

# The Most Recent Development in the Reform Process of the Control System of the European Convention on Human Rights – the Additional Protocol No. 14*bis*

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## I. Introduction

At their 119<sup>th</sup> session on 12 May 2009 in Madrid, the Ministers of Foreign Affairs and representatives of the 47 Council of Europe Member States adopted a new protocol to the European Convention on Human Rights – Protocol No. 14*bis*. Although the new protocol represents only an interim solution, it is nevertheless an important step forward in the reform process of the Strasbourg-based Court. As is well-known, Protocol No. 14 (without the supplement “*bis*”) which was aimed at reforming the proceedings before the European Court of Human Rights in a far-reaching manner, failed to enter into force in December 2006 because of the refusal of the Russian State Duma to ratify the reform package.<sup>1</sup> This happened at a time when 46 out of 47 State Parties had already ratified Protocol No. 14. However, since Protocol No. 14 is an “amending protocol”, it requires the ratification of all Member States to enter into force, including Russia; hence, for two and a half years now, it has been put on hold. In this context the newly adopted Protocol No. 14*bis* can be considered a solution to the deadlock.

## II. The Background

The dramatic situation of the European Court of Human Rights with regard to its caseload becomes obvious when one looks at the actual Annual Report of the

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<sup>1</sup> For the official reasons see EuGRZ 2007, 507-508; for the arguments of the Russian State Duma and counter-arguments thereto: Memorandum of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, The Russian Federation’s non-ratification of Protocol No. 14 to the European Convention on Human Rights, 5 September 2008, AS/Jur (2008), 45.

Court. In 2008 the number of applications pending before a “judicial formation”<sup>2</sup> increased from 79.400 at the beginning of the year to 97.300 by 31 December 2008. On the other hand, merely 30.164 applications were disposed of by inadmissibility decisions or struck out under Article 37 ECHR whereas 1.881 judgments were delivered by the Court in 2008.<sup>3</sup>

This daunting caseload problem finds its origin in different aspects. Amongst others, one reason is the enlargement of the Council of Europe and the consequent increase in the number of High Contracting Parties to the European Convention on Human Rights from 15 States in 1950 to 47 States nowadays. Furthermore the individual right of application, which was optional under the old system, has become obligatory with the entry into force of Protocol No. 11 in 1998. Since then, every individual of the 47 Convention States is in principle in the position to bring a complaint before the Court in Strasbourg. This encompasses about 800 million people.<sup>4</sup> Moreover the number of Member States has not only augmented in a quantitative manner. The situation has also aggravated in a qualitative way: with the admission of the Central and Eastern European States to the Convention system in the 90s, the complaints with respect to those States provide for new and serious questions before the Court. The main reason for this is that these States still have structural deficiencies which lead not only to a large caseload but also to particularly complex cases.<sup>5</sup>

The necessity to reform the protection system under the Convention in order to preserve the efficiency of the Court already emerged in the 90s. The first great reaction was the elaboration and ratification of Protocol No. 11, which entered into force on 1 November 1998. This amending protocol led to immense changes in the Convention system, abolishing the European Commission of Human Rights and centring the Court as a permanent and the single deciding organ. Moreover individuals were granted a direct right of application to the Court. In addition, the requirement of previous recognition of the jurisdiction of the Court by the States was abolished.

Yet it soon became clear that despite Protocol No. 11 there was still an urgent need for reform and that the Strasbourg Court was flooded with complaints particularly from former communist countries. Subsequently, Protocol No. 14 was drafted, opened for signature in May 2004, ratified by nearly all States and finally did not succeed on account of the Russian refusal in December 2006. To understand the recently adopted Protocol No. 14*bis* one should recall the main reform steps which Protocol No. 14 was focusing on. One of the main points was the introduction of a single judge system: instead of a committee of three judges to reject

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<sup>2</sup> This phrase is used in the Annual Report of the European Court of Human Rights, Annual Report 2008 of the European Court of Human Rights, Council of Europe.

<sup>3</sup> Annual Report 2008 of the European Court of Human Rights, Council of Europe, 127.

<sup>4</sup> Keller, 50 Jahre danach: Rechtsschutzeffektivität trotz Beschwerdeflut? Wie sich der EGMR neuen Herausforderungen stellt, EuGRZ 2008, 360.

<sup>5</sup> Ibid., at 361.

plainly inadmissible applications, a single judge would have received this competence.<sup>6</sup> This was aimed at filtering out the huge number of clear-cut cases more quickly and efficiently, where the inadmissibility of the application was manifest from the outset. Another important element of the great reform package of Protocol No. 14 was the extension of the powers of three-judge committees. Under Protocol No. 14 they would have been able to declare applications admissible and decide on the merits of obviously well-founded cases instead of chambers of seven judges, whenever the questions that had been raised were covered by well-established case-law of the Court.<sup>7</sup> Moreover, Protocol No. 14 introduced a new admissibility criterion, the competencies of the Committee of Ministers were extended and the European Union was enabled to accede to the Convention. In addition, the independence of the judges at the Court would have been strengthened by extending their term of office from six to nine years without the possibility of being re-elected.<sup>8</sup> After this reform protocol had failed for the time being, the Council of Europe searched for a way to reorganise the Court system and improve the Court's capacity to handle the flood of cases coming in.

### III. Additional Protocol No. 14bis

The starting point for the concrete elaboration of Protocol No. 14bis was a meeting of the Committee of Ministers' Liaison Committee with members of the European Court of Human Rights in October 2008. In the framework of this meeting the Court's President, Mr. Costa, again drew attention to the serious crisis of the Court and addressed the urgent need for implementation of certain procedural provisions of Protocol No. 14. The idea of an interim solution pending entry into force of Protocol No. 14 was further pursued by the Committee of Ministers which requested the Steering Committee on Human Rights and the Committee of Legal Advisers on Public International Law to give their opinions on the advisability and the method of implementing some procedures to increase the Court's efficiency. In March 2009 the two Committees presented their reports by concluding that significant steps had to be taken at the earliest opportunity. While the best solution remained the entry into force of Protocol No. 14, the implementation of two of its reform elements by means of a new additional protocol was recommended. In April 2009 the Rapporteur Group on Human Rights drafted Protocol No. 14bis on the basis of these reports and transmitted the text to the Parliamentary Assembly for its opinion, which approved the draft protocol on 30 April 2009.<sup>9</sup>

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<sup>6</sup> Article 7 of Protocol No. 14.

<sup>7</sup> Article 8 of Protocol No. 14.

<sup>8</sup> Article 2 para.1 of Protocol No. 14.

<sup>9</sup> See Parliamentary Assembly, Opinion No. 271 (2009) as well as the Report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of 28 April 2009, Doc. 11879.

At the 119<sup>th</sup> session of the Committee of Ministers in Madrid mid-May, Protocol No. 14*bis* was adopted.<sup>10</sup>

The content of the newly adopted protocol is the advanced introduction of two procedural elements taken from Protocol No. 14. Two elements were chosen that could affect the efficiency of the Court in the most immediate and greatest possible way. Firstly, single-judge formations will have the competence to declare cases inadmissible, where such a decision can be taken without further examination. Instead of the current system where three judges sitting in “committees” filter obviously inadmissible complaints out of the cases transmitted to the chambers, a single judge will now decide on those cases. Consequently, it will be possible to render decisions with a minimal composition of a single judge, who will be assisted by non-judicial rapporteurs of the registry. This is an evident rationalisation of expenditures on personnel on cases which are evidently inadmissible. In addition, more proceedings can be held simultaneously by reducing the number of judicial staff members handling one application. At this point, it is worth mentioning that more than 90 % of the complaints before the Court in Strasbourg are found inadmissible. The reduction of the number of judges deciding on clearly inadmissible cases will undoubtedly unburden the committees and chambers of the Court. One could criticise the finality of the inadmissibility decision of the single judge. Although under the three-judge committee system the inadmissibility decisions were also final, the requirement to render those decisions unanimously nonetheless established a certain barrier and therefore protection for the applicant. Nevertheless, it is necessary to take radical steps: if the decision of the single judge was not final, the effect of this reform module would not be sufficiently far-reaching. In addition it should be emphasised once more that the single judge is only competent to reject clear-cut cases, where the inadmissibility is manifest from the outset. In case of doubt, the judge will have to refer the application to a committee or a chamber.<sup>11</sup> As a last point, it should be added that the single judge will not be able to decide on cases brought against his or her own country.<sup>12</sup>

The second reform element of Protocol No. 14*bis* is the extension of the powers of three-judge committees. Whereas these committees under the current system merely decide on the rejection of clearly inadmissible cases, they may under the new Protocol also decide on the admissibility and merits of evidently well-founded applications which raise questions already covered by well-established case-law of the Court. This is specifically the case with respect to repetitive or so called “clone cases” that have their origin in structural or systemic problems at the domestic level and hence create a large number of complaints. About 70 % of admissible

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<sup>10</sup> See for the whole development: Explanatory Report of Protocol No. 14*bis* to the Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>11</sup> Explanatory Report of Protocol No. 14*bis* to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 15.

<sup>12</sup> Article 3 para. 3 of Protocol 14*bis*.

cases are repetitive cases.<sup>13</sup> Having three judges decide on these obviously well-founded cases will to a considerable degree unburden the chambers of seven judges presently handling these cases.

On 27 May 2009 the new Protocol was opened for signature. Since it is only an “additional” and not an “amending” protocol, it will not require ratification by all High Contracting Parties. Article 6 of Protocol No. 14bis provides for a particularly low number of ratifications necessary to allow the protocol to enter into force as quickly as possible.<sup>14</sup> With the ratification of the Protocol by only three High Contracting Parties and the expiration of a period of three months, the two reform elements will apply to all States which have ratified, whereas to those that refuse to ratify or have not yet ratified, the proceedings remain unchanged. It is important to point out that Protocol No. 14bis has the explicit character of an interim solution and so automatically ceases to be in force from the date of entry into force of Protocol No. 14 which is still considered to be the best solution for the caseload problem.<sup>15</sup>

Next to the adoption of Protocol No. 14bis by the Committee of Ministers, a Conference of the High Contracting Parties to the Convention in the margins of the Madrid meeting by consensus adopted an agreement which equally aims at the implementation of the single-judge formation and the expansion of the three-judge committee’s competencies: State Parties may individually consent to the direct provisional application of the two relevant provisions of Protocol No. 14. This offers a second legal avenue towards achieving the same outcome, and allows the States to apply the new reform provisions already prior to the entry into force of Protocol No. 14bis.<sup>16</sup>

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<sup>13</sup> Report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly on the Draft Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 28 April 2009, Doc. 11879, B. I. para. 6.; see also Explanatory Report of Protocol No. 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 16 for 2008.

<sup>14</sup> Report of the Committee on Legal Affairs and Human Rights on the Draft Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 28 April 2009, Doc. 11879, B. III. para. 19.

<sup>15</sup> Committee of Legal Advisers on Public International Law (CAHDI), Opinion 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 which are already envisaged to increase the Court’s case-processing capacity, in particular the new single judge and committee procedure, 20 March 2009, Doc. CM (2009) 56 add, para. 11 and conclusions and recommendations of the CAHDI para. 1; Steering Committee for Human Rights (CDDH), Final opinion on putting into practice certain procedures envisaged to increase the Court’s case-processing capacity, 31 March 2009, CM (2009) 51 Addendum final 6 May 2009, para. 12.

<sup>16</sup> A similar option is foreseen by Article 7 of Protocol No. 14bis.

## IV. Appraisal

The entry into force of the new Additional Protocol No. 14*bis* will increase the case-processing capacity of the Court by 20-25 %.<sup>17</sup> Insofar it certainly ameliorates the dramatic situation of the Strasbourg Court.

On the other hand there is also a downside to having opted for an interim solution. Firstly, at the end of the day there is a risk that the pressure on Russia as the last State Party not having ratified Protocol No. 14 is reduced. Furthermore, it cannot be ignored that the overload of the Court essentially also finds its origin in complaints against the Russian Federation. For instance at the end of 2008, 28 % of the pending applications in Strasbourg concerned only Russia even though there are 46 other Convention States. Looking at this figure, one may wonder whether there might be any true relief at all. Moreover, one might criticise that the proceedings before the European Court of Human Rights become fragmented due to the nature of the new protocol as an additional protocol: with the entry into force of the new protocol after ratification by three States and the expiration of a three-month period, the Court will have to operate two different sets of procedures for two sets of States. For some High Contracting Parties, the single-judge system will apply and proceedings before three-judge committees instead of chambers of seven judges will increase. For others the current system will remain in place. This is certainly a novelty in the history of the European Human Rights protection system. On the other hand, one could argue that probably all State Parties having ratified Protocol No. 14 will ratify the “short version” of Protocol No. 14, namely Protocol No. 14*bis*. Hence the fear of a real fragmentation of the protection system might be exaggerated. The only thing one could anticipate is the supposable Russian refusal to ratify the new Additional Protocol and consequently the evocation of a separate treatment of applications against Russia.

Despite the mentioned concerns one might have about the chosen path, the escape out of lethargy should be welcomed: at least certain rationalising procedures will be put into practice with respect to certain States instead of waiting any longer for an uncertain ratification of Protocol No. 14 by the Russian Federation. Moreover, there are also other Member States contributing to the flood of applications, for instance Turkey, Romania and Ukraine.<sup>18</sup> If those States are willing to ratify the Additional Protocol, there will be a noticeable alleviation of the Court's work.

Being an interim solution, the new Additional Protocol No. 14*bis* can be assessed positively as it, for the time being, protects the European Court of Human Rights immediately and effectively against the often predicted fate of becoming irrevocably “a victim of its own success”.

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<sup>17</sup> Report of the Committee on Legal Affairs and Human Rights on the Draft Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 28 April 2009, Doc. 11879, B. II. para. 8.

<sup>18</sup> Annual Report 2008 of the European Court of Human Rights, Council of Europe, 129.