



Strasbourg, 14 September 2012

GT-GDR-B(2012)R1

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

**DRAFTING GROUP 'B' ON THE REFORM OF THE COURT
(GT-GDR-B)**

1st Meeting

Strasbourg

Wednesday 12 September – Friday 14 September 2012

Agora, Meeting Room G05

MEETING REPORT

Item 1: Opening of the meeting, adoption of the agenda and order of business

1. Drafting Group B on the reform of the Court (GT-GDR-B) held its 1st meeting in Strasbourg from 12-14 September 2012. The list of participants appears at Appendix I. The agenda, as adopted, appears at Appendix II. The Group elected Mr Rob LINHAM (United Kingdom) as Chairperson and Mrs Denise RENGER (Germany) as Vice-chairperson.

Item 2: Terms of reference

2. The Group exchanged views on its terms of reference and how to fulfil them, recalling the decisions taken by the Committee of Ministers following the Brighton Conference (doc. CDDH(2012)008) and the subsequent guidance given by the CDDH at its 75th meeting (19-22 June 2012, doc. CDDH(2012)R75), including its organisation of the various elements of follow-up to the Brighton Conference (doc. CDDH(2012)009REV.)

Item 3: Draft Protocol No. 15

3. The Group examined and provisionally approved draft text for Protocol No. 15 to the ECHR, as it appears in the Addendum. It did so in accordance with a general preference for clarity, transparency, simplicity and brevity throughout.

4. During its discussions, the Group considered certain issues to be outside its terms of reference or insufficiently supported, and therefore decided not to include them in the draft text. It wished nevertheless to record these discussions in its meeting report.

- i. In connection with the reduction in the time limit for submitting applications, it was suggested that Protocol No. 15 could also define more precisely what type of document should be submitted within the time limit. In this connection, the Group took note of information from the Registry concerning the Court's on-going pilot project on strict application of Rule 47 of the Rules of Court and the possibility of this approach becoming generalised. The proposal was, however, considered to fall outside the Group's terms of reference and to be potentially too time-consuming to examine further.
- ii. In connection with the removal of the parties' right to object to a Chamber's relinquishment of a case to the Grand Chamber, it was suggested that Article 30 of the Convention be further amended to replace the expression "inconsistent with a judgment previously delivered by the Court" with the expression "inconsistent with the well-established case-law of the Court". This proposal was considered to reflect a real concern in relation to the current wording of Article 30, the term "judgment" being arguably too narrow, but to be outside the Group's terms of reference as not consequential to the principal amendment.
- iii. Also in connection with the removal of the parties' right to object to a Chamber's relinquishment of a case to the Grand Chamber, it was proposed that Chambers should be required first to rule on admissibility before relinquishing jurisdiction. The Group decided not to retain this proposal.
- iv. Also in connection with the removal of the parties' right to object to a Chamber's relinquishment of a case to the Grand Chamber, it was suggested that a Chamber's

decision to relinquish jurisdiction should be taken unanimously, rather than by majority decision as is now the case. This proposal was considered not to be a consequential amendment, as it was contrary to the underlying aim of the principal amendment (i.e. to facilitate relinquishment in appropriate cases).

- v. Also in connection with the removal of the parties' right to object to a Chamber's relinquishment of a case to the Grand Chamber, it was proposed that, where such relinquishment occurs, an unsuccessful party before the Grand Chamber should be able to ask the Grand Chamber to reconsider its decision or judgment. The Group decided not to retain this proposal.
 - vi. Also in connection with the removal of the parties' right to object to a Chamber's relinquishment of a case to the Grand Chamber, it was suggested that the Court should seek the parties' views on relinquishment and give reasons for its decision. These proposals were considered not to be a consequential amendment, as they were contrary to the underlying aim of the principal amendment.
5. In connection with the new age requirements for judges of the Court, the Group asked for a request to be transmitted to the Secretariat of the Parliamentary Assembly to provide information about how the new rules would operate in respect of the election procedure, particularly in respect of nominated candidates who are approaching the age of 65 years at the time of their election.

Item 4: Draft Protocol No. 16

6. The Group examined the proposals made by the Dutch and Norwegian experts (doc. GT-GDR-B(2012)005). It structured its discussions around the following questions:
- i. Who can request an advisory opinion (Article 1(1) in doc. GT-GDR-B(2012)005)? The Group considered that only domestic courts or tribunals should be able to request the Court to give an advisory opinion; there was no support for including any other authority, such as national governments. As to the definition of relevant domestic courts or tribunals, the Group agreed that each State should be required to specify a limited number of its domestic courts and tribunals upon accession to the Protocol, subject to certain constraints; it instructed the Secretariat to consult the Treaty Office on the technicalities involved in making this specification. Most experts preferred that only the "highest" courts or tribunals should be included, with further elaboration of this term to be given in the Explanatory Report, including on the significance of different legal systems and the fact that States would have a margin within which to specify such courts or tribunals. There was insufficient support to retain the further prescription that only those courts or tribunals "against whose decisions there is no judicial remedy under national law" should be specified, as this approach did not work consistently across all legal systems.
 - ii. In what cases can an advisory opinion be requested (Article 1(1))? The Group considered that the circumstances in which an advisory opinion could be requested should be limited. This could be done on the basis of the wording of Article 43(2) of the Convention on referral to the Grand Chamber: "*if the case raises a serious question affecting the interpretation or application of the Convention of the Protocols thereto, or a serious question of general importance*", with the possible exception of the final seven words. In this connection, it asked the Secretariat to obtain for the next

meeting information on the Court's practice in applying Article 43(2). There should also be an explicit requirement for a link to a specific case at national level. There was some support for the Court's proposal ("questions of principle or of general interest relating to the interpretation of the rights and freedoms defined in Section I of the Convention and the protocols thereto"). It noted that the CDDH's alternative proposal ("cases concerning compatibility with the Convention of legislation, a rule or an established interpretation of legislation by the Court") would require further modification. There was some strong opposition to the option reading "issues revealing a potential systemic or structural problem relating to the interpretation of the rights and freedoms defined in Section I of the Convention and the protocols thereto".

- iii. What does the requesting authority have to do (Article 1(2))? The Group considered that two issues arose for possible inclusion in a request for an advisory opinion: the factual and legal context and the requesting authority's own view on the legal issue. It noted that some highest domestic courts that might appropriately request advisory opinions had no competence to establish facts. It considered that it should not be compulsory for the requesting authority to give its own view. Taking note of the Information Note on references from national courts for a preliminary ruling [of the Court of Justice of the European Union (OJEU 2011 C 160, P.1), it considered that the necessary requirements could met by a formulation such as "*The requesting court or tribunal should provide the relevant legal and factual background to the request as well as the reasons prompting it*", with further explanation of the nature of the relevant background given the Explanatory Report. The Group agreed to return to this issue in further detail at its next meeting.
- iv. Can the Court refuse a request for an advisory opinion? If so, must it give reasons? (Article 1(1)-(3)) The majority agreed that the Court should have some discretion to refuse requests. This discretion should not be unfettered: the grounds for exercising it should be specified. These grounds should not include reference to the Court's workload. Different views were expressed on whether and how to refer to possible interference with the right of individual application. The Group considered that it may be necessary to expand the grounds for the Court exercising its discretion beyond the substantive (see ii. above) and procedural (see iii. above) grounds. On the Court's procedure, the Group felt that the text should mention the role of the five-judge panel of the Grand Chamber (see further under vi. below) in deciding on requests. It retained the following possible wording: "*A panel of five judges of the Grand Chamber shall decide whether, having regard to the legal issues raised, to accept the request for an advisory opinion*"; to which it may be necessary to add reference to the national judge sitting on the five-judge panel, although this latter point could perhaps instead be included in the Explanatory Report. In order to achieve these aims, the Group asked the Secretariat to restructure Article 1(1)-(3) in line with Article 43 of the Convention. The Group felt that the Court should give reasons for any refusal, although this would not be reflected in the Protocol but rather in the Explanatory Report.
- v. How should the Court consider an advisory opinion (Article 1 (4)-(5))? The Group agreed that the Grand Chamber of the Court should consider accepted requests for advisory opinions. The proceedings not being adversarial, no party would automatically be invited to make submissions. The Government of the High Contracting Party from which the request was made, however, would have the right (but not an obligation) to submit written comments or to take part in any hearing. The Court would determine whether any other parties, including the parties to the

domestic proceedings, should be invited to make such submissions and to take part in any hearing (cf. Article 36(2) of the Convention). The Court would decide whether a hearing was necessary. The Explanatory Report should mention that the requesting court or tribunal would implicitly have the right to withdraw a request, and that the Court should inform the High Contracting Party concerned of the acceptance of any requests made by its courts or tribunals. The Group felt that it was not necessary to refer to prioritisation of requests for advisory opinions, which would be left to the Court as is generally the case.

- vi. What form should an advisory opinion take (Article 2)? The Group agreed that the relevant provision should be based on Article 49 of the Convention. The Court should also communicate an advisory opinion to the High Contracting Party whose court or tribunal had requested it. It need not communicate it to the Committee of Ministers, as there would be no supervision of its execution. The advisory opinion should be published (cf. Article 44(3) of the Convention and the Court's practice as set out in Rules 77 and 78 of the Rules of Court).
- vii. In what languages should requests be made and advisory opinions issued? The Group noted that domestic courts were required to work in national official languages, which often did not include English or French (the official languages of the Court): they could neither formulate in non-official languages requests for advisory opinions nor admit to their proceedings advisory opinions in non-official languages. The Group noted that the Court would be able to process requests in languages other than English or French, as it did for individual applications. It was suggested that the requesting court or tribunal should be responsible for preparing or commissioning a certified translation of an advisory opinion for admission to the domestic proceedings. The Group decided to contact the members of the plenary Committee of experts on the reform of the Court (DH-GDR) to ascertain whether any member States would have problems preventing the admission into domestic proceedings of an advisory opinion not in a national official language, and whether those problems would require resolution in the Protocol itself.
- viii. When should the Protocol come into force, and should it have a "trial period" (Article 5)? The Group considered that the Protocol should come into force following a minimum number of ratifications; if possible, only one: the Secretariat was instructed to enquire of the Treaty Office whether this was possible and if not, why not. It was noted that the issue of the minimum number of ratifications is closely linked to the effect of an advisory opinion in respect of later cases against other High Contracting Parties. The Group decided to return to this issue at its next meeting. The Group considered that there should not be a "trial period" during which States could decide whether or not to maintain the new procedure thereafter.

Item 5: Organisation of future work

7. The Group, with the aim of fulfilling its terms of reference at its next meeting, organised its future work as follows:
 - i. Experts were invited to submit to the Secretariat (david.milner@coe.int) by Friday 28 September any written comments on the draft Protocol No. 15, as provisionally approved, in particular its Articles 1, and 8(1) and (3).

- ii. The Secretariat was instructed to prepare a preliminary draft explanatory report on draft Protocol No. 15, as provisionally approved.
- iii. The Secretariat was instructed to prepare in accordance with the above conclusions (see Item 4) revised text for draft Protocol No. 16, to be distributed in advance of the next meeting.
- iv. The Secretariat was instructed to prepare elements for a preliminary draft explanatory report on draft Protocol No. 16, to the extent examined so far.
- v. Experts were invited to submit to the Secretariat (david.milner@coe.int) by Friday 28 September any written comments on the following outstanding questions concerning draft Protocol No. 16: what is the effect of an advisory opinion in respect of the domestic case in respect of which it has been requested, and on the right of individual application to the Strasbourg Court of parties to proceedings in that case? What is the effect of an advisory opinion in respect of later cases against the same High Contracting Party? What is the effect of an advisory opinion in respect of later cases against other High Contracting Parties?

Appendix I**List of participants****MEMBERS / MEMBRES****ANDORRA/ANDORRE**

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Mr John DARCY, Conseiller du président et du greffier / adviser to the President and the Registrar, Private Office of the President, European Court of Human Rights, Cabinet du Président, Cour européenne des droits de l'homme

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Mr Alfonso DE SALAS, Head of the Human Rights Intergovernmental Cooperation Division / Chef de la Division de la coopération intergouvernementale en matière de droits de l'Homme, Secretary of the CDDH / Secrétaire du CDDH

Mr David MILNER, Administrator / Administrateur, Human Rights Intergovernmental Cooperation Division / Division de la coopération intergouvernementale en matière de droits de l'Homme, Secretary of the DH-GDR / Secrétaire du DH-GDR

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Mlle Haldia MOKEDDEM, Assistant / Assistante, Human Rights Intergovernmental Cooperation Division / Division de la coopération intergouvernementale en matière de droits de l'Homme

INTERPRETERS/INTERPRÈTES

Ms Sally BAILEY-RAVET

Ms Corinne McGEORGE

Mr Christopher TYCZKA

Appendix II**Agenda (as adopted)****Item 1: **Opening of the meeting, adoption of the agenda and order of business, and election of the Chairperson****General background documents

- Draft annotated agenda GT-GDR-B(2012)OJ001
- Report of the 75th meeting of the CDDH (19-22 June 2012) CDDH(2012)R75
- Report of the 74th meeting of the CDDH (7-10 February 2012) CDDH(2012)R74
+ Addenda I & II
- Report of the 1st meeting of the DH-GDR (17-20 January 2012) DH-GDR(2012)R1
- Brighton Declaration CDDH(2012)007
- Follow-up to the High-level Conference on the Future of the European Court of Human Rights (Brighton, 18-20 April 2012) CDDH(2012)009REV.

Information document

- Committee of Ministers' Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods CDDH(2011)012

Item 2: **Terms of reference**Background document

- Report of the 73rd meeting of the CDDH, including the terms of reference of the CDDH and bodies subordinate to it for the biennium 2012-2013 CDDH(2011)R73 &
Appendix VIII

Item 3: **Draft Protocol No. 15**Working documents

- Draft elements for certain of the issues to be addressed in Protocol No. 15 (prepared by the Secretariat) GT-GDR-B(2012)001
- Compendium of States' contributions concerning the reference to the principle of subsidiarity and the doctrine of the margin of appreciation in the Preamble to the Convention GT-GDR-B(2012)002

Reference document

- Contribution of Greece concerning relinquishment of jurisdiction from the Chamber to the Grand Chamber (English only) GT-GDR-B(2012)003
- Submission of the European Group of National Human Rights Institutions on draft Protocol No. 15 to the ECHR GT-GDR-B(2012)007

- Joint preliminary comments on the drafting of Protocols 15 and 16 to the ECHR (submitted by Amnesty International, the International Commission of Jurists et al) (English only) DH-GDR(2012)008

Item 3.1: Shortening to four months the time limit under Article 35(1) of the Convention within which an application must be made to the Court

Item 3.2: Amending Article 35(3)(b) of the Convention to remove the words “and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal”

Item 3.3: Amending Article 30 of the Convention to remove the words “unless one of the parties to the case objects”

Item 3.4: Amending Article 23(2) of the Convention to replace the age limit for judges by a requirement that judges must be no older than 65 years of age at the date on which their term of office commences

Item 3.5: Including a reference to the principle of subsidiarity and the doctrine of the margin of appreciation in the Preamble to the Convention

Item 4: **Draft Protocol No. 16**

Working documents

- Draft elements for Protocol No. 16 (submitted by the experts of The Netherlands and Norway) GT-GDR-B(2012)005

Background documents

- Advisory opinions: Brighton Declaration negotiations (paper by the United Kingdom expert) GT-GDR-B(2012)006
- CDDH Report on measures to enhance relations between the Court and national courts (Appendix V to the CDDH Final Report on measures requiring amendment of the Convention) CDDH(2012)R74
Addendum I, Appendix V
- Court’s Reflection Paper on the proposal to extend the Court’s advisory jurisdiction #3853038
- Joint preliminary comments on the drafting of Protocols 15 and 16 to the ECHR (submitted by Amnesty International, the International Commission of Jurists et al) DH-GDR(2012)008

Item 5: **Organisation of future work**

Item 6: **Other business**

Item 7: **Adoption of the conclusions and meeting report**