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Establishing Judicial Precedents Through Advisory Opinions of the European Court of Human Rights

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Abstract

The recent practice of the European Court of Human Rights to follow, in its case law, legal statements made in the exercise of its new advisory competence pursuant to Additional Protocol No. 16 raises some considerable issues. The most important of such issues regards the possibility for principles of law established by the Strasbourg Court to be recognized as judicial precedents within the European Convention of Human Rights system, which is the object of this paper. For this purpose, the analysis will focus not only on the approach of the European Court of Human Rights, but also on that of the Italian judicial authorities, which developed a particularly innovative case law at this regard. Finally, it will also consider the experience of other international judicial bodies, in order to draw some general conclusions on the contribution of advisory opinions to the development of international law.

Keywords

European Convention of Human Rights – Additional Protocol No. 16 – advisory opinions – judicial precedents – *res interpretata* – evolutive interpretation – international human rights

1 Introduction

The Additional Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms ("ECHR"), which establishes the advisory competence of the European Court of Human Rights ("ECtHR"), entered into force on 1 August 2018. Shortly thereafter, the Strasbourg Court applied the

legal principles stated in its advisory opinions in judgements in contentious matters, rendering it clear that the exercise of its advisory competence contributes to the evolutive interpretation of the ECHR guarantees. It followed this approach both in judgements issued against States which have not participated in that specific advisory proceeding, and against States which have not even ratified the Additional Protocol No. 16. Such practice raises a question whether the advisory competence may in some way contribute to the affirmation *erga omnes partes* of judicial precedents within the ECHR system.

After analyzing the main features of the advisory competence of the ECtHR, this paper will focus on the exercise of such competence by the ECtHR, so as to comprehend if the principle of *res interpretata* – which is used for justifying the judicial precedent in the case law of the ECtHR – may be also applied to advisory opinions. With this regard, the analysis will extend also to the jurisprudence of Italian courts, which is particularly innovative on this issue, especially because of the lack of ratification of the Protocol No. 16 by Italy. If true, such extension could confirm the asserted "constitutional role" of the Strasbourg Court,[1] in what can be defined – as it will be seen further on – [2] as an overall tension of the ECHR system towards the attribution of a sort of nomophylactic function to its adjudicative body.

Finally, the paper will address other experiences of advisory competence in international law, in order to verify if the approach of the ECtHR is comparable to the one followed by other international judicial authorities. For this purpose, specific attention will be dedicated to the case law of the International Court of Justice ("ICJ") and other human rights courts.

2 Advisory Competence of the European Court of Human Rights Pursuant to Additional Protocol No. 16

Additional Protocol No. 16 to the ECHR entered into force in 2018 following the ratification of the tenth Member State of the Council of Europe ("CoE"), as required by Article 8 of the same, after being opened for signature on 2

1 Para. 1 of the Explanatory Report to the Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms: "[…] The Group of Wise Persons concluded that it would be useful to introduce a system under which the national courts could apply to the Court for advisory opinions on legal questions relating to interpretation of the Convention and the protocols thereto, in order to foster dialogue between courts and enhance the Court's 'constitutional' role […]".

2 See *infra*, paras. 3.1, 3.2, and 5.

October 2013.[3] This instrument is part of the package of measures undertaken by the CoE since the Interlaken Conference,[4] with the purpose to relieve the ECtHR from the great number of applications filed each year on similar legal issues by giving a clear guidance to national judges through a clarification of the law at an earlier stage, thus increasing the possibilities of the issue being settled at national level.[5] This Protocol introduces, in fact, the advisory competence of the Court on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or in its protocols.[6] This new advisory competence, however, is not the first experience of this kind within the ECHR system. In fact, it represents a further instrument, that stands alongside to the one already provided by Article 47 of the ECHR regarding advisory opinions,[7] which however can be activated only by the Committee of Ministers and basically only on institutional issues.[8]

3 For a comment on the Protocol No. 16, see GIANNOPOULOS, "Considerations on Protocol N° 16: Can the New Advisory Competence of the European Court of Human Rights Breathe New Life into the European Convention on Human Rights?", German Law Journal, 2015, p. 337 ff.; PAPROCKA and ZIÓLKOWSKI, "Advisory Opinions under Protocol No. 16 to the European Convention on Human Rights", European Constitutional Law Review, 2015, p. 274 ff.; ANRÒ, "Il Protocollo n° 16 alla CEDU in vigore dal 1° agosto 2018: un nuovo strumento per il dialogo tra corti?", Rivista trimestrale di diritto e procedura civile, 2019, p. 189 ff.; GERARDS, "Advisory Opinion: European Court of Human Rights (ECtHR)", in *Max Planck Encyclopedia of International Procedural Law*, Oxford, 2019, (online edn).

4 High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010.

5 As stated by the Steering Committee for Human Rights ("CDDH"), Final report on measures requiring amendment of the European Court of Human Rights, 74th meeting, Doc. CDDH(2012)R74 Addendum I, 15 February 2012, para. 52. PAPROCKA and ZIÓLKOWSKI, *cit. supra* note 3, p. 275. In particular, for a comment on these measures, see RUI, "The Interlaken, Izmir and Brighton Declarations: Towards a Paradigm Shift in the Strasbourg Court's Interpretation of the European Convention of Human Rights?", Nordic Journal of Human Rights, 2013, p. 28 ff.

6 Art. 1(1) of the Protocol No. 16 to the ECHR.

7 Art. 47 of the ECHR: "1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto. 2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention. […]".

8 The experience of advisory competence under Article 47 of the ECHR has been very poor, since the Court has issued only three opinions pursuant to this norm and none of them, due to its very nature, regarded the content of human rights. While the first request (A47-2004-001) regarded "the coexistence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European

The main purpose of the Protocol is to strengthen the dialogue between the ECtHR and the national judicial authorities, so as to prevent violations by States, thus guaranteeing the effectiveness of ECHR rights – also in compliance with the principle of subsidiarity – [9] and fostering "a harmonious interpretation of the minimum standards set by the Convention rights".[10]

As to the specific rules applicable to advisory proceedings, the Protocol provides that the request for an opinion must be carried out by the highest domestic courts and tribunals,[11] in order both not to overload the ECtHR and to align the discipline with the requirement of the prior exhaustion of domestic remedies set forth for individual applications.[12] For this purpose, States Parties should identify such judicial authorities and communicate them to the Secretary General. The request of advisory opinion should not be abstract in nature, it must originate from an ongoing judicial proceeding, thus rendering an assessment by the ECtHR necessary to solve a specific legal issue within a pending domestic case.[13] The request must also be motivated and accompanied by some information regarding the domestic proceeding, including its object, the relevant factual and legal background, the applicable domestic provisions, and an indication of the relevant provisions of the ECHR.[14] The request thus formulated will be submitted to the Grand Chamber panel of five judges to assess the admissibility of the same, having to duly justify a possible rejection, as provided for by Article 2(1) of the Protocol. The acceptance of the request for an advisory opinion, as provided by the Guidelines for the implementation of Protocol No. 16, adopted on 18 September 2017, seems to depend

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Convention on Human Rights", the other two (A47-2008-001 and A47-2010-001) concerned "the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights".

9 Preamble to the Protocol No. 16 to the ECHR. Council of Europe, Report of the Group of Wise Persons to the Committee of Ministers, 979bis Meeting, Doc. CM(2006)203, 15 November 2006, para. 81; CDDH, Final report, *cit. supra* note 5, para. 3, lit. *f*). *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. 4 (Opinion of the Court).

10 European Court of Human Rights, Reflection paper on the proposal to extend the Court's advisory jurisdiction, 2012, available at: <https://www.echr.coe.int/Documents/2013_Courts_advisory_jurisdiction_ENG.pdf>; GERARDS, *cit. supra* note 3, para. 33.

11 Arts. 1(1) and 10(1) of the Protocol No. 16.

12 GERARDS, *cit. supra* note 3, para. 6.

13 Art. 1(2) of the Protocol No. 16. *Opinion of the Court on Draft Protocol No. 16 to the Convention*, *cit. supra* note 9, para. 7. On the contrary, see PAPROCKA and ZIÓLKOWSKI, *cit. supra* note 3, p. 281.

14 Art. 1(3) of the Protocol No. 16 and Art. 92(2) and (12) of the 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).

on whether it "raises a novel point of Convention law", or where "the facts of the case do not seem to lend themselves to a straightforward application of the Court's case-law, or [...] there appears to be an inconsistency in the case-law".[15] In one of these situations, the competence will therefore be entrusted to the assessments of the Grand Chamber.

The Explanatory Report to Protocol No. 16 states that the advisory function of the ECtHR is aimed at enhancing the "constitutional" role of the Court;[16] however, as set forth by Article 5 of Protocol No. 16, "[a]dvisory opinions shall not be binding", either for the authority that asked for them, or for third States, albeit parties to the Protocol. Nevertheless, in the event that the State authority delivering the request has not complied with the interpretation of the pertinent right given by the Strasbourg Court, it will still be an option for the individual to avail himself of its contentious jurisdiction, with the consequent risk of the violation of ECHR guarantees for the State in question.[17] If the final domestic judicial decision complies with the principles established in the advisory opinion, any following individual application to the ECtHR will be declared inadmissible.[18]

However, the express lack of binding nature of advisory opinions raises broader questions on how to conciliate such a provision with the consistent practice of the ECtHR to attribute the authoritative interpretative value to its statements.

3 Interpretative Value of Advisory Opinions of the European Court of Human Rights

Such last assertion is in line with the need to ensure the consistence of the jurisprudence in establishing general standards of protection, which is, in fact, particularly important within the regional systems of protection of human rights, where the resemblance of legal cultures of Member States also justifies the sharing of the rule of law. This is particularly evident in relation to the ECHR, the special character of which as a self-contained regime[19] is often highlighted

15 Para. 5 of the Guidelines on the implementation of the Protocol No. 16, *cit. supra* note 14.
16 Para. 1 of the Explanatory Report the Protocol No. 16, *cit. supra* note 1.
17 See Opinion of the Court on Draft Protocol No. 16, cit. *supra* note 9, para. 12.
18 Para. 26 of the Explanatory Report to the Protocol No. 16, *cit. supra* note 1.
19 This qualification flows directly from the rule set forth in Art. 55 of the ECHR, which expressly excludes the use of other dispute resolution mechanisms relating to the interpretation and application of the European Convention on Human Rights.

by the ECtHR.[20] The affirmation of this regime takes place through the autonomous interpretation of the fundamental rights enshrined in the Convention by the Strasbourg Court. The overall tension of the system is therefore aimed at identifying the minimum levels of protection, thus indicating to States Parties the correct path towards the effective implementation of the ECHR guarantees in compliance with the same.[21]

The general standards of protection within the ECHR system are set both through the competence in contentious matters and through the new advisory competence pursuant to Additional Protocol No. 16. In fact, besides the binding nature of judgements towards to the Parties to the proceeding with regard to a given litigation, as set forth in Article 46 of the ECHR,[22] judgments and advisory opinions aim to interpret the Convention to the same extent.[23] Such an interpretative nature of ECtHR statements given through both of its functions – as it will be seen further on – [24] does not depend on the *res judicata* value of the judgement. Hence, such statements acquire the *res interpretata* value, thus helping to form an integral part of the ECHR system through the interpretation of the guarantees provided therein.[25] Through the *res interpretata*

20 In this regard, the special character of the European Convention on Human Rights is recalled, in particular, in these judgments: *Ireland v. the United Kingdom*, Application No. 5310/71, Judgment of 18 January 1978, para. 239; *Loizidou v. Turkey*, Application No. 15318/89, Judgment of 23 March 1995, para. 70. TZEVELEKOS, "The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECTHR: an Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration", Michigan Journal of International Law, 2010, p. 621 ff., p. 622; SCHAUB, "On the Primacy of the European Convention on Human Rights over Other International Treaties", The Finnish Yearbook of International Law, 2011, p. 167 ff.

21 Committee on Legal Affairs and Human Rights, Report submitted by the Rapporteur Mr. Yves Pozzo Di Borgo on the effectiveness of the European Convention on Human Rights: the Brighton Declaration and beyond, Doc. No. 13719, 2 March 2015, A) Draft resolution, para. 5.

22 SCHABAS, *The European Convention on Human Rights: A Commentary*, Oxford, 2015, p. 861 ff.; ARNARDÓTTIR, "*Res Interpretata, Erga Omnes* Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights", The European Journal of International Law, 2017, p. 819 ff.

23 ALBANESI, "The European Court of Human Rights' Advisory Opinions Legally Affect Non-Ratifying States: A Good Reason (From a Perspective of Constitution No. 16 to the ECHR", European Public Law, 2022, p. 1.

24 See *infra*, para 4.

25 GERARDS, *cit. supra* note 3, para. 20; PAPROCKA and ZIÓLKOWSKI, *cit. supra* note 3, p. 280. Parliamentary Assembly of the Council of Europe, Resolution 1226 (2000), *Execution of judgments of the European Court of Human Rights*, para. 3. Same reasoning is applicable to other regional systems. JONAS, "*Res interpretata* principle: Giving domestic effect to the judgments of the African Court on Human and Peoples' Rights", African Human Rights Law Journal, 2020, p. 736 ff.

principle, the Strasbourg judge tends to give continuity to the principles of law established in its judgments and advisory opinions, justifying this choice on the need of continuity of its overall jurisprudence as a fundamental condition for ensuring the predictability, certainty, and equality of the law within the ECHR system.[26]

3.1 *The Principle of Res Interpretata in the Case Law of the European Court of Human Rights*

The *res interpretata* principle has been first established with regard to judgments of the ECtHR. This approach has been followed since the *Ireland v. the United Kingdom* judgment of 18 January 1978. In this ruling, the Court stated that its "judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties".[27] Moreover, such last function constitutes one of the primary purposes of the Court, as provided for by Article 19 of the ECHR regarding the establishment of the Court.[28]

In its subsequent ruling *Cossey v. the United Kingdom* of 27 September 1990, the idea of constant jurisprudence within the EctHR has been consolidated at least with regard to the same State. Such a consideration is particularly evident from the passage where the Court specified that although it "is not bound by its previous judgments […], it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law".[29]

The process of affirming the notion of *res interpretata* within the ECHR system is finally completed in the judgment *Opuz v. Turkey* of 9 June 2009, where the authoritativeness of judicial precedent is made explicit also towards third

26 *Stafford v. the United Kingdom*, Application No. 46295/99, Judgment of 28 May 2002, para. 68; *Goodwin v. the United Kingdom*, Application No. 28957/95, Judgment of 11 July 2002, para. 74.

27 *Ireland v. the United Kingdom*, *cit. supra* note 20, para. 154. See also, among others, *Karner v. Austria*, Application No. 40016/98, Judgment of 24 July 2003, para. 26.

28 Art. 19 of the ECHR: "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as 'the Court'. It shall function on a permanent basis".

29 *Cossey v. the United Kingdom*, Application No. 10843/84, Judgment of 27 September 1990, para. 35.

States to the proceeding.[30] Given all these trends, the Contracting Parties to the ECHR are under the obligation to familiarize with principles of law established in the previous judgments issued by the ECtHR against other States and take them into consideration.[31] Moreover, this approach seems to be the most appropriate in the ECHR system, which consists of obligations with *erga omnes partes* effects[32] and where the need to establish – above all through the activity

30 *Opuz v. Turkey*, Application No. 33401/02, Judgment of 9 June 2009, para. 163: "[…] the Court provides final authoritative interpretation of the rights and freedoms defined in Section I of the Convention, the Court will consider whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concern other States". Such an approach has been also supported by the Interlaken Conference, *supra*, para. 4, lit. *c*), and by the CDDH Report on the Longer-Term Future of the System of the European Convention On Human Rights (CDDH Report), Doc. CDDH(2015)R84 Addendum I, 11 December 2015, para. 37: "While a judgment of the Court is formally binding only on the respondent State under article 46 of the Convention (there is no *erga omnes* effect), in order to prevent future violations the High Contracting Parties are encouraged to consider the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system, and to integrate the Strasbourg Court's case law into national law. In this respect, reference is often made to the principle of *res interpretata* whereby it is argued, based on Articles 1, 19, 32 and 46 of the Convention, that national authorities should take account of the Convention as interpreted by the Court, but also bearing in mind the principle of subsidiarity and the doctrine of the margin of appreciation". BODNAR, "*Res Interpretata*: Legal Effect of the European Court of Human Rights' Judgments for other States Than Those Which Were Party to the Proceedings", in HAECK and BREMS (eds.), *Human Rights and Civil Liberties in the 21st Century*, Berlin, 2014, pp. 223–262.

31 Such approach is adopted by several States parties to the ECHR, as highlighted by the Venice Commission in its Report on "Ways and means to recognise the interpretative authority of Judgments against other States – the experience of the Constitutional Court of Croatia", Doc. CDL-JU(2010)019, 5 November 2010. The same is true for the Italian legal system, as stated by *Corte Costituzionale*, Judgment of 24 October 2007, No. 348, para. 4.6: "[…] Since the legal rules live in the interpretation that the operators of law give them, the judges in the first place, the natural consequence that derives from art. 32, paragraph 1, of the Convention, among the international obligations assumed by Italy with the signing and ratification of the ECHR, there is the one of adapting its legislation to the norms of that treaty, in the meaning attributed by the Court specifically established to interpret and apply them. We cannot therefore speak of a jurisdictional competence that overlaps the one of the judicial bodies of the Italian State, but of an eminent interpretative function that the Contracting States have recognized in the European Court, thereby helping to clarify their international obligations in the specific matter." (author's translation). BODNAR, *cit. supra* note 30, pp. 249–251.

32 BESSON, "The *Erga Omnes* Effect of Judgments of the European Court of Human Rights: What's in a Name?", in BESSON (ed.), *The European Court of Human Rights after Protocol 14*, Zürich, 2011, p. 125 ff.; ARNARDÓTTIR, *cit. supra* note 22, p. 823.

of the Grand Chamber – general standards of protection within the conventional regime is particularly prominent.[33]

As mentioned above, this assumption derives first from Article 19 of the ECHR, taken together with Articles 1 and 32 thereof, which set forth respectively the obligation for the Contracting States to secure the rights enshrined in the Convention and the ECtHR jurisdiction to interpret and apply them. In light of these provisions, the Convention is seen as a living instrument. Thus, the compliance with Article 1 of the Convention requires States to apply the ECHR guarantees in the light of the autonomous interpretation provided by the Strasbourg judge in a manner reflecting the present-day conditions.[34] Therefore, Member States have the duty to take note of the overall ECtHR jurisprudence – especially that of the Grand Chamber,[35] or concerning the interpretation of autonomous concepts of the Convention,[36] or issued in pilot proceedings – in order to implement its principles within the domestic system, thus preventing possible future violations of the Convention.[37]

Similar considerations can be made also in relation to advisory opinions introduced by Protocol No. 16, notwithstanding their non-binding nature which is expressly set forth by Article 5 thereof. This rule does not seem to have in any way slowed down the tendency of the Strasbourg Court to equate the *res interpretata* effects deriving from advisory opinions to that deriving from judgments. This occurs, first of all, with respect to subsequent jurisprudence regarding the requesting State: this was the case with the first Advisory opinion delivered on 10 April 2019 by the ECtHR, pursuant to Protocol No. 16, upon the request of the French Court of Cassation. That instance concerned the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother.[38] In the Court's view, the State Parties are under the positive obligation pursuant to Article 8 ECHR to ensure the parent-child relationship with the intended parent, if needed also through adoption, provided that it leads to

33 *Karner*, *cit. supra* note 27, para. 26; *Rantsev v. Cyprus* and *Russia*, Application No. 25965/04, Judgment of 7 January 2007, para. 197.

34 BESSON, *cit. supra* note 32, p. 134; ARNARDÓTTIR, *cit. supra* note 22, p. 825.

35 BODNAR, *cit. supra* note 30, p. 237.

36 BESSON, *cit. supra* note 32, pp. 136–137.

37 CDDH, Report on the longer-term future of the system of the European Convention on Human Rights, *cit. supra* note 30, para. 41.

38 LEMMENS, "Protocol No 16 to the ECHR: Managing Backlog through Complex Judicial Dialogue?", European Constitutional Law Review, 2019, p. 691 ff., p. 701 ff.

a prompt and effective outcome.[39] This last principle of law has been, in fact, followed in the following judgment *D. v. France* of 16 July 2020[40] and in the decision *C. v. France* and *E. v. France* of 19 November 2019.[41]

However, the same approach has been adopted also with respect to States which do not take part in the advisory proceeding, even if they have not yet ratified Protocol No. 16. A clear example of this trend is represented by the second Advisory Opinion of 29 May 2020, which was issued at the request of the Armenian Constitutional Court. The question concerned the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence, and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law.[42] In this opinion, the Court posited, among other things, that for the blank criminal legislation to be compatible with Article 7 ECHR regarding the principle of legality, it is necessary that its knowledge, together with the recalled rule, can ensure the concrete predictability of the consequences of individual conduct. In fact, this principle was then applied by the ECtHR in its judgments *Pantalon v. Croatia* of 19 November 2020[43] and *N.Š. v. Croatia* of 10 September 2020,[44] where the Court ascertained Croatia's responsibility through reference to the second opinion which was used as "precedent", without considering that Croatia has never ratified Protocol No. 16.[45]

39 Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother of 10 April 2019, No. P16-2018-001, para. 55. ANRÒ, *cit. supra* note 3, p. 202; FERACI, "Il primo parere consultivo della CEDU su richiesta di un giudice nazionale e l'ordinamento giuridico italiano", Osservatorio sulle fonti, 2019, p. 1 ff.

40 *D. v. France*, Application No. 11288/18, Judgment of 16 July 2020, para. 67.

41 *C. v. France* and *E. v. France*, Application Nos. 1462/18 and 17348/18, Decision of 19 November 2019, para. 42.

42 Advisory Opinion of 29 May 2020 concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law, No. P16-2019-001.

43 *Pantalon v. Croatia*, Application No. 2953/14, Judgment of 19 November 2020, para. 45.

44 *N.Š. v. Croatia*, Application No. 36908/13, Judgment of 10 September 2020, para. 83.

45 The same happened with regard to the Advisory Opinion of 26 April 2022 on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture, No. P16-2021-001, requested by the Armenian Court of Cassation. The principles established therein has been applied in a judgement issued against Bulgaria, which is not party to the Protocol No. 16 (see *Stoyanova v. Bulgaria*, Application No. 56070/18, Judgement of 14 June 2022, para. 71).

While the crystallization of a principle of law in the ECtHR jurisprudence may clearly be pursued through both judgments and advisory opinions, this does not preclude the further evolution of such principle alongside with the changing legal and social values. A good indicator of such a consideration is represented by the use of the so-called "European consensus" in the ECtHR case law, which strongly influences the intensity of the control on the State conduct by the ECtHR. This approach is based on the most important principles of human rights, namely on the principle of the most favorable treatment, which requires the Strasbourg Court to adopt an evolutive interpretation of conventional guarantees.[46] However, only "cogent reasons" may justify departing from a consolidated trend in order to "ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions";[47] such reasons should be made explicit in the Court's reasoning.[48]

3.2 *Advisory Opinions as Res Interpretata and the Role of Domestic Judicial Decisions: the Italian Experience*

A very similar approach, whereby stances in advisory opinions of the ECtHR are deemed *res interpretata*, can also be observed in the Italian legal system. More specifically, the *Corte Costituzionale* clearly upheld position in the sense

46 *Stafford*, *cit*. *supra* note 26, para. 68. On the evolutive interpretation of international treaties see, FITZMAURICE, "Dynamic (Evolutive) Interpretation of Treaties", Hague Yearbook of International Law, 2009, p. 3 ff.; DZEHTSIAROU, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights", German Law Journal, 2011, p. 1730 ff.; BJORG, *The Evolutionary Interpretation of Treaties*, Oxford, 2014; TURRINI, *Teoria e prassi dell'interpretazione evolutiva nel diritto internazionale*, Napoli, 2019.

47 *Cossey*, *cit*. *supra* note 29, para. 35; *Stafford*, *cit*. *supra* note 26, para. 68: "[…] It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement".

48 CDDH, Report on the longer-term future of the system of the European Convention on Human Rights, *cit*. *supra* note 30, para. 113; Council of Europe, Explanatory Report to the Additional Protocol No. 15 to the ECHR, para. 19. BESSON, *cit. supra* note 32, pp. 135–136. This is particularly evident in *Vilho Eskelinen et al. v. Finland*, Application No. 63235/00, Judgment of 19 April 2007, para. 56: "[i]t is against this background and for these reasons that the Court finds that the functional criterion adopted in Pellegrin must be further developed. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement". MOWBRAY, "An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case-law", Human Rights Law Review, p. 179 ff.

of their authoritative nature in its judgment No. 33 of 2021,[49] quiet in contrast to Italy's decision not to ratify the Protocol No. 16. Before analyzing in detail such practice, some specifications on the implementation of the ECHR in the Italian legal order should be made.

The relevance of the ECtHR case law had been in some way put forward by the Italian *Corte di Cassazione*, which – in particular in its judgment No. 6173 of 2004 – stated that it is a well-settled jurisprudential trend that the case law of the Court of Strasbourg must be recognized as precedent in the examination of disputes relating to legal situations protected by the ECHR.[50] But its ultimate affirmation – insofar as it complies with the Italian constitutional principles – was afterwards highlighted in the "twin" judgments No. 348 and No. 349 of 2007.[51] In such rulings the *Corte Costituzionale* stated for the first time that the ECHR – and other international treaties – stay in between the Constitution and the ordinary legislation (for instance, an act of Parliament) in the hierarchy of sources of the Italian law. This also implies two consequences: first, the ordinary legislation shall be interpreted consistently to the ECHR, on the basis of the constraint of consistent interpretation (*obbligo di interpretazione conforme*), which binds domestic courts;[52] second, the ordinary legislation non-compliant with ECHR norms can be declared invalid by the Italian *Corte Costituzionale*.

This approach, however, has been narrowed in the judgment No. 49 of 2015,[53] where the *Corte Costitutionale* embraced a rather qualified and restrictive meaning of the *obbligo di interpretazione conforme*, identifying it only with regard to consolidated case law of the ECtHR. In fact, such idea was present somehow in the previous judgment No. 311 of 2009,[54] but only *en passant*, without any further information. Thus, in judgment No. 49 of 2015, the Court develops such assumption, stating that the consolidation of a principle of law established by the ECtHR (concerning in this case the legal nature of the urban

49 *Corte Costituzionale*, 9 March 2021, No. 33, para. 3.1.

50 *Corte di Cassazione* (*Sezione Lavoro*), 27 March 2004, No. 6173. See also *Corte di Cassazione* (*Sezione Lavoro*), 10 March 2004, No. 4932; *Corte di Cassazione* (*Sezioni Unite*), 26 January 2004, Nos. 1338, 1339, 1340, and 1341.

51 *Corte Costituzionale*, 24 October 2007, No. 348, para. 4.7 and No. 349, para. 6.2.

52 Such approach has been further confirmed by subsequent judgments. See, *ex pluribus*: *Corte Costituzionale*, 15 July 2009, No. 239, para. 3; 8 October 2012, No. 230, para. 7; 2 April 2012, No. 78, para. 13.

53 SONELLI, "Convenzione europea dei diritti dell'uomo e giudici nazionali nella giurisprudenza 'trial and error' della Corte costituzionale", Rivista di diritto internazionale, 2015, p. 1155 ff.

54 *Corte Costituzionale*, 16 November 2009, No. 311, para. 6. Approach confirmed in *Corte Costituzionale*, 19 July 2011, No. 236, para. 9.

planning confiscation) is assessed through precise evidences: first, the degree of creativity of that principle; second, existing conflicts with other principles affirmed on the same matter; third, the quantity and quality of dissenting opinions to judgment in which it was established; fourth, the composition of the Court which ruled on the point, which should have ruled in the capacity of the Grand Chamber in order to satisfy the aforementioned requirement. When such evidences show that the principle is not well-settled, the judge is not bound to share the interpretative line adopted by the ECtHR to decide a particular dispute, except for "pilot judgments".[55]

This last approach has been mitigated by judgment No. 68 of 2017,[56] in which the *Corte Costituzionale* stated that

> "[...] the idea that the interpreter cannot apply the ECHR, except with reference to cases that have already been the subject of punctual rulings by the Strasbourg Court, should also be rejected. [...] The duty [of Domestic courts] to avoid violations of the ECHR obliges them to apply its rules, based on the principles of law expressed by the EctHR, especially when the case is object of precedents in the jurisprudence of the European judge".[57]

However, still after this judgment, references to the settled ECtHR jurisprudence have not ceased; notably, the judgment No. 43 of 2018 of the *Corte Costituzionale*[58] regarding the implementation of interpretation of the right not to be tried or punished twice provided for in the judgment *A. and B. v. Norway* of 15 November 2016. In this ruling, the ECtHR established that the States may punish, in dual administrative and criminal proceedings, certain conducts where there is a "sufficiently close connection in substance and in time" between the two sets of proceedings concerned.[59]

The approach of the *Corte Costituzionale* later evolved with regard to the new advisory competence of the ECtHR, thus enhancing – at the same time – the interpretative function of advisory opinions. In fact, the Italian *Corte Costituzionale* made a reference to the first Advisory Opinion of the ECtHR in

55 CARUSO, "Il 'posto' dell'interpretazione conforme alla CEDU", Giurisprudenza Costituzionale, 2018, p. 1985 ff.

56 SCIARABBA, "La Corte EDU tra Corte costituzionale e giudici comuni", Questione giustizia, 2019, p. 201 ff.

57 *Corte Costituzionale*, 7 February 2017, No. 68, para. 7; (author's translation).

58 *Corte Costituzionale*, 24 January 2018, No. 43, para. 5.

59 *A. and B. v. Norway*, Application Nos. 24130/11 and 29758/11, Judgment of 15 November 2016, para. 134.

judgment No. 230 of 2020. This was made for dismissal of the constitutional review request of the domestic rules concerning the impossibility of the registration of the woman, who had entered a civil union and shared the parenting project with the genetic mother of a child, which was born through a medically assisted procreation, in the latter's birth certificate.[60] For the *Corte Costituzionale* – as established by the ECtHR – the adoption in special cases is the appropriate solution. However, no legal explanation was given for justifying the mention of this ECtHR precedent.[61] The same happened also in judgment No. 32 of 2021, which concerned the regulation of medically assisted procreation as such.[62] Here the *Corte Costituzionale* not only mentioned expressly the first Advisory Opinion of the ECtHR, but it also recalled the principle established therein when urging the legislature to amend the provisions on adoption.[63]

Finally, the most recent judgment (No. 33 of 2021) further extends the constraint of consistent interpretation, which derives from the aforementioned hierarchy of sources. In fact, also this ruling draws from the first Advisory Opinion of the ECtHR on surrogacy. The *Corte Costituzionale* enhances the trend established therein by the ECtHR with regard to Article 8 as a parameter of the review of constitutionality of various legal provisions, thus innovating its previous jurisprudence. Therefore, such judgement contributes to the consolidation of the idea of the authoritative precedent deriving from advisory opinions of the ECtHR.

First of all, the *Corte Costituzionale* overcomes the previous approach of the Italian case law, upheld on several occasions and most recently confirmed in judgment No. 12193 of 2019 by the *Corte di Cassazione* (*Sezioni Unite*). On the basis of such approach, the primary interest of the child to the stability of his or her relationship with the purely intentional parent could fall under the scope of the so-called "adoption in special cases" pursuant to Article 44(1)(d), of the Italian Law 4 May 1983, No. 184, regarding the adoption and custody of children.[64] For the *Corte Costituzionale*, this right must be ensured through an effective and prompt adoption procedure, which recognizes the filiation bond between the adopter and the adopted in full, when it has been concretely

60 Art. 1(20) of the Italian Law 20 May 2016, No. 76 and Art. 29(2) of the Decree of the Italian President 3 November 2000, No. 396.

61 *Corte Costituzionale*, 20 October 2020, No. 230, para. 6.

62 Arts. 8 and 9 of the Italian Law 19 February 2004, No. 40.

63 *Corte Costituzionale*, 28 January 2021, No. 32, para. 2.4.1.2. Like in judgement No. 33, the Court states that legislative amendment in points of law is necessary.

64 *Corte Costituzionale*, 27 January 2021, No. 33, paras. 13.2 and 13.4.

ascertained that this is in the interest of the child,[65] whereas the "adoption in special cases" does not satisfy these requirements. The *Corte Costituzionale* thus relies expressly on the principles set out in the ECtHR first Advisory Opinion,[66] even if Italy is not yet a party to the Protocol No. 16.[67]

For the *Corte Costituzionale*, the parameter of the review of constitutionality is not the advisory opinion as such, since

> "[t]he referring judge, while invoking this opinion, in fact correctly invokes – as an interposed parameter in a review of constitutional legitimacy based, among other things, on the Article 117(1), of the Constitution – the Article 8 of the ECHR, which sets forth the right to private and family life of the child: a right on which the arguments developed in the referral are based".[68]

The Court, in fact, acknowledges the lack of binding nature of the advisory opinion; rather it highlights its interpretative value with regard to the ECHR guarantees, albeit confirmed by further rulings in contentious matters.[69]

The *Corte Costituzionale* seems, thus, to abandon the more rigorous requirement of well-settled nature of the ECtHR case law,[70] as even precedents

65 *Ibid.*, para. 5.7.

66 *Ibid.,* para. 3.1.

67 In fact, Italy did not ratify the Additional Protocol No. 16 to the ECHR, as the most recent bill of government initiative (C. 1124 of 10 August 2018) regarded only the ratification of Protocol No. 15, while the part relating to the ratification of Protocol No. 16 was removed by parliamentary committees out of fear that its entry into force for Italy could create an excessive lengthening of trial times, as well as a possible weakening of the Constitutional Court. LAMARQUE, "La ratifica del Protocollo n. 16 alla CEDU: lasciata ma non persa", Giustizia insieme, 18 November 2020, p. 1 ff.; NASCIMBENE, "La mancata ratifica del Protocollo n. 16. Rinvio consultivo e rinvio pregiudiziale a confronto", Giustizia insieme, 29 January 2021, p. 1 ff.

68 *Corte Costituzionale*, No. 33, *supra*, para. 3.1; (author's translation). *Contra*, LUCCIOLI, "Il parere preventivo della Corte EDU e il diritto vivente italiano in materia di maternità surrogata: un conflitto inesistente o un conflitto mal risolto dalla Corte di Cassazione?", Giustizia insieme, 22 May 2020, p. 1 ff.

69 Such as *D. v. France*, Application No. 11288/18, Judgement of 16 July 2020, and *C. v. France* and *E. v. France*, Application Nos. 1462/18 and 17348/18, Judgement of 19 November 2019; *Corte Costituzionale*, No. 33, *supra*, para. 3.1.

70 The overcome of the approach adopted in judgment No. 49 of 2015 is also confirmed in the recent order No. 45179 of 7 December 2021 of the Italian *Corte di Cassazione* for referral of the proceeding to the all sections of the same in a situation that could create future jurisprudential conflicts, in order to establish the scope of the general principle established by the ECtHR in its judgment on the case of *Maestri et al. v. Italy* of 8 July 2021 (nos. 20903/15 *et al.*) in the Italian legal system with respect to pending criminal proceedings.

established through an exercise of the advisory jurisdiction of the Strasbourg Court, to which Italy is not party, are considered to be authoritative.

Therefore, the upholding of the *res interpretata* principle becomes evident also with regard to the exercise of the new advisory competence of the ECtHR. Moreover, it is difficult to escape the authority of advisory opinions which derives from a need for coherence in the overall jurisprudence of the ECHR.[71] This approach is entirely consistent with the Explanatory Report to Protocol No. 16, which expressly states that "[t]he interpretation of the Convention and the Protocols thereto contained in such advisory opinions would be analogous in its effect to the interpretative elements set out by the Court in judgments and decisions".[72] This means that, both for the CoE and State Parties to the ECHR, statements of principle contained in an advisory opinion constitute *res interpretata*, like those present in the rulings on contentious matters.[73] Such

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In this ruling, the Strasbourg Court stated that before reforming the acquittal decision, the court of appeal must order the examination of the accused, even if he or she did not participate in the hearings or did not ask to be heard or did not object. For a comment of this decision, see LA MUSCATELLA, "Le Sezioni Unite saranno chiamate a delineare i limiti del principio di diritto stabilito dalla Corte Europea nel caso *Maestri ed altri* v. *Italia*. Nota a: Cassazione penale, 21 settembre 2021, n. 45179, sez. I", Diritto & Giustizia, 2021, p. 7 ff. As stated by *Corte di Cassazione*, Order of 7 December 2021, No. 45179, para. 2.2, for the domestic judge, in addition to the pilot judgment that implies an obligation of consistent interpretation, there is another category of rulings with same implications. In fact, "it is also correct to find the existence of judgments of general application: these ones (formally mentioned by the article 61, 9 [of the Rules of Court]), although not falling within the content and procedural cases of the pilot judgment, ascertain '[…] a violation of ECHR rules on the matter of human rights, likely to be repeated with similar prejudicial effects towards a plurality of subjects other than the applicant, but in his same condition'", (author's translation). However, this is not the only possible reading of the Judgment No. 49 of 2015 of the *Corte Costituzionale*; some scholars highlight, instead, the aim pursued by the same of limiting the generalized constraint with respect to judgments of the ECtHR, even where these reflect internal conflicts within the ECHR system on a specific legal issue. ZAGREBELSKY, "Corte cost. n. 49 del 2015, giurisprudenza della Corte europea dei diritti umani, art. 117 Cost., obblighi derivanti dalla ratifica della Convenzione", Rivista AIC, 2015, p. 1 ff.; REPETTO, "Vincolo al rispetto del diritto CEDU 'consolidato': una proposta di adeguamento interpretativo", Rivista AIC, 2015, p. 1 ff.

71 SALERNO, "La coerenza dell'ordinamento interno ai trattati internazionali in ragione della costituzione e della loro diversa natura", Osservatorio sulle fonti, 2018, p. 1 ff., p. 20.

72 Explanatory Report to the Protocol No. 16, *cit. supra* note 1, para. 27.

73 European Court of Human Rights, Reflection paper on the proposal to extend the Court's advisory jurisdiction, *cit. supra* note 10, para. 44; PAPROCKA and ZIÓLKOWSKI, *cit. supra* note 3, p. 290; LEMMENS, *cit. supra* note 38, p. 702; ALBANESI, "Un parere della Corte EDU ex Protocollo n. 16 alla CEDU costituisce norma interposta per l'Italia, la quale non ha ratificato il Protocollo stesso?", Consulta online, 2021, p. 232 ff., p. 235. This is also confirmed in *Vavřička et al. v. Czech Republic*, Application nos. 47621/13 *et al.*, Judgment of 8 April 2021, para. 287.

conclusion appears to be consistent with the need of the Court to exercise its interpretative function through both its competences, so to avoid future violations of the Convention,[74] also enhancing the Grand Chamber's nomophylactic function.[75]

4 Advisory Opinions as Judicial Precents in International Law

The fact that advisory opinions have interpretative value is corroborated by developments concerning other international judicial bodies. Even though not all the judicial bodies exercise their advisory competence in the same manner – as it is based on different statutory provisions – some general conclusions may be drawn by analyzing the convergent practice of few of the most relevant thereof. For this purpose, it is worth mentioning advisory function and its exercise in practice by the ICJ, the Inter-American Court of Human Rights ("IACtHR"), and the African Court on Human and Peoples' Rights ("ACtHPR"). Such courts – similarly to the ECtHR – contribute to the development of international law through interpretation, to the extent that such interpretation concerns legal questions of a general character, such as the meaning of legal rules, especially if regarding controversial and evolving issues thereof.[76] Such legal statements are thus independent from the concrete facts of the case before the relevant judicial body. In fact, its interpretative function does not derive from the *res judicata* – which attains the binding force of judgements toward the parties to the proceeding – but from the very mandate of the judicial body to interpret primary norms under its jurisdiction.[77]

74 Para. 2 of the Explanatory Report to the Protocol No. 16, *cit. supra* note 1. This approach is also followed by the Inter-American Court of Human Rights, Advisory Opinion of 19 August 2014, No. OC-21/14, para. 31.

75 ANRÒ, *cit. supra* note 3, p. 211.

76 Advisory Opinions of the European Free Trade Agreement Court (EFTA Court) pursuant to Art. 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice of 1994 may acquire similar relevance. Even if this argument is out of the scope of this article, it is worth mentioning the practice of the European Court of Justice to recall EFTA Court's statements regarding the interpretation of the EFTA Convention of 1960, the Agreement on the European Economic Area of 1994 and, more generally, the European legal order. GALLO, "From Autonomy to Full Deference in the Relationship between the EFTA Court and the ECJ: The Case of the International Exhaustion of the Rights Conferred by a Trademark", EUI RSCAS Working Papers, 2010, pp. 1–29; PIERDOMINICI, "Genesi e circolazione di uno strumento dialogico: il rinvio pregiudiziale nel diritto comparato sovranazionale", Federalismi, 2020, p. 225 ff.

77 OELLERS-FRAHM, "Lawmaking through Advisory Opinions", German Law Journal, 2011, p. 1033 ff.

Before analyzing in detail this practice, it is useful to reflect, more generally, on the value of judicial decisions in contentious matters in international law, so as to evaluate the overall contribution of international judicial authorities to the development of international law.

The legal obligation upon a court to follow its previous decisions as binding precedents – and thus as sources of law – is recognized mainly in common law systems pursuant to the *stare decisis* doctrine.[78] Civil law systems follow a different approach. In fact, within civil law systems, the practice of following the consistent interpretative trend with regard to specific rules cannot be considered as binding[79] and, moreover, it is also limited to existent normative boundaries.[80]

International procedural law is similar to the civil law in this regard. The doctrine – or, as some scholars define it, the rule – [81]of *stare decisis* finds no place here. This consideration flows directly from Article 38(1)(d), of the 1945 ICJ Statute regarding the sources of international law, which entrusts judicial decisions with a merely subsidiary function in the determination of international legal rules. This aspect is especially evident in the French version of the text by the use of the adjective *auxiliaire*.[82] Indeed, judgments do not have an

78 LILE, "Some Views on the Rule of *Stare Decisis*", Virginia Law Review, 1916, p. 95 ff.; FREDERICK, "Precedent", Stanford Law Review, 1987, p. 571 ff.; PERRY, "Judicial Obligation, Precedent and the Common Law", Oxford Journal of Legal Studies, 1987, p. 215 ff.; DUXBURY, *The Nature and Authority of Precedent*, Cambridge, 2008; WALDRON, "*Stare Decisis* and the Rule of Law: A Layered Approach", Michigan Law Review, 2012, p. 1 ff.

79 To be honest, sometimes even civil law systems contain mechanisms capable of giving life to decisions with some binding effects. For instance, art. 618, 1 *bis*, of the Italian Criminal Code of Procedure, introduced by the Law of 23 June 2017, No. 103, requires the simple sections to refer the question to all sections whereas they don't share the principle of law previously enunciated by the latter. Although the hypothesis of non-referral is not sanctioned, Italian scholars considers this rule as expressive of the *Corte di Cassazione* all section to establish binding precedents in the Italian legal system in the exercise of its nomophylactic function.

80 GUILLAUME, "The Use of Precedent by International Judges and Arbitrators", Journal of International Dispute Settlement, 2011, p. 5 ff.

81 LILE, *cit. supra* note 77; DUXBURY, *cit. supra* note 77, p. 31–57; KOZEL, "*Stare Decisis* as Judicial Doctrine", Washington and Lee Law Review, 2010, p. 411 ff.

82 Art. 38(1)(d), of the 1945 ICJ Statute: "La Cour, dont la mission est de régler conformément au droit international les différends qui lui sont soumis, applique: [...] sous réserve de la disposition de l'Article 59, les décisions judiciaires et la doctrine des publicistes les plus qualifiés des différentes nations, comme moyen auxiliaire de détermination des règles de droit".

autonomous normative power,[83] and can only be called upon in support of one of other sources set forth by Article 38.[84]

4.1 *The Practice of the International Court of Justice*

As to the ICJ, Article 59 of the ICJ Statute stipulates that its judgements bind the parties of the proceeding;[85] however, the statements made therein may contribute to the effectiveness, construction and development of international law through its assessment, namely the determination of the exact interpretation of a rule, or even the recognition of principles or legal rules of general application.[86] As highlighted by Pellet

83 *Fisheries Jurisdiction* (*United Kingdom v. Iceland*), Judgment of 24 July 1974, ICJ Reports, 1974, p. 4 ff., pp. 24–25, para. 53. There are also some opinions in contrast with this consideration, such as *Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain*), Judgment of 24 July 1964, Dissenting Opinion of Judge Armand-Ugon, ICJ Reports, 1964, p. 116 ff., p. 116: "The Permanent Court and the International Court, which were created by States, have the capacity to lay down mandatory rules of law in the same way as any national legislature". Less rigid is the position of the Judge Tanaka, *South West Africa* (*Liberia v. South Africa*), Judgment of 18 July 1966, Dissenting Opinion of the Judge Tanaka, ICJ Reports, 1966, p. 250 ff., p. 277: "Undoubtedly a court of law declares what is the law, but does not legislate. In reality, however, where the borderline can be drawn is a very delicate and difficult matter. Of course, judges declare the law, but they do not function automatically. We cannot deny the possibility of some degree of creative element in their judicial activities. What is not permitted to judges, is to establish law independently of an existing legal system, institution or norm. What is permitted to them is to declare what can be logically inferred from the *raison d'être* of a legal system, legal institution or norm. In the latter case the lacuna in the intent of legislation or parties can be filled".

84 PELLET and MÜLLER, "Competence of the Court, Article 38", in ZIMMERMANN *et al.* (eds.), *The Statute of the International Court of Justice: A Commentary*, Oxford, 2019, p. 819 ff., para. 306.

85 This provision regards the *res judicata*, the scope of which is limited both from a subjective point of view to the parties to the proceedings that gave rise to the judgment, and from the objective point of view to the dispositive part of the ruling, which must correspond to the object of the proceeding, besides to those parts of the reasoning which regard matters determined by necessary implication. See *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast* (*Nicaragua v. Colombia*), Judgment of 17 March 2016, ICJ Reports, 2016, p. 100 ff., p. 126, para. 61; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007, ICJ Reports, 2007, p. 42 ff., p. 95, para. 126. CRESPI REGHIZZI, *L'intervento "come non parte" nel processo davanti alla Corte internazionale di giustizia*, Milano, 2017, p. 22–40.

86 BENVENUTI, *L'accertamento del diritto mediante i pareri consultivi della Corte Internazionale di Giustizia*, Milano, 1984, p. 29 ff., p. 327 ff.; MAYR and MAYR-SINGER, "Keep the Wheels Spinning: The Contributions of Advisory Opinions of the International Court of Justice to the Development of International Law", Heidelberg Journal of International Law, 2016, p. 425 ff., p. 446; CRESPI REGHIZZI, *cit. supra* note 84, p. 47 ff.; TAMS, "The Development of

> "the Court constantly and consistently (even if rather prudently) adapts the law to the new circumstances and needs of the international society. This happens when it is clear that a more orthodox interpretation would lead to a dead-end or is no longer acceptable by the international society, or because there appear to be gaps in the existing applicable rules".[87]

Therefore, Court's decisions are, in fact, endowed with a specific interpretative force. For these reasons, ICJ is often called as a "Progressive Developer" of international law[88] with respect to the primary rules taken into consideration. Notably, through *res interpretata*, ICJ rulings acquire the *erga omnes* effects, namely towards all the subjects belonging to a given regulatory framework.[89]

Same considerations also regard advisory opinions of the ICJ, which may equally be considered as a product of its jurisdiction, since they are based on procedural rules, that ensure a sufficient degree of objectivity and impartiality,[90] and issued at the end of a proceeding that leads to application of abstract rules to concrete cases.[91] For instance, there is a possibility for all States to

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International Law by the International Court of Justice", in *Gaetano Morelli Lectures Series: Decisions of the ICJ as Sources of International Law?*, Roma, 2018, p. 63 ff.

87 PELLET, "Decisions of the ICJ as Sources of International Law?", in *Gaetano Morelli Lectures Series: Decisions of the ICJ as Sources of International Law?*, Roma, 2018, p. 7 ff, p. 42.

88 PELLET, *cit. supra* note 86, p. 39.

89 See also, CONDORELLI, "L'autorité de la décision des juridictions internationales permanentes", *in Actes du Colloque de Lyon, La juridiction internationale permanente* (Société française pour le droit international), Paris, 1987, p. 277 ff.

90 Art. 68 of the ICJ Statute.

91 However, the assimilation of advisory proceeding before the ICJ to its contentious functions is debated. On the one hand, it has its origins in the experience of the Permanent Court of International Justice (PCIJ), which exercised its advisory jurisdiction as an autonomous dispute settlement instrument, delivering opinions related, in most cases, to existing disputes between States. On the other hand, however, such a practice – less widespread within the ICJ system – is at odds with the requirement of the consent to be subjected to the contentious jurisdiction of the ICJ. However, as highlighted by Zeno Creispi-Reghizzi, "[i]ndeed, since its advisory opinion in *Interpretation of Peace Treaties* and up to its recent opinion in the *Chagos* case, the Court has always exercised its advisory jurisdiction even in the absence of the parties' consent", dismissing States objections upon a simple argument that it will not deal with issues relating to the dispute. See, CREISPI-REGHIZZI, "The International Court of Justices's Advisory Jurisdiction Dispute Settlement and State Consent: an Historical Perspective", Rivista di Diritto Internazionale, 2021, p. 139 ss. For further literature, see GREIG, "The Advisory Jurisdiction of the International Court and the Settlement of Disputes between States", International and Comparative Law Quarterly, 1966, p. 325 ff.; KEITH, *The Extent of the Advisory Jurisdiction of the International Court of Justice*, Leiden, 1971, p. 89 ff.; LUZZATTO, "La competenza consultiva della Corte internazionale di giustizia nella soluzione delle controversie internazionali", Comunicazioni e studi, 1975, p. 493 ff.

submit their views in conformity with Article 66 of the Statute[92] and Article 105 of the Rules of Court adopted in 1978.[93] Moreover, the authoritativeness of the ICJ statements flows directly from its status of the principal judicial organ of the United Nations ("UN"),[94] which highlights its role in declaring and developing international law within the UN system.[95] In fact, in the past, the ICJ dealt with various legal issues of utmost importance for the international legal order in the exercise of its advisory competence. Hence, not taking into consideration such opinions could also underrate its overall impact on international law.

But the alignment of advisory opinions to judgments regarding the interpretative value of principles of law established therein is also particularly evident in those cases where the Court must deal with issues implying interpretation of rules aiming to protect collective interests of the international community.[96] In fact, the non-binding nature of advisory opinions of the ICJ – unless the relevant legal provision, such as Article VIII, Section 30, of the Convention on the Privileges and Immunities of the United Nations of 1946, provides

92 Art. 66 of the ICJ Statute: "1. The Registrar shall forthwith give notice of the request for an advisory opinion to all states entitled to appear before the Court. 2. The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question […]".

93 Art. 105 of the Rules of Court: "Written statements submitted to the Court shall be communicated by the Registrar to any States and organizations which have submitted such statements. […]".

94 Art. 92 of the UN Charter: "The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter." See also Art. 1 of the UN Charter. FORLATI, *The International Court of Justice. An Arbitral Tribunal or a Judicial Body?*, Berlin, 2014.

95 FALK, "Toward Authoritativeness: The ICJ Ruling on Israel's Security Wall", American Journal of International Law, 2005, p. 42 ff.

96 As happened in: *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South-West Africa*) *notwithstanding Security Council Resolution 276* (*1970*), Advisory Opinion of 21 June 1971, ICJ Reports, 1971, p. 16 ff.; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports, 2004, p. 135 ff. PAPA, "Funzione consultiva della Corte internazionale di giustizia e tutela dei valori fondamentali della comunità internazionale: alcune osservazioni alla luce del parere sulle Isole Chagos", in ANNONI, FORLATI and FRANZINA, *Il diritto internazionale come sistema di valori. Scritti in onore di Francesco Salerno*, Napoli, 2021, p. 319–342.

otherwise – [97] does not contrast with their function of ascertainment of legal situations. Such an ascertainment inevitably affects the nature and the content of obligations enshrined in relevant international primary rules,[98] through statements of the law with *erga omnes* effects,[99] as argued by the Court itself in the Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* of 8 July 1996.[100]

Moreover, the lack of binding force does not "deprive an advisory opinion of all the moral consequences which are inherent in the dignity of the organ delivering the opinion, or even of its legal consequences".[101] Thus, "when the Court refers to its jurisprudence it mentions its judgments and its advisory opinions".[102] After all, the object of the request for advisory opinion is limited to "legal questions" as provided for by Article 96 of the ICJ Statute, which touches upon the relevant international norms.

Even absent any obligation to do so,[103] the ICJ usually applies the relevant legal principles already established within its case law, regardless of whether they were stated in the exercise of its contentious or advisory competence – even in cases concerning other States – in relation to similar circumstances or issues.[104] This practice aims to ensure the "consistency with its own past

97 Art. VIII, Section 30 of the Convention on the Privileges and Immunities of the United Nations, adopted on 13 February 1946 and entered into force on 17 September 1946: "All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question in volved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties". AGO, "'Binding' Advisory Opinions of the International Court of Justice", American Journal of International Law, 1991, p. 439 ff.

98 PAPA, *cit. supra* note 95, p. 326.

99 These last words are used by MAYR and MAYR-SINGER, *cit. supra* note 85, p. 430.

100 Legality of the Threat or Use of Nuclear Weapons, cit. supra note 82, para. 18.

101 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, Separate Opinion of Judge Azevedo, ICJ Reports, 1950, p. 79 ff., p. 80, para. 3.

102 PELLET, *cit. supra* note 86, p. 7 ff.

103 *Continental Shelf* (*Libyan Arab Jamahiriya v. Malta*), Judgment of 21 March 1984, request of intervention by Italy, ICJ Reports, 1984, p. 3 ff., p. 26, para. 42; *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria: Equatorial Guinea intervening*), Judgment of 11 June 1998, ICJ Reports, 1998, p. 275 ff., p. 292, para. 28.

104 Similar considerations regarded also the jurisprudence of the Permanent Court of International Justice. GARDNER, "Judicial Precedent in the Making of International Public Law", Journal of Comparative Legislation and International Law, 1935, p. 251 ff., pp. 252–253. However, the idea of binding precedent in international law appears to be

case law in order to provide predictability", since "[c]onsistency is the essence of judicial reasoning".[105] For instance, in the Judgment *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*) of 19 December 2005, the Court recalled its Advisory Opinion on *the Construction of Wall*, to address the issues of the relationship between international humanitarian law and international human rights law and of the applicability of international human rights law instruments outside the national territory.[106]

Principles of law stated by the ICJ in its advisory opinions – just as happens for those stated in its judgements – [107]however, not only fall within the

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stronger before its establishment. HALL, "The Force of Precedents in International Law", International Journal of Ethics, 1916, p. 149 ff., p. 152 ff.; SHAHABUDDEEN, *Precedent in the World Court*, Cambridge, 1996, pp. 97–109.

105 This approach is not new to the ICJ jurisprudence. In fact, it seems to be confirmed by frequent references to the concept of "settled jurisprudence" in the following cases: *United States Diplomatic and Consular Staff in Tehran* (*United States of America v. Iran*), Judgment of 24 May 1980, ICJ Reports, 1980, p. 2 ff., p. 18, para. 33; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, ICJ Reports, 1980, p. 72 ff., p. 87, para. 33. See also, *Legality of Use of Force* (*Serbia and Montenegro v. France*), Judgment of 15 December 2004, Joint Declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby, ICJ Reports, 2004, p. 621 ff., pp. 621–622, para. 3, where they state that, whereas the Court finds the lack of its competence, "[…] in exercising its choice, it must ensure consistency with its own past case law in order to provide predictability. Consistency is the essence of judicial reasoning. This is especially true in different phases of the same case or with regard to closely related cases […]". The same may be told with regard to the jurisprudence of the PCIJ, as supported by the ICJ reasoning in the case of *Corfu Channel* (*United Kingdom of Great Britain and Northern Ireland v. Albania*), Judgment of 9 April 1949, ICJ Reports, 1949, p. 4 ff., p. 24: "In this connexion, the Court refers to the views expressed by the Permanent Court of International Justice with regard to similar questions of interpretation". See also, PELLET and MÜLLER, *cit. supra* note 83, para. 310 ff.

106 *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Judgment of 19 December 2005, ICJ Reports, 2005, p. 167 ff., pp. 242–243, para 216.

107 This is particularly evident in the ICJ judgment on the case of military and paramilitary activities in and against Nicaragua of 17 June 1986 (*Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), Judgment of 27 June 1986, ICJ Reports, 1986, p. 13 ff., pp. 50–51, para. 86, where the Court has, for the first time, construed the rule on responsibility for the conduct directed or controlled by a State in the situation of "planning, direction and support" activities attributable to the State, in attributing the conduct of Contras to the United States. This rule has been afterwards implemented in Art. 8 of the International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001. See, REINISCH, "Aid or Assistance and Direction and Control between states and International Organizations in the Commission of Internationally Wrongful Acts", International Organizations Law

range of possible interpretations of the law applicable to the case, but may also constitute its re-elaboration, thus going beyond the normative framework and enhancing, therefore, the role of the international judge in his activity of ascertaining international law. Such a function of "codification" of international law has been carried out in the Advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* of 28 May 1951.[108] In fact, the principles established therein regarding the admissibility of reservations were afterwards incorporated in Article 19 of the 1969 Vienna Convention on the Law Treaties, being also considered as customary international law.[109]

4.2 *The Human Rights Courts' Experiences*

This approach is also reflected in the practice of other international judicial bodies, especially human rights courts. In particular, the IACtHR usually applies principles established in its previous rulings, on the basis of the consideration that "human rights established in international treaties [form] true 'constitutional block' or mass which [...] takes into consideration not only the human rights enshrined in international agreements, but also the case law of the Inter-American Court".[110] Such an assumption extends also to the advisory competence of the IACtHR pursuant to Article 64 of the American Convention

Review, 2010, p. 63 ff.; CRAWFORD, *State Responsibility. The General Part*, Cambridge, 2014, p. 141 ff.; MILANOVIC, "Special Rules of Attribution of Conduct in International Law", International Law Studies, 2020, p. 295 ff.

108 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, ICJ Reports, 1951, p. 15 ff., in which the Court defined rules applicable to treaty reservations. PELLET and MÜLLER, *cit. supra* note 83, para. 333. See also, CANÇADO TRINDADE, "Contemporary International Tribunals: Their Jurisprudential Cross-Fertilization Pertaining to Human Rights Protection", in ZICCARDI CAPALDO (ed.), *Global Community: Yearbook of International Law and Jurisprudence 2014: Vol. I*, Oxford, 2015, p. 2016 ff.

109 PELLET, *cit. supra* note 86, p. 48.

110 *Gelman v. Uruguay*, Order of 20 March 2013, para. 69: "[...] the mere fact of being a Party to the American Convention means that all public authorities and all the organs of State, including the democratic bodies, judges and other organs involved in the administration of justice at all levels, are bound by the treaty. This obliges them to exercise control of conformity with the Convention *ex officio*, taking into account the treaty itself and its interpretation by the Inter-American Court [...]"; *Cabrera García* e *Montiel Flores v. Mexico*, Judgment of 26 November 2010, Concurring opinion of *ad hoc* Judge Eduardo Ferrer Mac-Gregor, para. 26. MAC-GREGOR, "Conventionality Control the New Doctrine of the Inter-American Court of Human Rights", American Journal of International Law, 2015, p. 93 ff.

on Human Rights ("ACHR").[111] As highlighted by the former judge Cançado Trindade in its concurring opinion to the Advisory Opinion No. 17 issued in 2002 by the IACtHR,

> "[…] the adoption […] of the present Advisory Opinion n. 17 […] constitutes, in my view, a new contribution of its recent case-law to the evolution of the International Law of Human Rights. […] The Court, thus, has […] responsibility and the duty […] to exert its advisory function, the operation of which is a matter of international *ordre public*".[112]

The progressive development of international human rights law also, and especially, through its advisory competence is thus one of the perceived functions of the IACtHR,[113] as it enhances the State Parties' compliance with its international obligations.[114] In line with such a reasoning, the IACtHR follows its own precedents established through advisory competence, as happened – for instance – in judgement *Raxcacó-Reyes v. Guatemala* of 15 September

111 Art. 64 of the American Convention on Human Rights, 22 November 1969, entered into force 18 July 1978: "1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court. 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments".

112 *Juridical Condition and Human Rights of the Child*, Advisory Opinion of 28 August 2002, OC-17/02.

113 TIGROUDJA, "La fonction consultative de la Cour Interamericaine des Droits de l'Homme", in ONDOUA and SZYMCZAK, (eds.), *La fonction consultative des juridictions internationales*, Paris, 2009, pp. 67–88.

114 *Proposed amendments to the naturalization provision of the constitution of Costa Rica*, Advisory Opinion of 19 January 1984, OC-4/84, para. 19: "It should also be kept in mind that the advisory jurisdiction of the Court was established by Article 64 to enable it "to perform a service for all of the members of the inter-American system and is designed to assist them in fulfilling their international human rights obligations". [I/A Court H.R., *"Other treaties" Subject to the Advisory Jurisdiction of the Court* (*Art. 64 American Convention on Human Rights*), Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, par. 39.] Moreover, as the Court noted elsewhere, its advisory jurisdiction "is designed to assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions associated with the contentious judicial process". [I/A Court H.R., *Restrictions to the Death Penalty* (*Arts. 4*(*2*) *and 4*(*4*) *American Convention on Human Rights*), Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, par. 43]".

2015, where the Court recalled legal principles stated in the Advisory Opinion regarding *restrictions to the death penalty* of 8 September 1983.[115]

The same reasoning regarding the interpretative value of the Courts' statements is proposed in literature also with regard to the ACtHPR.[116] The advisory competence of the ACtHPR has been introduced in the African system by Article 4 of Additional Protocol to the African Charter on Human and Peoples' Rights ("ACHPR") in 1998, in force from 25 January 2004,[117] which resembles quiet strongly the model of the ACHR.[118] Such a resemblance pushed the scholars to assert that advisory opinions may contribute to the development of the jurisprudence of the ACtHPR,[119] as happened in the Inter-American context. Although the ACtHPR has issued only four advisory opinions to date – while the other requests were declared inadmissible – the importance of such competence in terms of defining the content of human rights guarantees is self-evident. A good example of this phenomenon is represented by the Advisory Opinion on the compatibility of vagrancy laws – which represents an

115 *Raxcacó-Reyes v. Guatemala*, Judgement of 15 September 2015, para. 50. TIGROUDJA, *cit. supra* note 112, p. 80.

116 AYENI, "The African Human Rights Architecture: Reflections on the Instruments and Mechanisms within the African Human Rights System", Beijing Law Review, 2019, p. 302 ff.; JONAS, *cit. supra* note 25. In any case, similar considerations can be made with regard to the activity of the African Commission on Human and Peoples' Rights, which for instance developed a progressive case law on indigenous rights in its individual communication procedure under Art. 55 of the African Charter, notwithstanding the lack of the express provision regarding indigenous peoples therein. See, African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Centre and Another v. Nigeria*, Communication No. 155/96, 15th Activity Report 2001–2002 ("Ogoni case"); *Centre for Minority Rights Development* (*CEMIRIDE*) *and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication No. 276/2003, 27th Activity Report, June 2009-November 2009 ("*Endorois* case"). TRAMONTANA, "The Contribution of the African Court on Human and Peoples' Rights to the Protection of Indigenous Peoples' Rights", Federalismi, 2018, p. 1 ff.

117 Art. 4 of the Additional Protocol to the African Charter on Human and Peoples' Rights, 10 June 1998, entered into force 25 January 2004: "1. At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission. 2. The Court shall give reasons for its advisory opinions provided that every judge shall be entitled to deliver a separate or dissenting decision".

118 CHENWI, "The Advisory Proceedings of the African Court on Human and Peoples' Rights", Nordic Journal of Human Rights, 2020, p. 61 ff.

119 ONDOUA, "La fonction consultative de la Cour africaine des droits de l'Homme et des peoples", in ONDOUA and SZYMCZAK (eds.), *cit. supra* note 112, pp. 105–116.

important social issue on the African continent – with the ACHPR and other human rights instruments applicable in Africa, delivered on 4 December 2020 upon request of the Pan African Lawyers Union. In this Opinion, the Court places a positive obligation on African States to review and amend or repeal the relevant offences, which target individuals because of their status rather than their actions, in that they are inconsistent with the ACHPR, the African Charter on the Rights and Welfare of the Child, and the Protocol to the African Charter on the Rights of Women in Africa.[120] Such an obligation binds all the States Parties to the African Convention, thus providing valuable interpretive guidance on how they should act.[121]

Hence, even if the jurisprudential development of the African Court's case law on the res *interpretata principle* is not well-settled, it seems fair to say that its advisory function contributes to the development of human rights guarantees, as its stances have the value of judicial precedent within the African system.

5 Concluding Observations

The new advisory competence of the ECtHR raises some important questions regarding the interpretation of the ECHR guarantees. One of these undoubtedly relates to the effectiveness of the opinions *vis-à-vis* third States to the advisory proceeding, especially if they have not yet ratified the Protocol No. 16 to the ECHR, given the express lack of their binding nature (Article 5).

This rule derives from the lack of *res judicata* effects of advisory opinions. However, that does not preclude them – as well as judgements – from acquiring the value of *res interpretata*, based on which particular importance is given to the product of the interpretation, which thus helps to build the primary

120 *The compatibility of vagrancy laws with the African Charter on Human and Peoples' Rights and other human rights instruments applicable in Africa*, Advisory Opinion of 4 December 2020, No. 001/2018, para. 154. The Court declared the laws against vagrancy non compatible with: Arts. 2, 3, 5, 6, 7, 12, and 18 of the Charter, Arts. 3, 4(1), and 17 of the Children's Rights Charter and Art. 24 of the Women's Protocol.

121 KAMAU, "Advisory Opinion on the Request by the Pan African Lawyers Union Regarding the Compatibility of Vagrancy Laws with the African Charter of Hum and other Human Rights Instruments Applicable in Africa (Afr. Ct. H.P.R.)", International Legal Materials, 2022, p. 141 ff.

legal rule object of the same.[122] In fact, the *res interpretata* principle is particularly relevant in the ECHR system, where the Strasbourg judge provides for the general standards of interpretation of the human rights set forth therein, thus guarantying the legal predictability of its decisions, and greater effectiveness to the ECHR guarantees, so to prevent their violation by States.

Consequently, on the one hand, advisory opinions are part of ECtHR jurisprudence, alongside judgments issued in contentious matters, thus producing – albeit not binding – *erga omnes partes* effects. But on the other hand, they also erode the scope of the margin of appreciation of States Parties to the Convention.[123] In fact, not only principles regarding the interpretation of primary rules established in advisory opinions are incorporated in the case law of the Court also with respect to third States to the proceeding and to the Protocol No. 16, but even the domestic judicial authorities of States that have not ratified such Protocol act in accordance with them.

This happened also in Italy with respect to the matter of surrogacy. Particularly, Judgment No. 33 of 2021 of the *Corte Costituzionale* is good evidence of how the provision of Article 5 of Protocol No. 16, which is aimed to reassure States that the choice to ratify the Protocol No. 16 would not alter the relations between the Strasbourg Court and the highest State courts and tribunals in favor of a predominance of the European judge over the State authorities, is not fully in line with the authoritative nature that advisory opinions acquire in practice. However, the main aim of this rule does not appear to have been fully achieved, as only 16 States have so far chosen to ratify the Protocol in question. Furthermore, judgement No. 33 also highlights the scarce practical utility of the Italian choice not to join this instrument, which deprives it of a privileged position in the dialogue with the ECtHR – through which it could have had the opportunity to share the peculiarities of the Italian legal system – with the risk of Italy failing to comply with the obligations of the ECHR.[124] This solution, however, does not free the Italian authorities from the obligation to respect the interpretative approach undertaken in an advisory opinion – even in the face of a high degree of innovation of the principles established therein – which contributes to identify the parameter of the consistent interpretation of the Italian domestic law to the ECHR.

122 See *infra* Section 3.2; TANCREDI, "I pareri resi dalla Corte Europea dei diritti dell'uomo ai sensi del Protocollo N. 16 nella recente giurisprudenza costituzionale", in ANNONI, FORLATI and FRANZINA, *cit. supra* note 95, p. 589 ff.

123 PAPROCKA and ZIÓLKOWSKI, *cit. supra* note 3, pp. 290–292.

124 GERARDS, *cit. supra* note 3, para. 21; LAMARQUE, *cit. supra* note 66, p. 9; ALBANESI, *cit. supra* note 72, p. 237.

Advisory opinions of the ECtHR are, in fact, endowed with an authoritative interpretative value, to the extent that they formulate principles of law – although with high political impact – [125]regarding primary rules, which bind all States Parties to the ECHR. This idea had already been anticipated in some way by the ECtHR in its *Reflection paper* on the proposal to extend the Court's advisory jurisdiction adopted in 2012, where it is specified that "[advisory opinions] would provide an occasion to have a discussion on essential questions concerning the interpretation of the Convention in a possibly larger judicial forum". And again, that they "[…] could complement the existing pilot-judgment procedure – without necessarily being limited to cases revealing structural or systemic problems in a Contracting State".[126] In fact, in the case of following applications to the Court on the same matter – as the experience of the first two opinions demonstrates – the relevant principles of law will constitute a precedent in order to assess the compliance with the ECHR guarantees.[127]

The new Additional Protocol seems, therefore, to contribute to strengthening the position of the Strasbourg Court in the multi-level dialogue for the protection of fundamental rights, through an intensified nomophylactic activity of the Grand Chamber, carried out no longer only in litigation cases, but also in the advisory ones. In fact, even if not binding, advisory opinions issued by the Grand Chamber acquire a strong persuasive nature, thus enhancing the activity of the Court in providing coherence in the establishment of the general standards of protection, especially for cases which involve important or novel legal issues, and so require an evolutive interpretation of human rights.

Such a practice regarding advisory opinions of the ECtHR reflects the ICJ and other courts' experiences, which demonstrate that both judgments and advisory opinions contain statements of law which strongly influence the development of international law.[128] All these international judicial practices confirm the interpretative value of advisory opinions, which significantly contribute to the creation of the case law of the relevant judicial authority. Hence, usually scholars maintain that precedent in international law is not binding, but is taken into consideration, with the only difference that this operation

125 ANRÒ, *cit. supra* note 3, p. 216. V. *contra*, RASI, "Sugli effetti dei pareri consultivi della Corte europea dei diritti dell'uomo", Rivista di diritto internazionale, 2021, p. 889 ff.

126 Reflection paper on the proposal to extend the Court's advisory jurisdiction, *cit. supra* note 10, para. 5.

127 As it flows from the rulings of the ECtHR on cases *D. v. France*, *supra*, and *C. v. France* and *E. v. France*, *supra.*

128 See *Infra* Section 3.2.

does not represent a response to an expressly provided obligation of *stare decisis* but is the result of a court's will to bind itself, in order to ensure continuity of its jurisprudence.[129] In fact, judicial precedents derive their authority directly from the binding nature of international norms which they interpret.[130] The precedent thus represents the attempt to confer certainty to international law in a context where, due to the multiplicity and variety of sources, such certainty is often difficult to achieve.[131]

This of course does not mean that a crystallization of a specific trend categorically rules out the possibility of the progressive development of international law, to which – on the contrary – international judicial authorities actively participate, also through their advisory competence.[132] However, a change of a given principle of law will require to explain the reasons that imposed it. Therefore, once an interpretative line has been established through a judicial precedent, a court will rather ask itself whether "there is cause not to follow the reasoning and conclusions of earlier cases", since there must be "compelling reasons" for modifying it.[133]

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129 GUILLAUME, "The Use of Precedent by International Judges and Arbitrators", Journal of International Dispute Settlement, 2011, p. 5 ff.; PELC, "The Politics of Precedent in International Law: A Social Network Application", The American Political Science Review, 2014, p. 547 ff.; ARIF, "Judicial Precedent and its Authority Under International Law", International Journal of Law, 2017, p. 75 ff.

130 FORLATI, "Interpretazione giudiziale e sviluppo del diritto internazionale", Ars interpretandi, 2020, p. 51 ff.

131 COHEN, "Theorizing Precedent in International Law", in BIANCHI *et al.* (eds.), *Interpretation in International Law*, Oxford, 2018, p. 268 ff., p. 275.

132 MAYR and MAYR-SINGER, *cit. supra* note 85, p. 440.

133 As stated by the ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v. Serbia*), Judgment of 18 November 2008, ICJ Reports, 2008, p. 411 ff., pp. 428–429, paras. 53–54. SALERNO, *Diritto internazionale. Principi e norme*, 6th ed., Milano, 2021, p. 615.