



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

## **REFLECTION PAPER<sup>1</sup>**

### **ON THE PROPOSAL TO EXTEND THE COURT'S ADVISORY JURISDICTION**

#### **I. INTRODUCTION**

1. Before setting out its general and specific reflections on the proposal to extend its advisory jurisdiction, the Court would like to recall the following. In the Declaration adopted at the High Level Conference on the Future of the European Court of Human Rights in Izmir, Turkey, on 27 April 2011 the Committee of Ministers was invited to reflect on the advisability of introducing a procedure allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention. These advisory opinions should serve to help States Parties in avoiding future violations of the Convention. The Conference invited the Court to assist the Committee of Ministers in its consideration of the issue of advisory opinions.<sup>2</sup>

2. The Court further observes that, in its Opinion for the Izmir Conference adopted on 4 April 2011, it already found that the idea of allowing national courts to seek advisory opinions aimed at reinforcing domestic implementation of the Convention in accordance with the principle of subsidiarity. It considered that, although there was a risk that it might initially generate more work, the longer term objective would clearly be to ensure that more cases were dealt with satisfactorily at national level.

3. In its Opinion for the Izmir Conference, the Court had already taken the view that the proposal to extend the Court's advisory jurisdiction could be explored further and considered that it should be involved closely in this process. It stresses in that context that the proposal to extend the Court's competence to give advisory opinions forms part of the long-term reflections on the Court's future role and functioning.

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<sup>1</sup> This paper is a reflection document that is not intended to bind the Court in future discussions. The Court reserves the right to continue its reflections on various points presented in the paper and to submit its observations if and when a detailed considered proposal on the institution of an advisory opinion procedure might be presented to it for consultation.

<sup>2</sup> Izmir Declaration, adopted at the High Level Conference on the Future of the European Court of Human Rights organised within the framework of the Turkish Chairmanship of the Committee of Ministers of the Council of Europe in Izmir, Turkey, on 26-27 April 2011, Follow-up Plan, D., available at <http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Declaration%20Izmir%20E.pdf>.

## II. GENERAL REFLECTIONS: OBJECTIVES AND IMPLICATIONS OF EXTENDING THE COURT'S ADVISORY JURISDICTION

### *1. An institutionalised dialogue between domestic courts of last instance and the Court to reinforce their respective roles in human rights' protection*

4. Extending the Court's advisory jurisdiction so as to allow domestic courts of last instance to obtain an advisory opinion from the Court on questions concerning the interpretation of the Convention could serve to create an institutionalised dialogue between these domestic courts and the Court.<sup>3</sup> This may reinforce both the role of the Court and its case-law and that of the domestic courts in protecting human rights.

5. It has been argued in the Wise Persons' Report of 2006 that an extended advisory jurisdiction would enhance the Court's "constitutional" role.<sup>4</sup> This may be understood in the following manner. Advisory opinions provide an opportunity to develop the underlying principles of law in a manner that will speak to the legal systems of all the Contracting Parties.<sup>5</sup> They may therefore be of comparable significance to the Court's leading judgments and foster a harmonious interpretation of the minimum standards set by the Convention rights and thus an effective protection of human rights throughout the Contracting States. They would provide an occasion to have a discussion on essential questions concerning the interpretation of the Convention in a possibly larger judicial forum. They could complement the existing pilot-judgment procedure (Rule 61 of the Rules of Court)<sup>6</sup> – without necessarily being limited to cases revealing structural or systemic problems in a Contracting State.<sup>7</sup> The procedure would thus allow the Court to adopt a larger number of rulings on questions of principle and to set clearer standards for human rights protection in Europe.

6. It has further been submitted by those in favour of an extension of the Court's advisory jurisdiction that the institutionalised dialogue established by an advisory opinion procedure could serve to avoid controversies between domestic courts and this Court. As it would be for the domestic courts of last instance to implement the Court's advisory opinions, such a procedure could diminish any national susceptibilities with regard to the Court's case-law.<sup>8</sup> This could promote the States' continuous support for guaranteeing an efficient Convention system.

7. Those in favour of extending the Court's jurisdiction to give advisory opinions stressed that the Court's authority could therefore be enhanced by that procedure. In their view, the Court notably did not appear to run a real risk of its authority being questioned by a domestic court not following its advisory opinion. It appeared rather unlikely that a domestic court asking for the Court's advice would subsequently not follow it.<sup>9</sup> Others considered, on the contrary, that there was a risk that domestic courts would not follow a non-binding advisory opinion. In any event, the Court should still have jurisdiction following an individual

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<sup>3</sup> Report of the Group of Wise Persons to the Committee of Ministers of 15 November 2006, doc. CM(2006)203, § 81; see also J.-P. Costa / P. Titium, *Les avis consultatifs devant la CEDH*, Mélanges P. Tavernier (being published).

<sup>4</sup> See the Report of the Group of Wise Persons to the Committee of Ministers of 15 November 2006, doc. CM(2006)203, § 81.

<sup>5</sup> See also Michael O'Boyle, *The Convention system as a subsidiary source of law*, speech given at the conference on "The principle of subsidiarity" held in Skopje on 1-2 October 2010, p. 5 (manuscript).

<sup>6</sup> See the report presented by the Norwegian and Dutch experts to the DH-S-GDR, cited in document DH-GDR(2010)019, pp. 10-11.

<sup>7</sup> See II.3. below.

<sup>8</sup> See also the report of the Norwegian and Dutch experts to the DH-S-GDR, cited in document DH-GDR(2010)019, pp. 10, 11 and the reference in footnote no. 4.

<sup>9</sup> See also the view presented by the Norwegian and Dutch experts to the DH-S-GDR, cited in document DH-GDR(2010)019, p. 11.

application in the same case, as the right to individual petition should not be restricted by a new advisory opinion procedure.<sup>10</sup>

8. Arguments in favour of the proposal to extend the Court's jurisdiction also comprised that, just as much as to the Court, an advisory opinion procedure could be beneficial to the domestic courts making use of it. The authority of the domestic courts ruling on a case following the Court's advisory opinion would equally be enhanced as those courts could decide the case on a solid basis in respect of the interpretation of the Convention. The likelihood that the parties accept their decision would be thereby increased.

9. As expressed in the Opinion of the Court for the Izmir Conference, an implementation of the Convention by the domestic courts in that manner would further emphasise their crucial role in applying the Convention and thus reinforce the principle of subsidiarity.<sup>11</sup> An advisory opinion procedure would therefore fully be in line with the Action Plan agreed upon in the Interlaken Declaration of 19 February 2010. In that Declaration, the Conference stressed the joint responsibility of the State Parties and this Court in securing the rights set forth in the Convention. It pointed out that it was first and foremost the responsibility of the States to guarantee the implementation of the Convention rights.<sup>12</sup> Having regard to the Court's current workload, a reinforcement of the national courts' role in applying the Convention is of the utmost importance and all tools working towards that end should be seriously examined.

10. Moreover, it was argued that following the European Union (EU)'s accession to the Convention, the Court of Justice of the EU (CJEU) could avail itself of the advisory opinion procedure, which could serve to guarantee the respect of the principle of autonomy of EU law.<sup>13</sup>

11. It was objected to the proposal to extend the Court's advisory jurisdiction that requesting an advisory opinion from the Court would inevitably lead to delays in the proceedings before the domestic courts themselves. Those in favour of the proposal countered that these delays should not be very significant<sup>14</sup> and that the overall resolution of the specific case would not be delayed in cases which would otherwise be dealt with later by the Court anyway following an individual application.<sup>15</sup>

## *2. Implications for the Court's workload*

12. One of the main concerns with regard to an extension of the Court's advisory jurisdiction is that, instead of leading to the intended decrease in the number of cases pending before the Court, it would increase the Court's workload.<sup>16</sup>

13. It is clear that introducing a new procedure before the Court will lead to a new group of cases pending before it that would not otherwise be presented at that stage. In that context,

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<sup>10</sup> See II.6. below.

<sup>11</sup> See Opinion of the Court for the Izmir Conference, adopted by the Plenary Court on 4 April 2011. See also the report presented by the Norwegian and Dutch experts to the DH-S-GDR, cited in document DH-GDR(2010)019, pp. 10, 11 and the reference in footnote no. 4.

<sup>12</sup> See Interlaken Declaration, adopted at the High Level Conference on the Future of the European Court of Human Rights organised within the framework of the Swiss Chairmanship of the Committee of Ministers of the Council of Europe in Interlaken, Switzerland, on 18 / 19 February 2010, PP 6 and part B., §§ 4 and 9 of the Action Plan.

<sup>13</sup> See also the reference in footnote no. 4.

<sup>14</sup> See II.4.b.(ii) below.

<sup>15</sup> See for this argument also the document presented by the Norwegian and Dutch experts to the DH-S-GDR, cited in document DH-GDR(2010)019, p. 11.

<sup>16</sup> See also the report presented by the Norwegian and Dutch experts to the DH-S-GDR, cited in document DH-GDR(2010)019, p. 10.

it has to be borne in mind that the Court, and in particular the Grand Chamber which may be called upon to decide on requests for advisory opinions, is already facing a very heavy workload.

14. At the same time, it has been argued that, by giving guidance concerning the interpretation of the Convention while cases are still pending before the domestic courts, the Court would allow cases – which may end up at the Court anyway – to be settled already at national level. This would be particularly valuable in cases revealing structural or systemic problems, but would equally apply to other cases raising questions of principle or of general interest concerning the application of the Convention.<sup>17</sup> The Court could clarify issues relating to the interpretation of the Convention at an early stage and thereby anticipate and prevent a possibly large number of individual applications raising the same issue from being lodged with it. An extended advisory jurisdiction, working in that manner, could, in sum and in a mid- or long-term perspective, help reduce the Court's workload, as was stressed notably in the Izmir Declaration.<sup>18</sup>

15. Those opposed to an extension of the Court's advisory jurisdiction stressed, however, that it was difficult to foresee the use made of an extended advisory jurisdiction by domestic courts of last instance and thus the effect of it on the Court's workload. It was common ground that it would, therefore, be of the utmost importance, if the Court's advisory jurisdiction were extended, to design the new procedure in a manner enabling it to decrease the Court's workload in the long run.<sup>19</sup>

16. It was further stressed in this context that the extension of the Court's advisory jurisdiction was envisaged and should be seen in the wider context of the reform of the Convention system and the future *long-term* role of the Court. It is clear that the key objective of that reform must be to increase the Court's effectiveness. An extended advisory jurisdiction would have to be set up in a way so as to guarantee that the beneficial effects of it, despite an initially increased workload – characteristic of every reform – would prevail in the long run. If this was done in a successful manner, it would be one of a number of procedural reforms, which could, once adopted, allow the Court to hand down more important rulings on questions of principle or of general interest relating to the interpretation and application of the Convention and at the same time reinforce the domestic courts' role in implementing the Convention.

### **III. SPECIFIC REFLECTIONS ON DIFFERENT ASPECTS OF THE PROPOSAL TO EXTEND THE COURT'S ADVISORY JURISDICTION**

#### *1. Executive summary*

17. If the Court's advisory jurisdiction were extended, it should be shaped so as to comply best with the objectives set out above and should, in the long run, help reduce the Court's overall workload.

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<sup>17</sup> See also DH-GDR, document DH-GDR(2010)019, pp. 6, 9-10.

<sup>18</sup> Izmir Declaration of 26-27 April 2011, *ibid.*, Follow-up Plan, D.; see also J.-P. Costa / P. Titium, *Les avis consultatifs devant la CEDH*, *ibid.*; and the report presented by the Norwegian and Dutch experts to the DH-S-GDR, cited in document DH-GDR(2010)019, p. 6.

<sup>19</sup> See II. below; and the document presented by the Norwegian and Dutch experts to the DH-S-GDR, cited in document DH-GDR(2010)019, p. 10.

18. The Court notes that the discussions on the question of the Court's future advisory jurisdiction in the Committee of Experts on the Reform of the Court (DH-GDR) of the Committee of Ministers' Steering Committee for Human Rights (CDDH) were mainly based on a proposal made in January 2009 by the Norwegian and Dutch experts to the Reflection Group for the follow-up of the reform of the Court (DH-S-GDR).<sup>20</sup>

19. Assuming that the Court's jurisdiction to give advisory opinions is extended, this proposal appears to be in line with the aims pursued by that extension. Support has been expressed by those generally in favour of an extended advisory jurisdiction for most aspects of the proposal. Different reflections concerned notably the types of cases in which a request for an advisory opinion should be allowed and the scope of possible interventions by other parties in the proceedings. The Court shall first summarise the characteristics of a possible future advisory jurisdiction which, were its jurisdiction to be extended, appear best to attain the objectives pursued by an extended advisory opinion procedure and then develop its reflections in more detail.

20. In order to avoid an increase in the workload, only domestic courts of last instance should be authorised to request an advisory opinion. It was repeatedly argued that such requests should only be allowed in cases concerning questions of principle or of general interest relating to the interpretation of the Convention. Some considered that, as under the Norwegian / Dutch proposal, advisory opinions should be restricted to cases revealing potential systemic or structural problems<sup>21</sup>.

21. As for the procedure to be followed, it should be optional for domestic courts to submit a – duly reasoned – request for an advisory opinion. The Court, for its part, should have discretion to refuse requests to give an advisory opinion. Much support was expressed for the proposal that the Court should not be obliged to give reasons. It could adopt a set of general guidelines for national courts on the scope and the functioning of its advisory jurisdiction. In principle, the Grand Chamber should have jurisdiction to give advisory opinions.

22. As for the time-frame for dealing with requests for an advisory opinion, these may only concern important cases raising questions of principle or of general interest relating to the interpretation of the Convention or cases revealing potential systemic or structural problems, which call per definition for priority treatment. The Court should therefore aim at giving an advisory opinion on a domestic court's request within a relatively short time.

23. Only the Government of the State the domestic court of which requested the Court to give an advisory opinion should have a *right* to intervene in the advisory opinion proceedings (according to the Norwegian / Dutch proposal, all States Parties to the Convention should have the opportunity to submit written submissions)<sup>22</sup>. For other States Parties to the Convention, any person concerned and other institutions, the existing rules laid down in Article 36 of the Convention should apply *mutatis mutandis*.

24. Considerable support was expressed for the view that advisory opinions should not be binding. The right to individual application under Article 34 of the Convention should not be

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<sup>20</sup> See document DH-S-GDR(2009)004.

<sup>21</sup> See the document presented by the Norwegian and Dutch experts to the DH-S-GDR, cited in document DH-GDR(2010)019, p. 7.

<sup>22</sup> See the document presented by the Norwegian and Dutch experts to the DH-S-GDR, cited in document DH-GDR(2010)019, pp. 8-9.

restricted where the Court has issued an advisory opinion. A number of judges, however, pleaded in favour of a binding nature of advisory opinions.

25. It should be optional for State Parties to ratify an additional Protocol to the Convention providing for an extension of the Court's advisory jurisdiction and thus to allow their courts to make requests for advisory opinions with the Court.

*2. Domestic authority/ies which could request an advisory opinion*<sup>23</sup>

26. As set out above, one of the main aims of extending the Court's advisory jurisdiction would be to allow for an institutionalised dialogue between domestic courts of last instance and the Court. Therefore, as has already been proposed by the Group of Wise Persons,<sup>24</sup> only the court(s) or tribunal(s) of a Member State against whose decision there is no judicial remedy under national law should be authorised to request the Court to give an advisory opinion. Parliaments or governments should not be authorised to do so.<sup>25</sup> This limited competence to submit a request for an advisory opinion would also avoid a proliferation of such requests.

*3. Types of cases in which a request for an advisory opinion should be allowed*<sup>26</sup>

27. Considerable support was expressed for the view that if the Court's advisory jurisdiction were to be extended, advisory opinions should only be allowed in essential cases that relate to the interpretation and application of the Convention, and accordingly concern, as proposed by the Wise Persons,<sup>27</sup> questions of principle or of general interest relating to the interpretation of the Convention or the Protocols thereto. They would thus have a completely different scope to advisory opinions given at the request of the Committee of Ministers under Articles 47-49 of the Convention, which are subject to the restrictions laid down in Article 47 § 2.

28. Others argued that the advisory jurisdiction should be limited to cases revealing a potential structural or systemic problem, as proposed by the Dutch and Norwegian experts to the DH-S-GDR.<sup>28</sup> It could be objected, however, that this would only allow a very small number of cases potentially decreasing the Court's workload in the long run to be submitted to the Court. The above, still very limited scope of the Court's advisory jurisdiction would sufficiently guarantee that the subject-matter of an advisory opinion would affect numerous existing or potential future cases, possibly concerning several Contracting Parties. It was submitted that it would therefore allow sufficient scope for an institutionalised dialogue to be created between domestic courts and the Court, without running counter to the aim of reducing the Court's overall workload in the medium- to long-term.

29. Advisory opinions in cases concerning questions of principle or of general interest in the above sense could also cover cases raising an issue with regard to the compatibility with the Convention of legislation, a rule or an established interpretation of legislation by a court.<sup>29</sup> However, there should not be an abstract review of legislation.<sup>30</sup> The advisory

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<sup>23</sup> See for the different options also Doc. DH-GDR(2011)015 FINAL, pp. 5-6, point 8.

<sup>24</sup> Report of the Group of Wise Persons to the Committee of Ministers of 15 November 2006, doc. CM(2006)203, §§ 81, 86.

<sup>25</sup> See for reservations in this respect also the proposal presented by the Norwegian and Dutch experts to the DH-S-GDR, cited in document DH-GDR(2010)019, pp. 7-8.

<sup>26</sup> See for the different options also Doc. DH-GDR(2011)015 FINAL, pp. 4-5, point 7.

<sup>27</sup> Report of the Group of Wise Persons to the Committee of Ministers of 15 November 2006, doc. CM(2006)203, § 86.

<sup>28</sup> Cited in document DH-GDR(2010)019, pp. 6-7.

<sup>29</sup> See for this option Doc. DH-GDR(2011)015 FINAL, pp. 4-5, point 7. This would not run counter to the Court's well-established case-law in relation to individual applications that it is in the first place for the

opinion procedure should be limited to questions arising in a contentious case concerning individual rights in a dispute between parties.

30. Requests for advisory opinions in that sense could be envisaged in relation to many questions of principle or of general interest concerning the application of the Convention such as those that have been raised in cases before the Grand Chamber or in leading cases before the Chambers. Thus, for example, the question of the compatibility of denying a suspect access to a lawyer while in police custody, provided for by the relevant legal provisions of domestic law, with the right to a fair trial and to legal assistance under Article 6 §§ 1, 3 (c) of the Convention,<sup>31</sup> could have been addressed in an advisory opinion. It raised a question of general interest and relevance to several States Parties to the Convention.<sup>32</sup> Assuming that there would have been an extended advisory jurisdiction of the Court, the domestic court of last instance of the State concerned could have requested the Court, in criminal proceedings pending before it, to give an advisory opinion on the question whether the denial of access to a lawyer was compatible with Article 6 of the Convention in circumstances such as those in the case before the referring court. Following the Court's opinion, it would have been for the domestic court to apply the Court's interpretation of the Convention in the case before it.

31. Likewise, the compatibility with the Convention of the expulsion of an asylum seeker to Greece in application of the EU Dublin II Regulation,<sup>33</sup> of the refusal to allow a homosexual person to contract marriage<sup>34</sup> or of the denial of access to court on grounds of State immunity<sup>35</sup>, which raised questions of principle relevant to many Contracting States to the Convention, could have been dealt with in an advisory opinion.

#### 4. Procedural aspects

##### a. Institution of the advisory opinion proceedings

32. If the Court's advisory jurisdiction was extended, it should be optional for national courts to request an advisory opinion, not obligatory, in order to comply with the principle of subsidiarity.<sup>36</sup>

33. A request for an advisory opinion should be authorised only once the factual circumstances have been sufficiently examined by the national court.<sup>37</sup> Requests for advisory opinions should be reasoned in a way that demonstrates convincingly that the case raises a

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national authorities, and notably the courts, to interpret domestic law and that the Court will not substitute its own interpretation for theirs in the absence of arbitrariness (compare, *inter alia*, *Fáber v. the Czech Republic*, no. 35883/02, § 55, 17 May 2005; and *Agbovi v. Germany* (dec.), no. 71759/01, 25 September 2006). While it is not the Court's function to deal with errors of fact or of law allegedly committed by a national court, it is called upon to intervene if and in so far as these errors may have infringed rights and freedoms protected by the Convention (compare, *inter alia*, *Schenk v. Switzerland*, 12 July 1988, § 45, Series A no. 140). The discussed possible scope of the Court's extended advisory jurisdiction would not interfere with the domestic courts' and the Court's respective competences in this respect.

<sup>30</sup> See for this option Doc. DH-GDR(2011)015 FINAL, pp. 4-5, point 7.

<sup>31</sup> See the Court's judgment in the case of *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008.

<sup>32</sup> See, *inter alia*, *Brusco v. France*, no. 1466/07, 14 October 2010.

<sup>33</sup> See the Court's judgment in the case of *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, 21 January 2011.

<sup>34</sup> See the Court's judgment in the case of *Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010.

<sup>35</sup> See the Court's judgment in the case of *Cudak v. Lithuania* [GC], no. 15869/02, ECHR 2010.

<sup>36</sup> See both the Report of the Group of Wise Persons to the Committee of Ministers of 15 November 2006, doc. CM(2006)203, § 82, and the report presented by the Norwegian and Dutch experts to the DH-S-GDR, cited in document DH-GDR(2010)019, p. 8; for the different options see further Doc. DH-GDR(2011)015 FINAL, p. 6, point 10.

<sup>37</sup> See for the different options Doc. DH-GDR(2011)015 FINAL, p. 6, point 9.

question of principle or of general interest concerning the application of the Convention relevant to the outcome of the case. Inspiration could be drawn in this respect from the case-law of the CJEU developed in relation to the preliminary reference procedure on that point (relevance of the question, *acte-clair* doctrine).

34. The Court should have discretion to refuse requests for an advisory opinion. It could be envisaged that the Panel of the Grand Chamber or a panel of the judicial formation called upon to decide on the request for an advisory opinion could have jurisdiction to decide whether or not to accept the request. In line with the Wise Persons' proposal and that of the Norwegian and Dutch experts, it could, for instance, consider it preferable to refuse a request because the subject-matter overlaps with that of a pending individual application.<sup>38</sup> It would be for the Court to establish principles to ensure harmonious co-existence of advisory opinions and individual applications.

35. As proposed by the Wise Persons and the Norwegian and Dutch experts, it further appeared preferable to many, on balance, that the Court would have a discretion and not a duty to give reasons for the refusal of a request for an advisory opinion.<sup>39</sup> This would guarantee that the procedure remained flexible and that the additional workload created by requests for advisory opinions would be limited as far as possible.

36. The Court is aware that a rejection of a domestic court's request for an advisory opinion without giving reasons may run counter to the objective of fostering dialogue with that court. It could therefore be envisaged that the Court adopt a set of general guidelines on requests by national courts for advisory opinions explaining the scope, the aim and the functioning of the procedure, to which it could possibly refer in case of the rejection of a request. General reasons for the rejection of a request for an advisory opinion could comprise, for instance, that an individual application raising the same issue is already pending before the Court, that the issue raised in the request can more suitably be dealt with in an individual application or that the views on the issue raised in the request are currently split within the Court (which would make an advice to domestic courts less clear). Such general guidelines should be enough to guarantee efficient cooperation of the Court with the domestic courts.

#### **b. Treatment of the request by the Court**

##### *(i) Decision-making body*

37. It appears advisable that, in principle and in any event at the outset, it should be for the Grand Chamber to give advisory opinions under an extended advisory jurisdiction. This is also the case for advisory opinions delivered under Articles 47-49 of the Convention at the request of the Committee of Ministers (see Rule 87 § 1 of the Rules of Court) and would reinforce the authority of advisory opinions.<sup>40</sup>

38. It could be considered to allow judges to attach to the Court's advisory opinions under the proposed new mechanism a separate (concurring or dissenting) opinion or a statement of dissent. Judges have a right to do so in respect of advisory opinions under the above provisions of the Convention (see Rule 88 § 2 of the Rules of Court).

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<sup>38</sup> Report of the Group of Wise Persons to the Committee of Ministers of 15 November 2006, doc. CM(2006)203, § 86; and the report presented by the Norwegian and Dutch experts to the DH-S-GDR, cited in document DH-GDR(2010)019, p. 8.

<sup>39</sup> See for the different options in this respect Doc. DH-GDR(2011)015 FINAL, pp. 6-7, points 11 and 12; and Report of the Group of Wise Persons to the Committee of Ministers of 15 November 2006, doc. CM(2006)203, § 86; and the view presented by the Norwegian and Dutch experts to the DH-S-GDR, cited in document DH-GDR(2010)019, p. 8.

<sup>40</sup> See for this option Doc. DH-GDR(2011)015 FINAL, p. 9, point 18.



(ii) *Priority*

39. It is for the Court to determine its priorities, which it would have to do having regard to the subject-matter underlying the request for an advisory opinion as well as to that of other Grand Chamber cases pending before it. However, advisory opinions under a possibly extended jurisdiction should only be authorised in cases concerning questions of principle or of general interest relating to the interpretation of the Convention or in cases revealing potential systemic or structural problems, which are, per definition, important cases calling for priority treatment. The Court should therefore aim at giving an advisory opinion on a domestic court's request within a relatively short time.

**c. Intervention in the proceedings<sup>41</sup>**

(i) *Government of the State of which a national court requested an advisory opinion<sup>42</sup>*

40. The Government of the State the domestic court of which requested the Court to give an advisory opinion should have a right to intervene in the proceedings in order to give its own view on the subject-matter as it is that State's legal / judicial system which would be concerned in the first place by an advisory opinion.

(ii) *Other States Parties to the Convention, other persons and institutions<sup>43</sup>*

41. Much support was expressed for the idea that for other States Parties to the Convention, any person concerned (including the parties to the proceedings before the domestic courts) and other institutions, the rules laid down in Article 36 of the Convention should apply *mutatis mutandis*. It should thus be left to the President of the Court to decide whether other States Parties to the Convention or other persons and institutions should be allowed to submit written or oral observations in the interest of the proper administration of justice (see, *mutatis mutandis*, Article 36 § 2 of the Convention) in the circumstances of the case. This would ensure that the procedure would not systematically become more complex while leaving open the possibility to obtain a broader range of views in cases in which this would be considered helpful.

*5. Whether the advisory opinion should be binding on the requesting court*

42. There was considerable support for the view that the opinions requested by the domestic courts should not be binding on the courts in question, in accordance with the view expressed by the Wise Persons and by the Norwegian and Dutch experts.<sup>44</sup> Advisory opinions are also not binding under the procedures before the International Court of Justice (ICJ), the Inter-American Court of Human Rights (IACHR) and the African Court of Human and People's Rights. The preliminary ruling procedure before the CJEU was considered as not comparable.<sup>45</sup> Conversely, a number of judges pleaded in favour of a binding nature of advisory opinions.

43. Those in favour of non-binding advisory opinions considered that there appeared to be little risk in practice that a national court which had voluntarily asked for an advisory opinion would not subsequently follow that opinion. Several judges objected, however, that such an

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<sup>41</sup> See for the different options in this respect Doc. DH-GDR(2011)015 FINAL, pp. 7-8, points 13-14.

<sup>42</sup> See for the different options in this respect Doc. DH-GDR(2011)015 FINAL, pp. 7-8, point 14.

<sup>43</sup> See for the different options in this respect Doc. DH-GDR(2011)015 FINAL, p. 7, point 13.

<sup>44</sup> See Report of the Group of Wise Persons to the Committee of Ministers of 15 November 2006, doc. CM(2006)203, § 82; the report presented by the Norwegian and Dutch experts to the DH-S-GDR, cited in document DH-GDR(2010)019, p. 9; and for the options on that point doc. DH-GDR(2011)015 FINAL, pp. 8-9, point 16.

<sup>45</sup> See also report presented by the Norwegian and Dutch experts to the DH-S-GDR, cited in document DH-GDR(2010)019, p. 9.

eventuality could not be excluded, which would question the Court's authority. In any event, if its opinion was not followed, the Court would still have jurisdiction on an individual application lodged subsequently and could give it high priority. It is only in such circumstance that the non-binding nature of advisory opinions could undermine the aim to reduce the Court's workload and to foster the Court's dialogue with domestic courts of last instance.

44. Despite the fact that its advisory opinions would not be formally binding on the domestic courts, the Court itself should consider them as valid case-law which it would follow when ruling on potential subsequent individual applications. Despite the fact that advisory opinions would not have the binding character of a judgment in a contentious case, they would thus have "undeniable legal effects".<sup>46</sup> Even though advisory opinions are also not binding under the procedures before the ICJ and the IACHR, these courts nevertheless draw in practice upon their reasoning in advisory opinions in the same way as upon its case-law developed in contentious cases.<sup>47</sup>

#### 6. *Harmonious coexistence with the right to individual application*

45. Assuming that the Court's advisory jurisdiction was extended, the right to individual application under Article 34 of the Convention, which is at the core of the Convention system, should not be restricted where the Court has issued an advisory opinion.<sup>48</sup> The individual must retain the right to bring his or her case to Strasbourg where he or she claims that a domestic court did not (fully) follow the Court's non-binding advisory opinion. This should not undermine the purpose of an extended advisory jurisdiction to reduce the Court's overall workload. The Court should make clear that it will follow the principles established in its advisory opinions so as to encourage the domestic courts to follow those opinions and to discourage applicants from lodging applications where the domestic courts fully implemented its findings in that opinion. The procedure in a subsequent individual application could be adapted to the fact that there is a previous advisory opinion on the issue (in particular, by giving high or low priority to the application depending on whether the opinion was followed or by use of the well-established case-law procedure, the Single-Judge procedure or of the procedure under Article 37 § 1 of the Convention).

46. In order to ensure harmonious co-existence between the Court's advisory jurisdiction and its jurisdiction in individual applications, regard may further be had to the experience of the Inter-American Court of Human Rights in this respect. That court has used its discretion to refuse requests for advisory opinions, in particular, in order to ensure that its advisory jurisdiction did not prejudice or undermine in any way its jurisdiction in contentious cases.<sup>49</sup>

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<sup>46</sup> This was stressed, for instance, by the IACHR in respect of its advisory opinions, see "*Reports of the Inter-American Commission on Human Rights*", Advisory Opinion OC-15/97 of 14 November 1997 § 26, Series A No. 15.

<sup>47</sup> See for the ICJ, for example, *Case concerning pulp mills on the river Uruguay (Argentina v. Uruguay)*, judgment of 20 April 2010, §§ 89, 101, 150, 193 and 273; and *Case concerning application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, judgment of 1 April 2011 (preliminary objections), §§ 30 and 139. See for the IACHR, *inter alia*, *Case of Neira-Alegría et al. v. Peru*, judgment of 19 January 1995 (merits), §§ 82-84, Series C No. 20; and *Case of "Juvenile Reeducation Institute" v. Paraguay*, judgment of 2 September 2004, § 245, Series C No. 112.

<sup>48</sup> See also the report presented by the Norwegian and Dutch experts to the DH-S-GDR, cited in document DH-GDR(2010)019, p. 9; and for the different options here Doc. DH-GDR(2011)015 FINAL, p. 9, point 17.

<sup>49</sup> See, for instance, IACHR, "*Other treaties*" subject to the consultative jurisdiction of the Court, Advisory Opinion OC-1/82 of 24 September 1982, § 31, Series A No. 1; and IACHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, § 22, Series A No. 5.

### *7. Implementation of an extended advisory jurisdiction*

47. An amendment of the Convention would be necessary to extend the Court's advisory jurisdiction as part of the long-term reform of the Court. It appears advisable to make it optional for State Parties to allow their courts to request advisory opinions from the Court, even though Protocols to the Convention making procedural amendments have until now, as a rule, not been optional. This would allow the entry into force of a Protocol making the necessary amendments to the Convention in due course for those States Parties to the Convention which considered an extended advisory jurisdiction of the Court to be useful for assisting them in achieving better compliance with the standards set by the Convention.

### *8. Conclusion*

48. Finally, the Court would like to reiterate the position it has already expressed in its Opinion for the Izmir Conference that it should be closely involved in the further discussion of the proposal to extend its advisory jurisdiction. As set out above, the Court reserves the right to submit further observations if and when a detailed considered proposal on the institution of an advisory opinion procedure is presented to it for consultation.