

## The Reform of the European Court of Human Rights – The ongoing process

PRANVERA BEQIRAJ (MIHAND)

Ph. D Candidate

Faculty of Political Sciences and Law  
“Aleksandër Moisiu” University of Durrës

Albania

Prof. Asoc. Dr. ERALDA (METHASANI) ÇANI

Faculty of Law, University of Tirana

Albania

### Abstract:

*The expansion of the Council of Europe by the accession of new states to the Convention after the fall of the Berlin wall in 1989 has brought the caseload of the European Court of Human Rights (Court) at a critical stage putting at risk its effectiveness. The Council of Europe has undertaken various reforms to deal with the Court's caseload. Protocol No.14, 15, and 16 are analyzed in this paper.*

*Protocol No.14 amends the control system of the Convention by reforming the functioning of the Court. The paper will aim to analyze the reform made with the aim of clarifying its aspects such as the new filtering mechanism, the new admissibility criterion, etc. aimed at increasing the efficiency and efficacy of the Court, in order for the individuals and the national institutions to use the system effectively.*

*Following, the changes brought by the additional Protocols No.15 and 16 are examined. At the core of the innovations of these two Protocols is the effective operation of the principle of subsidiarity within the overall Convention system and the increasing of the application and protection of the rights and freedoms at the domestic level.*

**Key words:** Protocol, reform, caseload, Court

## 1. Introduction

It is widely recognized that the control mechanism of the European Convention on Human Rights and Fundamental Freedoms (Convention) has led to the most advanced human rights protection system to date and the individual right of application to the Court, which unlike other human rights treaties is compulsory for State parties, is a unique feature and pillar of the system.<sup>1</sup>

However, the system's success has brought with it a caseload which the European Court of Human Rights (Court) has found more and more difficult to handle. The massive influx of individual applications has led to a rapid accumulation of pending cases before the Court, resulting in lengthy proceedings. This has put the effectiveness and the future of the Court at risk, leaving it unable to fulfill its central mission of providing legal protection of human rights at the European level.<sup>2</sup>

As the statistics prove, the number of pending applications before the Court has constantly grown. During 2003, some 39.000 new applications were lodged and at the end of that year, approximately 65.000 applications were pending before the Court.<sup>3</sup> In 2007 the number of pending cases reached to 79.400 and this figure rose to 97.300 at the end of 2008. The backlog reached 151,600 applications pending before a judicial formation in 2011. After the entry into force of Protocol No 14, at the end of 2012 this number was reduced by 16% to just

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<sup>1</sup> Antonio Bultrini, "*The Future of the European Convention on Human Rights after the Brighton Conference*", IAI WORKING PAPERS, 2012 pg. 1

<sup>2</sup> Helen Keller, Andreas Fischer, Daniela Kühne "*Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals*", The European Journal of International Law Vol. 21 no. 4, 2011, pg 1026

<sup>3</sup> Council of Europe, "*Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention – Explanatory Report*", <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>, 2005, pg. 2

128.100 pending applications<sup>4</sup>, and a reduction of 30% to just 69.900 pending application before a judicial formation at the end of 2014.

Along the years, the Council of Europe has searched for solutions to these problems putting forward a number of reforms designed to increase the Court's efficiency.

A good understating and proper use of the system are core to the enjoyment of the rights and freedoms, therefore the paper will aim at first analyzing the reform made by Protocol No.14 with the aim of clarifying its aspects such as the new filtering mechanism, the new admissibility criterion, etc. Secondly, the paper will focus on the Court's jurisprudence relying to the new admissibility criterion's requirements subjects of violation of human rights and freedoms are required to fulfill in order for them to use the system effectively and their case to be considered by the Court.

Finally, the innovation of the Protocols No.15 and 16 are assessed.

## **2. Analysis of the reform of Protocol No.14**

The thrust of Protocol no.14 is a major re-organization in the operation of the Court in order to deal with problems in efficiency and efficacy. For this purpose, the reform proposals were put forward addressing in particular the two principal factors to the Court's excessive workload:

1. Applications related to structural issues in which the Court has already delivered judgments finding a violation of the Convention and where a well established case law exists.<sup>5</sup> These applications are called repetitive cases.
2. Cases which are rejected as inadmissible (or struck out).

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<sup>4</sup> Annual Reports

<sup>5</sup> Council of Europe, "*Protocol 14 - The reform of the European Court of Human Rights*" – Factsheet, [www.echr.coe.int](http://www.echr.coe.int), pg.1

To achieve this, amendments are introduced in three main areas:

- Measures for dealing with repetitive cases;
- Reinforcement to the Court's filtering capacity in respect of the mass of unmeritorious applications;
- A new admissibility criterion concerning cases in which the applicant has not suffered a significant disadvantage; the new criterion contains two safeguard clauses.

## **2.1 A single judge formation and an extended competence of three – judge committees**

In order to improve efficiently the processing of the large number of inadmissible cases, on one hand, and the many repetitive cases on the other, Protocol no.14 adopted two procedural mechanism.

First, it establishes an entirely new judicial formation: a competent single judge<sup>6</sup>. This judge is empowered to declare cases inadmissible “where such a decision can be taken without further examination”.<sup>7</sup> As the Explanatory Report clearly explains, this provision is intended for use “only in clear-cut cases, where the inadmissibility of the application is manifest from the outset.” In other words, this provision pertains to cases that violate Court rules and whose merits do not need to be explored. Examples of such cases include applications lodged past the Court's time limit expiration date; claims against non-Member States; and cases initiated before the exhaustion of national remedies.<sup>8</sup> In all borderline cases, the judge is obliged

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<sup>6</sup> New Art. 26 of ECHR

<sup>7</sup> New Art. 27 of ECHR

<sup>8</sup> Jennifer W. Reis, “*Protocol no. 14 ECHR and Russian Nonratification: The current state of affairs*” Harvard Human Rights Journal / Vol. 22, 2009, pg 300

to refer the matter for further review by a three judge committee or a seven-judge chamber.<sup>9</sup>

Prior to Protocol No. 14, the preliminary processing of applications was the responsibility of three-judge Committees which, by final decision, were to declare applications inadmissible where such a decision called for no ‘further examination’.<sup>10</sup> These decisions were hugely time consuming for the three judge committees and had a negative effect on the capacity of judges to process admissible cases.

In 2005, 27.613 cases were declared inadmissible or stricken out and this number rose to 33.067 in 2009, thus an increase of 19.7% from 2005 to 2009.<sup>11</sup>

Case-processing statistics from the Court show a constant and significant increase in the number of cases rejected at the filtering stage after the entering into force of the single judge formation.

The single-judge formation entered into force for all States Parties in mid-2010, and by the end of that year the number of cases rejected at the filtering stage increased by 17% to just over 38,576.<sup>12</sup> The Court’s output rose even further in 2011,<sup>13</sup> when 50.677 applications were dealt with by single judges, an increase of 31%. This upward trend has continued in 2012 with an increase of 70% to just 86.201 application declared inadmissible or stricken out.<sup>14</sup>

These results had made it possible for the Court, to envisage a situation in which, as far as filtering is concerned, there would, by the end of 2015, be both a balance between the “input” of new cases and the “output” of decided cases, and

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<sup>9</sup> Helen Keller, Andreas Fischer, Daniela Kühne “*Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals*”, *The European Journal of International Law* Vol. 21 no. 4, 2011, pg 1033

<sup>10</sup> Former Art. 28 of ECHR

<sup>11</sup> Annual Report 2005 and 2009, ....

<sup>12</sup> Annual Report 2010

<sup>13</sup> Annual Report 2011

<sup>14</sup> Annual Report 2012

elimination of the current backlog of clearly inadmissible applications.<sup>15</sup>

When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected. But, it is worthwhile noting that the ‘conviction of a state by an organ of international jurisdiction without the mandatory participation of a judge who has been elected in respect of the respondent state constitutes a small “revolution” in the area of public international law, where the institution of a “national judge” or the “ad hoc” judge has a long tradition, reflecting an aspect of state sovereignty’.<sup>16</sup>

Secondly, with a view to dealing more expeditiously with the many repetitive, well founded cases, Protocol No. 14 extends the competence of the three-judge Committees under Article 28 of the Convention. They are not just to rule on the inadmissibility of applications, but may also, declare them admissible and decide on their merits when the questions they raise concerning the interpretation or application of the Convention are covered by well – established case law of the Court.<sup>17</sup> Committee judgments require unanimity; where this is not achieved, the case will be referred to a Chamber.

Whether case law is well-established or not is obviously a matter of interpretation. According to the Explanatory Report to Protocol No. 14, ‘well-established case-law’ normally means case law which has been consistently applied by a Chamber. Thus, such Committees will take over a large number of the cases formerly submitted to the chambers of seven judges. Such cases often arise before nations have had the opportunity to bring their national law in line with their obligations under the

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<sup>15</sup> Committee of Experts on the Reform of the Court, “*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*”, www.echr.coe, 2012, pg. 6 - 8

<sup>16</sup> *Ibid*, pg 1034

<sup>17</sup> Art 28 of ECHR

Convention and do not require lengthy legal analysis—merely an examination of the merits. Prime examples are cases complaining of excessive lengths of proceedings before national tribunals.

Under Protocol No. 14, the three judge committees would have competence to dispose of these cases—rather than employing a seven-judge chamber. Thus, by reducing the number of judges needed for the application of pre-existing doctrine, the Court can have more efficiency in this area.<sup>18</sup>

Regarding the repetitive cases, between 1 January and 31 July 2012, 1,884 repetitive applications were struck out or declared inadmissible by Committees which is more than twice the number during the same period in 2011.<sup>19</sup> Also, the 2011 statistics reveal a number of promising trends. The number of repetitive cases transmitted to the Committee of Ministers in 2011 has decreased for the first time in years (Annual Report 2012).

## **2.2 New admissibility criterion**

A new admissibility criterion is inserted in Article 35 of the Convention. Applications may be declared inadmissible if “*the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.*”

So, even where the applicant has not suffered a significant disadvantage, a first safeguard clause ensures that the application is not declared inadmissible if “respect of

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<sup>18</sup> Jennifer W. Reis, “Protocol no. 14 ECHR and Russian Nonratification: The current state of affairs” Harvard Human Rights Journal / Vol. 22, 2009, pg 301

<sup>19</sup> Much of the increase in the number of cases pending before Committees, in particular that during 2011, was due to their transfer from Chambers to Committees following identification as well established case law cases.

human rights” otherwise warrants an examination on the merits. The second safeguard clause, provides for admissibility despite no significant disadvantage and ensures that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

### **2.2.1 Case – law of the Court on the new admissibility criterion**

#### **“Significant disadvantage”**

The main element contained in the new admissibility criterion is that of “a significant disadvantage”. It is a term which is capable of, and requires, interpretation establishing objective criteria through the gradual development of the case-law of the Court. Thus, the purpose of the following analyses is to set out the case law principles and criteria for the new admissibility requirement under Article 35§ 3 (b), as developed by the Court during the first two years of its operation. It is to be recalled that application of the criterion was reserved exclusively to Chambers and the Grand Chamber from 1 June 2010 until 31 May 2012. Thus single-judge formations and Committees were prevented from applying the new criterion during a period of two years following the entry into force of the Protocol. In accordance with Article 20 of Protocol No. 14, the new provision began to apply to all applications pending before the Court, except those declared admissible.<sup>20</sup>

The new “no significant disadvantage” criterion hinged on the idea that a violation of a right, however real from a purely legal point of view, should attain **a minimum level of severity** to warrant consideration by an international court. The assessment of this minimum level was, in the nature of things, relative and depended on all the circumstances of the case.<sup>21</sup> The severity of the violation had to be assessed, taking

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<sup>20</sup> *Ibid* pg 14

<sup>21</sup> *Korolev vs Russia*



into account both the applicant's **subjective perceptions** and what was **objectively** at stake in the case.<sup>22</sup>

Thus, an applicant's subjective feeling about the impact of alleged violations had to be justifiable on objective grounds.<sup>23</sup> In *Ladygin v. Russia*, the applicant's subjective perception that he had not been treated fairly was insufficient to conclude that he had suffered a significant disadvantage. Such a subjective perception had to be justifiable on objective grounds, which according to the Court, did not exist in this instance.

Moreover, in evaluating the subjective significance of the issue for the applicant, the Court can take into account the *applicant conduct*.<sup>24</sup> In *Shefer v. Russia*, as to subjective significance, the Court attached decisive importance to the fact that the applicant never re-submitted the writ of execution to the bailiffs' service, even though that had been the only legal avenue for the enforcement of her award. By effectively remaining inactive for more than seven years, the applicant had demonstrated that she had no significant interest in the outcome of the proceedings.<sup>25</sup>

However the case law cited above, remained limited because it had only partly established the criteria on which to verify whether the violation of a right attained the "minimum threshold" of seriousness to justify its examination by an international court. <sup>26</sup> In *Giusti v. Italy* the Court introduced certain new elements, in order to verify whether the violation of a right attained that minimum threshold, it was necessary to take into account *inter alia*: the nature of the right allegedly breached, the seriousness of the impact of the alleged violation on the exercise of the right and/ or the potential consequences of the violation on the applicant's personal situation. In

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<sup>22</sup> *Korolev vs Russia*

<sup>23</sup> *Korolev vs Russia* , *Ladygin vs Russia*

<sup>24</sup> Council of Europe/European Court of Human Rights, "Research Report - The new admissibility criterion under Article 35 § 3 (b) of the Convention: case-law principles two years on", [www.echr.coe.int](http://www.echr.coe.int) , 2012, pg 5

<sup>25</sup> *Shefer v. Russia*

assessing those consequences, the Court would examine, in particular, the importance or outcome of the domestic proceedings.<sup>27</sup>

In a large number of cases which have so far come before the Court, the level of severity attained is assessed in light of the **financial impact** of the matter in dispute and the **importance of the case for the applicant**.<sup>28</sup> As far as insignificant financial impact is concerned, the Court has thus far found a lack of “significant disadvantage” in the following cases where the amount in question was not great<sup>29</sup>:

- In the case *Bock v. Germany* the application was declared inadmissible due to the pettiness of the amount in question.
- In *Ionescu v. Romania*, the Court was of the view that the financial prejudice to the applicant was not great, being the sum of 90 euros where there was no information to indicate that the loss of this sum would have any important repercussions on the personal life of the applicant.
- In *Korolev v. Russia* the applicant’s grievances were explicitly limited to the defendant authority’s failure to pay a sum equivalent to less than one euro awarded to him by the domestic court.
- In *Vasilchenko v. Russia* the applicant complained of the authorities’ failure to enforce an award of 12 euros.
- In *Rinck v. France* the sum involved was 150 euros in addition to 22 euros in costs, where there was no evidence to indicate that this amount would have significant repercussions on the applicant’s personal life.

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<sup>26</sup> *Giusti vs Italy*

<sup>27</sup> *Giusti vs Italy*

<sup>28</sup> Council of Europe/European Court of Human Rights, “*Research Report - The new admissibility criterion under Article 35 § 3 (b) of the Convention: case-law principles two years on*”, www.echr.coe.int , 2012, pg 5

<sup>29</sup> Council of Europe/European Court of Human Rights, “*Practical Guide on Admissibility Criteria*”, www.echr.coe.int, 2011, pg 75 - 76

- In *Gaftoniuc v. Romania* the amount the applicant should have received was 25 euros.
- In *Ștefănescu v. Romania* the domestic authorities had failure to reimburse EUR 125 ( (dec.), no. 11774/04, 12 April 2011);
- In *Fedotov v. Romania* the applicant complained of the authorities' failure to pay the applicant EUR 12
- In *Burov v. Moldova* the State authorities had failure to pay the applicant EUR 107 plus costs and expenses of EUR 121,totalling EUR 228
- In *Fernandez v. France* , a case concerning a fine of EUR 135, EUR 22 of costs and one penalty point on the applicant's driving licence
- In *Kioui*, a case where the Court noted that the amount of pecuniary damages at issue was EUR 504
- In *Havelka v. the Czech Republic*, a case where the initial claim of EUR 99 made by the applicant against his lawyer was considered in addition to the fact that he was awarded the equivalent of EUR 1,515 for the length of the proceedings on the merits.
- In *Guruyan v. Armeni*, the case of a salary arrears of AMD 102,8829
- In *Šumbera v. the Czech Republic*, a case concerning EUR 227 in expenses ( (dec.),
- In *Shefer v. Russia*, the case concerning enforcement of a judgment for EUR 34. Given the low amount of the award, there were no grounds to hold that the enforcement of the judgment had been objectively significant for the applicant.

However, the Court will be conscious of the fact that the impact of a pecuniary loss must not be measured in abstract terms<sup>30</sup> and that the pecuniary interest involved is not the only element to determine whether the applicant has suffered a significant

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<sup>30</sup> *Gaftoniuc v. Romania*

disadvantage.<sup>31</sup> Although even modest pecuniary damage could be significant in the light of an individual's specific circumstances and the economic climate in which he or she lived.<sup>32</sup>

Furthermore, a violation of the Convention may concern important questions of principle and thus cause a significant disadvantage without affecting pecuniary interest.<sup>33</sup> Therefore, in *Giuran v. Romania*, in addition to the pecuniary interest in the actual goods and the sentimental value attached to them, it was necessary also to take into account the fact that the proceedings concerned a question of principle for the applicant, namely his right to respect for his possessions and for his home. Under these circumstances, the applicant could not be deemed not to have suffered a significant disadvantage.<sup>34</sup> However, the Court is not exclusively concerned with cases of insignificant financial sums. The actual outcome of a case at national level might have repercussions other than financial ones.<sup>35</sup> In *Luchaninova v. Ukraine*, the Court observed that the outcome of the proceedings, which the applicant claimed had been unlawful and conducted in an unfair manner, had a particularly negative effect on her professional life. In particular, the applicant's conviction was taken as a basis for her dismissal from work. Therefore, the applicant had suffered a significant disadvantage.<sup>36</sup>

In *Van Velden v. the Netherland*, the applicant complained under Article 5 § 4 of the Convention. The Government argued that the applicant had not suffered any significant disadvantage since the entire period of pre-trial

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<sup>31</sup>Council of Europe/European Court of Human Rights, "Practical Guide on Admissibility Criteria", www.echr.coe.int, 201, pg 75 - 76

<sup>32</sup> *Korolev vs Russia*

<sup>33</sup> *Korolev vs Russia*

<sup>34</sup> *Giuran v. Romania*

<sup>35</sup> Council of Europe/European Court of Human Rights, "Research Report - The new admissibility criterion under Article 35 § 3 (b) of the Convention: case-law principles two years on", www.echr.coe.int , 2012, pg 6

<sup>36</sup> *Ibid*, pg 6

detention had been deducted from his prison sentence. However, the Court found that it was a feature of the criminal procedure of many contracting Parties to set periods of detention prior to final conviction and sentencing off against the eventual sentence; for the Court to hold generally that any harm resulting from pre-trial detention was thereby ipso facto nugatory for Convention purposes would remove a large proportion of potential complaints under Article 5 from the scope of its scrutiny. The Government's objection under the new criterion was therefore rejected.<sup>37</sup> In *Živic v. Serbia*, the Court found that the applicant's financial disadvantage together with what was at stake, namely the inconsistent case-law of the District Court in Belgrade as regards the right to fair wages and equal pay for equal work, was enough for the Court to reject the Government's objection under the new criterion.

### **2.3.2 Whether respect for human rights requires an examination on the merits**

The second element is a safeguard clause to the effect that the application will not be declared inadmissible if respect for human rights as defined in the Convention or the Protocols thereto requires an examination on the merits. The Court found necessary a further examination of a case when it raised questions of a general character affecting the observance of the Convention.<sup>38</sup>

Such questions of a general character would arise, for example, where there is a need to clarify the States' obligations under the Convention or to induce the respondent State to resolve a structural deficiency affecting other persons in the same position as the applicant.

The Court has thus been frequently led, under former Articles 37 and 38, to verify that the general problem raised by

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<sup>37</sup> *Ibid*, pg 6

<sup>38</sup> Council of Europe/European Court of Human Rights, "*Practical Guide on Admissibility Criteria*", www.echr.coe.int, 2011, pg. 76

the case had been or was being remedied and that similar legal issues had been resolved by the Court in other cases.<sup>39</sup>

In *Leger v Franc*, the Court held that respect of human rights does not require it to continue the examination of an application when, the relevant law has changed and the similar issues have been resolved in other cases before it. Nor where the relevant law has been repealed and the complaint before the Court is of historical interest only.<sup>40</sup> Similarly, respect for human rights does not require the Court to examine an application where the Court and the Committee of Ministers have addressed the issue as a systemic problem, for example non-enforcement of domestic judgments in the Russian Federation, length of proceedings cases in Greece.<sup>41</sup>

### **2.3.4 Whether the case was duly considered by a domestic tribunal<sup>42</sup>**

It will not be possible for the Court to reject an application on account of its trivial nature if the case has not been duly considered by a domestic tribunal. This clause reflects the principle of subsidiarity, as enshrined notably in Article 13 of the Convention, which requires that an effective remedy against violations be available at the national level.<sup>43</sup> Also, it ensures that every case receives a judicial examination, either at national or at European level.

In *Holub v. the Czech Republic* the Court has clarified that it is the “case” in the more general sense and not the “application” before the Strasbourg Court which needs to have been duly examined by the domestic courts. Otherwise, it would be impossible to declare inadmissible an application concerning

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<sup>39</sup>*Ibid*, pg. 77

<sup>40</sup>*Ionesco v. Romania*

<sup>41</sup>Council of Europe/European Court of Human Rights, “*Research Report - The new admissibility criterion under Article 35 § 3 (b) of the Convention: case-law principles two years on*”, www.echr.coe.int , 2012, pg. 8

<sup>42</sup>This safeguard clause is removed by Protocol No.15

<sup>43</sup> Council of Europe/European Court of Human Rights, “*Practical Guide on Admissibility Criteria*”, www.echr.coe.int, 2011, pg. 77

violations allegedly caused by final instance authorities, as their acts by definition are not subjected to further national examination. Case, is therefore understood as the action, complaint or claim the applicant has lodged with the national court.<sup>44</sup>

As for the interpretation of “duly”, the new criterion will not be interpreted as strictly as the requirements of a fair hearing under Article 6 of the Convention<sup>45</sup> Although, as clarified in *Sumbera v. Czech Republic*, some failures in the fairness of the proceedings could, by reason of their nature and intensity, impact on whether the case has been “duly” considered.<sup>46</sup>

Moreover, the notion “duly examined” does not require the State to examine the merits of any claim brought before the national courts, however frivolous it may be. In *Ladygin v. Russia*, the Court held that where an applicant attempts to bring a claim which clearly has no basis in national law, the last criterion under Article 35 § 3 (b) is nonetheless satisfied.<sup>47</sup> Although the cases analyzed above may not be very numerous, the two year period following the entry into force of Protocol No. 14 has allowed Chambers to develop legal principles for the application of the new admissibility criterion. These principles will now be followed also by Single Judges, whose sole task is to issue inadmissibility decisions.

### **3. The Court’s reform according to Protocol No. 15**

Summarizing, Protocol No.15 brought these changes to the Court’s system:

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<sup>44</sup>Council of Europe/European Court of Human Rights, “*Research Report - The new admissibility criterion under Article 35 § 3 (b) of the Convention: case-law principles two years on*”, www.echr.coe.int , 2012, pg. 9

<sup>45</sup>*Ionesco v. Romania*

<sup>46</sup>Council of Europe/European Court of Human Rights, “*Research Report - The new admissibility criterion under Article 35 § 3 (b) of the Convention: case-law principles two years on*”, www.echr.coe.int , 2012, pg. 11

<sup>47</sup>*Ibid*, pg. 11

1. The principle of subsidiarity and the doctrine of the margin of appreciation has been added to the end of the Preamble of the Convention;
2. For the candidates for judges was set an upper age limit and was removed the upper age limit for retirement for judges;
3. The time limit for submitting applications was set at four months;
4. The parties may no longer object to relinquishment of a case by a Chamber in favour of the Grand Chamber; and
5. Changes in the ‘significant disadvantage’ part of the admissibility criterion were made.

Two from the changes brought by Protocol No. 15 are related to the admissibility criteria. Both articles 4 (time limit for submitting applications) and 5 (“significant disadvantage”) 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 applicant must be made to the Court. The development of swifter communications technology, along with the time limits of similar length in the Member States, argue for the reduction of the time limit.<sup>48</sup>

Human Rights NGOs are concerned that this change may result in a weakening of human rights protection because of a negative impact on the possibility of parties to successfully bring cases to the Court. Not only does it reduce the time to find appropriate legal team to work on the case, but it also decreases the time for the preparation of the application. Human Rights NGOs have also drawn attention to another potential negative impact of this amendment in some of the jurisdictions, namely in those with recurrent failure or a prolonged delay in notifying

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<sup>48</sup> Explanatory report, paragraph 21



applicants of final domestic decisions.<sup>49</sup> A reduction of this time period may have particularly detrimental effect in such cases.

Article 35, paragraph 3.b of the Convention regarding the ‘significant disadvantage’ admissibility criterion has been amended and no longer contains the safeguard clause that the case has 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 greater effect to the maxim *de minimis non curat praetor*.<sup>50</sup> Prior to this change, it was claimed that such a protective clause was unnecessary in the light of Article 35.1, which requires exhaustion of effective domestic remedies. Thus, it is given greater strength to the subsidiarity criteria by further emphasizing the subsidiary nature of the judicial protection offered by the Court.

Quarrel against include that the proposal would probably have little effect, given how infrequently the Court has applied the criterion. The Court should have been 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 clause would lead to a decrease in judicial protection offered to applicants.<sup>51</sup>

#### **4. The Court’s reform according to Protocol No. 16**

Based on a proposal initially contained in a 2005 report of the Group of Wise Persons to the Committee of Ministers, further

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<sup>49</sup> Joint NGO Statement - Protocol 15 to the European Convention on Human Rights must not result in a weakening of human rights protection’. Human Rights Watch Website. <[http://www.hrw.org/sites/default/files/related\\_material/2013\\_Europe\\_Joint%20NGO%20Statement%20ECHR.pdf](http://www.hrw.org/sites/default/files/related_material/2013_Europe_Joint%20NGO%20Statement%20ECHR.pdf)>.

<sup>50</sup> In other words, a court is not concerned by trivial matters.

<sup>51</sup> The Reform Of The European Court Of Human Rights: additional protocols no. 15 and 16 Serhat ALTINKÖK, pg.18 Gazi Üniversitesi Hukuk Fakültesi Dergisi C. XVIII, Y. 2014

considered in Izmir (2011) and formally proposed in Brighton (2012) another protocol of the Convention was open for signature on October 02, 2013 - Protocol No. 16. It is part of the efforts for addressing one of the most burning issues of the Convention system - the domestic implementation of the Convention.<sup>52</sup>

Characterized as ‘the protocol of dialogue’ by Judge Spielmann, Protocol No. 16 extends the jurisdiction of the Court to give advisory opinions according to a system which permits ‘highest national courts and tribunals’ to request non-binding advisory opinions on ‘questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto’.<sup>53</sup> By stating that relevant courts or tribunals “may” request that the Court 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.

Highest national courts and tribunals competent to request advisory opinions should be nominated by Contracting Parties, with the flexible gloss that such nominations may be changed ‘at any later date’.<sup>54</sup> 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.<sup>55</sup>

Article 1(2) of the Protocol No. 16 requires that the request for an advisory opinion should be made in the context of

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<sup>52</sup> Studiorum, pg 3

<sup>53</sup> Article 1 (1), Protocol No. 16

<sup>54</sup> Article 10, Protocol No. 16

<sup>55</sup> Explanatory Report (Protocol No. 16), paragraph 8.

a case pending before the requesting national court or tribunal. The procedure is not intended, e.g., to allow for abstract review of legislation which is not to be applied in that pending case.<sup>56</sup>

Article 1(3) of the Protocol sets out certain procedural requirements that must be met by the requesting court or tribunal. 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. 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.<sup>57</sup>

In providing the relevant legal and factual background, the requesting national court or tribunal should present: (a) the subject matter of the domestic case and relevant findings of fact made during the domestic proceedings; (b) the relevant national legal provisions; (c) the relevant Convention matters, especially the rights in danger; (d) a summary of the arguments of the parties to the domestic proceedings on the question; (e) a statement of its own regards on the question, including any analysis it may itself have made of the question.<sup>58</sup>

According to paragraphs 1- 2 of Article 2 the Grand Chamber of the Court has taken the exclusivity of the admissibility of requests and delivery of opinions. The admissibility of the request is handled by a 5-judge panel, and

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<sup>56</sup> Article 1 (2), Protocol No. 16

<sup>57</sup> Explanatory Report, paragraph 11

<sup>58</sup> Explanatory Report, paragraph 12

the Grand Chamber will deliver the opinions if the panel accepts the request.

The protocol provides that if the panel of 5 judges refuses the request for advisory opinion it should be motivated with reasons.<sup>59</sup> It would have been odd for a Protocol aimed at enhancing dialogue between courts not to require the Court to provide specific reasons to requesting courts. The Court's Opinion suggests that it has now been persuaded by the benefits of this approach, in the interests of promoting 'constructive dialogue' (echoing Lord Neuberger's phrase in *Pinnock*). Such reasons will, the Court observes 'normally not be extensive'.<sup>60</sup>

The final goal of Protocol No. 16, as a continuation of previous reforms, is the reduction of the Court's excessive caseload. Advisory Opinions of the Court regarding the interpretation and application of the Convention will help to explain the provisions of the Convention and the case law of the Court, by giving further instructions to help States Parties to avoid violations in the future. In this respect, the reform of Protocol No.16 through the enhancement of the dialogue between The Court and the highest national courts or tribunals aims a better application of the Conventions at the domestic level. This is seen as an opportunity to reduce the workload of the Court.

However, aspirations for this procedure as a 'platform for dialogue' which will additionally impact on the Court's voluminous docket seem utopian. A reduction in the Court's docket of pending contentious cases will not materialise in the long-term unless serious consideration is given to the Grand Chamber's capacity to handle this procedure. There is an obvious risk that it could generate more litigation without achieving the desired knock-on effects of reducing contentious

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<sup>59</sup> Article 2(1), Protocol No. 16

<sup>60</sup> Noreen O'Meara, "Reforming the European Court of Human Rights through Dialogue? Progress on Protocols 15 and 16 ECHR", pg 12 - 13

cases. The need for expeditious delivery of advisory opinions, as accepted by the Court in its Opinion (para 13), whilst at the same time avoiding delays to pending contentious cases could be a big ask. The Grand Chamber rarely delivers more than two-dozen cases per year: the last thing it needs is more. <sup>61</sup>

## **Conclusion**

Protocol No.14 makes no radical changes to the system established by the Convention. The changes relate more to the functioning than to the structure of the system. Their main purpose is to improve it, giving the Court the procedural means and flexibility it needs to process all applications in a timely fashion, while allowing it to concentrate on the most important cases which require in-depth examination and that raise important human rights issues.

Some of the reform measures, such as the introduction of the single-judge formation and the new extended competence of three – judge Committees had the greatest effect in increasing the Court's case-processing and proved successful shortly after its operation (see the statistics above). Thereby the introduction of smaller judicial formations increases the Court's capacity, by freeing up more judicial time to devote to cases of greater legal importance or urgency.

According to the new admissibility criterion, different concerns were raised by States, NGOs and judges of the Court. They shared the opinion that this new requirement risked putting forth an unintended negative message that some human rights violations are not significant and that this measure would be seen as an erosion of the right of the individual application before the Court.

But the wording of the new requirement and the objective criteria established by the Court (see case law above) ensure that it will operate as an additional tool for the Court's

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<sup>61</sup> *Ibid*

filtering work and that rejection of cases requiring an examination on the merits is avoided. This will notably include cases which, notwithstanding their trivial nature, raise serious questions affecting the application or the interpretation of the Convention or important questions of national law. Thus the wording of the new criterion and the development of the case law of the Court do not restrict the right of individuals to apply to the Court or alter the principle that all individual applications are examined on the merits.

These reforms contained in Protocol No.14 are certainly a very important first step in responding to the caseload crisis and to guarantee the stability of the Convention system. But, as Mr. Luzius Wildhaber stressed, *“Protocol No.14 will not itself reduce the volume of cases coming to Strasbourg; it will not turn off the tap; it will not even slow down the flow.”*<sup>62</sup> In this case, the obvious answer could be found in the speech given by Mr. Jean Paul Costa: *“much more must be done to protect human rights at home, at the domestic level. The fact that repetitive cases have to be dealt with in Strasbourg shows that national systems are not well-adapted and that, quite often, judgments are not properly executed by States. It is for the States to uphold complaints by victims of manifest violations of the Convention. It is for the States to protect human rights and make reparation for the consequences of violations. The Court must ensure that States observe their engagements but cannot substitute itself for them. It cannot be a fourth-instance court, of course, but still less a court of first instance or a mere compensation board.”*<sup>63</sup>

In line with this reasoning were adopted both Protocols after Protocol No.14: Protocol No.15 by introducing the subsidiary nature of the Court’s jurisdiction in the Preamble of

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<sup>62</sup> Speech given by Mr. Luzius Wildhaber, President of the European Court of Human Rights on the occasion of the opening of the judicial year; Annual Report 2004.

<sup>63</sup> Speech given by Mr. Jean Paul Costa, President of the European Court of Human Rights on the occasion of the opening of the judicial year; Annual Report 2010.

the Convention and Protocol No.16 by addressing the domestic implementation of the Convention.

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