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(CDDH)

**DRAFTING GROUP ON THE EVALUATION OF THE FIRST EFFECTS OF
PROTOCOLS No. 15 AND No. 16 TO THE EUROPEAN CONVENTION ON
HUMAN RIGHTS**

(DH-SYSC-PRO)

**Draft report evaluating the first effects of Protocol No. 16 to the European
Convention on Human Rights**

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I – Introduction

1. The CDDH’s Terms of Reference for the period 2024-2027 require it to submit “a Report on the first effects of Protocol No. 16 to the European Convention on Human Rights” to the Committee of Ministers, with preparatory work to be conducted under the authority of its subordinate body the Committee of Experts on the System of the European Convention on Human Rights (DH-SYSC). To this end, the CDDH established a Drafting Group on the evaluation of the first effects of Protocols No. 15 and 16 to the European Convention on Human Rights (DH-SYSC-PRO). The present document contains the report required of the CDDH.

2. The CDDH set out to identify tangible effects of Protocol No.16 in relation to its objectives as stated therein and in its Explanatory Report. The Preamble of the Protocol states that “the extension of [the European Court of Human Rights, “the Court”]’s competence to give advisory opinions will further enhance the interaction between the Court and national authorities and thereby reinforce implementation of the [European Convention on Human Rights, “the Convention”], in accordance with the principle of subsidiarity. The Explanatory Report refers to relevant documents and decisions preceding the Protocol which highlight the aims of the advisory opinion procedure such as fostering the dialogue between courts and enhancing the Court’s ‘constitutional’ role;¹ providing further guidance in order to assist States Parties in avoiding future violations;² and strengthening of the interaction between the Court and national authorities by the introduction into the Convention of a further power of the Court, which States Parties could optionally accept, to deliver advisory opinions upon request on the interpretation of the Convention in the context of a specific case at domestic level.³

3. The CDDH looked in particular at the final determination of cases by the requesting courts in the context of which they submitted advisory opinions requests to the Court and the implementation of the Convention at the domestic level by means of integrating the Convention’s principles set out in advisory opinions in the case law of domestic courts. It also looked at the effects of advisory opinions on the number of applications lodged with the Court, the Court’s workload, and the evolution of the Court’s interpretation or application of Convention rights in the light of the advisory opinion procedure.

4. In preparing this report the CDDH has relied on the Court’s judicial practice, in particular regarding the advisory opinion procedure, as well as on the information it has received in response to its questionnaires addressed to member States, the highest courts designated by the States Parties to Protocol No. 16 and the Court itself.⁴ The CDDH’s analysis covers the judicial practice at the time of writing of this report.

II. Overview of Protocol No.16

5. Protocol No. 16 to the Convention was opened for signature on 2 October 2013 and entered into force on 1 August 2018 following its 10th ratification. The elaboration of Protocol No.16 was one of the results of the 2012 Brighton High-level Conference on the future of the Court, which formed part of broader efforts to ensure the long-term effectiveness of the control

¹ Report of the Group of Wise Persons, set up under the Action Plan adopted at the Third Summit of Heads of State and Government of the Member States of the Council of Europe (Warsaw, 16-17 May 2005) to the Committee of Ministers; see [Explanatory Report](#) to Protocol No.16, § 1.

² Declaration of the Izmir High-level Conference on the future of the Court (26-27 April 2011); see [Explanatory Report](#) to Protocol No.16, § 2.

³ Declaration of the Brighton High-level Conference on the future of the Court (19-20 April 2012); see [Explanatory Report](#) to Protocol No.16, § 3.

⁴ CDDH(2023)20REV; [DH-SYSC-PRO\(2024\)02REV2](#), Compilation of replies to the CDDH questionnaire.

mechanism of the Convention known as the Interlaken Process.⁵ The judicial dialogue and co-operation method between the Court and the highest judicial authorities that was introduced by Protocol No. 16 epitomizes the principle that the High Contracting Parties to the Convention and the Court have a shared responsibility to ensure the effective implementation of the Convention and the principle of subsidiarity.⁶

6. Protocol No.16 introduced new powers for the Court to provide on request from the designated highest courts and tribunals of the High Contracting Parties advisory opinions on questions relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto (Article 1, paragraph 1). Each such party shall at the time of signature or when depositing its instrument of ratification, acceptance or approval, by means of a declaration addressed to the Secretary General of the Council of Europe, indicate the courts or tribunals that it designates for purposes of Article 1, paragraph 1, of the Protocol. This declaration may be modified at any later date and in the same manner (Article 10).

7. The decision to request an advisory opinion lies with the designated courts. A request for an advisory opinion must concern a question of principle relating to the interpretation of the Convention or application of the rights and freedoms defined in the Convention or the protocols thereto. The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it while giving reasons for its request and providing relevant legal and factual background on the pending case (Article 1, paragraphs 2 and 3).

8. The request is examined by a panel of five judges of the Grand Chamber which will decide on whether or not the request is to be accepted for examination by the Grand Chamber. The panel includes *ex officio* the judge elected in respect of the High Contracting Party to which the requesting court or tribunal pertains. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of the judge. The panel shall give reasons for any refusal to accept a request (Article 2, paragraph 1). The Court has a discretion to accept a request or not, although – according to the Explanatory Report (§ 14) – it is to be expected that the Court would hesitate to refuse a request that satisfies the relevant criteria.

9. The Court gives reasons for its advisory opinions. Any judge of the Grand Chamber can deliver a separate opinion. Advisory opinions are communicated to the requesting court or tribunal and to the High Contracting Party to which that court or tribunal pertains and are published (Article 4).

10. An advisory opinion is not binding upon the requesting court (Article 5) which is competent to decide on the effects of the opinion in the domestic proceedings.⁷ The fact that the Court has delivered an advisory opinion on a question arising in the context of a case pending before a court or tribunal of a High Contracting Party would not prevent a party to that case subsequently exercising their right of individual application under Article 34 of the Convention. However, where an application is made subsequent to proceedings in which an advisory opinion of the Court has effectively been followed, it is expected that such elements of the application that relate to the issues addressed in the advisory opinion would be declared inadmissible or struck out.⁸ As noted in the Explanatory Report (§ 27), advisory opinions would

⁵ So-called because it was launched at a high-level conference held in Interlaken, Switzerland in 2010. See context provided in the [Explanatory Report](#) to Protocol No.16, §§ 1-4.

⁶ This principle should be understood in the light of the preamble of the Convention, as amended by Protocol No. 15, which affirms that “the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto”.

⁷ [Explanatory Report](#) to Protocol No.16, §25.

⁸ *Ibid.*, §26.

form part of the case law of the Court, alongside its judgments and decisions. The 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.

III – Status of ratifications of Protocol No.16

11. At the time of writing this report 22 Council of Europe member States have ratified Protocol No.16 and four others have signed it.

12. 29 member States replied to the CDDH questionnaire regarding the ratification of Protocol No. 16 (see paragraph 4 above), of which 15 have ratified the Protocol and 14 that have not. According to the information submitted by the latter: government or legislative initiatives on ratification are underway in three member States, including one which has signed the Protocol; ratification is still being analysed in two other member States; a further three member States have concluded not to ratify Protocol No.16 or noted that they have no immediate plans to do so; another three member States will examine the opportunity of signing and ratifying Protocol No.16 on the basis of the practice of the Court and how the Protocol will function in practice; and one member State's decision on the possible signature and/or ratification of the Protocol will be informed by the present report.⁹



13. Member States have underlined various reasons for having ratified Protocol No. 16. These are summarised below:

- to promote interaction and judicial dialogue between the Court and domestic courts, which in turn would facilitate their understanding and interpretation of the Convention and reinforce its implementation in accordance with the principle of subsidiarity, as well as avoiding litigation before the Court;
- to promote a better application of the Convention and a harmonised approach to addressing complex human rights issues;
- to promote the efficiency of the Court as part of the long-term reform of the Convention system: Protocol No.16 is considered as a reform measure through which the government shares joint responsibility for the implementation of the Convention and the advisory opinion procedure is considered as capable of reducing

⁹ [DH-SYSC-PRO\(2024\)02REV2](#), Compilation of replies to the CDDH questionnaire.

- the number of individual applications before the Court due to its general guiding effect and, in turn, speeding the processing of applications by the Court in general;
- to reduce substantially the Court’s workload in the medium term by allowing domestic courts to seek the opinion of the Court when faced with a systemic problem and apply the Court’s interpretation of the Convention to decide on all similar cases at domestic level;
 - the increasing number of cases being communicated by the Court to that member State and the willingness to resolve in advance difficulties in interpreting the Convention;
 - allowing the Court to become better acquainted than before with the views of the highest national courts on the application and interpretation of the Convention.¹⁰

14. One of the reasons invoked most frequently by member States for not ratifying Protocol No.16 is the need for more time to see the effects and the impact of the Protocol or the evolving practice of the Court. Other reasons include:

- issues in identifying the competent domestic courts;
- limited number of cases in which the opportunity to ask for an advisory opinion of the Court is expected to arise;
- the existence of domestic remedies guaranteeing the scrutiny of domestic legislation’s compatibility with the Convention as interpreted by the Court;
- perceived similarity to the preliminary ruling procedure at the Court of Justice of the European Union;
- possible additional strain on the national courts in terms of resources;
- possible delays in national court proceedings;
- uncertainty about the effectiveness of the advisory opinion procedure due to its non-binding nature as well as about its impact in reinforcing the guarantees for human rights and fundamental freedoms;
- lack of sufficient detail as regards the criteria for refusing a request for an advisory opinion which leaves a margin of discretion that could lead to a risk of overloading the Court and give rise to some legal uncertainty.¹¹

¹⁰ Ibid.

¹¹ Ibid.

15. Four member States have noted specifically that even though they are not High Contracting Parties to Protocol No.16, the Court's advisory opinions are taken into account when either considering national legislation relating to the issue dealt with by an opinion or in domestic court proceedings.¹²

16. Some member States have indicated that they have taken legislative action to ratify Protocol No.16 without pointing out to any difficulties in this process. Two member States, which are in the process of analysing ratification, have underlined that possible legislative changes of the relevant procedures before civil, criminal and administrative courts would be required, to effectively address questions such as the identification of the courts competent to submit advisory opinion requests, the handling of requests by parties to domestic proceedings for the submission of an advisory opinion request, the decision-making procedure concerning submission of requests, the staying of domestic proceedings, the language of advisory opinion requests, and the implementation of advisory opinion requests in the domestic system.¹³

17. Recalling that the Ad Hoc Negotiation Group ("46 + 1") on the Accession of the European Union to the European Convention on Human Rights reached a provisional agreement in March 2023, the CDDH further notes that according to the draft revised Agreement on the Accession of the European Union (EU) to the Convention for the Protection of Human Rights and Fundamental Freedoms, the accession of the EU to Protocol No. 16 is not foreseen for the time being. Yet, Article 59, paragraph 2, of the Convention shall be amended so as to allow the EU to accede to the optional protocols to the Convention, including Protocol No. 16, at a later stage.¹⁴

IV – Reliance on the advisory opinion procedure by the designated highest courts

18. 10 highest designated courts and tribunals from a total of eight member States have requested advisory opinions from the Court, namely the French Court of Cassation, the Constitutional Court of Armenia, the Court of Cassation of Armenia, the Supreme Administrative Court of Lithuania, the Supreme Court of Slovakia, the French Council of State, the Supreme Court of Finland, the Council of State of Belgium, the Supreme Court of Estonia and the High Court of Cassation and Justice of Romania.¹⁵

19. Requests for advisory opinions have been made in relation to a variety of issues, including:

- the legal recognition of the parent-child relationship for a child born through gestational surrogacy abroad;
- the independence of a mechanism for assessing complaints against the police;
- the use of the "legislation by reference" technique in criminal law;
- a ban on standing for parliamentary election following an impeachment proceeding;
- the applicability of limitation periods to offences constituting, in substance, acts of torture;
- the difference in treatment of landowners' associations;

¹² Ibid. [Czech Republic, Italy, Poland, Switzerland]

¹³ Ibid. [Poland, Serbia]

¹⁴ [Draft revised Agreement on the Accession of the European Union \(EU\) to the Convention for the Protection of Human Rights and Fundamental Freedoms](#), Article 1, paragraph 2.

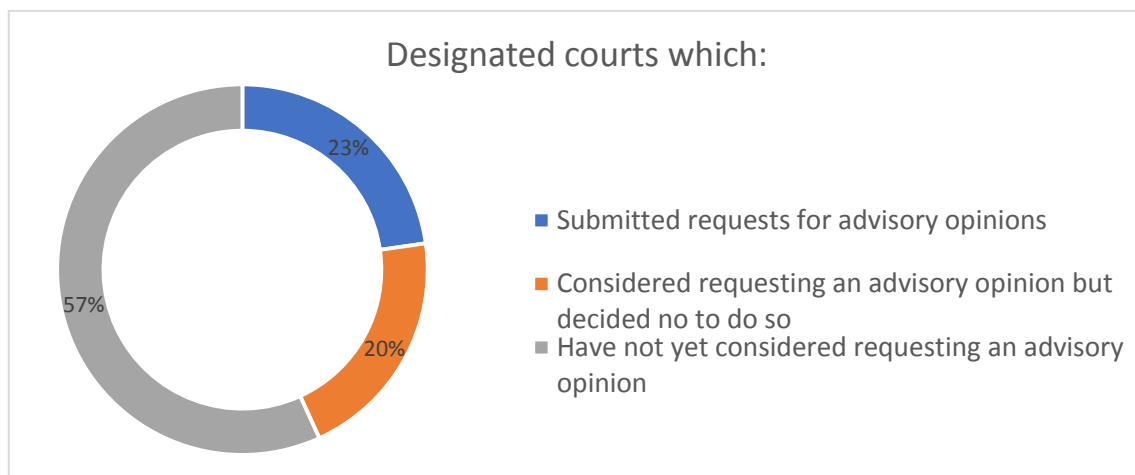
¹⁵ Listed in the chronological order in which the requests were submitted to the Court.

- the adult adoption procedure;
- the refusal to authorise the exercise of certain professions by persons close to or belonging to certain religious movements;
- the prosecutor’s decision to discontinue criminal proceedings;
- the confiscation of a sum of money from a civil servant in application of legislation aimed at ensuring integrity in the public office and preventing institutional corruption.

20. The content of the requests and of the relevant opinions or decisions of the Court as well as their significance in the national legal orders is analysed in sections V/2; V/3; VI/2 and VI/3 of this report. For ease of reference, a list containing full titles and references to advisory opinions and decisions on advisory opinion requests is included in the annex to the present report.¹⁶

21. Most of the nine requesting courts which replied to the CDDH questionnaire (see paragraph 4 above) did not elaborate on their reasons for having made requests. One court, however, explained that its decision containing the request for an advisory opinion from the Court provided the specific procedural and domestic jurisprudential context in which it was made, and its motivation related to an efficient dialogue amongst judges. Another court noted that its request was justified by the fact that in view of new legislation that had been introduced in the High Contracting Party to which it pertained, it could not find answers to its questions in the case law of the Court, despite its density on the subject matter to which its questions related.

22. The 44 replies of the 56 highest designated courts and tribunals to the CDDH’s questionnaire (see paragraph 4 above) showed that other highest courts designated by the High Contracting Parties to Protocol No. 16 have considered requesting advisory opinions but decided not to do so. A general break-down of the replies is presented in the table below.



23. Nine designated courts explained that they had considered requesting an opinion from the Court, primarily based on motions by the parties to the relevant cases, but had decided not to do so. These courts had considered that the cases before them did not raise questions of interpretation of the Convention, that the questions proposed to be included in a possible request for advisory opinion were not necessary to the resolution of cases pending before

¹⁶ [DH-SYSC-PRO\(2024\)02REV2](#), Compilation of replies to the CDDH questionnaire.

them, or that they had already resolved that there had been no violations of the Convention rights.¹⁷ Two other designated courts from one High Contracting Party noted that given the recent ratification of Protocol No.16 it had not been possible for them to request advisory opinions from the Court despite their willingness to do so.¹⁸

24. Three designated courts explained that the reasons for not requesting an advisory opinion from the Court were protected by a duty of confidentiality or were otherwise not public. Two designated courts of two High Contracting Parties had resolved two questions in pending cases by following the principles set out in advisory opinions delivered by the Court in response to requests from a designated court pertaining to a third High Contracting Party. Another court noted that it had not proceeded with the submission of a request for an advisory opinion given the non-binding nature of such opinion, specifying that a decision of the constitutional court dealt with the constitutional conformity of the legislative provisions challenged in the relevant case.¹⁹

25. Research carried out in respect of the designated courts in one High Contracting Party highlighted some other considerations for not requesting an advisory opinion from the Court. These included the lack of need for further explanation of the Convention, having regard to the available case law of the Court, the major role that EU law (and the preliminary ruling procedure at the Court of Justice of the EU) plays in fundamental rights cases, and practical considerations, such as the suspected long duration of the advisory procedure.²⁰

V – The Court’s response to advisory opinion requests

26. The Court has accepted seven requests for advisory opinions and issued advisory opinions on them.²¹ Three requests have been rejected.²² This section analyses procedural and substantive aspects of the Court’s response to advisory opinion requests.

1. *Procedural aspects*

1.1. *Rules of Court*

27. Rules on the functioning of the Court’s advisory jurisdiction were introduced in the Rules of Court at the time of the entry into force of Protocol No.16.²³ They set out requirements regarding the form and the content of a request for advisory opinion, the composition of the Panel of judges deciding on whether to accept the request, the proceedings following the Panel’s acceptance of a request and the costs of advisory proceedings and legal aid where a party to domestic proceedings is invited to intervene in the advisory opinion proceedings.²⁴ They largely reflect provisions of the Protocol itself, in particular its Articles 1 and 2.

¹⁷ Ibid., [Constitutional Court of Albania, State Council of Belgium, French Constitutional Council, French State Council, Hellenic Council of State, Constitutional Court of Lithuania, the Administrative Jurisdiction Division of the Council of State of the Netherlands, the High Court of Cassation and Justice of Romania, Supreme Administrative Court of the Slovak Republic]

¹⁸ Ibid., [Constitutional Court and Supreme Court of Justice of Republic of Moldova.]

¹⁹ Ibid., [Supreme Administrative Court of the Slovak Republic]

²⁰ Protocol 16 ECHR: Background, meaning, effects and experiences. [Research report commissioned by the Dutch Scientific Research and Documentation Centre \(WODC\)](#), at page 40.

²¹ Advisory Opinion [no. P16-2018-001](#); Advisory Opinion [no. P16-2019-001](#); Advisory Opinion [no. P16-2020-002](#); Advisory Opinion [no. P16-2021-001](#); Advisory Opinion [no. P16-2021-002](#); Advisory Opinion [no. P16-2022-001](#); Advisory Opinion [no. P16-2023-001](#).

²² Decision [no. P16-2020-001](#); Decision [no. P16-2023-002](#); Decision [no. P16-2024-001](#).

²³ Chapter X “Advisory opinions under Protocol No.16 to the Convention” was inserted in the Rules of Court on 19 September 2016.

²⁴ Rules 91-95 of [Rules of Court](#) (all references are to the edition of Rules issued on 28 March 2024).

28. A request for advisory opinion shall be reasoned and set out the subject matter of the domestic case, its relevant legal and factual background, the relevant domestic legal provisions and the relevant Convention issue, in particular the rights or freedoms at stake.²⁵ Designated courts are left with discretion to determine whether it is relevant to include a summary of the arguments of the parties on the question which is the subject matter of the request and whether or not it is possible and appropriate to include a statement of their own views on that question as well as any analysis they may have made of the question.²⁶ Two requesting courts have presented their views in their requests.²⁷

29. The panel is composed of the President of the Court, a judge designated as judge Rapporteur, two Presidents of Sections designated by rotation, the judge elected in respect of the High Contracting Party to which the requesting court pertains, or where appropriate, a judge appointed pursuant to Rule 29 and at least two substitute judges designated in rotation among the judges elected by the Sections to serve on the panel for a period of six months. The panel deals with requests for advisory opinions as a matter of priority. The panel gives reasons for its refusal of a request.²⁸ The panel's examination is focused on whether the request submitted to the Court concerns a question or questions of principle which relate to the rights and freedoms defined in the Convention and the Protocols thereto and whether it meets the procedural requirements established in Article 1, paragraphs 2 and 3, of the Protocol and the relevant Rules of Court.

30. A request accepted by the panel is considered by a Grand Chamber of 17 judges composed of the President and the Vice-Presidents of the Court, the Presidents of the Sections, the judge elected in respect of the High Contracting Party to which the requesting court pertains, judges and substitute judges to complete the Grand Chamber who are designated among the remaining judges by a drawing of lots by the President of the Court in the presence of the Registrar, and the judge designated as Judge Rapporteur in the panel.²⁹ Proceedings comprise a written procedure involving submissions of further information by the requesting court or written observations by the parties to the domestic proceedings when the President of the Grand Chamber decides to invite such submissions. Once the written procedure is closed, the Grand Chamber decides whether an oral hearing should be held or not.³⁰ No public hearings have been held to date in relation to any advisory opinion procedure.

31. According to Article 3 of Protocol No.16, the Council of Europe Commissioner for Human Rights and the High Contracting Party to which the requesting court pertains shall have the right to submit written comments and take part in any hearing. The Commissioner has not yet exercised this right. State Parties to which the requesting court pertains have exercised their right to submit written comments in six procedures.³¹ While the request for an advisory opinion is expected to be focused on the questions submitted to the Court and their link to the pending internal procedure, the observations of the High Contracting Parties can

²⁵ Rule 92, (2/1)(a)-(c) [Rules of Court](#). See also Article 1, paragraph 3, of the Protocol and corresponding paragraphs of the [Explanatory Report](#) to Protocol No. 16.

²⁶ Rule 92, (2/1)(d)-(e) [Rules of Court](#). See also the [Explanatory Report](#) to Protocol No. 16, paragraph 12.

²⁷ Supreme Court of Estonia. Supreme Court of Finland.

²⁸ Rule 93, [Rules of Court](#). See also Article 2, paragraph 1, of the Protocol and corresponding paragraphs of the [Explanatory Report](#) to Protocol No. 16

²⁹ Rule 94(1), [Rules of Court](#). See also Article 2, paragraph 3, of the Protocol and corresponding paragraphs of the [Explanatory Report](#) to Protocol No. 16

³⁰ Rule 94 (2)-(5), [Rules of Court](#). See also Article 3 of the Protocol and corresponding paragraphs of the [Explanatory Report](#) to Protocol No. 16.

³¹ Advisory Opinion [no. P16-2018-001](#),§6; Advisory Opinion [no. P16-2019-001](#),§7; Advisory Opinion [no. P16-2020-002](#), §5; Advisory Opinion [no. P16-2021-001](#),§6; Advisory Opinion [no. P16-2021-002](#),§5; Advisory Opinion [no. P16-2023-001](#), §§ 5.6.

be of a more broad and general nature and cover a wider set of implications of the submitted questions for the legislative, judicial or executive level.³²

32. Also, according to Article 3 of Protocol No.16, the President of the Court may, in the interest of the proper administration of justice, invite any other High Contracting Party or person also to submit written comments or take part in any hearing. According to the Explanatory Report, it is expected that the parties to the case in the context of which the advisory opinion had been requested would be invited to take part in the proceedings. The Court invited the parties to the domestic proceedings to submit written observations in six out of seven procedures in relation to requests that it had admitted for examination.³³ Generally speaking the parties submitted their observations.³⁴ Three High Contracting Parties which had not ratified Protocol No.16 submitted written observations in one advisory opinion procedure.³⁵ In three advisory opinion procedures, non-governmental organisations submitted written comments.³⁶ Copies of observations submitted by third parties are transmitted to the requesting court or tribunal, which have the opportunity to comment on those observations, without this affecting the close of the written procedure.³⁷

33. Advisory opinions are adopted by a majority vote of the Grand Chamber and delivered in both official languages of the Court, with both language versions being authentic. They mention the number of judges constituting the majority. Any judge may, if he or she so desires, attach to the advisory of the Court either a separate opinion, concurring with or dissenting from the advisory opinion or a bare statement of dissent.³⁸ Separate concurring opinions were attached to two of the seven advisory opinions issued to date.³⁹ No dissenting opinion has been issued in respect of any advisory opinion.

1.2. Guidelines

34. The Court's [Guidelines](#) on the implementation of the advisory opinion procedure introduced by Protocol No.16 were issued almost one year before its entry into force (18 September 2017). The Guidelines are a non-binding instrument intended to offer practical assistance on the initiation of and follow-up to the procedure set out in the Protocol to the designated courts. The Court routinely refers to the Guidelines in its decisions on advisory opinion requests.⁴⁰ One such reference relates to a point on which the Court had not pronounced itself before, which is that a "question of principle relating to the interpretation or application of the ... Convention" must be considered by the requesting court or tribunal to be necessary for its adjudication of the case.⁴¹

35. The Guidelines provide information with extracts and references to the relevant Rules of Court on all phases of the advisory opinion procedure starting from the submission of a request for an advisory opinion to the Court's decision on it or the delivery of its opinion. They

³² [DH-SYSC-PRO\(2024\)02REV2](#), Compilation of replies to the CDDH questionnaire; see reply from the Registry.

³³ Parties to domestic proceedings were invited in six advisory opinion procedures; see Advisory Opinion [no. P16-2018-001](#), §4; Advisory Opinion [no. P16-2019-001](#), §6; Advisory Opinion [no. P16-2021-001](#), §5; Advisory Opinion [no. P16-2021-002](#), §4; Advisory Opinion [no. P16-2022-001](#), §6; Advisory Opinion [no. P16-2023-001](#), §5.

³⁴ Appellants only in Advisory Opinion [no. P16-2018-001](#), §4; one appellant in Advisory Opinion [no. P16-2022-001](#), §6.

³⁵ Advisory Opinion [no. P16-2018-001](#), §6.

³⁶ Ibid. See also Advisory Opinion [no. P16-2019-001](#), §7; Advisory Opinion [no. P16-2021-001](#), §6.

³⁷ Rule 94 (6), [Rules of Court](#).

³⁸ Rule 94 (7)-(8), [Rules of Court](#). See also Article 4, paragraph 2, of the Protocol and corresponding paragraphs of the [Explanatory Report](#) to Protocol No. 16.

³⁹ Advisory Opinion [no. P16-2019-001](#) and Advisory Opinion [no. P16-2021-001](#).

⁴⁰ Decision [no. P16-2020-001](#), §17. Decision [no. P16-2023-002](#), §18.

⁴¹ Decision [no. P16-2020-001](#), §17; with a reference to paragraph 6.2 of the Guidelines.

set out requirements regarding the form, content and the language of an advisory opinion request. On the latter aspect, the Guidelines state that a complete request may be lodged in the language of the domestic proceedings where that is an official language of the High Contracting Party to which the requesting court or tribunal pertains. However, an English or French translation of the request must be filed with the Court within the time-limit specified by it.⁴² It must be recalled that the Explanatory Report to Protocol No.16 expresses an expectation that “in most cases advisory opinions will have to be admitted to proceedings that take place in an official language of the High Contracting Party concerned that is neither English nor French, the Court’s official languages.”⁴³ The Court has been provided with translations of advisory opinion requests in two cases; in both cases, the translations were provided by the requesting courts within a short space of time.⁴⁴

36. The Guidelines also provide practical guidance and recommendations based on the Court’s judicial practice on various aspects of the interaction between the Court and designated courts in the framework of the advisory procedure. These include, for example, information regarding the discretion afforded to a designated court to request an advisory opinion based on its own view on the case before it;⁴⁵ the limited scope of the advisory jurisdiction of the Court;⁴⁶ the expected level of precision of a request for an advisory opinion;⁴⁷ and the requirement to inform the Court of any procedural step that may affect the request and, in particular, if any new parties are admitted to the domestic proceedings.⁴⁸

37. The Guidelines recommend that a request be lodged with the Court only after, in so far as relevant, the facts and legal issues, including issues of Convention law, have been identified.⁴⁹ The Court encourages requesting courts include in their requests a summary of the arguments of the parties on the question which is the subject matter of the request and their views on that question.⁵⁰ The requesting court should immediately indicate, giving reasons, whether there are any special circumstances which would require an urgent examination of the request and a speedy ruling by the Court. In these cases, the Court notes the desirability that the requesting court consults the parties to the proceedings before it when indicating such urgency and to attach their views to its reasons for the request.⁵¹

38. According to the Guidelines, an advisory opinion may be delivered in writing or at a public hearing by the President of the Grand Chamber.⁵² The last two opinions were delivered

⁴² Guidelines, paragraph 18.

⁴³ [Explanatory Report](#) to Protocol No. 16, §23.

⁴⁴ Decision [no. P16-2023-002](#), §1; translation provided by the requesting court in less than two weeks. The request was considered to have been lodged on a later date when the requesting court submitted certain supplementary information requested by the Court. Advisory Opinion [no. P16-2020-002](#), §2; [translation provided by the requesting court at the Court’s request in less than two months. The request for advisory opinion was considered to have been lodged on that date.](#)

⁴⁵ It is for the designated court to conclude that the case before it, in its view, raises a novel point of Convention law, or the facts of the case do not lend themselves to a straightforward application of the Court’s case-law, or that there appears to be an inconsistency in the case-law; Guidelines, paragraph 5.

⁴⁶ The Court has no jurisdiction either to assess, where relevant, the facts of a case or to evaluate the merits of the parties’ views on the interpretation of domestic law in the light of Convention law or to rule on the outcome of the proceedings; Guidelines, paragraph 6.2.

⁴⁷ Guidelines, paragraph 6.3.

⁴⁸ *Ibid.*, paragraph 22.

⁴⁹ *Ibid.*, paragraph 10.

⁵⁰ *Ibid.*, paragraph 13.

⁵¹ *Ibid.*, paragraph 30.

⁵² *Ibid.*, paragraph 32.

at a public hearing, which further underlines the importance given by the Court to the advisory procedure.⁵³

2. Admissibility

39. The panel evaluates if the conditions of Article 1 of Protocol No.16 are fulfilled when deciding on whether to accept a request for an advisory opinion; in case of refusal, it provides reasons (Article 2). It verifies that the requesting court is one of the highest designated courts under Article 10 of Protocol No.16 and ascertains that the request originates in pending domestic proceedings currently being heard by that court,⁵⁴ that it is reasoned and provides the relevant legal and factual background of the pending case, and that it raises questions of principle relating to the interpretation or application of the Convention.⁵⁵ The panel's decision to accept a request for an advisory opinion does not preclude the Grand Chamber from conducting its own assessment of each of these conditions.⁵⁶

40. Despite the limited number of refusal decisions – three at the time of writing this report – the Court has through their reasoning provided some guidance on the application of Article 1 conditions. Guidance can also be found in some of the advisory opinions delivered.

2.1. Pending domestic proceedings

41. The Court inferred from Article 1, paragraphs 1 and 2, of the Protocol, that its opinions must be confined to points that are directly connected to the proceedings pending at domestic level.⁵⁷ In a case where the Court found that this requirement was not fulfilled for certain questions asked by the requesting court, it concluded that it could not answer these questions.⁵⁸ For the Court to be able to assess whether the questions raised are directly connected to pending domestic proceedings, a sufficient level of precision of requests is necessary. Where the questions asked are broad and of a general nature, the Court may also choose to reformulate them having regard to the specific factual and legal circumstances in issue in the domestic proceedings,⁵⁹ or to combine them.⁶⁰ (See also section V/3.2. below on the Court's reformulation of questions raised in advisory opinion requests.)

42. The requirements of Article 1 paragraphs 1 and 2 do not specify at what stage of domestic proceedings a request for an advisory opinion should be submitted. The Court has accepted a request submitted by the requesting court in the context of the constitutionality review of a law applicable to a criminal case whose relevant facts had not yet been decided by the first instance court and which was at an early stage of proceedings. The Court proceeded based on the facts as provided by the requesting court, and gave in that light guidance to decide on the constitutionality of the law in light of the requirements of the Convention Article raised in the request. It would then be for the first instance court to apply the answers given by the requesting court to the facts of the case.⁶¹

43. The Court has also accepted a request submitted to it at a stage of domestic proceedings at which the members of the bench hearing the case had not consulted certain

⁵³ [DH-SYSC-PRO\(2024\)02REV2](#), Compilation of replies to the CDDH questionnaire, see the reply by the Registry, para.55, page 102..

⁵⁴ Decision [no. P16-2020-001](#), §§15, 16.

⁵⁵ Decision [no. P16-2023-002](#), §16

⁵⁶ Advisory Opinion [no. P16-2019-001](#), § 47.

⁵⁷ Advisory Opinion [no. P16-2018-001](#), §26. The Court rejected the points regarding the interpretation of Articles 2 and 3 of the Convention in its Decision [no. P16-2020-001](#), § 8.

⁵⁸ Advisory Opinion [no. P16-2019-001](#), §§52-56

⁵⁹ Ibid., §§44-45; §§52-56. Advisory opinion [no. P16-2018-001](#), §§27-33.

⁶⁰ Advisory Opinion [no. P16-2019-001](#), §45.

⁶¹ Ibid., §§48,49.

classified documents of the file. The Court observed that it would base its opinion as closely as possible on the legal and factual background to the request before it. In this opinion, the Court referred to the Guidelines' principle that it is for the requesting court to assess the most appropriate stage of domestic proceedings at which the request for an advisory opinion should be made, so that the request contains all the necessary information to enable the Court to provide the interpretative guidance sought as regards the application of Convention law to those proceedings.⁶²

2.2. Questions of principle

44. Judicial practice has shed some light on the Court's interpretation of what is meant by "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto". The clarification of this issue through judicial practice had been one of the States Parties' expectations when Protocol No.16 was elaborated.⁶³

45. Questions of principle must be considered by the requesting court as necessary for adjudicating the case pending before it.⁶⁴ Questions of principle are those which, on account of their nature, degree of novelty and/or complexity or otherwise, concern an issue on which the requesting court would need the Court's guidance by way of an advisory opinion to be able to ensure respect for Convention rights when determining the case before it.⁶⁵ According to the Guidelines, a request may be referred to the Court when the requesting court considers that it raises a novel point of Convention law, or 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.⁶⁶ This provision of the Guidelines has not been cited in any of the advisory opinions or decisions on requests for advisory opinions delivered so far.

46. Requests for advisory opinions which have raised questions that do not call for any further elaboration of principles developed in the Court's well-established case law have been considered by the Court as inadmissible. This was the case in respect of a question concerning the applicability of Article 4 of Protocol No. 7 to the Convention to a decision by a public prosecutor to discontinue criminal proceedings. While providing an overview of the principles of its well-established case law which were pertinent to the question raised,⁶⁷ the panel decided that the question raised was not considered as a question of principle within the meaning of Article 1, paragraph, 1 of the Protocol and that it did not warrant examination by the Court's Grand Chamber.⁶⁸

47. A similar approach was taken in relation to the questions raised in another request for an advisory opinion. The first question was whether a procedure of assets' evaluation required by domestic law could be qualified as a criminal procedure in the meaning of Article 6 of the Convention. The panel considered that the existing case law contains a number of useful elements which would permit the requesting court to resolve the dispute in view of the pertinent provisions of the Convention and in line with the principle of subsidiarity.⁶⁹ It provided an overview of the criteria emerging from its well-established case law which circumscribe the

⁶² Advisory Opinion [no. P16-2023-001](#), 14 December 2023, §§ 63,65; Decision [no. P16-2024-001](#), §28; Guidelines, paragraph 6.2.

⁶³ [Explanatory Report to Protocol No. 16](#), § 15.

⁶⁴ Decision [no. P16-2020-001](#), § 17. Decision [no. P16-2023-002](#), § 18.

⁶⁵ Decision [no. P16-2020-001](#), § 23. Decision [no. P16-2023-002](#), §20. Decision [no. P16-2024-001](#), §§28-29.

⁶⁶ Guidelines, paragraph 6.2.

⁶⁷ Decision [no. P16-2023-002](#), §§ 22-29.

⁶⁸ *Ibid.*, §§ 30, 31.

⁶⁹ Decision [no. P16-2024-001](#), §45.

applicability of the relevant provision of the Convention.⁷⁰ The second question was whether the assets' evaluation procedure in question constitutes a violation of Article 1 of Protocol No.1 to the Convention. The panel provided a brief overview of the requirements of this provision of the Convention according to its well-established case law, notably the principle of proportionality and the requirement of procedural equity.⁷¹

2.3. *Reasons for requests*

48. As regards the requirement of Article 1, paragraph 3, of Protocol No.16 that the requesting court shall give reasons for its request and shall provide the relevant legal and factual background of the pending case, none of the Court's opinions or panels' decisions has found that such requirements had not been fulfilled. The opinions and decisions delivered by the Court in response to the relevant requests do not summarise the reasons provided by the requesting courts.

2.4. *Other elements*

49. The Court has consistently held in its advisory opinions that its task is not to reply to all the grounds and arguments submitted to it or to set out in detail the basis for its reply.⁷² In one opinion, the Court held that it did not consider appropriate to give an answer to the first question raised by the requesting court. The question was raised in the context of a case concerning a former member of parliament who had been removed in impeachment proceedings being banned from standing for election to the parliament.⁷³ The legal ban in question was a direct consequence of the domestic regulations, which the Court had previously found to be in breach of Article 3 of Protocol No. 1 to the Convention on grounds of amounting to a disproportionate sanction. The Court interpreted the question raised as asking whether the requesting court should take into account the difficulties encountered by the domestic authorities in executing the Court's earlier judgment. In view of the ongoing constitutional amendment process, which took into account its previous judgment, and the inherent limitations of the advisory opinion procedure when it comes to issues relating to the execution of the Court's judgments, the Court did not consider it appropriate to answer the question raised by the requesting court.⁷⁴

50. It is further noted that, according to the draft revised Agreement on the Accession of the European Union to the Convention, a court or tribunal of a member State of the EU that has ratified Protocol No. 16 to the Convention, shall not be considered as a highest court or tribunal for the purposes of Article 1, paragraph 1, of the Protocol. This in the event that a case pending before it, encounters a question of principle relating to the interpretation or application of the rights and freedoms defined in the Convention, and if the question falls within the field of application or interpretation of EU law.

3. **Substantive and methodological aspects**

3.1. *The scope of the advisory jurisdiction*

51. The Court has consistently defined the scope of its advisory jurisdiction with reference to the aims of the advisory opinion procedure, notably to enhance the interaction between the

⁷⁰ Ibid., §§31-38

⁷¹ Ibid., §§41-44

⁷² Advisory Opinion [no. P16-2018-001](#), §34; Advisory Opinion [no. P16-2022-001](#), §46. Advisory Opinion [no. P16-2020-002](#), §67.

⁷³ Advisory Opinion, [no. P16-2020-002](#), §97-100.

⁷⁴ Ibid., §100.

Court and the national authorities and thereby reinforce the implementation of the Convention in accordance with the principle of subsidiarity. The aim of the procedure is not to transfer the dispute to the Court or to rule in adversarial proceedings on contentious applications by means of a binding judgment, but rather to give the requesting court, within as short a time frame as possible, guidance on a Convention issue enabling it to ensure respect for Convention rights when determining the case before it. The Court has no jurisdiction either to assess the facts of a case or to evaluate the merits of the parties' views on the interpretation of domestic law in the light of Convention law, or to rule on the outcome of the proceedings. Its role is limited to furnishing an opinion in relation to the questions properly submitted to it. It is for the requesting court or tribunal to resolve the issues raised by the case and to draw, as appropriate, the conclusions which flow from the opinion delivered by the Court for the provisions of national law invoked in the case and for the outcome of the case.⁷⁵ In one advisory opinion the Court has, nonetheless, elaborated its views on certain aspects relating to the facts and the views of parties in domestic proceedings while acknowledging that the requesting court to resolve the issues raised by the case.⁷⁶

3.2. Reformulation of questions

52. The Court has provided its opinions on the questions submitted to it as they have been formulated by the requesting courts. In certain cases, however, the Court has reformulated the questions.

53. In one advisory opinion, the Court reformulated the first question of the requesting court in a manner which narrowed down the number of pertinent situations and subjects whose rights would require examination. The request 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.⁷⁷ The Court took into account the specific factual and legal circumstances in the domestic proceedings and excluded from its examination the right to respect for family life of the child or the intended parents and the latter's right to respect for their private life.⁷⁸ It then proceeded with the examination of the question whether the right to respect for private life, within the meaning of Article 8 of the Convention, of the child born through the gestational surrogacy arrangement also requires that domestic law provide a possibility for recognition of a legal parent-child relationship with the intended mother.⁷⁹ The Court determined two important issues for the examination of this question, namely the child's best interest and the scope of the margin of appreciation available to the High Contracting Parties.⁸⁰ The same issues guided the Court's examination of the second question of the requesting court, concerning the means for the recognition of the

⁷⁵ Advisory Opinion [no. P16-2022-001](#), §44-46. Advisory Opinion [no. P16-2023-001](#) § 61, with references to previous advisory opinions.

⁷⁶ Advisory Opinion [no. P16-2022-001](#), §66.

⁷⁷ Advisory Opinion [no. P16-2018-001](#), § 9. The question arose in domestic proceedings concerning a refusal to enter in the civil register the details of the birth certificate of a child born abroad through a gestational surrogacy arrangement who was conceived using the gametes of the intended father and a third-party donor, in so far as the certificate designates the 'intended mother' as the 'legal mother', while accepting registration in so far as the certificate designates the 'intended father' who is the child's biological father. The requesting court asked in its first question, whether such refusal exceeded the margin of appreciation under Article 8 of the Convention and whether a distinction should be drawn according to whether or not the child was conceived using the eggs of the 'intended mother'. In its second question, it asked if, in the event that the answer to either of these two questions were positive, the possibility for the intended mother to adopt the child of her spouse, the biological father, would ensure compliance with the requirements of Article 8 of the Convention.

⁷⁸ *Ibid.*, §§27-30.

⁷⁹ *Ibid.*, §32.

⁸⁰ *Ibid.*, §37.

relationship, which it had reformulated by way of including additional means to those mentioned by the requesting court.⁸¹

54. In another advisory opinion, the Court reformulated one of the questions submitted by the requesting court, having noted its broad and very general nature and probably with a view to determining its substance and being able to provide guidance based on Court's case law.⁸² In the same opinion, the Court did not answer two questions raised by the requesting court which it had found not to be directly linked to the pending domestic proceedings and impossible to reformulate so as to allow it to confine its advisory opinion to points that are directly connected to those proceedings.⁸³

55. It appears that the reformulation of questions raised by the requesting courts in these opinions has enabled the Court to focus its examination, with a view to providing guidance on the interpretation of the Convention based on its case law.

3.3. Convention criteria for the domestic examination of cases

56. The Court has progressively developed its methodological approach to delivering opinions on the questions raised by the requesting courts. In its earlier advisory opinions, the Court provided summaries of principles emerging from its case law that it considered as relevant to resolving the question submitted by the requesting court. In the first advisory opinion, for example, the Court identified two key factors which, in its view, carry weight in providing an answer to the reformulated questions (see also paragraph 53 above),⁸⁴ and then proceeded with an overview of relevant principles of the Court's case law on those factors.⁸⁵

57. A similar approach was taken in response to another request for an advisory opinion asking about the criteria to be applied when assessing whether a ban preventing a former member of parliament who had been removed in impeachment proceedings from standing for election to the parliament had become disproportionate for the purposes of Article 3 of Protocol No. 1 to the Convention.⁸⁶ The legal ban in question was a direct consequence of domestic regulations which the Court had previously found to be in breach of this provision of the Convention on grounds of amounting to a disproportionate sanction.⁸⁷ The Court first summarised the case law relating to the issues involved in the case at hand in the light of

⁸¹ Ibid., §§ 33; 49-59. While the requesting court's question focused on adoption, the Court examined the question whether, if the answer to the first (reformulated) question is affirmative, the child's right to respect for his or her private life within the meaning of Article 8 of the Convention requires such recognition to take the form of entry in the civil register of the details of the birth certificate legally established abroad, or whether it might allow other means to be used, such as adoption of the child by the intended mother.

⁸² Advisory Opinion [no. P16-2019-001](#), §§ 41-45, 59, 60-70. One of the questions raised by the requesting court asked whether criminal law that defines a crime and contains a reference to certain legal provisions of a legal act with supreme legal force and higher level of abstraction meets the requirements of certainty, accessibility, foreseeability and stability. Having qualified this legislative technique as "blanked reference" or "legislation by reference", the Court addressed the question whether it was compatible with the requirements of legal certainty and foreseeability under Article 7 of the Convention. The Court then proceeded to an overview of the general principles developed in its case law as regards the requirements of certainty and foreseeability under Article 7 as well as its case-law which had specifically dealt with the question whether criminal laws referencing a provision of the Constitution and the referenced constitutional provision read together were sufficiently clear and foreseeable in their application.

⁸³ Ibid. §§ 52-56.

⁸⁴ Advisory Opinion [no. P16-2018-001](#), § 37.

⁸⁵ Ibid., §§ 37-47; 48-59.

⁸⁶ Advisory Opinion [no. P16-2020-002](#), § 68.

⁸⁷ The judgment in question is *Paksas v. Lithuania* [GC], [no. 34932/04](#), 6 January 2011.

which the requirements of its judgment should be understood.⁸⁸ It then elaborated on the relevance of the principles of this case law for the advisory opinion in question.⁸⁹

58. In some of its more recent advisory opinions, the Court has asserted a more active role in providing guidance to the requesting courts by “indicating, in a general manner, the criteria under the Convention that is considers relevant to enable the requesting court to examine the dispute before it.”⁹⁰

59. One of the requests concerned a difference in treatment authorised by certain provisions of the Environment Code between landowners’ associations “having a recognised existence on the date of the creation of an approved municipal hunters’ association” and landowners’ associations set up after that date. The request asked, in essence, what criteria should be applied to assess whether this difference was compatible with Article 14 of the Convention taken in conjunction with Article 1 of Protocol No.1.⁹¹ The Court provided a framework of criteria based on its case law aimed at assisting the requesting court to examine the questions before it. The Court set out a number of elements relevant to assessing whether the difference in treatment in question falls within the scope of the invoked provisions of the Convention,⁹² whether it concerns persons in analogous or relatively similar situations,⁹³ and whether it is justified.⁹⁴

60. With particular regard to the question whether the difference in treatment pursued one or more legitimate aims, the Court set out the elements stemming from its well-established case law that were relevant in this respect, notably the notion of “general interest” within the meaning of Article 1 of Protocol No.1.⁹⁵ In addition, the Court elaborated on the criteria that it considered relevant to the examination by the requesting court whether the law satisfied the requirements of lawfulness and whether the means employed by the legislature were proportionate to the general-interest aims pursued by the law.⁹⁶

61. In another request for an advisory opinion, the domestic court asked whether the fact that a person belongs to a religious movement that is considered by the competent administrative authority to represent a threat to the country constitutes a sufficient ground, in the light of Article 9, paragraph 2, of the Convention, for refusing to allow that person to work

⁸⁸ Advisory Opinion [no. P16-2020-002](#), §§73-89.

⁸⁹ *Ibid.*, §§ 90-97

⁹⁰ Advisory Opinion [no. P16-2023-001](#), 14 December 2023, §65. See also Advisory Opinion [no. P16-2021-002](#), §56.

⁹¹ Advisory Opinion [no. P16-2021-002](#), §§9,10, 56. The question read as follows: “[w]hat are the relevant criteria for assessing whether a legally established difference in treatment, as described in point 13 of the present decision, pursues, having regard to the prohibitions set out in Article 14 of the Convention taken together with Article 1 of the First Additional Protocol, a public-interest aim based on objective and rational criteria, related to the aims of the law introducing it, which, in the present case, is intended to prevent the unregulated exercise of hunting and promote rational use of game stocks, in particular by encouraging the practice of hunting on grounds with a sufficiently stable and extensive area?” Point 13 of the decision of the *Conseil d’État* reads as follows :“It follows from Article L. 422-18 of the Environment Code as worded subsequent to the Law of 24 July 2019 that, in addition to landowners or holders of hunting rights over land in a single block of land attaining or greater than the minimum surface area resulting from Article L. 422-13 of this Code, only those landowners’ associations which had a recognised existence prior to the date of creation of the ACCA are entitled to withdraw from it, provided that they pool plots of land with a total area meeting the condition laid down in Article L. 422-13; comparable associations created after that date are deprived of that right, even where they bring together plots of land with a total area meeting the condition laid down in Article L. 422-13.”

⁹² *Ibid.*, §§59-62.

⁹³ *Ibid.*, §§63-71.

⁹⁴ *Ibid.*, §§72-111

⁹⁵ *Ibid.*, §§ 78-82

⁹⁶ *Ibid.*, §§84-111. This included , *inter alia*, the nature of the criterion of differentiation introduced by the law and its impact on the national authorities’ margin of appreciation; the choice of means employed to achieve the aim(s) pursued; the appropriateness of the means employed in relation to the aim(s) sought to be realised; and the impact of the means employed.

as a security guard or officer. While observing that it fell to the requesting court to assess whether the interference with Article 9 rights was compatible with the requirements of this provision of the Convention, namely that it be prescribed by law and necessary in a democratic society to achieve the relevant aim, the Court provided an overview of the criteria derived from the Convention on the basis of which such assessment should be done.⁹⁷

62. With particular regard to the assessment of the pressing social need of the preventive measure in question, the Court provided examples, based on its case law, of how national authorities may legitimately have recourse to preventive measures to defend against a threat to the values of a democratic society.⁹⁸ The Court offered a framework of elements for analysing the nature, the reality and scale and the immediacy of the risk which the preventive action was aimed at preventing.⁹⁹ With regard the proportionality of such measure, the Court highlighted a number of considerations relevant to assessing whether the interest pursued by the preventive measure outweighs the consequences for the person concerned and whether adequate procedural safeguards have been afforded to that person.¹⁰⁰

4. Time frames

63. Four advisory opinions were delivered by the Court within periods of six to 10 months after the requests for advisory opinions were received.¹⁰¹ Three advisory opinions were delivered respectively in periods of one year and two months and one year and seven months.¹⁰² Three rejection decisions were delivered within periods of two to four months.¹⁰³

64. The Court has not held public hearings in advisory opinion proceedings so far. As far as possible, the Grand Chamber has sought to adopt the draft submitted by the judge-rapporteur in a single round of deliberations. This has also helped in the rapid treatment of advisory opinion requests.¹⁰⁴

5. Resources

65. The Registry has stated that dealing with a request for an advisory opinion takes up a considerable amount of the Court's time and resources. The arrival of a large number of requests for advisory opinions could have a major impact on the work of the Grand Chamber, as well as on the time required for this judicial formation to deliver decisions and judgments in the contentious cases referred to it. The entry into force of Protocol No. 16 was not accompanied by any increase in the number of legal staff able to deal with this type of request at Grand Chamber level, although the Court has obtained new legal posts for the Registry following a budget increase after the 4th Summit of Heads of State and Government which took place in Reykjavik on 16 and 17 May 2023.¹⁰⁵

VI – The impact of Protocol No.16

1. Final determination of pending cases at the domestic level

⁹⁷ Advisory Opinion [no. P16-2023-001](#), 14 December 2023, §§ 75-76, 118.

⁹⁸ *Ibid.*, §§84-92.

⁹⁹ *Ibid.*, §§94-111.

¹⁰⁰ *Ibid.*, §§113-118.

¹⁰¹ Advisory Opinions [no. P16-2018-001](#), [no. P16-2019-001](#), [no. P16-2022-001](#), [no. P16-2023-001](#).

¹⁰² Advisory Opinions [no. P16-2020-001](#), [no. P16-2021-002](#), [no. P16-2020-002](#).

¹⁰³ Decision [no. P16-2020-001](#); Decision [no. P16-2023-002](#); Decision [no. P16-2024-001](#).

¹⁰⁴ [DH-SYSC-PRO\(2024\)02REV2](#), Compilation of replies to the CDDH questionnaire, see the reply by the Registry.

¹⁰⁵ *Ibid.*

66. All of the highest courts which had ruled on a case in which the Court had rendered an advisory opinion replied to the CDDH questionnaire that the Court's opinions had been relevant or contributed to the final determination of the case. Two courts noted that the opinions were used as a source of information or were otherwise relied upon in their own argumentation of their judgments.¹⁰⁶ One court noted that it had applied the criteria indicated in the advisory opinion to the circumstances of the dispute, ultimately ruling that the rights of the applicant were not breached.¹⁰⁷

67. The analytical framework/method provided by the Court in its advisory opinion had been considered as extremely useful by another requesting court and had been followed in delivering its judgment.¹⁰⁸ One requesting court observed that the Court's advisory opinion delivered on its request was very useful in shaping its judgment, which in turn introduced a new jurisprudential principle into domestic law. The advisory opinion had reinforced the authority of the requesting court's judgment in the pending case by confirming its compliance with the Convention which was important in the context of domestic doctrinal debates.¹⁰⁹

68. None of the requesting courts which responded to the corresponding question in the CDDH questionnaire explained that there had been an unjustified delay in the delivery of a judgment in domestic proceedings in connection with which the request had been submitted. One requesting court specified that there had been a delay but that it was nonetheless considered as justified in view of the importance of the question raised and the scope of the reply of the Court, which went beyond that of the underlying domestic proceedings.¹¹⁰ According to another requesting court, its request for an advisory procedure had prevented it to examine the appeal pending before it, which concerned a decision of the Central Electoral Commission, within the time frame of 48 hours prescribed by domestic law. The requesting Court noted that it was ready to apply compensatory judicial remedies *ex officio* as a means to redress the consequences of a violation of the Convention if, after receiving the advisory opinion, it was concluded that the candidate was precluded from participating in the elections without due reason.¹¹¹

69. The Court has not yet received an individual application resulting from any of the domestic proceedings in which it has given an advisory opinion.

2. Reinforcing the implementation of the Convention at the national level

70. Requests for advisory opinions have been submitted in relation to a variety of issues (see paragraph 19 above). The significance of these issues in the national legal orders of the countries to which the courts requesting the advisory opinions pertained, in particular their relevance for a larger number of cases than the pending cases in which they were raised, is difficult to gauge with the information at hand. However, it does not appear that any of the requests has related to systemic issues in the relevant jurisdictions. Indications of the impact of advisory opinions beyond the cases in the context of which the opinions were requested

¹⁰⁶ [DH-SYSC-PRO\(2024\)02REV2](#), Compilation of replies to the CDDH questionnaire [Court of Cassation of Armenia; Supreme Court of Finland.]

¹⁰⁷ *Ibid.*, [Supreme Administrative Court of Lithuania].

¹⁰⁸ *Ibid.*, [French Conseil d'État].

¹⁰⁹ *Ibid.*, [French Court of Cassation]. The principle concerns the recognition of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother and is referred to as follows: "the existence of a surrogacy arrangement could not, on its own, preclude either the transcription on the birth certificate drawn up by the authorities of the foreign State, in respect of the child's biological father, or the recognition of the parent-child relationship in respect of the intended mother mentioned in the foreign certificate, which had to take place at the latest when that relationship between the child and the intended mother materialised."

¹¹⁰ *Ibid.*, [French Conseil d'État].

¹¹¹ *Ibid.*, [Supreme administrative Court of Lithuania in respect of the advisory opinion [no. P16-2020-002](#)].

can also be found in the replies of the requesting courts to the CDDH questionnaire. The Court's case law mentioning how its advisory opinions have been integrated in the national courts' jurisprudence also suggests such an impact, even if, for the time being, this is limited to only one case.¹¹²

71. One requesting court has noted that, following the advisory opinion of the Court, it declared unconstitutional certain legal provisions mentioned in its request.¹¹³ Another requesting court considered that the advisory opinion it had received may serve as precedent in subsequent cases, given that in its judgment it had adopted the Court's interpretation of the relevant Convention provision.¹¹⁴

72. In one case, the advisory opinion has served as a basis for a change of the jurisprudence of the requesting court.¹¹⁵ That advisory opinion has been referred to in other cases examined by national courts and the principles defined in the framework of the advisory opinion procedure were relied upon by the legislator in its subsequent legislative intervention on the subject matter.¹¹⁶

73. The Court's advisory opinions have also had positive effects on the execution of previous judgments of the Court. Two of the 10 requests for advisory opinions arose in domestic proceedings that related in different ways to the execution of such judgments.¹¹⁷ One request related to a constitutional amendment process initiated following the delivery of a judgment of the Court finding a violation of the Convention.¹¹⁸ In the context of the supervision of the execution of this judgment by the Committee of Ministers, the respondent government declared its intention to wait for the Court's advisory opinion before proceeding with further execution steps.¹¹⁹ Soon after the delivery of the advisory opinion, the constitutional amendments were completed, which led to the closing of supervision of the earlier Court judgment.¹²⁰ The requesting court subsequently resolved the case before it.¹²¹ The other request for an advisory opinion was submitted in the context of a criminal case re-opened in national proceedings in the course of the Committee of Ministers' supervision of the execution of the Court's judgment.¹²² The Committee of Ministers was satisfied with the individual measures taken in the execution of this case, including the decision rendered by the requesting court after it received the advisory opinion from the Court.¹²³

74. In some cases, advisory opinions have been quoted by the highest courts of member States which have not yet ratified Protocol No.16. The Danish Supreme Court applied the advisory opinion on the legal recognition of a legal parent-child relationship for a child born through gestational surrogacy abroad to a case before it.¹²⁴ The High Court of the United

¹¹² [D. v. France](#), No. 11288/18, 16 July 2020, §§21-23.

¹¹³ [DH-SYSC-PRO\(2024\)02REV2](#), Compilation of replies to the CDDH questionnaire, [Constitutional Court of Armenia in respect of the advisory opinion [no. P16-2019-001](#).]

¹¹⁴ *Ibid.*, [Supreme Administrative Court of Lithuania in respect of the advisory opinion [no. P16-2020-002](#)].

¹¹⁵ [D. v. France](#), No. 11288/18, 16 July 2020, §§21-23.

¹¹⁶ [DH-SYSC-PRO\(2024\)02REV2](#), Compilation of replies to the CDDH questionnaire; [French Court of Cassation in respect of the advisory opinion [no. P16-2018-001](#).]

¹¹⁷ A third request was raised in the context of the re-examination of an appeal following a finding of violation by the Court; see Advisory Opinion [no. P16-2018-001](#), §§10-17. At the time of the examination of the request, the Committee of Ministers had decided to close the supervision of the execution of the Court's relevant judgment; see [CM/ResDH\(2017\)286](#).

¹¹⁸ Advisory Opinion [no. P16-2020-002](#), §63.

¹¹⁹ [CM/Del/Dec\(2021\)1406/H46-18](#)

¹²⁰ [CM/Del/Dec\(2022\)1443/H46-15](#)

¹²¹ [DH-SYSC-PRO\(2024\)02REV2](#), Compilation of replies to the CDDH questionnaire.

¹²² Advisory Opinion [no. P16-2021-001](#), § 56.

¹²³ [CM/Del/Dec\(2024\)1492/H46-1](#)

¹²⁴ *K.K. and others v. Denmark*, [no. 25212/21](#), 6 December 2022, §§15-17. The Supreme Court concluded that the advisory opinion also applied to surrogacy where remuneration had been paid in the sense of the Adoption Act.

Kingdom has examined a case before in the light of certain principles set out in the same advisory opinion, notably the State Parties' choice of the means for ensuring the legal recognition of the relationship and the need for an effective mechanism enabling such recognition.¹²⁵ The Swiss Federal Court referred to the same advisory opinion in several judgments.¹²⁶ The Italian Court of Cassation and Constitutional Court have also relied on this advisory opinion.¹²⁷ The Swedish Supreme Court cited the same advisory opinion, noting that it could be considered to have "a significant value as a legal source in conjunction with the interpretation" of the Convention.¹²⁸

3. The influence of advisory opinions on the Court's case law

75. Advisory opinions are part of the Court's case law, alongside its judgments and decisions; the interpretation of the Convention and the Protocols thereto contained in such advisory opinions is analogous in effect to the interpretative elements set out by the Court in its judgments and decisions.¹²⁹ This *res interpretata* effect of advisory opinions has been confirmed in various judgments and decisions of the Court issued in contentious proceedings.

76. Six of seven advisory opinions delivered by the Court have been referenced in various rulings in cases against both High Contracting Parties and non-High Contracting Parties to Protocol No.16. These include the opinions on the legal recognition of the parent-child relationship for a child born through gestational surrogacy abroad;¹³⁰ on the use of the "legislation by reference" technique in criminal law;¹³¹ on the applicability of limitation periods to offences constituting, in substance, acts of torture;¹³² on the difference in treatment of landowners' associations;¹³³ on a ban on standing for parliamentary election following an impeachment proceeding;¹³⁴ and on the refusal to authorise the exercise of certain professions by persons close to or belonging to certain religious movements.¹³⁵ The advisory opinions are referenced in the same way as judgments or decisions of the Court. The Court's interpretation

Given the latter's absolute ban on granting adoption if anybody having to consent to the adoption had been paid, the Supreme Court concluded that the Government need to reconsider the relevant part of the Adoption Act. Until a change to that effect, the authorities should in all cases carry out an individual assessment whether refusing an application for adoption would be contrary to Article 8 of the Convention.

¹²⁵ H. v The United Kingdom ((dec), [no. 32185/20](#), 31 May 2022, §17.

¹²⁶ Judgments [148 III 384](#) of 1 July 2022; of 7 February 2022.

¹²⁷ Speech by Silvana Sciarra, President of the Italian Constitutional Court, published in the Court's Annual Report for 2023, available at this link [Annual Reports - ECHR - ECHR / CEDH \(coe.int\)](#) pages 17-21. See also « *Sugli effetti dei pareri consultivi della Corte Europea dei diritti dell'uomo* » Aurora Rasi, Rivista di Diritto Internazionale, [Anno CIV Fasc.3-2021](#), pages 893-895.

¹²⁸ [Activity report 2022 - The Supreme Court \(domstol.se\)](#), pg.21.

¹²⁹ [Explanatory Report](#) to Protocol No.16 (§27)

¹³⁰ Advisory Opinion [no. P16-2018-001](#) referred to in *Vavříčka and Others v. the Czech Republic* [GC], no. [47621/13](#) and 5 others, § 287, 8 April 2021; *D. v. France*, no. [11288/18](#), 16 July 2020, §§ 51-53, 64 and 66-67, 16 July 2020; *C.E. and Others v. France* (nos. [29775/18](#) and [29693/19](#), §§ 85-89; 24 March 2022; *H. v The United Kingdom* ((dec), [no. 32185/20](#), 31 May 2022, §§49, 56; *A.M. v. Norway*, no. [30254/18](#), §126, 24 June 2022; *D.B. and others v. Switzerland* (nos [58817/15](#) et [58252/15](#), 22 November 2022, §§ 79-81,88.; *K.K. and others v. Denmark*, [no. 25212/21](#), 6 December 2022, §§54,56, 63,65; *S.C. and others v. Switzerland*, (dec.) no [26848/18](#), §21, 11 January 2024;

¹³¹ Advisory Opinion [no. P16-2019-001](#); *Pantalon v. Croatia*, no. [2953/14](#), § 45, 19 November 2020, N.Š. v. Croatia, no. [36908/13](#), § 83, 10 September 2020, and *Tristan v. Republic of Moldova* (no. [13451/15](#)) §§ 47 and 52, 4 July 2023.

¹³² Advisory Opinion [no. P16-2021-001](#); *Vegotex International S.A. v. Belgium* [GC], no. [49812/09](#), §§ 116, 120 and 121, 3 November 2022; *M.S. v. Italy*, no. [32715/19](#), § 137, 7 July 2022; and *Stoyanova v. Bulgaria*, no. [56070/18](#), §71, 14 September 2022.

¹³³ Advisory Opinion [no. P16-2021-002](#); *Pinkas and Others v. Bosnia and Herzegovina*, no. [8701/21](#), §§ 58 and 60, 4 October 2022.

¹³⁴ Advisory Opinion; *Sacharuk v. Lithuania*, [no. 39300/18](#), 23 April 2024, §65.

¹³⁵ Advisory Opinion [no. P16-2023-001](#); *Executief van de Moslims Van België and Others v. Belgium* (nos. [16760/22](#) and 10 others), 13 February 2024, § 117.

of the Convention carries the same weight whether it is delivered in the form of rulings or in the form of advisory opinions.

77. The Court has not affirmed in any judgment or decision that its advisory opinions have established new principles of interpretation of the Convention. Nevertheless, in one specific case it appears that the Court's advisory opinion has contributed significantly to the evolution of its case law. This was the case as regards the right to respect for private life within the meaning of Article 8 of the Convention of a child born through a gestational surrogacy arrangement abroad. The Court's case law until the advisory opinion was delivered had required that the domestic law provide a possibility for recognising the legal relationship between the child and the intended father who was also a biological father.¹³⁶ In the advisory opinion, the Court held that the child's right to respect for his/her private life also requires that domestic law provide a possibility of recognition of a legal relationship with the intended mother. The choice of means by which to achieve recognition of the legal relationship between the child and the intended mother falls within the State's margin of appreciation. However, once the relationship between the child and the intended mother has become a "practical reality", the procedure laid down to establish recognition of the relationship in domestic law must be capable of being "implemented promptly and efficiently."¹³⁷

78. These principles appear to have had a decisive influence on the Court's reasoning in some subsequent rulings, notably as regards the means for the legal recognition of a parent-child relationship arising from surrogacy arrangements. The obligation for children born under a surrogacy arrangement to be adopted in order to ensure legal recognition of the relationship between the genetic mother and her child does not violate the mother's right to private life.¹³⁸ The refusal of domestic authorities to allow children born under a surrogacy arrangement to be adopted by the intended mother, when domestic law does not provide for other possibilities of recognition of a legal parent-child relationship with her, violates the children's right to respect for their private life under Article 8 of the Convention.¹³⁹ The impossibility, during several years, for the complainants to have the parental relationship between the intended father and the child born abroad legally recognised, which was due to the fact that adoption was open only to married couples but not to couples living in a registered partnership, violates the child's right to respect for his or her private life.¹⁴⁰

79. The full integration of advisory opinions in the Court's case law is also demonstrated by the Court's practice of referring to them in the questions addressed to the respondent governments at the stage of communicating applications. This practice is followed irrespective of whether or not the State Party concerned has ratified Protocol No.16.¹⁴¹

4. New applications before the Court

80. No direct or indirect link can be established between Protocol No. 16 and the volume of applications lodged with the Court. The decrease in the number of new applications in 2023 is attributable to factors which do not relate to advisory opinions.¹⁴² There is no noticeable

¹³⁶ Advisory Opinion [no. P16-2018-001](#), §§35-37.

¹³⁷ *Ibid*, see holding.

¹³⁸ *D. v. France*, no. [11288/18](#), 16 July 2020, §§63-72.

¹³⁹ *K.K. and others v. Denmark*, [no. 25212/21](#), 6 December 2022, §§ 63-77.

¹⁴⁰ *D.B. and others v. Switzerland* (nos [58817/15](#) and [58252/15](#)), 22 November 2022, §§ 79-83; 87-90.

¹⁴¹ *S.C. and Others v. Switzerland*, [no. 26848/18](#), 15 June 2020, *A.M. v. Norway*, no. [30254/18](#), 6 September 2019, and *K. K. and Others v. Denmark*, no. [25212/21](#), 3 June 2021.

¹⁴² [DH-SYSC-PRO\(2024\)02REV2](#), Compilation of replies to the CDDH questionnaire; see reply from the Registry which notes that the decrease can be explained by the fact that the Russian Federation ceased to be a Party to the Convention and by a decrease in the number of applications from certain States which have not ratified Protocol No. 16 or whose courts have not yet made use of it.

effect on the number of applications against both States to which the requesting courts pertain. Also, there is no noticeable effect on the number of applications against other States concerning issues that are similar to those dealt with in the advisory opinions delivered by the Court. The Registry notes that a possible explanation could be the highly technical nature of some of the questions put to the Court or the fact that the requests for advisory opinions relate to situations that are rather rare in practice.¹⁴³

VII – Conclusions

81. Six years after its entry into force and more than 10 years after its opening for signature, Protocol No.16 has been ratified by nearly half of the Council of Europe member States. A positive dynamic towards its ratification can be observed in a couple of member States, which are at different stages of their ratification processes. It can be reasonably expected that, with a possible expansion of the Court's number of advisory opinions in the future, more member States will gain confidence in the opportunities that the ratification of Protocol No.16 presents for judicial dialogue and in turn for an enhanced implementation of the Convention at the national level.

82. 10 highest courts or tribunals, from a total of eight member States, have submitted advisory opinion requests. The Court has delivered seven opinions and rejected three requests. Those which were accepted by the Court raised specific Convention questions in relation to various matters such as the legal recognition of a parent-child relationship arising from surrogacy arrangements abroad, standing for parliamentary election, adoption of adults or national security. None of the requests appears to have raised national systemic human rights issues. The requesting courts have relied on the advisory opinions delivered to them by the Court in different ways. Some of them used the opinions as a source of information for the argumentation of their judgments and others directly applied the criteria indicated by the Court in the advisory opinion or followed its analytical framework to resolve the dispute before them.

83. The Court's judicial practice on the admissibility of advisory opinion requests offers guidance on the conditions of Article 1 of Protocol No.16, notably on certain requirements for requests to be directly linked to pending domestic proceedings and on what can properly be regarded as "questions of principle relating to the interpretation or application of the Convention". Even when the Court rejected requests because it found that its well-established case law would suffice to enable the requesting court to resolve the dispute before it, the Court provided an overview of the principles or criteria of its case law which were pertinent to the questions raised. The Court's reformulation or combination of the questions asked by requesting courts, with due regard to the specific factual and legal circumstances in the domestic proceedings, also appears to be motivated by the desire to provide focused guidance on the interpretation and application of the Convention.

84. The Court has gradually defined the scope of its advisory jurisdiction and developed its methodological approach to delivering opinions on the questions raised by the requesting courts. Its guidance has developed from summaries of principles emerging from its case law that it considered as relevant to resolve the question submitted by the requesting court to indicating the Convention criteria that it considered relevant to enable the requesting court to examine the dispute before it.

85. Despite the workload that the advisory opinion procedure presents for the Court and its Registry, it did not cause an unjustified delay in the pending domestic proceedings. The

¹⁴³ Ibid.

CDDH welcomes the fact that following the Reykjavik Summit, new human resources have been allocated to the Court for the period 2024-2025, which should help alleviate any such workload.

86. The interaction that has taken place between the Court and the designated highest courts and tribunals in the framework of Protocol No.16 has further strengthened one of the lasting (inexhaustible) objectives of the Protocol, notably enhancing such interaction and thereby reinforcing the implementation of the Convention, in accordance with the principle of subsidiarity. The Court's advisory opinions have contributed to reinforcing the compliance of domestic legislation with the Convention, to encourage alignment of domestic jurisprudence with the standards of the Court's interpretation of the Convention, as well as to the execution of the Court's judgments. The fact that one advisory opinion has been quoted by several of the highest courts of member States which have not yet ratified Protocol No.16 speaks to the potential influence of Protocol No.16 in terms of implementing the Convention.

87. Protocol No. 16 has not had a noticeable impact on the number of applications lodged with the Court so far. In that sense, the effect of the Protocol has been more of a qualitative than of a quantitative nature. Yet, it should be noted that the Court's practice in this context is still limited and that up to now, its advisory opinions did not address national systemic issues. Therefore, there cannot yet be any conclusion drawn in respect of the potential effect of an advisory opinion.

88. Advisory opinions have become an integral part of the Court's case law. While the Court has not affirmed in any of the judgments or decisions issued in contentious proceedings that any of its advisory opinion has established distinct new principles of interpretation of the Convention, it appears that one of the Court's advisory opinion has contributed significantly to the evolution of its case law as regards recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother.

Annex – list of advisory opinions and decisions on advisory opinion requests
(in chronological order)

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 [GC], request [no. P16-2018-001](#), French Court of Cassation, 10 April 2019.

Advisory opinion 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 [GC], request [no. P16-2019-001](#), the Armenian Constitutional Court, 29 May 2020.

Decision on a request for an advisory opinion under Protocol No. 16 concerning the interpretation of Articles 2, 3 and 6 of the Convention; request [no. P16-2020-001](#), the Supreme Court of the Slovak Republic, 14 December 2020.

Advisory Opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings [GC], request [no. P16-2020-002](#), the Lithuanian Supreme Administrative Court, 8 April 2022.

Advisory Opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture [GC], request [no. P16-2021-001](#), the Armenian Court of Cassation, 26 April 2022.

Advisory Opinion on the difference in treatment between landowners' associations "having a recognised existence on the date of the creation of an approved municipal hunters' association" and landowners' associations set up after that date [GC], request [no. P16-2021-002](#), the French Conseil d'État, 13 July 2022.

Advisory Opinion on the procedural status and rights of a biological parent in proceedings for the adoption of an adult [GC], request [no. P16-2022-001](#), the Supreme Court of Finland, 13 April 2023.

Advisory Opinion as to whether an individual may be denied authorisation to work as a security guard or officer on account of being close to or belonging to a religious movement [GC], request [no. P16-2023-001](#), the *Conseil d'État* of Belgium, 14 December 2023.

Decision on a request for an advisory opinion under Protocol No. 16 concerning the interpretation of Article 4 of Protocol No. 7 to the Convention, request [no. P16-2023-002](#), the Supreme Court of Estonia, 19 February 2024.

Decision on a request for an advisory opinion under Protocol No. 16 concerning the interpretation or application of Article 6 of the Convention and Article 1 of Protocol No. 1 of the Convention, request [no. P16-2024-001](#), the High Court of Cassation and Justice of Romania, 28 June 2024 (in French only).