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Addendum I

STEERING COMMITTEE FOR HUMAN RIGHTS (CDDH)

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CDDH Preliminary Opinion on putting into practice certain procedures envisaged to increase the Court's case-processing capacity

adopted at its 67th meeting
Strasbourg, 25-28 November 2008

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Preliminary Opinion of the Steering Committee for Human Rights (CDDH) on putting into practice certain procedures envisaged to increase the Court's case-processing capacity

(adopted at its 67th meeting, 25-28 November 2008)

I. Introduction – the Ministers' Deputies' request

1. On 19 November, the Ministers' Deputies, having 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" and "agreed that it is urgent to adopt measures aimed at enabling the Court to increase its case-processing capacity", "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".

2. It can be observed from the outset that the two new procedures explicitly mentioned are also contained in provisions of Protocol No. 14 to the European Convention on Human Rights. Protocol 14, however, requires ratification by all States parties to the European Convention on Human Rights before it can enter into force. One of the 47 States parties to the Convention has yet to ratify the Protocol, with the result that it has not come into force. Obviously, the most appropriate and desirable method for putting the two procedures into practice remains prompt ratification of Protocol 14 by the 47th State party to the Convention and its subsequent entry into force as a result.

3. In accordance with the Deputies' request, the CDDH will have first to address the question of the advisability of putting the new measures into practice. If the CDDH does consider this advisable, it should then address the question of modalities. This provisional opinion will address the latter question under two aspects: how (on what legal basis) the Court could act, and how to invite the Court to act.

4. The CDDH is well aware of the importance of respecting the principle of legality in exploring these modalities, all the more so in that they relate to the control mechanism of the European Convention on Human Rights. It is essential that any action in this area have a sound legal basis. For the purpose of this preliminary opinion, therefore it will only address, in a tentative and non-exhaustive manner, some options which, it has been suggested, may *prima facie* appear to exist under public international law, although it will not enter into questions of public international law in detail. It assumes that these possibilities will be considered further in the CAHDI's opinion on the public international law aspects, on which basis it will return to them in its own final opinion.[1] An important general question on which CAHDI's opinion would be

[1] The Deputies 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 this matter and to inform the CDDH of this opinion through the Secretariat."

particularly helpful is what consequences may be drawn, under public international law, from the fact that a consensus exists among 46 States parties to the Convention on the introduction of the new procedures foreseen in Protocol 14, with the remaining State having signed the Protocol. Further specific questions to the CAHDI appear at various points in this provisional opinion.

II. The advisability of inviting the Court to put the two new procedures into practice

5. As President Costa noted at the 14 October 2008 meeting of the Ministers' Deputies Liaison Committee with the Court, the already huge backlog of pending cases [around 100,000 individual applications] grew by a further 15,500 cases in the first nine months of 2008 alone.[2] The enormous efforts already undertaken by the Court to maximise efficiency and the expansion of its Registry have proved insufficient to prevent further exponential growth of the backlog, let alone reduce it.

6. Such a continually deteriorating situation is clearly unsustainable and, as the Ministers' Deputies noted, seriously threatens the effectiveness and credibility of the control mechanism. President Costa has expressed the fear that the very existence of the Court is at stake. Indeed, the "urgent need to maintain and improve the efficiency of the control system for the long term, mainly in the light of the continuing increase in the workload," was already recognised and explicitly stated in the preamble of Protocol 14 as the reason for its adoption by the Committee of Ministers in 2004.

7. It is thus obvious that significant steps must be taken at the earliest possible opportunity to enable the Court to respond effectively to its caseload. President Costa has indicated that the two new procedures explicitly mentioned could increase the Court's capacity by 20-25%.[3] They would thus constitute appropriate steps.

8. The CDDH notes that the Deputies' decision refers to "certain procedures which are already envisaged to increase the Court's case-processing capacity" generally. It recalls that along with the two procedures mentioned, the new admissibility criterion contained in Article 12 of Protocol 14 was also amongst those provisions intended to increase, albeit not immediately, the Court's case-processing capacity, by providing an additional ground on which the Court could find cases inadmissible and thereby avoiding the need to proceed to judgment on their merits. It also recalls that its Reflection Group has already begun considering whether and how a similar result could be achieved on the basis of the current text of the Convention. The CDDH intends to return to this question in its final opinion.

9. Depending on the eventual modality that might be retained for putting the two procedures into practice, the result may be that the new procedures would apply only with respect to those States that have already ratified Protocol 14. Such an outcome may be considered undesirable, in terms both of the unity between Council of Europe member States and the effectiveness of protection provided by the Court to those bringing applications against the State that has yet to ratify Protocol 14. Evidently, it would be preferable to arrive at a solution applicable to all 47

[2] see doc. CL-CEDH(2008)CB2 FINAL

[3] The CDDH notes that other commentators have suggested that very significant increases in capacity could be obtained: see e.g. P. Boillat, "Le Protocole n°14 : les enjeux de la réforme," Les Petites Affiches (Paris), n°44, 2 March 2006, pp. 6-11, and Eaton & Schokkenbroek, "Reforming the Human Rights Protection System Established by the ECHR," HRLJ 2005, Vol. 26 No. 1-4, pp. 1-17 (p.5).

States, if possible. Nevertheless, the CDDH is firmly of the view that the necessity to respond to the threat to the Convention's control mechanism as a whole – the cornerstone of the wider European human rights protection system and of fundamental importance to the activities of the Council of Europe as a whole – is of overriding importance.

10. In this connection, it should be noted that the Registry of the Court has indicated that there would be no technical obstacles to putting these procedures into practice with respect only to those States that have ratified Protocol 14. For the non-ratifying State, the current procedures could remain in force unchanged.

III. Modalities whereby the Court could put the procedures into practice

11. Without claiming to be exhaustive, this opinion will look at the following six options by which the two procedures could be put into practice. Where appropriate, questions will be put for further consideration by the Committee of Legal Advisers on Public International Law (CAHDI) in its own opinion.

(i) Provisional application of Protocol 14
(ii) Action by the Committee of Ministers under the Statute of the Council of Europe
(iii) Unilateral declarations by States parties
(iv) Interpretation of the Convention in the light of its object and purpose, the current situation of the Court and adoption of Protocol 14 by the Committee of Ministers and its ratification by 46 of the 47 States parties to the Convention
(v) A new Protocol including some or all of the provisions of Protocol 14 but not requiring ratification by all States parties to the Convention for entry into force
(vi) A combination of possible options.

General considerations

12. In addition to questions of effectiveness and legality, three further factors should be taken into account when considering putting into practice the two new procedures: their effect (or otherwise) on the competence of the Court; their effect (or otherwise) on the situation of States parties during Court proceedings; and their effect (or otherwise) on the position of applicants.

13. First, since the Court already has full competence to rule on admissibility and merits, the two new procedures do not extend or modify its competence. This contrasts with the infringement proceedings envisaged by Protocol 14, under which both the Committee of Ministers and the Court would exercise new powers. The two procedures merely reduce the size of certain Court formations for certain categories of cases. Indeed, Protocol 14 itself envisages that such changes are not issues that must necessarily be dealt with in a treaty: see Article 6 of the Protocol amending Article 26 of the Convention regarding reduction in the size of Chambers.

14. Second, applying the two procedures would in practice not introduce any significant changes to States parties' procedural and substantive position under the Convention. The new single-judge procedure does not involve the respondent State in practice; indeed, if an application is dismissed as inadmissible under this procedure, the respondent State is not even informed of its existence. As to the new committee procedure, the main effect from the perspective of a respondent State would be that judgment in cases involving issues that are already the subject of well-established case-law would be given by a committee of three judges rather than a chamber of seven.

15. Third, the single judge procedure only affects clearly inadmissible cases. The new competences of committees in repetitive cases would lead to a quicker judgment in favour of the applicants. They are thus even in the interest of applicants and, indeed, States, as they would make it possible for the Court to reduce the length of proceedings.

Option A: Provisional application of Protocol 14

16. Article 25 of the 1969 Vienna Convention on the Law of Treaties provides that "a treaty or a part of a treaty [may be] applied provisionally pending its entry into force if the negotiating States have in some manner so agreed." It should be noted that not all States parties to the ECHR nor signatories of Protocol 14 were involved in negotiating the Protocol as they were not member States of the Council of Europe at the time.

Questions to the CAHDI:

17. Does Article 25 of the Vienna Convention or, indeed, public international law in general provide an appropriate legal basis on which the two new procedures (and potentially also the new admissibility criterion) could be put into effect? If so, what would be an appropriate modality for States to act on this basis?

Option B: Action by the Committee of Ministers under the Statute

18. The Convention and its Protocols were drafted and adopted under the aegis of the Council of Europe in pursuit of its general aim. For example, the preamble to the Convention refers to the signatory governments "being members of the Council of Europe" and notes that "one of the methods by which [the aim of the Council of Europe] is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms".

19. The Statute of the Council of Europe gives the Committee of Ministers potentially wide powers that may be applicable to the current situation. In brief, Article 15.a. requires the Committee of Ministers to "consider the action required to further the aim of the Council of Europe, including the conclusion of … agreements and the adoption by governments of a common policy with regard to particular matters." "The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage" (Article 1.a.), with these ideals including "individual freedom, political liberty and the rule of law" (preamble). "This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in … the maintenance and further realisation of human rights and fundamental freedoms" (Article 1.b.). Furthermore, Article 3, which requires member States to "accept the principles of the rule of law and of the enjoyment by all persons within [their] jurisdiction of human rights and fundamental freedoms, and [to] collaborate sincerely and effectively in the realisation of the aim of the Council", suggests that the collective responsibility of member States requires them to take such action.

20. A significant potential obstacle to adopting this approach for putting the two procedures into practice that needs to be examined is that it may contradict the text of the Convention and its existing amendment procedures.

Questions to the CAHDI:

21. Do the powers under the Statute extend to taking necessary action to protect and preserve the effectiveness of the Convention, as a Council of Europe treaty, and more generally the European human rights protection system that it underpins? In particular, would it allow the Committee of Ministers to adopt a resolution on the basis of which the Court could be invited to put into practice certain measures already envisaged to increase the Court's case-processing capacity? If so, does public international law impose particular requirements concerning the modality for adopting such a resolution?

Option C: Unilateral declarations

22. This option would involve States each making a unilateral declaration e.g. authorising the Court to apply the new procedures in respect of application made against them.

23. There are two potential drawbacks to this option. First, it might take some time before all States concerned had issued such declarations. Second, in the meantime, the Court could not only have to operate two sets of procedures but could have to do so for groups of States whose composition would change as new declarations were made. Ideally, therefore, all States that have ratified Protocol 14 would make their declarations simultaneously or even collectively, acting within the framework of the Committee of Ministers or otherwise; alternatively, each declaration could perhaps be expressed in such a way as to come into effect only when all ratifying States had made declarations.

Questions to the CAHDI:

24. Could unilateral declarations be an appropriate avenue for putting the two new procedures into practice? What would be an appropriate modality for making such declarations?

Option D: Interpretation of the Convention

25. The object and purpose of a treaty are of primary importance to its interpretation. The object and purpose of the Convention, as expressed in its preamble, are "the maintenance and further realisation of human rights and fundamental freedoms" through "collective enforcement of certain of the rights contained in the Universal Declaration [of Human Rights]", with Protocol 11 establishing the right of individual petition as central to the object and purpose. As the Court itself has stated, given that the Convention is a law-making treaty, it is necessary to seek the interpretation that is most appropriate to realise its aim and achieve its object.

26. The effectiveness principle is also an important consideration in interpretation. The Convention has a special character as a constitutional instrument of European public order. Unlike "classic" international treaties, it creates objective obligations which benefit from collective enforcement. It should therefore be interpreted in a way that ensures its effectiveness in these respects. Indeed, the Court has when necessary interpreted provisions of the Convention relating to its control mechanism in such a way as to show concern for the effectiveness principle.

27. In addition, Article 32 of the Vienna Convention states that recourse may be had to supplementary means of interpretation where interpretation would otherwise lead to a result which is manifestly absurd or unreasonable.[4] In this case, could the supplementary means be the fact that all 47 States parties to the Convention have adopted and signed Protocol 14 and that 46 of them, by ratifying it, have consented to the measures it contains? Could the States parties, in effect, be considered as having expressed no objection to putting into practice the more efficient and effective procedures envisaged under Protocol 14?

28. This begs the question as to whether an application of the Convention that would allow its control mechanism to become ineffective and its protection thereby illusory should be considered to have become incompatible with its object and purpose and be seen as manifestly absurd or unreasonable. If so, would it be possible to adopt a different interpretation that is consistent with the object and purpose of the Convention and preserves its effectiveness?

29. A significant potential obstacle to adopting this approach for putting the two procedures into practice that needs to be examined is that it may contradict the text of the Convention and its existing amendment procedures.

30. In sum, could the Committee of Ministers invite the Court to take account of the fact of the States parties to the Convention having waived or renounced certain procedures when interpreting relevant procedural provisions, in the circumstances of the system's failure to achieve the object and purpose of the Convention and the need to ensure its effectiveness?

31. Furthermore, could the Court, following such an invitation from the Committee of Ministers based on the wide consent amongst the States parties to the Convention and bearing in mind the principle of competence competence, amend the Rules of Court by incorporating certain measures envisaged under Protocol 14 (e.g. Articles 4, 5, 6, 7, 8 and 9 of the Protocol, amending Articles 24, 26, 27 and 28 of the Convention)?

Question to the CAHDI:

32. The CDDH would be interested to hear the CAHDI's views on these questions, whilst bearing fully in mind that the Court itself has jurisdiction over interpretation of the Convention and authority over the Rules of Court.

Option E: a new Protocol

33. A new protocol, whether containing only the two new procedures (along, perhaps, with the new admissibility criterion) or also other provisions of Protocol 14, that did not require ratification of all States parties to the Convention to enter into force could certainly be effective in allowing the Court to put the two procedures into practice. It would also appear not to present any difficulties under public international law (see, for example, the precedent of Protocol No. 9 to the Convention).

[4] Article 32 states that such supplementary means include the preparatory work of the treaty and the circumstances of its conclusion; it does not explicitly exclude other means, such as those suggested above.

34. There would, however, be other significant drawbacks related to the fact that a Protocol would require a new ratification process to enter into force. First, ratification is a lengthy and complicated process and therefore this approach would probably not be capable of providing a quick solution. Second, there would be no guarantee that parliaments which had ratified the package of measures contained in Protocol 14 would do the same for a different package, even if broadly similar. Third, it may be constitutionally or politically awkward to ask national parliaments to ratify treaties containing provisions that had been included in previously ratified treaties.

Option F: Combination of options

35. A further possibility would involve an approach combining several Options, not limited to those mentioned above.

IV. Modalities of inviting the Court to put the procedures into practice

36. Although this question is to some extent linked to that of the modalities whereby the Court could put the procedures into practice, the basic answer is the same. A resolution of the Committee of Ministers would represent a common position expressed through the formal adoption of a written text. All States that have negotiated, signed or ratified Protocol 14 would be represented. Perhaps the most significant exception could relate to Option C, depending on the manner in which unilateral declarations would be made. As appropriate, further questions of procedure concerning adoption of a relevant Resolution will be addressed in the final opinion.[5]

V. Conclusion

37. The CDDH has not sought to take a firm position on the various points and questions analysed above, nor does it claim to have pointed to all relevant considerations, questions and options at this stage. Indeed, different views were expressed within the CDDH on many of the issues raised above. It therefore agrees that this preliminary opinion should be transmitted to the CAHDI for further analysis of the questions raised herein and of any other possible approaches from the perspective of public international law, in accordance with the Deputies' decision. It therefore requests the Secretariat to ensure that this preliminary opinion is brought to the attention of the CAHDI. Pending receipt of the CAHDI's opinion, the CDDH requests the Reflection Group (DH-S-GDR) to consider the matter further before itself returning to it, notably in the light also of the CAHDI opinion, at its meeting of 24-27 March 2009, with a view to adopting a final opinion for submission to the Committee of Ministers by 31 March 2009.

[5] Following adoption of this preliminary opinion by the CDDH, the Secretariat will contact the Secretariat of the Legal Advice Department with a view to obtaining further information concerning this question.

General question to the CAHDI:

38. Given the non-exhaustive and preliminary nature of this document, the CDDH would be grateful if the CAHDI could, in its own opinion, address any other means of achieving the desired result – whether involving the two procedures, the new admissibility criterion or any other measure envisaged under Protocol 14 – as well as any relevant questions of public international law not raised in this document.