Considerations on Protocol N°16: Can the New Advisory Competence of the European Court of Human Rights Breathe New Life into the European Convention on Human Rights?

By Christos Giannopoulos[*]

A. Introduction

Protocol n°16 expands the advisory jurisdiction of the European Court of Human Rights (hereinafter ECtHR) by introducing a mechanism of litigation-related opinions (*"avis contentieux"*). It affords the highest national courts and tribunals the ability to ask the ECtHR for an advisory opinion on questions of principle related to the interpretation and application of the rights and freedoms defined in the European Convention on Human Rights (hereinafter Convention) and the Protocols thereto.

In theory, the mechanism is simple. If a national court or tribunal sends a request to the Court, a panel of five judges of the Grand Chamber will decide on the admissibility of the question before the Grand Chamber rules on the merits.[1] Protocol No. 16 (hereinafter "the Protocol") reserves this right only for the highest courts and tribunals,[2] as the Parties have designated them at the time of signature or when depositing their instruments of ratification, acceptance, or approval.[3]

This new Protocol aims to strengthen communication between the ECtHR and the national judges by introducing a dialogue between the various institutions that interpret the Convention. In this way, the protection of the Convention's Rights will be reinforced at the

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[1] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, as amended, Protocol 14, Art. 1, May 13, 2004, C.E.T.S. No. 194, *available at* http://conventions.coe.int/Treaty/EN/Treaties/Html/214.htm [hereinafter Protocol No. 16].

[2] In the present Article, the term of national judges is used in a narrow sense and refers mostly to the highest national courts and tribunals.

[3] Protocol No. 16, *supra* note 1, Art. 10.

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national level according to the principle of subsidiarity. Moreover, this Protocol aspires to enhance the effectiveness of the conventional mechanism so as to ensure the maximal coherence of the case law of the ECtHR. The new mechanism, therefore, will gradually relieve the ECtHR of the deluge of petitions.

This article presents an overview of this Protocol, which poses questions regarding the nature and role of the new advisory jurisdiction within the existing system. Part A sets forth the drafters' deliberate choice in the Protocol of a flexible relationship between the ECtHR and national courts. Part B focuses on the evaluation of this optional Protocol with a view towards understanding the point at which this reform could reconstruct the European mechanism on the protection of human rights.

Before starting the analysis, it is useful to review how the Protocol was adopted. The Group of Wise Persons first introduced the proposal to extend the advisory jurisdiction of the ECtHR in 2006 in an effort to increase the effectiveness of the Convention.[4] In April 2011, the High-Level Conference on the Future of the ECtHR held in Izmir invited the Committee of Ministers to consider introducing "a procedure allowing the highest national courts to request advisory opinions from the Court."[5] The task was then entrusted to the Steering Committee for Human Rights (CDDH) led by experts from the Netherlands and Norway.[6] Finally, in July 2013 the Committee of Ministers approved Protocol n°16, which has been open for signature and ratification by the Member States since October 2013.

The Protocol is an opt-in addition to the Convention and applies only to State parties who willingly ratify it. Its entry into force is automatic once ten ratifications are submitted to the Secretary General of the Council of Europe.[7] Currently, fourteen States have signed the Protocol, but none have ratified it.

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[4] *See* Conseil de l'Europe, 979bis Réunion, 15 novembre 2006, Rapport du Groupe des Sages au Comité des Ministres, Document CM(2006)203, pt. 76–86, 135, 21–22, 36, *available at* https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2006)203&Language=lanFrench&Ver=original&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864.

[5] *See* Council of Europe, Izmir Declaration adopted on 27 April 2011 at the High Level Conference on the future of the European Court of Human Rights, pt. I.2.b, Apr. 27, 2011, *available at* https://wcd.coe.int/ViewDoc.jsp?id=1781937.

[6] *See* Council of Europe, *Guaranteeing the Long-Term Effectiveness of the Control System of the European Convention on Human Rights*, STEERING COMMITTEE FOR HUMAN RIGHTS (CDDH), 119TH SESSION OF THE COMMITTEE OF MINISTERS, May 12, 2009, CM(2009)51 final pt. 42–44, at 12–13, *available at* https://wcd.coe.int/ViewDoc.jsp?id=1441881&Site=CM.

[7] Protocol No. 16, *supra* note 1, Art. 11.

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B. The Choice of a Flexible Relationship Between National Courts and the ECtHR

Under article one, paragraph one of the Protocol, only the highest courts and tribunals, as specified by the Contracting Party, are authorized to seek an opinion. The reason for limiting the number of courts that may request an opinion necessitates a certain degree of flexibility that accommodates special features of the Contracting Parties' judicial systems.[8] The flexibility of the mechanism, however, is not limited only to these two aspects.

I. The Existence of a So-Called Question of Principle

The Explanatory Report to the Protocol provides that the "interpretation of the definition [of a question of principle] will be a matter for the Court when deciding whether to accept a request for an advisory opinion."[9] It is clear, therefore, that the drafters did not want to limit the new advisory jurisdiction of the ECtHR only to certain types of questions; rather, they sought to allow the ECtHR to address a diverse range of problems that could appear in practice.

The first category of issues presented to the ECtHR relates to the existence of a structural or systemic problem in the internal order. The ECtHR provides some instruction to the national judge, who submits the question in order to solve the problem at the national level. Optimally, the judge should then use these instructions in order to avoid further intervention from the ECtHR. This possibility limits the repetition of cases before the ECtHR in the future.

A question of principle may also concern the compatibility of the Convention with a national law, an internal rule, or a consistent interpretation of a statute by a national court[10]. The ECtHR should not, however, make an abstract review of national legislation when rendering an advisory opinion. The Court's opinions should be given only when there is a precedent that poses an interpretative problem, when there is non-coherent jurisprudence in the contentious cases, or when individual interests are involved.[11]

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[8] European Court of Human Rights, *Opinion of the Court on the Draft Protocol No. 16 to the Convention extending its competence to give advisory opinions on the interpretation of the Convention*, pt. 6, at 2 (adopted by the Plenary Court on May 6, 2013), http://www.echr.coe.int/Documents/2013_Protocol_16_Court_Opinion_ENG.pdf.

[9] Council of Europe, Explanatory report to Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, pt. 9, at 3, http://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf.

[10] European Court of Human Rights, *Document de réflexion sur la proposition d'élargissement de la competence consultative de la Cour*, pt. 27–30, at 6–7, http://www.coe.int/t/dgi/brighton-conference/documents/Court-Advisory-opinions_fr.pdf]; *See also* European Court of Human Rights, the Opinion of the Court on Draft Protocol N°16 to the Convention (extending its competence to give advisory opinions on the interpretation of the Convention) (adopted by the Plenary Court on May 6, 2013).

[11] *Document de réflexion*, *supra* note 10, point 27–31, at 6–8.

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Furthermore, a question of principle may concern an issue of a more general interest. These questions may "elucidate, safeguard and develop the rules instituted by the Convention."[12] Examples of such issues that could be the subject matter of an advisory opinion include the compatibility of the expulsion of asylum seekers with the Convention, the refusal to allow same-sex marriage, and the right of prisoners to vote.[13]

The new advisory jurisdiction of the ECtHR presents an opportunity to discuss key issues about the collective enforcement of the Convention within a broader judicial forum. That the Protocol recognizes not only the Commissioner of Human Rights but also any contracting party's right to submit written comments and to join hearings reflects the flexibility of this mechanism.[14]

Moreover, it is important to note that the drafters' silence with respect to the definition of a question of principle under the Protocol is not an exceptional case. Frequently, the ECtHR possesses the discretion to define concepts enshrined in the Convention. For instance, in Protocol No. 14 the drafters introduced a new admissibility criterion of individual petition to Article 35, section 3(b) of the Convention—the existence of a significant disadvantage—without giving any specific guidance to the Court. Here, as in the Protocol, the drafters recognized that these are "legal terms capable of, and requiring, interpretation establishing objective criteria through the gradual development of the case-law of the Court."[15] In this way, the ECtHR has the capacity to determine the exact meaning of these words. The ECtHR's wide discretion in defining the type of requests that it will hear, however, is not without limits. Under Article 4 the ECtHR must give reasons for its opinion, and any judge is entitled to deliver a separate opinion. [16] Accordingly, the panel of five

[12] Ireland v. United-Kingdom, App. No. 5310/71 18 EUR. CT. H.R., 154 (1978); Karner v. Austria, App. No. 40015/98, EUR. CT. H.R., 26 (2003).

[13] After the case *Hirst v. United Kingdom (n°2)*, the European Court of Human Rights [hereinafter ECtHR] has issued similar decisions concerning Italy and Russia based on the existence of the similar legislation in these two States, which was also the subject of litigation. In this way, it is likely that a national judge could ask the Court for the conformity of his own country's system in relation to the standards issued by the ECtHR. *See, e.g.*, Hirst v. United Kingdom *(n°2)*, App. No. 74025/01 EUR. CT. H.R. (2005); Scoppola v. Italy *(n°3)*, App. No. 126/05 EUR. CT. H.R. (2012); Anchugov and Gladkov v. Russia, App. Nos. 11157/04 & 15162/05. EUR. CT. H.R. (2013).

[14] Protocol No. 16, *supra* note 1, Art. 3.

[15] Explanatory report of the Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Council of Europe, Treaty Office, point 80, p. 12, *availiable at* http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&NT=194]

[16] Protocol No. 16, *supra* note 1, Art. 1, para. 3.

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judges of the Grand Chamber must provide reasons for any refusal to accept the request of a national court.[17]

Additionally, the ECtHR must issue its opinion within the legal and factual context of the request, provided by the involved judge. Paragraph 3 of Article 1 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."[18] This paragraph reflects the goal of the procedure, which is not to transfer the dispute to the ECtHR but to give to the requesting court or tribunal guidance on Convention issues while determining the case before it.[19]

Furthermore, the opinion of the ECtHR cannot relate to a hypothetical question.[20] The question must arise from the context of a case pending before the national court submitting the request.[21] To this end, the national court or tribunal should provide relevant legal and factual background, the relevant Convention issues, particularly the rights or freedoms at stake, a summary of the parties' arguments in the domestic proceedings, and a statement of the national court's point of view on the matter.[22]

II. The Legal Effects of the Advisory Opinions of the ECtHR

The Explanatory Report of Protocol N°16 indicates that advisory opinions are not binding but take place in the context of the judicial dialogue between the ECtHR and the national judges[23]. This theoretically means that the referring judge is not required to comply with the position of the Strasbourg court.

Once again, the drafters of the Protocol did not want to put pressure on the Contracting Parties, for fear of seeing the Protocol fail for lack of ratifications. The new Protocol

[17] *Id.* at Art. 2, para. 1. It is interesting to note also that in the contentious cases when the panel of five judges examines the request by a party to refer a case to the Grand Chamber, the panel is not obliged to give reasons for a refusal of the request. *See* European Court of Human Rights, Rules of Court, Art. 73, para. 2 (amended July 1, 2014).

[18] Explanatory Report, *supra* note 9, point 11, at 3.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] Explanatory Report, *supra* note 9, point 11–12, at 3. The Protocol gives the ability to the national judges to express their own points of view on the subject. This is important considering the fact that the Court often has been criticized for ignoring the national particularities and practices. In this way, the ECtHR can have direct access to the national judges' opinions and compare their points of view with its own.

[23] Explanatory Report, *supra* note 9, point 25, at 5.

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establishes direct interaction between national courts and the ECtHR through persuasive, non-binding authority. The drafters insisted on the idea of a dialogue between the Courts for this exact reason. The Council of Europe posits that the only way to implicate national authorities in the protection of convention rights is by enhancing the interactions between them and the Council.[24] As the ECtHR expressed in its opinion on the Draft Protocol N°16, "[I]t is in the nature of a dialogue that it should be for the requesting court to decide on the effects of the advisory opinion in the domestic proceedings."[25]

Thus, the new advisory competence of the ECtHR opens the channels for collaboration among judges. However, the fact the new Protocol is instituting a formal interaction among judges does not mean that the national courts will be obliged to take into consideration the rulings of the ECtHR. Consequently, the challenge of this mechanism will be evaluated in relation to the ability of the ECtHR to help a national court solve a real problem at the national level without giving the impression that it underestimates or marginalizes the national point of view.

In this way, the new Protocol places the interpreters of the Convention in a complementary, rather than a competitive, relationship. The Court issues its opinion, which should be followed because it is in everyone's interest to adopt the solution, not because it is mandatory to do so. It relies, however, on the national judge's decision of whether to incorporate the ECtHR's opinion into his ruling. The referring judge can also withdraw his request at any point before the ECtHR issues its opinion on the question. Here, problems could also arise in the cooperation of the Courts.

The fact that advisory opinions do not have a binding effect for the judge who addresses the question does not mean, however, that they are devoid of any legal effect. As stated in the Explanatory Report to the Protocol, "[T]he interpretation of the Convention and the Protocols . . . contained in such advisory [opinions] would be analogous in its effect to the interpretative elements set out by the Court in judgments and decisions."[26] Thus, the advisory opinions enter into the case law of the ECtHR.

One may wonder why the drafters of the Protocol did not augment the status of the opinions delivered by the ECtHR by indicating that the judge who sent the demand should defer to the opinion of the ECtHR. Such an approach could facilitate the task of the national courts of fulfilling their obligations under the Convention. Under the actual provision, however, the national judge seeking the advice of the ECtHR knows neither the

[24] *See also* Implementation of the Judgments of the European Court of Human Rights: A Shared Judicial Responsibility? *in* Dialogue between Judges 2014, Editions of the Council of Europe, http://www.echr.coe.int/Documents/Dialogue_2014_ENG.pdf.

[25] See the Opinion of the Court on Draft Protocol No. 16, *supra* note 8, pt. 12, at 2.

[26] Explanatory Report, *supra* note 9, point 27, at 6.

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extent he should consider the Court's response, nor the actual nature of its authority. For instance, consider the following hypothesis: The views expressed by the ECtHR in the opinion conflict with the national legal order, such as a provision of domestic Bill of Rights. In this case, it would be difficult to understand how the initial dialogue between national and European Courts offers any solutions.[27]

This dialogue between the ECtHR and the national judges would certainly benefit the applicant. The advisory competence of the ECtHR does not prevent an individual application under article 34. In the case of an alleged refusal of the national judge to follow the opinion of the ECtHR, the unsatisfied party may submit an individual application to the ECtHR in order to obtain a final, binding judgment. Although the Explanatory Report states, "[W]here an application is made subsequent to proceedings in which an advisory opinion of the Court has effectively been followed, it is expected that such elements of the application that relate to the issues addressed in the advisory opinion would be declared inadmissible or struck out,"[28] it is likely that the ECtHR will reexamine a case because of the partial or the "tricky" attitude of the national instance.

Due to the fact that human resources are limited and the Grand Chamber examines an average of thirty cases per year,[29] there are concerns about obstructing the European mechanism of human rights protection if national judges simultaneously make several requests for consultative opinions. While the panel of five judges refines the requests reaching the Grand Chamber by verifying their admissibility, there are no substantial guarantees as to how the ECtHR will regulate the potential flood of cases under this mechanism. In almost every Member State there is at least one pending case that could form the object of a request for an advisory opinion, either because it concerns a systemic or a structural problem at the national level, or because a previous judgment of the Court creates controversy in the domestic law. This vast array of potential requests is likely to impede the system and delay the response of the ECtHR.

C. A Reform That May Reconstruct the European Human Rights Protection Mechanism

Since the beginning of the preparatory works on the Protocol, the drafters faced the problem of its form. Should the Protocol involve a mechanism like the preliminary ruling that exists in the European Union, or would it be better to reinforce the advisory

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[27] The Convention, though incorporated in the national legal orders of the member States, still has a different status in the national level. Only a minority of States recognizes a constitutional status in the internal hierarchy (Austria, Bosnia-Hercegovina). The Convention only has a status above ordinary statute in most states.

[28] Explanatory Report, *supra* note 9, point 26, at 5.

[29] *See* Sicilianos Linos-Alexander, *The Enlargement of the Advisory Function of the European Court of Human Rights: Comments on Protocol No. 16*, 97 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 14 (2014).

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jurisdiction of the ECtHR—a well-known mechanism in the international courts' practice?[30] This question has been debated both in the context of judicial meetings[31] and in academic literature[32] before and during the drafting of the Protocol. Some authors postulate that the tables have turned with the advent of the new Protocol and that the European Union is now in a position to "give something back" to the Convention system.[33] In such circumstances, the Protocol opts for the mechanism of litigation-related opinions ("*avis contentieux*"). It thus incorporates the experience of the preliminary ruling already existing in the European Union while simultaneously it respects the particularities of the conventional system.

I. A Mechanism Partly Inspired by the Preliminary Ruling of TFEU Article 267

Under Article 267 of the Treaty on the Functioning of the European Union (TFEU), the Court of Justice of the European Union has jurisdiction to give preliminary rulings concerning the interpretation of Treaties and the validity and interpretation of acts of the institutions, bodies, offices, or agencies of the Union.[34] This option for the ordinary judges becomes an obligation only before national courts or tribunals against whose decisions there is no judicial remedy under national law.[35] Thus, the European Court of Justice gives an obligatory ruling concerning the interpretation and the validity of EU law and leaves the application to national judges.

In principle, there is a clear distinction between the interpretation and the application of the European law that generates a distribution of the jurisdictions between the interpreters of the European law. Professor Denys Simon indicates, "it is the responsibility of the European Court of Justice to clarify the meaning and the scope of Community

[30] For a detailed analysis in the role of the advisory opinions in the case law of the International Court of Justice, *see generally* MAHASEN MOHAMMAD ALIAGHOUB, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT OF JUSTICE 1945-2005 (2006); *see also* Marie-Clotilde Runavot, *La compétence consultative des juridictions internationales. Reflet des vicissitudes de la fonction judiciaire internationale*, *in* BIBLIOTHÈQUE DE DROIT INTERNATIONAL ET COMMUNAUTAIRE (2010).

[31] Jean-Paul Jacqué, *Preliminary References to the European Court of Human Rights*, *in* HOW CAN WE ENSURE GREATER INVOLVEMENT OF NATIONAL COURTS IN THE CONVENTION SYSTEM? DIALOGUE BETWEEN JUDGES 2012, Conseil de l'Europe, 18–24.

[32] Francoise Benoît-Rohmer, *Les Perspectives de Réformes à Long Terme de la Cour Européenne des Droits de l'Homme: "Certiorari" Versus Renvoi Préjudiciel*, 14 REVUE UNIVERSELLE DES DROITS DE L'HOMME 313–19 (2002).

[33] Paul 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*, 38 EUR. L. REV., 229, 230 (2013).

[34] TFEU Art. 267.

[35] The European Court of Justice has further developed the exceptions of the obligation of national judges to ask for its preliminary ruling under TFEU art. 267, paragraph 3, in the case Cilfit et Lanificio di Gavardo SpA v. Minister of Health, CJEU Case C–283/81, 1982 E.C.R. 3415, paras. 9, 11, 14.

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[European Union] legislation, while it leaves on the national courts to draw the necessary consequences for applying the standard interpreted in the main proceedings by the ECJ."[36] The sharing of tasks between the European Court of Justice and the national courts expresses a principle inherent in the logic of judicial cooperation that leads gradually to a sincere and decent dialogue between them, even if there can be some jurisprudential deviations.[37]

A duplication of the mechanism of preliminary ruling of the European Union in the conventional level, however, is impossible. It objects to the physiognomy of the European mechanism on human rights and especially to the principle of subsidiarity. The latter is a cornerstone concept that penetrates the conventional construction and implies that the ECtHR should tact as an *ultimum subsidium* only when the national authorities fail to fulfill their conventional obligations.[38] The Convention, therefore, should be protected and guaranteed at the national level. This particularity of the conventional model explains why only the highest national jurisdictions are allowed to ask for the expertise of the ECtHR without being completely bound by its opinions. The Protocol obeys this logic with great success by respecting both the material aspect of the principle of subsidiarity and the principle of the exhaustion of national remedies.

Moreover, the Protocol does not distinguish between interpretation and application as found in the preliminary rulings of the European Court of Justice. The Grand Chamber will adjudicate the request of the national judge on its merits relating not only to the interpretation of the ECtHR's precedents but also to the application of the Convention on the national level. Although this double faculty of the Grand Chamber was recognized in order to facilitate the Court's work and to guarantee its interpretative predominance over national judges,[39] there is a potential risk of limiting the national courts to the singular role of recording the solutions dictated by the Court. This possibility might shift the European

[36] DENYS SIMON, LE SYSTÈME JURIDIQUE COMMUNAUTAIRE 694 (3d ed. 2001). However, the author recognizes that this separation is more theoretical and that in practice the interpretation and the application do not have many differences. According to Simon, "the guiding line between interpretation and enforcement duties (application) can vary depending on the accuracy of the question made by the national court, the complexity of the legal and factual context of the question and the type of the European legislation interpreted by the Court of Justice." (Author's translation.)

[37] For a detailed analysis on this point, *see* Ami Barav, *Déformations Préjudicielles*, *in* MÉLANGES EN HOMMAGE À GEORGES VANDERSANDEN: PROMENADES AU SEIN DU DROIT EUROPÉEN 21–88 (Georges Vandersanden et al. eds., 2008); *see also* Ami Barav, *Déviation Préjudicielle*, *in* LES DYNAMIQUES DU DROIT EUROPÉEN EN DÉBUT DE SIÈCLE, ETUDES EN L'HONNEUR DE JEAN CLAUDE GAUTRON 227–47 (Pedone ed., 2004).

[38] *See* ECHR, Art. 35, para. 1(a) (regarding the admissibility criteria of an individual application, providing that "the Court may only deal with the matter after all domestic remedies have been exhausted").

[39] The Convention guarantees rights by establishing a centralized system of collective protection of Human Rights. According to articles 32 and 19 of the Convention, the ECtHR is the authentic interpreter of the text and its Protocols in a way that it has the original capacity of interpreting the Convention.

judge to a judge of the national circumstances.[40] This implies a substantial increase in his work, especially when the ECtHR will be obliged to reformulate the national judge's question to correspond to the alleged human rights violation.

The mechanism introduced by the Protocol has many similarities with the preliminary ruling of TFEU article 267. First, the two mechanisms are involved in a preventive way while the situation is still *sub judice* at the national level. Escaping from the linear process by interrupting the proceedings before the domestic court, the request has suspensory effect.[41] One of the ambitions of the advisory opinion is precisely to "help shift, from *ex post* to *ex ante*, the resolution of a number of questions of interpretation of the Convention's provisions in the domestic forum, saving—in the long run—the valuable resources of the Court."[42]

Second, both mechanisms emphasize the role of national judges, who become ordinary judges of the European law of human rights broadly, establishing an institutional dialogue between different judicial bodies. In this way, both mechanisms help avoid the excessive politicizing of a dispute by instituting a "preferred means to resolve in a spirit of cooperation between judges difficulties arising from legal pluralism."[43] Third, the execution of the judgments is facilitated as it follows the normal domestic law process, providing that each part will play its role in this institutional transaction.

II. The Articulation of the New Advisory Opinions with Other Conventional Proceedings

The Explanatory Report states that the Protocol, due to its optional character, "does not have the effect of introducing new provisions into the Convention, whose text remains unchanged."[44] In this context, its application for the Contracting Parties that have ratified it depends on all other relevant provisions of the Convention.

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[40] Due to the role of the ECtHR as the authentic interpreter ("*interprète authentique*") of the ECtHR, its interpretations are incorporated in the Conventions' rights and compose standards for the national judges. However, the national judges who are the common judges of the ECHR can limit this power of the ECtHR. For an example of the use of this capacity by the British judges, *see* Sarah Lambrecht, *Bringing Rights More Home: Can A Home-Grown UK Bill of Rights Lessen the Influence of the European Court of Human Rights?*, 15 GERMAN L. J. 407 (2014).

[41] Jacqué, *supra* note 31, at 20.

[42] Parliamentary Assembly Opinion 285 (2013), Draft Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, part 2, http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=20015&Language=EN.

[43] Jacqué, *supra* note 31, at 20.

[44] Explanatory Report, *supra* note 9, at 6.

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The Convention already provides for the advisory jurisdiction of the ECtHR.[45] Under article 47, the ECtHR can give advisory opinions on legal questions concerning the interpretation of the Convention and its Protocols at the request of the Committee of Ministers.[46] The second paragraph of the same article further limits the scope of the Article by underscoring that such opinions should not address any questions relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols. It also should not provide such opinions dealing with any other question which the Court or the Committee of Ministers might consider in consequence of any such proceedings as could be instituted in accordance with the Convention.[47]

Until today, the ECtHR exercised this power in an extremely restrictive and rigorous way because it refused to treat questions on substantial matters.[48] In an effort to avoid a situation in which it adopted a position likely to prejudice the subsequent review of an application submitted under articles 33 and 34 of the Convention, the ECtHR went so far as to consider that "it suffice[d] to exclude its advisory jurisdiction that the legal question submitted to it is one which it might be called upon to address in the future in the exercise of its primary judicial function, that is in the examination of the admissibility or merits of a concrete case."[49] In the same spirit, the ECtHR expressly excluded any advisory jurisdiction on political expediency questions.[50] Thus, the Court has refused to rule on the coexistence of the Convention with the Convention of Human Rights and Fundamental Freedoms of the

[45] The advisory competence of the ECtHR was introduced in the Convention by the adoption of the Second Protocol. It opened for signature on May 6, 1963 and entered into force on September 21, 1970.

[46] Article 47, paragraph 1, provides, "The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto."

[47] Article 47, paragraph 2, provides,

> "Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention."

[48] Advisory Opinion Concerning the Lists of Candidates Submitted with a View to the Election of Judges to the European Court of Human Rights, EUR. CT. H.R. (Feb. 12, 2008); Advisory Opinion on Certain Legal Questions Concerning the Lists of Candidates Submitted with a View to the Election of Judges to the European Court of Human Rights (No. 2), EUR. CT. H.R. (Jan. 22, 2010).

[49] Decision on the Competence of the Court to Give an Advisory Opinion, European Court of Human Rights, June 2, 2004, pt. 33.

[50] *See* Advisory Opinion on Certain Legal Questions, *supra* note 48, at 29.

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Commonwealth of Independent States (CIS Convention), which was ratified by twelve Member States and entered into force on 11 August 1998.[51]

Recalling the use of Article 47 of the Convention to date, it can be suggested that the Protocol is an enlargement of the advisory jurisdiction of the ECtHR. An overview of its Explanatory Report in relation to the *travaux préparatoires*, which accompanied Protocol No. 2, shows that times have changed and that the drafters are looking to restructure the conventional mechanism. As highlighted by Judge Sicilianos, the new mechanism "transforms radically [the] vision rather dull of the advisory jurisdiction of the Court and therefore, in long term, the very nature of it."[52] The former President of the ECtHR Jean-Paul Costa and Patrick Titiun have emphasized the importance of restructuring the existing mechanism, considering that the preventive character of "litigation-related opinions merits . . . to be transposed into the conventional mechanism especially because there are urgent issues which are likely to bring many repetitive petitions before the Strasbourg court, as the practice has already shown."[53]

The new advisory competence, however, does not only alter the traditional role of the advisory opinions of the ECtHR. Due to the fact that "the advisory jurisdiction and the contentious jurisdiction present themselves as two independent and complementary versions of a single international judicial function,"[54] the examination of the relationship between the Protocol and the individual petition also presents an interest. The question arises as to how the ECtHR will react when it is presented with an individual application and a request for an advisory opinion which both bear on the same subject or problem. The Explanatory Report indicates that the prioritization to be given to proceedings under this Protocol would be a matter for the Court, as it is with respect to all other proceedings. In particular,

> This high priority applies at all stages of the procedure and to all concerned, namely the requesting court or tribunal, which should formulate the request in a way that is precise and complete, and those that may be

[51] The question was about if the proceedings before the Commission of the CEI could be considered as a proceeding in the spirit of Article 35, section 2(b) of the European Convention on Human Rights.

[52] *See* Sicilianos, *supra* note 30, at 17.

[53] Jean-Paul Costa and Patrick Titiun, *Les Avis Consultatifs Devant la Cour Européenne des Droits de l'Homme*, *in* L'HOMME DANS LA SOCIÉTÉ INTERNATIONALE: MÉLANGES EN HOMMAGE AU PROFESSEUR PAUL TAVERNIER 614 (Bruylant ed., 2014).

[54] MARIE-CLOTILDE RUNAVOT, LA COMPÉTENCE CONSULTATIVE DES JURIDICTIONS INTERNATIONALES: REFLET DES VICISSITUDES DE LA FONCTION JUDICIAIRE INTERNATIONALE 125, 145 (2010).

[54] Explanatory Report, *supra* note 9, at 4.

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> submitting written comments or taking part in hearings, as well as the Court itself.[55]

The ECtHR's priority policy as practiced since 2009 further demonstrates the potentials of this mechanism.[56] To ensure that the most serious cases and the cases disclosing the existence of widespread problems capable of generating large number of additional cases are brought before the Court, there are seven categories of cases that are treated with respect to their importance. The first category relates to urgent matters.[57] The second category deals with applications raising questions capable impacting the effectiveness of the Convention system, particularly a structural or endemic situation, or applications raising an important question of general interest, particularly a serious question capable of having major implications in domestic legal systems or the European system.[58] A normal priority is given to cases raising issues under the core rights of Articles 2, 3, 4, or 5 Section 1 of the Convention, irrespective of whether they are repetitive or not and the potentially well-founded applications based on other articles. Finally, applications raising issues already dealt with in a pilot judgment or applications giving rise to a problem of admissibility receive a low priority.[59]

Among these categories, it seems that the advisory opinions under the Protocol are classified in the second category because they concern questions of principle related to the interpretation and the application of the Convention. The only cases that have priority over advisory opinions, therefore, are the cases belonging to the first category, namely urgent applications. In particular, these cases might deal with an imminent risk to the life or the health of the applicant, or other circumstances linked to a personal or familial situation, particularly where the well being of a child is at issue.[60]

D. Conclusion

Advisory opinions, by definition, do not require the recipient to be adapted automatically to the will of the transmitter. Instead, they aim to enrich his mind. In this way, the new advisory competence of the ECtHR is prone to have a persuasive authority not only for the national judge who submitted the question, but also for other national courts and tribunals

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[55] *See* Protocol No. 16, *supra* note 1, at 4.

[56] For a full analysis on the ECtHR's priority policy, *see* European Court of Human Rights, *The Court's Priority Policy*, http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf.

[57] *See supra*, Part B.

[58] *See supra*, Part B.

[59] *See supra*, Part B.

[60] *See supra*, Part B.

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who may face a similar situation. This persuasive authority urges the national judges to consider the opinions of the ECtHR as solutions for problems of a large scale in the national level or insofar as far as they can boost the exchanges between the national instances and the ECtHR instances on the human rights topics. In this way, the advisory opinions would have in the long-term an *erga omnes* effect and not merely symbolic value.

Thus, this Protocol creates a platform for productive and fruitful dialogue between the highest national courts and the ECtHR because it can formalize their relations and guide their interactions, which, until now, have taken place implicitly by way of exhaustion of domestic remedies.

As previously noted, however, the Protocol is the result of a long period of reflection. As J.P. Jacqué remarks, "[I]n the area of European construction, a considerable amount of time may pass between the emergence of an idea and the moment when it becomes possible to start putting that idea into practice."[61] In this regard, it is quite surprising that the Protocol makes some space for the appreciation of the ECtHR and even more space for the national appreciation. Even if all the ambiguities will be resolved in practice, it would be to the benefit of judicial certainty to define further the role of each actor in this new institutional dialogue.

Taking for granted that no State can adhere in advance to a mechanism without knowing the exact extent of its obligation, this Protocol leaves many questions unanswered. Far from questioning the necessity of the existence of an official path for a dialogue between national and European judges, the goal of strengthening the interaction between the national and the European level is still far from being accomplished. This Protocol constitutes a valuable starting point for a better understanding of human rights at a pan-European level, but it is highly questionable whether at this stage it can breathe new life into the European Convention on Human Rights.

[61] Jacqué, *supra* note 31, at 17.

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