



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

**SOME REFLECTIONS ON PROTOCOL No. 16**

*Speech by Síofra O'Leary and Tim Eicke, Judges elected in respect of Ireland and the United Kingdom.*

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**I - Introduction**

On 12 April 2018, France became the tenth High Contracting Party to the European Convention on Human Rights to deposit its instrument of ratification of Protocol No. 16 to the Convention. As a consequence, Protocol No. 16 entered into force on 1 August 2018.<sup>1</sup> Since then, Andorra, Greece and the Netherlands have also ratified the new protocol. The latter extends the advisory jurisdiction of the Court, allowing it to provide advisory opinions, at the request of identified courts of the state's parties to the Protocol, on "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto".<sup>2</sup> Prior to the entry into force of Protocol No. 16, the Court's plenary adopted both the necessary amendments to the Rules of Procedure as well as non-binding Guidelines on the implementation of this new procedure. The latter Guidelines are intended to offer practical assistance to those courts and tribunals with competence to submit a request for an advisory opinion on the initiation of the request and the procedure to be followed. At the time of the seminar on the occasion of the opening of the judicial year, the first request for an advisory opinion, lodged by the French Court of Cassation on 16<sup>th</sup> October 2018, had been accepted and was pending before the Grand Chamber. At the time of writing, the first advisory opinion had been handed down by the Court in that case and a second request had been received from the Armenian Constitutional Court.<sup>3</sup>

This paper focuses on some key issues relating to the entry into force of the Protocol and on questions relating to the nature and effects of future advisory opinions and some procedural questions to which they may give rise. We will first touch briefly on the history and origins of Protocol No. 16 (II), the aims which this new advisory procedure is meant to achieve (III), before proceeding to distinguish between the characteristics of the new procedure (what the Explanatory Report refers to as "key parameters") (IV) and procedural issues relating to their future treatment within this Court (V).<sup>4</sup>

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<sup>1</sup> Article 8(1) of Protocol No. 16. The other nine states which have so far ratified the protocol are Albania, Armenia, Estonia, Finland, Georgia, Lithuania, San Marino, Slovenia and Ukraine. A further twenty two states have signed it. Article 6 emphasises that acceptance of Protocol No. 16 is optional (see further below) and the latter does not have the effect of introducing new provisions into the ECHR for those High Contracting Parties that do not accept it.

<sup>2</sup> See below for further discussion of this criterion. Provision for advisory opinions is of course already made in Articles 47-49 of the Convention but both those who can request such opinions (the Committee of Ministers), and the scope of what they may cover, are restricted. Two such requests were made up until 2008 and only one was accepted by the Court.

<sup>3</sup> See the short addendum below for further details.

<sup>4</sup> Note that preliminary draft amendments to the Rules of Court were submitted to Governments and interested NGOs in 2015, inviting them to comment by the end of November 2015. Comments were received by two governments and from certain NGOs in a collective response.

As serving judges, we do not perceive our role as being in any way to applaud or, on the other hand, criticise the protocol. It is clear that it is for the High Contracting Parties to decide whether and when to sign and ratify the latter. Now it is in force, it will be for the Court to apply it. The paper seeks merely to consider and discuss the protocol's practical consequences, to alert readers to questions and possible problems before they present themselves and, of course, in the context of an annual seminar dedicated to judicial dialogue, to listen to the points raised by visiting judges.

Finally, by way of an introductory note, we are aware that it may be tempting, when reflecting on the effects of Protocol No. 16, to compare it with the preliminary reference procedure which is the CJEU's main judicial engine. However, it is important, in this context, to bear in mind the conclusion reached by the Group of Wise Persons in its 2006 Report. Working under the chairmanship of Mr Gil Carlos Rodríguez Iglesias, previously President of the CJEU, the Report noted that:

"In this connection, the introduction of a preliminary ruling mechanism on the model of that existing in the European Union was discussed. However, the Group reached the conclusion that the EU system is unsuitable for transposition to the Council of Europe. The preliminary ruling mechanism represents an alternative model to the judicial control established by the Convention, which requires domestic remedies to be exhausted. The combination of the two systems would create significant legal and practical problems and would considerably increase the Court's workload."<sup>5</sup>

So while the two procedures may bear some similarities, and there is no doubt that the procedural and judicial lessons learned with reference to the established Luxembourg procedure may be useful when developing the Strasbourg one, the two procedures are by no means identical, nor were they intended to be. Cross references to the Luxembourg procedure should not be interpreted as an indication to the contrary.

## II - History

Before considering the detail of the substantive provisions of the Protocol, it may help to take a brief look at the origins and the major steps in the history of the idea of empowering the Court to give advisory opinions at the request of national courts.

The aforementioned *Report of the Group of Wise Persons* to the Committee of Ministers first suggested that:

"[...] it would be useful to introduce a system under which the national courts could apply to the Court for advisory opinions on legal questions relating to interpretation of the Convention and the protocols thereto. This is an innovation which would foster dialogue between courts and enhance the Court's 'constitutional' role."<sup>6</sup>

That 2006 Report went on to suggest that:

"84. [...] 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 to the Court on the legal issues on which an opinion is requested.

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<sup>5</sup> Report of the Group of Wise Persons to the Committee of Ministers, Document CM(2006)203([https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805d7893](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d7893); last accessed 23 September 2019), §80

<sup>6</sup> *Ibid.* § 81.

85. The Group is aware of the repercussions which the proliferation of requests for opinions might have on the Court's workload and resources, since the requests for opinions and the member states' observations would also need to be translated. In addition, providing such opinions would not be the Court's principal judicial function. Accordingly, the Court's new advisory jurisdiction should be subject to strict conditions.

86. It is proposed in this connection that:

- a) only constitutional courts or courts of last instance should be able to submit a request for an opinion;
- b) the opinions requested should only concern questions of principle or of general interest relating to the interpretation of the Convention or the protocols thereto.
- c) the Court should have discretion to refuse to answer a request for an opinion. For example, the Court might consider that it should not give an answer in view of the state of its case-law or because the subject-matter of the request overlaps with that of a pending case. It would not have to give reasons for its refusal."

The next step appears to have been a joint proposal by the Dutch and Norwegian experts in January 2009 to extend the Court's jurisdiction to give advisory opinions:<sup>7</sup>

- a. A request for an advisory opinion could only be made in cases revealing a potential systemic or structural problem.
- b. A request could only be made by a national court against whose decision there is no judicial remedy under national law.
- c. It should always be optional for the national court to make a request.
- d. The Court should enjoy full discretion to refuse to deal with a request, without giving reasons.
- e. All States Parties to the Convention should have the opportunity to submit written submissions to the Court on the relevant legal issues.
- f. Requests should be given priority by the Court.
- g. An advisory opinion should not be binding for the State Party whose national court has requested it.
- h. The fact of the Court having given an advisory opinion on a matter should not in any way restrict the right of an individual to bring the same question before the Court under Art. 34 of the Convention.
- i. Extension of the Court's jurisdiction in this respect would be based in the Convention."

In February 2012, in preparation for the Brighton Conference in April that year, the Court issued a *Reflection Paper* on the proposal to extend its jurisdiction to provide such advisory opinions.<sup>8</sup>

The Brighton Declaration of 20 April 2012 stated that:

"[...] the interaction between the Court and national authorities could be strengthened by the introduction into the Convention of a further power of the Court, which States Parties could optionally accept, to deliver advisory opinions upon request on the interpretation of the Convention in the context of a specific case at domestic level, without prejudice to the non-binding character of the opinions for the other States Parties; invites the Committee of Ministers to draft the text of an optional protocol to

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<sup>7</sup> Summarised in document CDDH(2012)R74 Addendum I, Appendix V (<https://rm.coe.int/090000168045fdc5>; last accessed 23 September 2019)

<sup>8</sup> [http://echr.coe.int/Documents/Courts\\_advisory\\_jurisdiction\\_ENG.pdf](http://echr.coe.int/Documents/Courts_advisory_jurisdiction_ENG.pdf); last accessed 23 September 2019.

the Convention with this effect by the end of 2013; and further invites the Committee of Ministers thereafter to decide whether to adopt it.”<sup>9</sup>

The proceedings of the Brighton Conference record the head of the Dutch delegation as stating that:

“We are particularly pleased to see a reference to an optional protocol on advisory opinions. We believe this will strengthen the dialogue between the Court and domestic legal orders and reinforce the principle of subsidiarity. By introducing advisory opinions, we aim to alleviate the Court’s work load in the long term.”<sup>10</sup>

The drafting of the Protocol having been completed, on 6 May 2013 the Court adopted its “Opinion of the Court on Draft Protocol No. 16 to the Convention extending its competence to give advisory opinions on the interpretation of the Convention”<sup>11</sup> and Protocol No. 16 was opened for signature on 2 October 2013.

### **III - Aims and objectives of the advisory opinion procedure**

The extension of the Court’s advisory jurisdiction is, according to the preamble of Protocol No. 16, to enhance the interaction between the Court and national authorities with a view to reinforcing the implementation of the ECHR in accordance with the principle of subsidiarity.<sup>12</sup> As can be seen from its history and origins, the advisory opinion procedure is intended to be a further, concrete manifestation of that principle.

Subsidiarity is of course a two-sided principle. The Court’s supervisory role is subsidiary because it is the primary responsibility of the Member States to protect human rights within their jurisdiction. Advisory opinions are thus intended to provide assistance to Member States so as to avoid future violations, facilitate the correct interpretation of the Convention within national legal orders and, in this context, enhance judicial dialogue. In the process, it is hoped advisory opinions might alleviate the Court which, despite a remarkable decrease in its stock of cases in recent years due to the introduction of new procedures and working methods,<sup>13</sup> is confronted by an untenable number of individual applications and decreasing financial resources to deal with them.

The aim of the procedure is not to transfer the national dispute to the Court, but rather to give the requesting court or tribunal guidance on Convention issues when it subsequently determines the case before it. This is reflected in the procedural requirements discussed further below. Presumably, it is thought that if superior courts follow the advisory opinion of the Court, the interpretation of the Convention provided by the latter will gain more traction within the domestic legal system as lower courts will be bound (whether as a matter of fact or law) to follow the lead of their superior courts.

### **IV - Key parameters of the advisory opinion procedure**

Articles 1 and 5 of the protocol establish what the key parameters or characteristics of the procedure will be.

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<sup>9</sup> Paragraph 12 (d) of the Brighton Declaration.

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805caa07>; last accessed 23 September 2019.

<sup>10</sup> <http://rm.coe.int/high-level-conference-on-the-implementation-of-the-european-convention/1680695a9c>; last accessed

<sup>11</sup> [http://www.echr.coe.int/Documents/2013\\_Protocol\\_16\\_Court\\_Opinion\\_ENG.pdf](http://www.echr.coe.int/Documents/2013_Protocol_16_Court_Opinion_ENG.pdf); last accessed 23 September 2019

<sup>12</sup> Note that, with Protocol No. 16 entering into force before Protocol n° 15, this would mean that the first explicit reference to subsidiarity in the ECHR would derive from the former and not the latter and be the consequence of ratification by a reduced number of Contracting States.

<sup>13</sup> Numbers (rounded up) of cases allocated to a judicial formation of the ECHR: 150,000 in 2011; 65,000 in 2015; 80,000 in 2016; and 30,500 between 1 January and 31 August 2019.

## **1. Which courts can request an advisory opinion?**

Advisory opinions can be requested by the “highest courts or tribunals [...] as specified by [the High Contracting Party] under Article 10”.<sup>14</sup>

Use of the term “highest”, as opposed to “the highest”, as well as enabling/requiring High Contracting Parties to specify the domestic courts who may request an advisory opinion from the Court suggest a more generous approach than initially envisaged (whereby limiting such a right to “national courts against whose decision there is no judicial remedy under national law” was envisaged). The intention appears to have been to permit the 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. The idea was also to allow the necessary flexibility to accommodate the particularities of forty seven different national judicial systems.

By restricting the courts which can request advisory opinions, the intention is not only to reflect the exhaustion of domestic remedies rule but also to avoid a proliferation of requests and to identify the appropriate level at which the intended judicial dialogue should take place. As the declarations lodged thus far reveal, High Contracting Parties vary considerably in their approach. Finland, for example, has declared that the Supreme Court, the Supreme Administrative Court, the Labour Court and the Insurance Court may all request advisory opinions.<sup>15</sup> In contrast, Estonia and the Ukraine have declared that only their Supreme Courts may request advisory opinions,<sup>16</sup> while Romania, which has signed but not ratified the protocol, has designated fifteen courts of appeal, the High Court of Cassation and Justice and the Constitutional Court.

## **2. Optional nature of the advisory opinion procedure – request and withdrawal**

Relevant courts or tribunals *may* request the Court to give an advisory.<sup>17</sup>

Several interesting questions may develop despite the optional nature of the procedure. Could, for example, the highest court with jurisdiction to refer a request be obliged to reason any refusal to do so if one of the parties to the domestic proceedings had explicitly urged the national court to request an advisory opinion? An analogy which could be drawn is with the Court’s Article 6 case-law requiring national courts whose decisions were not open to appeal under domestic law to give reasons, based on the applicable law and the exceptions laid down in CJEU case-law, for their refusal

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<sup>14</sup> See Article 1(1) of Protocol No. 16. According to Article 10(2) of the protocol, the declaration designating courts or tribunals for the purposes of Article 1(1) may be modified by the High Contracting Party at any later date.

<sup>15</sup> Declaration contained in the instrument of ratification deposited on 7 December 2015.

<sup>16</sup> Declarations contained in the instrument of ratification deposited on 31 August 2017 (Estonia) and 22 March 2018 (Ukraine) respectively.

<sup>17</sup> See Article 1(1) of Protocol No. 16 and Rule 92(1) of the Rules of Court. This is the first and major difference to be noted with the EU preliminary reference procedure. See, in particular, the judgment in *Cilfit and Others*, 283/81, EU:C:1982:335, paragraph 21: “In accordance with the third paragraph of Article 267 TFEU, a court or tribunal against whose decisions there is no judicial remedy under national law *is required*, where a question of EU law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the provision of EU law in question has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt”. In addition, preliminary references on the validity of EU legislation must be referred: “courts may consider the validity of a Community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. [...] On the other hand, those courts do not have the power to declare acts of the Community institutions invalid. [...] where the validity of a Community act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice.” (*Foto Frost*, 314/85, EU:C:1987:452, paragraphs 14, 15 and 17). On withdrawal of a preliminary reference, see below for a temporal restriction.

to refer a preliminary question on the interpretation of EU law.<sup>18</sup> However, there are of course important distinctions – not least the obligatory nature of the EU preliminary reference procedure for courts of last resort (subject to certain well-defined exceptions) or the importance of the preliminary reference procedure in the context of the presumption of equivalence which the Strasbourg court operates in relation to the protection of fundamental rights in the EU.<sup>19</sup>

The advisory opinion procedure is not only optional but the requesting court may, according to the Explanatory Report, withdraw its request. Rule 92(2.3) of the Rules of Court provides that it must notify the Registrar in the event of withdrawal, upon receipt of which the Court shall discontinue the proceedings.

There is no indication whether a request must be withdrawn within a specific time-limit. For example, if the Court has set a date for the pronouncement of an advisory opinion could a requesting national court withdraw its request at that late stage?<sup>20</sup> One approach would be, by analogy with contentious proceedings before the Court, that withdrawal should be possible at any stage until pronouncement by the Grand Chamber. Time alone will tell if a restriction on the entitlement to withdraw after a certain time-limit becomes necessary.

Withdrawal also raises issues regarding notification of the discontinuance of the advisory procedure by the Court under Rule 92(2.3). Should the Court be responsible for notifying the Member State from which the request originated, the parties, the third party interveners etc.? Will a specific type of order or act, announcing a strike out or discontinuance be required? If so, its form and language will have to be worked out. These may seem mundane questions but considering the Court's docket and increasingly limited resources they may be of some considerable administrative relevance depending on the judicial "traffic" which the new protocol generates.

### **3. What type of questions fall within the scope of the advisory opinion procedure?**

As indicated previously, pursuant to Article 1(1), advisory opinions may be requested on "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto". The language of the latter provision reflects that of Article 43(2) ECHR on referral to the Grand Chamber although the two procedures are, of course, very different.

The definition of what comes within the scope of the advisory opinion procedure will be a matter for the Court, and in particular the Panel established under Article 2(1) of the Protocol, when deciding whether to accept a request for an advisory opinion. It is to be expected that a line of case-law will develop – on the basis of the Panel's reasons for refusal of such requests – on criteria for determining what questions fall within and without the scope of Protocol No. 16. This is certainly what has occurred at the level of the CJEU, where there is extensive case-law both on questions of the limits to the jurisdiction of the Court and the admissibility of requests for preliminary

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<sup>18</sup> See, variously, *Ullens de Schooten and Rezabek v. Belgium*, nos. 3989/07 and 38353/07, 20 September 2011; *Dhahbi v. Italy*, no. 17120/09, 8 April 2014; *Schipani and Others v. Italy*, no. 38369/09, 21 July 2015; *Baydar v. the Netherlands*, no. 55385/14, 24 April 2018 and *Repcevirág Szövetkezet v. Hungary*, no. 70750/14, 30 April 2019.

<sup>19</sup> See, in particular, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, §§ 160-65, ECHR 2005-VI; *Michaud v. France*, no. 12323/11, §§ 112-115, ECHR 2012; and *Avotiņš v. Latvia* [GC], no. 17502/07, § 110, ECHR 2016.

<sup>20</sup> The Rules of Procedure of the CJEU were amended in 2012 to avoid this possibility – see Article 100(1): "The withdrawal of a request [for a preliminary ruling] may be taken into account until notice of the date of delivery of the judgment has been served on the interested persons".

references.<sup>21</sup> It should be noted however that the Court itself envisaged in 2013 that “such reasons [for refusal] will normally [not] be [...] extensive”.<sup>22</sup>

The development of such case-law may also be of subsequent interest for those applying to the Grand Chamber referral panel under Article 43(2) and for the work of the referral panel itself. As the latter does not give reasons when it accepts or refuses a referral request,<sup>23</sup> there is no established case-law on what constitutes, within the meaning of Article 43(2), “a serious question affecting the interpretation or application of the Convention or Protocols thereto, or a serious issue of general importance”. Guidance on this issue has so far had to be deduced from the type of cases accepted by the panel for referral (insofar as possible) and from the Explanatory Report on Protocol No. 11, which refers to important questions on the interpretation and application of the ECHR, to cases where there may be a reason to revise well-established case-law and to cases raising an important matter of general interest.

#### **4. When can an advisory opinion be requested?**

An advisory opinion can only be made in the context of a case pending before the requesting court or tribunal.<sup>24</sup> The procedure is not intended to allow for abstract review of legislation.

The question arises whether, again drawing from the TFEU preliminary reference procedure, the Strasbourg Court will have to develop case-law to “police” this requirement. In the context of a procedure designed to enhance judicial dialogue and based, implicitly, on a principle of loyal cooperation, albeit not a formally established principle, a high degree of confidence will have to be accorded to the requesting court. However, even the existence of a recognised principle of loyal cooperation under EU law has not prevented the Luxembourg court on some, albeit rare, occasions from refusing to provide a preliminary ruling in circumstances where it considered the pending case to be fictitious or where a dispute was not really pending.<sup>25</sup> In addition, since the 1990s, that court has developed an extensive line of case-law examining whether the admissibility requirements in Article 267 TFEU, the Statute and the Rules of Procedure have been fulfilled. In short, just as the CJEU has insisted on its right and its duty to control the limits of its own jurisdiction, once Protocol No. 16 is in force, the ECtHR will need to consider – no doubt over time and informed by practical experience – whether and how far it needs to “police” compliance with this requirement and how far it can rely on a, if not express, at least implicit equivalent principle of loyal cooperation.

On the exclusion of requests involving abstract review of legislation from the scope of Protocol No. 16, the debate in France in the context of preparation for ratification of the protocol may be of some

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<sup>21</sup> See the digest of relevant CJEU case-law (in French), accessible at [https://curia.europa.eu/common/recdoc/repertoire\\_jurisp/bull\\_3/tab\\_index\\_3\\_04.htm](https://curia.europa.eu/common/recdoc/repertoire_jurisp/bull_3/tab_index_3_04.htm); last accessed 23 September 2019.

<sup>22</sup> ECtHR, Opinion of the Court on Draft Protocol No. 16 to the Convention extending its competence to give advisory opinions on the interpretation of the Convention, Strasbourg, 6 May 2013, Paragraph 9, [http://www.echr.coe.int/Documents/2013\\_Protocol\\_16\\_Court\\_Opinion\\_ENG.pdf](http://www.echr.coe.int/Documents/2013_Protocol_16_Court_Opinion_ENG.pdf); last accessed 23 September 2019.

<sup>23</sup> See paragraph 105 of the Explanatory Report to Protocol n° 11.

<sup>24</sup> Article 1(2) of Protocol No. 16.

<sup>25</sup> See, for example, *Foglia v. Novello*, 244/80, EU:C:1981:302, paras. 18-20: “the duty assigned to the Court by Article [267] is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States. It accordingly does not have jurisdiction to reply to questions of interpretation which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of [EU] law which do not correspond to an objective requirement inherent in the resolution of a dispute. [...] Whilst the spirit of cooperation which must govern the performance of the duties assigned by Article [267] to the national courts on the one hand and the Court of Justice on the other requires the latter to have regard to the national court's proper responsibilities, it implies at the same time that the national court, in the use which it makes of the facilities provided by Article [267], should have regard to the proper function of the Court of Justice in this field”. See also the judgment of the ICJ in *The Case concerning the Northern Cameroons (Cameroon v United Kingdom)(Preliminary Objections)* judgment [1963] ICJ Reports 15, 37 where the Court indicated that “[...] even if, when seised of an Application, the Court finds that it has jurisdiction, it is not obliged to exercise it in all cases. If the Court is satisfied, [...], that to adjudicate on the merits of an Application would be inconsistent with its judicial function, it should refuse to do so”. For a recent expression of the EU principle of sincere cooperation see *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, C-64/16, EU:C:2018:117.

interest. The draft law authorising ratification of the protocol was put before the *Assemblée nationale* on 20 December 2017. It designates the *Conseil d'État*, the *Cour de Cassation* and the *Conseil Constitutionnel* as the three highest courts which can seise the Strasbourg Court by virtue of Protocol No. 16. The designation of this latter court, whose task is to control the conformity of legislation with the French constitution has given rise to questions relating to whether a request for an advisory opinion by the *Conseil Constitutionnel* would comply with the criterion established by the protocol requiring a request for guidance in a concrete case, excluding abstract review.<sup>26</sup> The answer to this question is no doubt to be found in domestic law. However, the debate reveals the extent to which views on which domestic courts should be able to refer is likely to vary considerably from one State to the next.

### **5. The nature and jurisprudential effects of an advisory opinion**

As is clear from Article 5 of the protocol, advisory opinions are not binding.

In the context of the judicial dialogue in which they are handed down, it is the requesting court which decides on the effects of the advisory opinion in the domestic proceedings pending before it.

In addition, the handing down of an advisory opinion would not prevent a party to the case subsequently exercising their right of individual application under Article 34 ECHR. Where an application is made subsequent to proceedings in which an advisory opinion of the Court has effectively been followed, it could be expected that such elements of the application that relate to the issues addressed in the advisory opinion would be declared inadmissible or struck out. It is also possible, however, that the approach the Court would take with regard to such an application may be different, since the individual application is likely to address the challenged national interpretation of the Court's advisory opinion rather than the Court's interpretation of the Convention as such. This question remains open of course for the time being.

However, and here we signal quite personal views, the introduction of the advisory opinion procedure presents the Court with both tremendous opportunities and tremendous challenges.

On the one hand, it has the possibility, given the more "constitutional" nature of the new procedure<sup>27</sup> to express, clarify or develop general principles in a context broader than the individual facts of an individual case may permit. The Article 34 individual applications vehicle is subject to the risk – in certain cases, in certain circumstances and with reference to certain Convention questions – of obfuscating those general principles given the degree to which the relevant judicial formation concentrates on their application in the circumstances of a concrete case.<sup>28</sup>

The challenges posed by Protocol No. 16 will, in our view, be many, but two in particular are worth highlighting.

- a) The Court will first hand down an advisory opinion setting out the general principles to be applied as regards the interpretation and application of the ECHR but, in any subsequent individual application following the conclusion of the same case at national level, it will have to remain coherent and consistent both in terms of the expression of those same principles

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<sup>26</sup> See, for example, P. Cassia, «Le Conseil Constitutionnel et la procédure d'avis devant la Cour de Strasbourg», 9 January 2018 (<https://blogs.mediapart.fr/paul-cassia/blog/080118/le-conseil-constitutionnel-et-la-procedure-d-avis-devant-la-cour-de-strasbourg>; last accessed 23 September 2019). For discussion in a recent Strasbourg case of the type of review exercised by the *Conseil Constitutionnel* see *Charron and Merle Montet v France* (dec.), n° 22612/15, 16 January 2018, §§ 26-29.

<sup>27</sup> References to the Court's so-called "constitutional" role are absent from most official documents relating to Protocol No. 16. See, however, the reference to such a role in the 2006 report of the Group of Wise men where the origins of the proposal leading to Protocol No. 16 can be traced.

<sup>28</sup> See, in this regard, the comments by our colleague, Judge Koskelo in XXVI FIDE conference, Copenhagen, 2014, pg. 152.



and their application to the facts of the case. A good example of the difficulties which may arise is provided in the *Schatschaschwili v. Germany* case on the inability to examine absent witnesses, whose testimonies carried considerable weight in the applicant's conviction. As is clear from the joint dissenting opinion, the minority judges who were in favour of finding no violation agreed, however, with the majority as regards the general principles the judgment established. They only parted company with the majority as regards the *application* of the relevant principles to that case.<sup>29</sup> One is also reminded in this context of the formula oft-used by the Court, in particular, in Article 10 cases, where it states that "the Court would require strong reasons to substitute its view for that of the domestic courts".<sup>30</sup> It remains to be seen whether this will also be the preferred approach in such double adjudication situations, either in relation to certain Convention articles or across the board.

b) The second challenge goes to the legitimacy and standing of the Court in the eyes of its national interlocutors. If national superior courts consistently or regularly decide not to follow the terms of an advisory opinion, the resulting problems are obvious.

As regards the jurisprudential value of advisory opinions, they will form part of the case-law of the Court, alongside its judgments and decisions. The interpretation of the Convention contained in such advisory opinions would, one imagines, be analogous in its effect to the interpretative elements set out by the Court, sitting in a Grand Chamber formation, in judgments and decisions. This would mean, however, that even if an advisory opinion does not bind the requesting national Court when resolving the case before it, the interpretation of the Convention provision(s) provided by the Court is nevertheless an authoritative one. In addition, even for those Member States which decide not to ratify Protocol No. 16, it is difficult to avoid the conclusion that any opinions handed down on that basis will carry equal weight in cases involving them.<sup>31</sup>

An alternative view, if other Member States are not involved or do not involve themselves in the procedure, would be that the resulting advisory opinion is addressed only to the requesting court. However, Member States (and the public in general) are already alerted via the Court's *Hudoc* database of all communicated cases. A decision not to intervene when informed of a pending advisory opinion procedure should not detract from the generality of the guidance provided by the Court. Both the formation chosen to provide advisory opinions and the nature of the questions which can be the subject of requests suggest that limiting the value of the opinion handed down to the requesting court only is to misconstrue the nature and intent of the protocol and the procedure it provides for.

Given that they are decided by the Court sitting in Grand Chamber formation, the question will inevitably arise whether advisory opinions should not equally be given higher precedential value than judgments of chambers and committees, despite their non-binding nature for the national requesting court.<sup>32</sup>

## **V – Procedural issues**

### **1. The content of a request for an advisory opinion**

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<sup>29</sup> App. n° 9154/10, judgment of 15 December 2015; see also *Merabishvili v. Georgia* [GC], no. 72508/13, ECHR 2017 (extracts).

<sup>30</sup> See, for example, *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, ECHR 2012.

<sup>31</sup> Especially as Article 46(1) of the Convention, by definition, does not apply to advisory opinions under Protocol No. 16; see below under Hearings and Interventions on the right of other States Parties to intervene.

<sup>32</sup> A related issue is how to cite advisory opinions so that they can be easily distinguished from individual and interstate applications.

The procedural requirements which a request for an advisory opinion must fulfil are set out in Article 3(1) of Protocol No. 16 which provides that the requesting court or tribunal shall give reasons for its request and shall provide the relevant legal and factual background of the pending case.

As the Explanatory Report highlights, these requirements serve two purposes:

- the requesting court or tribunal must have reflected upon the necessity and utility of soliciting an advisory opinion of the Court, so as to be able to explain its reasons for doing so.
- the requesting court or tribunal must 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 relating to the interpretation or application of the Convention or the Protocols thereto. In its Opinion on the draft protocol the Court stressed:

“[...] the need to allow the Court to focus on the question of principle before it. The Court should not be called upon to review the facts or the national law in the context of this procedure.”<sup>33</sup>

As regards the legal and factual background, according to Rule 92 (2.1) of the Rules of Court, the request for an advisory opinion should include<sup>34</sup>:

- The subject matter of the domestic case and its relevant factual and legal background;<sup>35</sup>
- The relevant domestic legal provisions;
- The relevant Convention issues, in particular the rights or freedoms at stake;
- If relevant, a summary of the arguments of the parties to the domestic proceedings on the question;
- If possible and appropriate, a statement of the requesting court or tribunal’s own views on the question, including any analysis it may itself have made of the question.

The overarching aim must be that the requesting court or tribunal places the Court in the most informed position possible in order to enable it to respond meaningfully to the concerns expressed and questions raised by the requesting court or tribunal as regards the application of Convention law to the domestic proceedings.

Further, the Guidelines approved by the Plenary Court in September 2017 reiterate that in order for the Court to be in a position to provide clear interpretative guidance to the requesting court or tribunal, a request should be set out as prescribed in the Protocol and Rules of Court and should be complete and precise.

The Explanatory Report to the Protocol does not address the extent, if any, to which the parties to the procedure can or should be involved in the initiative to request an advisory opinion or in the formulation of any request. The Guidelines note that the requesting court or tribunal has a degree of

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<sup>33</sup> Opinion adopted by the Plenary Court on 6 May 2013.

<sup>34</sup> The detail derives not from the Protocol itself but from the amended Rules of Court and, previously, from the *Explanatory Report to Protocol No. 16 to the ECHR*, CM (2013) 31, 2 April 2013. The similarity between this list and that in Article 94 of the CJEU’s Rules of Procedure which details what a request for a preliminary ruling must contain, are striking. The amended Rules of Court reproduce the detail in the Explanatory Report; detail which is given further flesh in the Guidelines discussed below at Section V.

<sup>35</sup> The wording of the relevant part of the Explanatory Report and Rule 92(2.1)(a) differs. Rule 92(2.2) specifies that the requesting court or tribunal shall also “submit any further documents of relevance to the legal and factual background of the pending case”.

discretion to determine whether it is “relevant” to include a summary of the arguments of the parties on the subject matter of the request. To some extent this absence of detail mirrors the position in EU law but, as we know, the CJEU has developed case-law on the subject, emphasising that the right to request a preliminary ruling is not an individual right of the parties but rather is a right (and sometimes a duty) of the national court.<sup>36</sup> The extent to which parties are involved in the formulation of any request for an article 267 TFEU ruling varies greatly between Member States. The Guidelines, however, do note that depending on the position in domestic law, it may well be the case that one or both parties can take the initiative to ask the domestic court to make a request for an advisory opinion in their grounds of appeal against the decision of an inferior court. Nonetheless, it is emphasised that in any event the final decision on whether or not to request an advisory opinion rests with the appellate court or tribunal insofar as it has been designated as a court which may make such a request for the purposes of the Protocol.

A further point of note is the recommendation that the requesting court include “where possible and appropriate” its views on the Convention question raised and any analysis it may have made in this regard. The NGOs consulted in 2015 expressed concern that this might lead to the outcome of the domestic proceedings being prejudged.<sup>37</sup> Questions of national procedural law aside, we do not, personally, see where the problem lies. The views expressed are clearly not binding but they may be of tremendous assistance to the Court. It will be under pressure to provide an answer in an expedited procedure in order not to delay domestic proceedings.<sup>38</sup> The Guidelines point out that what is important is that the requesting court or tribunal, in the exercise of its judgment, places the Court in the most informed position possible in order to enable it to provide the interpretative guidance sought.

Finally, while there was no indication in the protocol or the Explanatory Report of any limit to the written comments or documents submitted, the Guidelines will provide detailed practical instructions for the presentation of a request. According to these Guidelines, the page limit, in principle, for a complete request should not exceed twenty pages. The economy and relevance of documents submitted in connection with a request for an advisory opinion is plainly an important consideration given both linguistic and time constraints.

## **2. Procedure for deciding on the acceptance or rejection of a request**

This procedure is set out in Article 2(1) of Protocol No. 16 which makes clear that the Court has discretion regarding whether to accept or refuse a request but that the latter must be reasoned.<sup>39</sup> This contrasts with the referral procedure where the five judge referral panel, as indicated previously, does not reason the refusal of a referral request. Once again, this difference could be regarded as entirely in accordance with the nature of the judicial dialogue which the advisory opinion procedure seeks to enhance. Nevertheless, it is worth emphasising that both the original 2006 report of the Wise Men and the Court in its own 2012 Reflection Paper proposed no obligation to reason in order to preserve the Court’s flexibility and limit the additional workload which processing requests for advisory opinions might entail.

It should not be presumed that the referral and the advisory opinion panels would be the same or identical in their composition. After all, Article 2(3) of the Protocol requires that the panel “shall

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<sup>36</sup> See, for example, judgment in *T-Mobile Czech Republic et Vodafone Czech Republic*, C-508/14, EU:C:2015:657, paragraphs 28-29: “Under Article 267 TFEU, it is for the national court, not the parties to the main proceedings, to bring a matter before the Court of Justice. The right to determine the questions to be put to the Court thus devolves on the national court alone and the parties may not change their tenor”.

<sup>37</sup> See the legal briefing of the Open Society, March 2016, reference provided below.

<sup>38</sup> See, similarly, paragraph 24 of the CJEU’s non-binding *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings*, OJ 2012 C 338/01, remembering that a preliminary ruling is, moreover, binding.

<sup>39</sup> See also Rule 93(4).

include *ex officio* the judge elected in respect of the High Contracting Party to which the requesting court or tribunal pertains”; a requirement that does not apply to the referral panel, the composition of which is governed by Rule 24(5) of the Rules of Court. In fact, Rule 24(5)(c) expressly provides that “No judge elected in respect of, or who is a national of, a Contracting Party concerned by a referral request may be a member of the panel when it examines that request”. The composition of the five judge advisory opinion panel is governed by Rule 93 of the new Chapter X to the Rules of Court. It will consist of the President of the Court, two Section Presidents designated by rotation, the judge elected in respect of the Contracting Party to which the requesting court or tribunal pertains and a judge designated by rotation from among the other Section judges serving on the panel for a six-month period.

The amended Rules of Court provide in Rule 93(2) that requests for advisory opinions shall be processed as a matter of priority in accordance with Rule 41 of the Rules of Court. However, there is no formal time-limit expressed, either in the Guidelines or in binding form, within which the Court should adopt a decision to refuse a request for an advisory opinion.

As indicated previously, it can be expected that the advisory opinion panel will, over time, clarify what is meant by “questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto”.

We express a note of caution, again a personal one, in relation to the need for the panel to clearly reason in terms of jurisdiction or admissibility.<sup>40</sup> A close reading of the case-law of the CJEU under Article 267 TFEU reveals that these issues are sometimes treated as synonymous and sometimes not. In general, the CJEU has refused to provide preliminary rulings where the domestic case is hypothetical, where the question referred bears no relation to the facts and subject matter of the case before the national court, where the facts or legal framework are insufficiently clear (even though the Court can also make further inquiries of the national referring court in both regards) or where the questions do not involve an interpretation of EU law.<sup>41</sup>

The terms of decisions to refuse a request will and should provide guidance to domestic courts and tribunals when considering whether to make a request and will and should thereby help to deter inappropriate requests which will consume precious Court resources.

In this context, it is necessary to insert a further note of caution (a personal *obiter* no doubt) in relation to the statement in the Explanatory Report to the effect that:

“It is to be expected that *the Court would hesitate* to refuse a request that satisfies the relevant criteria by (i) relating to a question as defined in paragraph 1 of Article 1 and (ii) the requesting court or tribunal having fulfilled the procedural requirements as set out in paragraphs 2 and 3 of Article 1.”<sup>42</sup>

After all, this statement describes an untested procedure which will require the Court to extend its jurisdiction to a perhaps very different judicial exercise than those which it currently performs under Article 34 and without any prior knowledge of how many States will consent to the protocol or the frequency, complexity and clarity of their requests if and when they do.<sup>43</sup> The Court’s initial

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<sup>40</sup> Already one can see some potential “false friends” in the protocol and the Explanatory Report, where the former refers in the preamble to an extension of the Court’s “competence”, while the latter talks about an extension of its “jurisdiction”.

<sup>41</sup> This case-law is accessible via the CJEU digest of case-law at [https://curia.europa.eu/common/recdoc/repertoire\\_jurisp/bull\\_3/tab\\_index\\_3\\_04.htm](https://curia.europa.eu/common/recdoc/repertoire_jurisp/bull_3/tab_index_3_04.htm).

<sup>42</sup> See paragraph 14 of the Explanatory Report.

<sup>43</sup> Since the questions which can be the subject of an advisory opinion have some parallel with those which can be the subject of a referral request, it is worth reproducing the number of such requests accepted in recent years: 7 (2012), 10 (2013), 18 (2014), 15 (2015), 14 (2016) and, 10 (2017).

reflection paper on advisory opinions spoke of cases which might not require further clarification or where Strasbourg case-law is sufficiently clear, implicitly referring to something along the line of the CJEU's *acte clair* doctrine. The Court will of course have to be deft when explaining to a national court which thinks the case-law is unclear why, in contrast, the Court considers it is. Another scenario envisaged by the Wise Persons' Report was the rejection of a request where its subject-matter overlaps with that of a pending case. It will surely be possible for the Court to refuse a request even if the subject matter falls within the scope of Protocol No. 16 and basic procedural requirements are complied with. Certainly, the Report of the Group of Wise Persons referred to previously stated that the new advisory jurisdiction should be subject to strict conditions and the provision of such opinions would not constitute the Court's principal judicial function. By implicating the Grand Chamber in all requests deemed admissible, Protocol No. 16 could otherwise have not insignificant consequences for the workload of that judicial formation. It may require, in the short or medium term, adaptation of that formation's working methods.

### **3. The nature and form of an advisory opinion**

It is the Grand Chamber of the Court that shall deliver advisory opinions following acceptance of a request by the five-judge panel and reasons shall be given (Articles 2(2) and 4(1) of the protocol).<sup>44</sup>

This was considered appropriate given the nature of the questions on which an advisory opinion may be requested and the fact that only the highest domestic courts or tribunals may request it, along with the recognised similarities between the present procedure and that of referral to the Grand Chamber under Article 43 of the Convention. Time alone will tell whether this choice was wise. A specialised advisory opinion Chamber might, alternatively, have allowed any subsequent individual application (alleging non- or incorrect application of any opinion) to be relinquished rapidly and where necessary to the Grand Chamber.

While the draft Explanatory Report referred explicitly to the possibility of the Grand Chamber reformulating the questions in the request, the text as adopted does not expressly tackle this issue. If reformulation or reclassification of the advice sought were an option, which the Court's case-law on the reclassification of complaints suggests it might be,<sup>45</sup> then the Court's advisory opinion might address articles of the Convention not the subject of the request in addition or even instead of those which are. Reformulation of questions is a well-established technique in Luxembourg preliminary references albeit, it should be added, not one always or universally welcomed by national courts.<sup>46</sup>

It remains to be seen to what extent the new procedure will entail significant additional work for the Grand Chamber and how easy it will be for that composition to reconcile its workload under Articles 33 and 34 of the Convention with this new advisory workload. It cannot be excluded that the new procedure will warrant some changes to the Court's internal working methods in Grand Chamber cases.

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<sup>44</sup> There is no similar provision under the TFEU or the Rules of Procedure of the CJEU requiring references from superior courts or courts of last resort to be dealt with by the Grand Chamber of that court. Member States or EU institutions can request, however, that a case be dealt with by the Grand Chamber (see Article 60(1) of the CJEU's Rules of Procedure).

<sup>45</sup> See, by analogy, the Court's approach in contentious proceedings, where it has repeatedly indicated that "being master of the characterisation to be given in law to the facts of the case (see *Castravet v. Moldova*, no. 23393/05, § 23, 13 March 2007; *Marchenko v. Ukraine*, no. 4063/04, § 34, 19 February 2009; and *Berhani v. Albania*, no. 847/05, § 46, 27 May 2010) [it] is not bound by the characterisation given by the parties": *Gatt v. Malta*, no. 28221/08, § 19, ECHR 2010.

<sup>46</sup> See, for example, the CJEU judgments in *Campina*, Case C-45/06, EU:C:2007:154, paragraphs 30 and 31, and *Fuß*, EU:C:2010:609, paragraph 39: "[I]n the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The Court has a duty to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court by those courts".

As indicated previously, if a request is accepted, the composition of the Grand Chamber will be determined by Rule 24(2)(a), (b), (e) and (h) of the Rules of Court. It shall include *ex officio* the judge elected in respect of the High Contracting Party to which the requesting court or tribunal pertains or, failing that, an *ad hoc* national judge.<sup>47</sup>

Not only will advisory opinions be reasoned; they may be accompanied by separate concurring and dissenting opinions or a bare statement of dissent (Article 4(1) and (2) and Rule 94 (8)). In its Opinion on the draft Protocol the Court noted that:

“This is in keeping with the Rules of Court on advisory opinions under the current system (Rule 88 § 2) *although it has been the practice of the Court when issuing advisory opinions to endeavour to speak with one voice.*”<sup>48</sup>

This leads to the inevitable question, raised we understand in the context of the Dutch Senate consideration of draft ratifying legislation, whether and how a judgment of the Grand Chamber in such proceedings can be seen as a correct/authoritative ruling on the “question of principle” raised by the requesting court where, in the context of contentious proceedings, judgments of the Court regularly contain dissenting opinions both in Chamber judgments as well as in Grand Chamber judgments.<sup>49</sup> Personally speaking we consider that, if the advisory opinion is to fulfil the function for which it was intended – enhancing judicial dialogue with national judges with a view to reinforcing implementation of the Convention – the Grand Chamber will be put to the collegiate test in future and must seek to minimise the occasions on which, on questions of legal principle, it is highly divided.<sup>50</sup>

#### **4. Priority treatment**

The Explanatory Report referred to the need to avoid “undue delay” without specifying what is meant by undue delay?

Rule 93(2) of the Rules of Court sets out that requests for advisory opinions shall be processed as a matter of priority in accordance with Rule 41 thereof. Section XI of the Guidelines will provide further detail on the priority to be accorded to requests, and makes provision for ‘urgent’ examination over and above the priority status normally to be accorded to all such requests.

In such urgent cases, the Guidelines will provide that the requesting court or tribunal should indicate, giving reasons, whether there are any special circumstances which would require an urgent examination of the request and a speedy ruling by the Court. It will be for the Court to determine whether the reasons put forward by the requesting court or tribunal are such as to justify an expedited treatment of the request. The Court can also decide of its own motion to treat a request according to an expedited procedure.

The Explanatory Report had made clear that priority status for requests for advisory opinions should apply 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 hearings,<sup>51</sup> as well as the Court itself.

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<sup>47</sup> Article 2(3) of the Protocol and Rule 24(2)(b).

<sup>48</sup> § 11 of the Opinion, cited above (emphasis added).

<sup>49</sup> See the deliberations of the Eerste Kamer on 5 September 2017.

<sup>50</sup> A good case in point may be the *Bélané Nagy v. Hungary* [GC], n° 53080/13, 13 December 2016.

<sup>51</sup> See also Article 3, discussed below.

In recent years, the average times for judgments or decisions before the Grand Chamber following referral or relinquishment respectively were as follows: 2015: 15.6 months/17.5 months; 2016: 17.1 months/17.4 months; 2017: 15.9 months/17.8 months and 2018: 17 months/22 months. The speed of put through is clearly affected by the number of cases pending before that formation and entry into force of the protocol may, as stated previously, increase the pressure.

Looking to the Luxembourg court for some additional statistical guidance, the 2016 annual report of that Court reveals the following:

- on average, it took 15 months to dispose of a preliminary reference.
- as regards a subset of the Article 267 TFEU procedure, the urgent preliminary ruling procedure, 12 urgent preliminary rulings were requested in 2016 but the Court chose to apply the procedure in 8 cases. It took, on average, 2.7 months to dispose of these cases, up from 2.1 in 2015.

Although referring to a quite distinct court and judicial procedure, these statistics reveal that the Strasbourg Court is highly likely to be faced with decisions and challenges regarding what is meant by “no undue delay” and what, in practice, priority means. As the CJEU knows only too well, the time taken to dispose of a preliminary reference – which at its peak in 2003 reached 25.5 months – at times influenced the decision by certain national courts on whether to refer.

If “undue delay” is interpreted to mean less than the present Grand Chamber average which, as we will see below, the treatment of the first French request suggests is the case, this can be expected to have a knock on effect on the work of the Court generally and on the work of the Grand Chamber in particular.

## **5. Hearings and interventions**

Hearings are clearly not excluded but neither are they obligatory.<sup>52</sup> According to Rule 94(6) of the amended Rules of Court, the President will decide on whether or not to hold a hearing at the close of the written procedure.

Most Grand Chamber cases (referrals and relinquishments) are organised with an oral procedure.<sup>53</sup> If the procedure is both written and oral the time taken for the advisory opinion to be communicated to the requesting court will of course be longer.

The Member State from which the request originates may submit written comments or appear at any hearing but is not obliged to do so. The President of the Court may also, pursuant to Article 3 of the Protocol and in the interest of the proper administration of justice, invite any other Member State or person to submit written comments or take part in any hearing.

As regards who can intervene and how they do so, a number of issues were initially relatively vague and, even after the amendment of the Rules of Court and the development of Guidelines, some remain so.

It was not initially clear whether the parties to the proceedings at the domestic level would be notified of a request and/or invited to intervene if that request is accepted or, in certain cases, in the

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<sup>52</sup> See the terms of Article 3 of Protocol No. 16. See also paragraph 21 of the Explanatory Report which provides that it will be for the Court to decide whether to hold a hearing on an accepted request.

<sup>53</sup> See Rules 63 and 71. Most Chamber cases are processed without a hearing.

initial processing of the request? The Explanatory Report indicates that this is expected but the text of the Protocol left the question open. Rule 94(3) provides that the President of the Grand Chamber may invite these parties to submit written observations and, if appropriate, to take part in an oral hearing. It has been observed that were parties allowed to submit their memoranda automatically, the borderline between adversarial procedure and the advisory opinion procedure would become blurred.<sup>54</sup> There are of course counter-arguments in this regard, not least the fact that the Court will hand down its opinion in the context of a pending dispute between two or more parties at domestic level. The Guidelines provide that with regard to notification about progress in the proceedings, it is for the requesting court or tribunal to keep the parties to the domestic proceedings informed, except in the event that one or both parties have been invited to intervene in the proceedings, in which case the Court shall assume this function.

Will the Court and its President be as inclusive as they are now, in some Grand Chamber cases, regarding requests for third party interventions under Article 36 § 2 and Rule 44?<sup>55</sup> The new Rule 44(7) will apply the provisions on third-party intervention *mutatis mutandis* to the advisory opinion procedure.<sup>56</sup> The same criterion – acceptance in the interests of the proper administration of justice – applies. Careful consideration of this issue is required given the different nature of the advisory procedure, the fact, as stated above, that it is occurring in the context of a pending case between identified parties, the fact that it is not intended as a vehicle for abstract review of Member State legislation or policy and the time component highlighted above. It is useful to refer again to the Article 267 TFEU procedure, where intervention extends only to the parties to the domestic proceedings, EU institutions (where appropriate), Member States and the European Commission as a sort of *amicus curiae*.<sup>57</sup> In Luxembourg, in cases before the Grand Chamber and even at chamber level, extensive use of this intervention is made by Member States depending on the legal and political importance, and to some extent novelty, of the questions raised in the pending preliminary reference.<sup>58</sup> In contrast, to date, Member States have more often than not availed themselves sparingly of their opportunity to intervene in Strasbourg Grand Chamber cases.<sup>59</sup> Given the proposed jurisprudential effects of future advisory opinions handed down by the Grand Chamber, it is worth considering whether Contracting Parties, even if they have not ratified Protocol No. 16, should not pay greater attention to the question of third party interventions in future. In the run up to the 2018 Copenhagen conference on the future of the Court and the Convention system, there was much discussion of the different form – judicial and political – which dialogue with the Court should take. The Court, in its Opinion on the draft Copenhagen Declaration, stressed that in relation to the development of its case law, the appropriate mechanisms for dialogue take the form of domestic court decisions and third party interventions before the Court. It noted that the latter mechanism can be relevant to different stages in the examination of a case by the Court, including the admissibility stage, the stage of seeking referral of a case under Article 43 of the Convention, and ultimately that of the Grand Chamber’s consideration of the case. According to the Court, used well, interventions by third parties in proceedings are helpful for the Court, giving it the benefit of

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<sup>54</sup> See K. Dzehtsiarou and N. O’Meara, “Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control?” (2014) *Legal Studies* 18.

<sup>55</sup> See, variously, P. Harvey, “Third party interventions before the ECtHR: A Rough Guide, 24 February 2015; W. A. Schabas, *The European Convention on Human Rights*, OUP, 2015, pgs. 788 – 795 and L. van der Eynder, “An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the ECtHR” (2013) 31 *Netherlands Quarterly of Human Rights* 271 – 295.

<sup>56</sup> Note that, pursuant to Rule 94(5), copies of third-party interventions shall be transmitted to the requesting court or tribunal and the latter shall have the opportunity to comment on them. It remains to be seen how useful or necessary provision for this opportunity will prove to be.

<sup>57</sup> See Article 23 of the Statute of the CJEU.

<sup>58</sup> In the seminal CJEU case on the scope of application of the Charter of Fundamental Rights of the EU, for example – *Åkerberg Fransson* C-617/10 EU:C:2013:105 - nine Member States and the European Commission intervened. In recent ground breaking data protection cases, the number of Member State interventions was also very high – see, for example, *Digital Rights* C-293/12 and C-594/12 EU:C:2014:238 (eight Member States, European Parliament and the European Commission) or *Tele 2 Sverige* C-203/15 and C-698/15 EU:C:2016:970 (fifteen Member States, European Parliament, Council and Commission).

<sup>59</sup> For example, out of a grand total of nineteen judgments and one decision delivered by the Grand Chamber during the course of 2017, Member States intervened in a maximum of five cases.



additional perspectives on the issues to be decided in the case. It noted that this mechanism of engagement by States with the Court’s judicial function does not appear to be used to its fullest potential and that, once Protocol No. 16 has entered into force, this mechanism may become even more significant. We would underline the Court’s position in this regard.<sup>60</sup>

While § 13 of the Explanatory Report expressly envisaged that the Court “would be able to receive requests in languages other than English or French, as it does at present for individual applications” no mention is made in either the Protocol itself or the Explanatory Report of the language of written submissions and interventions. Rule 44(6), which applies *mutatis mutandis* to third-party interventions in an advisory opinion procedure, requires them to be in an official language. Rule 94 (3) is silent on the language of the submissions of any parties to the domestic proceedings.

Finally, judicial dialogue, in order to be enhanced, also has to be nurtured; particularly when what is at issue is a new, untried procedure. Even when dealing with accepted requests, it cannot be excluded that the Court would wish to engage its judicial interlocutor further. The new Rule 94(2) provides that after a request is accepted, the President of the Grand Chamber may invite the requesting court or tribunal to submit any further information which is considered necessary for clarifying the scope of the request or its own views on the questions raised by the request. Similarly the Guidelines will envisage the possibility to seek supplementation of the request where it is considered to be ‘deficient’. The terms of Rule 94(2) could be read as presupposing that the conditions for the admissibility of a request provided for in Rule 92(2.1) are to be strictly applied and have been met. Guidelines aside, the strictness or flexibility in the application of the 92(2.1) procedure will be closely watched by national courts one would imagine. Depending on the number of requests received, it may also determine the extent of the Court’s additional advisory workload.

## **6. Language of requests and of advisory opinions**

While the Court has only two official languages,<sup>61</sup> requests for advisory opinions may be addressed to the Court in the national official language used in the domestic proceedings in accordance with Rule 34(7). If the language used is not an official language of the Court, the Rules will provide that an English or French translation must be submitted within the time-limit fixed by the President of the Court.

As regards the request itself, this means that the immediate access of most Judges to the request, except where the language is a well-known one, may only be through the national judge and the registry lawyers until or unless a translation is available. On the one hand, one could argue that this is entirely in keeping with the Court’s existing working methods – or rather the existing constraints under which it works – when dealing with individual applications. On the other, it could be argued that this method is ill-suited to a procedure which has, as its purpose, the enhancement of *judicial* dialogue and where any delay will have a knock on effect on the still pending domestic proceedings.

The Explanatory Report emphasised the sensitivity of the language issue but only as regards the resulting advisory opinions; not as regards the initial processing and subsequent treatment of requests by and within the Court. It provides that:

“It is important to bear in mind that in most cases advisory opinions will have to be admitted to proceedings that take place in an official language of the High Contracting Party

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<sup>60</sup> Opinion of the ECtHR on the draft Copenhagen Declaration, adopted by the Bureau in light of the discussion in the Plenary Court on 19 February 2018 ([https://www.echr.coe.int/Documents/Opinion\\_draft\\_Declaration\\_Copenhagen%20ENG.pdf](https://www.echr.coe.int/Documents/Opinion_draft_Declaration_Copenhagen%20ENG.pdf), last accessed 23 September 2019), § 16; see now also paragraphs 33 to 41 (“Interaction between the national and European level – the need for dialogue”) of the Copenhagen Declaration as adopted on 13 April 2018.

<sup>61</sup> Rule 34.

concerned that is neither English nor French, the Court's official languages. Whilst respecting the fact that there are only two official languages of the Court, it was considered important to underline the sensitivity of the issue of the language of advisory opinions. It should also be taken into account that the suspended domestic proceedings can in many legal systems be resumed only after the opinion is translated into the language of the requesting court or tribunal. In the event of concerns that the time taken for translation into the language of the requesting court or tribunal of an advisory opinion may delay the resumption of suspended domestic proceedings, it may be possible for the Court to co-operate with national authorities in the timely preparation of such translations."<sup>62</sup>

In the absence of increased budgetary resources, it is difficult to foresee how the issue of translation can be tackled. The Court, in its Opinion on the draft protocol, expressed grave concern on this issue both in terms of workload and cost.<sup>63</sup>

## VI - Where do we go from here?

As indicated previously, the Court worked for some considerable time to prepare itself for the entry into force of Protocol No. 16 on 1 August 2018. As part of this process, amendments to the Rules were adopted by the Plenary in September 2016 and non-binding Guidelines were approved by the same formation in September 2017. The operation of the latter will be kept under periodic review.

The new procedure has been the subject of various but not extensive academic and judicial comment.<sup>64</sup> Legal academia is, understandably, more reactive than predictive when it comes to a new, untested judicial procedure. The paucity of commentaries will no doubt change in due course.

Particular concern relating to the protocol has been expressed in some EU circles. In Opinion 2/13 on the accession of the EU to the ECHR, the Court of Justice referred to Protocol No. 16, noting that:

"[...] since [after accession] the ECHR would form an integral part of EU law, the mechanism established by that protocol could — notably where the issue concerns rights guaranteed by the Charter corresponding to those secured by the ECHR — affect the autonomy and effectiveness of the preliminary ruling procedure provided for in Article 267 TFEU.

In particular, it cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No. 16 by a court or tribunal of a Member State that has acceded to that protocol could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented, a procedure which, [...] is the keystone of the judicial system established by the Treaties."<sup>65</sup>

Many commentators have criticised the CJEU's own criticism of the failure in the draft accession agreement to make any provision in respect of the relationship between the mechanism established

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<sup>62</sup> See § 23 of the Explanatory Report.

<sup>63</sup> See paragraph 14 of the Opinion, cited above.

<sup>64</sup> See variously L.-A. Sicilianos, «L'élargissement de la compétence consultative de la Cour européenne des droits de l'homme – A propos du Protocole No. 16 à la Convention européenne des droits de l'homme, 2014/97 *Revue trimestrielle des droits de l'homme* 9-29; D. Ritleng, "Le renvoi préjudiciel communautaire, modèle pour une réforme du système de protection de la CEDH?" (2002) 3ème année, n° 7 *L'Europe des libertés : revue d'actualité juridique* 3-7; P. Gragl, "(Judicial) love is not a one-way street: the EU preliminary reference procedure as a model for ECtHR advisory opinions under draft Protocol No. 16" (2013) 38 *ELRev* 229-247; J. Gerards, "Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the ECHR" (2014) 21 *Maastricht Journal of European and Comparative Law* 633; J. Callewaert, "Protocol No. 16 and EU law" in *Mélanges en l'honneur de Dean Spielmann*, WLP, 2015, pp. 57-63; Open Society Justice Initiative, Implementing ECHR Protocol No. 16 on Advisory Opinions, March 2016 and Dzehtsiarou and O'Meara, cited above..

<sup>65</sup> Opinion 2/13, EU:C:2014:2454, paras. 196-199.

by Protocol No. 16 and the preliminary ruling procedure provided for in Article 267 TFEU. On the one hand, when the CJEU was deliberating, the protocol was not yet in force, nor was it foreseeable when it would be. On the other hand, commentators point out that misuse by national courts of Protocol No. 16 in order to circumvent the preliminary reference procedure and refer questions on substantive EU fundamental rights law to the Strasbourg court could be sanctioned in different ways, not least by the introduction of infringement proceedings.<sup>66</sup> Furthermore, it should be recognised that in some cases the problem may not necessarily be the decision to request a non-binding opinion from Strasbourg but the decision to refrain from seeking a binding one from Luxembourg. In *Melki and Abdeli*, the CJEU examined the priority nature of an interlocutory procedure for the review of the constitutionality of a national law (known as the “question prioritaire de constitutionnalité” or QPC in French law). The CJEU held in that case that:

“[...] Article 267 TFEU precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, in so far as the priority nature of that procedure prevents – both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question – all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling”.<sup>67</sup>

In contrast, Article 267 TFEU was judged not to preclude such national legislation, in so far as the other national courts or tribunals remain free, *inter alia*, to refer to the CJEU for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary. As the advisory opinion procedure is both facultative in terms of its use and non-binding in terms of the resulting opinion, it is questionable to what extent a *Melki and Abdeli* type instruction would be required to deter or prevent national courts of EU Member States from having recourse to the advisory opinion procedure under Protocol No. 16. Given the terms of Article 52, paragraph 3 of the EU Charter and indeed the very reason for its existence, it is clear that some questions referred under the advisory opinion procedure may, indeed will, have indirect consequences for the interpretation for the corresponding provisions of the Charter. As the President of the CJEU emphasised in his speech at the opening of the 2018 Strasbourg judicial year:

“the CJEU takes account of the Convention as the minimum threshold for protection”, even if, of course, the EU system of fundamental rights protection may go above and beyond that threshold.”

That does not mean, however, that the advisory opinion procedure, as such, should pose a problem for the autonomy and effectiveness of the EU judicial order or for the latter’s exclusive competence

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<sup>66</sup> See further, within the CJEU, the View of Advocate General Kokott in the proceedings leading to Opinion 1/2013, EU:C:2014:2475, paragraphs 139-141: “[the CJEU’s] role in relation to the interpretation of the ECHR within the EU could, however, be jeopardised by the fact that the highest courts and tribunals of the Member States which have ratified Protocol No. 16 to the ECHR might be tempted, in application of its provisions, to refer questions concerning the interpretation of the ECHR to the ECtHR rather than to the Court of Justice. Ultimately, this phenomenon would not, however, be a consequence of the accession of the EU to the ECHR. Even without the proposed accession of the EU, courts and tribunals of Member States which have ratified Protocol No. 16 can turn to the ECtHR with questions on fundamental rights relating to the interpretation of the ECHR, instead of referring to the Court of Justice questions that are identical in substance but relate to the interpretation of the Charter of Fundamental Rights. In order to solve this problem, it is sufficient to refer to the third paragraph of Article 267 TFEU, which imposes on the Member States’ courts and tribunals of last instance a duty to refer matters to the Court of Justice for a preliminary ruling. The third paragraph of Article 267 TFEU takes precedence over national law and thus also over any international agreement that may have been ratified by individual Member States of the EU, such as Protocol No. 16 to the ECHR. It follows from this that the Member States’ courts and tribunals of last instance are required — in so far as they are called upon to determine a dispute within the scope of EU law — to refer questions concerning fundamental rights primarily to the Court of Justice and to respect primarily the decisions of that court.”

<sup>67</sup> *Melki and Abdeli*, C-188 and C-189/10 EU:C:2010:363. On the QPC in Strasbourg case-law see *Renard e.a. v. France (dec.)*, no. 3569/12, 9145/12, 25 August 2015.

when it comes to the interpretation of EU law, including the Charter. Indeed, in Opinion 2/13, the CJEU stressed the mutually interdependent legal relations linking the EU and its Member States and the fact that the EU's legal structure "is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected".<sup>68</sup> Given these essential characteristics of the EU legal order it is difficult therefore, from a Strasbourg perspective, to see why EU Member State courts would systematically or regularly have recourse to the ECHR seeking answers to questions which, in reality, concern EU law. That being said, the advisory opinion panel and the Grand Chamber when seized of a request, will have to adhere faithfully to the Court's well-established case-law according to which, under the terms of Article 19 and Article 32 § 1 of the Convention, the Court is not competent to apply or examine alleged violations of EU rules unless and in so far as they may have infringed rights and freedoms protected by the Convention.<sup>69</sup>

Suffice it, for our present purposes, to say that the CJEU's foray into an examination of Protocol No. 16 in Opinion 2/13 underlines the interest and sensitivity which the protocol excited in some quarters, the need for the new procedure to be well explained and, when it comes into force, the need for the Strasbourg Court to carefully delimit its jurisdiction when accepting/refusing requests and handing down advisory opinions. What is clear is that Protocol No. 16 was not intended as an invitation to forum shop but rather as a means to enhance judicial dialogue regarding the interpretation and application of the Convention.

## Addendum

As indicated previously, when the judicial year 2019 was opened, the first request for an advisory opinion, which concerned the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, had already been lodged by the French Court of Cassation. Some of the features of the procedure which led to the advisory opinion, handed down on 10 April 2019, are worth noting.<sup>70</sup> Firstly, no oral hearing was held in the case. Secondly, written submissions were received from the applicants in the domestic proceedings, the French Government, three intervening governments and seven other third party interveners. While it took the Court almost two months to process the request at panel level, the advisory opinion was handed down within six months. In terms of the form and content of the opinion, it was shorter than traditional Grand Chamber judgments and did not reproduce in detail either the written submissions lodged with the Court or comparative and international law and material of relevance.<sup>71</sup> It is also noteworthy that, through a series of preliminary considerations, the Court sought to emphasise the distinct nature of the new procedure but also to delimit its judicial task and the questions to be addressed thereunder. In particular, it stressed that the aim of the procedure 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.

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<sup>68</sup> See Opinion 2/13, §§ 167-168 and

<sup>69</sup> See, for example, *Jeunesse v. the Netherlands* [GC], no. 12738/10, 3 October 2014, § 110.

<sup>70</sup> Advisory opinion requested by the French Court of Cassation, Request no. P16-2018-001, 10 April 2019 [GC].

<sup>71</sup> In § 34 of the advisory opinion, the Grand Chamber stressed that its task is not to reply to all the grounds and arguments submitted to it or to set out in detail the basis for its reply. Under Protocol No. 16, the Court's role is not to rule in adversarial proceedings on contentious applications by means of a binding judgment but rather, within as short a time frame as possible, to provide the requesting court or tribunal with guidance enabling it to ensure respect for Convention rights when determining the case before it. It should be noted that the first request, which followed on from a previous judgment in an individual application involving the same applicant family, is unusual in the sense that the Grand Chamber was able to cross refer to material already published in its judgment in that context. See *Menesson v. France*, no. 65192/11, ECHR 2014 (extracts).

In addition, it observed that the opinions it delivers under Protocol No. 16 must be confined to points that are directly connected to the proceedings pending at domestic level.<sup>72</sup>

At the time of writing, a second request for an advisory opinion has been lodged by the Armenian constitutional court and is pending before the panel of five judges which will determine whether the requirements of Article 1 of Protocol No. 16 have been fulfilled and whether therefore to accept the request.<sup>73</sup>

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<sup>72</sup> Ibid. §§ 25-34.

<sup>73</sup> <http://hudoc.echr.coe.int/eng-press?i=003-6476599-8537053>.