23 October 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 GT-GDR-B and in view of the 2nd meeting of the DH-GDR, 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

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.[2]

[1] Comments are based on the document GT-GDR-B (2012) R2 Addendum I.
[2] 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

With regard to the current proposed text of article 1 of draft Protocol 15, we consider it absolutely fundamental that this provision recalls the supervisory jurisdiction of the Court and makes clear, in line with what was agreed at Brighton,[3] that the Court remains the sole institution empowered to define, develop and apply tools of judicial interpretation such as the margin of appreciation doctrine.

The Court uses this doctrine to apply specific Convention standards to complex circumstances that are brought before it and it is fundamental that the judicial nature of this role is explicitly recognized and preserved.

In addition, 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.[4]

It is therefore critical that the text of article 1 of draft Protocol 15 does not misrepresent this judicial tool of interpretation by failing to distinguish between the rights and freedoms concerned by the doctrine of the margin of appreciation.

In view of the above:

- We urge the state parties to include in the text of article 1 of draft Protocol 15 the terms "that the Court defines", currently inserted between brackets, or the terms "as developed in the Court's case law", as agreed in the Brighton Declaration.[5]

- We urge the state parties to include a reference to the supervisory jurisdiction of the Court (currently inserted between brackets as follows: "subject to the supervisory jurisdiction of the Court"). Such a jurisdiction is indeed a fundamental aspect of the principle of subsidiarity.

B.- Draft Protocol 16 to the European Convention on Human Rights[6]

We welcome and support the decision taken by the GT-GDR-B to avoid adding admissibility criteria to the ones already contained in the text of the Convention,[7] as well as to allow the Court to receive contributions from any High Contracting Party or person.[8]

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. We consider that the Protocol should mention that all parties to the domestic proceedings have a right to submit

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rather than theoretical and illusory; and the principle that the very essence of a right must never be impaired.

[3] See paragraph 12(b) of the Brighton Declaration, which confirms that the principle of subsidiary and the doctrine of the margin of appreciation have to be understood in the limits defined by the Court's case law.

[4] As recognized in paragraph 11 of the Brighton Declaration.

[5] See paragraph 12(b) of the Brighton Declaration.

[6] Comments are based on document GT-GDR-B (2012) R2 Addendum III.

[7] 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.

[8] Thus mirroring the procedure foreseen by article 36 ECHR.

written comments and take part in any hearing. With regard to the would-be applicants, we also consider that a legal aid system before the Court should be available.

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 GT-GDR-B at article 4 of draft Protocol 16 and consider that, should such a provision be endorsed by the DH-GDR, the explanatory report of 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.

With regard to the type of domestic courts specified by the High Contracting Parties in accordance with article 6 of draft Protocol 16, we suggest that the 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.