Appendix VII

DRAFT CDDH Report on the proposal to extend the Court's jurisdiction to give advisory opinions

A. Introduction

1. At the 4th meeting of the DH-S-GDR (28-30 January 2009), the Norwegian and Dutch experts submitted a proposal to extend the Court's jurisdiction to give advisory opinions.[1] This proposal was taken up in the CDDH's Opinion on the issues to be covered at the Interlaken Conference [2] but not subsequently mentioned in the Interlaken Declaration. It was, however, included in the Izmir Declaration, as a result of which the Deputies have invited the CDDH "to advise, setting out … the main practical arguments for and against, on a system allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention, already being considered."[3] It has been suggested that this proposal is also connected with the long-term strategic approach formulated in the Izmir Declaration and referred to in the Deputies' decisions on follow-up thereto.

2. The Norwegian/ Dutch proposal featured the following characteristics:

(i) A request for an advisory opinion could only be made in cases revealing a potential systemic or structural problem.

(ii) A request could only be made by a national court against whose decision there is no judicial remedy under national law.

(iii) It should always be optional for the national court to make a request.

(iv) The Court should enjoy full discretion to refuse to deal with a request, without giving reasons.

(v) All States Parties to the Convention should have the opportunity to submit written submissions to the Court on the relevant legal issues.

(vi) Requests should be given priority by the Court.

(vii) An advisory opinion should not be binding for the State Party whose national court has requested it.

(viii) The fact of the Court having given an advisory opinion on a matter should not in any way restrict the right of an individual to bring the same question before the Court under Art. 34 ECHR.

(ix) Extension of the Court's jurisdiction in this respect would be based in the Convention.

B. Arguments in favour of the proposal in general

3. The following general arguments have been advanced in favour of the proposal to extend the Court's jurisdiction to give advisory opinions:

(i) It could contribute to decreasing, in the medium- to long-term, the Court's backlog, thereby increasing its effectiveness.

[1] See doc. DH-S-GDR(2009)004.
[2] See doc. CDDH(2009)019 Add. I.
[3] See doc. CM/Del/Dec(2011)1114/1.5, "other" in this context meaning 'other than a system of fees for applicants to the Court' (see doc. DH-GDR(2011)011 REV.)

(ii) The Court would be provided with the possibility to give clear guidance on numerous potential cases bringing forward the same question, thus constituting an additional procedural tool in cases revealing potential systemic or structural problems and thereby contributing to the efficiency of the Court.

(iii) The procedure would allow for a clarification of the law at an earlier stage, increasing the chances of the issue being settling at national level and avoiding a large number of individual complaints arriving at the Court, thereby reducing the burden on the Court.

(iv) An advisory opinion would provide national courts with a solid base for deciding the case, especially where interpretation of the Convention appeared unclear, and would thus increase the likelihood of the decision being accepted by the parties; it may therefore enhance the authority of national courts and authorities in applying the Convention.

(v) The potential to resolve a number of pending or potential applications raising the same issue, whether at national or European level, could justify the delay in the individual case

(vi) The continuing primary responsibility of the national court (the case remaining within the national system) to act on the Court's advisory opinion, in accordance with the legal, social and political context of the country concerned, may have the effect of enhancing the authority of the Court and its case-law in the member States whilst fostering dialogue between the Convention mechanism and domestic legal orders, thereby reinforcing the principle of subsidiarity.

(vii) The proposal could be pursued in parallel to and not instead of or in competition with work on, for example, filtering or fees. As with work on a simplified amendment procedure, it would be a case of planning for the long-term.

(viii) Implementation of the proposal should not imply excessive costs or administrative burdens and therefore would not in that sense cause any "harm."

C. Arguments against the proposal in general

4. The following general arguments have been advanced against the proposal to extend the Court's jurisdiction to give advisory opinions:

(i) The purpose of the proposal is unclear and may not be suitable to the current state of the Convention system, which is in several ways distinct from other judicial systems that allow for the possibility of requesting advisory opinions.

(ii) It could increase, rather than decrease, the Court's case-load by creating a new group of cases that would otherwise not be presented.

(iii) The Court is already over-loaded and could have difficulty in absorbing this new competence satisfactorily.

(iv) Many questions of interpretation and application of the Convention are already pending before the Court.

(v) Implementing the proposal could also lead to additional work for national courts.

(vi) It would introduce a delay into national proceedings whilst the national court awaited the Court's advisory opinion. This would be inevitable and

would have to be taken into account by the national court when considering whether to make a request.

(vii) The authority of the Court could be put in question if the national court did not follow the advisory opinion, if non-biding (see further para. 18 below).

(viii) Implementation of a new system may create a risk of conflict of competence between national constitutional courts and the European Court of Human Rights, depending on the characteristics of the model chosen.

D. Main aspects of the proposal – options and arguments for and against

5. The following are main aspects of a possible system extending the Court's jurisdiction to give advisory opinions, deriving from the Norwegian/ Dutch proposal. Presented first are those aspects on which there is broad agreement, followed by those on which views differ, with various options (which may be alternative or cumulative) for each and arguments that have been advanced in favour of and against them.[4]

Aspects on which there is broad agreement

6. There was broad agreement that requests for advisory opinions should be limited by reference to the nature of the related case, in order to avoid a proliferation of requests overburdening the Court. Two main options have been suggested: cases revealing a potential systemic or structural problem (the original Norwegian/ Dutch proposal) and those concerning the compatibility with the Convention of legislation, a rule or an established interpretation of legislation by a Court. These options may in fact not be mutually exclusive: indeed, the former may be simply a more restrictive version of the latter, or even the same basic idea expressed in different words.

7. On the question of which domestic authority/ies could request an advisory opinion, there was broad agreement that a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law should be able to, for the following reasons. Advisory opinions are of a legal nature and should only be requested by courts. Limiting the procedure to the highest national courts would introduce a form of exhaustion of domestic remedies. This would help avoid a proliferation of requests overburdening the Court. Allowing lower courts to request advisory opinions may interfere with the dialogue between national jurisdictions, which should be resolved before a case is brought to Strasbourg. It was also suggested that Governments be able to request advisory opinions, since they may wish to be assured of the conformity of a draft law with the Convention (cf. the consultative competence under the American Convention on Human Rights)[5]; on the other hand, it was argued that this would augment the risk of increasing the burden on the Court and may risk the transfer of legal disputes to Strasbourg for political reasons.

[4] It should be observed that some experts expressed views on these issues whilst remaining opposed to or having reservations over any extension of the Court's jurisdiction to give advisory opinions, at least at this stage.

[5] Under Article 64 of the American Convention on Human Rights, "The member states of the Organization may consult the [Inter-American Court of Human Rights] regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court."

8. It was suggested that at least the Government of the State of which a national court or tribunal had requested an advisory opinion should be able to intervene in the proceedings, as that Government should be able to present its own position on the subject-matter of the request. (See also para. 18 below.) The position of the parties to the domestic proceedings may also need consideration.

9. The relevant national authority may only request the Court's advisory opinion once the factual circumstances have been sufficiently examined by the national court (see further para. 15 below).

10. It was suggested that the relevant national authority should also provide the Strasbourg Court with an indication of its views on the question on which it has requested an advisory opinion.

11. It should be optional for the relevant national authority to request an advisory opinion. It would only be appropriate for relevant national authorities to request an advisory opinion when they have serious doubts about the compatibility of national law or case-law with the Convention. An individual concerned always has the possibility of bringing the case before the Court (see further para. 20 below), which would thus retain the possibility of pronouncing on the legal issue.

12. The Court could give priority to requests for advisory opinions, whether accepted or refused. This could ensure cases were promptly settled at national level and thereby avoid both delays in the national proceedings and large numbers of complaints being presented to the Court. Only if requests for advisory opinions did not relate to systemic or structural problems or essential cases relating to the interpretation or application of the Convention could they not be given priority; prioritisation would then depend upon the nature of the case.

13. The competence to deliver advisory opinions should be limited to the Grand Chamber, as is the case for advisory opinions given to the Committee of Ministers under Article 47 ECHR. The authority of the advisory opinions would thus be reinforced.

14. Finally, it could be optional for States Parties to submit to an extension of the Court's jurisdiction to give advisory opinions. This would allow other States to see how the system operated and developed.

15. It was also noted that there would be a need to introduce procedural guarantees in line with the principle of legal certainty.

Aspects on which different options have been proposed

16. There are differences over how far rendering advisory opinions would require the Court to take into account the factual circumstances which have given rise to the request for an advisory opinion. It is understood that, in any event, the Court itself should not undertake a factual assessment in place of a national court.

(i) On the one hand, it is desirable to avoid advisory opinions that are too abstract in nature and which might have unintended consequences and be difficult to apply effectively at national level.

(ii) On the other hand, some degree of generality is implied by the concept of advisory opinions, and the authority of the advisory opinion would be undermined if the Court drafted it in too general terms.

17. Different views were put forward on whether the Court should have discretion to refuse requests for advisory opinions.

(i) Arguments expressed in favour were that the Court should have a full discretion to refuse, making the system as flexible as possible and helping to ensure that the Court did not become over-burdened with the preparation of advisory opinions. The requirement that only cases revealing a potential systemic or structural problem may be subject of a request for an advisory opinion, along with the procedure for dealing with them, however, should ensure that, above all in the medium- to long-term, there should be no increase in the net work-load of the Court.

(ii) Arguments against included that where a superior national court had duly considered it appropriate to request an advisory opinion, the Court should not have a discretion to refuse, as this would undermine dialogue between the two jurisdictions. Furthermore, in the delicate situation of divergent case-law between Court sections, a request for an advisory opinion would allow harmonisation of the Court's case-law (this argument also being of potential general relevance). The existence of a pending application relating to the same issue would not be an obstacle to the Court giving an advisory opinion, and could indeed accelerate resolution of the pending case.

18. Views also differed on whether the Court should be required to give reasons for a refusal to accept a request for an advisory opinion.

(i) On the one hand, it was argued that the relevant national authority has a right to know why an advisory opinion is not being given. Some explanation of the refusal would help foster judicial dialogue. Reasons for refusals would guide national courts when considering whether to make a request, in particular the national court whose request has been refused; this could decrease the number of requests likely to be refused. Even the Court of Justice of the EU gives brief reasons for not formally responding to a request for a preliminary ruling.

(ii) On the other hand, requiring the Court to give reasons for refusals would increase its work-load; it should at most be optional for the Court to give reasons: this should be especially the case for a flexible, optional system. The Court is not required to give reasons for refusals to refer to the Grand Chamber and so should not be so for refusals to give advisory opinions.

19. There were also differing views on whether other interested actors, including other States Parties to the Convention, should be able to intervene in advisory opinion proceedings.

(i) In favour, it was argued that Advisory opinions relate to the interpretation of an international treaty and so potentially affect all States Parties, although an underlying systemic problem may be based on specific national circumstances. Interventions by States would enhance knowledge of the Court's case-law in the States Parties generally and would widen the impact of the Court's guidance on a specific legal issue. They would help the Court frame the legal question and provide broader understanding of the situation in the States Parties. They would enhance the authority of the opinion and the case-law in

general, by having it preceded by a sufficiently wide legal debate. Non-state entities should also be able request leave to intervene. (As a practical matter, the Court would have to notify national governments of pending advisory opinion cases or, alternatively, publish such cases on its web-site. Also, interventions in this context should be subject to short time-limits so as to avoid delaying proceedings.)

(ii) Against the idea, it was noted that allowing other States Parties to intervene could risk creating a certain asymmetry, since requests for advisory opinions would come from national courts, whereas any interventions would not. Allowing for such interventions would delay the procedure, thus further delaying proceedings at national level.

20. A particular point of difference concerned the question of the effects the advisory opinion should have in the relationship between the European Court of Human Rights, rendering the advisory opinion, and the national authority requesting it.

(i) Arguments in favour of opinions being binding included that the Court is the central authority for ensuring uniform application of the Convention. Should the request come from a court and the opinion be merely optional, this would lead to loss of the potential gain expected from the procedure, since the applicant would probably subsequently apply to the Court, which would have acknowledged his rights in the context of the advisory opinion procedure: a binding advisory opinion would offer finality. The extent to which the advisory opinion would be binding could depend on the nature of the case: if in relation to a specific systemic/ structural problem, then the advisory opinion would be binding for the requesting authority; if on interpretation of the Convention, then a general binding effect for all States Parties. It is difficult to envisage a non-binding advisory opinion when it is optional to make the request: this would imply that the domestic authority could apply a solution contrary to that indicated by the Court, following which the individual would almost certainly make an application to Strasbourg; this would run contrary to the purpose of the system. The non-binding nature of advisory opinions under the existing procedure may be justified by the political nature of the final decision, taken by the Committee of Ministers, in which legal issues were only one consideration.

(ii) It may be unnecessary to make the advisory opinion formally binding, since the authority of the advisory opinion within the domestic legal order would derive from the legal status of the consequent decision of the body that had requested it. Should the advisory opinion concern application of the Convention to the specific facts of the case before the national court, it may perhaps not automatically be applicable to other cases. The Court would be advising on a Convention issue, not deciding on the case before the national court. The "sanction" for non-compliance with an advisory opinion would be the finding of a violation in a subsequent individual application. Since it would be optional for the national court to request an advisory opinion, however, it seems unlikely that a national court would delay proceedings in order to request one and then not follow it. Advisory opinions of most international courts are not legally binding.

21. There were also differences over whether there should be restrictions on the right of individuals to bring the same legal issue before the Court under Article 34 ECHR.

(i) Arguments in favour included that the Court's advisory opinion should not be challenged in substance by individual applications concerning the same question. The right of individual petition could be restricted where the advisory opinion is followed by the requesting authority. Maintaining an unrestricted right of individual petition following an advisory opinion relating to the same case would undermine the purpose of the system, namely to reduce the number of future individual applications.

(ii) Those against included that the right of individual petition should not be restricted as it was at the core of the Convention system. If its advisory opinion concerns interpretation of the Convention, the Court should not be prevented from assessing individual applications concerning concrete situations. If the advisory opinion is not followed by the requesting authority, the individual must retain the right to bring the case to Strasbourg.