

THE REFORM of the EUROPEAN COURT of HUMAN RIGHTS: ADDITIONAL PROTOCOLS no. 15 and 16

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ABSTRACT

In this article, the innovations brought by the additional Protocols No. 15 and 16 that new stages in the process of enhancing the effectiveness of the Court were examined. In the additional Protocol No. 15 of the Convention, the principle of subsidiarity was written into the preamble of the Convention, emphasizing the margin of appreciation of the High Contracting Parties national courts', time limit for submitting application was shortened, brought significant disadvantage criterion, the term of the judges rearranged and relinquishment of jurisdiction in favour of the Grand Chamber issues are regulated. In additional Protocol No. 16 of the Convention, advisory opinions to bring empowerment to increase the interaction between national institutions and the Court thus reinforce the implementation of the Convention with the framework of subsidiarity principle was intended.

Keywords: *Additional Protocols no. 15 and 16 of the Convention, Subsidiary Criteria, Margin of Appreciation, Significant Disadvantage, Advisory Opinion.*

AVRUPA İNSAN HAKLARI MAHKEMESİNDE REFORM: 15 VE 16 No.lu EK PROTOKOLLER

ÖZET

Bu makalede, Mahkemenin etkinliğinin artırılması sürecinde yeni bir aşama olan 15 ve 16 numaralı ek Protokollerle getirilen yenilikler incelenmiştir. Ek 15 no.lu ek Protokolle, ikincillik ilkesi Sözleşme'nin önsözüne yazılmış, Yüksek Sözleşmeci Tarafların ulusal mahkemelerinin takdir marjı konusuna vurgu yapılmış, Mahkemeye başvuru süresi kısaltılmış, önemli zararın bulunması kriteri getirilmiş, yargıçların görev süreleri yeniden düzenlenmiş ve Büyük Daire lehine görevden el çekme hususları düzenlenmiştir. Sözleşme'ye ek 16 No.lu Protokol ile getirilen istişari görüş verme yetkisi ile de Mahkeme ile ulusal kurumlar arasındaki etkileşimin artırılması ve böylece Sözleşme'nin ikincillik ilkesi çerçevesinde uygulanmasının pekiştirilmesi amaçlanmıştır.

Anahtar Kelimeler: *Sözleşme'ye Ek 15 ve 16. Protokoller, İkincillik İlkesi, Takdir Marjı, Önemli Zarar, İstişari Görüş.*

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INTRODUCTION

The European Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”)¹ is fundamental to human rights protection in Europe and lies at the heart of the activities of the Council of Europe (“Council”). Over time, the Convention system has grown and developed in response to changing circumstances. The on-going process of reform is necessary to its continuing relevance and effectiveness. This process, although often referred to as reform of the European Court of Human Rights (“the Court” or “ECtHR”), includes action concerning not only the judicial control mechanism but also national implementation of the Convention and execution of the Court’s judgments, including supervision of this execution by the Committee of Ministers.

In the context of the ongoing reforms at the ECtHR and potential changes to the Convention, the Council of Europe’s Steering Committee on Human Rights (“CDDH”²) set up two drafting groups at the end of 2011. The first group³ focuses on drafting reports two issues: Firstly, the measures taken by state parties to implement relevant parts of the Interlaken⁴ and İzmir Declarations.⁵ Secondly, the effects of Protocol No. 14 and of the Interlaken and İzmir Declarations on the work of the Court itself.⁶ The report about

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European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, E.T.S. 5 (entered into force Sep. 3, 1953) [hereinafter the Convention].

² French acronym of the Steering Committee on Human Rights [autor’s note].

³ Drafting Group A.

⁴ See Council of Europe, *High Level Conference on the Future of the European Court of Human Rights Interlaken Declaration* [hereinafter Interlaken Declaration], 19 February 2010.

⁵ See Council of Europe, *High Level Conference on the Future of the European Court of Human Rights İzmir Declaration* [hereinafter İzmir Declaration], 26-27 April 2011. See also Steering Committee on Human Rights (CDDH), *Drafting Group “A” on the Reform of the Court (GT-GDR-A)* [Draft CDDH report on measures taken by the member States to implement relevant parts of the Interlaken and Izmir Declarations], GT-GDR-A(2012)R2 Addendum I, 7 September 2012.

⁶ See Steering Committee on Human Rights (CDDH), *Drafting Group “A” on the Reform of the Court (GT-GDR-A)* [Draft CDDH report containing elements to contribute to the evaluation of the effects of Protocol No. 14 to the Convention and the implementation of the Interlaken and Izmir Declarations on the Court’s situation, GT-GDR-A(2012)R2 Addendum II, 7 September 2012.

this matter contains some encouraging conclusions about real prospects of disposing of the Court's case backlog in the coming years.

The second group⁷ focuses on implementing decisions taken following the Brighton Conference, particularly the drafting of two protocols to the Convention. First of which would amend the Convention on the issues agreed in the Brighton Declaration⁸ and the second being optional, would expand the Court's competence to give "advisory opinion", should the Committee of Ministers decide to adopt it. The first protocol⁹ contains additions to the Convention's preamble and the decrease of the six months admissibility time limit to four months, as well as some other changes. On the other issue, Protocol No. 16 contains to give advisory opinions.

I. THE COURT'S REFORMS STATED IN THE ADDITIONAL PROTOCOL NO. 15

The High-level Conference on the Future of the European Court of Human Rights organised by the Swiss Chairmanship of the Committee of Ministers, take place 18-19 February 2010 in Interlaken (Switzerland). The Conference adopted an Action Plan and invited the Committee of Ministers to release field of jurisdiction to the competent bodies in order to preparing by June 2012, suggestions for steps requiring amendment of the Convention. On 26-27 April 2011, a second High-level Conference on the Future of the Court was organised by the Turkish Chairmanship of the Committee of Ministers at İzmir (Turkey). This Conference adopted a follow-up plan to review and further the reform process.¹⁰

In the context of work on succeed to these two Conferences; the Ministers' Deputies gave restored terms of reference to the CDDH and its subordinate bodies during 2012-2013. These required the CDDH, through its Committee of experts on the reform of the Court ("DH-GDR"), to prepare a draft report for the Committee of Ministers containing specific proposals requiring amendment of the Convention.¹¹

⁷ Drafting Group B.

⁸ See Council of Europe, *High Level Conference on the Future of the European Court of Human Rights Brighton Declaration* [hereinafter Brighton Declaration], (19-20 April 2012).

⁹ See Steering Committee on Human Rights (CDDH), *Drafting Group "B" on the Reform of the Court COURT (GT-GDR-B)* [Draft Protocol No. 15], GT-GDR-B(2012)R1 Addendum, 14 September 2012.

¹⁰ Council of Europe, *Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS no. 213) Explanatory Report* [hereinafter Explanatory Report (Protocol No. 15)], § 2.

¹¹ Explanatory Report (Protocol No. 15), § 2.

Beside this report, the CDDH displayed a Contribution to the High-level Conference on the future of the Court, organised by the United Kingdom Chairmanship of the Committee of Ministers at Brighton (United Kingdom) on 19-20 April 2012. The Court also presented a Preliminary Opinion in preparation for the Brighton Conference containing a number of specific proposals.

In order to give effect to specific provisions of the declaration adopted at the Brighton Conference, the Committee of Ministers subsequently instructed the CDDH to prepare a draft amending protocol to the Convention. This subject at first occur during two meetings of a Drafting Group of restricted composition, before being examined by the DH-GDR, following which the draft was further examined and adopted by the CDDH at its 76th meeting (27-30 November 2012) for submission to the Committee of Ministers. The Parliamentary Assembly, at the invitation of the Committee of Ministers, adopted Opinion No. 283 (2013) on the draft protocol on 26 April 2013.¹²

At its 123rd session, the Committee of Ministers analysed and decided to adopt the draft as Protocol No. 15 to the Convention. At the same time, it pays attention to the present Explanatory Report to Protocol No. 15.¹³

For the opinion of ECtHR, preamble of the Protocol No. 15 gives rise to two remarks: Firstly, the reference in the second paragraph to the Brighton declaration makes clear the context within which the draft Protocol was negotiated. Secondly, the Court welcomes the wording of the fourth paragraph that as did a very similar paragraph in the preamble to Protocol No. 14, affirms the leading role of the Court in protecting human rights in Europe. It is a statement very much consistent with the declarations of all three high-level reform conferences, those of Interlaken, İzmir and Brighton.¹⁴

A. Subsidiary Criteria and Margin of Appreciation

At the end of the preamble to the Convention, a new expression shall be supplemented, which shall read as follows: “Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have

¹² See Parliamentary Assembly/Council of Europe, *Opinion 283 (2013)* [Draft Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms]. See also Explanatory Report (Protocol No. 15), § 5.

¹³ Explanatory Report (Protocol No. 15), § 6.

¹⁴ European Court of Human Rights, *Opinion of the Court on Draft Protocol No. 15 to the European Convention on Human Rights* [hereinafter *Opinion of the ECtHR on Protocol No. 15*], adopted on 6 February 2013, § 3.

the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention[.]”¹⁵ The new phrase containing a reference to the principle of (i) subsidiarity and (ii) the doctrine of the margin of appreciation.

For the ECtHR opinion, this provision contains a new paragraph intended to become the final reading in the Preamble to the Convention. The Court’s principal concern was that the expression used, which it found to be incomplete, could cause uncertainty as to its intended meaning. While the text has not been revised, the drafters’ intentions have been clarified. The explanatory report now states that “[i]t is intended ... to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case[-]law”. That declared intention match the suggestion that the Court made at the end of its comment to develop the text further. Consequently, the intended meaning can be said to coexist the relevant terms of the Brighton Declaration. As the Court indicated in its observation to the CDDH, there clearly was no common intention of the High Contracting Parties to change either the substance of the Convention or its system of international, collective enforcement. In spite of the fact that the Court’s favourite is still for a more developed text, it is conscious that the current wording represents a reunite among High Contracting Parties in order to reach agreement over the Protocol wholly. In any condition both the explanation given and the context in which the text was drafted are themselves legally significant, as demonstrated by the Court’s references to the Explanatory Report to Protocol No. 14 and to the Interlaken Action Plan in the case of *Korolev v. Russia*.¹⁶

I. Subsidiary Criteria

In many member states, it is possible to apply to the national constitutional court for remedy of an assert of violation of a right protected under the national constitution in addition to providing a final domestic level of application for determination of a complaint. This form of general

¹⁵ Council of Europe, *Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms* [hereinafter Protocol No. 15] 24 June 2013, Article 1. In accordance with Article 8(4) of the Protocol No. 15, no transitional provision relates to this modification, which will enter into force in accordance with Article 7 of the Protocol (See Explanatory Report (Protocol No. 15), § 10).

¹⁶ Opinion of the ECtHR on Protocol No. 15, § 4; See also *Korolev v. Russia* (dec.), App. No. 25551/05, 1 July 2010.

remedy may also contribute to ensuring consistency in or the development of interpretation and application of protected rights at domestic level, with the overall result of more generally increasing that protection. Through its rulings on individual cases that are subsequently the subject of applications to the Court, the national constitutional court can engage directly in the judicial dialogue between the national and European levels. These two issues contribute to effective operation of the principle of subsidiarity within the overall Convention system.¹⁷

General remedies may also play an important role in providing an effective remedy in situations where no specific remedy exists, so as to satisfy the requirement under Article 13 of the Convention for provision of an effective remedy for “everyone whose rights and freedoms ... are violated”. For example, some member States in effect have an individual application/constitutional complaint as their domestic remedy for alleged violations of the right to trial within a reasonable time, because of an exception to the otherwise applicable rule of exhaustion of other remedies.¹⁸

Several member States constitutions thus foresee some form of constitutional complaint procedure through an individual and in some cases also legal persons,¹⁹ may complain to the national constitutional court that an act or omission of a public authority has caused a violation of their rights as protected by the constitution. Such remedies are recognised as being effective with the meaning of Article 13 of the Convention when the rights protected by the constitution clearly include or match in substance to Convention rights.²⁰ The Court has stated that, “as regards legal systems which provide constitutional protection for fundamental human rights and freedoms ... it is incumbent on the aggrieved individual to test the extent of that protection”.²¹

¹⁷ Directorate General Human Rights and Rule of Law/Council of Europe, *Guide to Good Practice in Respect of Domestic Remedies* [hereinafter Guide to Good Practice], adopted by the Committee of Ministers on 18 September 2013, p. 46.

¹⁸ Guide to Good Practice, p. 46.

¹⁹ For example, Austria, Czech Republic, Latvia, Bosnia and Herzegovina, Russian Federation, Slovenia, Turkey, Slovakia.

²⁰ The Court noted that none of the related national constitutional provisions “... sets forth guarantees against the non-enforcement of binding decisions which are at least remotely comparable to those developed in the Court’s case law” (Apostol v. Georgia, App. No. 40765/02, 28 November 2006, § 38).

²¹ See, e.g., Vinčić and Others v. Serbia, App. No. 44698/06 and others, 1 December 2009, § 51.

Restrictions on the legal scope of such a remedy may make it in certain circumstances ineffective under Article 13 of the Convention. For example, the Court has found that a constitutional court's review of individual complaints was ineffective where an alleged violation resulted not from the unconstitutionality of an applied legal provision –in condition of an issue that was within the constitutional court's jurisdiction– but from the wrong application or interpretation of a provision whose substance was not unconstitutional.²² Similarly, a constitutional complaint may be ineffective as a remedy under Article 35 of the Convention where it relates only to legislative provisions and not decisions of ordinary courts, when a complaint concerns the latter.²³

Constitutional complaints are generally subsidiary. In other words before bringing an individual application/constitutional complaint, an applicant must firstly have exhausted accessible, effective remedies available before courts of regular law. There may be exceptions to this rule, e.g. when its application would cause serious and irreversible damage to the applicant or in particular types of complaint, such as of excessive length of proceedings before national courts.

However, the way in which the principle of subsidiarity is applied may interfere with the effectiveness under Article 13 of the Convention of a constitutional complaint. For instance, the Court has found in the case of *Ismayilov v. Azerbaijan* that a domestic requirement first to exhaust a remedy consisting of an additional cassation appeal to the Supreme Court President, where that prior remedy was ineffective, was a barrier to the accessibility of the constitutional complaint.²⁴ In the case of *Zborovsky v. Slovakia*, the Court found that a domestic requirement restricting the scope of the constitutional complaint to the points of law arguable before the Supreme Court “resulted in an actual bar to examination of the applicant's substantive claims” by the constitutional court.²⁵ Where a constitutional court has appreciation to admit a complaint on condition that the right has been “grossly violated” with “serious and irreparable consequences” for the applicant, with an absence of sufficient case-law on how these conditions were interpreted and applied, the

²² See *Savics v. Latvia*, App. No. 17892/03, 27 November 2012, §§ 113-15; See also *Dorota Szott-Medynska v. Poland (dec.)*, App. No. 47414/99, 9 October 2003.

²³ See, e.g., *Rolim Comercial, S.A. v. Portugal*, App. No. 16153/09, 16 April 2013.

²⁴ *Ismayilov v. Azerbaijan*, App. No. 4439/04, 17 January 2008, §§ 39-40.

²⁵ *Zborovsky v. Slovakia*, App. No. 14325/08, 23 October 2012, §§ 51-54.

constitutional complaint could not "... be regarded with sufficient certainty as an effective remedy in the applicant's case".²⁶

Generally, to be considered an effective remedy, a constitutional complaint must be directly accessible by individuals. The Court has thus refused to consider, e.g., the exceptional constitutional remedy available in Italy as an effective remedy, insofar as only the judge may hold the constitutional court, either "ex-officio"²⁷ or at the petition one of the parties: "... in the Italian legal system an individual is not entitled to apply directly to the constitutional court for review of a law's constitutionality. Only a court trying the merits of a case has the right to make a reference to the constitutional court, either of its own motion or at the request of a party. Accordingly, such an application cannot be a remedy whose exhaustion is required under Article 35 of the Convention".²⁸ It is necessary that the remedy before the constitutional court guarantee effective decision-making. Where a court finds itself unable to obtain a decision, whether because of a lack of safeguards against impasse or their failure, the consequence is to restrict the essence of the right of access to a court and to deprive an applicant of an effective right to have his constitutional appeal finally determined.²⁹

So that the constitutional complaint procedure to constitute an effective remedy in the sense of Article 13 of the Convention, it must also provide effective redress for a violation. The constitutional court may therefore be equipped with a scope of powers. In many times include to declare the existence of a violation,³⁰ quash the impugned decision, measure or act,³¹ where the violation is because of an omission, order the relevant authority to take the necessary action,³² remit the case to the relevant authority for further proceedings, based on the findings of the constitutional court,³³ order payment

²⁶ Horvat v. Croatia, App. No. 51585/99, 26 July 2001, §§ 41-44. *See also* Slaviček v. Croatia (dec.), App. No. 20862/02, 4 July 2002.

²⁷ The term "ex-officio" (lat.) means that used to show powers exercised by public officials by virtue or because of the office they hold [autor's note].

²⁸ Immobiliare Saffi v. Italy [GC], App. No. 22774/93, 28 July 1999, § 42. *See also*, I.R.S. v. Turkey, App. No. 26338/95, 28 January 2003.

²⁹ Marini v. Albania, App. No. 3738/02, 18 December 2007, §§ 119-23.

³⁰ *E.g.*, Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Armenia, Czech Republic, Germany, Latvia, Russian Federation, Serbia, Slovak Republic and Slovenia.

³¹ *E.g.*, Albania, Andorra, Armenia, Austria, Czech Republic, Belgium, Germany, Slovak Republic, Serbia, and Slovenia.

³² *E.g.*, Albania, Czech Republic, Serbia and Slovak Republic.

³³ *E.g.*, Albania, Bosnia and Herzegovina, Czech Republic, Germany, Slovak Republic and Slovenia.

of compensation³⁴ and order *restitutio in integrum*.³⁵

These powers must exist not only in theory but be effective in practice. For example, a constitutional court's order to speed up proceedings must have a preventive effect on violations of the right to trial within a reasonable time by in fact accelerating the proceedings.³⁶

Therefore, in order to ensure the long-term effectiveness of the Convention system, the principle of subsidiarity must be made fully functional. This should be the main point of the Interlaken Conference. It alludes a shared responsibility for all those charged with protecting Convention rights. It requires national authorities to suppose their primary responsibilities under the Convention to provide effective protection for human rights and remedies for any violations, especially those arising from situations that have already been the subject of repeated judgments of the Court. It also requires the Court to release consistently its responsibility to issue clear and consistent judgments and decisions that provide reliable guidance to national courts and other authorities on interpretation and application of the Convention, during acting as a safety net for cases where individual's rights were not effectively protected own territory. The Court should continue to develop the way it implements the principle of subsidiarity at all stages of its consideration of an application. Eventually, it requires member States to execute the Court's judgments fully and carefully and the Committee of Ministers to supervise the execution of Court judgments promptly and efficiently.³⁷

The present situation in many member States of the Council means that particular emphasis at European level is still needed on the protection of rights through judicial determination of individual applications to the Court. However, it is important that the functioning of the Convention include more incentives for full protection of rights at national level, by means of that decreasing the mentioned need for subsidiary protection by the Court.³⁸

³⁴ E.g, Austria, Bosnia and Herzegovina and Slovak Republic.

³⁵ E.g, Slovak Republic. The term "restitutio in integrum" (lat.) means return of the original state of affairs [autor's note].

³⁶ For example, Vičanová v. Slovakia, App. No. 3305/04, 18 December 2007.

³⁷ Steering Committee on Human Rights (CDDH), *Opinion on the issues to be covered at the Interlaken Conference* (as prepared by the CDDH at its 69th meeting (24-27 November 2009)) [hereinafter Opinion on Interlaken], CDDH(2009)019 Addendum I, 1 December 2009, § 10.

³⁸ Opinion on Interlaken, § 11.

It is intended to enhance the transparency and accessibility of these characteristics of the Convention system and to be coherent with the doctrine of the “margin of appreciation” as developed by the Court in its case-law. In making this proposal, the Brighton Declaration also recalled the High Contracting Parties commitment to give full effect to their obligation to secure the rights and freedoms explained in the Convention.³⁹

High Contracting Parties of the Convention are obliged to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention and to provide an effective remedy before a national authority for everyone whose rights and freedoms are violated. The Court officially interprets the Convention. It also acts as a safeguard for individuals whose rights and freedoms are not secured at the national level.⁴⁰

The CDDH receives the internal reflection by the Court on its response as to how it can give full effect to the principle of subsidiarity. The CDDH recalls that the principle of subsidiarity implies the sharing of responsibility for the protection of human rights between national authorities and the Court. The primary responsibility belongs to the national authorities to implement the Convention entirely, with the Court playing a subsidiary role to intervene only when States have failed properly to accomplish this responsibility.⁴¹

Subsidiarity must operate so that the Court can strike a balance in its workload and focus on those crucial applications that relate to the implementation of the Convention. This is all the more important given the Court’s backlog of cases. Effective application of the subsidiarity principle is clearly one way of dealing with the increasing number of applications submitted to the Court. However, the significance and importance of the principle of subsidiarity extends beyond considerations of practical efficiency.⁴²

The CDDH invites the Court to reflect on giving full weight to the appreciation that all Convention rights must be applied in the domestic context and that national courts, are in principle in the best position to appraise how this should be obtained. This is coherent with the letter and spirit of the Convention⁴³

³⁹ Explanatory Report (Protocol No. 15), § 7.

⁴⁰ Explanatory Report (Protocol No. 15), § 8.

⁴¹ Steering Committee on Human Rights (CDDH), *Contribution to the Ministerial conference organised by the United Kingdom Chairmanship of the Committee of Ministers*, 74th meeting Strasbourg, 7-10 February 2012 [hereinafter Contribution to the Ministerial conference], CDDH(2012)R74 Addendum III, 15 February 2012, Appendix § 3.

⁴² Contribution to the Ministerial conference, Appendix § 4.

⁴³ Contribution to the Ministerial conference, Appendix § 5.

As such, case-law the CDDH takes the view that the Court should focus on its role of overall review in the light of the Convention, confirm that the domestic court has taken a decision within the limits of proper interpretation of the Convention.⁴⁴ Especially the CDDH does not see the role of the jurisprudence of the Court as an instrument of judicial harmonisation of the way the Convention is applied in High Contracting Parties.⁴⁵

The Court should focus on reviewing whether the domestic judgment itself falls within the acceptable limits of legitimate interpretation and application of the Convention.⁴⁶ The Court should not replace its own assessment for that of national authorities, made within the proper margin of appreciation. The margin of appreciation is an important device through which the Court gives effect to the principle of subsidiarity. It means that the Court should give full gravity to the considered views of national courts alongside of other national authorities, especially national parliaments.⁴⁷

The evaluation of facts made by national courts should not be tested by the Court except where there has been an obvious error and only in those cases where that error is fundamental to the application of the Convention. Neither should the Court in principle considered following developments that were not within the topic of the national proceedings.⁴⁸

During the Court is competent to verify the conformity of national law with the provisions of the Convention, it should not in principle interpret national law.⁴⁹ Additionally the principle of subsidiarity requires and the Convention stipulates that all domestic remedies must have been exhausted before the Court declares an application admissible. This condition must be the case even where several remedies coexist and a strict interpretation of exhaustion of domestic remedies must be applied by the Court to enable the national courts to deal with the matter at the beginning.⁵⁰

The jurisdiction of the Court is closely linked to its subsidiary role and comes from the international treaty nature of the Convention. Therefore it

⁴⁴ Contribution to the Ministerial conference, Appendix § 6.

⁴⁵ Contribution to the Ministerial conference, Appendix § 7.

⁴⁶ Contribution to the Ministerial conference, Appendix § 8.

⁴⁷ Contribution to the Ministerial conference, Appendix § 9.

⁴⁸ Contribution to the Ministerial conference, Appendix § 10.

⁴⁹ Contribution to the Ministerial conference, Appendix § 11.

⁵⁰ Contribution to the Ministerial conference, Appendix § 12.

should be interpreted in conform to the 1969 Vienna Convention on the Law of Treaties.⁵¹ As stated in the İzmir Declaration, the Court should apply fully, consistently and foreseeable all admissibility criteria and the rules regarding the scope of its jurisdiction. A strict application of these criteria will also have a positive effect on reducing the caseload of the Court by discourage applications which are outside of the scope of its jurisdiction.⁵²

The full functioning of subsidiarity necessarily means a tolerance of the fact that Convention rights can be implemented differently by different Contracting Parties, consistent with their national conditions provided that they are actually implemented. This is of clear importance for those guarantees of the Convention requiring a consideration of interests but applies to all the rights guaranteed by the Convention and moves to the heart of the relationship between the Court and the Contracting Parties.⁵³

2. Margin of Appreciation

The jurisprudence of the Court makes clear that the High Contracting Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the conditions of the case and the rights and freedoms occupied. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national territory and that national authorities are in principle better placed than an international court to appraise local requirements and conditions.

The margin of appreciation goes coexist with supervision under the Convention system. The role of the Court is to review whether decisions taken by national authorities are in keeping with the Convention, having due regard to the State's margin of appreciation.

B. Criteria for Office

The legitimacy of the Court as a judicial body is crucial for the continuing effectiveness of the Court. This includes respect for the integrity and quality of its judgments, in the eyes of not only Governments and domestic courts but also applicants and the general public entirely. As a result, it is vital that candidates presented for election to the Court are persons of high standing with all the specific professional qualities necessary for the exercise of the function

⁵¹ *Vienna Convention on the Law of Treaties*, 1969, United Nations, Treaty Series (No: 18232).

⁵² Contribution to the Ministerial conference, Appendix § 13.

⁵³ Contribution to the Ministerial conference, Appendix § 14.

of judge of an international court whose decisions have consequences for all High Contracting Parties.⁵⁴

Article 22 of the Convention states that “the judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party”. The Parliamentary Assembly has special competence for electing Court judges but the quality of the judges initially depends on the quality of the candidates that are nominated by the High Contracting Parties. If a list is not comprised of qualified candidates the most that the Parliamentary Assembly can do is refuse it.⁵⁵

Emphasizing the fundamental importance of the High Contracting Parties role in recommending candidates of the highest possible quality for election as judges of the Court in order to keep the impartiality and quality of the Court in that connection strengthening its authority and credibility. Firstly, recalling Articles 21 and 22 of the Convention that respectively set out the criteria for office and entrust the Parliamentary Assembly with the task of electing judges from a list of three candidates nominated by each High Contracting Party. Secondly, recalling the Interlaken Declaration that stressed the importance of maintaining the independence of the judges and of preserving the impartiality and quality of the Court.⁵⁶

Recalling also the İzmir Declaration that cited the need to encourage applications by good potential candidates for the post of judge at the Court and to guarantee a sustainable recruitment of competent judges, with relevant experience and the impartiality and quality of the Court.⁵⁷ In İzmir Declaration invites the Committee of Ministers to maintain its reflection on the criteria for office as judge of the Court and on the selection procedures at national and international level in order to support applications by good potential candidates and to guarantee a sustainable recruitment of competent judges with relevant experience and the impartiality and quality of the Court.⁵⁸

⁵⁴ Steering Committee on Human Rights (CDDH), *CDDH report on the review of the functioning of the Advisory Panel of experts on candidates for election as judge to the European Court of Human Rights*, CDDH(2013)R79 Addendum II [hereinafter Candidates for election as judge], 29 November 2013, § 1.

⁵⁵ Candidates for election as judge, § 2.

⁵⁶ Interlaken Declaration, p. 5. *See also* Candidates for election as judge, § 3.

⁵⁷ *See* İzmir Declaration, p. 2.

⁵⁸ *See* İzmir Declaration, p. 2.

Recalling Committee of Ministers “Resolution CM/Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights” which restated the responsibility of the High Contracting Parties to the Convention to ensure a fair and transparent national selection procedure.⁵⁹ Referring to “the responsibility of the High Contracting Parties to the Convention to ensure a fair and transparent national selection procedure”,⁶⁰ the Committee of Ministers stated its idea that “the establishment of a Panel of Experts mandated to advise on the suitability of candidates that the member States intend to put forward for office as judges of the Court would constitute an adequate mechanism in this regard”.⁶¹ This stresses the fact that the principle role of the Advisory Panel is to provide advice to Contracting Parties during the process of selection of candidates.⁶²

Recalling Recommendation 1649 (2004) of the Parliamentary Assembly⁶³ on candidates for the Court and the Committee of Ministers’ reply thereto. There were also various resolutions of the Parliamentary Assembly on the matter including Resolution 1646 (2009)⁶⁴ on the appointment of candidates and election of judges to the Court.⁶⁵

In Article 21 of the Convention, a new paragraph 2 will be inserted which shall read as follows: “Candidates shall be less than 65 years of age at the date by which the list of three candidates has been requested by the Parliamentary Assembly, further to Article 22”.⁶⁶ A new paragraph 2 is introduced in order to

⁵⁹ Committee of Ministers/Council of Europe, *Resolution CM/Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights* [hereinafter Advisory Panel], adopted by the Committee of Ministers on 10 November 2010 at the 1097bis meeting of the Ministers’ Deputies, p. 1.

⁶⁰ Advisory Panel, p. 1.

⁶¹ Advisory Panel, p. 3.

⁶² Candidates for election as judge, § 5.

⁶³ Parliamentary Assembly/Council of Europe, *Recommendation 1649 (2004)1 Candidates for the European Court of Human Rights*, adopted by the Assembly on 30 January 2004 (8th Sitting), § 17.

⁶⁴ Parliamentary Assembly/Council of Europe, *Recommendation 1646 (2009)1 Candidates for the European Court of Human Rights*, adopted by the Assembly on 27 January 2009 (4th Sitting).

⁶⁵ See Committee of Ministers/Council of Europe, *Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights*, adopted by the Committee of Ministers on 28 March 2012 at the 1138th meeting of the Ministers’ Deputies, CM(2012)40finalE, 29 March 2012, *passim*.

⁶⁶ See Protocol No.15, Article 2, p. 2. (“In order to take account of the length of the domestic procedure for the selection of candidates for the post of judge at the Court, Article [8(1)] of

require that candidates be less than 65 years of age at the date by which the list of three candidates has been requested by the Parliamentary Assembly further to its role in electing judges under Article 22 of the Convention. The ECtHR welcomes this change, which should be beneficial in future by fostering the election of very highly experienced candidates as judges, whose services may be kept beyond an age limit that no longer seems very important in the present day.⁶⁷

This adaptation intend enabling highly qualified judges to serve the full nine year term of office and in that connection reinforce the steadiness of the membership of the Court. The age limit applied under Article 23(2) of the Convention, as drafted prior to the entry into force of this Protocol, had the effect of preventing certain experienced judges from completing their term of office. It was considered no longer crucial to force an age limit given the fact that judges' terms of office are no longer renewable.⁶⁸

The criteria for office set down by the Convention concern the judges' ethical character and professional qualifications. These criteria guarantee that they are independent, impartial and competent. The selection procedure involves the High Contracting Parties, each of which offers a list of three candidates and the Parliamentary Assembly that elects one of the three. Interlaken Declaration had suggested ensuring full satisfaction of the selection criteria. The Committee of Ministers establish a panel of experts responsible for advising the High Contracting Parties concerning the lists of candidates.

The election process of a judge, from the domestic selection procedure to the vote by the Parliamentary Assembly is long. Therefore, it has been considered necessary to foresee a date adequately certain at which the age of 65 must be determined to avoid a candidate being prohibited from taking office for having reached the age limit throughout the course of the procedure. Because this practical reason, the text of the Protocol No. 15 leaves from the exact wording of the Brighton Declaration, while pursuing the same

the Protocol foresees that these changes will apply only to judges elected from lists of candidates submitted to the Parliamentary Assembly by High Contracting Parties under Article 22 of the Convention after the entry into force of the Protocol. Candidates appearing on previously submitted lists, by extension including judges in office and judges-elect at the date of entry into force of the Protocol, will continue to be subject to the rule applying before the entry into force of the present Protocol, namely the expiry of their term of office when they reach the age of 70" (See Explanatory Report (Protocol No. 15), § 15)).

⁶⁷ Opinion of the ECtHR on Protocol No. 15, § 6.

⁶⁸ Explanatory Report (Protocol No. 15), § 12.

end. Consequently, it was decided that the age of the candidate should be determined at the date by which the list of three candidates has been requested by the Parliamentary Assembly. In this connection, it would be useful if the Contracting Party's request applications were to refer to the relevant date and if the Parliamentary Assembly were to offer a means by which this date could be publicly verified whether by publishing its letter or otherwise.

C. Relinquishment of Jurisdiction to the Grand Chamber

Caseload of the Court raises a serious difficulty affecting the interpretation of the Convention or the additional Protocols or where the resolution of a question before the Chamber may have a result incompatible with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

In Article 30 of the Convention, the statement "unless one of the parties to the case objects" shall be deleted.⁶⁹ Article 30 of the Convention has been amended such that the parties may no longer object to relinquishment of a case by a Chamber in favour of the Grand Chamber. This measure is intended to contribute to consistency in the case-law of the Court which had indicated that it intended to modify its Rules of Court (Rule 72: "Request for interpretation of a judgment")⁷⁰ in order to make it obligatory for a Chamber to relinquish jurisdiction where it imagine departing from settled case-law.⁷¹ Removal of the parties' right to object to relinquishment will reinforce this development.

The removal of this right would also intend accelerating proceedings before the Court in cases that raise a serious question affecting the interpretation of the Convention or the additional Protocols or a potential departure from existing case-law. In this connection, it would be expected that the Chamber will consult the parties on its intentions and it would be better for the Chamber to reduce the case to the extent that possible including by finding inadmissible any relevant parts of the case before relinquishing it.⁷²

⁶⁹ Protocol No. 15, Article 3, p. 3. ("A transitional provision is foreseen in Article [8(2)] of the Protocol. Out of concern for legal certainty and procedural foreseeability, it was considered necessary to specify that removal of the parties' right to object to relinquishment would not apply to pending cases in which one of the parties had already objected, before entry into force of the Protocol, to a Chamber's proposal of relinquishment in favour of the Grand Chamber." (See Explanatory Report (Protocol No. 15), § 20)).

⁷⁰ European Court of Human Rights, *Rules of the Court*, Registry of the Court, Practice Directions amended on 29 September 2014, p. 38.

⁷¹ See European Court of Human Rights, *Preliminary Opinion of the Court in preparation for the Brighton Conference*, adopted by the Plenary Court on 20 February 2012, § 16.

⁷² Explanatory Report (Protocol No. 15), § 17.

This change is made in the expectation that the Grand Chamber will in future give more specific indication to the parties of the potential departure from existing case-law or serious question of interpretation of the Convention or the additional Protocols.

This change, which was proposed by the Court as a means of enhancing case-law consistency is also welcomed by the ECtHR. For the Court first point is that the Chamber narrows down the case in question by rejecting any inadmissible complaints at that stage. The Court's practice at present, at both Chamber and Grand Chamber level, is to consider issues of admissibility and merits simultaneously, as envisaged by Article 29(1) of the Convention. It is of course open to a Chamber to dispose of part of an application by means of an admissibility decision and then to relinquish jurisdiction in favour of the Grand Chamber.⁷³ The second point is that the Court give more specific indications to the parties concerning the possible change in case-law that might occur, or the serious question of interpretation that has prompted relinquishment. It is in the interests of the procedure that it be obvious to the parties what matters they should address in depth before the Grand Chamber. In most cases, these issues should be clear enough. Where a party has a doubt, it may raise the substance with the Court's Registry, which can provide assistance.⁷⁴

D. Admissibility Criteria

I. Time Limit for Submitting Applications

In Article 35(1) of the Convention, the words "within a period of six months" shall be replaced by the words "within a period of four months".⁷⁵ Articles 4 and 5 of the Protocol amend Article 35 of the Convention. Paragraph 1 of Article 35 has been amended to reduce from six months to four the period following the date of the final domestic decision within which an application must be made to the ECtHR. The development of quicker communications technology together with the time limits of similar length in force in the High Contracting Parties argue for the decrease of the time limit.⁷⁶

⁷³ See *Catan and Others v. the Republic of Moldova and Russia* [GC], App. No. 43370/04, 18454/06 and 8252/05, 19 October 2012. See also *Scoppola v. Italy (no.2)* [GC], App. No. 10249/03, 17 September 2009.

⁷⁴ Opinion of the ECtHR on Protocol No. 15, §§ 7, 10-11.

⁷⁵ Protocol No. 15, Article 4, p. 3.

⁷⁶ Explanatory Report (Protocol No. 15), § 21. (A transitional provision appears at Article 8(3) of the Protocol. It was considered that the reduction in the time limit for submitting an application to the Court should apply only after a period of six months following the entry

2. Significant Disadvantage

The proposal would be to amend the “significant disadvantage” admissibility criterion in Article 35(3)(b) of the Convention, by removing the safeguard requiring prior due consideration by a domestic tribunal. In favour of the proposal, it has been claimed that protect is unnecessary in the light of Article 35(1), which requires exhaustion of effective domestic remedies. In fact, the requirement for “due consideration” puts a higher standard for cases not involving significant disadvantage to the applicant than for those that do. There would still be a requirement of examination on the merits if respect for human rights so requires. The proposal would give greater effect to the expression *de minimis no curat praetor*.⁷⁷ It would reinforce the criteria of subsidiarity by further easing the Court of the obligation to deal with cases in which international judicial adjudication is not authorized. The right of individual application would remain whole.⁷⁸

Quarrel against include that the proposal would probably have little effect, given how infrequently the Court has applied the criterion. The Court should be given more time to develop its interpretation of the current criterion, permitting its long-term effects to become obvious. The current text was a carefully drafted agreement. Removing the safeguard would lead to a decrease in judicial protection offered to applicants. The safeguard in fact underlines the importance of the criteria of subsidiarity because High Contracting Parties are required to provide domestic judicial protection.⁷⁹

into force of the Protocol, in order to allow potential applicants to become fully aware of the new deadline. In addition, the new time limit will not have retroactive effect, since it is specified in the final sentence of paragraph 4 that it does not apply to applications in respect of which the final decision within the meaning of Article 35(1) of the Convention was taken prior to the date of entry into force of the new rule. *See* Explanatory Report (Protocol No. 15), § 22).

⁷⁷ The term “*de minimis no curat praetor*” (lat.) means that the Court does not concern itself with trivial matters. For detailed information about the term and significant disadvantage *see* Serhat Altinkök, “The New Admissibility Criterion Stated in the Article 35 § 3 (b) of the European Convention of Human Rights: ‘Significant Disadvantage’”, *Ankara Üniversitesi Hukuk Fakültesi Dergisi* [Ankara University the Journal of Faculty of Law], 2013, 62(2), p. 349-405.

⁷⁸ Steering Committee on Human Rights (CDDH), *CDDH Final Report on measures requiring amendment of the European Convention on Human Rights* (74th meeting Strasbourg, 07-10 February 2012) [hereinafter Final Report], CDDH(2012)R74 Addendum I, 15 February 2012, § 25.

⁷⁹ Final Report, § 26.

Some arguments have been advanced in favour of the proposal on the criteria on significant disadvantage could be counted like that: (i) The additional safeguard requiring previous due consideration by a domestic court in Article 35(3) is unnecessary considering the fact that paragraph 1 already mentions that all domestic remedies have to be exhausted. (ii) Article 35(1) of the Convention does not mention about the additional safeguard of “due consideration” by those domestic remedies. It is exceptional that paragraph 3 that concerns cases in which the applicant did not suffer a significant disadvantage, does offer such an additional safeguard. (iii) Even in a case where the applicant’s concerns have not been given due consideration on the national level, the applicant does not need to be granted relief by the ECtHR where his case is trivial in its significance. In any case, the provision would still contain the requirement that an application receive an examination on the merits if respect for human rights so requires. (iv) It would render the existing *de minimis non curat praetor* rule more effective and easily applicable. The Court would be provided with a further instrument to focus on more important questions of human rights protection under the Convention. Amendment of the provision would also provide a clear political signal in this regard. (v) It would further emphasise the subsidiary nature of the judicial protection offered by the ECtHR. The reference to “duly considered” in the current text of Article 35(3) of the Convention may convince the Court to deal substantively with cases in which judicial supervision by an international human rights court is not warranted.⁸⁰

In Article 35(3)(b) of the Convention, the words “and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal” shall be deleted.⁸¹ Article 35(3)(b) of the Convention, containing the admissibility criterion concerning “significant disadvantage”, has been amended to delete the condition that the case have been duly considered by a domestic tribunal. The requirement remains of examination of an application on the merits where required by respect for human rights. This amendment is intended to give larger effect to the term *de minimis non curat praetor*.

⁸⁰ Final Report, p. 36.

⁸¹ Protocol No. 15, Article 5, p. 3. “As regards the change introduced concerning the admissibility criterion of “significant disadvantage”, no transitional provision is foreseen. In accordance with Article 8, paragraph 4 of the Protocol, this change will apply as of the entry into force of the Protocol, in order not to delay the impact of the expected enhancement of the effectiveness of the system. It will therefore apply also to applications on which the admissibility decision is pending at the date of entry into force of the Protocol.” (See Explanatory Report (Protocol No. 15), § 24).

II. THE COURT'S REFORMS STATED IN THE ADDITIONAL PROTOCOL NO. 16

The proposal to extend the jurisdiction of the ECtHR to give advisory opinions was made in the report to the Committee of Ministers of the Group of Wise Persons that sets up under the Action Plan adopted at the Third Summit of Heads of State and Government of the Member States of the Council of Europe “to consider the issue of the long-term effectiveness of the ECHR control mechanism”.⁸² The Group of Wise Persons concluded that “it would be useful to introduce a system under which the national courts could apply to the ECtHR for advisory opinions on legal difficulties relating to interpretation of the Convention and the additional protocols, in order to encourage dialogue between the national courts and enhance the ECtHR’s “constitutional” role.⁸³ Requests for an opinion, which would be submitted only by constitutional courts or courts of last instance, would always be optional and the opinions given by the Court would not be binding”.⁸⁴ Such a new ability would be in addition to that given to the Court under Protocol No. 2 to the Convention⁸⁵ whose provisions are now principally reflected in Articles 47-49 of the Convention. The Group of Wise Persons’ proposal was examined by the CDDH as part of its work on follow-up to the former’s report.⁸⁶

In the İzmir Declaration later invited “... the Committee of Ministers to reflect on the advisability of introducing a procedure allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention that would help clarify the provisions of the Convention and the Court’s case-law, thus providing further

⁸² Committee of Ministers/Council of Europe, *Third Summit of Heads of State and Government of the Member States of the Council of Europe* (Warsaw, 16-17 May 2005), Action Plan [hereinafter Action Plan], CM(2005)80 final 17 May 2005, p. 2.

⁸³ For detailed information about constitutional role of the ECtHR, see Altınkök, 2013, pp. 353-54.

⁸⁴ See Committee of Ministers/Council of Europe, *Report of the Group of Wise Persons to the Committee of Ministers*, CM(2006)203, 979bis Meeting, 15 November 2006, § 135.

⁸⁵ See Council of Europe, *Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions*, 6 May 1963.

⁸⁶ See Steering Committee on Human Rights (CDDH), *Activity Report on guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights*, CDDH(2009)007Addendum I, 30 March 2009, §§ 42-44. See also Steering Committee on Human Rights (CDDH), *Opinion on the issues to be covered at the Interlaken Conference* (as prepared by the CDDH at its 69th meeting (24-27 November 2009), CDDH(2009)019 Addendum I, 1 December 2009, § 19.

guidance in order to assist States Parties in avoiding future violations”.⁸⁷ The Ministers’ Deputies decisions on follow-up to the İzmir Conference then invited the CDDH to complicated specific proposals, with options, for introducing such a procedure.⁸⁸ The CDDH’s Final Report to the Committee of Ministers on measures requiring amendment of the Convention⁸⁹ included an deeply examination of a more detailed proposal made by the experts of the Netherlands and Norway, reflected also in its Contribution to the Ministerial Conference organised by the United Kingdom Chairmanship of the Committee of Ministers.⁹⁰

The question of advisory opinions was discussed at length during the preparation of the subsequent Brighton Conference that the ECtHR contributed a detailed “Reflection Paper on the proposal to extend the Court’s advisory jurisdiction”.⁹¹ The Brighton Declaration stated “... that the interaction between the Court and national authorities could be strengthened by the introduction into the Convention of a further power of the Court, which States Parties could optionally accept, to deliver advisory opinions upon request on the interpretation of the Convention in the context of a specific case at domestic level, without prejudice to the non-binding character of the opinions for the other States Parties; invites the Committee of Ministers to draft the text of an optional protocol to the Convention with this effect by the end of 2013; and further invites the Committee of Ministers thereafter to decide whether to adopt it”.⁹²

Afterwards the Brighton Conference, the 122nd Session of the Committee of Ministers instructed the CDDH to draft the required text.⁹³ This work initially happen during two meetings of a Drafting Group of restricted

⁸⁷ İzmir Declaration, p. 4.

⁸⁸ See Committee of Ministers/Council of Europe, *121st Session of the Committee of Ministers* (İstanbul, 10-11 May 2011), CM/Del/Dec(2011)1114/1.5.

⁸⁹ See Final Report, §§ 51-56 and Appendix V.

⁹⁰ See Contribution to the Ministerial conference, § 17.

⁹¹ See European Court of Human Rights, *Reflection Paper on the Proposal to Extend the Court’s Advisory Jurisdiction*, 20 February 2012 (“This paper is a reflection document that is not intended to bind the Court in future discussions. The Court reserves the right to continue its reflections on various points presented in the paper and to submit its observations if and when a detailed considered proposal on the institution of an advisory opinion procedure might be presented to it for consultation.”).

⁹² Brighton Declaration, p. 4.

⁹³ See Committee of Ministers/Council of Europe, *122nd Session of the Committee of Ministers* (Strasbourg, 23 May 2012).

composition, before being examined by the plenary Committee of experts on the reform of the Court (DH-GDR), following which the draft was further examined and approved by the CDDH at its 77th meeting for submission to the Committee of Ministers. The key topic addressed during this process were: (i) The nature of the domestic authority that may request an advisory opinion of the Court; (ii) the type of questions on which the Court may give an advisory opinion; (iii) the procedure for considering requests, for deliberating upon accepted requests and for issuing advisory opinions and (iv) the legal effect of an advisory opinion on the different categories of subsequent case.⁹⁴

The Parliamentary Assembly, at the invitation of the Committee of Ministers, adopted Opinion No. 285(2013) on the draft protocol.⁹⁵ At their 1176th meeting, the Ministers' Deputies examined and decided to adopt the draft as Protocol No. 16 to the Convention.⁹⁶

A. Advisory Opinion

Article 1(1) of the Protocol No. 16 sets out three key parameters of the new procedure.⁹⁷ Firstly, by stating that relevant courts or tribunals “may” request that the ECtHR give an advisory opinion, it makes clear that it is optional for them to do so and not in any way obligatory. In this connection, it should also be understood that the requesting court or tribunal might pull back its request.

Secondly, it defines the domestic authority that may request an advisory opinion of the ECtHR as being the “highest courts or tribunals ... as specified by under Article 10”. This wording is intended to keep away from potential difficulties by allowing a certain freedom of choice. “Highest court or tribunal” would refer to the courts and tribunals at the peak of the national judicial system. Use of the term “highest”, as opposed to “the highest”, allows the potential containment of those courts or tribunals that, although inferior to the constitutional or supreme court, are however of especial relevance because of being the “highest” for a particular category of case.⁹⁸

⁹⁴ Council of Europe, *Protocol No. 16 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS no. 214) Explanatory Report* [hereinafter Explanatory Report (Protocol No. 16)], § 4.

⁹⁵ See Parliamentary Assembly/Council of Europe, *Draft Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion 285 (2013), adopted by the Assembly on 28 June 2013 (27th Sitting).

⁹⁶ Explanatory Report (Protocol No. 16), § 6.

⁹⁷ See Council of Europe, *Protocol No. 16 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms*, CETS No. 214 [hereinafter Protocol No. 16], 2 October 2013, p. 2.

⁹⁸ Explanatory Report (Protocol No. 16), § 8.

Together with the necessity that a Contracting Party specify which highest courts or tribunals may request an advisory opinion, allows the necessary flexibility to accommodate the specialities of national judicial systems. Restricting the choice to the “highest” courts or tribunals is coherent with the idea of exhaustion of domestic remedies, even though a “highest” court need not be one to which recourse must have been made in order to satisfy the requirement of exhaustion of domestic remedies under Article 35(1) of the Convention. It should avoid an increase of requests and would reflect the suitable level at which the dialogue should take place. It can be noted that under Article 10, High Contracting Parties may at any time change its specification of those of its highest courts or tribunals that may request an advisory opinion. In some conditions, the constitutional arrangements of a High Contracting Parties may provide for courts or tribunals to hear cases from more than one territory.⁹⁹

This may include territories to which the Convention does not apply and territories to which the High Contracting Parties has extended the application of the Convention under Article 56. In such cases, when specifying a court or tribunal for the purposes of this Protocol, a High Contracting Party may specify that it excludes the application of the Protocol to some or all cases arising from such territories.¹⁰⁰

Thirdly, parameter concerns the character of the questions on which a domestic court or tribunal may request the Court’s advisory opinion. The definition “questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto” is that was used by the Group of Wise Persons and approved by the ECtHR in its Reflection Paper, which was in turn inspired by Article 43(2) of the Convention on referral to the Grand Chamber. It was felt that there were definite equivalents between these two procedures, not limited to the fact that advisory opinions would themselves be delivered by the Grand Chamber. When applying the criteria, the different purposes of the procedure under Protocol No. 16 and that under Article 43(2) of the Convention will have to be considered. Interpretation of the definition will be a matter for the Court when deciding whether to accept a request for an advisory opinion.¹⁰¹

⁹⁹ European Court of Human Rights, *Opinion of the Court on Draft Protocol No. 16 to the Convention extending its competence to give advisory opinions on the interpretation of the Convention* [hereinafter *Opinion of the ECtHR on Protocol No. 16*], adopted by the Plenary Court on 6 May 2013, § 4. *See also* Explanatory Report (Protocol No. 16), § 8.

¹⁰⁰ Explanatory Report (Protocol No. 16), § 8.

¹⁰¹ Explanatory Report (Protocol No. 16), § 9.

The Court welcomes the fact that the drafters of the Protocol considered points included in the Court's reflection paper, which was in turn informed by the results of earlier inter governmental discussions. The exercise thus provides a good example of a constructive exchange of ideas between States and the ECtHR.¹⁰² For the Court's opinion, the Protocol's aim at enabling a dialogue between the highest national courts and the ECtHR is well defined in the third paragraph of the Preamble to the Protocol No. 16, which refers to improved interaction between the ECtHR and national authorities and to reinforced implementation of the Convention conformity with the principle of subsidiarity.¹⁰³

Article 1(2) of the Protocol No. 16 requires the request for an advisory opinion to be made in the context of a case pending before the requesting national court or tribunal.¹⁰⁴ The procedure is not intended, e.g., to allow for abstract review of legislation which is not to be applied in that pending case.¹⁰⁵ Article 1(3) of the Protocol sets out certain procedural requirements that must be met by the requesting court or tribunal.¹⁰⁶ They reflect the aim of the procedure, which is not to transfer the dispute to the Court, but rather to give the requesting national court or tribunal guidance on Convention issues when determining the case before it.¹⁰⁷

These requirements serve two purposes: Firstly, they mean that the requesting national court or tribunal must have thought about the necessity and utility of requesting an advisory opinion of the Court, in order to be able to explain its reasons for perform. Secondly, they mean that the requesting court or tribunal is in a position to reveal the related legal and factual background, in connection allowing the Court to focus on the question of principle relating to the interpretation or application of the Convention or the additional Protocols.¹⁰⁸

In providing the relevant legal and factual background, the requesting national court or tribunal should present (*i*) the subject matter of the domestic

¹⁰² Opinion of the ECtHR on Protocol No. 16, § 3.

¹⁰³ Opinion of the ECtHR on Protocol No. 16, § 3.

¹⁰⁴ See Protocol No. 16, Article 1, p. 2.

¹⁰⁵ Explanatory Report (Protocol No. 16), § 10.

¹⁰⁶ See Protocol No. 16, Article 1, p. 2.

¹⁰⁷ Explanatory Report (Protocol No. 16), § 11. See also Opinion of the ECtHR on Protocol No. 16, § 8.

¹⁰⁸ Explanatory Report (Protocol No. 16), § 11.

case and relevant findings of fact made during the domestic proceedings; (ii) the relevant national legal provisions; (iii) the relevant Convention matters, especially the rights in danger; (iv) a sum of the arguments of the parties to the domestic proceedings on the question; (v) a statement of its own regards on the question, including any analysis it may itself have made of the question.¹⁰⁹

B. The Procedure and Application Method of the Advisory Opinion

Article 2(1) of the Protocol No. 16 reads, “A panel of five judges of the Grand Chamber shall decide whether to accept the request for an advisory opinion, having regard to Article 1. The panel shall give reasons for any refusal to accept the request.”¹¹⁰ Article 2(1) of the Protocol No. 16 aim at the procedure for deciding whether or not a request for an advisory opinion is accepted. The Court has a appreciation to accept a request or not, although it is to be expected that the Court would hesitate to refuse a appeal that satisfies the relevant criteria by (i) relating to a question as defined in Article 1(1) and (ii) the requesting court or tribunal having accomplished the procedural needs as set out in paragraphs 2 and 3 of Article 1. As is the case for requests for referral to the Grand Chamber under Article 43 of the Convention, the decision on acceptance is taken by a five-judge panel of the Grand Chamber.¹¹¹

However, the procedure under Article 43 of the Convention different from the panel must give reasons for any refusal to accept a domestic court or tribunal’s request for an advisory opinion. This is intended to reinforce dialogue between the Court and national judicial systems,¹¹² including through clarification of the Court’s interpretation of what is intend by “questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto”, which would offer supervision to domestic courts and tribunals when considering whether to make a request and in that connection help to deter unsuitable requests. The Court should inform the High Contracting Party concerned of the approval of any requests made by its courts or tribunals.¹¹³

Article 2(2) of the Protocol No. 16 reads that “[i]f the panel accepts the request, the Grand Chamber shall deliver the advisory

¹⁰⁹ Explanatory Report (Protocol No. 16), § 12.

¹¹⁰ See Protocol No. 16, Article 2, p. 2.

¹¹¹ Explanatory Report (Protocol No. 16), § 14.

¹¹² Opinion of the ECtHR on Protocol No. 16, § 9.

¹¹³ Explanatory Report (Protocol No. 16), § 16.

opinion.”¹¹⁴ This is proper given the nature of the questions on which an advisory opinion may be requested and the fact that only the highest domestic courts or tribunals may request that, together with the identified similarities between the current procedure and that of referral to the Grand Chamber under Article 43 of the Convention.¹¹⁵

The priority to be given to proceedings beneath Protocol No. 16 would be important for the Court, as it is concerning all other proceedings. This provision supposed that the nature of the question on which it would be appropriate for the Court to give its advisory opinion recommends that such proceedings would have high priority. This high priority applies at all stages of the procedure and to all interested, especially the requesting court or tribunal, which should formulate the request in a way that is exact and whole. Excessive delay in the advisory opinion proceedings before the Court would also cause delay in proceedings in the case pending before the requesting court or tribunal and should therefore be avoided.¹¹⁶

Article 2(3) of the Protocol No. 16 states that the panel and the Grand Chamber shall include ex-officio the judge elected in respect of the High Contracting Party to which the requesting court or tribunal pertains.¹¹⁷ It can be noted that this is as well the case for the Grand Chamber when sitting in its full composition on a case brought before it under Articles 33 or 34 of the Convention. Article 2(3) of the Protocol No. 16 also sets up a procedure for conditions where there is no such judge or that judge cannot sit. This procedure is intended to be similar to that based under Article 26(4) of the Convention.¹¹⁸

Article 3 of the Protocol No. 16 gives to the Council of Europe Commissioner for Human Rights and to the High Contracting Party whose domestic court or tribunal has requested the advisory opinion the right to submit written comments to and take part in any hearing before the Grand Chamber in proceedings concerning that request.¹¹⁹ The wording used in the Protocol, though a bit different to that found in the Convention, is intended to have the same effect. Because of advisory opinion proceedings would not be

¹¹⁴ See Protocol No. 16, Article 2, p. 2.

¹¹⁵ Explanatory Report (Protocol No. 16), § 16.

¹¹⁶ Explanatory Report (Protocol No. 16), § 17.

¹¹⁷ See Protocol No. 16, Article 2, p. 2.

¹¹⁸ Explanatory Report (Protocol No. 16), § 18.

¹¹⁹ See Protocol No. 16, Article 3, p. 3.

adversarial, neither would it be obligatory for the government to participate, although it would always keep the right to do so, in the same way as does a High Contracting Party in proceedings brought by one of its nationals against another High Contracting Party.¹²⁰

The President of the Court may invite any other High Contracting Party or person to submit written comments or participated in any hearing, where to do so is in the interest of the proper administration of justice. This views the situation concerning third party interventions under Article 36(2) of the Convention. It is expected that the parties of the case in the context of which the advisory opinion had been requested would be invited to take part in the proceedings.¹²¹

Article 4(4) of the Protocol No. 16 claims the Court to give reasons for advisory opinions delivered under this Protocol. Article 4(2) of the Protocol No. 16 allows for judges of the Grand Chamber to deliver a separate opinion.¹²² Article 4(3) requires the ECtHR to communicate advisory opinions to both the requesting court or tribunal and the High Contracting Party to which that court or tribunal belongs. It is expected that the advisory opinion would also be communicated to any other parties that have participated in the proceedings in accordance with Article 3 of the Protocol. It is important to remember that in most cases advisory opinions will have to be accepted to proceedings that occur in an official language of the High Contracting Party concerned that is neither English nor French, the Court's official languages.¹²³

While respecting the fact that there are only two official languages of the Court, it was considered important to underline the sensitivity of the issue of the language of advisory opinions. It should also considered that the suspended domestic proceedings can in many legal systems be resumed only after the opinion is translated into the language of the requesting court or tribunal. In case of concerns that the time taken for translation into the language of the requesting court or tribunal of an advisory opinion may delay the restart of suspended domestic proceedings, it may be possible for the Court to work together to the national authorities in the opportune preparation of such translations.¹²⁴

¹²⁰ Explanatory Report (Protocol No. 16), § 19.

¹²¹ Explanatory Report (Protocol No. 16), § 20. *See also* Opinion of the ECtHR on Protocol No. 16, § 10.

¹²² *See* Protocol No. 16, Article 4, p. 3.

¹²³ Explanatory Report (Protocol No. 16), § 23.

¹²⁴ Explanatory Report (Protocol No. 16), § 23.

Article 4(4) of the Protocol No. 16 requires the publication of advisory opinions delivered under this Protocol. It is expected that this will be done by the Court in accordance with its practice in similar issues and with due respect to applicable confidentiality rules.¹²⁵

Article 5 of the Protocol No. 16 states that advisory opinions shall not be binding.¹²⁶ They happen in the context of the judicial dialogue between the Court and domestic courts and tribunals. Therefore, the requesting court decides on the effects of the advisory opinion in the domestic proceedings.¹²⁷

The fact that the Court has delivered an advisory opinion on a question arising in the context of a case pending before a court or tribunal of a High Contracting Party would not prevent a party to that case subsequently exercising their right of individual application under Article 34 of the Convention. However, where an application is made following to proceedings in which an advisory opinion of the ECtHR has effectively been followed, it is expected that such elements of the application that relate to the issues mentioned in the advisory opinion would be declared inadmissible or struck out.¹²⁸

Advisory opinions under the Protocol No. 16 would have no direct effect on other later applications. However, they would part of the case-law of the Court beside its judgments and decisions. The interpretation of the Convention and the additional Protocols contained in such advisory opinions would be similar in its effect to the interpretative elements set out by the Court in judgments and decisions.¹²⁹

Article 6 of the Protocol No. 16 reflects the fact that approval of the Protocol is optional for High Contracting Parties to the Convention.¹³⁰ It thus does not have the effect of introducing new provisions into the Convention, whose text remains unchanged. Only between High Contracting Parties that choose to admit the Protocol do its provisions operate as additional articles to the Convention, in which case its application is conditioned by all other relevant provisions of the Convention. It is understood that this, in conjunction with Article 58 of the Convention, would permit a High Contracting Party to condemn the Protocol without denouncing the Convention.¹³¹

¹²⁵ Explanatory Report (Protocol No. 16), § 24.

¹²⁶ See Protocol No. 16, Article 5, p. 3.

¹²⁷ Opinion of the ECtHR on Protocol No. 16, § 12.

¹²⁸ Explanatory Report (Protocol No. 16), § 26.

¹²⁹ Explanatory Report (Protocol No. 16), § 27.

¹³⁰ See Protocol No. 16, Article 6, p. 3.

¹³¹ Explanatory Report (Protocol No. 16), § 28.

The Court was attracted attention two practical and partly related issues. Firstly, since the domestic proceedings are stayed pending the delivery of the opinion, there is a clear need for the advisory procedure to be completed within a reasonably short time and therefore it to be given a degree of priority.¹³² Secondly, requests may be made in the language used in the domestic proceedings and Article 1(3) of the Draft Protocol indicates that requests are to be accompanied by annexes of relevant documents “setting out the relevant legal and factual background of the pending case”.¹³³ The Court notes that the possibility of submitting the request in that language is not included in the text of the additional Protocol. The Court is opposed to the proposal that it should be for it to ensure translations of such requests and enclosed documents. Even though it can understand the thinking behind this, the result is to impose on the Court a costly burden of translation. In many legal systems the domestic proceedings can be resumed only once the opinion has been made available in the language of those proceedings.¹³⁴ Here again the Court has hesitations about what is meant by the suggestion that the Court would “co-operate” with the national authorities in the timely preparation of such translations.¹³⁵

C. OVERALL CONCLUSION

The Convention is fundamental to human rights protection in Europe and lies at the heart of the activities of the Council. Over time, the Convention system has grown and developed in response to changing circumstances. The on-going process of reform is necessary to its continuing relevance and effectiveness. This process, although often referred to as reform of the ECtHR includes action concerning not only the judicial control mechanism but also national implementation of the Convention and execution of the Court’s judgments.

The present situation in many member States of the Council means that particular emphasis at European level is still needed on the protection of rights through judicial determination of individual applications to the Court. However, it is important that the functioning of the Convention include more incentives for full protection of rights at national level, by means of that decreasing the mentioned need for subsidiary protection by the Court.

¹³² Opinion of the ECtHR on Protocol No. 16, § 13. *See also* Explanatory Report (Protocol No. 16), § 28.

¹³³ Explanatory Report (Protocol No. 16), § 13.

¹³⁴ Explanatory Report (Protocol No. 16), § 23.

¹³⁵ Opinion of the ECtHR on Protocol No. 16, § 14.

In many member states, it is possible to apply to the national constitutional court for remedy of an assert of violation of a right protected under the national constitution in addition to providing a final domestic level of application for determination of a complaint. This form of general remedy may also contribute to ensuring consistency in or the development of interpretation and application of protected rights at domestic level. Through its rulings on individual cases that are subsequently the subject of applications to the Court, the national constitutional court can engage directly in the judicial dialogue between the national and European levels. These two issues contribute to effective operation of the principle of subsidiarity within the overall Convention system.

The Court should focus on reviewing whether the domestic judgment itself falls within the acceptable limits of legitimate interpretation and application of the Convention. The Court should not replace its own assessment for that of national authorities, made within the proper margin of appreciation. The margin of appreciation is an important device through which the Court gives effect to the principle of subsidiarity.

The legitimacy of the Court as a judicial body is crucial for the continuing effectiveness of the Court. This includes respect for the integrity and quality of its judgments, in the eyes of not only Governments and domestic courts but also applicants and the general public as a whole. As a result, it is vital that candidates presented for election to the Court are persons of high standing with all the specific professional qualities necessary for the exercise of the function of judge of an international court whose decisions have consequences for all High Contracting Parties.

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