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28 April 2009

## **Draft Protocol No. 14 *bis* to the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>1</sup>**

Report  
Committee on Legal Affairs and Human Rights  
Rapporteur: Mr Klaas De VRIES, Netherlands, Socialist Group

### *Summary*

In the light of the non-entry into force of Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights (ECHR) or referred to simply as “the Convention”) and the negative impact that this is having on the Court’s output, the Committee of Ministers has taken the initiative to put into practice certain procedures, envisaged in Protocol No. 14, to increase the Court’s case-processing capacity. In this context, the Committee of Ministers has invited the Parliamentary Assembly, under the urgent procedure provided for in Rule 50 of the Assembly’s Rules, to state its opinion on draft Protocol No.14 *bis*.

Protocol No. 14 *bis* is to be an additional protocol which will not require ratification by all the States Parties to the Convention. It will enable single-judge formations to deal with plainly inadmissible applications (presently handled by committees of three judges) and extend the competence of three-judge committees to handle clearly well-founded and repetitive cases deriving from structural or systemic defects (presently handled by Chambers of the Court, composed of seven judges).

Protocol No. 14 *bis* would cease to exist once Protocol No. 14 to the Convention enters into force.

The Committee on Legal Affairs and Human Rights fully supports this important initiative, on the clear understanding that this must be seen as a provisional interim measure, pending entry into force of Protocol No. 14.

### **A. Draft opinion**

1. The Parliamentary Assembly attaches utmost importance to the functioning of the European Court of Human Rights (the Court), whose effectiveness is being seriously threatened in the face of, *inter alia*, an ever-accelerating influx of new applications and a constantly growing backlog of cases. It therefore welcomes the initiative taken by the Committee of Ministers to adopt, as soon as practicable, draft Protocol No. 14 *bis* which will increase the Court’s case-processing capacity pending entry into force of Protocol No. 14 to the European Convention on Human Rights (the Convention).

2. The Assembly also notes, in this connection, the parallel initiative to foresee the provisional application of provisions in Protocol No. 14 *bis* by means of a declaration to be made by a Conference

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1. See Doc. 11864.

of High Contracting Parties to the Convention on the margins of the 119th Ministerial Session in Madrid on 12 May 2009, an initiative to which it fully subscribes. This would permit the Court to apply these provisions to certain States Parties to the Convention prior to or independently of the entry into force of Protocol No. 14 *bis*.

3. The Assembly recalls, in this connection, the “Warsaw Declaration” of 17 May 2005, in which all heads of state and government strongly committed themselves to a long-term strategy to secure the effectiveness of the Convention system, taking into account the initial effects of Protocol No. 14 and other decisions taken by the Committee of Ministers in May 2004. The non-entry into force of Protocol No. 14 therefore remains an issue of major concern.

4. In this context, the Assembly strongly deplores the position taken by the Russian Federation’s State Duma to refuse to provide its assent, since December 2006, to the ratification of Protocol No. 14 to the Convention, which is an important amending protocol that can only enter into force when all States Parties to the Convention have ratified it. By so doing, the Russian State Duma has, in effect, considerably aggravated the situation in which the Court has found itself, and has also deprived persons within its jurisdiction from benefiting from a streamlined case-processing procedure before the Court. The Russian State Duma is urged, in the strongest possible terms to recognise that the changes of the control system envisaged in Protocol No. 14 (and Protocol No. 14 *bis*), will permit the Court to deal with applications in a timely fashion so that it can concentrate on important cases requiring in-depth examination.

5. The Assembly considers draft Protocol No. 14 *bis* as a good interim solution to bring into effect, quickly, the provisional application of two provisions extracted from Protocol No. 14 to the Convention. It will be an additional protocol which will not require ratification by all States Parties to the Convention. It will enable single-judge formations to deal with plainly inadmissible applications, presently handled by committees of three judges, and will also extend the competence of three-judge committees to handle clearly well-founded and repetitive cases deriving from structural or systemic defects which are presently handled by Chambers of the Court, composed of seven judges. Protocol No. 14 *bis* will cease to exist once Protocol No. 14 to the Convention enters into force.

6. The Assembly appreciates the Committee of Ministers recourse to the Assembly’s “urgent procedure” provision, which has permitted it, at short notice, to take a stand on an important subject which is still under active consideration at the intergovernmental level.

7. The Assembly recommends to the Committee of Ministers that the following amendments be made to draft Protocol No. 14 *bis*:

7.1. in the Preamble, add a new third paragraph that would read: “3. Having regard to Opinion [...] (2009), adopted by the Parliamentary Assembly of the Council of Europe on [...] April 2009;”;

7.2. in Article 1 replace “Parties” by “the High Contracting Parties”;

7.3. in Article 6, paragraph 1, replace “member states” by “High Contracting Parties”;

7.4. in Article 6, paragraph 2, replace “member state” by “High Contracting Party to the Convention”, replace “by it” by “by this Protocol” and add, after the words “into force”, the words “for that High Contracting Party”;

7.5. remove the square brackets from Article 7; replace “of the Protocol” by “of this Protocol” and replace the words “that it will apply to it” by “that the provisions of this Protocol shall apply to it”;

7.6. remove all the square brackets from Articles 8 to 10.

8. As concerns the explanatory report, the Assembly recommends that when the final version of paragraph 6 is drafted, specific mention be made to the present opinion of the Parliamentary Assembly and the date of its adoption.

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**I. Procedure**

1. At its 1054th meeting on 15 and 16 April 2009, the Committee of Ministers (Ministers' Deputies) invited the Parliamentary Assembly to provide it with an opinion on draft Protocol No. 14 bis to the Convention for the Protection of Human Rights and Fundamental Freedoms, with the request that this be done during its 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 was made in order to allow for this text to be finalised by the Ministers' Deputies in early May 2009 prior to the 119th Ministerial Session in Madrid on 12 May. When transmitting this text, together with a draft explanatory memorandum, the Chairperson of the Ministers' Deputies drew attention to the fact that the procedures of the possible provisional application of this protocol were still under discussion.

2. On 27 April 2009, the Assembly referred the request of the Committee of Ministers for an opinion to the Committee on Legal Affairs and Human Rights for a report.

3. At its meeting on the same day, the Committee on Legal Affairs and Human Rights appointed Mr Klaas de Vries (Netherlands, Socialist Group) as rapporteur.

**II. Urgency to increase the Strasbourg Court's case-processing capacity***i. The context*

4. In the light of the non-entry into force of Protocol No. 14 to the Convention and the negative impact that this is having on the output of the European Court of Human Rights (the Court), there is widespread agreement, both within the Parliamentary Assembly and the Committee of Ministers that if a temporary, interim solution is not quickly found to help the Court to substantially increase its case-processing capacity, the Court will be in danger of collapsing under the weight of its caseload.

5. In 1999, 22 650 applications were lodged and nearly 3 700 disposed of judicially. In 2006 over 50 000 applications were lodged of which nearly 30 000 were disposed of judicially. In 2006, the number of incoming applications rose by 11%, with the number of new Russian applications rising by 38%. By the end of 2008, the Court had 97 300 applications pending for determination by a judicial formation (of which 57% concern Romania, Russia, Turkey and Ukraine), an increase of 23% in comparison with 2007. In 2008 judgments were delivered in respect of 1 880 applications (compared with 1 735 in 2007 – an increase of 8%) and 32 043 applications were disposed of judicially in 2008, an increase of 11% in relation to 2007.

6. It follows that the Court must urgently find a way in which to deal with, in particular, three matters: judges must not spend too much time on obviously inadmissible cases (approximately 95% of all applications), they must deal expeditiously with repetitive cases that concern already clearly established systemic defects within states (this represents approximately 70% of cases dealt with on the merits) and, by so doing, concentrate their work on the most important cases and deal with them as quickly as possible.

*ii. Non-entry into force of Protocol No. 14 to the Convention*

7. Although Protocol No. 14 to the Convention (together with other measures to guarantee the long-term effectiveness of the Convention system, as explained in the protocol's explanatory memorandum) deals with a number of other important issues, such as the new admissibility criterion, European Union accession and the nine-year single term in office for judges, I intentionally limit my observations to those provisions that would have an immediate effect on the Court's case-processing capacity. As concerns other reasons as to why this amending protocol needs to come into force, suffice is to refer, in this connection, to the "Warsaw Declaration" of 17 May 2005, in which all heads of state and government strongly committed themselves to a long-term strategy to secure the effectiveness of the Convention system, taking into account the initial effects of Protocol No. 14 and other decisions taken by the Committee of Ministers in the so-called "May 2004 reform package".<sup>2</sup>

8. The case-processing capacity of the Court is likely to increase by 20% to 25% if two procedures envisaged in Protocol No. 14 to the Convention were already now to be put into effect, that is, the single-judge formation (to deal with plainly inadmissible applications) and the new competences of the three-judge committee (clearly well-founded and repetitive applications deriving from structural or systemic defects). In other words, decisions on clearly inadmissible applications, which are presently dealt with by a committee of three judges, could be handled by a single judge, and clearly well-founded and repetitive cases deriving from a structural defect at national level, could be handled in all aspects (admissibility, merits, just satisfaction) by a committee of three judges instead of a seven-judge Chamber, as at present.<sup>3</sup>

9. The problem is that Protocol No. 14 to the Convention, an amending protocol opened for signature on 13 May 2004, has been ratified – since October 2006 – by all contracting States Parties to the Convention with the exception of the Russian Federation, and cannot enter into force until all states parties have ratified it.<sup>4</sup> At the time of the protocol's opening for signature, the Committee of Ministers adopted a declaration committing States Parties to ensure its entry into force within two years. This commitment was reiterated at the May 2005 3rd Summit of Heads of State and Government of the Council of Europe. Russia's non-ratification of Protocol No. 14 is the reason for the impasse in which we find ourselves today.

10. The Russian State Duma's attitude on this subject is difficult to comprehend, especially as it's position is totally out of line with that of all the other 46 States Parties to the Convention, including their legislative organs, and even its own executive.<sup>5</sup> This issue has been closely followed by our Committee on Legal Affairs and Human Rights, on the basis of the Assembly Bureau decision of 26 January 2007, subsequent to the current affairs debate on the threat to the European Court of Human Rights: urgent need for Russia to ratify Protocol No. 14. Since then this matter has regularly been on the committee's agenda.<sup>6</sup> If it were not for the Russian State Duma's intransigence, we would not have run into the problems we are facing today! So I can only deplore the State Duma's refusal to provide its assent, since December 2006, to the ratification of Protocol No. 14 by Russia. By so doing, the State Duma has, in effect, considerably aggravated the situation in which the Court has found itself, and has also deprived persons within the jurisdiction of the Russian Federation from benefiting from a streamlined case-processing procedure before the Court. The State Duma must be urged to take a responsible attitude in this matter and to recognise that the changes of the control system envisaged in Protocol No. 14 (and Protocol No. 14 *bis*), will permit the Court to deal with applications in a timely fashion so that it can concentrate on really important cases requiring in-depth examination.

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2. The full text of Protocol No. 14 to the Convention and its explanatory report can be accessed on: <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=194&CM=8&DF=1/20/2007&CL=ENG>. See also, in this connection, M. Eaton and J. Schokkenbroek "Reforming the Human Rights Protection System Established by the ECHR" in *Human Rights Law Journal* (2005), Vol. 26, pp. 1-17.

3. See previous footnote for details, as well as, in so far as Russia is concerned, Document AS/Jur (2007) 31 "Protocol No. 14 to the European Convention of Human Rights: an overview", paragraph 7, and Document AS/Jur (2008) 45 "The Russian Federation's non-ratification of Protocol No. 14 to the European Convention on Human Rights", paragraph 3 and paragraphs 6-8.

4. See documents referred to above, as well as Document AS/Jur (2007) 09 "Non-ratification by the Russian Federation of Protocol No. 14 to the ECHR: background information".

5. See Assembly Document AS/Mon (2009) 09 rev "Information note by the co-rapporteurs on the state of the monitoring procedure with regard to Russia", especially paragraphs 78-82.

6. Including an exchange of views with State Duma representatives when the committee met in Moscow on 10 and 11 November 2008 (minutes subsequently declassified by the committee).

iii. *Provisional application of two provisions in Protocol No. 14 to the Convention*

11. As indicated in the draft explanatory report to Protocol No. 14 *bis*, it would appear that the idea of bringing into force the two procedural measures, namely the single-judge procedure and the three-judge committee for repetitive cases, in anticipation of the entry into force of Protocol No. 14, was mooted during a meeting the Court's President had with the Ministers' Deputies in October 2008, when President Costa drew attention to the extremely serious situation facing the Court.<sup>7</sup> A similar idea was expressed by the Chairperson of the Committee on Legal Affairs and Human Rights, in a letter she sent to the head of the Russian delegation to the Assembly on 9 April 2008, when she referred to the possible provisional application of treaties, as envisaged in Article 25 of the 1969 Vienna Convention on the Law of Treaties.<sup>8</sup>

12. This idea was quickly followed up by the Committee of Ministers. On 19 November 2008, the Ministers' Deputies 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". The Ministers' Deputies therefore asked the Steering Committee for Human Rights (CDDH) and the Committee of Legal Advisers on Public International Law (CAHDI) to see what measures could be taken to increase the Court's case-processing capacity, in particular by instituting the new single-judge formation and committee procedures already envisaged in Protocol No. 14.

13. The CDDH and the CAHDI issued their respective reports in March 2009,<sup>9</sup> which were discussed by the Ministers' Deputies and its Rapporteur Group on Human Rights during the month of April.

14. It would appear that, on the basis of discussions within the Committee of Ministers and its rapporteur group, as well as the decision taken by the Ministers' Deputies on 16 April 2009 to request the Assembly for an opinion on draft Protocol No. 14 *bis*, the following options have been tabled in order to facilitate putting into practice the two simplified case-processing procedures prior to the entry into force of Protocol No. 14:

– Option 1: an agreement on the provisional application of the two provisions – by a conference of High Contracting Parties to the Convention – on the margins of the 119th Ministerial Session in May 2009. This would require consensus amongst the 47 States Parties to the Convention, following which each state would be able to make a declaration to the effect that it accepts the provisional application of the two provisions of Protocol No. 14 in its respect;

– Option 2: adoption of a new legal instrument (an additional protocol = Protocol No. 14 *bis*); this protocol would be adopted by the Committee of Ministers by the usual majority of two thirds and would come into force after its ratification by a limited number of states.<sup>10</sup>

15. Options 1 and 2 could be engaged in parallel, leaving it to each state to decide which of the two is best suited to its own constitutional and domestic legal order. Indeed, each State Party to the Convention would be free to choose the option which it considers to be most appropriate and/or the one which would more rapidly be operational under its own constitutional system.

7. Doc. 11864, p. 5, paragraph 3. He added that such an improvement, though not providing a definitive answer to the Court's problems, would be an extremely useful contribution.

8. Article 25 of the Convention, entitled "Provisional application", stipulates;

"1. A treaty or a 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."

9. Restricted documents CDDH(2009)007 Addendum I (Extract) and CAHDI (2009) 2 – made available to committee members on the committee's Extranet site.

10. As opposed to Protocol No. 14, which is an amending protocol which must be ratified by all states parties in order to enter into force, Protocol No. 14 *bis* is to be an additional protocol which could enter into force after its ratification by a certain number of states parties, but not all of them.

16. The measures proposed, if put into effect, would ease the Court's workload and result in an arrangement whereby applications with respect to certain states could be dealt with under the accelerated procedure, in parallel with the procedure currently applicable in pursuance of Protocol No. 11 to the Convention. Finally, were Protocol No. 14 to come into effect, the provisional arrangements described above would cease to exist and the accelerated case-processing procedures would apply to all States Parties to the Convention (see paragraph 7 above).

### III. Comments on the provisions of Protocol No. 14 *bis* to the Convention

#### *i. General provisions*

17. I consider the text of draft Protocol No. 14 *bis*, as submitted to the Assembly, as a good interim solution to bring into effect, as quickly as possible, the provisional application of the two provisions extracted from Protocol No. 14 to the Convention, pending entry into force of Protocol No. 14.<sup>11</sup> This will undoubtedly be of considerable help to the Court to effectively respond to its horrendously mounting case law (see statistics, paragraph 5, above). This is a *force majeure* situation, until Protocol No. 14 enters into force. And only once the provisions of Protocol No. 14 are operational, should we concentrate our minds on the utility or otherwise of a major overhaul of the Convention control system.

18. Similarly, the parallel initiative to foresee the provisional application of these provisions – by means of a declaration by a Conference of High Contracting Parties to the Convention on the margins of the 119th Ministerial Session in Madrid on 12 May 2009 – is an initiative which I propose we subscribe to. But, here again, on the clear understanding that this is an exceptional procedure justified by specific circumstances as described above.

19. This exceptional situation also explains why Protocol No. 14 *bis* is an additional protocol, as opposed to Protocol No. 14, which is an amending protocol that must be ratified by all States Parties to the Convention in order to enter into force (see paragraph 9 above). In other words, the text as presented – which the Assembly should endorse – will, in accordance with Article 6 of Protocol No. 14 *bis*, require only three ratifications for it to come into force. The number of states is set at three only, in order to allow the protocol to enter into force as quickly as possible.<sup>12</sup> Also, as already noted, Protocol No. 14 *bis* will cease to exist upon entry into force of Protocol No. 14.

#### *ii. Specific provisions*

20. I would propose very few amendments to the text, most of which are of a technical nature and self-explanatory. Herein is what, upon a quick perusal of the text, should be proposed to the Committee of Ministers:

- in the preamble, I would propose adding a new third paragraph which should read: “3. Having regard to Opinion [...] (2009), adopted by the Parliamentary Assembly of the Council of Europe on [...] April 2009;” as has been done in the past with respect to Protocols Nos. 11 and 14 to the Convention;
- in Article 1, the word “Parties” should be replaced by “the High Contracting Parties”;
- in Article 6, paragraph 1, the words “member states” should be replaced by “High Contracting Parties”;
- in Article 6, paragraph 2, the words “member state” should be replaced by “High Contracting Party to the Convention”, the words “by it” replaced by “by this Protocol” and, after the words “into force”, the following words should be added “for that High Contracting Party”;
- in Article 7, the words “of the Protocol” should be replaced by “of this Protocol” and the words “that it will apply to it” be replaced by “that the provisions of this Protocol shall apply to it”.

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11. See also Assembly Opinion 251 (2004) on draft Protocol No. 14 to the Convention, based on a report of the Committee on Legal Affairs and Human Rights, Rapporteur Mr McNamara, Doc. 10147.

12. See paragraph 22 of the draft explanatory memorandum.

21. I would also propose the removal of all square brackets in Articles 7 to 10. The reasons for so doing can be found in the draft explanatory memorandum, in the explanations relating to the final and transitional provisions, read in conjunction with paragraph 1 which refers to the “[present] unsustainable situation [that] represents a grave threat to the effectiveness of the Court as the centre-piece of the European human rights protection system”. Simply put, the Committee of Ministers should be encouraged to envisage the provisional application of this protocol’s provisions by the Court not only upon the protocol’s entry into force, but also upon the protocol’s signature (in those states where this is possible), as well as on the basis of a declaration, accepted by consensus, by a Conference of High Contracting Parties to the Convention (again, in states where this is constitutionally possible).

22. Finally, as concerns the explanatory report, I would propose reminding the Committee of Ministers that, when the final version of paragraph 6 is drafted, specific mention be made in the said paragraph to the present opinion of the Parliamentary Assembly and the date of its adoption.

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*Reporting committee:* Committee on Legal Affairs and Human Rights

*Reference to committee:* Urgent debate, Reference No 3528, Assembly decision of 27 April 2009

*Draft opinion* unanimously adopted by the committee on 28 April 2009

*Members of the committee:* Mrs Herta **Däubler-Gmelin** (Chairperson), Mr Christos **Pourgourides**, Mr Pietro **Marcenaro**, Mr Rafael Huseynov (Vice-Chairpersons), Mr José Luis Arnaut, Mrs Meritxell Batet Lamaña, Mrs Marie-Louise **Bemelmans-Videc**, Mrs Anna Benaki (alternate: Mr Emmanouil **Kefaloyiannis**), Mr Petru **Călian**, Mr Erol Aslan **Cebeci**, Mrs Ingrida **Circene**, Mrs Ann Clwyd, Mrs Alma Čolo, Mr Joe Costello (alternate: Mr Terry **Leyden**), Mrs Lydie Err, Mr Renato **Farina**, Mr Valeriy Fedorov, Mr Joseph Fenech Adami, Mrs Mirjana **Ferić-Vac**, Mr György Frunda, Mr Jean-Charles **Gardetto**, Mr József Gedei, Mrs Svetlana Goryacheva, Mrs Carina **Hägg**, Mr Holger **Haibach**, Mr Gultakin Hajibayli, Mr Serhiy Holovaty (alternate: Mr Ivan **Popescu**), Mr Johannes **Hübner**, Mr Michel **Hunault**, Mrs Fatme Ilyaz, Mr Kastriot Islami, Mr Želiko **Ivanji**, Mrs Iglica Ivanova, Mrs Kateřina Jacques, Mr András Kelemen, Mrs Kateřina Konečná, Mr Franz Eduard **Kühnel**, Mr Eduard Kukan (alternate: Mr József **Berényi**), Mrs Darja Lavtižar-Bebler, Mrs Sabine **Leutheusser-Schnarrenberger**, Mr Aleksei **Lotman**, Mr Humfrey **Malins**, Mr Andrija Mandić, Mr Alberto Martins, Mr Dick **Marty**, Mrs Ermira Mehmeti, Mr Morten Messerschmidt, Mr Akaki **Minashvili**, Mr Philippe Monfils, Mr Alejandro **Muñoz Alonso**, Mr Felix Müri, Mr Philippe Nachbar (alternate: Mr Jean-Claude **Frécon**), Mr Adrian **Năstase**, Mr Valery Parfenov (alternate: Mr Sergey **Markov**), Mrs Maria Postoico, Mrs Marietta **de Pourbaix-Lundin**, Mr Valeriy Pysarenko (alternate: Mr Hryhoriy **Omelchenko**), Mr Janusz **Rachoń**, Mrs Marie-Line Reynaud (alternate: Mr René **Rouquet**), Mr François Rochebloine, Mr Paul **Rowen**, Mr Armen Rustamyan, Mr Kimmo **Sasi**, Mr Ellert Schram, Mr Dimitrios Stamatis, Mr Fiorenzo **Stolfi**, Mr Christoph **Strässer**, Lord John Tomlinson (alternate: Mr Christopher **Chope**), Mr Tuğrul Türkeş, Mrs Özlem Türköne, Mr Viktor **Tykhonov**, Mr Øyvind **Vaksdal**, Mr Giuseppe Valentino, Mr Hugo Vandenberghe, Mr Egidijus Vareikis, Mr Luigi **Vitali**, Mr Klaas **De Vries**, Mrs Nataša **Vučković**, Mr Dimitry Vyatkin, Mrs Renate **Wohlwend**, Mr Jordi Xuclà i Costa (alternate: Mr Agustín **Conde Bajén**)

NB: The names of the members who took part in the meeting are printed in **bold**

*Secretariat of the Committee:* Mr Drzemczewski, Mr Schirmer, Mrs Maffucci-Hugel, Ms Heurtin