

LEGAL BRIEFING

Implementing ECHR Protocol 16 on Advisory Opinions

MARCH 2016

This legal briefing provides a summary of some of the proposed changes to the Rules of Procedure of the ECtHR that are intended to implement Protocol 16 to the Convention on advisory opinions. It provides an analysis of the expected impact of the proposals and identifies where there could be improvements, and includes a comparative analysis of advisory opinion procedures in other jurisdictions. Produced by lawyers at the Open Society Justice Initiative for a consultation of NGOs interested in submitting feedback to the ECtHR in regards to the proposals.

Executive Summary

1. Protocol 16 and the accompanying new rules of procedure are a significant expansion of the Court's authority to provide advisory opinions. This is intended to strengthen the interaction between national courts and the ECtHR, and to reduce the Court's excessive caseload.
2. The proposed amendments to the Rules of Procedure implementing Protocol 16 raise several issues that might be raised as concerns with the Registry.

Issues Raised as Concerns with the Registry

3. *No role for parties in the domestic proceedings.* Article 3 of Protocol 16 provides that the High Contracting Party and the Commissioner for Human Rights have the right to intervene in an advisory opinion reference, and permits the President to invite another state or person to do the same. Paragraph 20 of the Explanatory Report to the Protocol states that "It is expected that the parties to the case in the context of which the advisory opinion had been requested would be invited to take part in the proceedings". The amended Rules of Procedure do not reflect this explanation, and seem to place the claimant in the domestic proceedings in the same position as any other third party. We would propose that the rules be amended to require that a request for an advisory opinion, or a decision to accept such a request, be sent to the domestic parties and that they be invited to apply to participate as third parties.
4. *Arguments of the parties.* Draft Rule X(B)(d) provides that a summary of the arguments of the parties to the domestic proceedings on the question put to the ECtHR should only be included with the advisory opinion request "if relevant". It seems unlikely that arguments made on the issue would not be relevant, and this rule risks excluding the voice of the victim entirely from the proceedings. We would propose that the rule be amended to clarify that the domestic court should include summaries of the arguments of the parties where they address the issue on which the advisory opinion is sought, i.e. this is what makes them relevant.
5. *Views of the Domestic Court.* Draft Rule X(B)2.1(e) invites the requesting court to give their own views on the question. This risks the domestic court pre-judging the issue before they have heard from the ECtHR. We would propose that the rule be restricted so that the request for an advisory opinion would only contain the reasons for the request, and the relevant legal and factual background of the pending case, as set out in Article 1(3) of Protocol 16.

Minor Points for Clarification

6. *Costs/Legal aid.* The draft rules do not specify whether the Court should award costs to applicants when a national court seeks an advisory opinion in their case and they participate in the proceedings before the ECHR. The proposals also omit any guidance on the availability of legal aid to the parties.
7. *Languages.* Rule 34 allows the national court to submit a request in the national language, and to then provide a translation. The Rules might clarify that all subsequent proceedings should be conducted in one of the official languages of the Court.
8. *Publication.* Paragraph 4 of Article 4 of the Protocol calls for the publishing of advisory opinions. It would be helpful if the draft rules could clarify which documents will be

published and at what stage in the proceedings, so as to facilitate the participation of interested parties.

9. *Page limits.* The proposed amendments do not provide direction on the length requirement for submissions in relation to advisory opinions. The Court should clarify whether they plan to require any such restrictions.
10. This note sets out:
 - A. The current status of advisory opinions at the Court, and the main features of the new mechanism.
 - B. An analysis of the draft rules of procedure for Protocol 16.
 - C. A comparative analysis of advisory opinion procedures at other regional human rights systems.
 - D. A review of the academic discussion on the issues.

A. Advisory Opinions at the ECHR

11. While the power to issue advisory opinions has been substantially extended by Protocol 16, a limited power currently exists. Although not endowed with advisory jurisdiction in its founding treaty, the ECtHR was first accorded limited advisory jurisdiction by Protocols 2 and 11, which amended and restructured the control mechanisms of the ECtHR and provided the language for Articles 47-49 of the Convention. According to Protocol 2, which entered into force September 1970, the Court has the competence to provide advisory opinions on legal questions concerning the interpretation of the Convention and related Protocols.
12. This mechanism is heavily restricted: only the Committee of Ministers has the authority to request an opinion from the Court, the opinions cannot deal with any questions “relating to the content or scope of the rights or freedoms defined in Section 1 of the Convention and the Protocols thereto.”
13. The mechanism under this provision has been used rarely – only two requests for advisory opinions were made up until 2008, and only one of those was accepted by the Court.

Protocol 16

14. Protocol 16 extends the jurisdiction of the Court by introducing a system allowing the highest courts and tribunals of a Contracting Party to request directly from the ECtHR a non-binding advisory opinion on “questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto”, in addition to clarifying the Court’s case-law.¹ The courts and tribunals which may request an opinion are to be specified by each State. The underlying rationale behind the Protocol was to provide further guidance to States parties by assisting them in avoiding future violations, enhance the constitutional role of the Court, and strengthen interactions between the Court and national authorities.² The new mechanism also extends the jurisdiction of the Court to engage in direct dialogue with national courts of States parties on the very rights the Court is designed to protect.
15. The Protocol applies only to State parties who ratify it, and will enter into force for those States after it has been ratified by a minimum of ten States. As of 16 March 2016, six States have ratified Protocol 16 (Albania, Finland, Georgia, Lithuania, San Marino, and Slovenia), and a further 10 have signed it.³

Main Features of the New Mechanism

16. Only the “highest courts or tribunals” may request an advisory opinion. The limitation on national courts’ competency to direct advisory opinion requests to the ECtHR is an

¹ Committee of Ministers, *Explanatory Report to Protocol No. 16 to the European Convention on Human Rights*, CM(2013)31, 2 April 2013, paras. 1, 9.

² *Ibid.*, paras. 1-3.

³ http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/214/signatures?p_auth=fzaw8luV, accessed on 10/28/15.

important piece, designed to avoid a proliferation of requests.⁴ It is also a main point of contrast between the ECtHR and the Court of Justice of the European Union, which allows “any court or tribunal of a Member State” to submit questions for preliminary rulings.⁵

17. It is the responsibility of the State to specify which of its courts meet this definition and have the authority to make such a request.⁶ This allows for “the necessary flexibility to accommodate the particularities of national judicial systems”.⁷ The Committee has explained that the “highest” court specified by the State party does not need to be one to which recourse must have been made in order to satisfy Article 35 of the Convention,⁸ although the Protocol and Rules do not provide further guidance.
18. No stage of the process is binding. National courts or tribunals of States parties are not obliged to seek an advisory opinion. If a national court does request an advisory opinion, that request is not binding on the ECHR; a panel of the Grand Chamber must consider it and may deny a request for an advisory opinion, although it must provide an explanation for its denial.⁹ Even where the ECHR issues an advisory opinion, it does not bind the national court.¹⁰
19. Questions submitted by a domestic court or tribunal must be legal “questions of principle” relating to the interpretation or application of the rights and freedoms enshrined in the Convention or the protocols thereto, and may only be submitted in the context of a case pending before the requesting domestic court or tribunal.¹¹ This is to ensure the requesting court or tribunal has reflected upon the utility and necessity of requesting an advisory opinion, and to ensure it is in a position to set out the relevant legal and factual background of the case, “allowing the Court to focus on the question(s) of principle relating to the interpretation or application” of the Convention.¹²

⁴ Committee of Ministers, *Explanatory Report to Protocol No. 16 to the European Convention on Human Rights*, CM(2013)31, 2 April 2013, para. 8; ECtHR, Reflection Paper on the Proposal to Extend the Court’s Advisory Jurisdiction, para. 26.

⁵ Treaty of the Functioning of the European Union, Art. 267.

⁶ Art. 10, Protocol No. 16.

⁷ Committee of Ministers, “Protocol 16 Explanatory Report,” para. 8.

⁸ Committee of Ministers, *Explanatory Report to Protocol No. 16 to the European Convention on Human Rights*, CM(2013)31, 2 April 2013, para. 8.

⁹ Protocol 16, Art. 2.

¹⁰ Protocol 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, CETS. No. 214 (2013) [“Protocol 16”], Arts. 1, 5; see also Committee of Ministers, *Protocol 16 Explanatory Report*, para. 7.

¹¹ Committee of Ministers, *Explanatory Report to Protocol No. 16 to the European Convention on Human Rights*, CM(2013)31, 2 April 2013, paras. 9-10; Protocol 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, CETS. No. 214 (2013) [“Protocol 16”], Art. 1(2) [“Protocol 16”].

¹² Committee of Ministers, *Explanatory Report to Protocol No. 16 to the European Convention on Human Rights*, CM(2013)31, 2 April 2013, para. 11.

B. Draft Rules of Procedure for Protocol 16

20. The Standing Committee has issued a proposal for amendments to the Rules of the Court to implement Protocol 16. These proposed amendments add a new Chapter of substantive rules governing advisory opinions (Chapter X). They also make a number of consequential amendments to other rules, notably regarding definitions (extending the definition of “party” to include the parties to the underlying domestic proceedings) and third party interventions (applying the regime to both panel assessments of requests for advisory opinions, and proceedings on the substance of an advisory opinion), as well as to the composition of the court, and languages.
21. It is important to note that the proposed new section to the Rules of Procedure, Chapter X, contains a catch-all provision allowing the Court to apply “the other provisions of these Rules to the extent to which it considers this to be appropriate.”

New Chapter X of the Rules of Court on advisory opinions

22. The provisions of draft Chapter X of the Court’s Rules of Procedure apply to all proceedings relating to the new advisory opinion mechanism, including the making of requests submitted under Article 1 of the Protocol, examination of accepted requests before the Grand Chamber, and third party interventions.

Proposed general paragraph Rule X(A)

23. In addition to clarifying which national courts or tribunals may submit a request, section A contains a catch-all provision, stating: “In proceedings relating to advisory opinions requested by courts or tribunals designated . . . pursuant to Article 10 of Protocol No. 16 . . . the Court . . . shall also apply the other provisions of these Rules to the extent to which it considers this to be appropriate.” Only time will tell whether this provision will be interpreted as allowing it to pull from other provisions in its existing Rules of Procedure that were not amended to apply directly to the new advisory opinion mechanism. It may suggest that the Court should consult the new Chapter 10 before consulting any provisions contained in the earlier sections of the Rules.

Proposed Rule X(B): Mandatory components of a request

24. This section details the elements of a request by a national court or tribunal, in accordance with Article 1 of Protocol 16. Elements of the request mirror the requirements listed in the rules of procedure of other human rights systems, discussed in more detail in the section below.
25. These requirements are drawn from the Committee of Ministers’ explanatory report to the Protocol (para. 12). Significantly, the proposed rules omit any mention of the required elements of a request for an advisory opinion.
26. The elements include:
 - a) the subject matter of the domestic case and the relevant legal and factual background;
 - b) the relevant domestic legal provisions;

- c) relevant Convention issues, in particular the rights or freedoms at stake;
- d) if relevant, a summary of the arguments of the parties to the domestic proceedings on the questions being presented to the ECtHR; and
- e) if appropriate, a statement of the requesting court's own views on the question put to the ECtHR.

Proposed Rule X(C): Examination of a request by the panel

27. Draft section C details the composition of the Grand Chamber panel for the examination of a request for an advisory opinion, and underscores the Court's authority to reject requests under Article 2 of the Protocol.
28. The composition of the Grand Chamber panel in charge of reviewing requests includes the President of the Court and a judge elected in respect of the Contracting party where the requesting court or tribunal sits, or, "where appropriate, a judge appointed pursuant to Rule 29." Upon accepting a request for an advisory opinion in accordance with draft Rule C, the Grand Chamber is to be constituted pursuant to Rule 24, draft paragraph 2(h), which provides that it will be composed of 17 of the Court's judges.¹³
29. This section also mandates that the panel must accept the request if it considers the request fulfils the requirements of Article 1 of Protocol No. 16. However, neither Article 1 nor 2 of the Protocol specify what the possible grounds for refusal or acceptance of requests will be; the panel appears to be given full discretion to adjudicate what the parameters of an acceptable request will be. Experts believe it is likely a panel constituted under Article 2 of Protocol 16 will base its decisions on criteria similar to those used when considering internal requests to refer cases to the Grand Chamber.¹⁴ These considerations include:
 - Whether the case evokes important questions related to the interpretation and application of the Convention;
 - If the case presents a reason for revision of well-established case law, or
 - If it pertains to an important matter of general interest.¹⁵
30. The Committee of Ministers intends for this mechanism to "reinforce dialogue between the Court and national judicial systems".¹⁶ Thus, the Committee has opted to refrain from drafting its own guidelines on review of requests so as to allow the proliferation of the rules to come directly from the Court. However, this comes at the expense of national courts, whose introduction to Protocol 16 will have to begin by means of trial and error.

Proposed Rule X(D): Proceedings following the acceptance of a request

31. According to draft Rule X(D), upon acceptance of a request for an advisory opinion in accordance with Rule C, a Grand Chamber will be constituted pursuant to draft paragraph h

¹³ Standing Committee on the Rules of Court, *Proposals for Amendment to the Rules of Court in Anticipation of the Entry Into Force of Protocol No. 16*, RC(2015)6, 24 April 2015, Draft Rule X(D)(1).

¹⁴ See e.g. Janneke Gerards, "Advisory Opinions, Preliminary Rulings, and the New Protocol No. 16 to the European Convention of Human Rights, a Comparative and Critical Appraisal", *Maastricht Journal of European and Comparative Law*, vol. 21, issue 4 (2014), p. 633.

¹⁵ On these criteria, see for example, Explanatory Memorandum to Protocol No. 11, para. 100–102.

¹⁶ Committee of Ministers, *Explanatory Report to Protocol No. 16 to the European Convention on Human Rights*, CM(2013)31, 2 April 2013, para. 15 (referencing Art. 1(1) of Protocol 16).

of Rule 24, mirroring the composition rules for individual applications.

32. Other significant additions include:
- Copies of any third party submissions will be transmitted to the requesting court;
 - The President of the Grand Chamber will decide on the necessity of an oral hearing after the close of the written procedure;
 - Opinions will be given by a majority vote of the Grand Chamber; and
33. Significantly, the draft rule does not provide for the automatic sharing of the advisory opinion with *all* member states. Certified copies of the opinion will be sent by the Registrar to the requesting court, the Contracting State to which that court pertains, and any third party who has intervened. Adding such a provision to the draft rules would reduce the likelihood of a plethora of very similar requests for advisory opinions and serve the Court's intention to unify interpretations of the Convention across the Continent.

Consequential amendments to existing Rules of Procedure

Proposed Rule 44(7): Third party interventions

34. Draft paragraph 7 applies the existing regime for third party interventions to proceedings on advisory opinions. In part, this gives effect to Article 3 of Protocol 16, authorizing the CoE Commissioner for Human Rights to take part in proceedings. However, it does not appear to give such rights to the State party where the court sits, as required under Article 3 of Protocol 16; nor does it address inviting the parties to the domestic proceedings to participate, as the Committee of Ministers expected in its *Explanatory Report*.¹⁷ How these rules will apply in practice has not been spelled out.
35. As noted, this amendment may also be intended to permit the High Contracting party where the tribunal or court sits to participate, as authorized under Article 3 of Protocol 16, however it does not specifically provide as much: Rule 44 only provides for notice to (and a right to intervene for) Contracting Parties one of whose nationals is an applicant in the case. No national is an applicant in a request for advisory proceedings, and the amendment to the definition of "parties" (which includes "applicants" but does not alter the definition of that term) does not solve this.
36. The amendment also does not provide any clear mechanism for parties to the domestic proceedings to be invited to participate as third parties, despite the explicit expectation from the Committee of Ministers that they would be. It would seem appropriate that those parties be notified when a domestic court requests an advisory opinion, and (or at a minimum) when the ECHR panel accepts that request. Such notification should include informing the domestic parties of, and inviting them to, submit a request to present observations as a third party. It seems likely that the ECHR intends this to happen, or expects domestic courts to do this. Indeed, by including the parties to the domestic proceedings in the definition of "parties" in draft Article 1(p), they will be notified of and have the right to respond to other

¹⁷ See Committee of Ministers, "Protocol 16 Explanatory Report," para. 20.

third party interventions (Rule 44(6)). Yet there is no clear right to be notified of the proceedings initially and to submit their own third party interventions.

37. The amendment expressly applies these provisions to both proceedings before the Grand Chamber which is deciding on the advisory opinion, and also proceedings before a panel of the Grand Chamber which is considering whether to accept the request for an advisory opinion.
38. The time limits for third party interveners will be determined by the President of the Grand Chamber. However, it appears that applications to intervene would still be subject to the 12 week time limit to apply to intervene, which usually runs from notification of the application to the Contracting Party. The system for this notification (which is implicit under Article 3 of Protocol 16), however, is not clear.
39. The language requirements for third party written comments (that they must be in English or French) will also apply to third party submissions in relation to advisory opinions. However, the draft rules fail to resolve the burden sharing of translating third party submissions on behalf of the individual parties to the case and/or the requesting court. Given that Rule 34 allows the national court to submit a request in the national language of the Contracting state where it sits, it is foreseeable that there will be instances where the national court and the parties to the case will require translations. The parties to the original proceedings will often participate, making the question of translation and associated costs and other burdens an important one.
40. Additionally, the draft rule fails to ensure that the Contracting State where the national court sits will also receive copies of third party submissions. This is problematic given that proposed Chapter X of the Rules of Procedure, discussed in more detail below, provides that the State party in which the national court sits will receive both a notification of the panel's decision to accept or refuse a request¹⁸ and a certified copy of the advisory opinion.

Proposed amendments to Rule 1: terminology

41. The draft proposes to modify multiple definitions contained in Rule 1 so as to encompass the ECtHR's new advisory powers.
 - *Rule 1(h), defining the term "Court"* is expanded to include a panel of five judges constituted under Article 2 of Protocol 16, which dictates the process for deciding whether a request for an advisory opinion is accepted or refused.
 - *Rule 1(p) modifies the terms "parties" and "party"* to include "the parties to domestic proceedings which have given rise to a request for an advisory opinion".
 - *Rule 1(q) similarly expands the expression "third parties"* to include any Contracting party or person exercising their right to submit written comments and take part in hearings during considerations of Protocol 16 advisory opinions.

Proposed amendments to Rule 24

42. This regards the composition of the Grand Chamber when considering requests for an

¹⁸ Draft Ch. 10, Rule C(5)

advisory opinion under Article 1 of Protocol 16. These modifications guarantee that currently existing procedures for assembling the Grand Chamber will be afforded to parties involved in an advisory opinion request. This includes that the composition of the Court must be geographical balanced, the President and the Vice-Presidents of the Court and the Presidents of the Sections will be included in the Grand Chamber, and that judges hailing from the Contracting party where the national court making the request sits will sit as an *ex officio* member of the Grand Chamber.

43. Additionally, proposed drafting changes in this section clarify that parties seeking review of cases before the Grand Chamber that were submitted under Article 43 of the Convention are to be called “referral requests”, whereas submissions to the Grand Chamber under Protocol 16 would be considered a “request” for an advisory opinion.

Proposed Rule 34(7): Use of languages in advisory opinion proceedings

44. Proposed paragraph 7 to existing Rule 34 would allow the Court to receive requests in languages other than French or English, as is currently the practice for individual applications.¹⁹ Thus, requesting courts or tribunals may address the ECtHR in the national official language used in their domestic proceedings. Where the language is not an official language of the Court, English or French translations must be filed within a time-limit to be fixed by the President of the Court.
45. Unlike the approach used in other proposed amendments to the Court’s rules of procedure, draft paragraph 7 does not extend the provisions of Rule 34 *mutatis mutandis* to requests and examinations of advisory opinions. Consequently, certain factors relating to translations are not clear. For example, the proposals do not clarify who is responsible for bearing the cost of translating documents received from the national court or tribunal.²⁰

Amendments to Rule 82: advisory opinions under Articles 47-49

46. The proposed language offers greater clarity on the application of Rule 82, which will apply solely to the previously existing advisory opinion procedure available to the Committee of Ministers under Articles 47, 48, and 49.

Potential Concerns with the Proposed Rules Amendments

47. In addition to the specific concerns about participation of third parties, including clarifying the rights of the parties to the domestic proceedings and at what stages interventions are appropriate, there are a number of other potential concerns to consider.
48. *State party designation of its “highest courts or tribunals”*. Interestingly, the proposed rules do not offer guidelines for how a State party should determine which of its domestic courts and tribunals meet the Article 1 and Article 10 standard of “highest courts or tribunals”. Additionally, there is no procedure for what is to occur if another member State or the Court

¹⁹ Committee of Ministers, “Protocol 16 Explanatory Report,” para. 13; Standing Committee on the Rules of Court, *Proposals for Amendment to the Rules of Court in Anticipation of the Entry Into Force of Protocol No. 16*, RC(2015)6, 24 April 2015, Draft Rule 34(7).

²⁰ Contrast this with existing Rule 34(4)(b) and 4(d), provisions outlining language and translation procedures for Rule 44 third party interventions.

itself disagrees with a designation by a member State. The Committee of Ministers has explained that the “highest” court specified by the State party does not need to be one to which recourse must have been made in order to satisfy Article 35 of the Convention,²¹ however this is not detailed anywhere in the draft Rules.

49. *Relationship between requests for advisory opinions and individual applications.* The Committee of Ministers has expressed that the non-binding nature of advisory opinions codified in Article 5 of the Protocol guarantees that any individual party to a case before a national court having submitted an advisory opinion request will not be prevented from exercising their right of individual application under Article 34 of the Convention.²² That being said, the Court is expected to declare inadmissible or strike out any elements of the individual application that relate to the issues that have already been addressed in an advisory opinion, if one was issued.²³ However, both the Protocol and the proposed rules neglect to mention or define this relationship.
50. *The appropriate stage at which to make a request for an advisory opinion.* The draft rules of procedure implementing Protocol 16 do not specify at what stage a national court or tribunal may submit a request. This will be influenced by the nature of the courts that may make such requests, likely being appellate or constitutional courts. Courts may look to recommendations issued by the Court of Justice of the European Union, whose Rules of Procedure also refrain from specifying any particular stage at which a reference is filed to request a preliminary ruling.
51. *Notice of requests and proceedings.* There are no separate provisions on notice of requests for advisory opinions. Presumably decisions by the panel of the Grand Chamber whether to accept or reject such a request will be publicized through the ordinary system.
52. *Length of submissions.* The new rules do not address in what manner the practice directions of the Court will apply to submissions requesting advisory opinions, if at all. Of particular importance in this regard is a potential limitation on the number of pages any single request should be.
53. *Anonymity of parties.* The draft rules do not specify whether a party to the domestic proceedings may seek anonymity during the Court’s consideration of a request for an advisory opinion or upon its acceptance of the request, or the means by which a party would do so. It is unclear whether anonymity before the ECHR would be predicated solely on anonymity in the domestic proceedings, or how the Court would give effect to anonymity in domestic proceedings.
54. *Expedited advisory opinion procedures.* The draft rules do not provide for an expedited process should such a situation arise. Such a mechanism is provided for in the Court of Justice of the European Union

²¹ Committee of Ministers, *Explanatory Report to Protocol No. 16 to the European Convention on Human Rights*, CM(2013)31, 2 April 2013, para. 8.

²² Committee of Ministers, *Explanatory Report to Protocol No. 16 to the European Convention on Human Rights*, CM(2013)31, 2 April 2013, paras. 25-26.

²³ Committee of Ministers, *Explanatory Report to Protocol No. 16 to the European Convention on Human Rights*, CM(2013)31, 2 April 2013, para. 26.

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55. *Costs.* The draft rules do not specify whether the Court should award costs to applicants when a national court seeks an advisory opinion in their case, and they participate in the proceedings before the ECHR.
56. *Follow-up to the issuance of an advisory opinion.* The draft amendments to the Rules of Procedure do not provide for a follow-up mechanism between the national court and the ECtHR once the advisory opinion has been issued. Although non-binding, the Committee of Ministers has stressed that there will not be a difference in the legal force between an interpretation given to the Convention in an advisory opinion and that already given to an interpretation provided in a judgment, despite the non-binding nature of the advisory opinions. Without a means to follow-up, it is unclear how the Court will determine if its interpretations are given due weight. At the moment, the Court is left without a mechanism to ensure its interpretations of the substantive rights contained in the Convention are given their due weight.
57. *Publication.* Paragraph 4 of Article 4 requires the publication of advisory opinions delivered under this Protocol. It is expected that this will be in accordance with its practice in similar matters and “with due respect to applicable confidentiality rules”.²⁴

²⁴ Committee of Ministers, *Explanatory Report to Protocol No. 16 to the European Convention on Human Rights*, CM(2013)31, 2 April 2013, para. 24.

C. Comparative Analysis

58. Mechanisms similar to Protocol 16 and its draft rules exist across the various international legal institutions. The Court of Justice of the European Union (CJEU) and the East African Court of Justice (EACJ) preliminary reference procedures most closely align with the procedural framework of Protocol 16. In the Inter-American Court, the advisory opinion procedure is a more broadly situated mechanism tending to provide sweeping interpretive judgments on issues plaguing the region, and is more keenly focused on guiding states with implementing their treaty obligations through legislative and procedural mechanisms.

Court of Justice of the European Union

Background on the CJEU's preliminary reference mechanism

59. Similar to the impetus behind Protocol 16, the purpose of the CJEU's preliminary reference procedure is to facilitate cooperation between the Court of Justice and the national courts of EU Member States.²⁵ In both procedures the impetus is on the national courts to apply the answer provided by the Court in the case before them. Although similar in many regards, there are procedural differences showcasing the differing objectives of the two bodies. The particular objective of the CJEU procedure is to guarantee uniform interpretation of EU law. In contrast, the objective of Protocol 16 appears to be focused on providing guidance to national courts on interpreting the Convention and providing a new means to facilitate dialogue between the two.
60. The CJEU maintains exclusive jurisdiction over preliminary references, otherwise known as the "Article 267 procedure". The procedure is available to *all* national courts or tribunals at all levels in any member State, making it broader in application than the new Protocol 16 mechanism.²⁶ National courts may present questions about the interpretation and validity of EU law to the CJEU if it considers the question necessary to its judgment,²⁷ narrowing the scope of potential requests more so than Protocol 16. Article 267 expressly prohibits delay when the request from the national court concerns a person in custody; a protection not provided by Protocol 16.
61. According to the wording of Article 267(3), there is an obligation to refer a case concerning a question of EU law by any national court or tribunal against whose decision there is no judicial remedy, which the CJEU interprets as the highest court in a particular case.²⁸ Despite this wording, in *CILFIT v Ministry of Health*, the CJEU held that when a provision is so clear as to leave no scope for reasonable doubt, or where previous decisions of the Court have already dealt with the point of law in question, the last instance national court or tribunal

²⁵ Case C-445/06 *Danske Slagteriet* [2009] ECR I-2119, para. 65; see also M. Bobek, "The Court of Justice, the National Courts and the Spirit of Cooperation: Between Dichtung und Wahrheit", in A. Lazowski and S. Blockmans (eds.), *Research Handbook on EU Institutional Law* (Edward Elgar, 2014).

²⁶ Art. 267(1).

²⁷ Art. 267(1).

²⁸ Alexander Türk, King's College London, *Postgraduate Diploma/Masters in European Union Law*, "Introduction to the Treaties and Institutions", Module 1, Unit 1 (2015-2016), para. 1-122; *Da Costa v. Nederlandse Belastingadministratie*, CJEU, Judgment of 27 March 1963, part C.

has discretion as any other national court or tribunal to refer a case.²⁹ Known as the doctrine of *acte clair*, it appears to have amended the Treaty obligation on courts of final instance to refer interpretive questions to the Court.³⁰

CJEU preliminary rulings procedure

62. The rules governing preliminary rulings in the CJEU can be found in Title III of the Court's rules of Procedure (Articles 93 to 118).
63. *Language of the proceedings.* Article 37(3) allows the language of a referral to be the language of the referring court or tribunal, just as proposed by draft paragraph 7 of Rule 34 of the ECtHR.
64. *Discretion to deny a request for a preliminary ruling.* Neither the TFEU nor the Court's Rules of Procedure allocate discretion to deny requests for preliminary rulings, unlike the ECtHR which has been granted strong discretion to deny requests for advisory opinions under Protocol 16.
65. *Translation and service of the request.* The CJEU rules for translation and service of requests for preliminary rulings are more detailed than those currently proposed in the ECtHR. All request for preliminary rulings are served on all member States in both the original version and in the official language of the State to which it is addressed.³¹ Where non-member states have the right to take part in preliminary ruling proceedings, they too are served with an original and a translated copy of the request.
66. *Costs of the proceedings.* Preliminary ruling proceedings before the CJEU are free of charge, and the Court will not rule on the costs of the parties to the proceedings pending before the referring court or tribunal; the Rules expressly provide that the referring court is to decide on that matter.³² Unfortunately, Protocol 16 draft proposals do not offer clarification as to what the costs of advisory proceedings will be, and who will be responsible for such costs.
67. *Legal aid.* Parties have the option to apply for legal if they have insufficient means to participate in the proceedings.³³ Aid may be provided either by the referring court where possible under national laws, or by the CJEU. There is no counterpart currently available in the proposed Rules of Procedure relating to Protocol 16.
68. *Participation in preliminary ruling proceedings.* The CJEU expressly allows EU member States, and in certain cases non-Member States, to submit written observations.³⁴ Additionally, national institutions having adopted the original interpretation of EU law now in dispute before the CJEU are expressly allowed to submit observations.
69. *Rules on publication.* When the Court Registry receives a request by a referring national court for a preliminary reference, it publishes a notice in the *Official Journal for the European*

²⁹ See *CILFIT v Ministry of Health*, CJEU, Judgment of 1982, ECR 3415, paras. 14-16.

³⁰ See "Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Rulings Proceedings", Official Journal of the EU, 6 Nov. 2012, 2012/C 338/01, para. 12.

³¹ CJEU ROP, Art. 98.

³² CJEU ROP, Art. 102.

³³ See CJEU ROP, Art. 115-118.

³⁴ CJEU ROP, Art. 96. Non-member states may participate where they "are parties to an agreement relating to a specific subject-matter, concluded with the Council, where the agreement so provides and where a court or tribunal of a Member State refers to the Court" for a ruling on a question falling within the scope of that agreement.

Union.³⁵ This publication includes the questions asked by the referring court or tribunal.³⁶ This procedure allows domestic courts and tribunals to have more exposure to the advisory opinion mechanism of the CJEU. A similar procedure is lacking in the Protocol 16 proposed rules.

70. *Appropriate stage at which to make a reference for a preliminary ruling.* A national court or tribunal may submit a request for a preliminary ruling as soon as it finds that such a ruling on the interpretation of EU law is necessary. Recommendations published by the CJEU suggest national courts make a reference “when the national proceedings have reached a stage at which the referring court or tribunal is able to define the legal and factual context of the case”.
71. *Content of the request.* The required elements of a request for a preliminary ruling are similar to those proposed in draft Chapter 10 of the ECtHR’s Rules of Procedure:
 - Summary of the subject-matter of the dispute and any relevant factual findings;
 - Relevant domestic legal provisions;
 - A statement of the reasons prompting the referring court or tribunal to inquire about the interpretation or validity of EU law.³⁷
 - Unlike the ECtHR’s draft Chapter 10, the CJEU does not request a summary of relevant arguments of the parties to the domestic proceedings in question.
72. *Anonymity.* The CJEU rules of procedure allow the court of its own motion, or at the request of the referring court or party to the main proceedings, to render anonymous one or more persons or entities concerned by the case. As noted earlier, there is no such provision currently available to protect potential parties involved in Protocol 16 requests.
73. *Expedited procedures.* The CJEU has provided a mechanism by which at the request of the referring court or, exceptionally, of his own motion, the President of the Court may decide to expedite a preliminary ruling due to the nature of the case.³⁸ This is another area where the draft rules for Protocol 16 could benefit from further development. Having such contingency measures in place would alleviate future pressures on the Court when tasked with a similar situation.

East African Court of Justice

74. The East African Court of Justice (EACJ) preliminary reference procedure, grounded in Article 34 of the Treaty for the Establishment of the East African Community (TEEAC) is modeled after the CJEU procedure and shares the same purpose of ensuring uniform interpretation and application of law among Partner States.³⁹ Whenever faced with a case requiring the application or the interpretation of the TEEAC or any other East African

³⁵ CJEU ROP, Art. 21(4).

³⁶ CJEU ROP, Art. 21(4).

³⁷ CJEU ROP, Art. 94.

³⁸ CJEU ROP, Art. 105.

³⁹ *Guidelines on a Reference From National Courts For a Preliminary Ruling – Information Note*, para. 1.

Community law before a judgment can be rendered, the national court of the Partner State may refer the matter to the EACJ for a preliminary ruling.⁴⁰ Just as in the CJEU (and unlike Prot. 16), all national courts or tribunals have access to the preliminary reference procedure.

75. Significantly, the Treaty and the Rules of Procedure are silent as to who must raise the question of interpretation during the proceedings before the referring court; however experts on EACJ law believe it can be raised by either party to the case appearing before the national judge or by the judge himself or herself.⁴¹ Some scholars suggest the Treaty's intention was to institute a mandatory referral procedure, whereby once a national court has found that an interpretation of the TEEAC is necessary before it can deliver its judgment, it must refer the matter to the EACJ for a preliminary ruling.⁴² However, the most recent Guidelines published by the Court refute this understanding.⁴³

Preliminary Reference Procedures of the East African Court of Justice

76. *Determination by national courts of whether to seek a preliminary ruling.* Neither the Treaty nor its implementing rules provide national judges with guidelines or principles on how to exercise his or her discretion in the determination of whether to seek a preliminary reference. Due to this gap, some experts have borrowed from judgments by CJEU.⁴⁴ CJEU jurisprudence has established that a preliminary reference should not be sought where:
- the question raised is irrelevant;
 - the Community provision in question has already been interpreted by the Court; or
 - the correct application of the law is so obvious that it leaves no room for reasonable doubt.⁴⁵
77. *Content and length of the request.* In contrast to the CJEU and ECtHR, the EACJ Rules of Procedure do not list the specific elements of a submission; however Rule 76 does state that requests should be submitted "by way of a case stated." The Court recommends the request be no longer than 10 pages. When read together with Guidelines published by the Court, requests for preliminary rulings appear to require the following:
- Statement identifying the question or questions requiring a preliminary ruling that is "possible to understand . . . without referring to the statement of the grounds for the reference".
 - Brief account of the subject matter of the dispute and the relevant findings of fact, where possible, otherwise an account of the factual situation on which the question is based;
 - Identification of any relevant national provisions, and, in contrast to the rules of the other courts, relevant national case law, including internet references where possible;
 - Identification of East African Community law relevant to the case;

⁴⁰ Article 34 of the Treaty for the Establishment of the East African Community.

⁴¹ See e.g. <http://eacj.huriweb.org/wp-content/uploads/2013/09/EACJ-Ten-Years-of-Operation.pdf>.

⁴² See e.g. Dr. John Ruhangisa, "The East African Court of Justice: Ten Years of Operation (Achievements and Challenges)", Registrar, EACJ, 2 November 2011, pp. 21-22.

⁴³ *Guidelines on a Reference From National Courts For a Preliminary Ruling – Information Note*, para. 1.

⁴⁴ Dr. John Ruhangisa, "The East African Court of Justice: Ten Years of Operation (Achievements and Challenges)", Registrar, EACJ, 2 November 2011, pp. 21-22.

⁴⁵ *CILFIT and Lanificio di Gardo vs Ministry of Health*, Case 283/81.

- If relevant, a summary of the main relevant arguments of the parties to the main case;
 - And, if possible, that court's own view on the answer to the interpretive question.⁴⁶
78. *Stage at which to submit a question for a preliminary ruling.* Just as in the CJEU, a national court or tribunal may refer a question to the Court for a preliminary ruling as soon as it finds that a ruling on the point of interpretation is necessary to enable it to give a final judgment.⁴⁷
79. *Delivery of the Ruling.* Judgments on preliminary references are delivered in public sessions, absent any reasons the Court considers it preferential to deliver its judgment before the parties in private.⁴⁸ They are also communicated directly to the national court or tribunal concerned.⁴⁹
80. *Language of the request.* Requests must be submitted to the EACJ in English.⁵⁰
81. *Third party submissions.* Unlike the CJEU and the ECtHR, the EACJ does not have separate rules of procedure as to who may intervene or participate in preliminary rulings; however this may be due to the fact that the general rules of procedure are considered to be applicable to preliminary ruling proceedings as is. In the general rules, interventions are limited to submissions of evidence supporting or opposing the arguments of a party to a case. Persons entitled to intervene, with leave of the Court, include: other partner States, organs and institutions of the Community, and residents of a Partner State not a party to the case before the Court.⁵¹ All interventions are served on the other parties, who have 30 days to file a response. The Guidelines did not discuss third party interveners.
82. *Costs and legal aid.* Just as in the CJEU, preliminary ruling proceedings are free, the Court does not rule on the costs of parties to the main proceedings, and either the national court or the CJEU may provide aid for costs incurred by the parties, including legal fees.⁵²
83. *Follow-up.* Guidelines published by the Court urge national courts to follow-up with the EACJ to inform them what action was taken upon its receipt of the ruling, in addition to a copy of the national court's final decision.⁵³

Inter-American Court of Human Rights

84. The IACtHR mechanism is half-way between the lifeline of ECtHR advisory mechanisms as they existed prior to and after the advent of Protocol 16. Only member States may file requests, however they may do so on a very broad range of substantive rights. Codified in Article 2 of the Court's Statute and governed by Article 64 of the Convention,⁵⁴ advisory opinions of the Inter-American Court are declaratory and non-binding.

⁴⁶ *Guidelines on a Reference from National Courts for a Preliminary Ruling Information Note*, paras. 20-22.

⁴⁷ *Guidelines on a Reference from National Courts for a Preliminary Ruling Information Note*, para. 17.

⁴⁸ TEEAC, Art. 35.

⁴⁹ EACJ ROP, Rule 76.

⁵⁰ *Guidelines on a Reference from National Courts for a Preliminary Ruling Information Note*, para. 18.

⁵¹ TEEAC, Art. 40.

⁵² *Guidelines on a Reference from National Courts for a Preliminary Ruling Information Note*, paras. 25-26.

⁵³ *Guidelines on a Reference from National Courts for a Preliminary Ruling Information Note*, para. 29.

⁵⁴ Statute of the Inter-American Court of Human Rights, Art. 2(2) (1979).

Relevant procedural rules of the Inter-American Court

85. *Who can request.* Requests for advisory opinions may be submitted by a Member State or by the Commission of Human Rights and must state with specificity the question(s) on which the opinion of the Court is sought.⁵⁵ Where advisory requests are sought by OAS organs other than the Commission, they can do so directly to the Court and must include, in addition to the information listed above, an explanation for how their request relates to the competence of that body.⁵⁶
86. *Subject matter of the request.* The provisions of Article 64 endow the IACtHR with the ability to provide advisory opinions on “the interpretation of [the IACHR] Convention or of other treaties concerning the protection of human rights in the American states and to provide states with opinions regarding the compatibility of any of its domestic laws with the previously mentioned international treaties.” The Court views its jurisdiction to be as extensive as necessary to safeguard the rights enshrined the Convention, subject only to limitations imposed by the Convention itself.⁵⁷ The Inter-American Court has interpreted its jurisdiction to advise on “other treaties” to mean “any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principle purpose of such a treaty, and whether or not Member States of the Inter-American system are or have the right to become parties thereto”.⁵⁸ This is a significantly broader subject matter jurisdiction than that granted to the ECtHR by Protocol 16.
87. *Elements of the request.* Similar to Protocol 16, the advisory request must indicate the provisions of domestic law and the Convention relating to the request.⁵⁹ Unlike Protocol 16, however, the advisory request to the Inter-American Court may also indicate provisions of the “other treaties concerning the protection of human rights to which the request relates”.⁶⁰
88. *Publication of requests.* The Rules of Procedure of the Inter-American Court require all requests for advisory opinions to be shared with all member states, the Commission, the Permanent Council, the Secretary General, and if applicable, to the OAS organs whose competence is referred to in the request.⁶¹ A comparable rule has not been proposed in the ECtHR.⁶² As a tool in international human rights law, advisory opinions are thought to be more influential and authoritative than compulsory judgments in that they affect the general interpretation of international law for all States rather than just for the parties to an individual case.⁶³ Thus, this gap in Protocol 16 is surprising given the potential influence of advisory opinions on the general application of the Convention by States parties.

⁵⁵ IACtHR Rules of Procedure, (2009), Art. 70(1)-(2); IACHR, Art. 64.

⁵⁶ IACtHR Rules of Procedure, (2009), Art. 70(3).

⁵⁷ Pasqualucci, *The Practice and Procedures of the Inter-American Court of Human Rights*, (Cambridge: Cambridge University Press, 2003), p. 32.

⁵⁸ Advisory Opinion OC-1/82, IACtHR, 24 September 1982, Series A, No. 1.

⁵⁹ IACtHR Rules of Procedure, Art. 70 and 72(1) (2009).

⁶⁰ IACtHR Rules of Procedure, (2009), Art. 72(1)(a).

⁶¹ IACtHR Rules of Procedure, (2009), Art. 73.

⁶² Draft Rules X(D)(8)-(9) address the procedural rules for sending copies of advisory opinions given under Protocol 16. Draft rule X(D)(8) solely provides for the sending of copies of the opinion to “requesting court or tribunal and to the Contracting Party to which that court or tribunal pertains”, and Draft Rule X(D)(9) states that third parties intervening under Article 3 of Protocol 16 also receive a copy.

⁶³ Pasqualucci, *The Practice and Procedures of the Inter-American Court of Human Rights*, (Cambridge: Cambridge University Press, 2003), p. 30.

African Court on Human and Peoples' Rights

89. The jurisdiction of the African Court on Human and Peoples' Rights (ACtHPR) to give advisory opinions is broader than that provided to the ECtHR under Protocol 16, making it closer in scope to the Inter-American Court (see *supra* for more details). The procedures in the African and American systems suggest that advisory opinions are more general and not expected to be strictly based on the individual facts of a case coming before a national court; in this way the decisions can more readily apply to the practice of all member states. However, the new Protocol 16 procedures indicate that the Court will be paying more attention than its regional counterparts to the underlying facts of an individual case. Perhaps this would explain why there was no impetus to provide for a procedure that would automatically require the President of the Commission to transmit copies of advisory opinions to all States parties.

Relevant procedural rules

90. *Who may request.* Unlike the ECHR or the Inter-American Court, an advisory opinion may be requested by not only a State party or organ of the African Union, but also by any other African organization recognized by the African Union.⁶⁴
91. *Subject matter of the request.* Under Article 4 of the Protocol to the African Charter on Human and Peoples' Rights, the African Court has jurisdiction to provide non-binding advisory opinions on "any legal matter relating to the African Charter or other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission."⁶⁵ This grant of jurisdiction is more expansive than that granted to the ECtHR.
92. *Discretion to provide an advisory opinion.* Similar to the ECtHR, the ACtHPR's power to issue an opinion is discretionary, although there are no clear rules defining in what instances and on what basis the Court may decline.
93. *Elements of a request.* Similar to the European and Inter-American regional systems, the legal questions contained in the request must:
- meet a certain standard of specificity;
 - include the provisions of the African Charter "or of any other international human rights instrument" relevant to the questions put to the Court;
 - the circumstances giving rise to the request;
 - as well as the names and addresses of the representatives of the entities making the request.⁶⁶
94. *Delivery of advisory requests and opinions.* Copies of requests for advisory opinions and final opinions are transmitted to all other Member States, to the Commission, and to any other

⁶⁴ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human Rights, Art. 4.

⁶⁵ ACtHPR, Rules of Court, Rule 26, 68.

⁶⁶ ACtHPR, Rules of Court, Rule 68.

interested entity.⁶⁷ As in the EACJ, the delivery of an advisory opinion must take place in open Court, unless the Court decides the circumstances require otherwise.

⁶⁷ ACtHPR, Rules of Court, Rule 69, 73.

D. Scholarly Debate on the Impact of Protocol 16

95. Reactions to Protocol 16 have been mixed. Some experts see the new procedure enabling the Court to have a stronger potential of impacting national judgments.⁶⁸ Other experts believe Protocol 16 will fail to achieve its stated purpose to facilitate the Court's adjudicatory function, and will instead extend its constitutionalist function in a manner that is better achieved through the Court's contentious cases.⁶⁹
96. The Court is also of the opinion that this new procedure will complement its pilot-judgment procedure without the Court being limited to cases revealing solely structural or systemic problems in a Contracting State. In its view, the increased opportunity to develop the underlying principles of law in a manner that will speak to the legal systems of all States parties would make advisory opinions of comparable significance to the Court's leading judgments and would foster "a harmonious interpretation of the minimum standards set by the Convention rights".⁷⁰ However, the proposals to the Court's Rules of Procedure do not necessarily effectuate this intent because they lack a mechanism whereby advisory opinions are automatically shared with all High Contracting State parties.

⁶⁸ Janneke Gerards, "Advisory Opinions, Preliminary Rulings, and the New Protocol No. 16 to the European Convention of Human Rights, a Comparative and Critical Appraisal", *Maastricht Journal of European and Comparative Law*, vol. 21, issue 4 (2014), p. 638-639.

⁶⁹ Kanstantsin Dzehtsiarou and Noreen O'Meara, *Advisory Jurisdiction and the European Court of Human Rights: A Magic Bullet for Dialogue and Docket-Control?*, Volume 34, Issue 3, pages 444-468, September 2014.

⁷⁰ ECtHR, *Reflection Paper on the Proposal to Extend the Court's Advisory Jurisdiction*, para. 5.

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