

## 14. Council of Europe

*Extracts from statements delivered by the representatives of the Observer delegation of the Council of Europe*

Statement made in the Sixth Committee, Seventy-second session (2017), 22nd meeting, 26 October 2017:<sup>261</sup>

[T]he Council of Europe suggests including some examples of provisional application of specific treaty provisions from our long-standing Council of Europe practice in this field.

The Memorandum [of the Secretariat<sup>262</sup>], at paragraphs 20 and 33, makes reference to the provisional applicability of certain provisions of *Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (CETS No. 194) by separate agreement, the so-called “Madrid Agreement”, and Protocol 14bis to the *Convention for the Protection of Human Rights and Fundamental Freedoms* (CETS No. 204) including an express clause on provisional application.

Apart from these examples with regard to the *European Convention on Human Rights* we would like to draw your attention to other examples of provisional application included in conventions and protocols concluded within the framework of the Council of Europe: the provisional application of the *General Agreement on Privileges and Immunities of the Council of Europe* (ETS No. 2) (Article 22) and the *Convention on the Elaboration of a European Pharmacopoeia* (ETS No. 50) (Article 17).

Another unusual and peculiar example took place in 2016 in relation to the *Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism* (CETS No. 217) which has entered into force recently (1 July 2017). Article 7 of that Protocol, provides for the setting up of a network of 24-hour-a-day national contact points facilitating the rapid exchange of information concerning persons travelling abroad for the purpose of terrorism. With a view to applying this article provisionally, the Committee of Ministers at its 126th Ministerial session on 18 May 2016 “called for the expeditious designation of the 24/7 contact points to facilitate the timely exchange of information, as provided for by the *Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism* (CETS No. 217), pending its entry into force.” [emphasis added]

As a most recent example, when the *Protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons*<sup>263</sup> will be opened for signature on 22 November 2017 in Strasbourg (France) the signatories will have the possibility to declare under Article 5 of the Amending Protocol that they will apply the provisions of the Protocol on a provisional basis.

Communication transmitted to the Secretariat, 20 August 2019:

[As regards] the provisional application of a “part” of a treaty, we propose to include ... a reference to the *Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism* (CETS No. 217), and the provisional application of its Article 7 (which provides for the setting up of a network of 24/7 national contact points to facilitate the rapid exchange of information concerning persons travelling abroad for the purpose of terrorism), which was decided by the Committee of Ministers of the Council of Europe, at

<sup>261</sup> Full text available at: [https://www.un.org/en/ga/sixth/72/pdfs/statements/ilc/council\\_of\\_europe\\_1.pdf](https://www.un.org/en/ga/sixth/72/pdfs/statements/ilc/council_of_europe_1.pdf).

<sup>262</sup> Editorial note: see A/CN.4/707, reproduced at p. 311, below.

<sup>263</sup> CM(2017)90.

its 126th Ministerial session on 18 May 2016, pending the entry into force of the Protocol (which took effect on 1 July 2017).

This example also illustrates the action of the Committee of Ministers of the Council of Europe as “[...] the competent organ of an international organisation [...]” that agrees to provisionally apply a treaty obligation.

The [International Law Commission] acknowledges that provisional application of a treaty, “arising from contemporary practice”, may be undertaken by States that are not negotiating States and/or are not connected to the treaty in question. In this respect:

Article 36, paragraph 2, of the *Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (CETS No. 223) allows a State that is not a Party to the parent *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (ETS No. 108) to “express its consent to be bound by this Protocol by accession”, but only during the period from the opening for signature of the Protocol and its entry into force. This possibility would allow a third State to make a declaration about the provisional application of the Protocol (CETS No.223) without having been a Party to the Convention ETS No. 108 until that moment. Indeed, this provision establishes that a State “may not become a Party to the Convention without acceding simultaneously to this Protocol”.

Article 37, paragraph 3, of the Protocol amending the *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (CETS No. 223), which opened for signature on 10 October 2018, allows the provisional application of this Protocol among signatories of the Protocol that are Parties to the parent Convention (*Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*, ETS No. 108) and which make a declaration to this effect (see previous paragraph). The Protocol currently has 31 signatories, and two of them (Bulgaria and Norway) have made a declaration concerning the provisional application of the provisions of this Protocol.

[As regards the reference to] the fact that provisional application might not be possible under the internal law of States or the rules of international organisations], the Commission] provides examples [of] different clauses used in several Free Trade Agreements (e.g. “if its constitutional requirements permit”, “if their domestic requirements permit”). We would like to propose to add an example concerning an international organisation, namely the *General Agreement on Privileges and Immunities of the Council of Europe* (ETS No. 2) and its Article 22 on the possible provisional application of this Agreement by its signatories (from the date of signature and pending its entry into force) “so far as it is possible to do so under their respective constitutional systems”. A similar clause is found in Article 17 of the *Convention on the Elaboration of a European Pharmacopoeia* (ETS No. 50), whereby the signatories agree to provisionally apply the Convention “in conformity with their respective constitutional systems”.

[A]s regards the latest developments in the Council of Europe in relation [to] the provisional application of treaties:

Article 5 of the Protocol amending the *Additional Protocol to the Convention on the Transfer of Sentenced Persons* (CETS No. 222), not yet in force, provides that Parties to the Additional Protocol may declare (at the time of ratification, acceptance or approval of this Protocol or at any later moment) that they “will apply the provisions of this Protocol on a provisional basis”. The Protocol has currently 13 signatories and one ratification by the Holy See, on 15 January 2019. The Holy See made a Declaration “acting in the name and on behalf of Vatican City State”, stating that pending the entry into force of this Protocol, “it will apply its provisions on a provisional basis with respect to all other State Parties that make a declaration to the same effect”.

*Extracts from statements delivered by the representatives of Member States of the Council of Europe referencing the practice of the Council of Europe*

## **Bulgaria**

Communication transmitted to the Secretariat, 10 April 2020:

*[Reference to the practice of the Council of Europe:]*

In the process of negotiating the *Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of the Council of Europe* (CETS No 223) art 37 (3) was adopted at the suggestion of the Republic of Bulgaria. This article provides for declarations by States through which they may provisionally apply the provisions of the Protocol. At the time of ratification of the protocol, three states have made declarations to this effect.

Extracts from the fourth report on the provisional application of treaties, by Juan Manuel Gómez-Robledo, Special Rapporteur:<sup>264</sup>

162. As in other cases, the Special Rapporteur consulted the Council of Europe Treaty Office to inquire about the practice of that regional organization on the matter. As in the case of OAS, the preliminary view, subject to a pending final opinion, was that provisional application is infrequent in the practice of the Council of Europe.

163. The Special Rapporteur's attention was drawn to a document presented at the 51st meeting of the *Committee of Legal Advisers on Public International Law* (CAHDI), entitled Draft model final clauses for conventions, additional protocols and amending protocols concluded within the Council of Europe.<sup>265</sup> This document was distributed to the members of CAHDI on a restricted basis. Suffice it to say that no reference whatsoever is made in this set of model clauses to provisional application of treaties; this would appear to confirm the above-mentioned opinion.

Extracts from the fifth report on the provisional application of treaties, by Juan Manuel Gómez-Robledo, Special Rapporteur:<sup>266</sup>

49. The Council of Europe provided the following examples of provisional application, in addition to those contained in the memorandum by the Secretariat on the provisional application of treaties.<sup>267</sup>

50. The first is the General Agreement on Privileges and Immunities of the Council of Europe,<sup>268</sup> of which article 22, second paragraph, provides for the provisional application of the Agreement by the signatory States pending its entry into force.

*“Article 22.*

*Final provisions*

[...] pending the entry into force of the Agreement in accordance with the provisions of the preceding paragraph, the signatories agree, in order to avoid any delay in the efficient working of the Council, to apply it provisionally from the date of signature, so far as it is possible to do so under their respective constitutional systems.”

<sup>264</sup> Doc. A/CN.4/699 (2016).

<sup>265</sup> CAHDI (2016) 8, of 12 February 2016.

<sup>266</sup> Doc. A/CN.4/718 (2018).

<sup>267</sup> A/CN.4/707[, reproduced at p. 311, below].

<sup>268</sup> General Agreement on Privileges and Immunities of the Council of Europe (Paris, 2 September 1949), Council of Europe, *European Treaty Series*, No. 2; available at: <https://rm.coe.int/1680063729>.

51. Reference was also made to the *Convention on the Elaboration of a European Pharmacopoeia*,<sup>269</sup> which contains the following clause on provisional application:

“Article 17.  
*Provisional application*

Pending the entry into force of the present Convention in accordance with the provisions of Article 11, the signatory States agree, in order to avoid any delay in the implementation of the present Convention, to apply it provisionally from the date of signature, in conformity with their respective constitutional systems.”

52. Another example is the *Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism*,<sup>270</sup> which entered into force on 1 July 2017. The Protocol does not contain a provisional application clause. However, article 7 provides for the establishment of a network of national points of contact available on a 24-hour basis in order to strengthen the timely exchange of information concerning persons travelling abroad for the purpose of terrorism. In order to apply this article provisionally and set up the network as soon as possible, the Committee of Ministers of the Council of Europe adopted decision CM/PV(2016)126/2b-add1 at its 126th session, held in Sofia on 18 May 2016. In that decision, the Committee “called for the expeditious designation of the 24/7 contact points to facilitate the timely exchange of information, as provided for by the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism [...], *pending its entry into force*”.<sup>271</sup>

53. In this instance, it was the decision by the Committee of Ministers that led to the provisional application of article 7 of the Protocol.

54. Lastly, as the most recent example, the *Protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons*<sup>272</sup> was cited. The Protocol contains the following clause on provisional application:

“Article 5.  
*Provisional application*

Pending the entry into force of this Protocol according to the conditions set under Article 4, a Party to the Additional Protocol may at the time of ratification, acceptance or approval of this Protocol or at any later moment, declare that it will apply the provisions of this Protocol on a provisional basis. In such cases, the provisions of this Protocol shall apply only with respect to the other Parties which have made a declaration to the same effect. Such a declaration shall take effect on the first day of the second month following the date of its receipt by the Secretary General of the Council of Europe.”<sup>273</sup>

55. As at the time of submission of the present report, six States had signed the Protocol but none had made a declaration of provisional application.<sup>274</sup>

<sup>269</sup> Convention on the Elaboration of a European Pharmacopoeia (Strasbourg, 22 July 1964), Council of Europe, *European Treaty Series*, No. 50; available at: <https://rm.coe.int/168006ff4c>.

<sup>270</sup> Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (Riga, 22 October 2015), *Council of Europe Treaty Series*, No. 217; available at: <https://rm.coe.int/168047c5ea>.

<sup>271</sup> Democratic security for all in Europe in challenging times. b. Tackling violent extremism and radicalisation leading to terrorism (CM/PV(2016)126-final), appendix 3, para. 3; available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016806c9744](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016806c9744). Emphasis added.

<sup>272</sup> Protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons (Strasbourg, 22 November 2017), *Council of Europe Treaty Series*, No. 222; available at: <https://rm.coe.int/1680730cff>.

<sup>273</sup> [Footnote 273 is not applicable to the English version of the present report.]

<sup>274</sup> See <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/222>.