



Strasbourg, 21 March 2014

GT-GDR-F(2014)R1

STEERING COMMITTEE FOR HUMAN RIGHTS  
(CDDH)

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

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**1<sup>st</sup> Meeting**

**Strasbourg**

**Wednesday 19 March – Friday 21 March 2014**

**Agora, Meeting Room G01**

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**MEETING REPORT**

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## **Item 1:      Opening of the meeting, adoption of the agenda and election of a Vice Chairperson**

1.      Drafting Group F on the reform of the Court (GT-GDR-F) held its 1<sup>st</sup> meeting in Strasbourg from 19-21 March 2014 with Mr Martin KUIJER (The Netherlands) in the chair. The list of participants appears at Appendix I. The agenda, as adopted, appears at Appendix II. The Group elected Ms Isabelle NIEDLISPACHER (Belgium) as Vice-chairperson.

2.      The Group heard a welcoming presentation by Mr Christos GIAKOUMPOLOUS, Director, Human Rights, on behalf of Mr Philippe BOILLAT, Director-General, Human Rights and Rule of Law. Mr Giakoumopoulos in particular welcomed the ‘external experts’, Sir Nicolas BRATZA, Mr Alvaro GIL-ROBLES, Professor Christophe GRABENWARTER, Mr Alain LACABARATS, Professor Giorgio MALINVERNI and Professor Tatiana NESHATAEVA. The Group took note of the absence through illness of Mr Bahadır KILINÇ and wished him a speedy recovery. Mr Giakoumopoulos also introduced Mr Mikhail LOBOV, the recently appointed Head of the Human Rights Policy and Development Department, to the Group.

## **Item 2:      Terms of reference: expected results, working methods and schedule**

3.      The Group exchanged views on its terms of reference, taking account of the guidance given by the CDDH. It examined and broadly agreed with the Chairperson’s proposals concerning expected results, working methods and schedule (doc. GT-GDR-F(2014)001), subject notably to the following refinements concerning the structure of the final report:

- The aim of the Group’s exercise, and therefore its working methods, should be inclusive; all sensible analyses, criticisms and proposals should be examined, even if only then to conclude that they have been rejected
- With respect to the current system, the final report should aim to describe, evaluate and consider the need for reform of each relevant aspect
- Section II should be descriptive of the essential aims of the Convention system in the historical and current contexts
- Section III should be descriptive of the essential characteristics of the current Convention system as it operates in practice, with indications of their legal bases
- Treatment of ‘expected future challenges’ should be moved from Section II to either a new Section IIIbis or the beginning of Section IV (to be determined once draft text has been prepared)
- Section IV should include comprehensive analysis of the current system’s capacity to respond to expected future challenges, as a basis for then determining the need for further reforms, and the extent of any necessary reforms
- Sections VI-VIII (“Alternative models”) should be combined into a single section with sub-sections as necessary
- Basic, objective statistical data, where possible from existing documentary sources, should be included, in particular to illustrate particular situations and to support the evaluation of the effects of Protocol no. 14 on the Court’s situation
- Draft texts for the various sections will be distributed before the following meeting, to allow experts to submit written comments on the texts, so as to permit their revision by Rapporteurs in advance of the final meeting
- The final structure to be given to the report may if necessary be reconsidered once draft text on all the issues to be included has been prepared.

**Item 3: Preliminary examination of the results of the ‘open call for contributions’**

4. The Group examined the results of the ‘open call for contributions’, at this stage principally with a view to identifying contributions of such interest as to merit inviting their authors to participate at future meetings. On this basis, it agreed to invite the following two persons to participate at its second meeting (14-16 May 2014):

- Ms Nuala MOLE (AIRE Centre)
- Professor Marten BREUER (University of Konstanz).

5. The Group invited the CDDH, at its meeting immediately following the Oslo Conference, to consider inviting up to two further ‘ad hoc experts’ to participate at the Group’s second meeting. It also agreed to consider at its own next meeting whom it may wish to invite to subsequent meetings, taking account also of the results of the Oslo Conference (7-8 April 2014).

**Item 4: Analysis of the current Convention system**

6. As regards Section I (“Introduction”) of the final report (see doc. GT-GDR-F(2014)001 and para. 3 above), the Group instructed the Secretariat to prepare draft text setting out notably the background to its work and its terms of reference.

7. As regards Section II (“Essential aims of the Convention system”), the Group agreed on a draft structure and outline as they appear at Appendix III.

8. As regards Section III (“Main features of the current system”), the Group agreed on a draft structure and outline as they appear at Appendix IV.

9. As regards the part of the final report dealing with “Expected future challenges”, the Group, having based its examination on the principal points emerging from the contributions submitted under the ‘open call’, agreed on a draft structure and outline as they appear at Appendix V.

10. The Group appointed Ms Kristine LICE (Latvia) as Rapporteur to prepare draft text for the final report on Sections II and III, and on the question of ‘expected future challenges’.

**Item 5: Organisation of future work**

11. The Group recalled the holding of the Oslo Conference on 7-8 April 2014. The Chairperson encouraged interested persons to consult the dedicated website for the latest information, including on the programme.

12. The Chairperson encouraged members of the Group to keep it informed of any relevant events taking place in their countries, and if possible to ensure that substantive feedback on them could be provided.

13. The Chairperson also encouraged members to consider making substantive written submissions containing specific proposals in advance of future meetings. He recalled that the Secretariat would distribute copies of relevant previous CDDH reports as part of the reference documents for future meetings.

14. Mr Alfonso DE SALAS, Head of the Human Rights Inter-governmental Co-operation Division, informed the Group of the possibility of its Chairperson being invited to participate in meetings of the CDDH Bureau.

**Item 6: Other business**

15. None.

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Appendix I**List of participants****MEMBERS / MEMBRES****AUSTRIA / AUTRICHE**

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Sir Nicolas BRATZA

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Professor Tatiana NESHATAEVA

Professor Christophe GRABENWARTER

Mr Alvaro GIL-ROBLES

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Mr. Jan Michael AREND, German Institute

**CONSEIL DES BARREAUX EUROPEEN (CCBE)**

Me Laurent PETTITI, avocat au barreau de Paris

**REGISTRY OF THE EUROPEAN COURT OF HUMAN RIGHTS / GREFFE DE LA COUR EUROPEENNE DES DROITS DE L'HOMME**

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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Ms Ann-Katrin SPECK, Trainee, Legal Affairs & Human Rights Department

**DEPARTMENT FOR THE EXECUTION OF JUDGMENTS OF THE COURT/ SERVICE DE L'EXECUTION DES ARRÊTS DE LA COUR**

Mrs Geneviève MAYER, Head of Department

Mr Fredrik SUNDBERG, Deputy to the Head of Department, Adjoint à la Chef de Service

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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, Head of the Unit on the reform of the Court / Chef de l'Unité pour la réforme de la Cour, 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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Mme Corinne GAVRILOVIC, Assistant / Assistante, Human Rights Intergovernmental Cooperation Division / Division de la coopération intergouvernementale en matière de droits de l'Homme

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

Melle Mélodie SAHRAIE, Trainee/Stagiaire



**INTERPRETERS/INTERPRÈTES**

Sally BAILEY  
Christopher TYCZKA  
Julia TANNER

Appendix II**Agenda (as adopted)****Item 1:        **Opening of the meeting, adoption of the agenda and election of the Vice-chairperson****General background documents

- Draft annotated agenda GT-GDR-F(2014)OJ001
- Report of the 79<sup>th</sup> meeting of the CDDH (26-29 November 2013) CDDH(2013)R79
- Report of the 78<sup>th</sup> meeting of the CDDH (25-28 June 2013) CDDH(2013)R78
- Report of the 5<sup>th</sup> meeting of the DH-GDR (29-31 October 2013) DH-GDR(2013)R5
- Brighton Declaration CDDH(2012)007
- Securing the long-term effectiveness of the supervisory mechanism of the European Convention on Human Rights (Decisions of the 122<sup>nd</sup> Session of the Committee of Ministers, 23 May 2012) CM/Dec(2012)122/2
- Terms of reference of the Committee of Experts on the reform of the Court (DH-GDR) for 2014-2015 DH-GDR(2014)001

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: expected results, working methods and schedule****Reference document

- Expected results, working methods and schedule: proposals by the Chairperson GT-GDR-F(2014)001

**Item 3:        **Preliminary examination of the results of the 'open call for contributions'****Reference documents

- Compilation of the results of the 'open call for contributions' (prepared by the Secretariat) GT-GDR-F(2014)002
- Thematic overview of the results of the 'open call for contributions' (prepared by the Secretariat) GT-GDR-F(2014)003

**Item 4:      Analysis of the current Convention system**

Reference documents

- |   |   |                   |
|---|---|-------------------|
| - | Compilation of the results of the ‘open call for contributions’ (prepared by the Secretariat)       | GT-GDR-F(2014)002 |
| - | Thematic overview of the results of the ‘open call for contributions’ (prepared by the Secretariat) | GT-GDR-F(2014)003 |
| - | Written Submission on behalf of the European Network of National Human Rights Institutions (ENNHRI) | GT-GDR-F(2014)004 |
| - | Recent judicial lectures – Note by the United Kingdom expert  | GT-GDR-F(2014)005 |
| - | “An English Judge in Europe”, lecture given by the Rt Hon. Lady Justice Arden                       | GT-GDR-F(2014)006 |
| - | Proposals from Professor Neshataeva   | GT-GDR-F(2014)007 |

**Item 5:      Organisation of future work**

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Appendix III**Section II – Essential aims of the Convention system (structure & outline)**

## Original purpose (references to the Preamble of the Convention)

- “profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend”
- “European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law”
- “to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration [of Human Rights]”
- Primary protection by States Parties (subsidiarity); national implementation, incorporation into domestic law

## Two optional elements

- Acceptance of the jurisdiction of the Court and thereby of an institution that could authoritatively interpret and apply the Convention
- Acceptance of the right of individual application – thereby acceptance that the control mechanism could also deliver individual justice

## Evolution of the system

- Increased flexibility of the control mechanism (Commission) in the face of an increasing workload
- Protocols strengthening the procedural position of the applicant
- Gradual acceptance of Court’s jurisdiction and right of individual application; all States Parties by early 1990s
- Gradual decrease in the use of inter-state applications (with certain recent exceptions)
- Enlargement of the Council of Europe; all new member States required to ratify the Convention
- Rome Conference 2000 (reference)
- Compulsory jurisdiction of the Court (Protocol no. 11)
  - o Consideration of P11 ER: description of purpose and operation of Convention system
  - o Recall controversies & debates preceding adoption of Protocol no. 11
- Warsaw Summit (reference final declaration)
- Huge increase in jurisdiction *ad personam* of the Court & public awareness
- Huge increase in Court’s caseload

## Current roles of the control mechanism

- Individual judicial protection
- Uniform interpretation of minimum standards, as set out in the Convention, and maintenance of those standards
- Collective enforcement through Committee of Ministers’ supervision of execution of Court judgments; role of the Court in supervision proceedings under art. 46(3) & (4).

## Appendix IV

### **Section III – Main features of the current system (structure & outline)**

#### Substantive content of Convention (& protocols)

- Focus mainly on civil & political rights
- Social & environmental dimensions of certain rights elaborated in case-law
- Certain rights in the Convention; others in additional protocols
- Certain rights absolute &/ or non-derogable (Convention, public international law)
- Certain rights subject to implied regulation (case-law)
- Prohibition of abuse of rights (protection against ‘destruction’) (art. 17)

#### Obligation to respect and protect Convention rights (art. 1) – subsidiarity

- Incorporation of Convention into domestic legal orders (national law); consideration of Court judgments against other States Parties
- Right to an effective remedy (art. 13); developed through case-law
- Positive obligations; development of emphasis on procedural guarantees (case-law)
- Rights must be effective in practice and not illusory; essence of a right must not be impaired (case-law)
- Proportionality of interference with qualified rights; margin of appreciation (case-law)
- Obligation to execute judgments (art. 46) & friendly settlement decisions (art. 39); non-pecuniary individual & general measures; roles of Court under art. 46(3)-(5)
- Jurisdiction primarily territorial, exceptionally extra-territorial (case-law)

#### Court as authority for interpretation & application of the Convention (art. 32)

- Basic approach – interpretative methods as defined in VCLT
- Autonomous concepts (case-law)
- Margin of appreciation
- Convention as a living instrument / evolutive interpretative approach
- Consistency of Court’s case-law: role of Grand Chamber (art. 30 & 43; case-law)
- Advisory opinions (arts. 47-49; Protocol no. 16)

#### Collective enforcement

- CM role in securing Convention implementation; supervision of execution of Court judgments (art. 46)
- Secretary General’s inquiries (art. 52)
- Consideration by States Parties of Court judgments against other States Parties

#### Procedural avenues and guarantees of access to the control mechanism

- Right of individual application (art. 34), judicial determination of all applications (arts. 27-29); legal aid to applicants (Rules of Court)
- Inter-state cases (art. 33)
- Interim measures (Rules of Court); obligatory effect (art. 34 / case-law)
- Third-party interventions (including role of Commissioner for Human Rights) (art. 36)
- States’ obligation to co-operate with the Court in its examination of a case (art. 38)
- Right of access to CM supervision process (Rule 9, CM Rules)

#### Admissibility criteria *[to be completed]*

- Non exhaustion – subsidiarity (art. 35)
- Victim status – no actio popularis (art. 34)

- Possibility of striking out otherwise admissible applications, with possibility of subsequent restoration (art. 37)

Provision of redress – just satisfaction (art. 41); individual & general measures (art. 46)

Alternative dispute resolution – friendly settlements under art. 39; unilateral declarations (Rules of Court)

- Implementation subject to Court's supervision (art. 37)
- Implementation of terms of friendly settlements, but not unilateral declarations, subject to CM supervision (art. 46)

Status of the Court & its judges

- Election of judges (including role of the Parliamentary Assembly – arts. 21-23; Advisory Panel)
- Independence of the Court; Court's administrative autonomy within the CE
- Status of judges (art. 23, CM decision on recognition of service), Registry (art. 24) and persons participating in proceedings before the Court (Agreements)
- Court (plenary) adopts the rules of the Court (art. 25).

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## Appendix V

### **Expected future challenges (structure & outline)**

#### The Court's caseload/ number of applications

- The exact nature, extent and categorisation of the case-load problem must first be defined in order to determine whether solutions are required, and if so, what
- (Need for statistics in the report to illustrate relevant developments, including on developments in the number and nature of violations found each year)
- Also, the overall goal should be fewer violations, more effective domestic protection and remedies; not only increased Court processing of applications and delivery of judgments, which would evince disfunctioning of the overall system
- Biggest challenge remains the 850m potential applicants to the Court; a challenge to the Court especially where domestic protection mechanisms are ineffective
- Great reduction in backlog, especially of clearly inadmissible applications; increase in output (single judge decisions & judgments)
- Achievements result from the Court's use of Protocol 14 – Single Judge procedure, WECL (committees); also prioritisation, pilot judgment procedure
- Still too many pending cases but the situation is heading in the right direction
- Possible that Court has achieved numerical results by shifting resources to resolution of substantively less important cases – a 'cost' resulting from reduction of the backlog
- Most evident case-load problem now that of Chamber cases, especially non-priority
- The more the number of pending cases is reduced, the harder it may become to reduce it further because of the nature of the remaining cases
- Ultimately, there may be an irreducible gap between 'input' and 'output'; challenge would be how to close this gap, including through measures at domestic level
- These developments represent a change in the backdrop since the Interlaken and Izmir Conferences; can be expected to continue
- Need to assess likely situation in 2019 (Interlaken timeframe)

#### The level of resources made available to the Court, and best deployment of resources

- What is the most effective overall balance of allocation (marginal cost-benefit analysis)?
- Court's resources are clearly a problem – secondments necessary for basic functions; some States Parties' contributions to CE budget less than the 'cost' of 'their' judges
- Providing for increased judicial output by the Court, however, is not necessarily the only possible use of resources in terms of achieving desired Convention outcomes; Court cannot and should not be left alone to resolve all problems arising from breaches of the Convention
- Should also consider wider picture of resources made available to the Convention system as a whole, including for domestic implementation and related CE activities

#### Inadequate national implementation of the Convention by States Parties, including execution of Court judgments

- The overall human rights situation in Europe depends primarily on States' actions and the basic respect they show for Convention values
- May be inability (financial, structural or technical difficulties) or unwillingness (including political refusal – also by parliaments) to implement
- Level of resources available to CE technical assistance programmes (including in relation to supervision of execution of Court judgments) in order to maximise impact
- Challenge to involve wider range of actors (parliamentarians at domestic level; civil society, NHRIs, and other international organisations in CM supervision of execution)

- Challenge to ensure effective co-ordination between CE bodies, including Commissioner for Human Rights, & their co-operation with national authorities
- Challenge to ensure effective supervision of execution; although latest CM Annual Report statistics show decrease in number of cases pending for supervision of execution and record number of final resolutions closing supervision

#### The environment/ context in which the Convention system operates

- Certain factors/ challenges are outside the control of CM, Court, CDDH
- Austerity/ the economic and financial crisis – feasibility of providing effective protection in the face of severe budgetary constraints
- Certain political tendencies within States Parties; nationalism/ populism specifically mentioned
- Essential challenge is to ensure that the Convention system is flexible enough to adapt so as to continue achieving its essential aims; ability to absorb shock resulting from emergencies/ crises

#### Developing protection of rights through the Convention

- Constant pressure to add to/ expand the rights protected by the Convention, e.g. social, environmental rights
- Risk of criticism if the Court is perceived to deal with matters falling outside the Convention
- If the Court should not develop protection in response to new situations, the challenge will be on States to do so, both domestically and through international standards
- Parallel challenge in relation to developing full potential of existing Convention rights, e.g. development of case-law on Protocol no. 12

#### Accountability of non-state actors for violations

- Convention system predicated on State responsibility
- Two potential sources of human rights violations to which this protection may not extend: private actors, including (multinational) corporations (horizontal relationships); and international organisations (especially EU and UN)
- Accountability of private actors may be addressed through States' positive obligations insofar as they are able to take effective action, with supervision by the Convention control mechanism
- May be procedural imbalance, however, if individual complains to Court of violation by a private actor without own access to Court
- Biggest problem is the 'accountability gap' in relation to international organisations

#### Political attitudes towards the Court within, and its relationship with, the States Parties, including a perceived lack of democratic legitimacy ('democratic deficit')

- Challenge in some political quarters to concept of HR, as understood in post-War settlement – i.e. universal, inalienable ('natural') rights
- Challenge to international protection of rights; hostility towards 'foreign interference'
- Challenge to judicial protection of rights (rather than through legislative branch)
- Challenge as to relationship between judicial protection and democracy; how the two interact within rule of law, attitudes towards judicial interpretation & development of Convention (especially 'living instrument' doctrine)
- These challenges not necessarily unique to Court; wider phenomena with manifestations in other contexts
- Counter-terrorism measures/ national security/ state secrecy policies used as basis for challenging legitimacy of Convention system
- Also, reluctance to extend full human rights protection to migrants, refugees



Threat of withdrawal of a State Party from the Convention system

- Possibility of a State party withdrawing from the Convention system on account of above-mentioned political attitudes
- Withdrawal of any State Party would weaken the system & undermine acceptance of universality of human rights standards

European Union accession to the Convention and relations between the Court and the Court of Justice of the EU

- Possible problems of EU interaction with the Convention system once it becomes a party
- Problem of maintaining consistency of case-law on fundamental rights between the Court and the CJEU
- Problem of the EU assuming roles in relation to democracy, human rights and rule of law traditionally played by CE.

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