OXFORD PUBLIC INTERNATIONAL LAW

Max Planck Encyclopedias of International Law

Advisory Opinion: European Court of Human Rights (ECtHR)

Janneke Gerards

Content type: Encyclopedia entries
Product: Max Planck Encyclopedias of International Law [MPIL]
Module: Max Planck Encyclopedia of International Procedural Law [MPEiPro]
Article last updated: December 2018

Subject(s):

Advisory opinions — Human rights

Published under the direction of Hélène Ruiz Fabri, with the support of the Department of International Law and Dispute Resolution, under the auspices of the Max Planck Institute Luxembourg for Procedural Law.

A. Introduction

1 On 1 August 2018, barely five years after it was signed, Protocol 16 to the European Convention of Human Rights ('Protocol', 'P16', or 'Protocol 16') entered into force after having been ratified by ten Member States of the → *Council of Europe (COE)*. The first ten ratifying states are the Central and Eastern European States of Albania, Armenia, Estonia, Georgia, Lithuania, Romania, and Slovenia, complemented by Finland, France, and San Marino (for more information on the state of signatures and ratification, see Chart of signatures and ratifications of Treaty 214). For the highest courts in these States, if they have been so assigned by their national governments, Protocol 16 opens up a possibility to ask the → *European Court of Human Rights (ECtHR)* ('Court') for advice on the interpretation and application of the → *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)* ('ECHR' or 'Convention'). This makes the P16 advisory opinions procedure very different from the advisory opinions procedure of Articles 47 to 49 of the Convention, which were added to the Convention by Protocol No 2 (CETS No 44) and entered into force in 1970. This procedure allows the Committee of Ministers (not national courts) to request the Court to give an opinion on legal questions concerning the interpretation of the Convention and the Protocols. In addition, requests for advisory opinions under Article 47 ECHR may only relate to procedural issues, not to 'the content or scope of the rights or freedoms' contained in the Convention or matters of policy (Art 47 para 2 ECHR; see also Committee of Experts 1960, paras 7 and 8).

2 Although Protocol 16 has entered into force earlier than some expected, it is far from uncontroversial. Of the 47 Convention States, as at 1 November 2018, twelve States had signed but not yet ratified the Protocol and more than half of all States had not even signed it. Apparently, thus, many States have misgivings about the Protocol. At the same time, courts in the States that have ratified the Protocol appear to be already using it. On 23 October 2018, barely three months after the Protocol's entry into force, the ECtHR published a press release stating that it had received the first request for an advisory opinion from the French Court of Cassation (ECtHR Press Release, 2018).

3 To understand the Protocol's working and the controversies surrounding it, it is useful to understand its contents. This entry therefore starts by setting out the new procedure the Protocol introduces (sec B below). Since the ECtHR had not yet decided on a request for an advisory opinion at the time of writing, this section is based on the text of the Protocol and its Explanatory Report, as well as on the Rules of Court the ECtHR has adopted to accommodate the procedure. These Rules of Court were amended on 19 September 2016 and have been in force since 1 August 2018 (see in particular Chapter X). The Plenary Court has also adopted a set of Guidelines on the implementation of the advisory-opinion procedure ('Guidelines') to further explain the details of the new procedure. Section C below provides some background information on the reasons for the Protocol's drafting and the expectations of the drafters as to its effects. Finally, section D below pays attention to the benefits of the procedures, which for ten States have given reason enough to ratify the Protocol, and its disadvantages, which for the remaining 37 Member States may have been sufficient not to consider signature or ratification.

B. The Advisory Opinions Procedure of Protocol 16 ECHR

1. Courts Competent to Submit a Request for an Advisory Opinion

4 Protocol 16 creates a competence for highest national courts to present a request for an advisory opinion to the ECtHR (Art 1 P16). 'Highest courts' refers to courts from which no appeal is possible (Paprocka and Ziólkowski, 2015, 279–80). It is up to the States to decide which courts will be vested with this competence (Art 10 P16). They may decide, for example, to only empower a constitutional court or a supreme court to submit requests, but

they may also list highest courts with jurisdiction in specific fields, such as administrative or labour law (Explanatory Report, para 8). The list of competent courts must be submitted to the Secretary-General of the Council of Europe when a State ratifies the Protocol, but it may be modified at any later date (Art 10 P16).

5 The first ten ratifying States have listed different types of courts in their declarations. These include supreme courts and constitutional courts but sometimes also specialized highest courts. France, for example, has declared that the Constitutional Council, the State Council, and the Court of Cassation are competent to submit requests; Estonia has listed its Supreme Court, which in the Estonian court system is also the court of constitutional review; and Finland has assigned its Supreme Court, Supreme Administrative Court, Labour Court, and Insurance Court (see further Reservations and Declarations for Treaty No 214).

6 One reason why only highest courts may submit requests for an advisory opinion is that it is consistent with the idea of exhaustion of domestic remedies (→ *Local Remedies, Exhaustion of*), which is normally an admissibility requirement for applications to be lodged at the Court (Art 35 ECHR; Explanatory Report, para 8). In addition, the limitation should help avoid a proliferation of requests (Explanatory Report, para 8). The drafters also mentioned that the currently existing ‘dialogue’ between the ECtHR and national courts is mainly one between the Court and the highest national courts (Explanatory Report, para 8). According to the Explanatory Report, this is ‘the appropriate level at which the dialogue should take place’ (Explanatory Report, para 8; see also ECtHR, Reflection paper on the proposal to extend the Court's advisory jurisdiction, para 26).

2. Requirements for Requests for Advisory Opinions

7 A competent court may present questions to the ECtHR regarding the interpretation and application of the Convention (Art 1 (1) P16). The Rules of Court clarify that the request must be filed with the Registrar (Rule 2 Chapter X Rules of Court). The questions raised may not be of an abstract or theoretical nature, but must relate to a concrete case presented to the national court (Art 1 (2) P16). For that reason, the national courts must supply the ECtHR with information about the relevant legal and factual backgrounds of the case that has given rise to questions of interpretation of the Convention (Art 1 (3) P16). More specifically, according to the amended Rules of Court, the request must set out the subject matter of the domestic case and its relevant legal and factual background; 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; and if possible and appropriate, a statement of the requesting court’s own views on the question, including any analysis it may have made itself of the question (Rule 2 (2.1) Chapter X Rules of Court; in more detail, see the Guidelines, paras 12 ff). The Court has stressed in its Guidelines that it is particularly important to place it in the most informed position possible in order to enable it to provide useful advice and interpretative guidance (Guidelines, para 13). It therefore also advises the competent national courts to submit a request only after all the facts and legal issues in the case have been duly identified.

8 The Rules of Court further make clear that the request for an advisory opinion may be submitted in the national official language used in the domestic proceedings. If this is not English or French, the president of the Court will specify a time-limit for the State to

provide for an English or French translation of the documents (Rule 34 (7) Rules of Court; Guidelines, para 18).

9 It is the national court's own choice if it wants to suspend the national proceedings pending the delivery of the Court's opinion (Guidelines, para 21). Regardless of this choice, the requesting court should inform the Court of any relevant procedural step that is taken (Guidelines, para 22). In particular, the requesting court has to notify the Registrar if the request is withdrawn, since the Court will then discontinue the proceedings (Rule 2 (2.3) Rules of Court). This emphasizes that the Court is not to answer any purely theoretical or hypothetical questions and may not deal with a request if the underlying national proceedings have been ended.

10 There are no costs involved in the advisory opinions procedure before the Court. If such costs would arise on the national level, it is not the Court's task to settle that matter (Rule E Chapter X Rules of Court; Guidelines, para 23). Nevertheless, if a party on the national level does not receive legal aid and is in need of this, the Court may grant it (Guidelines, para 24).

3. Discretionary Power to Accept Requests for an Advisory Opinion

11 The Court is not obliged to accept a request for an advisory opinion. A panel of five judges of the Court's Grand Chamber will decide whether the request will be looked into on the merits (Art 2 P16). This panel is composed of the president of the Court (or the vice-president if need be), two presidents (or vice-presidents) of Sections designated by rotation, the judge elected in respect of the State from which the request originates, and a judge designated by rotation from among those judges elected to serve on a panel (Rule 3 (1.1) Chapter X Rules of Court).

12 For each request, the panel will first check whether the above-mentioned formal and procedural requirements for submitting a request have been complied with (Rule 3 (3) Chapter X Rules of Court; Guidelines, para 7). For example, if the request has been submitted by a court that is not on the list submitted to the Secretary-General of the Council of Europe, or if the national court has not provided sufficient contextual information, the Court will refuse to deal with the request and it will notify the requesting court as well as the Contracting Party of this (Rule 3 (5) Chapter X Rules of Court; see also Guidelines, para 4). The same is true if the Court discovers that the request does not originate in pending domestic proceedings (Guidelines, para 6).

13 Neither Protocol 16 nor the new Rules of Court contain any information as to possible substantive grounds for refusal or acceptance of requests; it only mentions that the request must raise 'questions of principle'—a term derived from a report that inspired the current Protocol (Group of Wise Persons, 2006, 339). According to several commentators, it is likely that the panel will base its decisions on criteria similar to those used in relation to requests for referral of cases to the Grand Chamber (Gragl, 2013, 234; Gerards, 2014, 514; Giannopoulos, 2015, 339–40; Paprocka and Ziólkowski, 2015, 287–88). Based on Article 43 ECHR, a case can be referred for internal appeal to the Grand Chamber if it evokes important questions related to the interpretation and application of the Convention; if it presents a reason for revision of well-established case law; or if the case pertains to an important matter of general interest (Reflection Paper ECtHR, 2012, paras 20, 22, and 30). More or less in line with these standards, the Court itself mentions in its Guidelines that a request could be made if it raises a novel point of Convention law; if the facts of the case do

not seem to lend themselves to a straightforward application of Convention law; or if there appears to be an inconsistency in the case law (Guidelines, para 5).

14 It is not yet clear whether and how the Court will use these criteria in deciding to accept or decline a request for advice. This might become clearer over time, since Protocol 16 stipulates that the reasons for the refusal of a request shall be made public (Art 2 (1) P16). The Court itself has already indicated, however, that it 'envisages that such reasons will normally not be extensive' (Opinion of the Court on Draft Protocol 16, 2013, para 9). In particular, it is unlikely that the Court will state elaborate substantive or 'political' grounds underlying a refusal. The Court will probably restrict itself to explaining that the request relates to a theoretical issue; that it does not pertain to a new or important question of interpretation; that an individual application on the same matter is already pending before the Court; or that the issue raised can more suitably be dealt with in an individual application (Explanatory Report, para 14; Reflection Paper ECtHR, 2012, para 36; Gragl, 2013, 238–39). Whether reasons of a lack of capacity to deal with a complaint can be advanced to justify a refusal to deal with a request is, as yet, uncertain. Equally unclear is whether the Court will mainly use its competence to decide on requests for advice if the request stems from a national issue which potentially may give rise to many similar national cases (Opinion of the Court on Draft Protocol 16, paras 27 ff).

4. Procedure before the Grand Chamber

15 If the Court accepts a request, the Grand Chamber—composed of seventeen of the Court's judges—will examine it (Art 2 (2) P16). This will be done as a matter of priority (Rule 3 (2) Chapter X Rules of Court in conjunction with Article 41 Rules of Court). If the national court thinks there is even more urgency to the matter, it must inform the Court about this and provide reasons why an expedited procedure is needed (Guidelines, para 15). It is for the Court to determine if an expedited treatment of the request is indeed warranted (Guidelines, para 29).

16 The president of the Grand Chamber may invite the requesting court to submit any further information that is considered necessary to deal with the request. In addition, the president may invite the parties to the domestic proceedings to submit written observation and, if appropriate, take part in an oral hearing (Rule 4 (3) Chapter X Rules of Court). The Council of Europe Commissioner for Human Rights and the State to which the requesting court pertains have the right to submit written comments and participate in any hearing (Art 3 P16). Upon invitation by the president of the Court, in the interest of the proper administration of justice, the same is true for other States or persons (Art 3 P16). In this respect, the same rules apply as in cases concerning individual or interstate applications (Rule 44 (7) Rules of Court).

17 The Court's advisory opinions must be reasoned (Art 4 P16). The Court has emphasized from the outset, however, that it is not its task to assess the facts of a case or evaluate the merits of the parties' views (Guidelines, para 6.2). Its role is strictly limited to furnishing an opinion on the request (Guidelines, para 6.2).

18 If the opinion is not adopted unanimously, any judge is entitled to deliver a separate opinion (Art 4 (2) P16 and Rule 4 (8) Chapter X Rules of Court). In this respect, the advisory opinions resemble the 'normal' judgments of the Court.

5. Effects of the Advisory Opinion for the National Procedure; res interpretata

19 Advisory opinions are not binding. When a highest national court is informed about the advice, it can decide for itself whether to follow it or not (Art 5 P16; Guidelines, para 6.2). The Court's Guidelines on the implementation of the procedure only invite the requesting national court to inform the Court of the follow-up given to the opinion and provide it with a copy of the final judgment or decision adopted in the case (Guidelines, para 31).

20 As is stressed in the Explanatory Report, however, there will be hardly any difference in legal force between an interpretation given to the Convention in an advisory opinion and an interpretation given in a judgment, which is binding for the parties to the case in accordance with Article 46 ECHR (Explanatory Report, para 27; see also already Opinion of the Court on Draft Protocol 16, 2013, para 44). In this respect, it is relevant that the Court's judgments are generally considered to have 'force of interpretation' or *res interpretata*. This means, briefly put, that a well-established interpretation of the terms and notions of the Convention given by the Court forms part and parcel of the Convention. The Parliamentary Assembly of the Council of Europe already acknowledged this effect of the Court's judgments in 2000 (Parliamentary Assembly of the Council of Europe, Res 1226/2000, para 3). The government leaders did the same in the intergovernmental conference in Interlaken on 19 February 2010 (Interlaken Declaration—Action Plan, 2010, para B.4 (c)).

21 The consequence of the acceptance of *res interpretata* is that, *de facto*, the Court's well-established interpretations and the general principles it has defined in its judgments can be considered to be binding on the States. Put differently; the States are obliged to comply with the Convention as it is explained by the Court (Vélu, 2000, 1521; Besson, 2011, 132; Gerards, 2014, 21–27; Bodnar, 2014, 223–62; Paprocka and Ziólkowski, 2015, 291).

22 Accordingly, the national courts are expected to follow the Court's interpretations in their own judgments, although they can adapt them to the concrete circumstances of a case. Since the legal effect of advisory opinions is similar to judgments, advisory opinions, too, will have *res interpretata* (Opinion of the Court on Draft Protocol 16, 2013, para 44). A distinction thereby has to be made between the general interpretations provided in the opinion and the Court's advice on the concrete application to the facts of the case. The former will have force of interpretation to the extent that it concerns well-established interpretations and general principles and it will therefore be *de facto* binding on the national courts. Only the latter (in contrast to judgments) will be non-binding. To illustrate, a national court may be presented with a case on the role the best interests of the child should play in relation to expulsion decisions. The national court then might decide to request an advisory opinion on this matter. In its advisory opinion, the Court could provide for an interpretation of the relevant Convention provisions, which could include general criteria and standards the national courts should take into account in deciding what weight to give to the best interests of the child. Based on the information supplied by the national court, the Court could also advise the national court on the application of these standards to the facts of the case. According to the text of the Protocol, this concrete advice would not be binding on the national court, which for instance could decide to strike a different balance between conflicting interests. However, in assessing the case, the national court still would be obliged to take account of the general criteria and factors the Court defined in its opinion, since these are covered by the notion of *res interpretata* (cf Opinion of the Court on Draft Protocol 16, 2013, paras 5 and 44; see also Voland and Schiebel, 2017, 83). Indeed, if the national court would ignore the Court's interpretations, it could be deemed to have violated its obligations under the Convention (Vélu, 2000, 1521; Gerards, 2014, 21–27; Bodnar, 2014, 223–62). Arguably, the same would hold true for other courts than the one presenting the request for an opinion, even for those in States which have chosen not to

ratify Protocol 16 (Steering Committee for Human Rights ('CDDH'), Report on measures to enhance relations between the Court and national courts, 2012, para 20 (b)).

6. Individual Complaints Lodged after the National Remedies have been Exhausted

23 In cases where the highest national court has requested and obtained an advisory opinion, the Protocol still allows individuals to lodge a complaint with the Court (Explanatory Report, para 26). It is not inconceivable that litigants may want to do so, given the non-binding nature of the advisory opinions in the concrete case and the requesting national court's discretion in the application of the Court's opinion (Explanatory Report, para 26). Moreover, litigants may have good reason to want the ECtHR to have another look at their case if, in their view, the national court has unduly ignored, misunderstood, or incorrectly applied the Court's opinion, or if the case contains elements related to Convention rights that have not played a role in the advisory opinions procedure.

24 As a consequence of this possibility, the Court may be asked to pronounce itself on a certain set of facts twice. Nevertheless, the perspective will tend to be different, since the individual application is likely to address the flawed national interpretation or application of the Court's advisory opinion rather than the Court's interpretation of the Convention as such. Moreover, if there really appears to be significant overlap between the cases, the Court might decide to declare those aspects of the case inadmissible that it has already dealt with (Explanatory Report, para 26; cf also Thorarensen, 2016, 79–100).

C. Background and Rationale of Protocol 16

1. Background: Backlog, Backlash, and the Brighton Declaration

25 The idea to introduce the advisory-opinions procedure discussed in section B above was launched at a time the ECHR system experienced a considerable → *backlog* crisis as well as was subjected to strong criticism (see eg Flogaitis, Zwart, and Fraser, 2013; Gerards and Fleuren, 2014; Popelier and Lambrecht, 2016). During the 1990s and the 2000s, after the accession of many new States Parties to the Convention, the number of incoming cases had continued to increase exponentially (eg Harmsen, 2001). The Court proved poorly equipped to deal with so many cases, which sometimes were simple but repetitive, yet at other times highly complex and politically sensitive (Glas, 2016, 40–45). This led to a series of reforms of the Court and the ECHR procedures, of which the introduction of a set of new procedural rules, including the setting-up of single judge formations, in Protocol 14, was the most significant one (see eg CDDH, 2012; Harmsen, 2011; Cameron, 2013; Glas, 2014; Gerards and Lambrecht, 2018). However, at the time Protocol 14 entered into force (in 2010), the backlog of the Court had already increased up to a point that it would be impossible to dispose of all complaints within a reasonable time (eg Glas, 2016, 38). This situation clearly called for a response entailing further procedural change.

26 As is equally well-documented (see mainly the same sources mentioned above), the backlog crisis coincided with another crisis, which is often dubbed the 'backlash crisis'. Around 2010, increasing criticism was voiced of the ECHR system and, in particular, the role of the Court (see eg Bossuyt, 2007; Hoffmann, 2009; Bossuyt, 2010; Bratza, 2011; Costa, 2013; Popelier and Lambrecht, 2016; Cram, 2018). According to the critics, the Court acted too much as a court of fourth instance and it intervened too frequently and too deeply in national affairs (Cram, 2018, 2). This was considered to be particularly problematic because the Court is not an elected body and therefore lacks democratic legitimacy (Walton, 2014, 195). Moreover, according to the critics, being a supranational

court, the ECtHR should heed national sovereignty and respect national diversity much more than it was seen to do.

27 This combination of backlog and backlash crises evoked a strong political response from several national governments. In 2010, they identified a number of problems in the system's functioning in the Interlaken High-Level Declaration and they devised an action plan, which was consolidated and further elaborated on in the 2011 Izmir Declaration. Further debate and deliberations, managed in particular by the United Kingdom, led to the adoption of another High-Level Declaration in Brighton in 2012 (on these developments, see Voland and Schiebel, 2017, 77; Gerards and Lambrecht, 2018).

28 The Brighton Declaration is especially famous for the strong emphasis it placed on the principle of → *subsidiarity* and the → *margin of appreciation*, and for the measures it suggested to reduce the possibilities for the Court to act as a court of fourth instance (see eg Helfer, 2012; Walton, 2014; Arnardóttir, 2018; Madsen, 2018). The principle of subsidiarity and the margin of appreciation doctrine were considered of such great importance as to warrant inclusion in the Convention's Preamble. To this end, the governments decided to draft and adopt a new Protocol to the Convention: Protocol 15 (CETS-no 213; see eg Voland and Schiebel, 2017, 78). Next to the changes to the Convention's Preamble (Art 1 P15), this Protocol also contains a number of new articles to smoothen the procedure before the Court, help it reduce its case-load, and strengthen the guaranties for judicial independence (Walton, 2014, 205; Madsen, 2018, 204). The adoption of Protocol 15 was and still is supported by many of the Council of Europe's Member States. This is exemplified by the fact that, as of June 2018, all 47 States had signed the Protocol and all but four States had ratified it: the exceptions being Bosnia and Herzegovina, Greece, Italy, and Spain (see Chart of signatures and ratifications of Treaty 213). It is probably just a matter of time before this Protocol enters into force.

29 Based on an originally Norwegian-Dutch proposal, the Brighton Declaration also led to the drafting of Protocol 16 (CDDH, 2012; Reflection Paper ECtHR, 2012; see also Paprocka and Ziólkowski, 2015, 275; Voland and Schiebel, 2017, 75). This Protocol was meant to contribute to solving both the backlog and the backlash crises by enhancing the dialogue between the Court and the national courts and by stimulating national authorities to deal with Convention rights issues themselves. These objectives are explained in more detail below.

2. Strengthening the Interaction between the National Courts and the ECtHR

30 The main objective of Protocol 16 is to reinforce and strengthen interaction between the ECtHR and the highest national courts (cf the Brighton Declaration, 2012, para 12 (d); Opinion of the Court on Draft Protocol 16, 2013, para 4; see also already Group of Wise Persons, 2006, para 81; and cf eg Voland and Schiebel, 2017, 80). As the Preamble to Protocol 16 explains, such closer interaction is a means to reinforcing the implementation of the Convention in accordance with the principle of subsidiarity. The Protocol thus clearly tunes in with the importance given to the notion of subsidiarity in Protocol 15 and the concerns expressed on the national level about the Court's interventions.

31 The drafters of Protocol 16 paid close attention to practices in Convention implementation that have proved successful in the past. Several studies have confirmed that national courts function as linchpins between the European and the national level, even if they have limited constitutional powers, and a symbiotic partnership can be said to exist between the national courts and the ECtHR (Helfer, 2008; Keller and Stone Sweet, 2008; Greer and Wildhaber, 2012, 662; Gerards and Fleuren, 2014, in particular Chapter 9; Gerards 2018). In this partnership, it is the ECtHR's task to give a clear interpretation to

the Convention. This means that the Court defines relevant standards, criteria, and factors. Subsequently, the national courts can transpose these to their own national legal systems and apply them in their judgments. Even if the standards and criteria are sometimes a bit twisted and turned in this process of transposition (eg Nussberger, 2014, 169), it has been shown that the application of the Convention by the national courts in fundamental rights cases has resulted in a strong 'embeddedness' of the Convention in national law (Helfer, 2008; Gerards and Fleuren, 2014). Further, it is a characteristic of the partnership that, in turn, the ECtHR's own case law is influenced by national courts and their judgments. The ECtHR has shown itself to be attentive to national courts' findings related to the Convention. In particular, it carefully scrutinizes any reasons given for a national interpretation or application of the Convention which deviates from its own case law (Gerards, 2014, 53 ff). If such a deviating application of the ECHR stems from a mere lack of carefulness or of willingness to comply with Convention standards, the Court is not likely to accept this. Yet if the deviating application proves to be the result of a deliberate and well-considered assessment and if it is based on a clear need to adapt the ECtHR's precedents to national constitutional or legal requirements, the Court has shown itself ready to revisit its own case law (Gerards, 2014, 77). A national court's well-considered criticism of the Court's case law may then lead to the adoption of slightly different standards and interpretations, which can fit in more easily with the national case law and therefore are more likely to be applied by the national courts (Gerards, 2014, 77). This partnership has been boosted even further by the establishment of a Superior Courts Network ('SCN') in 2015. The SCN has the function of bilateral exchanges of information on the case law of the European Court, Convention law and practice, and the domestic law of the States (Cooperation Charter, 2015, paras 1 and 3; Operational Rules, 2018, paras 4 and 5). According to its first annual report, the work of this SCN significantly contributes to its 'core mission of dialogue' (Annual Report SNC, 2017, para 5).

32 The dialogue between national courts and the ECtHR thus already contributes to the improvement of practicable fundamental rights standards and, thereby, to the effectiveness of fundamental rights protection on the national level (Glas, 2016). From this perspective, it can be understood that the government leaders at the Brighton Conference regarded it as appropriate and desirable to further strengthen the partnership and facilitate the contacts between the national courts and the ECtHR by introducing a new procedural instrument which would be particularly conducive to national dialogue. Although a certain dialogue already exists, shortcomings have been identified that could hamper the partnership's effectiveness (see Gerards, 2014, 80 ff; in more detail, Glas, 2016, 521 ff). For those States which have not ratified Protocol 16, for example, the Court can only pronounce itself on a certain matter if all national remedies have been exhausted. During these often lengthy procedures, the Court is not in a position to provide any guidance or to correct a flawed interpretation of the Convention. Further, it cannot be avoided that many similar cases are lodged, either at the national level or at the Court. Protocol 16 is intended to solve precisely these problems. The advisory opinions procedure is thought to enable the Court to have a more direct impact on national judgments and offer national courts more concrete guidance at an earlier stage of the proceedings (CDDH, Report on measures to enhance relations between the Court and national courts, 2012, para 52). Moreover, this assistance could be given in such a way as to allow national courts to dispose of repetitive complaints more effectively.

33 Importantly, the new procedure would also be in line with the notion of subsidiarity as it is defined in several consecutive High-Level Declarations and in the new Preamble to the Convention of Protocol 15 (Thorarensen, 2016, 80). This notion of subsidiarity entails that the primary responsibility to apply and respect the Convention lies with the national authorities, including the national courts (see eg Art 1 Protocol 15; Christoffersen, 2009; Tulkens, 2012). If complaints arise regarding the level of respect of the Convention rights,

national courts have to be given a fair chance to make reparations and offer redress before the Court would become involved. The Court's main, and subsidiary, task then is to have a second look at the national measures and the national judicial efforts at reparation to see whether they respect the Convention standards (see eg Spano, 2014; Walton, 2014; Huijbers, 2017; Gerards, 2018). Moreover, in order to enable the national authorities to comply with the Convention, an important task for the Court would be to elucidate the meaning of these standards in a clear and unambiguous manner (De Londras, 2013; Gerards, 2018). Protocol 16 is aimed at usefully contributing to this division of tasks between the national courts and the ECtHR. After all, the national courts can decide for themselves if they think it is useful to ask the Court for clarification of certain issues, or perhaps even invite it to change its case law. If they do, the Court can provide for a general interpretation, but in the end, it will be up to the national courts to decide how they want to implement that interpretation in their own judgments. Thus, the advisory opinions procedure of Protocol 16 does not just respect the principle of subsidiarity, it is its very embodiment.

3. Reducing the Court's Backlog

34 As mentioned above, the second main objective of Protocol 16 is to help alleviate the Court's burden and reduce the Court's still-existing backlog (CDDH, Report on measures to enhance relations between the Court and national courts, 2012, para 52 and Appendix V, para 3 (a) and (c); Reflection paper ECtHR, para 2; Voland and Schiebel, 2017, 79). The present caseload is 55,200 cases (June 2018). Taken at face value, the introduction of the advisory-opinions procedure would only seem to add to the Court's workload because the Court would be confronted with a potentially large number of requests for advisory opinions (CDDH, Report on measures to enhance relations between the Court and national courts, 2012, para 53 and Appendix V, para 4 (b); Reflection paper ECtHR, para 12 ff; see also Dzehtsariou, 2013). Nevertheless, the presumption of the drafters is that if the Court succeeds in clarifying the meaning of the Convention in specific types of situations, national courts can apply the relevant standards and criteria in their own case law and at a relatively early stage (CDDH, Report on measures to enhance relations between the Court and national courts, 2012, para 52). If they do so correctly and conscientiously, this will result in a lower number of cases to arrive at the Court since most cases are then satisfactorily solved at the national level. Moreover, applications that are still brought in relation to such issues can easily be declared inadmissible because they have been sufficiently assessed by a national court.

35 In addition, the procedure is intended to help solve the backlog problem created by repetitive cases (CDDH, 2012, Report on measures to enhance relations between the Court and national courts, para 3 (a)). The procedure allows a structural or systematic problem to be addressed at an early stage. Moreover, having requested the Court for advice, the national courts can put all similar cases on hold. Once the Court has provided its opinion, the national courts can resolve all pending cases at once. This is expected to significantly reduce the number of complaints lodged at the Court (CDDH, Report on measures to enhance relations between the Court and national courts, 2012, Appendix V, para 3 (b), (c), and (e)).

D. Criticism and Unanswered Questions

1. Introduction

36 Regardless of the aims of the drafters and the Protocol's potential advantages in terms of solving the backlash and backlog crises, a large majority of States have not signed Protocol 16. After five years, the number of expected ratifications is still very low, although some signatory States are very close to completing the ratification process (such as the Netherlands, where the parliamentary process of approval was nearly completed at the time of writing; see *Kamerstukken I* 2017/18, 34235 (R2053)). Of course, the first experiences with the advisory-opinions procedure may prove to be positive and the Protocol's main objective—facilitating a better interaction between national courts and the ECtHR—may show itself to be realized. In that case, the non-signatory States might be tempted to change their minds. Nevertheless, they may be induced to do so only if some of the apparent weaknesses of the procedure are removed or compensated for and satisfying responses are given to some as yet unanswered questions. This last section therefore serves to address the contested issues that may lie at the basis of the States' unwillingness to sign or ratify the Convention, as well as various open questions.

2. Contested Issues

(a) Misgivings about the Notion of 'Partnership'

37 Firstly, it is important to reiterate that the advisory-opinions procedure's main aim is to strengthen an already existing partnership and dialogue between the national courts and the ECtHR (see sec C above). The very idea of a dialogue is based on the presumption of a positive attitude of the national courts towards the ECtHR, as well as a positive attitude of other national authorities towards the national courts (Glas, 2016, 89). To all expectations, an advisory opinion of the Court will only be requested and, eventually, implemented if the national courts agree with the idea of a partnership and if they are willing to ask the Court for guidance (Gerards, 2014, 646). Moreover, there will be a measurable impact of the advisory opinions on national law only if the legislature and administrative authorities are ready to abide by the judgments of the national courts (Gerards, 2014, 646).

38 One major question related to Protocol 16 is whether these prerequisites are met. It seems that, in practice, the attitude of at least some national authorities towards the Court and the Convention is rather critical (CDDH, Report on measures to enhance relations between the Court and national courts, 2012, Appendix V, para 4 (g); Cameron, 2013, 50; see also the debates on the draft Copenhagen Declaration, which shows continuing criticism of the Court's interventions in some States—cf eg Gerards and Lambrecht, 2018, with further references). Indeed, to several States, the idea of creating or strengthening an institutional dialogue and of partnership between the ECtHR and the national courts seems rather alien. It can be expected that such States are not easily tempted to sign the Protocol (Gerards, 2014, 646). Moreover, if the prevailing sentiment in a State is that the Court is too active in protecting human rights and shows too little respect for national traditions and constitutional identity, the idea of giving the Court *more* rather than less possibilities to intervene will not be enthusiastically received. This is even more likely because requests for advice will pertain to 'questions of principle'. As a consequence, there is a high probability that the Court's opinions will relate to important and often rather politically-flavoured issues. Indeed, this appears to be confirmed by the very first request for advice that has been submitted by the French Court of Cassation, which concerns the highly sensitive and contested matter of registration and adoption of children born abroad to a surrogate mother (Press Release ECtHR, 2018). At least some States or rather, some national politicians, may want to decide on such matters themselves within the political system instead of having them decided in a judicial interplay between the national courts and the ECtHR. They may even feel more strongly about this because, in the process of providing its advice, the Court may well develop new general principles which may have great impact on

national law and which—in the end—are *de facto* binding because of the *res interpretata* principle.

39 By contrast, in States where there is already a good record of compliance with the Convention and a high level of protection of human rights, the question may arise whether the instrument has much use. In the Netherlands ratification debates, for example, this was an important consideration for critical political parties to object to the Protocol (*Kamerstukken II* 2014/15, 34235, no 7, 10). They felt little need to create yet another procedure, especially if it is one that may come with the significant consequences of having to spend time and court budgets on drafting a request and translating the various materials, waiting to see if the request is accepted and, if it is, waiting for the advisory opinion, and eventually having to implement that opinion in the judicial decision—only to see that the losing party continues to bring his or her case as an individual complaint before the Court.

(b) Increasing rather than Decreasing the Court's Workload

40 In section C above, the second objective of Protocol 16 was described as contributing to the reduction of the Court's workload (→ *Case management: European Court of Human Rights (ECtHR)*). Some commentators have emphasized that the long-term goal of alleviating the Court's burden may be an illusory one (eg O'Meara, 2013). To explain, as mentioned in section C above, the idea behind the Protocol is that the Court can clarify the meaning of the Convention before individual complaints start streaming in. This would be particularly useful if many similar cases are pending before the national courts. However, by far the most repetitive cases that presently come before the Court stem not from a lack of clarity about the Convention standards, but from familiar, yet still unsolved structural or systematic defects in the national legal systems, such as the excessive length of national proceedings or the refusal to give effect to national judgments. Such systematic problems will have to be solved through constitutional, legislative or administrative, and policy change, rather than through clarification of standards by the national and European courts. Moreover, by now the Court has created several procedural instruments to reduce the backlog created by repetitive cases (see further eg Glas, 2014), which reduces the need for yet another procedure to help it do so. Therefore, although there may be some contribution to reducing the backlog, Protocol 16 will probably not help to significantly reduce the number of complaints related to such structural problems (Dzehtsariou, 2013).

41 Indeed, it has been noted that the current backlog of the Court is not so much caused by the repetitive complaints the drafters have referred to, as much as by a large number of potentially meritorious, yet technically, factually, or legally fairly complex cases (Annual Report ECtHR, 2018, 13–14). These cases usually do not evoke the type of serious 'questions of principle' warranting a request for advice. Nevertheless, the individual right of complaint guaranteed by Article 34 ECHR requires that each of them is disposed of individually by the Court. This puts a strong demand on its capacity. The burden of having to dispose of these complaints is not alleviated by the Protocol.

42 In addition, whilst it is relatively easy to quickly dispose of large numbers of repetitive complaints related to legal issues resulting from structural problems, dealing with a request for an advisory opinion will be time-consuming and complex (CDDH, Report on measures to enhance relations between the Court and national courts, 2012, Appendix V, para 4 (c); Gerards, 2014, 648). It will be onerous to decide whether to take on a certain request and to provide reasons if the request is refused, especially if the individual application comes from a 'partner' highest court. For this reason, the ECtHR originally did not support the obligation to reason its refusals (Reflection paper ECtHR, paras 35–36). Moreover, if the panel decides to deal with the request many things must happen: seventeen judges, as well as three deputies, need to study the file; an opportunity has to be offered to the States, the parties, and third parties to submit observations; the eventual advisory opinion needs to be

carefully reasoned; separate opinions can be drafted, and so on. It is difficult to predict if this additional claim on the Court's capacity will stand in a proportionate relationship to the advantages of the procedure in terms of clarity for the national courts. Only the Court's practice will tell if this is the case.

(c) Risk of Political Use

43 It is further worth pointing to a potential risk of the advisory-opinions procedure to the Court's own position. For some States, this may be an additional factor in their debates on the suitability of the procedure and they may want to wait to see how the procedure works out in practice before they decide to sign and ratify it. The risk is that national highest courts start submitting requests to the Court for political and strategic motives rather than a 'noble' notion of partnership (Gerards, 2014, 646). In particular, it is easily conceivable that some national courts will use their newly acquired competence mainly to seek the authority of the ECtHR to help them solve delicate and politically sensitive issues which they prefer not to take on themselves (Dzehtsariou, 2013, 130). They can then hold the European Court responsible for obliging them to take a debatable or activist decision while keeping their own records clean. The national courts' authority and legitimacy may benefit from this since they cannot be held accountable for making disagreeable choices. Such strategic behaviour may even result in an overall improvement of compliance with the Convention if the national legislature and administrative authorities feel compelled to abide by the Court's and the national courts' rulings. The authority and legitimacy of the ECtHR, however, may suffer as a result which is all the more problematic in times of backlash against European human rights protection (Gerards, 2014, 647).

44 Presently, the Court uses a variety of instruments to avoid such criticism and to respect national discretion, such as the margin of appreciation doctrine and various forms of 'judicial minimalism' (Gerards 2018, with many references). It may be more difficult for it to do so, however, in relation to requests for advisory opinions (Gerards, 2014, 647). After all, such requests may expressly invite the Court to advise the national courts on how to deal with a highly politicized issue concerning the Convention which means that, for example, minimalism is a less fitting response (Gerards, 2014, 647). Surely, the Court could avoid getting involved in such issues by using its discretionary power to refuse requests for opinions relating to clearly political issues, yet this could spoil the Protocol's very aim of enhancing interaction on important matters of interpretation (Gerards, 2014, 647). Thus, the advisory opinions procedure may have the side-effect of luring the Court into national political minefields (Gerards, 2014, 647). As was mentioned above, this seems to be confirmed by the very first request presented to the Court, which relates to the highly controversial matter of recognition and adoption of children born abroad to a surrogate mother (Press Release ECtHR, 2018).

3. Unanswered Questions

(a) Standards for Accepting Requests for Advice

45 In addition to the aforementioned points of concern, the Protocol raises several unanswered questions which may be reason for some States to wait and see how the new procedure unfolds before they decide on signing and ratifying it. A first matter of uncertainty is on what grounds the Court's panel will decide to accept or decline requests for advice and how it will reason its findings. As mentioned in section B above, the Court's Guidelines make clear that it expects cases to really relate to important issues of interpretation and application of the Convention or questions of principle. It is not clear, however, if it will give special attention to issues potentially resulting in a large number of repetitive complaints, if it will refuse requests that are obviously politically motivated, and, if so, how it will reason its refusal. This lack of clarity as to the chances of a request for

advice being accepted by the Court makes it difficult for national courts to speculate on whether it will be useful to spend time and effort on drafting a request.

(b) Potential Horizontal Effect

46 Another potential consequence of the Protocol is one that is particularly sensitive in many States. Currently, Article 34 ECHR allows individuals to bring complaints only against the State. If the underlying conflict on the national level was 'horizontal' in nature—for example because it was an employment conflict, a conflict about privacy violations by a social media tycoon, or a civil law case of libel—it has to be 'verticalized' for a complaint to be admitted by the Court. This means that a construction has to be found to hold the State accountable for the violation of a Convention right which, *de facto*, has been committed by a private party. Such verticalization is possible by stating that national courts, as State organs, have omitted to ensure that the ECHR is fully respected in their judgments, or by holding the State accountable for a lack of legislation or control mechanisms to safeguard private parties' compliance with the Convention (Barkhuysen and Lindenberg, 2006, 48 ff; Lavrysen, 2016, 82 ff). Before the ECtHR, the State will have to defend these omissions, without the responsible private party having the obligation or the opportunity to explain why it interfered with someone's Convention rights. The result is that a conflict between private law interests is turned into a primarily administrative law procedure in which general interests play a principal role. After all, since the State is involved as a party, it will have to invoke a legitimate aim to justify its inaction or defend a judgment handed down by the civil courts. Typically, such legitimate aims will be public interests such as the need to protect the rights of others or the need to protect public order or national security.

47 By contrast, the new procedure under Protocol 16 would allow civil law conflicts to come before the Court in a much more direct and undiluted manner. There is no limitation in the text of the Protocol to the effect that requests for advice can only be made in cases between individuals and the State. Moreover, 'verticalization' is impossible, since the Court is to give its advice in the procedure as it is pending before the national court. Consequently, the Court could be asked to express itself directly on, for example, the reasonableness of an employer's decision to monitor the private acts of an employee, or of the fairness of Facebook's nudity policy. This may have far-reaching effects, especially if the Court made use of this opportunity to start providing standards for assessing private party's compliance with fundamental rights notions and the proportionality of their acts. The level of Court interference with private law, which already has been criticized by some (eg Cherednychenko, 2006; cf also Barkhuysen and Lindenberg, 2006), thereby would increase even further.

48 There are some ways for the Court to avoid the difficulties involved in this. First, it could simply refuse to deal with requests for advice that require it to express itself on private law conflicts and the responsibility of private parties to comply with the Convention. Second, if it should decide to deal with such requests, it could develop an approach similar to that taken by the Court of Justice, which often only provides for general standards to be taken into account and leaves the actual assessment of suitability, necessity, and proportionality to be made by the national court (Sarmiento, 2012). However, it is not yet clear which approach the Court will take and what the potential impact of the procedure on private law conflicts will be.

(c) Reasonable Time

49 Another yet unanswered question is what the effects of the Protocol will be on the reasonable time requirement of Article 6 ECHR. Although the Court is to give priority to requests for advice, and may be requested to deal with a case with even greater expedition if need be, it is clear that such requests will cause delays in the national proceedings. This raises the question whether the time it takes for the Court to deal with the request will count as part of the 'reasonable time' allowed to decide on cases under Article 6 ECHR (Thorarensen, 2016, 92). It may well be that the Court will leave the advisory-opinions procedure out of consideration in Article 6 cases on reasonable time. In addition, the national court may decide to revoke its request if the procedure is considered to take too long (Thorarensen, 2016, 89). Nevertheless, some States may want to be sure that the use of the procedure will not be held against them before they seriously consider signature and ratification.

(d) Concurrence of EU Preliminary Questions and ECHR Requests for Advice

50 Finally, clarification still needs to be offered on the interrelationship between the preliminary-rulings procedure under Article 267 Treaty on the Functioning of the European Union ('TFEU') and the advisory opinions procedure of Protocol 16 (→ *Preliminary ruling: European Court of Justice (ECJ)*). As yet, there is no answer to the question what happens if a national court first requests the Strasbourg Court for an advisory opinion and then continues to refer preliminary questions to the Luxembourg Court, or the other way around, or if two requests are lodged with the European Courts at the same time. It is not clear, for example, whether the Court of Justice of the European Union ('CJEU') could request a national court to give priority to the EU's preliminary-rulings procedure because this is, or can be, an 'obligatory' procedure. In addition, it is not obvious how diverging interpretations could be avoided if both Courts are asked to answer interpretative questions of similar rights at the same time. Another criticism in this respect is that the co-existence of two similar procedures could lead to 'forum shopping' by national courts that want to propose their questions to the Court they think is most likely to give them the answer they want (Voland and Schiebel, 2017, 89). For the CJEU these risks have even been a major argument in rejecting the EU's accession to the Convention since it estimated that they might seriously affect the autonomy and effectiveness of the preliminary-rulings procedure of Article 267 TFEU (Opinion 2/13, 18 December 2014, paras 198–99).

51 In academic commentaries, these problems have been treated as being relatively easy to solve because of the ECtHR's discretionary competence. If the situation did occur that a national court tries to approach both European Courts consecutively or simultaneously, or if a court seems to be forum shopping, the ECtHR's panel could simply decide to dismiss the request or suspend it until the CJEU has dealt with the preliminary questions (Callewaert, 2015, 61; Thorarensen, 2016, 98). Moreover, if the panel did decide to accept the request, informal discussions between the Courts could be organized to help them align and harmonize their approaches (Callewaert, 2015, 60). Furthermore, if the concurrence of different procedures resulted in divergent interpretations, nothing would stand in the national court's way to, again, refer preliminary questions or submit a request for another advice (Voland and Schiebel, 2017, 89). Thus, there are quite some possibilities to reduce the risk of divergence or a loss of autonomy of the EU legal system. However, the risk remains that such double use might complicate and extend the duration of the national procedures to the detriment of the parties.

E. Conclusion

52 If anything, the above has shown that the advisory-opinions procedure introduced by Protocol 16 is controversial. Although some European States have eagerly embraced the new instrument and have ratified it almost as soon as it was signed, eg Albania and Lithuania, most—mainly western European—States are loath to sign it. The main explanations for their aversion seem to be threefold. First, there are hesitations about the Protocol's potential to realize its objectives of facilitating the interaction between national courts and the ECtHR and reducing the Court's workload. Second, there may be political resistance in some States against the idea of entrusting the task to regulate human rights primarily to a court, and even more so if this court is an 'outsider' such as the ECtHR. And third, there are various unanswered questions, such as questions about the kind of requests the Court will decide to accept, the effect for the duration of national proceedings, the procedure's potential to affect civil law, and the concurrence between the EU's preliminary reference procedure and the procedure before the ECtHR.

53 Regardless of such hesitations, the Protocol has now entered into force for ten pioneering States and this offers a meaningful opportunity to see how the procedure works out in practice. The Protocol's applications may prove States with misgivings to be correct, and then the number of ratifying States may continue to be low. But it also may turn out that the expectations of the drafters of the Protocol are confirmed and the procedure proves to be a useful tool in respecting the principle of subsidiarity. In that case, the number of signatures and ratifications may start to slowly rise. Clearly, thus, this will be a matter of wait-and-see-what-happens.

Janneke Gerards

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