Protocol No 16 to the ECHR: Managing Backlog through Complex Judicial Dialogue?

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European Court of Human Rights – Protocol No. 16 – Advisory Opinions – Managing backlog – Unpredictable effects – Complex judicial dialogue – Interplay with preliminary rulings of European Court of Justice and national constitutional courts – *Bosphorus* presumption – National courts in charge of judicial diplomacy – Increased burden for national courts

Introduction

It has become a cliché to point out that the European Court of Human Rights has been (severely) criticised over the last decade.[1] Several strands of criticism can be distinguished. Some critics have taken issue with its supposedly 'activist' attitude.[2] This critique has not gone unnoticed. It led, amongst other things, to renewed interest in the 'margin of appreciation', a judge-made concept that will be inserted in the Preamble to the Convention when Protocol No. 15 enters into force.[3] Another effect is that the Court has appeared more likely to exercise restraint in recent years.[4]

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[1] *See* for an overview: P. Popelier et al. (eds.), *Criticism of the European court of human rights: shifting the convention system: counter-dynamics at the national and EU level* (Intersentia 2016).

[2] The problem of judicial activism/judicial restraint is deeply related to the technique of interpretation of the Convention. On this *see* F. de Londras and K. Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (Palgrave 2018) p. 71–92.

[3] There is an important body of literature on the margin of appreciation. *See*, for a recent contribution with references to that literature, K. Lemmens, 'The Margin of Appreciation in the ECtHR's Case Law A European Version of the Levels of Scrutiny Doctrine?', 20 *European Journal of Law Reform* (2018) p. 78.

[4] Ø. Stiansen and E. Voeten, *Backlash and Judicial Restraint: Evidence From the European Court of Human Rights*, Rochester, NY, Social Science Research Network, 17 August 2018, ⟨papers.ssrn.com/abstract=3166110⟩, visited 3 October 2019.

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Another line of critique pertains to the Court's case backlog. Figures indeed show that the Court has faced a major influx of cases over the last 15 years that it has not been able to deal with within a reasonable timeframe.[5] Various solutions have been proposed and implemented.[6] Solutions have targeted both the internal functioning of the Court and access to the Court. For instance, important internal institutional re-organisations have been implemented in order to accelerate case processing. The role of the single judge, introduced by Protocol No. 14, has been crucial in dealing with the numerous inadmissible applications. With regard to Court access, Protocol No. 14 introduced the requirement of 'significant disadvantage'. This is a *de minimis* condition, clearly aimed at preventing futile claims from making their way to Strasbourg.[7] Furthermore, Protocol No. 15 (established on 24 June 2013 but not yet in force) will reduce the time limit for filing an application to four months, as opposed to six months at present.

One of the most important reforms, however, is the advisory opinion procedure introduced by Protocol No. 16. The aim of this Protocol is to 'enhance the interaction between the Court and the national authorities'.[8] It is hoped that keeping national courts well-informed about the interpretation and implementation of the Convention and the Court's case law will be of great help, in the first place to national authorities and, indirectly, to the Court.[9] The underlying idea is that upstream intervention will obviate the need for downstream intervention. If national courts apply the Convention correctly, so the thinking goes, there should be no reason for applicants to file a complaint with the Strasbourg Court once a final decision has been reached by the domestic courts.

[5]Although major progress has been made, in 2018, there were still 56.350 cases pending before a judicial formation. At its apex in 2011, the number of cases pending was 151.600. See: ⟨www.echr.coe.int/Documents/Stats_analysis_2018_ENG.pdf⟩, visited 4 October 2019, p. 7.

[6]An overview is given in A. Paprocka and M. Ziółkowski, 'Advisory opinions under Protocol No. 16 to the European Convention on Human Rights', 11 *EuConst* (2015) p. 276.

[7]X.-B. Ruedin, 'De minimis non curat the European Court of Human Rights: The Introduction of a New Admissibility Criterion (Article 12 of Protocol No.14)', 1 *European Human Rights Law Review* (2008) p. 80.

[8]Preamble to Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms.

[9]G. Zampetti, 'The recent challenges for the European system of fundamental rights: Protocol No. 16 to the ECHR and its role facing constitutional and European Union level of protection', s.d., ⟨hdl.handle.net/10419/185058⟩, visited 3 October 2019, p. 9-10; C. Giannopoulos, 'Considerations on Protocol no. 16: can the new advisory competence of the European Court of Human Rights breathe new life into the European Convention on Human Rights', 16 *German LJ* (2015) p. 337–338.

In this contribution, I analyse the procedure established by Protocol No. 16. Since there is already a considerable and interesting body of scholarship on this topic,[10] my focus will be on the interaction between the 'Strasbourg preliminary ruling' procedure and other 'preliminary ruling' systems under EU law and national law. (In this article, Belgium will serve as an example.[11]) I argue that the interplay between the new system of optional preliminary rulings and the existing compulsory preliminary rulings might unnecessarily complicate the harmonious coexistence of the various legal orders. More specifically, I explain how the Strasbourg Court might find it more difficult than at present to foster friendly dialogue with the Court of Justice of the European Union. Finally, I suggest that it is not at all clear whether Protocol No. 16 will contribute to a reduced workload in the mid to long term.

Protocol No. 16

Protocol No. 16 is the latest in a series of Protocols on the reform of the Strasbourg system.[12] As early as 2005, a group of 'Wise Persons' was convened by the Heads of State and Government of the Member States of the Council of Europe[13] to reflect on the long-term effectiveness of the Strasbourg system, including the effects wrought by the then recently established Protocol No. 14 (2004, entry into force in 2010), which considerably changed the institutional machinery.[14]

Since the Wise Persons' Report (2006), various High Level Conferences have taken place.[15] At the heart of the debate was the improvement of the (effectiveness

[10]J. Gerards, 'Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal', 21 *Maastricht Journal of European and Comparative Law* (2014) p. 630; Paprocka and Ziółkowski, *supra* n. 6; Giannopoulos, *supra* n. 9, p. 337. A critical account can be found in K. Dzehtsiarou and N. O'Meara, 'Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control?', 34 *Legal Studies* (2014) p. 444.

[11]Zampetti, *supra* n. 9, made an interesting comparison from the Italian perspective.

[12]A special website on the reform has been created: ⟨www.echr.coe.int/Pages/home.aspx?p=basictexts/reform&c=#newComponent_1346159600649⟩, visited 3 October 2019.

[13]Council of Europe Press Division, 'A Group of Wise Persons to secure the long-term effectiveness of the European Court of Human Rights', 14 September 2005, ⟨rm.coe.int/168071ebfc⟩, visited 3 October 2019.

[14]Report of the Group of Wise Persons to the Committee of Ministers, 15 November 2006, 46 *International Legal Materials* (2007) p. 81.

[15]The High Level Conferences took place in Interlaken (2010), Izmir (2011) and Brighton (2012). After the adoption of Protocol No. 16, there were still conferences in Oslo (2014), Brussels (2015) and Copenhagen (2018): the Court's functioning and the interaction with the domestic authorities were all discussed during these later conferences.

of the) Convention system, which is clearly a joint responsibility of the Court and the High Contracting Parties. Indeed, it would have been far from optimal to attempt to improve the efficiency of the system by reforming the Court while at the same time paying no attention to the role of the national authorities. The result of the various Conferences is that the European system of protection of human rights can only function properly if both the High Contracting Parties and the Court fulfil their respective obligations.[16] Since the Convention is based on the principle of subsidiarity, it is in the first place up to the states to respect the Convention and enforce it in their domestic legal orders. The envisaged insertion of the 'margin of appreciation' in the Preamble confirms and underlines this aspect of subsidiarity.

However, if we accept that the domestic authorities are the primary defenders of the Convention, this implies that they need to apply the Convention in line with the Court's understanding of it. It is perhaps not surprising that there was some concern about the capacity of domestic authorities to do so. Fostering dialogue between the Court and the national (supreme) courts is certainly one way to acquaint those domestic courts with the Strasbourg Court's interpretation of the Convention. It would not be unreasonable to assume that, through structured dialogue, unintended divergences can be avoided. What remains to be seen, however, is whether *intended* divergences, i.e. where national courts disagree with the Strasbourg Court's interpretation of the Convention, can also be sidestepped.

The raison d'être of the Protocol

Intensified cooperation between the European Court of Human Rights and the national courts had been recommended as early as the Wise Persons report,[17] which explicitly proposed an advisory opinion mechanism. The Committee of Ministers, after discussion at the Izmir and Brighton High Level Conferences, entrusted the Steering Committee for Human Rights with the task of drafting a Protocol to address that issue. On 28 June 2013, the Parliamentary Assembly of the Council of Europe issued its Opinion No. 285 on the draft

[16]We can recall here that following the Interlaken Declaration, 'Before the end of 2019, the Committee of Ministers should decide on whether the measures adopted have proven to be sufficient to assure sustainable functioning of the control mechanism of the Convention or whether more profound changes are necessary'.

[17]Report of the Group of Wise Persons to the Committee of Ministers, *supra* n. 14, p. 85 ff.

version,[18] and the Committee of Ministers subsequently adopted the Protocol on 2 October of that year.[19]

Zampetti discerns two objectives, which he describes as respectively practical and substantive in nature. The practical aim, he holds, is to avoid future violations (and thus cases in Strasbourg) by means of preventive intervention.[20] This goal was explicitly mentioned in the Izmir Declaration.[21] The second goal, according to the author, is more 'substantive' in nature and pertains to the dialogue between national judiciaries and the Court, i.e. an expression of the idea of subsidiarity.[22] This goal is stated explicitly in the Preamble to Protocol No. 16.[23] National tribunals and courts are thus meant to apply the Convention under the guidance of the Strasbourg Court.[24] I am not convinced that it is particularly helpful to qualify the two goals in terms of practicality and substance, but that is a matter of semantics.

The essential point is the realisation that Protocol No. 16 focuses on enhanced cooperation between the highest national courts and the Court with the ultimate goal of using optional preliminary rulings to reduce the Court's workload. Protocol No. 16 entered into force on 1 August 2018[25] and a first request has been filed by the French *Cour de cassation*, which will be addressed below.

The system of preliminary questions

Protocol No. 16 establishes a rather straightforward procedure, the essential elements of which are as follows.[26]

First, it should be stressed that not all courts and tribunals are entitled to approach the Court for an opinion. It is up to the High Contracting States to indicate which of their domestic courts are entitled to refer questions

[18]For a detailed history *see* the Introduction of the Explanatory Report to Protocol No. 16. ⟨rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d383e⟩, visited 3 October 2019.

[19]Protocol No. 16.

[20]Zampetti, *supra* n. 9, p. 9.

[21]High Level Conference on the Future of the European Court of Human Rights (Izmir), Declaration 26-27 April 2011, point D, ⟨www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf⟩, visited 3 October 2019.

[22]Zampetti, *supra* n. 9, p. 10.

[23]Preamble to Protocol No. 16.

[24]Zampetti, *supra* n. 9, p. 10.

[25]Pursuant to Art. 8, stating that the Protocol would enter into force the first day of the month following the expiration of three months after the date on which 10 states have expressed their consent to be bound by it.

[26]*See* for an in depth analysis Paprocka and Ziółkowski, *supra* n. 6, p. 277 ff.; Gerards, *supra* n. 10, p. 633-636.

to Strasbourg. As indicated in the Explanatory Report, the drafters wanted to respect the particularities of each national legal order, thus any reference to '*the*' highest Courts was avoided. This implies that even courts whose judgments do not satisfy the usual requirement of exhaustion of domestic legal remedies to file an admissible complaint can be eligible to refer questions to Strasbourg.[27] On the other hand, an overload of applications needed to be avoided: hence the choice to restrict the number of courts allowed to ask for an opinion. Limiting that option to the 'highest courts' also stresses the fact that the envisaged judicial dialogue is supposed to take place at the 'appropriate' level.[28]

Second, the indicated courts and tribunals can – but are not required to – ask for an opinion. According to the Protocol, there is no obligation to ask questions. It is, in other words, optional, not obligatory for those courts. This goes hand in hand with the fact that whenever the Strasbourg Court delivers an opinion in the context of Protocol No. 16, it is advisory and thus non-binding in nature.

Third, the opinion must concern 'questions of principle relating to the interpretation or application' of the Convention or the Protocols. The Protocol does not define exactly what is meant by those words; the Explanatory Report states that it is up to the Court to interpret them.[29] Yet it is clear that there is some link with the requirement mentioned in Article 43, paragraph 2 of the European Convention on Human Rights, i.e. to refer a case to the Grand Chamber if it raises 'a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance'. It is to be expected that the approach applied to deal with requests for referral to the Grand Chamber will inspire the processing of requests for advisory opinions.

In any event, a compromise appears to have been reached here, too. Allowing advisory requests on any type of issue clearly increases the risk that the Court will be overloaded with too many, often futile, requests. During the preparations for Protocol No. 16, some argued to the contrary that only questions pertaining to 'systematic and structural problems' should be considered.[30] This was probably too narrow a proposal and would, at any rate, have impinged on the '*effet utile*' of Protocol No. 16. The compromise that has been reached tries to find a middle ground: Advisory opinions can be sought for 'questions of principle relating to the interpretation and the application of the rights and freedoms defined in the

[27]Explanatory Report to Protocol No. 16, *supra* n. 18, p. 2.

[28]Explanatory Report to Protocol No. 16, *supra* n. 18, p. 3; L.-A. Sicilianos, 'L'élargissement de la compétence consultative de la Cour européenne des droits de l'homme – A propos du Protocole n° 16 à la Convention européenne des droits de l'homme', 25 *Rev. trim. Dr.h.* (2014) p. 18-19.

[29]Explanatory Report to Protocol No. 16, *supra* n. 18, p. 3.

[30]ECtHR, Reflection Paper on the Proposal to extend the Court's advisory jurisdiction, paras. 20, 22 and 30 ⟨www.echr.coe.int/Documents/2013_Courts_advisory_jurisdiction_ENG.pdf⟩, visited 3 October 2019.

Convention or the Protocols'. That terminology clearly recalls the conditions that allow cases to be referred to the Grand Chamber pursuant to Article 43 paragraph 2 of the Convention. This is explicitly mentioned in the explanatory report, and the parallels between both the advisory opinion and the Grand Chamber procedures are highlighted.[31] This choice confirms the fundamental role of the Grand Chamber in interpreting and explaining the Convention.[32]

In this respect, it should be stressed that the requesting tribunal or court can only act within the context of a case pending before it. The procedure is thus not meant as a form of abstract judicial review.[33] The referring court needs to provide the Strasbourg Court with the 'relevant legal and factual background of the pending case'.[34]

Fourth, the procedural dimension requires some explanation. As in the case of a referral to the Grand Chamber, a request for an advisory opinion first needs to be accepted by the Court. A panel of five judges of the Grand Chamber decides whether or not to accept the request. A refusal has to be reasoned. It is noteworthy that the judge elected in respect of the High Contracting Party in question sits *ex officio* in both the panel and the Grand Chamber.[35]

Finally, it should be noted that the Protocol does not set a time limit for the Court to deliver an opinion. However, as the Strasbourg Court itself indicates, it is precisely due to the nature of the questions referred to it, which, by definition, are important, that the requests should be dealt with without delay. The Court, which aims to deliver the requested opinion in a 'relatively short time',[36] has decided that requests for advisory opinions will be treated with priority.[37]

Referrals by domestic highest courts: four scenarios

The question is how this advisory opinion procedure will function in practice. At this point, there are, in practice, four main hypotheses. For the sake of clarity, I will limit myself to cases involving the highest domestic courts only, since those

[31]Explanatory Report to Protocol No. 16, *supra* n. 18, p. 3; Sicilianos, *supra* n. 28, p. 18-19.

[32]In this sense: Sicilianos, *supra* n. 28, p. 19-20.

[33]Opinion of the Court on Draft Protocol No. 16 to the Convention extending its competence to give advisory opinions on the interpretation of the Convention, 6 May 2013, para. 7, ⟨www.echr.coe.int/Documents/2013_Protocol_16_Court_Opinion_ENG.pdf⟩, visited 3 October 2019.

[34]Arts. 1, 3. In the meantime, the Court has specified what information it should receive: *see* 'Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the Convention' (approved by the Plenary Court on 18 September 2017) p. 4-5, para. 12, ⟨www.echr.coe.int/Documents/Guidelines_P16_ENG.pdf⟩, visited 3 October 2019.

[35]Art. 2, 3rd para. Protocol No. 16.

[36]ECtHR, *supra* n. 30, p. 9, para. 39.

[37]Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the Convention' (approved by the Plenary Court on 18 September 2017), *supra* n. 34, p. 7, para. 29.

are the judicial bodies entitled, pursuant to Protocol No. 16, to ask for an advisory opinion. Obviously, the domestic interplay between lower courts and the respective domestic constitutional courts can complicate things further. For instance, a constitutional court might ask an advisory opinion in the context of a preliminary question referred to it by a lower court involving the constitutionality of a particular statue (and the lower court itself could, conceivably, have referred the case to the Luxembourg Court). I will leave such complex domestic situations aside.

An important preliminary remark needs to be made at this point.[38] No inferences are drawn from the frequency of conflicting interpretations of fundamental and human rights by the Strasbourg, Luxembourg and highest domestic courts.

A great deal of empirical research has been done which corroborates the influence of political preferences on judicial decision-making in the EU[39] and at the Strasbourg Court.[40] The preference structure underlying decision-making suggests that Luxembourg judgments can clash with Strasbourg judgments. The judicial behaviour of the Strasbourg Court can be captured in a single dimension, which ranges from pro-human rights claimant to pro-government respondent and often breaks down in terms of a left-right scale. Empirical research into the Luxembourg decision-making grapples, however, with a different type of architecture. The left-right scale matters to EU politics as well[41] but requires the addition of an EU integrationist dimension.[42] Importantly, these two dimensions relate to each other orthogonally.[43] Orthogonality indicates the property of

[38]I thank the anonymous peer reviewer for raising this point.

[39]M. Malecki, 'Do ECJ Judges All Speak with the Same Voice? Evidence of Divergent Preferences from the Judgments of Chambers', 19 *Journal of European Public Policy* (2012) p. 59; J. Frankenreiter, 'The Politics of Citations at the ECJ – Policy Preferences of E.U. Member State Governments and the Citation Behavior of Judges at the European Court of Justice', 14 *Journal of Empirical Legal Studies* (2017) p. 813; J. Frankenreiter, 'Are Advocates General Political? An Empirical Analysis of the Voting Behavior of the Advocates General at the European Court of Justice', 14 *Review of Law & Economics* (2018) p. 1.

[40]E. Voeten, 'The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights', 61 *International Organization* (2007) p. 669; E. Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights', 102 *The American Political Science Review* (2008) p. 417; Stiansen and Voeten, *supra* n. 4.

[41]L. Hooghe et al., 'Does Left/Right Structure Party Positions on European Integration?' 35 *Comparative Political Studies* (2002) p. 965.

[42]S. Hix, 'Dimensions and Alignments in European Union Politics: Cognitive Constraints and Partisan Responses', 35 *European Journal of Political Research* (1999) p. 69; T.C. Hartley, *The Foundations of European Union Law: An Introduction to the Constitutional and Administrative Law of the European Union*, 7th ed (Oxford University Press 2010) p. 72.

[43]Ibid.; J. Garry and J. Tilley, 'Inequality, State Ownership and the European Union: How Economic Context and Economic Ideology Shape Support for the European Union', 16 *European Union Politics* (2015) p. 139; E. van Elsas and W. van der Brug, 'The Changing Relationship between Left-Right Ideology and Euroscepticism, 1973–2010', 16 *European Union*

two or more dimensions that resist reduction into a single underlying category. In other words, preferences in one dimension do not inherently relate to preferences in the other dimension. Hence, it is possible for actors positioned on either side of the left-right divide in the first dimension to share a position in the integrationist dimension. The multidimensional nature of Luxembourg decision-making thus potentially confronts its judges with a different subset of underlying issues that Strasbourg judges do not face. Moreover, individual preferences that influence decision-making on these topics can be at odds depending on the dominant dimension at stake, thus introducing an inherent potential for conflict between the two Courts.[44]

Although it could well be that the coexistence of those various institutions contributes, in practice, to a consensus on and the convergence of human rights protections, that does not rule out the theoretical possibility that such conflicts may arise.[45] As Fabbrini argues, the 'European multilevel human rights architecture' is characterised by '(1) a plurality of constitutional sources enshrining fundamental rights; (2) a plurality of constitutional actors – notably courts – endowed with the power to protect them and thus (3) a plurality of constitutional views on human rights'.[46] Tensions, divergences, and contradiction tend to arise whenever there is a plurality of views. This can occur between the two 'European Courts', just as it can between the Luxembourg Court and domestic courts.

A few examples serve to illustrate the potential for such conflicts to arise. As early as 2009, Johan Callewaert observed a tendency to adhere to a harmonious interpretation of fundamental rights by both the Luxembourg and the Strasbourg Courts. Nevertheless, he was able to discern a few areas of law in which those courts held different views when interpreting fundamental rights: the privilege against self-incrimination and the detention of asylum seekers.[47] Tobias Lock, surely not one to overstate conflict, has stated concerning the right to self-incrimination that 'the courts hold different views on this question and that

Politics (2015) p. 194; G. McElroy and K. Benoit, 'Policy Positioning in the European Parliament', 13 *European Union Politics* (2012) p. 150.

[44]I thank Dr. Wessel Wijtvliet for the ideas, the references and the wording of this paragraph. The issue itself deserves a more comprehensive discussion in a separate article.

[45]In this respect, reference can also be made to ECJ 13 June 2014, View AG Kokott, Opinion Procedure 2/13, para. 167, ECLI:EU:C:2014:2475, where the AG Kokott stresses that in most cases there is convergence between the case law of Strasbourg and Luxembourg. However, she does not exclude that there might be divergences; L. Garlicki, 'Cooperation of Courts: The Role of Supranational Jurisdictions in Europe Constitutionalism', 6 *International Journal of Constitutional Law* (2008) p. 511.

[46]F. Fabbrini, *Fundamental Rights in Europe. Challenges and Transformations in Comparative Perspective* (Oxford University Press 2014) p. 26.

[47]J. Callewaert, 'The European Convention on Human Rights and European Union Law: a Long Way to Harmony', *European Human Rights Law Rev.* (2009) p. 774.

the protection offered by the CJEU falls somewhat short of that offered by the ECHR'.[48]

Discussion often ensues concerning the scope of rights or the way conflicting fundamental rights should be balanced. One could wonder whether balancing is a matter of 'principle relating to the interpretation or application of the rights and freedoms defined in the Convention'. I believe that that could be the case. The famous *Von Hannover No. 2*[49] case (and the very similar *Axel Springer*[50] case) concerned the conflict between freedom of expression and freedom of the press. The Chamber remitted both cases to the Grand Chamber of the Strasbourg Court. Given the previously indicated similarity between the 'contentious' competence of the Grand Chamber (whether on the basis of Article 30 or Article 43) and the advisory procedure, I am inclined to believe that such cases could also trigger advisory opinions.

Finally, I am not convinced by the idea that, in the event of differing levels of protection, preference can simply be given to the system that offers greater protection. In *Melloni*,[51] the Luxembourg Court formulated certain restrictions to this principle as it applies to the interplay between domestic and EU fundamental rights. Fabbrini sees *Melloni* as an example of a case in which EU fundamental rights serve as a 'ceiling of protection'.[52] It should be noted, though, that the European Human Rights Convention is sometimes part of domestic, constitutional guarantees.[53] The reasoning in *Melloni* influences discussion on the co-existence of EU law and the Convention, e.g. Opinion 2/13. In the words of Steve Peers, Luxembourg extended 'to the ECHR its long-standing principle that the primacy of EU law prevents Member States having higher human rights standards, where EU law has fully harmonised the matters concerned'.[54]

[48]T. Lock, *The European Court of Justice and International Courts* (Oxford University Press, 2015) p. 175. The author stresses, however, that there is a dialogue between the courts over the substance of the rights *in criminalibus*.

[49]ECtHR (GC) 7 February 2002, Nos. 40660/08 and 60641/08, *Von Hannover (No. 2)* v *Germany*, ECLI:CE:ECHR:2012:0207JUD004066008.

[50]ECtHR (GC) 7 February 2002, No. 39954/08, *Axel Springer* v *Germany*, ECLI:CE:ECHR:2012:0207JUD003995408.

[51]ECJ (GC) 26 February 2013, Case C-399/11, *Stefano Melloni* v *Ministerio Fiscal*, ECLI:EU:C:2013:107.

[52]Fabbrini, *supra* n. 46, p. 40.

[53]M. Kuijer, 'The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed accession', *International Journal of Human Rights* (2018), DOI: 10.1080/13642987.2018.1535433, p. 6.

[54]S. Peers, 'The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection, EU Law Analysis, 18 December 2014, ⟨eulawanalysis.blogspot.com/2014/12/the-cjeu-and-eus-accession-to-echr.html⟩, visited 3 October 2019.

Questions involving purely Convention-related issues

The most straightforward case would be that of a national high court with the competence to request an opinion from the Court without the need for any other preliminary ruling or opinion. In this scenario, the referring court might only be struggling with the interpretation of the Convention.

This is the basic position, and I refer to the foregoing part of this contribution for an explanation of the procedure. Until now, only one request has received an answer: on 3 December 2018, the Grand Chamber Panel[55] accepted a request from the French *Cour de cassation* on the question of surrogacy. More precisely, the *Cour de cassation* wanted to know whether, under Article 8 of the Convention and the doctrine of margin of appreciation, states could refuse to register a child born outside France to a surrogate mother, in so far as the foreign certificate designates the 'intended mother' as the 'legal mother'. The precise questions were:

> '(1) By refusing to enter, in the civil register of births, the birth of a child born abroad to a surrogate mother, in so far as the foreign birth certificate designates the child's "intended mother" as its "legal mother", whereas the registration is accepted in so far as it designates the "intended father", who is also the child's biological father, will a State party be overstepping its margin of appreciation under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms? In this connection should a distinction be drawn as to whether or not the child was conceived using the eggs of the "intended mother"?
>
> (2) In the event of an answer in the affirmative to one of the two questions above, would the possibility for the intended mother to adopt the child of her spouse, the biological father, this being a means of establishing the legal mother-child relationship, ensure compliance with the requirements of Article 8 of the Convention?'[56]

This situation is closely aligned with the stated goals of the Protocol. I would venture a guess that the request might have been granted were it not the first of its kind. On 10 April 2019, the Grand Chamber answered both questions. As to the first, it held that domestic law should indeed provide the possibility of recognition of the legal relationship with the intended mother, provided she was legally designated as the 'legal mother' abroad. The second question was also answered in the

[55]Registrar ECtHR, 'Grand Chamber Panel accepts first request for an advisory opinion under Protocol 16', 4 December 2018, ⟨hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-6269064-8165703&filename=Grand%20Chamber%20Panel%20accepts%20first%20request%20for%20an%20advisory%20opinion%20under%20Protocole%2016.pdf⟩, visited 3 October 2019.

[56]On a side note, it occurs to me that there is an issue with Art. 14 ECHR (equality and non-discrimination) as well.

affirmative: if adoption can be finalised promptly and effectively in the child's best interest, this is indeed a means of establishing that legal relationship.[57]

Another interesting matter is the legal effect of an advisory opinion. As indicated, the Protocol unambiguously confirms that advisory opinions are non-binding in nature. That is not the entire story, however.

In terms of the Convention vis-à-vis domestic courts, the Explanatory Report notes that opinions are as much a part of case law as are the Court's judgments and decisions.[58] This means that they have a force of '*res interpretata*'.[59] Things do, however, become a bit interesting here; opinions can, after all, bring about 'undeniable legal effects'.[60] To the extent that an opinion, like a decision or a judgment, concerns the *interpretation* of the Convention, it is hard to see how the referring court could not be bound by it. Setting aside the Court's interpretation would thus boil down to not respecting the obligation to respect the Convention (as interpreted by the Strasbourg Court, i.e. in its opinion).[61] Moreover, Linos-Alexandre Sicilianos is probably right when he says that it would be 'highly bizarre' for a high court, without being obliged to refer the question, to decide to do so and then, once the answer had been given, decide not to apply it.[62] In a state like Belgium, where the Supreme Court has explicitly held that the Convention must be understood in the way it is interpreted by the Strasbourg Court,[63] advisory opinions carry tremendous legal weight.[64] It should be noted, however, that there is generally more leeway in cases that involve the application of the Convention rather than the interpretation thereof.[65]

From an insider's perspective, Linos-Alexandre Sicilianos has underscored that Protocol No. 16 fails to address certain issues concerning the relationship between advisory opinions and the Courts' judicial function, e.g. 'new' issues on which the

[57]ECtHR (GC) 10 April 2019, request P16-2018-001.

[58]Explanatory Report to Protocol No. 16, *supra* n. 18, p. 6, para. 27.

[59]Gerards, *supra* n. 10, p. 636-635.

[60]ECtHR, *supra* n. 30, p. 10, para. 44.

[61]Gerards, *supra* n. 10, p. 636.

[62]Sicilianos, *supra* n. 28, p. 26.

[63]For the argument, *see* G. Schaiko et al., 'Belgium', in J. Gerards and J. Fleuren (eds.), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law* (Intersentia 2014) p. 104. In fact, the argument goes that since the judgment is the interpretation of the international norm, the case law is considered to be the norm itself. As Belgium is bound by the norm, it also bound therefore by the case law; J. Wouters and D. Van Eeckhoutte, 'Doorwerking van internationaal recht in de Belgische rechtsorde: een overzicht van bronnen en instrumenten', in J. Wouters and D. Van Eeckhoutte (eds.), *Doorwerking van internationaal recht in de Belgische rechtsorde [Effects of International Law in the Belgian Legal Order]* (Intersentia 2006) p. 24.

[64]Sicilianos, *supra* n. 28, p. 26.

[65]Along the same lines: Gerards, *supra* n. 10, p. 636.

Court has not yet taken a position or which involve systemic domestic problems. If the Grand Chamber were to be asked to give an opinion on such a matter, it would be wise for it to adjourn all pending cases on those issues and await the Grand Chamber's opinion. The second situation is one in which the Court is already dealing with several applications regarding an issue on which it is been asked to give an opinion. Referring to the practices of the Inter-American Court, Sicilianos contends that the Court should be allowed to refuse to give an opinion in such situations.[66]

With regard to the Court itself, the tension between its 'advisory' and 'judicial' functions could pose problems. The advisory opinion procedure is designed so as not to preclude a subsequent complaint. In fact, it is conceivable that the Strasbourg Court could have to hear applications concerning cases for which it has previously delivered an advisory opinion. A party to the domestic procedure might not be happy with the way the domestic courts have integrated Strasbourg's opinion. Obviously, the spirit of Protocol No.16 suggests that the domestic courts should integrate the Court's opinion in their judgments, which, if they do, could lead to any subsequent application being found inadmissible (as manifestly ill-founded, for example) or being dealt with in an accelerated fashion.[67]

Suppose that a national court does not follow the Court's opinion. In that case, the Strasbourg Court could still have good reasons to declare the application inadmissible or to process it rapidly. However, it cannot be ruled out that the particular circumstances of the case might justify the Court analysing the merits of the application, for instance, if the domestic court has not followed the Court's opinion on the *application* of the Convention to the facts of the concrete case.

One might wonder whether, in that situation, the aim of reducing the Court's workload by anticipating and avoiding future applications can be met. This will only be the case if the time and energy invested in the advisory opinion and the quick processing of the subsequent application are inferior to the effort made to deal with the substantive merits of the application in the event no advisory opinion had been requested. Little can be said on this point: we will have to await further implementation of the Protocol to gather empirical information that would allow us to make evidence-based statements on this question. In any event, the Court itself has admitted in its Reflection paper that the advantages in terms of workload will only be visible in the long term.[68] In the short term, it cannot be excluded, however, that the workload will increase.[69]

[66]Sicilianos, *supra* n. 28, p. 27.

[67]Explanatory Report to Protocol No. 16, *supra* n. 18, p. 6, para. 26.

[68]Reflection Paper on the Proposal to extend the Court's advisory jurisdiction, *supra* n. 30, p. 4, paras. 14–16.

[69]On this, in more detail, *see* Dzehtsiarou and O'Meara, *supra* n. 10, p. 457-462.

Another more institutional problem that has received scant attention here[70] is the relationship between Article 26 of the Convention and Protocol No. 16. Article 26 of the Convention states that the Judge elected in respect of the High Contracting Party shall sit in the Chamber (or Grand Chamber) cases concerning this state. Protocol No.16 contains a similar provision: the 'national' judge shall sit in the panel and subsequently in the Grand Chamber. This can bring about delicate situations on occasion.

It is likely that if an individual contentious application is filed in a case in which the Court has already delivered an advisory opinion, it will be dealt with in an 'accelerated way', i.e. in a single-judge formation or by a committee of three judges.[71] Single judges can never hear cases against the State in respect of which they are elected and committees of three judges do not necessarily contain the 'national' judge. In such circumstances, there is no problem.

The picture is somewhat different whenever the national judge happens to sit in the three-judge committee, or if the case is brought before a chamber of seven judges. In the latter case, the 'national judge' will have to take a position on a case in which he has already expressed an advisory opinion. More generally, this problem can arise for every judge in the panel and the Grand Chamber who takes part in the processing of the individual application afterwards.

Can a judge be a member of the 'advisory organs' of the Court and subsequently fulfil a role in the contentious procedure? This problem can be compared to the role of supreme administrative courts, such as the Council of State in states such as France, the Netherlands, Luxembourg and Belgium, that have both an advisory role and a judicial function. The case law of the Court is well established: it is not necessarily a problem *in se* that an institution combines both functions, but in order to respect the obligation of impartiality, what does matter is whether the members of the advisory section participate in the contentious phase and whether the debate at stake concerns the same case or decision.[72] Admittedly, the Convention does not apply to the Court itself, but one could at least advocate that, as a matter of legal elegance, the Strasbourg system itself tries to respect the standards it applies to other courts. Assuming the Court wants to comply with its own case law, much will depend on the interpretation of the concept of 'similar case'. To comply with its own standards, the Court has to show that the advisory opinion and the later application thereof do not concern similar questions.

[70]Sicilianos, *supra* n. 28, p. 22.

[71]Sicilianos, *supra* n. 28, p. 27.

[72]ECtHR 2 October 2014, No. 32191/09, *Adefdromil* v *France*, para. 65, ECLI:CE:ECHR:2014:1002JUD003219109; ECtHR 9 November 2006, No. 65411/01, *Sacilor Lormines* v *France*, paras. 71-74, ECLI:CE:ECHR:2006:1109JUD006541101; ECtHR (GC) 6 May 2003, Nos. 39343/98, 39651/98, 43147/98 and 46664/99, *Kleyn and Others* v *the Netherlands*, paras. 193-200, ECLI:CE:ECHR:2003:0506JUD003934398.

Another analogous situation can be observed in the Court's existing practices. In fact, one might wonder whether a judge can be both part of the Chamber and, subsequently, the Grand Chamber. Here the Rules of Court give a clear answer that, upon further inspection, is ambiguous. According to Article 26 of the Convention and Rule 24(d) of the Rules of Court, a judge cannot be member of the Grand Chamber and of the Chamber that ruled on the merits or on the admissibility of the case, except for the President and the judge who took part in the deliberation in respect of the State Party against which the application was lodged.[73] This rule could be interpreted as a compromise between full interdiction and full permission.

Be that as it may, it would seem to be quite difficult to deduce any principled position from this Rule. I do, however, propose that, apart from the national judge – because the Convention and the Protocol say so – no judge should be involved in both the advisory procedure and the contentious one. The Court has a sufficient number of judges to avoid such a double role.

Questions with an EU dimension

Things get considerably more complex as soon as there is EU law in the equation. Suppose indeed that the highest domestic court finds out that a case pending before it raises questions about the interpretation of both EU law and the Convention. How should that highest court proceed?

In order not to complicate things too much, I will refrain from discussing what kind of situation might arise following the accession of the EU to the Convention. At present, while this is still a possibility, after Opinion 2/13, it remains to be seen how imminent accession in fact is. Others have studied the potential effect of accession on Protocol No. 16.[74] I will focus here on the present-day situation.

In this state of affairs, it is already perfectly possible for the highest court of an EU Member State – if that state has ratified Protocol No. 16 – to incur an obligation under Article 267 TFEU to refer a question on the interpretation of the EU Charter for preliminary ruling to Luxembourg while at the same time having the option to ask Strasbourg for an opinion on the same issue, here in light of the interpretation of the analogous provision of the Convention.[75]

[73]In practice, however, Section Presidents are considered to have recused themselves.

[74]Zampetti, *supra* n. 9, p. 14 ff. The literature on Opinion 2/13 is abundant. Amongst others, *see* R. Baratta, 'Accession of the EU to the ECHR: the rationale for the ECJ's prior involvement mechanism', 50 *CML Rev.* (2013) p. 1305–1332. *See* the special section of the 16 *German Law Journal* (2015); T. Lock, 'The future of the European Union's accession to the European Convention on Human Rights after Opinion 2/13: is it still possible and is it still desirable?', 11 *EuConst* (2015) p. 239.

[75]AG Kokott, *supra* n. 45, para. 139, ECLI:EU:C:2014:2475.

Here, the point is that any comparison of the two procedures is 'uneven'. Article 267 TFEU contains an obligation for the (highest) courts, within the confines of the CILFIT case law,[76] to refer a case to Luxembourg. Protocol No. 16 does not contain an obligation, so there is little risk of the obligation under Article 267 TFEU being impacted: with or without Protocol No. 16, EU member states must respect that provision. As Advocate General Kokott stressed: the highest courts will have to refer questions on fundamental rights 'primarily' to the European Court of Justice.[77]

The question is, however, whether, beyond that, those highest courts will still be allowed to ask Strasbourg for an advisory opinion. The use of the term 'primarily' by Advocate General Kokott already indicates that, according to her, this possibility exists. If not, she would have used 'uniquely' or 'solely' or terminology of that kind. I would, in any case, argue that nothing prevents the highest domestic courts from also asking Strasbourg's opinion.

Two distinct questions thus arise here at present: one pertaining to the interpretation of the Charter of Fundamental Rights and the other to the interpretation of the Convention. Since the EU has not (yet) acceded to the Convention, there is no institutional link with the EU, nor between Luxembourg and Strasbourg. This situation does not differ, therefore, from the well-known cases in which the Strasbourg Court had to deal with cases in which High Contracting Parties, members of the EU, had to defend themselves against the complaint that their domestic law did not respect the Convention, even though they believed that they had acted in accordance with EU obligations. The famous *Bosphorus* case offers an excellent illustration. In that case, the Strasbourg Court reflected upon the co-existence of international (e.g. EU law) and Convention obligations. The Court posited:

> '155. In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (. . .). By "equivalent" the Court means "comparable"; any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued (. . .). However, any such finding of equivalence could

[76]ECJ 6 October 1982, Case 283/81, *Cilfit* v *Ministery of Health and Lanificio di Gavardo*, ECLI:EU:C:1982:335 in which the ECJ held that no request for preliminary ruling should be brought before the ECJ where there is already a judgment on the question (*acte éclairé*) or where there is no reasonable doubt as to the meaning of an act (*acte clair*).

[77]AG Kokott, *supra* n. 45, para. 141, ECLI:EU:C:2014:2475.

> not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.
>
> 156. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.
>
> However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights.'[78]

I do not believe, therefore, that at present the entry into force of Protocol No. 16 raises any serious questions of principle.[79] That is to say, no other problems than those that already exist. By delivering advisory opinions, the Strasbourg Court is not 'interpreting' EU law beyond what it already does in its existing role in contentious situations.

I do, however, perceive a few serious practical problems which have not yet attracted much attention.

Until now, possible tension between EU law and the Convention has been skilfully[80] mitigated if not entirely avoided by the Strasbourg Court's *Bosphorus* presumption. It should be noted, though, that in those kinds of cases, whenever Luxembourg did in fact intervene, it was usually in the context of a preliminary ruling during the domestic procedure. Therefore, by the time the case had made its way to Strasbourg, the Human Rights Court knew perfectly well what Luxembourg had said and could adopt a position accordingly. In other words, this created leeway for the Strasbourg Court, thus facilitating the adoption of an EU-friendly position. The advisory opinion mechanism runs the considerable risk of complicating this diplomatic exercise. In fact, should a highest domestic court ask for a preliminary ruling from Luxembourg and simultaneously or subsequently an advisory opinion from the Strasbourg Court, there is no certainty that Strasbourg will know or be able to predict what Luxembourg will have to

[78]ECtHR (GC) 30 June 2005, No. 45036/98, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi* v *Ireland*, paras. 155-156, ECLI:CE:ECHR:2005:0630JUD004503698.

[79]Obviously, this may be somewhat different once the EU has become party to the ECHR. If ever. On this, *see* Zampetti, *supra* n. 9, p. 16 ff (in particular 17).

[80]This is not to say that I subscribe to this solution: in terms of purely legal reasoning, I am not convinced by this approach (I fail to understand why that presumption would be valid vis-à-vis one legal order, the EU, but not vis-à-vis the national legal orders). But I recognise that, from a *diplomatic* perspective, the Strasbourg Court has skilfully avoided conflict with Luxembourg.

say on the matter. Thus, the diplomatic exercise could be jeopardised and potential conflicts between Strasbourg and Luxembourg may become more visible.

A second problem concerns the situation of a highest domestic court that receives answers from Luxembourg and Strasbourg that are at odds with each other. The reconciliation exercise carried out by the Strasbourg Court in the *Bosphorus* case(s) will now have to be performed by the domestic court. Under EU law, it will be required to apply and give preference to the Luxembourg answer in the event of a conflict with the Strasbourg answer. Yet, if a dissatisfied party brings the case to the Strasbourg Court, the latter will be faced with extra difficulty. Not only is there the problem of the relationship between the Strasbourg and Luxembourg Courts, but now there is even an issue of coherence between the Court's advisory opinion and its role in contentious procedures. Siding with the Luxembourg Court would, in such cases, mean that the advisory opinion is not followed. Sticking to the interpretation of the advisory opinion could lead to much more visible conflict with Luxembourg. At present, the Strasbourg Court is the last court to decide a case. This allows the human rights Court to play the game of jurisdictional diplomacy at will. The recent past has indeed shown the Court's willingness to do so,[81] although Protocol No. 16 may have complicated the exercise.

Questions with a constitutional dimension

Similar forum shopping problems occur whenever there is an issue that involves the interpretation of both a constitutional provision and a provision of the Convention.

This occurs, for instance, whenever a supreme (administrative) court refers a question to the constitutional court, pursuant to its domestic rules, and where the legal issue at stake also raises questions under the Convention so that the (administrative) court also feels the need to ask an opinion of the Strasbourg Court. Another example is the situation in which a preliminary question is referred to the constitutional court, which then decides that the question also concerns a 'serious question affecting the interpretation or application of the Convention or the Protocols'.

The latter hypothesis, the easiest one to address, in fact, combines two distinct referral procedures. First, the domestic 'constitutional' procedure which is then followed by the new Strasbourg procedure. As far as I can see, there is no serious issue with the consecutive application of the two procedures. Just as when the constitutional court refers a case to Luxembourg because there is an issue of

[81]For instance ECtHR (GC) 23 May 2016, No. 17502/07, *Avotiņš* v *Latvia*, ECLI:CE:ECHR:2016:0523JUD001750207.

EU law in need of clarification, the constitutional court can refer its questions to Strasbourg. The mechanism of Protocol No. 16 is then triggered. Once the constitutional court receives an answer from the Strasbourg Court, it can then, in turn, give an answer to the referring court. A potential problem here is the length of the procedure.

The former hypothesis is more complicated. Suppose a supreme administrative court is hearing an appeal against a government decision, and in the course of the proceedings it becomes clear that an important issue of both constitutional and conventional law is at stake. The supreme court might have an obligation to refer the question to the constitutional court yet also have the option of asking for an opinion from the Strasbourg Court at the same time.

Unlike the previously analysed situation, which concerned EU law, there is no question here of any obligation to ask the Strasbourg Court for a preliminary opinion. Moreover, the order in which the referrals take place does not matter. To the extent that the constitutional referral is mandatory (as in the case of Belgium, albeit that there are exceptions to that obligation) and the referral to Strasbourg is optional, it is to be expected that the court will first send the issue to the constitutional court and then – or at the same time – to the Strasbourg Court,[82] especially since Article 26 of the Special Law on the constitutional court establishes an order of precedence. Whenever a court hears the argument that a legal provision simultaneously infringes the Constitution and an analogous or partially analogous provision of international law, the referring court needs, except in legally-established exceptions, to address the question first to the constitutional court. Only after having received that Court's answer can the court hearing the substantive case tackle the issue of compatibility with international law.[83]

Much more interesting is the chronological order of the various answers. There are basically two situations imaginable. The referring judges either receive an answer from the Constitutional Court ahead of the answer from the Strasbourg Court, or vice versa. In any event, it can be assumed that the referring judges will wait for both answers before delivering their own judgment.

A potential cause of problems here is once again the interplay between the two Courts, e.g. where one of them is unaware of the other's position. Although this is not all that great a problem for the Strasbourg Court since it can simply answer the question, this hypothetical situation is more complicated for the

[82]M. Bossuyt and W. Verrijdt, 'The Full Effect of EU law and of Constitutional Review in Belgium and France after the Melki Judgment', 7 *EuConst* (2011) p. 368, dealing with the order of constitutional review (via preliminary ruling) and treaty review, clearly indicate that although both forms of review can take place simultaneously or sequentially, the parallel exercise of review is the least preferable option.

[83]P. Popelier and K. Lemmens, *The Constitution of Belgium. A Contextual Analysis* (Hart Publishing 2015) p. 247–248.

constitutional court. Consider, for example, the position in which a court such as the Belgian Constitutional Court finds itself. According to the Belgian Constitutional Court, the constitutional provisions protecting fundamental rights and the international provisions that offer analogous protection form an inextricable whole and have to be read together when constitutional review takes place.[84]

Thus, assuming that the Constitutional Court wishes to respect the Belgian Constitution and its own case law, it can only give a proper answer to the question after it has had the opportunity to study the Strasbourg Court's answer. If not, there is a risk that the Constitutional Court will hand down a ruling that, in the event of a conflict, will soon be overruled by the Strasbourg Court's opinion. This could lead to a situation in which – precisely because the domestic courts are likely to prefer, *bona fide*, to follow the Constitutional Court's interpretation, especially as it is reputed to be Strasbourg-friendly, and notwithstanding the earlier advisory opinion – the case could end up again in Strasbourg. The second time it will be presented to the Strasbourg Court as a contentious application.

I contend, therefore, that it is better for the Strasbourg Court's opinion to be asked first and then communicated to the Constitutional Court. In this scenario, the Constitutional Court can take immediate notice of the Strasbourg Court's findings and usefully integrate them in its own case law. If the highest aim of Protocol No. 16 is to avoid divergent interpretations and, as a consequence thereof, reduce the number of applications to Strasbourg, this option seems to be the one most in line with the *ratio legis* of the Protocol.

Questions with a Convention-based, a constitutional, and an EU dimension

Clearly, the most complex situation is the one in which a Belgian court or Supreme Court faces a problem that touches upon questions of Convention-based law, constitutional law, and EU law. This is, in a way, a more complex version of the already very difficult situation in which issues of constitutional law and EU law arise.

I have already indicated that, in Belgium, Article 26 of the Special Law on the Constitutional Court establishes a priority rule: in principle, the referring Court needs to refer the case first to the Constitutional Court, after which it can then assess the issues at stake against the backdrop of international law.

Obviously, the situation becomes a bit more complex once EU law enters into the equation. In fact, it would be highly problematic if the priority rule were to throttle the full effect of EU law. In the Luxembourg *Melki and Abdeli* case, on a similar French priority rule, guidelines were established by the Luxembourg

[84]E.g. Const. Court, case 162/2004, 20 October 2004, para. B.2.4.; Const. Court, case 16/2005, 19 January 2005, para. B.2.3.; Const. Court, case 43/2019, 14 March 2019, para. B.3.2.

Court in order to reconcile the internal priority rules with EU law. The Luxembourg Court accepts such rules as long as

'other national courts or tribunals remain free:

-to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary,
-to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order, and
-to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to European Union law.'[85]

As has been observed in the literature, there is also a fourth condition. Whenever the national legislation under scrutiny is a mere transposition of EU law, the question of the validity of the directive takes precedence over constitutional questions. Therefore, Luxembourg must be consulted in advance of the Constitutional Court.[86]

To this, we must now add the possibility of a referral to Strasbourg. Bearing in mind the optional nature of the advisory opinion procedure, it occurs to me that the '*Melki*' doctrine will still be applicable. That is: we can imagine that the referring judge might refer a case to the Constitutional Court first and then to the Strasbourg Court (provided the Constitutional Court does not itself pre-emptively ask the Human Rights Court for an advisory opinion). The referring judge must, however, be free to refer the case to Luxembourg as well, at any stage in the procedure.[87] The other conditions remain applicable as well.

Thus, we can ascertain that the interplay between preliminary rulings is complex, but not impossible. Advocate General Kokott's suggestion to refer questions to the Luxembourg Court first (before asking an opinion of the Strasbourg Court), and the lessons from the *Melki and Abdeli* judgment concerning the relationship between constitutional and EU preliminary rulings, are thus not incompatible. They do, however, increase the risk of proceedings becoming lengthy and complex.

[85]ECJ (GC) 22 June 2010, Case C-188/10 and C-189/10, *Melki and Abdeli*, ECLI:EU:C:2010:363.

[86]A. Alen and K. Muylle, *Handboek van het Belgisch Staatsrecht [Manual of Belgian Constitutional Law]* (Kluwer 2011) p. 744; ECJ (GC) 22 June 2010, Case C-188/10 and C-189/10, *Melki and Abdeli*, para. 56, ECLI:EU:C:2010:363.

[87]And, obviously, a highest Court is – under Art 267 TFEU – not free to decide to not refer to the ECJ, except when the question is not relevant or in case of an *acte clair* or *acte éclairé*.

Conclusion

It is understandable, given the Strasbourg Court's impressive and consistent backlog, that actions have been taken to combat it. In this contribution, I have focused on one of the proposed means for improving the efficiency of the Strasbourg system, i.e. the model of advisory opinions as introduced by Protocol No. 16. At present, only one question has been referred to the Grand Chamber, thus little can be said about the practice as such.[88]

However, I have tried to explain that the new procedure comes at the cost of increased complexity. In the simplest scenario, i.e. where the highest court only needs to refer a question to the Strasbourg Court, there is little procedural complexity involved. One is tempted to believe that this will improve the overall efficiency of the system, albeit only to the extent that the time spent on the advisory opinion plus any contentious application that follows proves to be less than the time that the Court would have spent on the processing of the application without having been requested to issue a prior advisory opinion.

The second problem in this respect is that, as Zempetti has rightly indicated,[89] the length-of-procedure problem is now transferred to the domestic level. Indeed, if the logic of Protocol No. 16 is followed and respected, one might assume that it would lead to fewer cases in Strasbourg or, at least, to cases that can be dealt with more quickly. This will have a positive effect on the caseload of the European Court of Human Rights. However, one might wonder whether this would not impose an extra burden in domestic procedures. Such procedures risk becoming lengthier now whenever domestic courts decide to ask for preliminary rulings. Protocol No. 16, therefore, only adjusts the balance in the relationship between the Strasbourg Court and the domestic courts. It remains to be seen whether and to what extent it will improve the situation of the individual citizen, who, if he is involved in a case in which an advisory opinion is asked, may have no choice but to accept a lengthier domestic procedure. Admittedly, the situation might be different if a national court finds itself faced with several similar subsequent claims or cases. An advisory opinion in one case will then have an overall beneficial impact in that the answer given in the first case can immediately be applied in subsequent cases.

Finally, I have indicated that Protocol No. 16 does raise questions about the order in which preliminary questions should be asked when an obligation exists for a court to refer a case to both the European Court of Justice and the domestic constitutional court for a preliminary ruling. Especially in the event of a

[88]Since this article was written, a second request has been formulated by the Armenian Constitutional Court.

[89]Zampetti, *supra* n. 9, p. 28.

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simultaneous referral to Luxembourg, there is a risk that the Human Rights Court, which might not necessarily be aware of what the Luxembourg Court will decide, will not be able to apply the legal diplomacy that underpins its *Bosphorus* case law. In this respect, it is not without irony that it can be observed that the improved dialogue between the domestic courts and the Strasbourg Court could endanger the harmonious relationship between Strasbourg and Luxembourg.

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