



EUROPEAN HUMAN RIGHTS ADVOCACY CENTRE



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

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 take note of the ongoing discussion over the drafting of Protocols 15 and 16 (P15 and P16) to the European Convention on Human Rights and wish to provide the following comments.

A.- Draft Protocol 15 to the European Convention on Human Rights¹

1.- A reference to the margin of appreciation and principle of subsidiarity in the Preamble

We remain concerned that, in deciding to include principles of judicial interpretation in the Convention's Preamble, 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 Nevertheless, we are satisfied that the current draft article

¹ Comments are based on the proposal outlined in document GT-GDR-B (2012) R1 Addendum.

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

1 P15 recalls the supervisory mandate 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 view of the above:

- In accordance with the fundamental principle that defining the parameters of subsidiarity and the doctrine of the margin of appreciation is a function of judicial interpretation, we call on the state parties to ensure that the Preamble explicitly acknowledges the Court as the sole institution empowered to define, develop and apply such interpretative tools.
- The Preamble should not go beyond affirming that the Convention rights are to be protected in accordance with principles of judicial interpretation, such as, and where relevant, the principle of subsidiarity and the doctrine of margin of appreciation.
- The enumeration in the Preamble of principles of judicial interpretation should always be illustrative, as opposed to exhaustive.
- The Court must adjudicate impartially any matter that comes before it. Any explanatory memorandum to the amendment should therefore reflect the Court's case law on these principles and not the state parties' own interpretation or political claims.

2.- Reduction of time limit for applying to the Court

We reiterate our opposition to the reduction of the six-month time limit for applying to the Court, a proposal which has been introduced without adequate time for reflection on its potential impact on applicants, on the substantive quality of applications and on the Court's effectiveness.

The time period for applying to the Court is crucial in many jurisdictions, in particular where there is a failure or a prolonged delay in notifying applicants of final domestic decisions. A reduction of this time period may have particularly detrimental effect in such cases. Moreover, sufficient time for preparing an application to the Court, including finding proper legal advice and assistance, must be given to potential applicants. Reducing the time limit available to victims to lodge a complaint from six to four months greatly risks the exclusion of individuals who live in geographically remote areas, those without access to communications technology such as the internet, those with complicated cases or lawyers who are not adequately experienced in preparing or lodging claims before the Court, and those with limited access to sufficiently qualified lawyers.

In light of the above:

- We call on the state parties to ensure that a reduction of the time limit to four months is imperatively accompanied with adequate safeguards to minimise as much as possible any adverse impact on the applicant's ability to apply to the Court. In particular, such a reduction must be accompanied by a specific provision allowing for judicial discretion in cases where injustice would result, or where the right to individual petition would be disproportionately restricted or fundamentally undermined.

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.

- We urge the state parties to maintain the current text of draft article 8(4) P15, postponing the entry into force of this amendment to one year after the entry into force of the Protocol and containing measures against its retroactive application. Moreover, this provision should indicate that the amendment will not apply to cases where the exhaustion of domestic remedies occurred prior to its entry into force.

3.- Relinquishment to the Grand Chamber

We strongly support the current text of draft article 4 P15, removing the ability of one of the parties to object when a Chamber seeks to relinquish jurisdiction to the Grand Chamber.

B.- Draft Protocol 16 to the European Convention on Human Rights⁴

1.- Outstanding questions highlighted at the first meeting of the GT-GDR-B

We agree with the Court that the right of individual application should not be restricted where the Court has issued an advisory opinion.⁵ It is fundamental that the applicant always retains the right to bring his or her case to the Court under article 34 ECHR.

While the current text of draft article 1(7) P16 allows the Court certain discretion in dealing with a subsequent individual application, this provision is too restrictive and unnecessary. The current admissibility criteria of the ECHR are 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.

It is important to note that the preservation of the right of individual petition under article 34 ECHR is independent from questions relating to the effect of the advisory opinion on the domestic authorities and the other state parties. Whatever the solution retained with regard to the binding nature of advisory opinions, it is critical that the Court is always granted the possibility to examine an application on its merits, subject to the admissibility criteria already contained in the ECHR.

With regard to the effect of advisory opinions, we consider that 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. Importantly, and 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 state parties.

2.- Other issues in the current draft Protocol 16

With regard to the institutions enabled to request an advisory opinion, we take note of the discussions in the GT-GDR-B where it was "agreed that each State would be required to specify a limited number of its domestic courts and tribunals upon accession to the Protocol, subject to certain constraints".⁶ When specifying which courts and tribunals can request an advisory opinion, we would support the prescription that state parties should include the domestic courts against whose decisions there is no judicial remedy under national law. In this

⁴ Comments are based on the document submitted at the 1st meeting of the GT-GDR-B by the Netherlands and Norway (Document GT-GDR-B (2012) 005).

⁵ Court's Reflection Paper on the proposal to extend the Court's advisory jurisdiction, Document #3853038, paragraph 45.

⁶ Drafting Group "B" on the Reform of the Court, 1st meeting, GT-GDR-B (2012) R1, paragraph 6(i).

regard, it would be important to include domestic courts which, while issuing final decisions, may not necessarily have to be considered to satisfy the exhaustion of domestic remedies.

With regard to the cases where an advisory opinion could be requested, we support an approach based on article 43(2) of the Convention, as it would enable the Court to address cases having a significant impact on the application of the Convention.

While the Court should be required to give reasons for a refusal, we support views considering that the Court must be given discretion to refuse requests for advisory opinions. Such flexibility is crucial to enable the Court to take into account all relevant factors, including the necessity to properly preserve the right of individual application.

In line with what is foreseen in article 36(2) of the Convention, we support providing the Court with the ability to receive third party interventions. Given the potential impact of the advisory opinion for the interpretation and application of the Convention, these third party interventions should not be dependent on prior participation in the domestic proceedings. With regard to third party interventions by the parties to the domestic proceedings, we are concerned that the proposal that there should be a right to intervene on the part of the concerned State only, with other interventions being left to the discretion of the Court, may result in inequality where the State is one of the parties to the domestic proceedings. We consider that the Protocol itself should clarify that there is a right of intervention for all those who are parties to the domestic proceedings. With regard to the would-be applicants, a legal aid system before the Court should be available.

Finally, with the view to avoiding detrimental delays in the domestic proceedings, we would support including in the text of Protocol 16 clear and strict time limits regarding requests and acceptance of advisory opinions.