



15 April 2013

Draft Protocol 15 to the European Convention on Human Rights: a reference to the doctrine of the margin of appreciation in the Preamble to the Convention

Open letter to all member states of the Council of Europe

To Ministers of Foreign Affairs and Permanent Representatives of all member states to the Council of Europe

Your Excellency,

In view of the discussion by the Committee of Ministers of draft Protocol 15 to the European Convention on Human Rights, Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre, the Helsinki Foundation for Human Rights, Human Rights Watch, Interights, the International Commission of Jurists, JUSTICE, Open Society Justice Initiative and REDRESS wish to draw your attention to a specific shortcoming in article 1 of this Protocol in relation to the insertion of a reference to the doctrine of the margin of appreciation in the Preamble to the Convention.

During the Brighton negotiations, we strongly opposed amending the Convention to incorporate jurisprudentially developed principles of judicial interpretation, such as the doctrine of the margin of appreciation. We welcomed the consensus eventually adopted at the Brighton Conference that any amendment to the substantive provisions of the Convention referring to

such principles was to be rejected. However, we expressed concern over the decision to include a reference to these principles in the Preamble to the Convention, as well as to single out the doctrine of the margin of appreciation and the principle of subsidiarity without reference to other and equally significant principles of interpretation applied by the Court.¹

We consider it fundamental that article 1 of draft Protocol 15 recalls the supervisory jurisdiction of the Court and recognizes that the Court remains the sole institution empowered to define, develop and apply tools of judicial interpretation such as the margin of appreciation doctrine.² 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 recognized and preserved.

The current text of article 1 of draft Protocol 15 reads:

“At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows:

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 enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.”

We take note of this compromise text adopted by the CDDH. While it is important that 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 should reflect this doctrine more accurately. The text of this provision should be sufficiently broadly worded to take account of the fact that, as a judicial tool of interpretation, the doctrine of the margin of appreciation is to be developed and applied by the Court on a case-by-case basis. In particular, we consider it crucial 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 to which the doctrine of the margin of appreciation applies and those to which it does not apply, in accordance with the Court’s jurisprudence.

It must be clear from the amended text of the Convention’s Preamble that, while according to the Court’s jurisprudence state parties have a certain, albeit variable, margin of appreciation with regard to the application of some Convention rights, the same jurisprudence unequivocally confirms that the doctrine of the margin of appreciation does not apply at all in respect of some Convention rights or aspects of rights. The Court, when defining the *scope* of the member states’ margin of appreciation when applying a certain Convention right or aspects of a right, will in some instances consider that such margin is wide and in other cases is narrow. With regard to its *existence*, the Court has always accepted that the doctrine of the margin of appreciation does not apply at all in respect of some rights or aspects of rights.

The current text of article 1 of draft Protocol 15 is open to interpretation contrary to this long-standing reality of the Court’s practice when it makes the unqualified assertion that when implementing the Convention rights and freedoms states “enjoy a margin of appreciation”, thus appearing to ignore that no such margin of appreciation exists when it comes to implementing provisions such as those on the prohibition of torture or slavery.

¹ 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.

² This is moreover in line with what was agreed at Brighton, see paragraph 12(b) of the Brighton Declaration confirming 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 take note that both the Brighton Declaration and the draft Explanatory Report to Protocol 15 recognize, while referring to the Court's jurisprudence, that the states' margin of appreciation "depend[...] on the circumstances of the case and the rights and freedoms engaged".³ Moreover, the draft Explanatory Report to Protocol 15 explicitly states that the drafter's intention is "to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case law".⁴ We welcome the fact that the intent of the drafters, as outlined in the *travaux préparatoires* of this Protocol, is solely to refer to the doctrine of the margin of appreciation in the Preamble to the Convention while recognizing the exclusive competence of the Court to define, develop and apply this doctrine, and not to alter this judicial tool of interpretation in any way.

However, we consider that in order to be truly in line with the drafter's stated intention to be "consistent" with the doctrine of the margin of appreciation as developed by the Court in its case law, as the draft Explanatory Report affirms, article 1 of draft Protocol 15 needs to be improved. Such improvement is particularly important to avoid any misunderstanding as to when this Court's doctrine actually applies.

The European human rights protection system represents an extraordinary achievement, one that is respected and closely scrutinized by other regional human rights systems. It has informed and enriched the protection of human rights, not just in Europe, but globally. As such, member states to the Council of Europe bear a responsibility reaching even beyond the more than 800 million people living in the Council of Europe region. The need to recognize the purely judicial nature of the Court's margin of appreciation doctrine is therefore all the more critical. Moreover, since the Court's doctrine of the margin of appreciation is of its nature restrictive of human rights, it is essential to avoid sending a confusing and potentially misleading signal – by ensuring that the Preamble to the Convention properly reflects the actual existence and scope of the Court's doctrine of the margin of appreciation. This is an important point of principle, not only for the European human rights protection system, but beyond.

In view of the above:

- We urge the state parties to the Convention to ensure that article 1 of draft Protocol 15 properly reflects the fact that, under the doctrine of the margin of appreciation as developed by the Court in its case-law, both the existence and the scope of the states' margin of appreciation depend on the rights and freedoms engaged and the circumstances of the case.
- In particular, we urge the state parties to ensure that this provision clearly recognizes that the Court's doctrine of the margin of appreciation does not apply at all to certain Convention rights, such as, *inter alia*, the prohibition of torture or slavery.
- While being conscious that the wording of article 1 of draft Protocol 15 is the result of a compromise, we consider that it should not be drafted at the expense of human rights protection.
- We consider that a limited amendment respecting the balance reached by the drafters while enabling adverse consequences to be avoided is possible.

³ As outlined in paragraph 11 of the Brighton Declaration and in the Draft Explanatory report to Protocol 15 (CDDH (2012) R76 Addendum IV, paragraph 9).

⁴ "It is intended [...] to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case law", Draft Explanatory report to Protocol 15, CDDH (2012) R76 Addendum IV, paragraph 7.

- Accordingly, we urge the state parties to improve the current text contained in article 1 of draft Protocol 15 as follows (amendment in bold):

“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.”