

THE CONSOLIDATION OF THE ADVISORY COMPETENCE OF INTERNATIONAL HUMAN RIGHTS COURTS

ЗАКРІПЛЕННЯ КОНСУЛЬТАТИВНОЇ КОМПЕТЕНЦІЇ МІЖНАРОДНИХ СУДІВ З ПРАВ ЛЮДИНИ

Polezhaka K.J., PhD Student at the International Law Department
Yaroslav Mudryi National Law University

The article is devoted to the issue of establishing the advisory competence of international courts on human rights on the example of the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights. The competence of many modern international courts includes an advisory component. These include, in particular: the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights. Advisory opinions of the specified judicial institutions are authoritative statements of international law that have a significant legal weight. At the same time, the ECtHR's advisory competence is limited only to the legal issues regarding interpretation of the Convention on the Protection of Human Rights and Fundamental Freedoms and Protocols thereto. The Court or the Committee of Ministers may hear in consequence of any proceedings, which may be instituted under the Convention. Decisions of the Committee of Ministers on submitting a request for an advisory opinion of the Court are adopted by a majority vote of representatives entitled to attend the Committee. The advisory function of the Inter-American Court is not limited to interpretation of the Convention (or other treaties adopted within or under the auspices of the Inter-American system), but applies to any other treaties related to the protection of human rights in the American States. The Inter-American Commission has the right to request an advisory opinion under the American Convention on Human Rights. The member states of the Association of American States enjoy the absolute right to request advisory opinions. On the contrary, bodies of the United States of America may request advisory opinions only within the limits of their competence. The African Court on Human and Peoples' Rights, at the request of a member state of the African Union, any of its bodies or any African organization recognized by it, may issue an advisory opinion on any legal issue related to the African Charter on Human and Peoples' Rights or any other relevant human rights document, provided that the subject of the opinion does not relate to the issue considered by the African Commission on Human and Peoples' Rights.

Key words: European Court of Human Rights, Inter-American Court of Human Rights, African Court of Human and Peoples' Rights, advisory competence, advisory opinions, protection of human rights, international judicial institutions, international court.

Стаття присвячена питанню встановлення консультативної компетенції міжнародних судів з прав людини на прикладі Європейського суду з прав людини, Міжамериканського суду з прав людини та Африканського суду з прав людини і народів. Компетенція багатьох сучасних міжнародних судів включає консультативний компонент. Це, зокрема, Європейський суд з прав людини, Міжамериканський суд з прав людини та Африканський суд з прав людини і народів. Консультативні висновки зазначених судових установ є авторитетними актами міжнародного права, які мають значну юридичну вагу. Водночас консультативна компетенція ЄСПЛ обмежується лише правовими питаннями тлумачення Конвенції про захист прав людини і основоположних свобод та протоколів до неї. Суд або Комітет міністрів можуть проводити слухання за наслідками будь-якого провадження, яке може бути порушене відповідно до Конвенції. Рішення Комітету міністрів про направлення запиту на отримання консультативного висновку Суду приймаються більшістю голосів представників, які мають право брати участь у роботі Комітету. Консультативна функція Міжамериканського суду не обмежується тлумаченням Конвенції (або інших договорів, прийнятих в рамках або під егідою Міжамериканської системи), а поширюється на будь-які інші договори, що стосуються захисту прав людини в американських державах. Міжамериканська комісія має право запросити консультативний висновок відповідно до Американської конвенції з прав людини. Держави-члени Асоціації американських держав користуються абсолютним правом запитувати консультативні висновки. І навпаки, органи Сполучених Штатів Америки можуть запитувати консультативні висновки лише в межах своєї компетенції. Африканський суд з прав людини і народів на запит держави-члена Африканського Союзу, будь-якого з його органів або будь-якої африканської організації, визнаної ним, може винести консультативний висновок з будь-якого правового питання, пов'язаного з Африканською хартією прав людини і народів або будь-яким іншим відповідним документом з прав людини, за умови, що предмет висновку не стосується питання, що розглядається Африканською комісією з прав людини і народів.

Ключові слова: Європейський суд з прав людини, Міжамериканський суд з прав людини, Африканський суд з прав людини і народів, консультативна компетенція, консультативні висновки, захист прав людини, міжнародні судові установи, міжнародний суд.

Problem setting. Competence of many modern international courts includes an advisory component. Its essence lies in the possibility of providing advisory opinions upon request. These are not the cases involving disputes between the specific parties, but the processes in which courts interpret international legal acts in response to the specific issues. Advisory opinions mean the authoritative clarifications of the international law by statements of the international law. They have a significant legal weight and are even considered to be tools of the «preventive diplomacy».

Analysis of research and publications proves that the issue of the advisory competence of international human rights courts has repeatedly attracted the attention of researchers, including: O. A. Alonkin, N. A. Bulycheva, L. M. Deshko [1] and others. At the same time, the advisory competence of international human rights courts, such as the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court on Human and Peoples' Rights, in the existing works of the Ukrainian researchers, is of a fragmentary nature.

Purpose of the article – to consider establishing the advisory competence of international human rights courts on the example of the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights.

Presentation of the main material. One of the international human rights courts with the advisory competence is the European Court of Human Rights (ECHR, the Court), a judicial body, which jurisdiction extends to the member states of the Council of Europe, which have ratified the Convention on the Protection of Human Rights and Fundamental Freedoms, and to all the issues of interpretation and application of this Convention and Protocols thereto [2]. As stated in the said Convention, the ECHR may, «at the request of the Committee of Ministers, provide advisory opinions on the legal issues related to interpretation of the Convention and Protocols thereto». Such opinions shall not apply to the issues related to the content or scope of the rights and freedoms specified in Chapter I of the Convention and Protocols thereto, or to any other issues, which the Court or the Com-

mittee of Ministers may consider as a result of any proceeding, which may be initiated under the Convention. Decisions of the Committee of Ministers on submitting the request for an advisory opinion of the Court are adopted by a majority vote of representatives entitled to attend the Committee» (Article 47) [2]. As noted, the advisory competence of the ECHR under Article 47 of the Convention is limited only to the legal issues regarding interpretation of the Convention and Protocols thereto.

At the same time, the Convention on the Protection of Human Rights and Fundamental Freedoms regulates the issue of the advisory competence of the Court simultaneously in several articles. Thus, in accordance with the provisions of Article 48, the Court decides whether the request of the Committee of Ministers to provide an advisory opinion is within its competence [2].

In its turn, Article 49 refers to motivation of the advisory opinions:

1. Advisory opinions of the Court must be motivated.

2. If the advisory opinion fails to express, fully or partially, the unanimous thought of the judges, each judge has the right to express his / her individual thought.

3. Advisory opinions of the Court shall be submitted to the Committee of Ministers» [2].

At the same time, it should be noted that the Convention for the Protection of Human Rights and Fundamental Freedoms signed in 1950 and entered into force in 1953, initially contained no provisions regarding the powers of the ECHR of an advisory nature. However, later on, the member states of the Convention adopted Protocol No. 2 to the Convention, which contained the advisory competence of the Court. By the way, it should be noted that restriction of the advisory opinions with the «legal issues» was underlined during the so-called «travaux préparatoires» (preparatory works) on Protocol No. 2. It was then decided to retain the adjective «legal» to exclude any jurisdiction of the court on the matters of politics. Conferring advisory jurisdiction on the Court was intended to give it «general jurisdiction over interpretation of the Convention, which would therefore include the issues arising from application of the Convention, but not resulting from «claim proceedings».

Protocol No. 2 was opened for signature on May 6, 1963 and became an integral part of the Convention with entry into force on September 21, 1970 until November 1, 1998 – the date of entry into force of Protocol No. 11, the provisions of which replaced the text of Protocol No. 2. According to Article 1 of Protocol No. 11, the provisions of Sections II–IV of the Convention (Articles 19–56) and Protocol No. 2 were replaced by Section II of the Convention (Articles 19–51).

The examples given in order to illustrate the type of the issues, which could fall under this general jurisdiction, corresponded mainly to procedural points concerning, *inter alia*, the election of judges and the procedure to be followed by the Committee of Ministers when monitoring implementation of the decisions, that was primarily discussed in the first advisory opinion – an advisory opinion on «Certain legal issues regarding the lists of candidates submitted for the election of judges to the European Court of Human Rights» [3]. Thus, in the first advisory opinion dated February 12, 2008, the Court established that, in accordance with Article 47 of the Convention, it has advisory jurisdiction over the substance of the request, i. e. it may provide advisory opinions on the legal issues related to interpretation of the provisions of the Convention and Protocols thereto. Lists of the candidates for judges from a member state of the Convention shall be drawn up taking into account the listed requirements, including implementation of the principle of gender equality [3]. On January 22, 2010, the ECHR provided the second advisory opinion in the history of its activity, which, at the request of the Committee of Ministers of the Council of Europe, also related to the problem of electing judges from a member state.

This request related to the issues, which were a consequence of the procedure for selecting candidates for the post of ECHR judge from Ukraine [4, p. 66].

At the same time, as far as on 23.05.2012, the Steering Committee for Human Rights of the Committee of Ministers of the Council of Europe was instructed to develop a mechanism, which would expand jurisdiction of the ECHR, empowering the latter to provide advisory opinions on interpretation and application of the provisions of the Convention, in order to make the content of the Convention and the practice of the ECHR clearer, as well as to help the member states to avoid violations of the articles of the Convention in the future. Such work resulted in adoption of Protocol No. 16 to the Convention.

The advisory opinion of the Parliamentary Assembly of the Council of Europe No. 285 (2013) states that Protocol No. 16 is aimed at strengthening the relationship between the ECHR and the highest courts of the member states by creating a platform for a judicial dialogue, thus, facilitating application of the ECHR practice by the national courts, assisting transition from «*ex post*» (*from the Latin* before the event) to «*ex ante*» (*from the Latin* after the event) in solving a number of the issues regarding interpretation of the provisions of the Convention at the state level, which in the long term will allow preserving the «valuable resources» of the ECHR. In addition, it was expected that acceleration of consideration of the typical cases at the state level would also contribute to strengthening the «principle of subsidiarity» of the ECHR.

The main innovation introduced by Protocol No. 16 was provision of an opportunity for the highest judicial institutions of the member states to turn to the ECHR for advisory opinions on the fundamental issues related to interpretation or application of the rights and freedoms specified by the Convention or Protocols thereto. Moreover, the «highest court» of each contracting state must determine independently the relevant clause, by declaring it, and is entitled to change it at any time. Protocol No. 16 to the European Convention on Human Rights introduces a mechanism, which allows certain national courts to seek advisory opinions from the ECHR as part of the broader reforms aimed at improving the Court's efficiency and legitimacy [5].

It is also worth noting that the specified tool for requesting an advisory opinion is exclusively optional. That is, such a right shall be exercised by the highest court at its own will and it may be terminated at any time by sending an application to withdraw the appeal for an advisory opinion. At the same time, in order for the relevant request to be recognized as «acceptable» for the purposes of providing an advisory opinion, the latter shall meet the following criteria: first, the request must be sent exclusively by the highest court designated by the member state of the Convention; secondly, the request must relate exclusively to the principle issues regarding interpretation or application of the rights and freedoms specified by the Convention or Protocols thereto; thirdly, the request may be sent exclusively in relation to the court case pending at the highest court [6]. It is worth saying that in Ukraine, for the purposes of Protocol No. 16, the Supreme Court of Ukraine is defined as the «highest court».

It is interesting that the advisory competence of the ECHR has a bilateral nature. On the one hand, advisory opinions of the ECHR are not binding. On the other hand, such opinions have undeniable legal consequences, because advisory opinions are a valid precedent practice to be followed by the ECHR when making a decision on the prospective subsequent individual statement. Creation of the aforementioned «horizontal» effect is a valid reason for the states to ratify Protocol No. 16 within a judicial dialogue: the non-ratifying states would suffer from a reduced influence on the development of law enforcement, but at the same time there would be no opportunity for their highest courts to contribute to creation of this precedent practice through a judicial dialogue (i. e., asking for advisory opinions) [7].

The first advisory opinion, since the entry into force of Protocol No. 16, was taken on December 3, 2018 by a five-judge panel of the Grand Chamber, which satisfied the request for an advisory opinion under Protocol No. 16 from the French Court of Cassation [8].

At the same time, on September 25, 2023, the ECHR at the plenary session of the Court (a meeting of all ECHR judges) approved an updated version of the Guidelines on implementation of the advisory opinion procedure, in accordance with Protocol No. 16 to the European Convention on Human Rights. The new guidelines may be found on the «Advisory Opinions» and «Official Texts» pages at the ECHR website. Changes based on the practice developed by the Court relate, *inter alia*, to the Court's jurisdiction over requests for advisory opinions (paragraphs 6.3 and 7), the appropriate stage at which the request must be submitted (paragraph 10), the form and content of the request (paragraphs 12, 13 and 14), as well as providing the opinion of the Court (clause 32). As of September 22, the member states of the Council of Europe have signed and ratified Protocol No. 16. The Court received eight requests for an advisory opinion. It accepted seven and rejected one, issued six advisory opinions, and one opinion was pending [9].

In its turn, a regional system of ensuring and protecting the social rights and interests of migrant workers was formed on the American continent within the framework of the Organization of American States. It is fundamentally different from the European system. First of all, the difference lies in the case law of the inter-American human rights protection system. All the acts of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights are placed according to the thematic principle: the right to life, liberty, personal integrity, equality, and fair trial; the right to life, personal integrity, appeal, protection of children in the family; right to life, fair trial, and information about the consular protection; the right to a fair trial and judicial protection; the right to a fair trial for the asylum seekers; the right to a fair trial and family protection; the right to personal integrity, a fair trial, private life, property, judicial protection, freedom of conscience and religion, associations; the right to personal freedom and information about the consular protection; the right to personal freedom, a fair trial, freedom of movement and residence, judicial protection; the right to freedom and protection from arbitrary arrest; the right to equality and non-discrimination; the right to residence and movement, etc. [10, p. 380].

The Inter-American Court of Human Rights is an independent, convention-based body devoted to the protection of human rights in the states of North and South America, which, together with the Inter-American Commission on Human Rights, are part of the relevant mechanism for monitoring fulfillment of their obligations by the member states of the American Convention on Human Rights dated November 22, 1969 [11]. Its competence includes: a) consideration of all cases referred to it concerning interpretation and application of the provisions of the Convention; b) adoption of temporary measures to prevent irreparable damage to the persons; c) issuance of an ordinance to provide the injured party with the opportunity to use the damaged right or freedom; d) issuance of an ordinance on elimination of the negative consequences and on payment of a fair satisfaction to the injured party; e) providing consultations on interpretation of the Convention or other treaties related to the protection of human rights; f) providing opinions regarding the compatibility of any internal regulatory-legislative act with the aforementioned documents; g) presentation of an annual report on its work to the General Assembly of the United States of America [1].

The advisory function of the Court consists in the fact that it interprets, upon the statements of the institutions of the Organization of American States and member states, the provisions of the American Convention on Human Rights dated November 22, 1969 [11] and other documents on human rights in

America, and on the conformity of the internal legislation of the member states to the aforementioned international agreements [11]. This interpretation may be given, upon the statements, all member states of the Association of American States, but not only those, which have ratified the Convention and accepted jurisdiction of the Court [10, p. 381]. Similarly, the Court established that the Inter-American Commission has the right to request an advisory opinion under Article 64 of the American Convention on Human Rights [11]. The Court noted that, in accordance with Article 64, the member states of the Association of American States enjoy an absolute right to request advisory opinions. On the contrary, the bodies of the Association of American States may request advisory opinions only within their competence [12].

It is interesting that the advisory function of the Inter-American Court is not limited to interpretation of the Convention (or other treaties adopted within or under the auspices of the Inter-American system), but applies to any other treaties related to the protection of human rights in the American States. The specified feature of the advisory competence follows from the provisions of the aforementioned Article 64. The Inter-American Court broadly interprets its advisory jurisdiction, stating that «in general, it may apply to any provision related to the protection of human rights contained in any international treaty applicable in the American States, whether or not the principal purpose of such a treaty is the protection of human rights, as well as whether the states, which are not the members of the Inter-American system, are or have the right to become its members [13].

In addition, in recent years the Inter-American Court has emphasized in its decisions on human rights cases that the states must act in accordance with its advisory opinions. So, for example, in 2017, the Inter-American Court noted that the judicial bodies of the states, which have ratified the American Convention on Human Rights [11] must take into account not only the treaty, but also interpretation made by the Inter-American Court [13]. This thought indicates that the member states may not ignore interpretation of the treaties issued by the Court. However, since the Inter-American Court has not yet explicitly confirmed that its advisory opinions are binding on the states, this issue remains unresolved among commentators.

The next international court with the advisory competence is the African Court on Human and Peoples' Rights. It is an independent body designated to protect human rights in African countries. It, together with the African Commission on Human and Peoples' Rights, is part of the mechanism for monitoring fulfillment of their obligations by the member states of the African Charter on Human and Peoples' Rights dated 26.06.1981 [6]. According to the Protocol to the African Charter on Human and Peoples' Rights on establishment of the African Court on Human and Peoples' Rights [6]: 1) its jurisdiction extends to all cases and disputes referred to it concerning interpretation and application of the African Charter on Human and Peoples' Rights, this Protocol and any other relevant human rights documents ratified by the relevant states; 2) at the request of a member state of the African Union, any of its bodies or any African organization recognized by it, it may issue an advisory opinion on any legal issue related to the African Charter on Human and Peoples' Rights or any other relevant document on human rights, provided that the subject of the opinion is not related to the issue considered by the African Commission on Human and Peoples' Rights (Articles 3 and 4 of the Protocol).

It should be noted that according to Article 4 (1) of the Protocol to the African Court [14], a member state of the Organization of African Unity, now the African Union, may submit a request for an advisory opinion to the Court. This provision extends to the possibility of requesting an advisory opinion to two types of the states. First, the African Union member states, which have ratified the Protocol to the African Court, and second, the African Union member states, which have not

ratified the Protocol. If it is a self-evident right for the states, which have ratified the Protocol to request an advisory opinion, the question arises why the Protocol extends to jurisdiction of the states, which have not ratified it.

According to Article 33 of the Protocol [14], the African Court clarified the procedural conditions for application of Article 4 of the Protocol to the African Court in its Rules of Procedure (the «Rules»). Rule 82 reproduces the content of Article 4, but adds that requests for advisory opinions must relate to the legal issues and specify the provisions of the African Charter or any other international human rights document, in respect of which an advisory opinion is requested, the context or background, which gave rise to the request, and the names and addresses of representatives of the organizations making the request (Rule 82 (2) of the 2020 Rules of Procedure). Rule 83 explains the conditions for transmission of the request for an advisory opinion to the entities concerned such as «member states of the African Union», «the African Commission», «relevant bodies of the African Union» and «any other relevant entities». Moreover, it is interesting that while the 2010 Rules of Procedure of the African Court say nothing about the time limits within which the persons concerned shall submit their statements, the 2020 Rules oblige them to do so within 90 days of receipt of the request. Rules 85 and 86, respectively, deal with the possibility of conducting an oral proceeding within the framework of consultative procedures and conditions associated with presentation of the opinion to be open, unless certain circumstances allow. At the same time, the African Court on Human and Peoples' Rights must justify its advisory opinions subject to each judge has the right to express his / her thought separately from the majority of the court [1 p. 17; 14].

It is worth noting that, despite the absence of the clear formal legal basis in the Protocol or Regulations, the Court may issue advisory opinions in an emergency. However, the only case [15] in which a decision was made in an emergency proves that the reasons for satisfying such a request should be considered in each specific case [16].

Opinions. Thus, in summary, it may be noted that the advisory competence of the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court on Human and Peoples' Rights are somehow different. Suchwise, the advisory competence of the ECHR is limited only to the legal issues regarding interpretation of the Convention and Protocols thereto. The advisory function of the Inter-American Court is not limited to interpretation of the Convention (or other treaties adopted within or under the auspices of the Inter-American system), and applies to any other treaties related to the protection of human rights in the American States. The African Court on Human and Peoples' Rights may, at the request of a member state of the African Union, any of its bodies or any African organization recognized by it, make an advisory opinion on any legal issue, in respect of the African Charter on Human and Peoples' Rights or any other relevant human rights instrument, provided that the subject matter of the opinion is not related to the issue considered by the African Commission on Human and Peoples' Rights.

Finally, it should be noted that establishing the advisory competence of international human rights courts on the example of the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court on Human and Peoples' Rights requires further scientific research.

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