16 November 2012

Joint NGO comments on the drafting of Protocols 15 and 16 to the European Convention for the Protection of Human Rights and Fundamental Freedoms

Following the outcome of the discussions within the DH-GDR and in view of the 76th meeting of the Steering Committee for Human Rights, Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre (EHRAC), the Helsinki Foundation for Human Rights (HFHR), Human Rights Watch, Interights, the International Commission of Jurists (ICJ), JUSTICE, Open Society Justice Initiative and REDRESS wish to provide the following comments.

A.- Draft Protocol 15 to the European Convention on Human Rights[1]

A reference to the margin of appreciation and principle of subsidiarity in the Preamble[2]

We consider fundamental that article 1 of draft Protocol 15 recalls the supervisory jurisdiction of the Court and makes clear that the Court remains the sole institution empowered to define, develop and apply tools of judicial interpretation such as the margin of appreciation doctrine.

[1] Comments are based on the document DH-GDR (2012) R2 Addendum III.

[2] We regret that the current proposal singles out the margin of appreciation and the principle of subsidiarity without reference to other and equally significant principles of interpretation applied by the Court, such as the principle of proportionality, the doctrine of the Convention as a living instrument and the principle of dynamic and evolutive interpretation, the principle that rights must be practical and effective rather than theoretical and illusory, and the principle that the very essence of a right must never be impaired.

We take note of the compromise text of current article 1 of draft Protocol 15. While the current wording recalls the supervisory jurisdiction of the Court, including when it applies tools of judicial interpretation such as the doctrine of the margin of appreciation, we consider that article 1 of draft Protocol 15 must be further improved to reflect more accurately this doctrine.

Article 1 of draft Protocol 15 must make clear that, while the Court considers that state parties have a certain margin of appreciation with regard to the application of some Convention rights, it is uncontested that the doctrine of the margin of appreciation does not apply at all in respect of some rights or aspects of rights. In this regard, both the Brighton Declaration and the draft Explanatory Report to Protocol 15 recognize that the existence and the scope of the states' margin of appreciation "depend[…] on the circumstances of the case and the rights and freedoms engaged".[3] While in some instances the margin of appreciation will be wide, the Court has always accepted that there are circumstances in which states' margin of appreciation is narrow, and that the margin of appreciation does not apply at all in respect of some rights or aspects of rights.

In view of the above:

- We urge the state parties to ensure that article 1 of draft Protocol 15 better reflects the fact that the existence and scope of the states' margin of appreciation depend on the circumstances of the case and the rights and freedoms engaged.

- Accordingly, we urge the state parties to amend the current text of article 1 of draft Protocol 15 as follows (amendment is highlighted in bold italic characters):

> "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and in doing so ***may*** enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention."

B.- Draft Protocol 16 to the European Convention on Human Rights[4]

We welcome and support the decision taken by the DH-GDR to avoid adding admissibility criteria to the ones already contained in the text of the Convention,[5] as well as to allow the Court to receive contributions from any High Contracting Party or person.[6]

With regard to the "right" to submit contributions, we regret that the current text of article 3 of draft Protocol 16 creates an imbalance between the parties to the domestic proceedings in cases where the State concerned is one of the parties to such proceedings. While we consider that the Protocol should mention that all parties to the domestic proceedings have a right to submit written comments and take part in any hearing, we take note and welcome the fact that the draft Explanatory Report to Protocol 16 indicates that the parties to the domestic proceedings should be invited to submit written and oral contributions.[7]

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[3] As outlined in paragraph 11 of the Brighton Declaration and in the Draft Explanatory report to Protocol 15 (DH-GDR (2012) R2 Addendum IV, paragraph 9).
[4] Comments are based on document DH-GDR (2012) R2 Addendum V.
[5] The current admissibility criteria of the ECHR are indeed sufficient. In particular, the ability to reject manifestly ill-founded applications (article 35(3)(a) ECHR) will enable the Court to declare an application, or part of an application, inadmissible where the domestic court or tribunal has clearly applied the advisory opinion and where the implementation of this advisory opinion removes any merit to the application or part of the application. With regard to the latter requirement, it is important to underline that an advisory opinion may cover only some of the issues at stake in an application.
[6] Thus mirroring the procedure foreseen by article 36 ECHR.
[7] DH-GDR (2012) 020, paragraph 20.

With regard to the participation of the would-be applicant in the advisory opinion proceedings, we consider that a legal aid system before the Court should be made available. This would enable effective access to a procedure which is initiated by the domestic court and which may have an important impact on the outcome of the case.

With regard to the effect of advisory opinions, we consider that the interpretation of the Convention rights given by the Court in an advisory opinion should be binding on the requesting court or tribunal, and more broadly on the state authorities of the concerned High Contracting Party. We therefore regret the approach retained by the DH-GDR at article 5 of draft Protocol 16 and consider that, should such a provision be endorsed by the CDDH, the Explanatory Report to Protocol 16 should make clear that in line with the purpose of having advisory opinions on significant issues pertaining to the application of the Convention, the Court's authoritative interpretation of the Convention should be applied by all High Contracting Parties. In this regard, the current wording of paragraph 28 of the draft Explanatory Report would need to indicate this requirement more clearly.

With regard to the type of domestic courts specified by the High Contracting Parties in accordance with article 10 of draft Protocol 16, we take note with satisfaction that the draft Explanatory Report indicates that state parties may include domestic courts which, while issuing final decisions, may not necessarily have to be considered to satisfy the exhaustion of domestic remedies.[8]

In view of the above:

- We urge the state parties to endorse the decision made by the DH-GDR to avoid adding admissibility criteria to the ones already contained in the text of the Convention, as well as to allow the Court to receive contributions from any High Contracting Party or person.

- We recommend that the Protocol effectively enables all parties to the domestic proceedings to submit written comments and take part in any hearing before the Court.

- We recommend that a legal aid system before the Court is made available to the would-be applicant, thus enabling an effective access to the advisory opinion proceedings initiated by the domestic court.

- We recommend that the Explanatory Report indicates more clearly that the Court's authoritative interpretation of the Convention shall be applied by all High Contracting Parties.

[8] DH-GDR (2012) 020, paragraph 8.