



Strasbourg, 15 October 2012

GT-GDR-B(2012)R2

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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

2nd Meeting

Strasbourg

Wednesday 10 October – Friday 12 October 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 2nd meeting in Strasbourg from 10-12 October 2012 with Mr Rob LINHAM (United Kingdom) in the chair. The list of participants appears at Appendix I. The agenda, as adopted, appears at Appendix II.

Item 2: Draft Protocol No. 15

2. The Group examined and approved draft text for Protocol No. 15 to the ECHR, as it appears in Addendum I.

3. In doing so, it paid particular attention to those proposals that had been made in writing (see doc. GT-GDR-B(2012)008), the non-paper presented by the delegation of Poland (see doc. GT-GDR-B(2012)017) and the Joint NGO Comments (see doc. GT-GDR-B(2012)016). With respect to its discussion of these proposals, the Group decided to record the following in its meeting report.

- i. The Group recalled that the aim of the proposed amendment to Article 30 of the Convention was to contribute to increasing the consistency of the case-law, noting that the Court intended to amend Rule 72 of the Rules of Court so as to make it obligatory for a Chamber to relinquish jurisdiction to the Grand Chamber where it envisages departing from settled case-law.
- ii. The Group looked again at the proposal, previously examined at the first meeting, that the parties to a case be able to ask the Grand Chamber to reconsider a judgment given by it following relinquishment by a Chamber. The proposal did not receive support as it was felt to be contrary to the principle that the Grand Chamber is the ultimate judicial authority within the Convention system; to be unrealistic, impractical and procedurally complicated; and that simpler, more appropriate means existed to achieve the same essential aim, in particular certain procedural measures.
- iii. The Group also examined the proposal, a variant upon one examined at the first meeting, that the Chamber be required to give reasons for its relinquishment decision and an explanation of the potential inconsistency with a previous judgment or serious question of interpretation of the Convention. It noted that a Chamber in such a situation might not be able to express unanimously a single set of reasons for its relinquishment decision. It agreed that the purpose of the proposal was to ensure that the parties are as well informed as possible of the issues to be addressed by the Grand Chamber, so as to allow proper preparation and effective participation in the proceedings, and that this was entirely consistent with the aim of the proposed amendment to the Convention. It felt that the purpose of the proposal could best be achieved by the Grand Chamber posing more precise questions to the parties. It therefore concluded that the Explanatory Report to Protocol No. 15 should refer to an “expectation that the Grand Chamber will in future give more specific indication to the parties of the potential departure from existing case-law or serious question of interpretation of the Convention or the Protocols thereto”.
- iv. The Group expressed its appreciation to the Polish expert for not maintaining certain other of her proposals, namely that the removal of the parties’ right to object to

relinquishment be made in some way optional or that Article 43(2) of the Convention also be amended.

- v. The Group also looked again at the proposal, previously examined at the first meeting, that Chambers be required to rule on admissibility before relinquishing a case to the Grand Chamber. It was noted that in some cases, admissibility was a very, if not the most important issue. It was also noted that a Chamber could rule on the admissibility of some complaints and not others, leaving the admissibility decision on those to the Grand Chamber following relinquishment of the relevant parts of the case. The Group therefore agreed that the best approach would be to express in the Explanatory Report to Protocol No. 15 a preference for the Chamber to narrow down the case as far as possible, including by finding inadmissible any relevant parts of the case before relinquishing it.
 - vi. The Group considered carefully how best to give effect to the decision to amend the age limit for judges and in particular the specific wording used in the Brighton Declaration. It noted that the date on which a judge takes office has the potential to vary to such a degree, both through possible complications in the election process and through the choice of the judge-elect, that it would make it difficult to be certain about some candidates' eligibility during the national nomination process and the elections by the Parliamentary Assembly. In light of this, the Group presented to the DH-GDR two alternative ways in which the age limit could be applied in a more foreseeable way, with an alternative explanation for each in the draft Explanatory Report.
4. Further to the above, the Group invited the Court to indicate how it would in practice respond to an expression of expectation such as that contained in paragraph 3.iii. above. With regard to Rule 72, as mentioned in paragraph 3.i. above, the Group also recalled that paragraph 12c(iii) of the Brighton Declaration encourages the Court to consult the States parties on proposals to amend the Rules of Court.

5. The Group noted the advice of the Directorate of Legal Advice and Public International Law (DLAPIL) that it is the practice of the Council of Europe to begin a preamble to a treaty with the phrase "The member States of the Council of Europe, signatories to the Convention for the Protection of Human Rights and Fundamental Freedoms..." The Group nevertheless preferred the expression "The High Contracting Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms...": it considered this consistent with similar references in other parts of the draft Protocol that anticipate the possible future accession to the Protocol of parties other than member States of the Council of Europe, such as the European Union.

Item 3: Draft Explanatory Report to Protocol No. 15

6. The Group examined and approved draft text for the Explanatory Report to Protocol No. 15, as it appears in Addendum II.

Item 4: Draft Protocol No. 16

7. The Group examined and approved draft text for Protocol No. 16 to the ECHR, as it appears in Addendum III.

8. In doing so, it decided to record the following aspects of its discussions.

- i. The Group looked again at the proposal, previously examined at the first meeting but reiterated with reference to Article 267 of the Treaty on the Functioning of the European Union on the jurisdiction of the Court of Justice of the European Union, that advisory opinions may only be requested by courts and tribunals “against whose decisions there is no judicial remedy under national law...” It recalled its earlier conclusions that such a definition would be too broad and thus run counter to the aim of limiting the number of courts or tribunals that could request an advisory opinion. It noted that High Contracting Parties would enjoy a certain leeway in their selection of which of their highest courts or tribunals would be able to request advisory opinions. The proposal did not therefore receive support.
- ii. The Group examined the proposal to set a deadline of three months for the panel of the Grand Chamber to decide whether or not to accept a request for an advisory opinion. It agreed on the importance of not causing undue delay in the domestic proceedings underlying the request. The Group felt if there were no consequences for any failure to respect such a deadline, however, then it would serve little purpose. It recalled that the requesting court or tribunal could withdraw the request. It noted that the potential problem of delay in domestic proceedings could relate not only to the panel’s decision but also to the Grand Chamber proceedings. It was suggested that to require the Court to allocate resources in order to meet such a deadline would be unfair on non-parties to optional Protocol No. 16. The Group reiterated its view that the Court should remain free to set its own priorities for dealing with all aspects of its case-load. It therefore concluded that the proposal should not be retained.
- iii. The Group examined the replies given to the question sent at its request by the Chairperson of the DH-GDR to the members of the latter concerning possible language problems (see para. 6.vii. of the report of the first meeting, doc. GT-GDR-B(2012)R1). It noted that none of the replies reported insuperable problems preventing the admission into domestic proceedings of an advisory opinion not in a national official language and that none insisted on resolution in the Protocol itself of whatever problems or difficulties that may exist. It recalled that the Court would be able to process in languages other than English or French requests for advisory opinions, as it did for individual applications, and agreed that the Explanatory Report should mention that relevant courts or tribunals would be able to make their requests to the Court in a national official language.

Item 5: Draft Explanatory Report to Protocol No. 16

9. The Group did not have time to consider in detail the draft text for the Explanatory Report to Protocol No. 16, contained in doc. GT-GDR-B(2012)015. It therefore instructed the Secretariat to revise this draft text, on the basis of the draft text of the protocol as approved under Item 4 above and discussions during the meeting, for presentation to and examination by the DH-GDR at its next meeting.

Item 6: Other business

10. The Group concluded that it had, in the light of the guidance given by the CDDH,¹ satisfied the terms of its mandate. It expressed its appreciation for the constructive atmosphere

¹ See doc. CDDH(2012)R75, para.6.

shown by its members throughout its work and for the way in which the Chairperson had conducted its meetings. The Group also expressed its gratitude to the Secretariat, whose hard work and support had been invaluable in facilitating the Group's efforts.

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

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Mr Andrew DRZEMCZEWSKI Head of Legal Affairs and Human Rights Department

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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

Mme Virginie FLORES, Lawyer / Juriste, Human Rights Intergovernmental Cooperation Division /
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INTERPRETERS / INTERPRÈTES

Christopher TYCZKA

Sylvie BOUX

Didier JUNGLING

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

- * Draft annotated agenda GT-GDR-B(2012)OJ002
- * Report of the 1st meeting of the GT-GDR-B (12-14 September 2012) GT-GDR-B(2012)R1
- 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.

Item 2: **Draft Protocol No. 15**Working document

- Draft Protocol No. 15 GT-GDR-B(2012)R1
Addendum I

Reference documents (* New document)

- * Compilation of written comments on draft Protocol No. 15 following the first meeting (prepared by the Secretariat) GT-GDR-B(2012)008
- 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
- Contribution of Greece concerning relinquishment of jurisdiction from the Chamber to the Grand Chamber (English only) GT-GDR-B(2012)003
- 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) GT-GDR-B(2012)004
- Submission of the European Group of National Human Rights Institutions on draft Protocol No. 15 to the ECHR (English only) GT-GDR-B(2012)007

Item 2.1: **Article 1 of the draft protocol (including a reference to the principle of subsidiarity and the doctrine of the margin of appreciation in the preamble of the Convention)**

Item 2.2: Article 8(1) of the draft protocol (transitional provision for the change in the age requirements for judges)

Item 2.3: Article 8(4) of the draft protocol (transitional provision for the change in the time limit for applying to the Court)

Item 2.4: Other matters concerning the draft protocol

Item 3: Draft Explanatory Report to Protocol No. 15

Working document

- Draft Explanatory report for Protocol No. 15 (prepared by the Secretariat) GT-GDR-B(2012)009

Reference document

- Draft Protocol No. 15 GT-GDR-B(2012)R1
Addendum I

Item 4: Draft Protocol No. 16

Working document

- Draft elements for Protocol No. 16 as revised by the Secretariat following the 1st meeting GT-GDR-B(2012)010

Reference documents (* New document)

- * Compilation of written comments on draft Protocol No. 16, following the first meeting (prepared by the Secretariat) GT-GDR-B(2012)011
- * Advice of the Treaty Office concerning (i) the technicalities involved in States Parties' specifying the relevant "highest courts or tribunals" and (ii) the minimum number of ratifications required for entry into force of Protocol No. 16 GT-GDR-B(2012)012
- * The General Practice of the Grand Chamber followed by the Panel of the Grand Chamber when deciding on requests for referral in accordance with Article 43 of the Convention (Court document) GT-GDR-B(2012)013
- * Information Note on references from national courts for a preliminary ruling of the Court of Justice of the European Union (OJ 2011 C 160, p.1) GT-GDR-B(2012)014
- Draft elements for Protocol No. 16 (submitted by the experts of The Netherlands and Norway) GT-GDR-B(2012)005
- Compendium of States' contributions concerning draft Protocol No. 16 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

Item 4.1: **The legal effect of an advisory opinion**

Item 4.2: **Procedural requirements for requesting an advisory opinion**

Item 4.3: **Entry into force of Protocol No. 16**

Item 4.4: **Other matters concerning the draft protocol**

Item 5: **Draft Explanatory Report to Protocol No. 16**

Working document

- Elements for a draft Explanatory report for Protocol No. 16 (prepared by the Secretariat) GT-GDR-B(2012)015

Reference document (* New document)

- * Draft elements for Protocol No. 16 as revised by the Secretariat following the 1st meeting GT-GDR-B(2012)010

Item 6: **Other business**

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