meeting of 14 October 2008 (1040th meeting, 5 November 2008, item 4.4);*

2. *noted with grave concern the continuing increase in the volume of individual applications brought before the Court and its impact on the processing of applications by the Court which creates an exceptional situation and threatens to undermine the effective operation of the Convention system;*

3. *agreed that it is urgent to adopt measures aimed at enabling the Court to increase its case-processing capacity;*

4. *requested the Steering Committee for Human Rights (CDDH) to give, before 1 December 2008, a preliminary opinion on the advisability and modalities of inviting the Court to put 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, and a final opinion on the same matter by 31 March 2009;*

5. *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 this matter and to inform the CDDH of this opinion through the Secretariat."*

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2. Taking note of the terms of the Ministers' Deputies decision, the CAHDI will confine its response thereto strictly to the public international law aspects of the matter.

Background

3. The words "certain procedures which are already envisaged", used in point 4 of the Committee of Ministers' decision of 19 November 2008, refer largely to *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*[1] (hereafter "Protocol 14") but also to all possible measures, in particular those mentioned by the Committee of Ministers, aimed at reinforcing the efficiency of the Court.[2]

4. The CAHDI recalls that, since the entry into force of Protocol 11, an in-depth study has been made of means of ensuring the Court's effectiveness. This process notably led to the drafting of Protocol 14,[3] which was opened for signature by Council of Europe member States signatories of the European Convention on Human Rights[4] on 13 May 2004. On this occasion the Committee of Ministers expressly recognised the urgency of the reform.[5] In conformity with the provisions of Article 19 of Protocol 14, its entry into force is conditional on its ratification by all Parties to the European Convention on Human Rights.

5. Between 4 October 2004, when the first instruments of ratification were deposited, and 12 October 2006, 46 out of the 47 States Parties to the European Convention on Human Rights ratified Protocol 14. To date, the Protocol's entry into force remains conditional on its ratification by the Russian Federation, which signed the Protocol on 4 May 2006.

6. In parallel, the Court and its Registry, in agreement with the States Parties to the European Convention on Human Rights, implemented a number of measures[6] contributing sensibly to the reinforcement of the efficiency of the Court, without however managing to stem the growing number of pending applications[7].

7. The CAHDI has regularly kept itself informed about the urgency of the situation at the Court. It discussed this question, in particular, at its 36th meeting (London, 7-8 October 2008), which followed the conference "International Courts and Tribunals - the Challenges Ahead" (London, 6-7 October 2008) in which the President and the Registrar of the Court had participated.

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[1] Council of Europe Treaty Series No. 194.

[2] See also Report of the Group of Wise Persons to the Committee of Ministers, Committee of Ministers Documents, 979bis Meeting, 15 November 2006; CM(2006)203 15 November 2006.

[3] For full details of this process see the explanatory report to Protocol 14, §§ 20 to 33.

[4] European Convention for the Protection of Human Rights and Fundamental Freedoms, European Treaty Series No. 5.

[5] See the Declaration adopted by the Committee of Ministers at the 114th ministerial session (12-13 May 2004) entitled "*Ensuring the effectiveness of the European Convention on Human Rights at national and European levels*".

[6] See the frequent application of Article 29 para. 3 of the Convention, allowing the Chambers to examine the merits of the applications at the same time as their admissibility.

[7] According to the statistics published by the Court in its annual reports, 18,383 cases were pending before the Court at the end of 2001. This number grew to 79,400 on 1st January 2008, and to 97,300 on 31st December 2008.

8. On 14 October 2008 the Liaison Committee with the European Court of Human Rights set up within the Committee of Ministers held a meeting with the President of the Court at which he voiced his serious concerns about the continuing growth in the number of individual applications brought before the Court and about the latter's capacity to process pending cases in an effective manner.

9. It was in this context that the Ministers' Deputies adopted the decision of 19 November 2008. On 1 December 2008 the Steering Committee for Human Rights (CDDH) of the Council of Europe adopted a preliminary opinion[8] (hereafter "the CDDH's opinion"), which was transmitted to the CAHDI through the Secretariat.

10. The substantive considerations set out in the present opinion include a number of elements in reply to the CDDH's opinion but, for practical reasons, do not necessarily respond point by point to the questions raised therein.

The CAHDI's analysis

11. The CAHDI firstly points out that the fastest, simplest way of putting the provisions of Protocol 14 into practice is, in any event, its ratification by all the States Parties to the European Convention on Human Rights, thereby enabling its entry into force. Therefore, the entry into force of Protocol 14 should remain the first priority of the States Parties to the European Convention on Human Rights. The CAHDI wishes every effort to be made to this end.

12. In this connection, the CAHDI points out that none of the provisions of the Protocol prevents the formulation of interpretative declarations or reservations at the time of its ratification. It nonetheless goes without saying that any reservations formulated should fulfil the relevant conditions laid down in this respect by pertinent norms of international law relevant to the law of treaties, as well as, where appropriate, by the treaty which the protocol is amending, that is to say the conditions set out in Article 57 of the European Convention on Human Rights, which expressly provides for the possibility of formulating reservations to the Convention in certain circumstances.

13. Since the conditions for the Protocol's entry into force have not been met, this opinion seeks to propose solutions which are consistent with the urgency of the situation, while respecting the governing principles of public international law.

[8] See document CDDH (2008)014 Addendum I.

14. The CAHDI notes that the *travaux préparatoires* of the Protocol show that the possibility of including in this treaty a specific provision on its provisional application, founded in particular on Article 25 of the Vienna Convention on the Law of Treaties[9] (hereafter the "Vienna Convention"), was suggested by the secretariat during the discussions on its drafting,[10] but was not deemed appropriate at the time.[11]

15. The CAHDI recalls that, at its 36th meeting, it had occasion to hold an exchange of views on the possibility of provisionally applying certain procedures provided for in Protocol 14. These discussions showed that there was a real will within the CAHDI to consider a solution that could offer a prompt answer to the Court's difficult position while taking into account the proposals made by other Council of Europe committees.

16. Like the CDDH in its preliminary opinion, the CAHDI wishes to underline the seriousness of the threat to the entire control mechanism of the Convention and the need to respond to it.

17. Lastly, the CAHDI notes that the Registry of the Court[12] has indicated that there would be no technical obstacles to implementing certain procedures laid down in Protocol 14. The Secretariat of the Council of Europe had already highlighted that the amendments contained in Protocol 14 would not represent any significant restructuring of the control system of the Convention[13].

18. The CAHDI is of the opinion that it is impossible to amend the European Convention on Human Rights by interpreting it dynamically on the basis of its object and purpose. Such a possibility, contemplated in the CDDH's opinion, does not seem to be based on established principles of public international law. Equally, it is not possible to amend the rules of the Court by incorporating measures envisaged under Protocol 14 as outlined by the CDDH. The rules of the Court - drafted and adopted, as they are, under the sole competence of the Court[14] - cannot serve the purpose of amending the Convention. Indeed, it would not be possible to modify the Convention on the basis of such a unilateral initiative of the Court.

19. One further suggestion was that each State might make a unilateral declaration consenting to the provisional application of certain provisions of Protocol 14, without there being an agreement among the Parties to the ECHR. However, whilst an individual

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[9] Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969 and entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331.

[10] See document CDDH-GDR [Reflection Group on the Reinforcement of the Human Rights Protection Mechanism] (2003)020 entitled *"Draft reform of the European Court of Human Rights - Final clauses for an accelerated entry into force of an amending protocol"*, document prepared by the Legal Advice Department and Treaty Office, Directorate General of Legal Affairs, Strasbourg, 14 May 2003. This document was submitted at the joint meeting with the Committee of Experts for the Improvement of Procedures for the Protection of Human Rights.

[11] See in particular document CDDH-GDR(2003)031 entitled *"Exchange of views on possibilities for an accelerated entry into force of an amending protocol to the Convention"* (extracts of the report of the joint CDDH-GDR/DH-PR meeting of 17-20 March 2003).

[12] CDDH(2008)014, § 10

[13] *Aide-mémoire*, prepared by the Directorate General of Human Rights of the Council of Europe : *Ensuring a rapid entry into force of Protocol No. 14 to the European Convention on Human Rights*, in *Applying and supervising the ECHR, Reform of the European human rights system*, Proceedings of the high-level seminar, Oslo, 18 October 2004, p. 64.

[14] See article 26 d) of the European Convention on Human Rights which states "The plenary Court shall (…) d) adopt the rules of the Court (…)".

State could waive the application of a provision in the current ECHR intended to benefit that State, that State could not waive the application of such a provision intended to benefit applicants. This option would not be advisable.

Possibility of adopting a new legal instrument

20. Establishing a new Protocol as a temporary alternative to Protocol 14, will require a decision from the Committee of Ministers acting as a Council of Europe organ, in accordance with its existing rules of procedure. These rules of procedure do not require unanimity[15]. This new Protocol will amend the ECHR. It will be for the Committee of Ministers to instruct the CDDH to draft a new Protocol, which should include crucial provisions from Protocol 14 on the understanding that only consequential changes to these provisions may be made. A new Protocol should also include a provision allowing for its provisional application, a provision on the entry into force as soon as the defined number of States has consented to be bound, with respect to those States, as well as a "sunset" provision which will bring the new Protocol to an end once Protocol 14 has been ratified by all Council of Europe Member States. Once a new Protocol is adopted by the Committee of Ministers, it will follow the normal process of signature and ratification by the Member States.

The legal basis offered by public international law for possible provisional application of certain provisions of Protocol 14

21. Article 25 of the Vienna Convention on the Law of Treaties, entitled "Provisional application", provides:

> "*1. A treaty or part of a treaty is applied provisionally pending its entry into force if:*
> *a) the treaty itself so provides; or*
> *b) the negotiating States have in some other manner so agreed.*
>
> *2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty."*

22. Upon the question of the applicability of the Vienna Convention, the CAHDI recalls that some of the rules laid down in that Convention might be considered as a codification of existing customary law.[16] In particular, this seems to be the case with regard to the rules laid down in Article 25.

23. It follows from the first paragraph of this article that provisional application of a treaty can be based either on a clause in the treaty making express provision for it or an agreement between the negotiating States, even if this agreement is concluded well after the adoption of the treaty in question.[17]

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[15] See Article 20 of the Statute of the Council of Europe.

[16] See, *inter alia*, International Court of Justice, Judgment of 25 September 1997, *Project Gabcikovo-Nagymaros* (Hungary/Slovaquia), I.C.J. Reports 1997, p. 38, para. 46.

[17] See A. GESLIN, *La mise en application provisoire des traités*, Editions A. Pedone, Paris, 2005, p. 124 (in particular the example of the trade agreement adopted on 16 September 1950 by the Belgo-Luxembourg Economic Union and Mexico), On provisional application of treaties, see moreover I. SINCLAIR, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 1984, pp. 46 et sec and A. AUST, *Modern Treaty Law and Practice*, Cambridge University Press, 2000, pp. 139-141.

24. As already mentioned, the CAHDI reiterates that nothing in Protocol 14 provides for the possibility of provisionally applying any of the provisions contained in it, thus ruling out the ground envisaged in Article 25.1 a) of the Vienna Convention.

25. Absent a specific clause included in the treaty, the provisional application of certain provisions of Protocol 14 should be founded on an agreement between the "negotiating" States, in accordance with Article 25.1 b) of the Vienna Convention.

26. The CAHDI underlines that many treaties and conventions, whether bilateral or multilateral, have already been provisionally applied, initially on the basis of widespread, albeit diverse, practice, and at a later stage on the basis of Article 25 of the Vienna Convention,[18] which codified this practice into law.

27. Nevertheless, the CAHDI is also conscious of the fact that, in order to provisionally apply the provisions of a treaty, on the basis of an agreement, some member States need to engage new national procedures to seek approval to this end, in accordance with their constitutional rules. Conversely, other States may not need to engage some new national procedures, including by inferring from the existing consent to be bound by the particular treaty, consent also on its provisional application.

Nature of the instrument constituting an agreement on the possible provisional application of certain provisions of Protocol 14

28. The CAHDI wishes to state forthwith that, since the Protocol says nothing about the possibility of provisional application of its provisions or a part thereof, such provisional application must have its basis in an instrument separate from the Protocol itself.[19]

The institutional framework within which the instrument of agreement on the provisional application of certain provisions of Protocol 14 might be adopted

29. The CAHDI points out that the provisional application of a treaty, in the present case Protocol 14, on the basis of Article 25.1 b) of the Vienna Convention is in principle conditional on an agreement between its "negotiating States". This wording is silent to the question whether States having already consented to be bound by the treaty after its adoption, but not being *stricto sensu* “negotiating States”, can join such agreement on provisional application.

30. Although Article 25.1 b) is thus unequivocal on the fact that the agreement on provisional application shall be based on the Protocol 14 “negotiating States”, this provision does not stipulate that this agreement shall necessarily be limited to those States. The CAHDI notes that several member States of the Council of Europe were

[18] A. GESLIN, op. cit., pp. 22 et seq.. For many examples of the provisional application of treaties, see also D. VIGNES, *Une notion ambiguë : la mise en application provisoire des traités*, Annuaire français de droit international, 1972, pp. 181-199, and R. LEFEBER, "Provisional application of treaties" *Essays on the law of treaties. A collection of essays in honour of Bert Vierdag*, J. Klabbers and R. Lefeber (Eds), Martinus Nijhoff Publishers, 1998, pp. 81-95.

[19] See, in particular, the International Law Commission's reasoning on this subject in Summary records of the 17th session, 3 May - 9 July 1965, discussions, 791st meeting, 26 May 1965, Extracts from the Yearbook of the International Law Commission, 1965, Vol. I, § 4, p. 109.

indeed not, strictly speaking, “negotiating States” of Protocol 14,[20] but have meanwhile consented to be bound by this instrument. There is nothing to prevent them from participating in the eventual provisional application process.[21]

31. As for the question whether such instrument could be concluded within the Committee of Ministers of the Council of Europe, the CAHDI points out that a resolution of the Committee of Ministers is in principle a unilateral decision attributable to the Organisation itself as a subject of international law.[22] The measures envisaged in Protocol 14 cannot be reduced to “matters relating to the internal organisation and arrangements of the Council of Europe”, which according to Article 16 of the Statute of the Council of Europe[23] would then fall within the ambit of decision-making powers of the Committee of Ministers. Amendments to the European Convention of Human Rights should follow the traditional treaty-making procedures set out in Article 15 of the Statute. Against this background it cannot be seen that adoption of such measures could be inferred from any implied powers of the Council of Europe as an international organisation. An agreement on provisional application concluded within the Committee of Ministers as such would consequently risk causing confusion, since it could be attributed to the Council of Europe as an organisation instead of to the Protocol's “negotiating States”, as should in fact be the case.

32. It follows that the Committee of Ministers as such should not be deemed to have the powers to adopt an agreement of this kind. In the past, the Committee of Ministers of the Council of Europe has had to deal with a situation which may appear to be similar but which, in reality, is not. On 11 December 1991, the Committee of Ministers did indeed adopt a decision related to the Protocol amending the European Social Charter[24] by which it "requested the States party to the Charter and the supervisory bodies to envisage the application of certain of the measures provided for in this Protocol before its entry into force, in so far as the text of the Charter will allow.” The agreement on provisional application which is at issue must be distinguished from the decision of 11 December 1991 as it would constitute, not a recommendation to the States, but a legal act rendering their effective consent to the provisional application of certain provisions of Protocol 14.

Conditions for the adoption of an instrument on the provisional application of certain provisions of Protocol 14

33. In accordance with Article 25, para.1 (b) of the Vienna Convention, the States Parties to the European Convention on Human Rights need to agree on provisional application. They may choose to do so within the meeting of the Committee of Ministers of the Council of Europe, which will then act as a forum of the negotiating States, and not as an organ of the Council of Europe.

34. This raises the question of *how* the States Parties should decide on provisional application. Article 25 of the Vienna Convention does not give a specific procedure for this, other than mentioning that “the negotiating States have in some other manner so

[20] The Principality of Monaco, Montenegro and the Republic of Serbia.
[21] For an opinion along these lines see R. LEFEBER, op. cit., p. 85.
[22] NGUYEN QUOC DINH†, P. DAILLIER, A. PELLET, Droit international public, L.G.D.J., 7th edition, § 252, p. 387.
[23] Statute of the Council of Europe, European Treaty Series, No 1.
[24] Protocol amending the European Social Charter, European Treaty Series, No. 142.

agreed." Accordingly, a decision by consensus and absence of disagreement by any negotiating State would be a legally sound basis for an agreement on provisional application.

35. This conclusion does not mean that the adoption of such an agreement would necessarily result in the provisional application of certain provisions of Protocol 14 in respect of all States Parties to the Convention. It simply entails that consensus should in any event be required for the adoption of such an agreement, albeit one providing for the provisional application of these provisions solely with regard to States having consented thereto.

36. The CAHDI deems it important to raise a number of points regarding the rules governing any agreement on provisional application.

37. The Committee points out that provisional application of a treaty differs from its entry into force.[25] As a result, a clear distinction must be drawn between provisional application and "anticipated" entry into force or "anticipated" application of a treaty, since a treaty has no legal existence as long as the conditions for its entry into force have not been met. As already mentioned, the provisional application of certain provisions of the original treaty is based on an agreement separate from the treaty itself.

38. The CAHDI is conscious that an agreement on provisional application may raise questions of compatibility with Member States' domestic law.[26] The problematic aspects of these issues are lessened by the fact that all but one State have ratified Protocol 14 and that the State which has not yet done so does not, in principle, seem to present any technical obstacles on this issue.[27]

39. The CAHDI does not overlook the possibility that certain States, having accepted the agreement so as to allow the Court to apply provisionally certain provisions of Protocol 14 as regards other States, cannot accept provisional application as regards themselves. An additional mechanism of acceptance should therefore be considered, following which the agreement on provisional application will have full effect.

40. Concerning the content of the agreement on provisional application, the CAHDI considers that it would be preferable to specify the date from which the agreement should be applicable. The application of such an agreement would entail suspending the application of the relevant provisions of Protocol 11,[28] but solely the provisions modified by the agreement on provisional application.

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[25] See, in particular, A. AUST, *Modern Treaty Law and Practice*, Cambridge University Press, Second Edition, 2007, p.172 ; and A. GESLIN, op. cit., pp. 145 et seq.

[26] Council of Europe, *Treaty making – Expression of Consent by States to be bound by a Treaty*, Council of Europe and British Institute of International and Comparative Law (Eds), published by Kluwer International Law, 2001, p. 83. See also, on the absence of impact of Protocol 14 on domestic law, *Aide-mémoire*, prepared by the Directorate General of Human Rights of the Council of Europe : *Ensuring a rapid entry into force of Protocol No. 14 to the European Convention on Human Rights*, *op. cit.*, p. 64.

[27] Council of Europe, *Treaty making – Expression of Consent by States to be bound by a Treaty*, p. 84.

[28] A. GESLIN, op. cit., pp. 98 et seq.

41. The agreement on provisional application must also stipulate whether its provisions can apply immediately to all applications pending before the Court, even if they were lodged at an earlier date.[29]

42. It could be considered to provide for the case of an application lodged simultaneously against two States to which different sets of rules apply. The CAHDI suggests that, in such a case, the provisions of Protocol 11 should be applicable.

43. The CAHDI further notes that the agreement on provisional application may expressly lay down the conditions of its termination. Article 25.2 of the Vienna Convention already sets out a hypothesis applicable where the negotiating States have said nothing on the matter. They are nonetheless entirely free to agree on the modalities of the agreement's termination.

44. The entry into force of Protocol 14, following its eventual ratification by all the States Parties to the European Convention on Human Rights, should logically bring to an end the provisional application.

45. Whatever be the proposed solution, other than entry into force of Protocol 14 as described in paragraphs 11 and 12 above, the existence of two different sets of procedure within the European Court of Human Rights can not be avoided.

Conclusions and recommendations of the CAHDI

1. The CAHDI took note of the terms of reference accorded to it by the Committee of Ministers and shared the concerns of the latter regarding the threat to the monitoring mechanism of the European Convention on Human Rights. It fully agreed on the necessity of urgently finding efficient responses to this serious problem.

The CAHDI considered that the entry into force of Protocol 14 remains the utmost priority. Therefore it encouraged the State Party to the European Convention on Human Rights which has not yet done so, to ratify this Protocol. If need be, interpretative declarations or reservations could be formulated in conformity with the principles of the international law of treaties and pertinent provisions of the Convention.

2. Pending the entry into force of Protocol 14, the CAHDI thoroughly examined the preliminary opinion issued by the CDDH on 1st December 2008. As regards the request pertaining to the advisability and modalities of inviting the Court to put 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, the CAHDI considered the two following options as fully compatible with the governing principles of public international law:

- The adoption of a new legal instrument (Protocol) stipulating the procedures in question which would enter into force following the deposit of a specific

[29] In the event of the entry into force of Protocol 14, Article 20 § 1 of the protocol itself provides for its immediate application to all cases pending before the Court, which is in keeping with effective processing of the backlog.

number of ratifications, with respect to those States that have expressed their consent.

- A conference or a meeting of the States Parties to the European Convention on Human Rights resulting in an agreement - adopted by consensus – which would decide on the provisional application of the relevant provisions of Protocol 14, with respect to those States that have expressed their consent.

3. The CAHDI also considered other proposals of the CDDH, namely the amendment of the Convention or its application by the Court by virtue of:

- the adoption of a resolution by the Committee of Ministers on the basis of its possible 'implied powers' ;
- the adoption of unilateral declarations by States;
- the dynamic interpretation of the Convention on the basis of its object and purpose;
- the amendment of the Rules of Court.

The CAHDI is of the opinion that these proposals raise serious questions of compatibility with public international law and/or do not offer sufficiently sound legal grounds for the implementation of the desired solutions.

4. The continued efforts of the Court and its Registry aimed at an increasingly efficient treatment of the cases, whilst maintaining the high quality of judgments delivered, should be unequivocally supported.