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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW
(CAHDI)

37th meeting
Strasbourg, 19-20 March 2009

LETTER FROM THE CHAIRMANSHIP OF THE CDDH TO THE CHAIRMANSHIP OF THE CAHDI IN VIEW OF THE DISCUSSION OF ITEM 5 OF THE AGENDA OF THE MEETING

Document submitted by
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Please quote: DG-HL/DA/ADS/mc

Mr Rolf Einar Fife
Chairperson of the Committee of
Legal Advisers on Public International Law

Strasbourg, 12 March 2009

Dear Mr Fife

I write in relation to the issue of putting into practice certain procedures foreseen to increase the Court's case-processing capacity, on the public international law aspects of which the CAHDI is expected to adopt an opinion and on which the CDDH will subsequently adopt its own final opinion. As you may be aware, since adoption of the CDDH's preliminary opinion last November, the Reflection Group, a body answerable to the CDDH, has itself also been discussing the issue. Mr Roeland Böcker, Chairperson of the Reflection Group, will be participating in your forthcoming meeting.

In the course of its discussions, the Reflection Group has gathered information from member States on the question of whether their domestic legal situations might affect implementation of any of the possible modalities outlined in the CDDH provisional opinion. This information and, indeed, the deliberations of the Reflection Group in general may prove useful to you in the course of your work. In accordance with the cooperation between our two committees set out in the decision of the Ministers' Deputies, therefore, I am forwarding to you herewith the relevant extracts of the reports of the last two Reflection Group meetings. I should be grateful if this information could be circulated to the members of CAHDI so that it can be taken into consideration in your discussions next week.

It would be particularly helpful to the CDDH if your committee could address the legal aspects of the option identified in paragraph 4 of the report of the 5th Reflection Group meeting, i.e. a "Protocol No. 14 bis," an option which was not explicitly identified in the CDDH's preliminary opinion.

May I express my hope that you have an enjoyable and constructive meeting. Once again, please accept my apologies for my unavoidable absence due to other commitments within the Committee of Ministers that day.

Yours sincerely

Deniz Akçay
Chairperson of the Steering Committee for Human Rights

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Report of the 4th meeting of the Reflection Group (28-30 January 2009) (extract)

2. On 19 November, the Ministers' Deputies had adopted a decision requesting the 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." The CDDH had adopted its preliminary opinion at its 67th meeting.[1]

3. The Chairperson also presented the "Advisory Report on the Application of Protocol No. 14 to the European Convention on Human Rights," prepared by the Dutch Advisory Committee on Issues of Public International Law.[2] This independent body, composed largely of university professors, had decided to focus on the new single-judge and committee procedures, since these measures were most likely to produce immediate results and would not risk creating divergent caselaw. The Advisory Committee had identified three possible modalities, namely partial provisional application of Protocol No. 14 to the Convention under article 25 of the Vienna Convention on the Law of Treaties, a "Protocol 14bis" containing the two measures and a provision on entry into force following ratification by a certain number of States, and a decision of the Committee of Ministers allowing the Court to put the two measures into practice. The Group observed that these largely overlapped with the possibilities identified by the CDDH in its preliminary opinion. The Chairperson informed the Group that the Dutch government had not yet taken position on these ideas but wished to place them before the Group for discussion.

4. The Group welcomed the Advisory Committee's report as an important contribution to the debate and unanimously agreed, as had the CDDH in its preliminary opinion (and, indeed, the Ministers' Deputies in their decision), that there was an urgent need for the Court to put into practice procedures to increase its case-processing capacity. In response to the report's reference to the situation in the Russian Federation, that country's expert informed the Group that the State Duma's current position against ratification meant that the ratification bill remained before it.

5. Discussions followed on the various possibilities suggested in the Advisory Committee's report and in the CDDH preliminary opinion, on the understanding that it would be for the CDDH to reach a final conclusion on the basis of all available material, including the Advisory Committee's report, the Group's own discussions and, of course, the expected CAHDI opinion on public international law aspects. The overriding importance of legality to any solution that might eventually be identified was strongly emphasised, in order to protect the credibility and authority of the Court.

6. The Group's discussions identified two important new considerations. First, a further possible modality was suggested, involving a new Protocol containing the two procedures mentioned above, with a provision on entry into force following ratification by a certain number of States and also one on provisional entry into force. A variation on this, to include all the substantive provisions of Protocol No. 14, was

[1] See doc. CDDH(2008)014 Add. I.
[2] See doc. DH-S-GDR(2009)005.

also considered but thought by many to be too difficult as it would include provisions such as those on changing the length of the judicial term of office and, most problematically, allowing for EU accession to the Convention.

7. Second, several experts expressed the concern that any modality that would have the effect of modifying a treaty that had been ratified by their national parliaments, namely the Convention, could be problematic under their national laws although it was unclear how serious or widespread such problems might be. It was important to take this into account when identifying appropriate modalities and in particular when assessing whether or not they could match the requirement suggested by the CDDH in its preliminary opinion for steps to be taken "at the earliest possible opportunity." Some experts suggested that similar concerns could also extend to any modality involving provisional application.

8. The Group concluded by stating its keen interest in the papers produced by the CDDH and the Dutch Advisory Committee, agreeing that further discussion was required on the various possible modalities. It decided that by its next meeting, all experts should have obtained information on whether their countries' domestic legal situations might affect implementation of any of the possible modalities, noting that this was a question that would have to be addressed before the CDDH could produce its final opinion. The Group also suggested that the Chairperson of the CDDH could make the same request to members of the CDDH when distributing copies of the Dutch advisory committee's report. Finally, the Group asked the Russian expert to provide information at its next meeting as to whether that country's government would agree to the other 46 member States putting certain procedures into practice, since this was also a question of fundamental importance.

Report of the 5th meeting of the Reflection Group (4-6 March 2009) (extract)

3. Following discussions at its 4th meeting, the Group continued its consideration of this issue, taking into account in particular responses received to the requests for information made at the 4th meeting.[3] The following additional information on national constitutional situations was also made available:

- *Austria:* parliamentary approval would be needed for every possible modality outlined so far.

- *Czech Republic:* Czech law observes the principle of "parallelisme des formes" – any modification to an instrument should follow the same procedure as for adoption of that instrument. Because Protocol No. 14 does not include a provision on provisional application, a full parliamentary procedure would be necessary. This implies that the procedure for "Protocol No. 14bis" would only be slightly more lengthy but would not involve any possible legal controversy.

- *Finland:* it appears that Finnish law requires parliamentary approval for any modality, although this could be obtained quickly.

[3] See doc. DH-S-GDR(2009)013.

- *Germany:* provisional application of part of Protocol No. 14 would probably not require formal parliamentary approval. Protocol No. 14bis would require ratification, which could be done quickly (subject to the parliamentary elections in September), but provisional application of it would be difficult as it would change existing national law.

- *Ireland:* parliamentary approval for provisional application of Protocol No. 14 would not be necessary, a government decision would be required. Whatever course is adopted must have a clear legal basis. Ireland will finalise its thinking on which is the best option shortly.

- *Italy:* Italian law stipulates that a law can only be changed by another law and not by a "simplified agreement." This applies also to changing the terms on which Protocol No. 14 would come into force. Furthermore, it should not be assumed that because a parliament has approved the entry into force of a treaty it can be taken to have approved also entry into force of part of that treaty; approval was to entry into force of the treaty as a package of measures.

- *Norway:* Norwegian law would require parliamentary approval for both Protocol No. 14bis and a unilateral declaration, although perhaps not for provisional application, depending on the articles of Protocol No. 14 to which it applied. None of this would be a serious practical problem, however, as parliamentary procedure would not be lengthy or complicated.

- *Poland:* provisional application would not be possible as not envisaged by Protocol No. 14. Furthermore, provisional application would only be possible on the basis of agreement by all States parties to the Convention. The parliamentary ratification procedure could take two years.

- *Romania:* the proposals mentioned in the CDDH preliminary opinion would require parliamentary approval, with the exception of provisional application of certain provisions of a treaty already ratified by Romania, such as Protocol No. 14. Consideration of the possibility of a Protocol No. 14bis should take into account the fact that provisional application would not be possible for Romania prior to ratification and the risk of fragmentation of the Convention mechanism.

- *Russian Federation:* the position of the Russian Federation on the issue is still under consideration by the relevant authorities. It is envisaged that the position will be defined after the CAHDI and the CDDH have finalised their positions.

- *Sweden:* according to Swedish law, parliamentary approval would be needed for action by the Committee of Ministers under the Statute, unilateral declarations and Protocol No. 14bis; it is not yet clear whether or not provisional application or interpretation of the Convention would require such approval. In any case, the parliamentary procedure would not be lengthy or complicated.

- *Switzerland:* although opinion amongst the government's legal advisers was not unanimous, it appears that provisional application and unilateral declarations would require parliamentary approval under Swiss law, as would Protocol No. 14bis. If several options are possible, the quickest should be preferred.

- *Turkey:* for the terms of a treaty to be changed by another treaty requires parliamentary ratification. It would be necessary to give consideration on a case-by-case basis to the requirements of other ways of changing the terms of a treaty.

- *United Kingdom:* agreement on provisional application of Protocol No. 14 would not require an additional ratification process but it would be necessary for all 47 States parties to the Convention to agree to provisional application by 46. The United Kingdom would be likely to prefer provisional application as a possible modality.

4. Following further discussions, the Group noted that provisional application would require lengthy parliamentary approval procedures for many States. Indeed, when taking into account the likely difficulties posed by various national laws, Protocol No. 14bis appeared worthy of further consideration. Such a protocol would contain the two new procedures along with provisions on (i) entry into force following ratification by a limited number of States parties to the Convention and (ii) provisional entry into force thereafter with respect to those other States that had not yet ratified and for which provisional entry into force was possible. The public international law aspects of this option remained to be further addressed by the CAHDI and the overall question, without limitation on the possible modalities open to consideration, to be resolved by the CDDH in its final opinion.