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

Seminar

"Judicial dialogue through the advisory opinion mechanism

under Protocol No. 16"

Session I: Different perspectives on Protocol No. 16

The Court's perspective

Intervention by Tim Eicke

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Let me join the President and the Chair for this session to welcome you all to the Court of Human Rights for this reflection on of Protocol 16 and the first 5 years of its operation – you are most welcome and it is a real pleasure to see so many of you here.

In light of the fact that, after the break, my colleague Judge Koskelo will address you on the Court's perspective of some of – as the title of her session says - "Concrete lessons to be learned from the first proceedings under Protocol No. 16", I will confine myself – in the time I have been given – to making some general remarks about the Court's general perspective on Protocol 16 and – what might be described as – the evolution of its approach to the idea of such an advisory opinion mechanism. This requires me to start with a little trip back in time.

As the opening paragraph of the Explanatory Report to Protocol 16 explains "[t]he proposal to extend the jurisdiction of … (the Court) to give advisory opinions was [first] made in the report to the Committee of Ministers of the Group of Wise Persons, set up under the Action Plan adopted at the Third Summit of Heads of State and Government of the Member States of the Council of Europe (Warsaw, 16-17 May 2005) 'to consider the issue of the long-term effectiveness of the ECHR control mechanism'".

In its report of 15 November 2006,[1] the Group of Wise Person formally proposed

> "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, in order to foster dialogue between courts and enhance the Court's "constitutional" role. Requests for an opinion, which would be submitted only by constitutional courts or courts of last instance, would always be optional and the opinions given by the Court would not be binding".

In reaching this proposal, the Group had already addressed some of the points which would inform the subsequent debate and negotiations leading to the creation of the mechanism as ultimately adopted as well as some of the key features of its operation in practice by the Court. These included:

1. 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

[1] https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d7893

also need to be translated" while, of course, "providing such opinions would not be the Court's principal judicial function"; a concern which they considered could be met by the imposition of strict conditions;

2. the apparent (but misleading) similarity to the preliminary reference procedure under what is now Article 267 TFEU; they considered that this procedure was "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 [they considered] would create significant legal and practical problems and would considerably increase the Court's workload". This is a view later reiterated by the Court in its 2012 Reflection Paper which I will come to; and

3. the authority of such advisory opinions which they considered would be enhanced if "all the States Parties to the Convention … have the opportunity to submit observations to the Court on the legal issues on which an opinion is requested".

The Court's response to this proposal – as set out in its Opinion on the Wise Persons' Report of 1 April 2007[2] – appeared, to say the least, unenthusiastic.

In a mere two paragraphs, it acknowledged that the objective of fostering dialogue with the highest national courts was "a valid one" but considered that this proposal called for "careful reflection" and should "be reserved for future consideration, when the current problems of the system will have been resolved through the necessary reforms".

Undeterred, however, the proposal was again discussed by the High Contracting Parties at the Izmir High Level Conference in April 2011 which, in turn, led to specific proposal being elaborated by the CDDH in a Final report of 2012, based amongst others on detailed proposals made by the experts from the Netherlands and Norway.

In March 2012, the Court responded in the form of a "Reflection Paper on the Court's Advisory Jurisdiction"[3] which provides an interesting insight into the discussions that appear to have taken place within the Court. President Bratza, in his speech to the Brighton High Level Conference in April 2012, summarised the Court's reflection paper as showing that the Court "is not opposed to such a procedure in principle, although there remain unanswered questions about how it would work in practice". The Reflection Paper, perhaps unusually, seems to summarise the view expressed both by those referred to as "in favour of an extension of the Court's advisory jurisdiction" as well as those who "objected to the proposal to extend the Court's advisory jurisdiction".

It would go to far to try to summarise all the views expressed but it is worth noting that the arguments of those who objected to the extension of the Court's jurisdiction included the following:

- that "requesting an advisory opinion from the Court would inevitably lead to delays in the proceedings before the domestic courts themselves";

- "the risk … that a national court which had voluntarily asked for an advisory opinion would not subsequently follow that opinion", and

- "that it was difficult to foresee the use made of an extended advisory jurisdiction by domestic courts of last instance and thus the effect of it on the Court's workload".

In relation to these latter two concerns the Reflection Document noted that a "number of judges pleaded in favour of a binding nature of advisory opinions". However, it appears that the majority saw the safeguard "if its opinion was not followed, [in the fact that] the Court would still have jurisdiction on an individual application lodged subsequently and could give it high priority. It is only in such

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2 https://www.echr.coe.int/documents/d/echr/2007_Wise_Person_Opinion_ENG

3 https://www.echr.coe.int/documents/d/echr/2013_Courts_advisory_jurisdiction_ENG

circumstance that the non-binding nature of advisory opinions could undermine the aim to reduce the Court's workload and to foster the Court's dialogue with domestic courts of last instance".

[A final, noteworthy, aspect of the Reflection Document is that the Court, over two paragraphs set out concrete examples of questions of principle or of general interest concerning the application of the Convention which could be envisaged as subjects of requests for advisory opinions.]

Following the Brighton Conference and after the Court issued its Opinion on the Draft Final Text in May 2013, Protocol 16 was adopted almost exactly 10 years ago, on 2 October 2013.

As we all know [and as the President mentioned in her opening remarks], Protocol 16 finally entered into force little more than 5 years ago (and nearly 5 years after its adoption) on 1 August 2018 following ratification by 10 states, as provided by Article 8(1) thereof. The final Protocol, in many respects, looked very much like the proposals considered and commented on by the Court with only a few notable exceptions. These include:

- the fact that the "highest courts and tribunals" who were able to request a – non-binding - advisory opinion under Article 1 § 1 was not limited to court(s) or tribunal(s) of a Member State against whose decision there is no judicial remedy under national law, a change which the Court, in its 2013 Opinion, agreed with;

- the fact that questions are not limited to cases revealing a potential structural or systemic problem, as proposed by the Dutch and Norwegian experts, but can relate to any "question of principle relating to the interpretation or application of the rights and freedoms defined in the Convention", and

- the fact that the Grand Chamber Panel is under a duty, under Article 2, to give reasons for refusing a request; something which the Court noted in its Opinion went "against the opinion expressed by the Court in its reflection paper" but which, ultimately, the Court "accepts [as] useful [as it] would enhance the aim of creating a constructive dialogue with the national courts; a conclusion that I hope is born out by the experience with the one refusal decision issued to date.

Once the Protocol had been adopted and started to be signed and ratified by High Contracting Parties, the Court embraced the new procedure and set to work to both adapt its Rules of Procedures to accommodate the requirements of the new procedure as well as drafting Guidelines for future users of this procedure. This work, which culminated in the adoption of the (new) Chapter X of the Rules of Court and some consequential amendments of other rules on 19 September 2016 (exactly a week after the start of my mandate) and the Guidelines "on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the Convention" approved by the Plenary on 18 September 2017, was – I would say - very much informed by a spirit of wanting to make this process work.

The aim was then and remains the same. That is to operate the process in a way that truly enhanced the dialogue between this Court and the domestic higher courts and tribunals - in a way that gives substance and meaning to that term while at the same time seeking to avoid unnecessary delay to the on-going domestic proceedings which gave rise to the request for an advisory opinion. In exercising this jurisdiction, as the Court has consistently confirmed in the Advisory Opinions it has given to date, it seeks to limit itself to giving the requesting court guidance on Convention issues when determining the case before it rather than to transfer the dispute to this Court. The Court has no jurisdiction either to assess the facts of a case or to evaluate the merits of the parties' views on the interpretation of domestic law in the light of Convention law, or to rule on the outcome of the proceedings. Its role is limited to furnishing an opinion in relation to the questions submitted to it.

Another aim, equally important throughout the legislative history, is that of minimising the impact of this procedure on this Court's workload and, consequently, its ability – within its very limited resources – to address the many thousands of individual applications being lodged before it every year under

Article 34 of the Convention; to date this year some 28350 applications have been allocated to judicial formations.

As a consequence – and Judge Koskelo will speak to our practical experience in more detail later – the Rules and the Guidelines, the latter of which are currently under review, make clear that requests for advisory opinions are generally treated by the Court as a matter of priority. However, provision is also made for an expedited/urgent procedure where the requesting court can show that "there are … special circumstances which would require an urgent examination of the request and a speedy ruling by the Court". The effectiveness of such priority consideration, of course, also depends on the cooperation of the requesting court including, for example, formulation of the questions and the content of the accompanying request and the material submitted in support as well as the provision of an English or French translation of the request to name but a few.

On the other hand, both to ensure a speedy response as well as to manage to Court's own resources, the Court has to date not seen it necessary or appropriate to hold an oral hearing in Protocol 16 proceedings.

Let me finish with one more general observation. Throughout the negotiations that culminated in Protocol 16 an important topic of discussion concerned the legal/jurisprudential value of any advisory opinion combined with the questions whether all High Contracting Parties to the Convention should have a right to intervene. While, of course, the final text of the Protocol has resolved this question to some extent – Article 5 makes clear that opinions are "not binding" and Article 3 makes clear that only the Commissioner for Human Rights and the High Contracting Party of the requesting court have a right to intervene – there can be little doubt that the assessment in the Court's 2012 Reflection Document continues to hold true. There the Court noted that "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'". Drawing on the experience of the ICJ and the IACHR, the Court noted that they draw in practice upon their reasoning in advisory opinions in the same way as upon its case-law developed in contentious cases. There was and is no reason why this should be different for this Court.

I will stop here and look forward very much to the dialogue between us in this room about the "dialogue" Protocol and its perception and operation.

Thank you.