Protocols no. 15 and 16 to the European Convention on Human Rights in the context of the perennial process of reform: a long and winding road

David Milner*

Table of Contents

* Co-Secretary of the Steering Committee for Human Rights and Head of the Unit on the reform of the European Court of Human Rights; Directorate-General Human Rights and Rule of Law, Council of Europe. The views expressed in this article are those of the author and do not necessarily reflect the official position of the Council of Europe.

I. Introduction

2013 was another historic year for the process of reform of the European Court of Human Rights,[1] distinguished as only the second year in the history of the European Convention on Human Rights[2] in which two protocols to it were opened for signature.[3] These protocols represented the culmination of work initiated at the 2005 Third Summit of Council of Europe Heads of State and Government,[4] which commissioned the report presented in 2006 by the Group of Wise Persons.[5] A lot happened during the seven years following the Wise Persons' Report: three High-level Conferences on the future of the European Court of Human Rights,[6] along with various other events;[7] the May 2009 Committee of Ministers' meeting and Conference of the Parties to the ECHR;[8] and, of fundamental importance to both the situation of the Court and the reform process, the entry into force of Protocol no. 14 in June 2010. A wide range of proposals, many quite radical in nature, were examined during this period. Yet in the end, half of the provisions found in Protocols no. 15 and 16 were based on last-minute proposals, made by the Court itself.

This article will cover the post-Protocol no. 14 reform process in its entirety. It will examine the Report of the Group of Wise Persons, Protocol no. 14bis and the Madrid Agreement, and the Interlaken, Izmir and Brighton Conferences and follow-up to them. It will then move on in more detail to the negotiation and final content of Protocols no. 15 and 16 themselves, as well as the discussions of proposals that were not, in the end, adopted.

II. Protocol no. 14 and the Warsaw Summit: the "new" Court in the "new" Europe

The current "single" court,[9] providing judicial determination of every application, was created by Protocol no. 11, which also abolished the erstwhile European Commission for Human Rights and made obligatory the right of individual application. Protocol no. 11 was

1 Hereinafter "the Court".
2 Hereinafter "the Convention" or "the ECHR".
3 In fact, in 1963, the previous occasion, three protocols were opened for signature; by an interesting coincidence, also one of these concerned the Court's jurisdiction to give advisory opinions.
4 Held at Warsaw on 16-17/5/2005.
5 See doc. CM(2006)203 of 15/11/2006. All documents are available at www.coe.int/reformechr (27/1/2014).
6 The Interlaken High-level Conference on the future of the European Court of Human Rights was held in February 2010 by the Swiss Chairmanship of the Committee of Ministers of the Council of Europe; the Izmir Conference, in 2011 by the Turkish Chairmanship; and the Brighton Conference, in 2012 by the United Kingdom Chairmanship.
7 The High-level Seminar on reform of the European human rights system (Oslo, 2004), the Colloquy on future developments of the European Court of Human Rights (San Marino, 2007), the Colloquy "Towards stronger implementation of the ECHR" (Stockholm, 2008) and the Round Table on the right to trial within a reasonable time and short-term reform of the European Court of Human Rights (Bled, 2009).
8 At which Protocol no. 14bis and the Madrid Agreement were adopted, see further below.
9 It should be recalled that, as a result of the "Stockholm compromise" (see further below), the "single" Court in fact consists of two levels of jurisdiction, the Chambers, which are the primary decision-making level, and the Grand Chamber, to which Chamber cases may be relinquished or Chamber judgments referred.

the fruit of negotiations dating back to the 1980s, when Europe and the Council of Europe looked very different from how they look today.[10] By 1998, when the protocol came into force, both the continent and the organisation had been transformed, with profound consequences for the Convention system. Following the fall of the Berlin Wall and the dissolution of the Soviet Union, the new democracies of central and eastern Europe all quite quickly joined the Council of Europe; on condition that they rapidly accede also to the Convention.[11]

This explosive enlargement of the Convention system had serious consequences for its functioning. *Andrew Drzemczewski* has noted that "This phenomenal growth in membership […] had not and could not in any way have been foreseen back in the mid-1980s when reform of the ECHR control mechanism was [first] on the agenda of the Organization's intergovernmental committees."[12] By at least 1992, however, concerns were being expressed: the Parliamentary Assembly, for example, noted that enlargement would lead to "a considerable increase in the number of applications […][disproportionate] to the population of the new member states […]. [The] real test for [the Council of Europe's] system for the protection of human rights is still to come".[13] The most obvious factor was indeed the massive increase in the size of the total population within the Court's jurisdiction, which now stands at over 800 million. Of at least equal significance, however, was the nature of the human rights issues arising in the new States Parties: "Such States were likely to generate cases raising issues different from and more complex than the issues in cases originating in the older member States, especially where structural problems were involved."[14]

Protocol no. 11 was thus, at least in part, intended to enable the Court to respond effectively (and efficiently) to these challenges. Its aims, stated in the Explanatory Report, included to "shorten the length of Strasbourg proceedings", notably by "[preventing] the overlapping of a certain amount of work" and "[avoiding] certain delays which are inherent in the present system", and to "[strengthen] the judicial elements of the system", so as to meet the "need for a supervising machinery that can work efficiently and at acceptable costs even with forty member States and which can maintain the authority and quality of the case-law in the future".

10 For the drafting history of Protocol no. 11, see the Explanatory Report.

11 From 22 (western European) members in 1988, the organisation expanded to 32 in 1993, 38 in 1995, 43 in 2001 and 47, its current membership, in 2007. The only European state not a member of the Council of Europe is Belarus, which has not committed itself to the organisation's basic standards.

12 *Drzemczewski*, A major overhaul of the European Human Rights Convention Control Mechanism: Protocol no. 11, Collected Courses of the Academy of European Law 1995, Vol. VI, Bk 2, pp. 121-244.

13 See Recommendation 1194 (1992) on reform of the control mechanism of the ECHR, para. 2-4. In fact, the Parliamentary Assembly as early as 1988 considered that the length of proceedings in cases brought by individuals had become "excessively long" – see Recommendation 1087 (1988) on improvement of the procedures of the ECHR, para. 3.

14 See Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, Council of Europe, 2001, pp. 18-19. In 1999, then-Deputy Court Registrar *Paul Mahoney* presciently anticipated the likely effects of enlargement on the nature of the Court's workload in some detail: see *Mahoney*, Speculating on the Future of the Reformed European Court of Human Rights, European Human Rights Law Journal 20 (1999), p. 2.

Nevertheless, in 1999, the year after the protocol's entry into force, the President of the "new" Court, *Luzius Wildhaber*, stated in a press release that "the continuing steep increase in the number of applications to the Court is putting even the new system under pressure […]. The volume of work is already daunting, but it is set to become more challenging still, especially as applications come in from countries which ratified the ECHR in the late 1990s."[15] These concerns were central to the 2000 Rome Conference celebrating the 50th Anniversary of the Convention, where President *Wildhaber* again warned that the Court's "annual case-load, which has increased by 500 % over the last seven years, is still rising. This trend will not disappear; indeed, it is likely to amplify."[16]

The Rome Conference led to the drafting of Protocol no. 14, labelled the "reform of the reform", intended in large part further to increase the efficiency of the post-Protocol no. 11 Court's procedures.[17] In particular, it introduced a new Single Judge formation to issue decisions of inadmissibility in clear cases (previously the task of three-judge committees), gave committees competence to deal with repetitive cases and introduced a new admissibility criterion requiring applicants to have suffered "significant disadvantage".[18]

Despite the significance of these measures, there was some expectation, even in the Explanatory Report, that neither Protocol no. 14 alone, nor the overall reform package,[19] would suffice to resolve the Court's problems. At the Third Summit of Heads of State and Government of Council of Europe Member States (Warsaw, 2005), it was again President *Wildhaber* who stated that "we now know […] that Protocol No. 14 will not be enough on its own. We therefore need to look beyond Protocol No. 14 and address the issue of the long-term future of the system, and we should start doing so now". Although others were more optimistic about the potential of the reform package, they nevertheless recognised

15 See press release no. 349 of 21/6/1999, Steep rise in workload for European Court of Human Rights.

16 See Reforming the ECHR: a work in progress, Council of Europe, 2009, p. 33.

17 Protocol no. 14 did, of course, include other important provisions, notably to allow EU accession to the Convention, change the judges' term of office to a single (non-renewable) nine-year period, and give the Council of Europe Commissioner for Human Rights the right to intervene as a third party in Court proceedings.

18 For further information on Protocol no. 14, see the Explanatory Report, and, for example, *Eaton/Schokkenbroek*, Reforming the human rights protection system established by the European Convention on Human Rights: a new protocol no. 14 to the convention and other measures to guarantee the long-term effectiveness of the convention system, HRLJ 2005, pp. 1-17; *Boillat*, Le Protocole no. 14: les enjeux de la réforme, Petites Affiches no. 44 of 2/3/2006, pp. 6-11.

19 See Committee of Ministers' Recommendations to member states No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the Court; Rec (2002) 13 on the publication and dissemination in the member states of the text of the ECHR and of the case-law of the Court; Rec (2004) 4 on the ECHR in university education and professional training; Rec (2004) 5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the ECHR and Rec (2004) 6 on the improvement of domestic remedies; and Resolutions Res(2002)59 concerning the practice in respect of friendly settlements and Res(2004)3 on judgments revealing an underlying systemic problem. Work on national implementation has continued since 2004, with further recommendations on efficient domestic capacity for rapid execution of Court judgments (CM/Rec (2008) 2) and on effective remedies for excessive length of proceedings (CM/Rec (2010) 3; since the Brighton Conference, there have also been an ECHR Toolkit for public officials and a Guide to Good Practice in respect of domestic remedies.

that any further reform would have to be far-reaching: *Philippe Boillat*, for example, observed that "Should [the reform package] not suffice to preserve the effectiveness of the Court, the next reform will then have to put into question – this time fundamentally – the protection mechanism established by the Convention […]."[20]

The Summit accordingly commissioned a Group of Wise Persons "to consider the long-term effectiveness of the ECHR control mechanism, including the initial effects of Protocol No. 14 and the other decisions taken in May 2004, [and] to submit, as soon as possible, proposals going beyond these measures, while preserving the basic philosophy underlying the Convention."[21]

III. The Report of the Group of Wise Persons, Protocol no. 14bis and the Madrid Agreement: setting the stage for the "reform of the reform of the reform"

Despite the calls for them to address fundamental issues concerning the long-term future of the system, the proposals made by the Group of Wise Persons were constrained by the requirement to "[preserve] the basic philosophy underlying the Convention". Amongst the more innovative were the following: establishing a "Judicial Committee" within the Court to deal with clearly inadmissible applications and repetitive cases, with the number of judges on the Court itself then reduced, in line with its work-load; introducing a Court Statute containing provisions relating to its operating procedures, susceptible to amendment by the Committee of Ministers without the need for ratification of an amending protocol; allowing the Court, upon request by national courts, to give advisory opinions on questions relating to interpretation of the Convention and protocols; and leaving to the domestic authorities the decision on the amount of just satisfaction to be awarded in compensation for a violation found by the Court.[22]

In one respect, the Group of Wise Persons was unable to fulfil its mandate: it did not consider the initial effects of Protocol no. 14, for the simple reason that the protocol had not yet come into force. Indeed, this situation persisted for several more years, with adverse consequences on not only the situation of the Court, in particular its case-load, but also the envisaged reform discussions.

On receipt of the Wise Persons' Report, the Committee of Ministers gave terms of reference to the Steering Committee for Human Rights (CDDH).[23] These required it to undertake three tasks: (i) examine the Report of the Group of Wise Persons with a view to proposing concrete follow-up on measures not requiring amendment of the Convention; (ii) report on proposals requiring amendment of the Convention, taking into account the Wise Persons' Report and an open-ended range of other relevant material; and (iii) evaluate the first effects of Protocol no. 14 during the first year following its entry into force.

20 *Boillat*, (fn. 18), p. 11; author's own translation from the French original.
21 Action Plan, doc. CM(2005)80 final.
22 Other proposals related to the enhancing the authority of the Court's case-law in the States Parties, improving domestic remedies, the pilot judgment procedure, friendly settlements and mediation, the role of the Commissioner for Human Rights and the institutional status of the Court and judges.
23 The CDDH, assisted by various sub-committees, has traditionally been the "nerve centre" and "engine room" within the Council of Europe for inter-governmental work on Court reform.

There was no shortage of material to work upon: at the first meeting of the specialised working group the "DH-S-GDR",[24] the Secretariat presented a compendium of 90 existing proposals, at least 23 of which would require Convention amendment.[25] The latter two of the CDDH's tasks, however, were severely compromised: the DH-S-GDR considered that "those proposals requiring amendment of the Convention that were unavoidably linked with the situation concerning Protocol No. 14 could not usefully be discussed at present, nor was it possible to fulfil the requirement to consider the effects of Protocol No. 14."[26] The initial conclusions on certain specific issues nevertheless merit further attention.

Unsurprisingly, it was concluded that proposals concerning filtering of clearly inadmissible applications, treatment of applications and admissibility could not be properly assessed: above all, the Single Judge formation and new admissibility criterion that would be introduced by Protocol no. 14. Interestingly (in the light of subsequent developments), there was "no support for further action" on the "advisory opinions" proposal. As to the "Statute" proposal, whose "importance" and "the welcome it had received above all from the Court" were noted, it was felt that "further detailed consideration […] should start straight away". The Wise Persons' proposal concerning who should calculate the level of just satisfaction was rejected.[27]

Work continued for around 18 months, at the end of which the CDDH presented a final Activity Report on "guaranteeing the long-term effectiveness of the control system of the ECHR".[28] This again noted that consideration of proposals requiring Convention amendment was "made difficult" by the non-entry into force of Protocol no. 14, since "the context within which such proposals would function was uncertain and the effects of already envisaged intermediary steps were unknown." Significant analytical progress had nevertheless been made on certain issues. Concerning filtering of applications, the CDDH considered that the Wise Persons' proposal for a "judicial committee" was interesting and should be examined further, although the suggestion that its implementation should lead to a reduction in the number of judges on the "senior" bench was "unrealistic". Attitudes towards the advisory opinions proposal had evolved significantly, following examination of a paper presented to the DH-S-GDR by the Norwegian and Dutch experts:[29] the CDDH now concluded that also this proposal merited further consideration. The Statute proposal was considered to be "interesting and of value in its own right […]. It could be given a more expansive sense than that contained in the Group of Wise Persons' proposal", and further work could be undertaken.[30]

24 Full title, Reflection Group for the follow-up of the reform of the Court. This body has since evolved into the current plenary DH-GDR, or Committee of Experts on the reform of the Court.
25 See doc. DH-S-GDR(2007)002, available from the Secretariat.
26 See the report of the 2nd DH-S-GDR meeting, doc. DH-S-GDR(2008)007.
27 Reference was made to its unfavourable reception at the Colloquy on "Future developments in the European Court of Human Rights in the light of the Wise Persons' Report", organised by the San Marino Chairmanship of the Committee of Ministers, San Marino, March 2007.
28 See Activity Report, doc. CDDH(2009)007, Addendum I; all CDDH reports are available at http://www.coe.int/cddh (27/1/2014).
29 See Document on extending the Court's jurisdiction to give advisory opinions, doc. DH-S-GDR(2009)004.
30 Activity Report, doc. CDDH(2009)007, Addendum I.

The CDDH also commented on a more radical proposal made (although not for the first time)[31] at the 2008 Stockholm colloquy: developing the Court into a "constitutional court", which was taken to mean "a Court with some degree of power to choose from amongst the applications it receives". The CDDH felt that "the Court might ultimately one day develop in this direction, but the time is not yet ripe to discuss the proposal further", as the situation in many member States meant that judicial determination by the Court of individual applications remained indispensable to effective human rights protection. It was, however, noted that the new "significant disadvantage" admissibility criterion to be introduced by Protocol no. 14, along with the Court's pilot judgment procedure,[32] were "developments that could lead in the direction of a 'constitutional court'", although their possible effects in that sense could not yet be evaluated.

The CDDH concluded its Activity Report with a note of alarm. "It is clear that the Court cannot continue with its current caseload and the overwhelming flow of new applications. No single judicial body, above all one whose role is intended as subsidiary to that of national authorities, could be expected to deal with the number of applications that the Court receives. The constantly widening gap between the Court's capacity and the demands made on it means that the effectiveness, credibility and stability of the entire system are at serious risk."[33]

These concerns also underlay another document adopted by the CDDH alongside the Activity Report – its Final Opinion on putting into practice certain procedures envisaged to increase the Court's case-processing capacity.[34] In November 2009, following a meeting with Court President *Jean-Paul Costa*, the Committee of Ministers noted that the Court's ever-growing case-load "creates an exceptional situation and threatens to undermine the effective operation of the Convention system" and agreed that "it is urgent to adopt measures aimed at enabling the Court to increase its case-processing capacity". It therefore requested the CDDH, along with the Committee of Legal Advisers on Public International Law (CAHDI), to give its opinion on the advisability and modalities of putting into practice certain procedures already envisaged to increase the Court's case-processing capacity, in particular the new single-judge and committee procedures. These opinions formed the basis of two legal instruments.

The first, Protocol no. 14bis, included the relevant provisions in a new protocol to the Convention, which although an amending protocol would enter into force once ratified by three States Parties to the Convention. It also contained an article allowing its provisional application following signature and pending ratification. By the time Protocol no. 14bis ceased to have effect, following the entry into force of Protocol no. 14, it had been ratified by 12 member States. The second, the "Madrid Agreement" adopted by a special Confer-

31 The idea has previously been raised, for example, during negotiation of Protocol no. 14: see the Explanatory Report.

32 For further details of the pilot judgment procedure, see Rule 61 of the Rules of Court (1 January 2014 edition); for a more detailed examination, see, for example, *Leach et al.*, Responding to Systemic Human Rights Violations: an Analysis of 'Pilot Judgments' of the European Court of Human Rights and their Impact at National Level, 2010.

33 The CDDH, in calling for the rapid entry into force of Protocol no. 14, also observed that it had been "intended by its drafters as an intermediate step in a longer process of reform".

34 See Activity Report, doc. CDDH(2009)007, Addendum I, Final Opinion.

ence of the Parties to the Convention, allowed States Parties to the Convention subsequently to declare to the Secretary General of the Council of Europe that they accepted the provisional application of the relevant provisions of Protocol no. 14 to applications brought against them. By the time the Madrid Agreement ceased to have effect, 10 member States had made declarations.[35]

IV. The entry into force of Protocol no. 14 and the Interlaken, Izmir and Brighton Declarations: release and reinvigoration

Protocol no. 14bis and the Madrid Agreement showed the determination of the Council of Europe to take whatever steps were available to give effect to the agreed reforms and thereby preserve the situation of the Court, even at the cost of creating a temporary distinction in the way in which individual applications against different States were treated by the Court. They were soon followed by a call from Court President *Costa* for a high-level conference, whose potential aims he outlined as follows: to reaffirm the political commitment of the States to the protection of human rights in Europe; to initiate work on longer-term goals, responding to the question "what Court for 2019?"; and to identify immediate initiatives that could be taken with respect to short-term goals, notably relating to national implementation of the Convention.[36]

The resulting Interlaken Conference took place on 18-19 February 2010.[37] The final Declaration had in fact been negotiated at the Council of Europe in Strasbourg during the preceding weeks, with contributions by the Parliamentary Assembly, the Secretary General, the Commissioner for Human Rights, the CDDH and a group of prominent human rights NGOs, in addition to the Court President's memorandum.[38]

The Interlaken Declaration was a political compromise, intended to relaunch a reinvigorated process of work on Convention reform, without suggesting final decisions on any reform proposal. It thus led to the CDDH being given further terms of reference: as regards Convention amendment, these called for "specific proposals for measures requiring amendment of the Convention, including proposals, with different options, for a filtering mechanism within the Court and proposals for making it possible to simplify amendment of the Convention's provisions on organisational issues". This work was to be completed by April 2012.[39]

35 Luxembourg both ratified Protocol no. 14bis – although this did not take effect before the protocol ceased to be in force – and made a declaration pursuant to the Madrid Agreement. It can be noted that none of the five highest case-count countries during the period 2009-2010 (Italy, Romania, the Russian Federation, Turkey and Ukraine), applications against which amounted to around 60 % of the total pending before the Court, either ratified Protocol no. 14bis or made declarations under the Madrid Agreement; although Romania and Ukraine signed, without subsequently ratifying, Protocol no. 14bis. Of course, it should be recalled that all but the Russian Federation had previously ratified Protocol no. 14.

36 See Memorandum of the President of the European Court of Human Rights to the States with a view to preparing the Interlaken Conference of 3/7/2009, doc. #2781022.

37 See Proceedings, doc. H/INF (2010) 5.

38 See Preparatory Contributions, doc. H/INF (2010) 3.

39 See doc. CDDH(2010)002.

In discharging these terms of reference, the CDDH was no longer confronted with an uncertain context within which such proposals would function. On 18 February 2010, immediately before the opening of the Interlaken Conference, the Russian Federation had ratified Protocol no. 14, with the result that the protocol could enter into force on 1 June 2010. It would still, however, be some time before "the effects of already envisaged intermediary steps" could become known.[40]

In April 2011, the Turkish Chairmanship of the Committee of Ministers organised the Izmir Conference, at an interim stage in the "Interlaken process". Although none of the issues under examination in the CDDH were ripe for decision, the Izmir Conference did provide a useful opportunity to take stock of progress. As a result, the CDDH's terms of reference were subsequently refined on several prominent issues: it was explicitly invited also to advise, setting out in each case the main practical arguments for and against, on the issue of fees for applicants to the Court; on any other possible new procedural rules or practices concerning access to the Court; and on the advisory opinions proposal.

At this stage, perhaps the most urgent preoccupation within the Council of Europe was the number of clearly inadmissible applications, which had continued to increase extremely rapidly during the period between the adoption and entry into force of Protocol no. 14. In its Interim Activity Report, adopted shortly before the Izmir Conference, the CDDH had noted that "the Registry has calculated that […] the Court would be able to produce some 32,000 SJ decisions [per year][…]. [Even] without the constant influx of new cases, it would take well over two-and-a-half years for the Court to clear [the current] back-log [of 119,300 applications]. Moreover, at the end of September 2010, 46,400 new applications had been filed in 2010. It is thus evident that there will be more than 32,000 incoming clearly inadmissible cases in one year".[41] In other words, it was expected that the number of cases pending before Single Judges would continue rapidly to increase.[42]

As a result, the CDDH spent a considerable part of its time examining proposals for measures aimed at helping the Court to deal with the number of clearly inadmissible applications ("filtering"). These proposals fell into three broad groups: filtering by members of the Registry; filtering by a new category of judge, which in one variant would also sit with 'regular' judges on committees dealing with repetitive cases; and the introduction of temporary, *ad litem* judges, who, again, could perhaps also discharge additional tasks.

As this work approached its conclusion, however, it was struck by a veritable thunderbolt from the Court, which announced that thanks to the way in which it was implementing the Single Judge system introduced by Protocol no. 14, it confidently expected firstly, soon to be able to process all newly arrived clearly inadmissible applications within a short time of their submission; and secondly, to have resolved the existing "backlog" of clearly inad-

40 In this respect, it can be noted that the CDDH in 2012 presented to the Committee of Ministers a 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, doc. CDDH(2012)R76, Addendum II. The issue will also form part of the CDDH's forthcoming work on the longer-term reform of the Convention system and the Court, on which a report will be presented by March 2015.

41 See doc. CDDH(2011)R72, Addendum I.

42 This would indeed be the case, at least until the second half of 2011.

missible cases by the end of 2015. In response, the CDDH's focus shifted abruptly from the problem of clearly inadmissible cases, apparently now in the process of being resolved, to that of the Court's case-processing capacity in general.[43] Two of the existing proposals were revised to this end: the first would involve a pool of temporary judges competent to discharge all functions of "regular" judges (other than sitting on the Grand Chamber) and called upon when necessary; the second, a new category of judge, employed for a fixed period of time to work only on repetitive cases in committees.[44]

Other proposals were either related to, or justified as addressing, the problem of clearly inadmissible cases. These were categorised as "measures to regulate access to the Court" and followed on from the post-Izmir invitation to examine "possible new procedural rules or practices concerning access to the Court". They included proposals to introduce fees for applications, make legal representation compulsory for applicants from the very outset of proceedings, and introduce a 'sanction' in futile cases where an applicant repeatedly submits applications that are clearly inadmissible and lacking in substance. In accordance with its terms of reference, the CDDH did not necessarily take position on these proposals, of which the first in particular was extremely controversial. Its report, however, made clear that there were at best profound divergences as to whether or not these proposals should be implemented, and at worst (in the case of compulsory legal representation), unanimous rejection.[45] This lack of unanimous support (to say the least) was reflected in the Committee of Ministers, with the result that none of these proposals found its way into the Brighton Declaration or subsequently into Protocol no. 15.

Further, related proposals concerned the admissibility criteria. One was to amend the "significant disadvantage" criterion introduced by Protocol no. 14, which was retained and will be examined later, alongside the rest of Protocol no. 15. The other was for a new admissibility criterion, under which an application would be inadmissible if "substantially the same as a matter that had already been examined by a domestic tribunal applying Convention rights, unless that tribunal had manifestly erred in its interpretation or application of the Convention rights or the application raised a serious question affecting interpretation or application of the Convention". A lack of consensus meant that this latter proposal was not as such retained either.[46]

Two proposals were intended to address directly the number of applications pending before the Court.[47] One was to introduce a "sunset" clause under which applications, if not communicated to the respondent State, could be automatically struck off the Court's list a certain period of time after being made; the other, to confer on the Court a discretion to

43 The Court's expectations have been proved correct. On 31 August 2011, there were 101,800 applications pending before Single Judges; on 30 November 2013, there were 29,050, fewer than the number pending before either committees or Chambers.

44 See CDDH Final Report on measures requiring amendment of the ECHR, doc. CDDH(2012)R74, Addendum I, Appendix IV.

45 See further doc. CDDH(2012)R74, Addendum I, Appendix III.

46 Ibid.

47 The various options for increasing the Court's case-processing capacity were also categorised under this heading.

decide which cases to consider. Once again, there was no consensus, and so the proposals were not retained.[48]

In addition, the CDDH reported on the proposal to extend the Court's jurisdiction to issue advisory opinions. As this met with approval and eventually found its way into Protocol no. 16, it will be dealt with in detail below.

Alongside the Activity Report, the CDDH also adopted a "Contribution" to the Brighton Conference.[49] This is a very wide-ranging document and gives a good insight into views held within the CDDH in early 2012 on reform of the Convention system in general, in both the short and long terms; several of the issues it raises have since been investigated in greater detail by the CDDH in more specific reports, and others will surely return in future.[50] Although the Contribution as a whole goes beyond present purposes, certain observations made in the "Final considerations relevant to decisions on the amendment proposals" merit further mention.

In particular, the "Contribution" observes that "During its examination of the various proposals requiring amendment of the Convention, the CDDH has repeatedly been confronted with certain principles that appear to set limits to their scope, notably the right of individual application and the requirement that all decisions be of a judge." The CDDH continued by recalling the value and significance of the right of individual application. It then went on to note that the requirement for a decision of a judge "is often considered an integral part of the right of individual petition" and, whether or not in itself a Convention-based right, "is a feature of the current Convention system", even if it is "not in practice always realised". The CDDH pointed out that these considerations "are relevant to the Court's case-load and to its capacity to deal with incoming cases within a reasonable time", especially since exercise of the right of individual application is subject only to the practical requirements to fill in a form and provide basic documentation. Having noted that deficient national implementation also continues to contribute to the Court's case-load, and that this should be a focus of efforts to maintain the effectiveness of the Convention system and its control mechanism, the CDDH nevertheless then invited the Brighton Conference "to consider the role of the right of individual petition in the context of reflections about the long-term future of the Court, which is linked to the requirement for a decision of a judge".[51]

It can be seen that the issue of a "simplified amendment procedure" was not amongst those addressed by the CDDH in this Activity Report. Work on this issue had proceeded

48 See further doc. CDDH(2012)R74, Addendum I, Appendix IV. Positions on the discretion (i.e. "constitutional court") idea had not shifted significantly since the 2009 CDDH Activity Report (see above), although discussion was a little more developed. It was noted that there were, potentially, clear advantages from the perspectives of case-management and (exclusive) prioritisation. Nevertheless, objections were raised that implementation of the proposal, which "presupposes a high level of national implementation of the Convention that is not so far universally realised", would "radically change the Convention system and significantly restrict the right of individual application by removing the requirement that decisions be taken by a judge".

49 See doc. CDDH(2012)R74, Addendum III.

50 As noted, the CDDH will shortly begin work on the longer-term future of the Convention system and the Court.

51 It is hard to discern any explicit reflection of this invitation in the actual text of the Brighton Declaration.

in parallel to the others, in a separate expert committee,[52] but had not been completed by the time of the Brighton Conference and so received little more than encouragement in the Brighton Declaration.[53] Preparatory work in fact progressed superficially very well: there was general agreement that "the Convention system would benefit from the introduction of [such a] procedure", Convention provisions suitable for amendment by a simplified procedure had been identified and a range of models permitting different modalities had been elaborated. During later stages, however, certain complications became unavoidable and certain objections more apparent.[54] The CDDH therefore concluded that other reform issues were "more urgent and should be given priority" and proposed to "return to the issue in future", once work on priority issues was completed, "with a view to resolving any outstanding matters and requesting any necessary decisions of the Committee of Ministers, as appropriate."[55]

Before turning to Protocols no. 15 and 16 themselves, it is necessary to explain the origins of, in fact, the majority of the proposals for Convention amendment that appeared in the Brighton Declaration (and subsequently Protocol no. 15) but which had not been examined by the CDDH. This concerns, in particular: amendment of the Preamble to add a reference to the principle of subsidiarity and the doctrine of the margin of appreciation; revising the age requirements for judges; shortening the time limit for applying to the Court; and revising the procedure for a Chamber to relinquish a case in favour of the Grand Chamber.

The first of these was in part the legacy, noted above, of the proposal to introduce a new admissibility criterion relating to cases properly considered by national courts. The supporters of this proposal continued in the Committee of Ministers to argue in favour of its inclusion in the Brighton Declaration, but continued also to meet with resistance from those opposed. The eventual compromise outcome of these and related negotiations was the amendment to the Preamble.

The others arose from three proposals made by the Court to the Committee of Ministers as part of a direct contribution to preparations for the Brighton Conference; they appeared after the CDDH had submitted its Activity Report, and so were not examined by it.[56] The

52 "DH-PS" or "Committee of Experts on a simplified procedure for amendment of certain provisions of the ECHR".

53 Brighton Declaration, para. 37 called for "a swift and successful conclusion to this work that takes full account of the constitutional arrangements of the States Parties", a reference to the emerging awareness of difficulties that some member States would face in ratifying the necessary protocol and/or subsequently agreeing to amendment of the relevant instrument by the Committee of Ministers.

54 To some extent, these included the fact that not everyone agreed with expansion of the Wise Persons' original proposal to involve also "upgrading" into either the Convention or a new treaty-based Court Statute of certain provisions of the Rules of Court; the Court especially was strongly opposed to this idea (see the Court's memorandum of September 2010 on The idea of a Court Statute, doc. #3275635; and the Court President's letter to the CDDH Chairperson, doc. #3981532 of 12/6/2012). Nevertheless, the "upgrading" of certain provisions of the Rules of Court (as well as the procedure for their amendment) will be addressed by the DH-GDR in 2014-2015, this time in isolation.

55 See the CDDH Final Report on a simplified procedure for amendment of certain provisions of the Convention, doc. CDDH(2012)R75. The issue does not, however, figure in the DH-GDR's terms of reference for 2014-2015.

56 See Preliminary opinion of the Court in preparation for the Brighton Conference of 20/2/2012.

first was to "reconsider the current age-limit for judges […]. The existing system may prevent experienced judges from completing a full term of office or indeed exclude their candidature altogether". The second, to reduce the time limit, was justified on the basis that "the time has perhaps come to consider whether this period, which was entirely reasonable 50 years ago, remains the appropriate length in today's digital society with swift communication tools. Having regard to equivalent time-limits in national proceedings, it may be possible to reduce this time-limit considerably". The third was complementary to the Court's internal decision obliging a Chamber, when envisaging departure from settled case-law, to relinquish jurisdiction to the Grand Chamber; both were intended to help avoid inconsistency in the case-law.[57]

V. Protocol no. 15: "reform of the reform of the reform" – and more?

Protocols no. 15 and 16 were both drafted and adopted on the basis of decisions taken after the Brighton Conference.[58] The following sections will address each in turn, article by article, through the negotiation and drafting process from the Brighton Conference up until their adoption; and beginning with Protocol no. 15.[59]

1. Article 1: principle of subsidiarity and the doctrine of the margin of appreciation

Article 1 of Protocol no. 15 adds at the end of the Preamble to the Convention a new recital containing a reference to the principle of subsidiarity and the doctrine of the margin of appreciation. In the words of the Explanatory Report, this is "intended to enhance the transparency and accessibility of these characteristics of the Convention system".

Paragraph 11 of the Brighton Declaration had included a relatively lengthy (too lengthy to be transcribed into Protocol no. 15) exposition on subsidiarity and the margin of appreciation: "The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether

57 The question of the "clarity and consistency of the Court's case-law" had in the aftermath of the Interlaken Conference been the subject of exchanges between the Court, in the person of its Jurisconsult, and the States Parties, including collectively through the CDDH: see the Note by the Jurisconsult, doc. #3197955; and the CDDH Collective Response, doc. CDDH(2012)R74, Addendum III, Appendix.

58 See Decisions adopted at the 122nd Session of the Committee of Ministers on 23/5/2012, Item 2, Securing the long-term effectiveness of the supervisory mechanism of the ECHR.

59 Negotiation of the Brighton Declaration itself will not be examined herein, as there is insufficient public reference material available: the various preliminary draft texts are not all in the public domain; on a multilateral level, the negotiations took place in camera; and some negotiations were conducted bilaterally between the United Kingdom, as organiser, and other member States' governments.

decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation".

Neither the Brighton Declaration nor the Committee of Ministers decision gave further guidance on how the new provision should be drafted. The CDDH therefore instructed its drafting group that the final wording should "stay within the consensus of the Brighton Declaration, respect the balance of the existing preamble and be comprehensible to the general public".[60] The problem was how to accommodate sometimes subtly but nevertheless significantly different positions within a concise, accessible text. The most difficult issues, as one could have expected, related to the margin of appreciation.

One question concerned whether or not the doctrine originated in or was defined by the case-law of the Court, or was instead inherent to the principle of subsidiarity. At the Brighton Conference, the President of the Court, *Sir Nicolas Bratza*, had referred to the margin of appreciation as "a valuable tool devised by the Court itself to assist it in defining the scope of its review".[61] This approach was reflected in some of the subsequent drafting proposals: the initial French proposal included the expression the margin of appreciation "that the Court allows them", Denmark's proposal included "[…] as developed in the Court's case law", and Finland proposed "[…] the Court defines".

By contrast, The Netherlands proposed the expression "the subsidiary nature of this mechanism implies that States parties are allowed a margin of appreciation"; Greece even more clearly argued that the margin of appreciation "stems directly from, and is inherent to, the principle of subsidiarity"; and a later French proposal, along with an Estonian proposal, stated that the States "enjoy" a margin of appreciation.[62]

Several of the observers in the drafting process were also active on this point. The Court itself, towards the end of the process, urged the CDDH to include the words "as developed in the Court's case-law",[63] considering that without them, the formulation would be "incomplete as a reference to a concept that […] varies widely in its relevance and consequence from one context to another […]. The margin of appreciation is not […] a given or a constant in every case". The Court continued by stating that "the key point with this phrase is that it duly recognises the provenance of the margin of appreciation" – which was for some States precisely the problem with it.[64] A group of prominent human rights NGOs argued that the doctrine of the margin of appreciation was a principle of judicial interpretation, and subsequently proposed either "margin of appreciation that the Court defines" or "[…] as

60 Report of the 75th CDDH meeting, doc. CDDH(2012)R75, para. 6.i.

61 See Proceedings/Actes, doc. H/Inf (2012) 3.

62 See the various compendia of contributions and comments compiled during the drafting process: docs. GT-GDR-B(2012)002, GT-GDR-B(2012)008 and DH-GDR(2012)012.

63 This latter formulation is in fact found in the Brighton Declaration itself; although so is the expression "The margin of appreciation goes hand in hand with supervision under the Convention system", which could be said to imply that the margin of appreciation exists separately from the Court's supervisory function.

64 See Comment from the European Court of Human Rights on the proposed amendment to the Preamble of the ECHR, attached to a letter from the Court President to the CDDH Chairperson of 23/11/2012, doc. #4160804.

developed in the Court's case-law";[65] the European Group of National Human Rights Institutions also encouraged this latter approach.[66]

Some States found further nuance in a distinction between on the one hand, the origin or definition of the doctrine of the margin of appreciation, and on the other its application. Greece, for example, argued that "it is the State's margin of appreciation reviewed by the Court rather than the Court's authority to define this margin" and proposed the wording "margin of appreciation, the scope of which is determined by the Court". Similarly, the United Kingdom argued that "It is not strictly accurate to say that the margin of appreciation is defined by the Court: it is applied by the Court, having regard to the terms of the Convention", and made alternative proposals, one of which read "the High Contracting Parties have the primary responsibility to secure the rights and freedoms defined in the Convention, and […] in doing so they are accorded a margin of appreciation", and the other simply "to secure the rights and freedoms defined in the Convention, within the margin of appreciation".

At the same time, there was recognition of the need to avoid giving a false impression that States had a margin of appreciation when applying all Convention rights[67] (for example, in relation to absolute rights, such as the prohibition of torture). That said, there was difficulty in finding acceptable text to express this, as some States could not agree to language suggesting that the margin of appreciation was defined by the Court or developed in its case-law, and a precise definition of the legal situation would have been inappropriate for the preamble, whether technically feasible or not.

In the end, a compromise was found through two approaches: one was for the amendment to be as brief as possible,[68] not attempt to define the relevant terms and to stay close to the agreed wording of the Brighton Declaration; and the other was to locate more delicate issues, requiring more detailed treatment, in the Explanatory Report.

Both the Court and the Parliamentary Assembly gave their opinions on the draft protocol, as submitted by the CDDH to the Committee of Ministers. The Court recalled its reservations concerning the phrasing of the reference to the doctrine of the margin of appreciation but, accepting that the current wording represented a necessary compromise between States, acknowledged that the drafters' intentions had been satisfactorily clarified in the Explanatory Report (see below). The Parliamentary Assembly's opinion simply "endorsed" the

65 See Joint Preliminary Comments on the drafting of Protocols 15 and 16 to the ECHR, doc. DH-GDR(2012)008.

66 See Submission of the European Group of National Human Rights Institutions on draft Protocol no. 15 to the ECHR, doc. GT-GDR-B(2012)007.

67 Some NGOs, for instance, were concerned that on the wider international level, the new recital, taken out of context, could be used to justify an inappropriate, relativistic approach.

68 In any event, most proposals had consisted of only one paragraph, although some had two (e.g. The Netherlands, Poland) and one had three (Bulgaria, whose proposal was unique also in referring to subsidiarity in the interpretation of the Convention and a margin of appreciation in the execution of Court judgments).

draft Protocol, with the accompanying explanatory memorandum also referring to the protocol's Explanatory Report.[69]

The final text of the new recital in the Preamble, to be introduced by Article 1 of Protocol no. 15, thus reads as follows: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and 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". The corresponding elements of the Explanatory Report include the relatively lengthy exposition found in paragraph 11 of the Brighton Declaration (see above), with the addition, noted above, that the new recital "is intended […] to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case-law". Unlike some other articles of the protocol, Article 1 has no transitional provision.

Although it has been suggested that the preamble to a treaty may act as an innocuous final resting place for proposals not otherwise accepted during negotiation,[70] it remains to be seen whether or not Article 1 of Protocol no. 15 will have any practical impact. It may be recalled that paragraphs 1 and 2 of Article 31 of the Vienna Convention on the Law of Treaties state *inter alia* that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context […]. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble […]."[71] In its opinion on the draft protocol, the Court insisted that "there clearly was no common intention of the High Contracting Parties to alter either the substance of the Convention or its system of international, collective enforcement".[72] It remains to be seen whether States, when pleading before the Court, will seek to persuade it otherwise.

69 See Parliamentary Assembly Opinion 283 (2013) on draft Protocol no. 15 amending the ECHR and the report of the Committee on Legal Affairs and Human Rights, doc. 13154. The Court's opinion (Committee of Ministers' doc. DD(2013)116) is conveniently appended to the Parliamentary Assembly Committee's report, available at http://assembly.coe.int/nw/Home-EN.asp (27/1/2014).

70 See e.g. *Aust*, Modern Treaty Law and Practice, 2013, pp. 367-368. *Aust* nevertheless cautions that "The more one burdens the preamble with unnecessary, but not always insubstantial, material, the greater the danger that it will come to be relied on to support an unintended interpretation of the main text".

71 This has been noted by the Court, which has observed that its case-law "has drawn upon the principles of the Preamble to the Convention in a number of landmark cases": see Comment from the European Court of Human Rights on the proposed amendment to the Preamble of the ECHR, attached to the Court President's letter to the CDDH Chairperson of 23/11/2012, doc. #4160804.

72 The Court elaborated further by noting that "both the explanation given and the context in which the text was drafted are themselves legally significant [...]. Moreover, the report of the relevant meeting of the CDDH […] forms part of the travaux préparatoires of the Protocol and thus is relevant to its interpretation" (cf. Article 32 of the Vienna Convention on the Law of Treaties).

2. Article 2: the age limit for judges

At first sight a straightforward provision, Article 2 in fact gave rise to some of the most complicated discussions during drafting of Protocol no. 15. The Brighton Declaration called for a provision to the effect that "judges must be no older than 65 years of age at the date on which their term of office commences". The problem related to the need for legal certainty. If the new requirement were to be observed, it would be necessary to know from the beginning of the national selection procedure the day on which the successful candidate would take office. In practice, however, the latter is unpredictable, and sometimes comes months (or even years) later than originally foreseen. Should someone having, say, 64 years of age apply at national level and there subsequently be a too lengthy delay before the Parliamentary Assembly's election,[73] the requirement would be breached, and the candidate (or even newly elected judge, prior to formally taking office) would become ineligible.

The question was, therefore, how to find some other acceptable reference date that would allow for legal certainty from the outset of the selection/election procedure. Various alternatives were examined, with the choice eventually falling on the date of the letter by which the Parliamentary Assembly requests the State Party to submit a list of candidates. There was some initial hesitation concerning this choice, since the Convention itself does not refer to any such letter. Alternatives were the date on which it is expected that the Parliamentary Assembly will hold the election, 1 January in the year in which the new judge's term of office began or the date of the end of the previous judge's term of office; these, however, also failed reliably to ensure a sufficient degree of certainty.[74]

Both the Court's and the Parliamentary Assembly's opinions on the draft Protocol supported the proposed amendment.

The new Article 21(2) of the Convention will read "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", and paragraph 2 of Article 23, containing the old upper-age limit, will be deleted. The Explanatory Report goes on to explain why the text of the Protocol departs from the exact wording of the Brighton Declaration, "whilst pursuing the same end".

Another difficult aspect was the transitional provision for entry into force of the new requirement. The problem here was that application of the new rule to lists already submitted to the Parliamentary Assembly for election would invalidate any candidate who had been over 65 years of age on the date of the Parliamentary Assembly's letter, with the result that the list would have to be rejected and a replacement candidate found. Article 8(1) of Protocol no. 15 therefore provides that the new rule "shall apply only to candidates on lists submitted to the Parliamentary Assembly by the High Contracting Parties under Article 22 of the Convention after the entry into force of this Protocol".

73 The Parliamentary Assembly, further to its role in electing judges, has a sophisticated set of rules for determining the date on which a judge is deemed to take office: see Resolution 1726 (2010) on effective implementation of the European Convention on Human Rights: the Interlaken process.

74 In the third case, this was due to the fact that under the Convention, judges are considered to "hold office until replaced" (Article 23(3)).

3. Article 3: relinquishment of cases by Chambers in favour of the Grand Chamber

Although technically one of the most straightforward amendments, Article 3 proved to be politically difficult. It can be recalled that the concept of a "two-tier" court was central to the "Stockholm compromise" between those preferring to retain both the Commission and the Court and those preferring a single, unitary Court, which in 1993 had allowed agreement on the institutional reforms of Protocol no. 11.[75] The fact that a respondent State (or an individual applicant) can by objecting prevent a Chamber from relinquishing jurisdiction gives at least a chance of having two opportunities to argue a case before the Court, subject to acceptance of a request for referral of a Chamber judgment to the Grand Chamber. Without this possibility, a Chamber's decision to relinquish would inevitably mean only one hearing, before the Grand Chamber, whose judgment would be final.

Although the Brighton Declaration was quite clear in its invitation to amend the Convention, Poland launched a series of objections and counter-proposals during the subsequent drafting process, on the basis that "there was no sufficient time during the Brighton negotiations to examine thoroughly all the implications and details linked with this proposal, nor even to provide analysis of the proposal as such. Poland, as well as several other delegations, raised questions on this proposal [but in] the spirit of compromise we joined the consensus on the Declaration relying on the promise included therein that the issue would continue to be examined in its entirety".[76] Clearly evoking the "Stockholm compromise", Poland's contribution noted that "The right of appeal under the Convention is already now formulated in a very restricted manner. The proposed amendment limits it even further […]. [Some] possibilities of re-examination should be preserved for most complex matters [such as those described in Article 30], thus safeguarding proper administration of justice". The contribution then criticised the proposal as having no obvious connection to the problem of the Court's case-load, which it claimed to be "the underlying reason for the ongoing post-Interlaken reform debates".

Over the course of the drafting process, a series of proposals for "consequential amendments",[77] presented mainly by Poland, were examined.[78] None were retained for the text of the protocol itself, although three were reflected instead in the Explanatory Report. Of the remainder, two lacked sufficient support for inclusion even in the Explanatory Report and the other was withdrawn.

One proposal, to compensate for the "negative consequences" of relinquishment, was to introduce procedural guarantees, such as the Chamber giving reasons for relinquishment and indicated the envisaged change to the settled case-law, or indicating the precise scope of the problem of interpretation. It was noted, however, that the Chamber may "not be able

75 See further e.g. *Drzemczewski*, (fn. 12).

76 See Contribution by Poland on the question of amendment of Article 30 of the Convention to remove the party's right to object to a Chamber's relinquishment of a case to the Grand Chamber, doc. GT-GDR-B(2012)017.

77 Para. 25d of the Brighton Declaration, dealing with this point, had invited the Committee of Ministers "to adopt the necessary amending instrument, and to consider whether any consequential changes are required".

78 See the reports of the 1st and 2nd GT-GDR-B meetings, respectively docs. GT-GDR-B(2012)R1 & R2, and the report of the 2nd DH-GDR meeting, doc. DH-GDR(2012)R2.

to express unanimously a single set of reasons". In any case, the goal of informing the parties of the nature of the issue at stake could be met in other ways; to achieve this, the Explanatory Report records the States' "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".

Another proposal was that the Chamber considering relinquishment should seek the parties' views on the matter. This was not retained as it was considered to be not a consequential amendment but rather to be inconsistent with the principal aim of facilitating relinquishment. It was agreed, however, that the Explanatory Report note the States' "expectation" "that the Chamber will consult the parties on its intentions", thereby in practice allowing greater flexibility.

The proposal that the Chamber be required to rule on admissibility before relinquishing jurisdiction was not retained. Instead, it was agreed that the Explanatory Report should reflect the States' "preference" "for the Chamber to narrow down the case as far as possible, including by finding inadmissible any relevant parts of the case before relinquishing it".

The proposal that the Chamber's decision to relinquish should be by unanimity (rather than, as is now the case, by majority) was rejected as it was considered not to be consequential, in particular because it was contrary to the aim of facilitating relinquishment.

A fifth was to consider "new legal possibilities for the parties to ask for the re-examination by the Grand Chamber of a judgment it delivered as the 'first instance' [i.e. following relinquishment] – in exceptional circumstances". This was not retained mainly on the basis that it was contrary to the principle that the Grand Chamber was the "ultimate judicial authority within the Convention system", as well as being "unrealistic, impractical and procedurally complicated".

Finally, Poland did not in the end maintain its proposal to make the amendment optional, with States by declaration opting either in or out (alternative approaches were suggested).

In its opinion on the draft protocol, the Court noted that it could "accommodate" the States' desire that the parties to a case be consulted by a Chamber before the latter decided to relinquish. It also noted that various procedural possibilities already existed to allow decisions of partial inadmissibility. As to the desire that it gives more specific indication to the parties of the issues underlying the decision to relinquish, the Court observed that "In most cases, these issues should be clear enough. Where a party has a doubt, it may raise the matter with the Court's Registry, which can provide assistance".

The resulting text of Article 3 provides that the words "unless one of the parties to the case objects" shall be deleted from Article 30 of the Convention. The transitional provision contained in Article 8(2) of the protocol stipulates that removal of the parties' right to object to relinquishment will not apply to pending cases in which one of the parties has already made such an objection. The aim of this is to ensure legal certainty and procedural foreseeability.

4. Article 4: the time limit for submitting an individual application

As already noted, this proposal was made by the Court directly to the Committee of Ministers and so had not previously been examined by the CDDH. An ancillary effect of this

was that the CDDH observers, including civil society organisations and representatives of applicants, had no opportunity directly to participate in discussion of its inclusion in the draft Brighton Declaration.[79]

A group of prominent NGOs, whilst accepting that a final political decision on the issue had been made, nevertheless expressed their dissatisfaction and concern, considering that the proposal had been "introduced without adequate time for reflection on its potential impact on applicants, on the substantive quality of applications and on the Court's effectiveness". They emphasised that "this amendment may unduly restrict the ability of individuals to apply to the Court", citing problems relating to failure or delay in notifying applications of final domestic decisions and the need to allow sufficient time to prepare an application to the Court, especially for those in remote areas, without internet access,[80] with complicated cases and/or inexperienced lawyers, or with only limited access to a lawyer.

These NGOs' first proposal was therefore that before amending the existing six-month deadline, there should be time for consultation, including with representatives of applicants in countries where access to legal advice and communications technology is limited. Further or in the alternative, they argued that any reduction in the time limit "should imperatively provide for adequate safeguards to minimise to the maximum extent possible any adverse impact on the applicant's ability to apply to the Court […]. [Any] change should be accompanied by specific provision to allow for judicial discretion in cases where injustice would result, or where the right to individual petition would be disproportionately restricted or fundamentally undermined."[81]

The drafting group members, however, considered themselves bound by the clear language of the Brighton Declaration and their terms of reference, such that they were constrained from reopening negotiation of the political decisions. The CDDH having in the past strongly encouraged the Court to apply strictly the time-limit, and supported its efforts to this end,[82] the national experts also declined either to include in the protocol a provision giving the Court a discretion in applying the time-limit, or to reflect in the explanatory report a suggestion that the Court might exercise such a discretion.

The final text of Article 4 of Protocol no. 15 amends Article 35(1) of the Convention by replacing the words "within a period of six months" by the words "within a period of four months".

As regards a transitional provision, there was general agreement that a certain period of time should be allowed between entry into force of the protocol as a whole, the exact date of which would be known with only some three months' notice, and entry into force of the reduced time limit. This would be intended to allow applicants and their representatives to

79 There was nevertheless some indirect civil society input into the negotiation of the Brighton Declaration, including on this issue: see, for example, Joint NGO preliminary comments on the first draft of the Brighton Declaration on the Future of the European Court of Human Rights of 5/3/2012, doc. AI Index: IOR 61/003/2012.

80 This was in effect a riposte to the Court's argument when making this proposal that the current six-month deadline may not be "appropriate […] in today's digital society with swift communication tools" (see above).

81 See doc. DH-GDR(2012)008. The European Group of National Human Rights Institutions also stated that it "does not agree with this amendment", see doc. GT-GDR-B(2012)007.

82 See, for example, the 2009 CDDH Activity Report (fn. 29).

be given sufficient notice of the new time limit to avoid falling foul of it unawares. The only disagreement was over the length of time by which application of this provision should be delayed. Civil society organisations in particular argued in favour of one year, which was the initial position taken by the drafting group. Following further reflection, however, Article 8(3) of the protocol defers entry into force of this provision by six months, which was felt to be sufficient.

In addition, the position of applicants is further safeguarded by a second transitional provision, by which the new time limit does not apply to applications in which the final domestic decision (within the meaning of Article 35(1) of the Convention) was taken prior to the date of entry into force of the new time limit. As noted in the Explanatory Report, this means that the new time limit will not have retroactive effect.

In its opinion on the draft protocol, the Court noted that "the transitional rules […] provide a valuable measure of legal certainty to applicants" and stated that it "will ensure that the public is notified in a clear and timely way of the entry into force of this amendment, and looks to Governments, national human rights institutions, the legal profession and civil society to assist it in this".

5. Article 5: the significant disadvantage admissibility criterion

The proposal for this amendment had been examined in detail by the CDDH and its subordinate bodies, where it had been justified as removing an unnecessary safeguard that could in fact set a higher standard for domestic examination of "insignificant" cases than for "significant" ones.[83] Some observers nevertheless continued to object on the basis that it would remove an important safeguard ensuring that anyone claiming to be victim of a human rights violation would have effective access to a court and the possibility of an effective remedy. The European Group of National Human Rights Institutions, for example, hoped that "the Court's application of a revised Article 35(3)(b) will not result in cases being declared inadmissible where they were not properly considered by the national courts or where the case was unsuccessful on procedural rather than substantive grounds".[84]

As with fundamental objections to other amendments, it was considered that this could not properly be entertained, as it was not possible to reopen the negotiations that had led to the Brighton Declaration, or to question the subsequent political decisions. Discussions on this article of the draft protocol were therefore relatively brief.

Neither the Court nor the Parliamentary Assembly expressed any particular views on this provision other than general support.

There is no transitional provision for this article of the protocol, which will enter into force along with the protocol generally. The Explanatory Report explains that the aim is "not to delay the impact of the expected enhancement of the effectiveness of the system. [The amendment] will therefore apply also to applications on which the admissibility decision is pending at the date of entry into force of the Protocol". The Explanatory Report

83 Article 35(1) of the Convention, read in conjunction with Article 13, means that a "non-insignificant" case may be inadmissible even without having been examined by a domestic tribunal.

84 See doc. GT-GDR-B(2012)007.

also notes that the purpose of the amendment is "to give greater effect to the maxim de minimis non curat praetor".

VI. Protocol no. 16: subsidiarity, judicial dialogue – and more?

From uncertain beginnings, progress towards Protocol no. 16 became, in the end, almost serene. In early 2012, the CDDH remained divided on whether or not the new procedure should be introduced; the Court's Reflection Paper, submitted prior to the Brighton Conference, gave only very qualified support to further work;[85] and the Brighton Declaration had been unable to agree on much in the way of detail and deliberately deferred any decision on whether or not the protocol, once drafted, would be adopted. Subsequent discussions were lengthy and technically very detailed, and the eventual compromises on some (albeit secondary) aspects were not entirely satisfactory to all.[86] Once the text of the draft Protocol and Explanatory Report was completed, however, their subsequent passage through the both the CDDH and Committee of Ministers was remarkably swift and untroubled; the decision to adopt was reached even before the deadline for submission of the draft.

1. Article 1: requirements for requesting an advisory opinion

The Report of the Group of Wise Persons had suggested that "only constitutional courts or courts of last instance" should be able to request an advisory opinion. This was refined in the Norwegian/Dutch proposal as "a national court against whose decision there is no judicial remedy under national law",[87] a formulation retained with minor amendment by the CDDH in its 2012 Activity Report. Following the Brighton Conference, however, further consideration revealed that this approach would not work consistently across all legal systems and was potentially too broad. Accordingly, the formulation "highest courts" (without a preceding "the")[88] was preferred, with such courts to be specified by the relevant High Contracting Party; further elaboration of the intended meaning would be given in the Explanatory Report. "High courts" was rejected as being too broad: "only a very limited number of courts or tribunals in each State should have the possibility of requesting an advisory opinion, in order to ensure that there would not be an excessive number of such requests resulting in a burden on the Court". A proposal to allow also individual governments to request advisory opinions was rejected, as it (and the possibility of national parliaments) had been by the Court in its Reflection Paper.

The first part of Article 1(1) therefore refers to "highest courts and tribunals of a High Contracting Party, as specified […]." The Explanatory Report indicates that this is intended to "avoid potential complications by allowing a certain freedom of choice […]. [It] would

85 See Reflection Paper on the proposal to extend the Court's advisory jurisdiction, doc. #3853038.
86 For further details of the drafting process, see the reports of the 1st and 2nd GT-GDR-B and 2nd DH-GDR meetings, respectively docs. GT-GDR-B(2012)R1 & R2, and DH-GDR(2012)R2.
87 With reference to Article 234 of the Treaty on the European Community concerning preliminary rulings by the Court of Justice of the European Union.
88 The Izmir Declaration had used the formulation "the highest" when inviting continued work on the issue.

refer to the courts and tribunals at the summit of the national judicial system [and] permits the potential inclusion of those courts or tribunals that, although inferior to the constitutional or supreme court, are nevertheless of especial relevance on account of being the 'highest' for a particular category of case. This […] allows the necessary flexibility to accommodate the particularities of national judicial systems." Furthermore, "Limiting the choice to the 'highest' courts or tribunals is consistent with the idea of exhaustion of domestic remedies, although 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 […] and would reflect the appropriate level at which the dialogue should take place".[89]

As noted in the Explanatory Report, by stating that relevant courts or tribunals "may" request an advisory opinion, Article 1(1) "makes clear that it is optional for them to do so and not in any way obligatory". This had been a characteristic of the Norwegian/Dutch proposal, supported by the CDDH in its 2012 Activity Report. The Explanatory Report goes on to note also that "it should also be understood that the requesting court or tribunal may withdraw its request". A proposal to set a deadline for withdrawing a request, intended to avoid withdrawal where the Court's proceedings were already at an advanced stage, was rejected, notably because it would be difficult to specify an appropriate period of time.

As to the nature of the question, the Group of Wise Persons had suggested "questions of principle or of general interest relating to the interpretation of the rights and freedoms defined in Section I of the Convention and the protocols thereto". The Norwegian/Dutch proposal, however, sought "to limit the cases further, and to reserve the advisory opinion procedure for cases revealing a potential *systemic* or *structural* problem" relating to the interpretation of Convention rights. This met with opposition, and interest shifted back to an approach based, like the Wise Persons', on Article 43(2) of the Convention concerning referrals to the Grand Chamber: "if the case raises a serious question affecting the interpretation or application of the Convention of the Protocols thereto, or a serious question of general importance".

In the end, Article 1(1) contains a slight variant on the Wise Persons' proposal, reading "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto". The Explanatory Report, remarking on the similarly to Article 43(2) of the Convention, notes "certain parallels between these two procedures, not limited to the fact that advisory opinions would themselves be delivered by the Grand Chamber. That said, when applying the criteria, the different purposes of the [two procedures] will have to be taken into account. Interpretation of the definition will be a matter for the Court when deciding whether to accept a request for an advisory opinion".

89 An interesting point concerning territorial issues is addressed in the Explanatory Report: "In some cases, the constitutional arrangements of a High Contracting Party may provide for particular courts or tribunals to hear cases from more than one territory. This may include territories to which the Convention does not apply and territories to which the High Contracting Party 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". In practice, this concerns only the United Kingdom (The Netherlands has extended application of the Convention to all those territories for whose international relations it is responsible and considered there to be no reason to distinguish cases arising therein).

The Brighton Declaration had indicated that advisory opinions should concern "the interpretation of the Convention in the context of a specific case at domestic level". This is reflected in Article 1(2), with the Explanatory Report stating that "The procedure is not intended, for example, to allow for abstract review of legislation which is not to be applied in that pending case".[90]

The CDDH, in its 2012 Activity Report, had suggested that a domestic court could "only request the Court's advisory opinion once the factual circumstances have been sufficiently examined by the national court". It was subsequently observed, however, that "some highest domestic courts that might appropriately request advisory opinions had no competence to establish facts". Furthermore, "it should not be compulsory for the requesting authority to give its own view" on the legal question, since some courts may be prohibited from expressing a preliminary position. It was instead considered sufficient to use a formulation based on that used with respect to preliminary rulings of the Court of Justice of the EU,[91] with further detail, similarly inspired, in the Explanatory Report.

Article 1(2) thus reads "The requesting court or tribunal shall give reasons for its request and shall provide the relevant legal and factual background of the pending case". The Explanatory Report states that this "[reflects] the aim of the procedure, which is not to transfer the dispute to the Court, but rather to give the requesting court or tribunal guidance on Convention issues when determining the case before it […]. [The] requesting court or tribunal must have reflected upon the necessity and utility of requesting an advisory opinion of the Court, so as to be able to explain its reasons for doing so [and be] in a position to set out the relevant legal and factual background, thereby allowing the Court to focus on the question(s) of principle". A list then follows of the various elements the requesting court or tribunal should present.

2. Article 2: treatment of requests and delivery of advisory opinions

Amongst other things, Article 2 of the protocol covers the issue of whether or not the Court should have a discretion to refuse a request for an advisory opinion. The Group of Wise Persons had recommended that it should, as had the Norwegian/Dutch proposal. During the drafting process, it was considered that the Court should have "some" discretion to refuse but that this should not be unfettered: "the grounds for exercising it should be specified. These grounds should not include reference to the Court's workload […] it may be necessary to expand the grounds for the Court exercising its discretion beyond the substantive […] and procedural […] grounds". It was found to be difficult, however, to be too prescriptive in the text of the protocol itself. The final phrase of Article 2(2) therefore states only that the decision on whether or not to accept a request is to be made "having regard to Article 1"; with the States' expectation "that the Court would hesitate to refuse a request that satisfies the relevant criteria […] as set out in paragraphs 2 and 3 of Article 1" recorded in the Explanatory Report.

90 The Court in its Reflection Paper had also opposed this possibility.

91 See Information Note on references from national courts for a preliminary ruling, OJ C 160 of 28/5/2011, p. 1.

With respect to the procedure for examining requests, there was agreement that the procedure should mirror that under Article 43 of the Convention concerning requests for referral to the Grand Chamber, with the decision to be taken by a panel of five judges of the Grand Chamber (see Article 2(1)).

The Wise Persons had thought that Court should not have to give reasons for refusing a request (as is the case under Article 43 of the Convention). The Norwegian/Dutch proposal concurred, and the Court, in its Reflection Paper, thought that it could have a discretion but not a duty to give reasons.[92] The majority of States, however, thought otherwise, and after initially considering that the point could be sufficiently addressed in the Explanatory Report, it was decided to include it in Article 2(1) of the protocol itself.[93] The Explanatory Report gives additional detail, noting that the requirement "is intended to reinforce dialogue between the Court and national judicial systems, including through clarification of the Court's interpretation of what is meant by 'questions of principle' [as defined in Article 1] […] which would provide guidance to domestic courts and tribunals when considering whether to make a request". The Court, in its Opinion on the draft protocol, subsequently accepted that "it may be useful to give reasons. Such an approach would enhance the aim of creating a constructive dialogue with the national courts".

It was agreed that advisory opinions should only be delivered by the Grand Chamber, as is the case for advisory opinions under Article 47 of the Convention. Both the panel of five judges and the Grand Chamber will include *ex officio* the judge elected with respect to the High Contracting Party of the requesting court, or, if unavailable, another appointed by the Court President from a list submitted in advance by that Party. The Explanatory Report states that "This procedure is intended to be identical to that established under Article 26, paragraph 4 of the Convention and to be based upon the same list".

3. Article 3: participation in advisory opinion proceedings of other interested parties

Article 3 of the protocol covers what were at one stage referred to as "third party interventions" but which will not in fact be such, as there will be no adversarial proceedings in which a "third party" could intervene. The Wise Persons, with whom the Norwegian/Dutch proposal agreed, had suggested that, "to enhance the judicial authority of this type of advisory opinion, all the States Parties to the Convention should have the opportunity to submit observations". This was refined in the CDDH Activity Report, which mentioned the government of the relevant High Contracting Party, as of right, and discussed also the possibility of including the parties to domestic proceedings and other High Contracting Parties. It was also agreed that the Council of Europe Commissioner for Human Rights should be able to participate by right, reflecting the position under Article 36(3) of the Convention with respect to third party interventions in Chamber and Grand Chamber proceedings.

92 The Court, in its Reflection Paper, initially preferred an approach by which it would "adopt a set of general guidelines on requests by national courts for advisory opinions explaining the scope, the aim and the functioning of the procedure, to which it could possibly refer in case of the rejection of a request".

93 "The panel shall give reasons for any refusal to accept the request."

As to the participation of "other" High Contracting Parties, arguments in favour included that it would enhance knowledge of the Court's interpretation of the Convention, increase the impact and authority of an advisory opinion and better inform the Court of the wider context; arguments against, that it would create asymmetry (as a court rather than a government would have made the original request) and delay proceedings. Some of the observers strongly supported the idea of giving the parties to the underlying domestic proceedings the right to participate, and also of providing legal aid to this end, but it was pointed out that "parties" would imply different things in different legal systems and jurisdictions.

The final text of Article 3 thus provides that "The Council of Europe Commissioner for Human Rights and the High Contracting Party to which the requesting court or tribunal pertains shall have the right to submit written comments and take part in any hearing. The President of the Court may, in the interest of the proper administration of justice, invite any other High Contracting Party or person also to submit written comments or take part in any hearing", this second provision reflecting the situation with respect to third party interventions. The Explanatory Report notably observes that "It is expected that the parties to the case in the context of which the advisory opinion had been requested would be invited [by the Court President] to take part in the proceedings" and clarifies that "It will be for the Court to decide whether or not to hold a hearing".

4. Article 4: content, communication and publication of advisory opinions

Article 4(1) requires that "Reasons shall be given for advisory opinions". This reflects the situation under Article 49 of the Convention in relation to advisory opinions under Article 47. Similarly, Article 4(2) of the protocol allows a judge sitting on the Grand Chamber giving an advisory opinion to deliver a separate (dissenting or concurring) opinion. Article 4(3) requires the Court to communicate an advisory opinion to the requesting court and the relevant High Contracting Party. A proposal that it be communicated also to all other High Contracting Parties was rejected on the basis that if so, it should be communicated to all interested parties, which would be impossible in practice; the Explanatory Report, however, records the expectation "that the advisory opinion would also be communicated to any other parties that have taken part in the proceedings" under Article 3. Article 4(4) provides that advisory opinion shall be published. A proposal that the panel's decision to refuse a request also be published was rejected on the basis that it "may not contribute to enhancing dialogue between judges".

The Explanatory Report on Article 4 also addresses the issue of languages, which was of particular difficulty. The starting point for discussions was the observation that most national courts do not work in either English or French, the official languages of the Council of Europe and hence of the Court. In the course of these discussions, it was recalled repeatedly that the Court was already habituated to receiving individual applications made in national official languages other than English or French. From this, it was concluded that the Court would also be able to accommodate requests for advisory opinions made in the official language of the requesting court. It was further observed that some requesting courts may have problems admitting into their proceedings an advisory opinion not in the national official language. A survey of member States concluded, however, that "none of the replies

reported insuperable problems preventing the admission into domestic proceedings of an advisory opinion not in a national official language and that none insisted on resolution in the Protocol itself of whatever problems or difficulties that may exist".

A proposal that the Court be explicitly required to publish an advisory opinion in both official languages was rejected on the basis that the Convention did not require this for judgments and, in any case, it was already the Court's practice to publish Grand Chamber judgments and advisory opinions under Article 47 of the Convention in both languages. Also rejected was a proposal that the Court be required to defer publication of an advisory opinion until it had been translated into the official language of the requesting court, as there was seen to be no good reason thus to favour the requesting court, and to do so could cause delays in the domestic proceedings.

Since concerns nevertheless persisted, the eventual compromise was to underline in the Explanatory Report "the sensitivity of the issue of the language of advisory opinions" and to suggest that, should there be concerns that the time required for translation would otherwise unduly delay the resumption of the underlying domestic proceedings, "it may be possible for the Court to co-operate with national authorities in the timely preparation of such translations".

The sole reservations expressed by the Court in its Opinion on the draft protocol concerned these language issues. It noted "that the possibility of submitting the request in [a non-official] language is not included in the text of the Protocol. The Court is opposed to the proposal that it should be for it to ensure translations of such requests and accompanying documents […] the result is to impose on the Court a costly burden of translation". The Court also had "hesitations" towards the suggestion that it "co-operate" in preparing translations of advisory opinions, which "could involve a considerable increase in its workload"; should it be required to perform this task, "the corresponding budgetary resources must be made available to it". The Parliamentary Assembly, in the explanatory memorandum to its own Opinion, agreed with these concerns.

5. Article 5: legal effect of advisory opinions

Behind the brief wording of Article 5 – "Advisory opinions shall not be binding" – lay lengthy and complex discussions. The Group of Wise Persons' and Norwegian/Dutch proposals provided that advisory opinions would not be binding. Some, however, subsequently suggested that a system of binding rulings would be preferable.

The CDDH Activity Report therefore examined the arguments for and against both possibilities. In favour of binding "opinions", it considered that they would be more effective, and it was suggested that the Court's authority would suffer if a domestic court declined to follow an advisory opinion; against, that it was not necessary for an advisory opinion to be binding as it was unlikely, in an optional procedure, that the requesting court would not follow it. Concerning non-binding opinions, there were questions as to the consequential domestic effects beyond the underlying case, and it was pointed out that the Court would always be able to "sanction" non-adherence to an advisory opinion through judgment on a subsequent related individual application. It was also noted that most international courts' advisory opinions were not binding. Slovenia suggested the addition to Article 5 of the

words "[…] but the requesting national court shall, in accordance with domestic law, address the positions from the advisory opinion in its decision", intended to ensure that it at least take full account of an advisory opinion, but this was not retained.

The Explanatory Report states that advisory opinion proceedings "take place in the context of the judicial dialogue between the Court and domestic courts and tribunals. Accordingly, the requesting court decides on the effects of the advisory opinion in the domestic proceedings".

6. Article 6: additional (optional) protocol

Article 6, in the words of the Explanatory Report, "reflects the fact that acceptance of the Protocol is optional for High Contracting Parties to the Convention". This is in accordance with the approach taken consistently throughout discussions, including in the Report of the Group of Wise Persons, the 2012 CDDH Activity Report and the Brighton Declaration. Indeed, the fact that the new procedure would be optional was instrumental in its eventual acceptance by the States as a whole.[94]

7. Article 8: entry into force

Article 8 provides that the protocol will enter into force once it has received ten ratifications. At first, there had been a preference for an absolute minimum – even only one – in order to allow the system to come into effect as quickly as possible and other States thereafter to observe its operation in practice. This rush of enthusiasm subsequently abated in favour of a more conservative approach. The final choice was thus for ten ratifications, in line with the usual practice for additional protocols to the Convention such as Protocol no. 9, as mentioned in the Explanatory Report.

8. Article 10: specification of "highest courts or tribunals"

Article 10 sets out the procedure whereby High Contracting Parties make declarations designating which of their "high" courts or tribunals will be able to request an advisory opinion. It also allows for this choice at any time to be modified in the same manner.

9. Other issues

Before finishing with Protocol no. 16, it is worth examining certain other issues that arose during discussions.

The possible effect of the new procedure on the Court's case-load was a matter of constant concern. It had been one of the main reasons for the DH-S-GDR's initial reluctance to pursue the proposal in 2008, and even the Group of Wise Persons had stated that it was aware of "the repercussions which the proliferation of requests for opinions might have on

94 As were the facts that requests are optional and advisory opinions non-binding.

the Court's workload and resources". On the one hand, it was argued that whilst there may be an increase in work-load in the short-term, this would be more than offset in the long-term by a reduction in individual applications due to better understanding and implementation of the Convention at national level. On the other hand, these possible long-term consequences were considered to be too uncertain or too remote. In relation to aspects such as the type of domestic court that may request an advisory opinion, or the nature of the legal question on which the opinion would be given, efforts were therefore made to ensure that the impact on the Court's case-load be as limited as possible, whilst ensuring that the procedure be effective in achieving its long-term aims. Only time, and the practical operation of the new procedure, will confirm whether the right balance has been struck.

The question of whether or not advisory opinion proceedings should be given priority by the Court was also discussed at length. The Norwegian/Dutch proposal had suggested that "Requests should be given priority by the Court"; the CDDH, in its 2012 Activity Report, had concurred. It was proposed that the panel be given a three month deadline to decide on requests, so as to avoid delay in the underlying domestic proceedings. In response, it was argued that if there were no consequences for failure to respect the deadline, it would serve little purpose, and noted that there may also be delay in delivery of an advisory opinion after a request had been accepted. Should there be undue delay, the requesting court could always withdraw its request. Furthermore, it would be unfair on non-parties to the protocol to prioritise the allocation of scarce Court resources to advisory opinion proceedings. In the end, it was agreed that the Court should be able to set its own priorities, as for all other types of proceedings. The Explanatory Report, however, notes that "the nature of the question [as defined in Article 1(1)] […] suggests that such proceedings would have high priority. This high priority applies at all stages of the procedure and to all concerned, namely the requesting court or tribunal, which should formulate the request in a way that is precise and complete, and those that may be submitting written comments or taking part in […], as well as the Court itself". In its Opinion on the draft protocol, the Court accepted "the need for expeditious handling of requests and simply recalls that this requires the cooperation of all those concerned".

A particularly sensitive issue was whether or not the delivery of an advisory opinion should lead to restrictions on the right of to make an individual application relating to the same issue. The Norwegian/Dutch proposal had suggested that delivery of an advisory opinion would "not in any way" restrict the right of an individual to bring an application on the same question. Some subsequently argued that an advisory opinion that had been followed by the requesting court should not be susceptible to challenge "in substance" through an individual application, and that leaving the right of individual application unrestricted would make the procedure less effective in reducing the Court's future case-load. Others, however, responded that the right of individual application was central to the Convention system and should not be restricted; that advisory opinions would be on questions of interpretation, whereas an individual application concerned a concrete legal and factual situation; and that certainly if an advisory opinion were not followed, the individual concerned must retain the right to apply to the Court.

In the end, it was agreed that the right of individual application should not be restricted but that the Explanatory Report should record the expectation that "where an application

is made subsequent to proceedings in which an advisory opinion of the Court has effectively been followed, […] such elements of the application that relate to the issues addressed in the advisory opinion would be declared inadmissible or struck out".

As reflected at several points above, a recurrent theme during discussions was the significance of allowing a domestic court to request an advisory opinion from the Strasbourg Court to judicial dialogue between the two. The Group of Wise Persons had argued that "This is an innovation which would foster dialogue between courts", and the Court's Reflection Paper noted that it "could serve to create an institutionalised dialogue between these domestic courts and the Court. This may reinforce both the role of the Court and its case-law and that of the domestic courts in protecting human rights"; the explanatory memorandum to the Parliamentary Assembly's opinion made similar observations. Court President *Dean Spielmann* has more recently stated that "I have always been strongly in favour of giving the highest national courts the opportunity to engage in such dialogue with our Court and that is why I named Protocol No. 16 'the dialogue protocol'".[95]

Of course, the extent to which such a dialogue takes place will in part depend on how the system is implemented by the Court itself. The protocol deliberately avoids regulating the procedure in detail, a task which will thus inevitably be left to the Rules of Court, which will also be susceptible to further development in the light of accumulated experience. There would seem to be considerable leeway in how relations between the requesting court and the Strasbourg Court are structured and how the interaction between them is conducted. Whether there will be a minimal, vertical exchange between the two consisting of submission of request followed by delivery of advisory opinion, or whether there will be a more extensive, horizontal engagement involving substantive discussion and a search for mutual comprehension, even agreement, remains to be seen. It may be imagined, however, that the more the Strasbourg Court is seen constructively to engage with a requesting court, and the more that court is seen to have an effective opportunity to impress its views on the Strasbourg Court, the greater will be the attraction of the system for domestic courts and, presumably, for High Contracting Parties to 'opt in' to it. In principle, the only constraints should relate to subsidiarity, the conclusive nature of the Court's jurisdiction under Article 32 of the Convention,[96] the need for efficiency and to respect the principle of finality, and the requirement of equal treatment of states.

The extent of the impact of advisory opinions has also been seen from the wider perspective of the Court's position within the Convention system. The Wise Persons had considered that "This is an innovation which would […] enhance the Court's 'constitutional' role". The Court's Reflection Paper, whilst (perhaps deliberately) avoiding the delicate term "constitutional", elaborated further on the wider advantages of the new system by noting that "Advisory opinions provide an opportunity to develop the underlying principles of law in a manner that will speak to the legal systems of all the Contracting Parties. They may therefore be of comparable significance to the Court's leading judgments and foster a harmonious interpretation of the minimum standards set by the Convention rights and thus

95 Intervention before the 78th CDDH meeting.

96 "[A]ll matters concerning the interpretation and application of the Convention and the Protocols thereto […]."

an effective protection of human rights throughout the Contracting States. They would provide an occasion to have a discussion on essential questions concerning the interpretation of the Convention in a possibly larger judicial forum. They could complement the existing pilot-judgment procedure – without necessarily being limited to cases revealing structural or systemic problems in a Contracting State. The procedure would thus allow the Court to adopt a larger number of rulings on questions of principle and to set clearer standards for human rights protection in Europe".

During drafting, however, several States expressed their reservations concerning the possible effect of advisory opinions on "other" High Contracting Parties; indeed, the Brighton Declaration stated that they should be "without prejudice to the non-binding character of the opinions for the other States Parties". Poland, for example, argued that "Advisory opinions should not be considered as general comments to the Convention or as its binding interpretation that would be later cited and applied in the Court's rulings in other cases against the same or any other High Contracting Party, nor should they depart from the existing case-law."

Others, however, accepted that "the opinion forms part of the general case-law of the Court, of which national authorities must take account" (France); Denmark, for example, noted their "guiding effect on later cases in clarifying the Court's interpretation of the Convention, regardless of whether a later case concerns the same High Contracting Party or another High Contracting Party". This was consistent with the position of the Court in its Reflection Paper, where it stated that "the Court itself should consider them as valid case-law which it would follow when ruling on potential subsequent individual applications. Despite the fact that advisory opinions would not have the binding character of a judgment in a contentious case, they would thus have 'undeniable legal effects'".[97]

These differences led to lengthy discussion of the relevant text of the Explanatory Report, with a compromise result: "Advisory opinions under this Protocol would have no direct effect on other later applications. They would, however, form part of the case-law of the Court, alongside its judgments and decisions. The interpretation of the Convention and the Protocols thereto contained in such advisory opinions would be analogous in its effect to the interpretative elements set out by the Court in judgments and decisions." It is nevertheless hard to see how the matter will not ultimately be a matter for the Court itself as part of its overall role in interpreting the Convention.

It is also worth noting that the Court sees potential for further such innovations: "If [the introduction of the new procedure] was done in a successful manner, it would be one of a number of procedural reforms, which could, once adopted, allow the Court to hand down more important rulings on questions of principle or of general interest relating to the interpretation and application of the Convention and at the same time reinforce the domestic courts' role in implementing the Convention".[98]

97 Some went further: the European Group of National Human Rights Institutions considered that "an opinion being an interpretation of the Convention, and the European Court being the ultimate organ responsible for the interpretation of the Convention, there is no reason for an advisory opinion not to be binding on the States parties".

98 Proposals such as those envisaged by the Court may well appear during forthcoming work on "longer-term reform".

VII. Conclusions and prospects for the future

If Protocol no. 14 was the "reform of the reform", then Protocol no. 15 can be seen as the "reform of the reform of the reform". In reality, however, each is more than that. Article 1 of Protocol no. 15 on subsidiarity and the margin of appreciation, even if in the end it has no practical impact, reflects real concerns on the part of certain States and others about the jurisdiction of the Court and the way in which it interprets and applies the Convention. Article 3 on relinquishment relates to an essential element of the compromise underpinning Protocol no. 11 and further refines the adjudicatory mechanism towards a single level of jurisdiction. Even Article 5 amending the "significant disadvantage" admissibility criterion has its own significance, in that it reinforces a measure that had refined the Court's role in protecting human rights.[99]

Protocol no. 16, of course, is of more immediately apparent importance. However it is implemented, it will create a significant change in the relationship between the Court and domestic judicial systems. If successful, it may open the way to further developments that could radically alter the role of the Court and the functioning of the overall Convention system.[100]

Behind these "headline" legal instruments, however, lie even broader discussions and negotiations on the most profound issues, including the purpose and content of the right of individual application, the relationship between domestic authorities and the Strasbourg Court and the extent of the latter's powers of review. On the one hand, the Convention plays an increasing role as a "constitutional instrument of European public order", with the Court's developing case-law ensuring its continuing relevance in the face of new challenges and its developing internal practice further refining its role and sharpening its focus.[101] On the other, this very evolution provokes debate on the proper limits of the role of an international judicial mechanism with respect to the democratic institutions of a sovereign state. Alongside this, the problems of the numbers of repetitive and Chamber cases have grown in prominence and visibility; and whilst Protocol no. 14 may have laid a basis for responses to the former, it is less apparent how the Court will be able to address the latter.[102]

99 As of 6 February 2014, Protocol no. 15 had been signed by 29 High Contracting Parties and ratified by 5. As an amending protocol, it requires the ratification of all 47 High Contracting Parties for entry into force.

100 As of 6 February 2014, Protocol no. 16 had been signed by 9 High Contracting Parties and ratified by none. An additional protocol, it requires the ratification of 10 High Contracting Parties for entry into force.

101 In this respect, one can note developments such as the pilot judgment and "expedited committee" procedures (on the latter, see the CDDH report on responses to "systemic issues", doc. CDDH(2013)R78, Addendum III) and its "priority policy".

102 The Court has stated its intention to exploit more creatively the committee procedure: for example through a "default judgment procedure", and a broader interpretation of "well-established case-law" allowing some current Chamber cases to be dealt with in committees; so far, however, States have shown little enthusiasm for these ideas.

Tensions between the various principles involved have prevented agreement on many of the proposals examined. Indeed, such tensions have been present since before the birth of the Convention itself, but the system has nevertheless been able constantly to evolve in response to new challenges. Protocols no. 15 and 16 thus find their place in the long-running, ongoing process of reform as both milestones and foundations for the future, whatever that may bring.