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STEERING COMMITTEE FOR HUMAN RIGHTS

COMITÉ DIRECTEUR POUR LES DROITS HUMAINS

(CDDH)

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

GROUPE DE RÉDACTION SUR L'ÉVALUATION DES PREMIERS EFFETS DES PROTOCOLES N° 15 ET N° 16 À LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME

(DH-SYSC-PRO)

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Compilation of replies to the CDDH questionnaire

Compilation des réponses au questionnaire du CDDH

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1. Introduction

1. This document contains the replies to the questionnaire adopted by the CDDH at its 99th meeting (28 November -1 December 2023, CDDH(2023)R99). The questions addressed to member States, to the highest courts and tribunals designated under Article 10 of the Protocol, and those addressed to the European Court of Human Rights (the Court) are copied at the beginning of each of the relevant sections below. The data summarised in the introduction is without prejudice to the more comprehensive analysis of the replies to be carried out in the preparation of the draft report on the first effects of Protocol No.16.

2. As background information, it should be noted that 22 member States have ratified Protocol No.16. These have designated a total of 56 courts as competent to request advisory opinions. All the designated courts were invited to respond to the relevant CDDH's questionnaire.

Member States's replies

3. A total of 29 replies was received, of which 15 from those that have ratified Protocol No.16,[1] and 14 from those that have not yet done so.[2] Of the latter, three have noted that government or legislative initiatives on the ratification of Protocol No.16 are underway;[3] three that the ratification is still being analysed;[4] three that they have concluded not to ratify Protocol No.16 or that they have no immediate plans to do so;[5] and two that they 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. [6] The three remaining non-State Parties did not provide information on their position on the ratification of Protocol No.16.

[1] Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Finland, France, Georgia, Greece, Lithuania, Netherlands, Republic of Moldova, Romania, San Marino, Slovak Republic, Slovenia.
[2] Croatia, Czech Republic, Denmark, Germany, Ireland, Italy, Monaco, Norway, Poland, Portugal, Serbia, Sweden, Switzerland, United Kingdom.
[3] Croatia, Italy, Sweden.
[4] Monaco, Poland, Serbia.
[5] Denmark, Germany and UK.
[6] Norway, Switzerland.

4. In response to question 1, some of the reasons highlighted by the member States which have ratified Protocol No. 16 include, promoting judicial dialogue and strengthening the collaboration between the Court and the domestic courts which could result in avoiding litigation before the Court, reinforcing the implementation of the Convention with due regard to the principle of subsidiarity, sharing joint responsibility and promoting the efficiency of the Court, reducing its workload, enhancing the application of the standards established in the Court's jurisprudence by domestic courts. One member State noted the increasing number of cases being communicated by the Court to it and the absence of internal practical difficulties (legal or legislative) in ratifying Protocol no.16.

5. The reasons put forward by member States which have not ratified Protocol No.16 include, the need for more time to see the effects and impact of the Protocol or the evolving practice of the Court, issues in identifying the competent domestic courts, uncertainty on how the advisory opinion procedure will work in practice, 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, perceptions relating to the similarity of the procedure to that of preliminary reference to the CJEU, additional strain on the national courts in terms of resources, delays in national court proceedings, uncertainty about the advisory opinion mechanism's effectiveness due to its non-binding nature as well as about its impact in reinforcing the guarantees for human rights and fundamental freedoms. Four member States have noted specifically that even though they are not State Parties to the Protocol, the Court's advisory opinions are taken into account when either considering national legislation relating to the issue dealt with by the opinion or in domestic court proceedings.[7]

6. In response to question 2, some of the States Parties to Protocol No.16 have noted that it is not possible to measure the contribution of the advisory opinion procedure at this time since requested opinions concern very specific issues of interpretation of the Convention rather than repetitive cases. Some others have highlighted a general contribution of the procedure in the implementation of the Convention. Changes in the national jurisprudence and legislation were highlighted in one reply as positive effects in terms of implementation of the Convention in the State Party to which the highest court requesting an advisory opinion from the Court pertained. States Parties whose courts have not yet submitted a request, as well as non-States Parties, generally considered the mechanism as useful, for example in providing a source of information to domestic courts and the law-makers on the Court's interpretation of the Convention.

7. In response to question 3 regarding the reduction in the number of applications lodged with the Court, most of the member States, including State Parties to Protocol No. 16, have pointed out the difficulty in gauging this effect in view of the low number of advisory opinions. Such assessment would be probably better carried out with the passage of time. However, several replies have underlined the potential of the advisory opinions of the Court in terms of preventing the submission of repetitive or similar applications especially when the question posed by the requesting court would have an impact on the harmonisation of the case law, or providing guidance on which domestic courts can rely in cases other than those on which the advisory opinion was requested.

8. Replies to question 4 regarding role of the Government Agent in the procedure under Protocol No. 16, generally noted the relevance of information provided by the Government as regards existing legislation and its application by domestic authorities, the legal and political

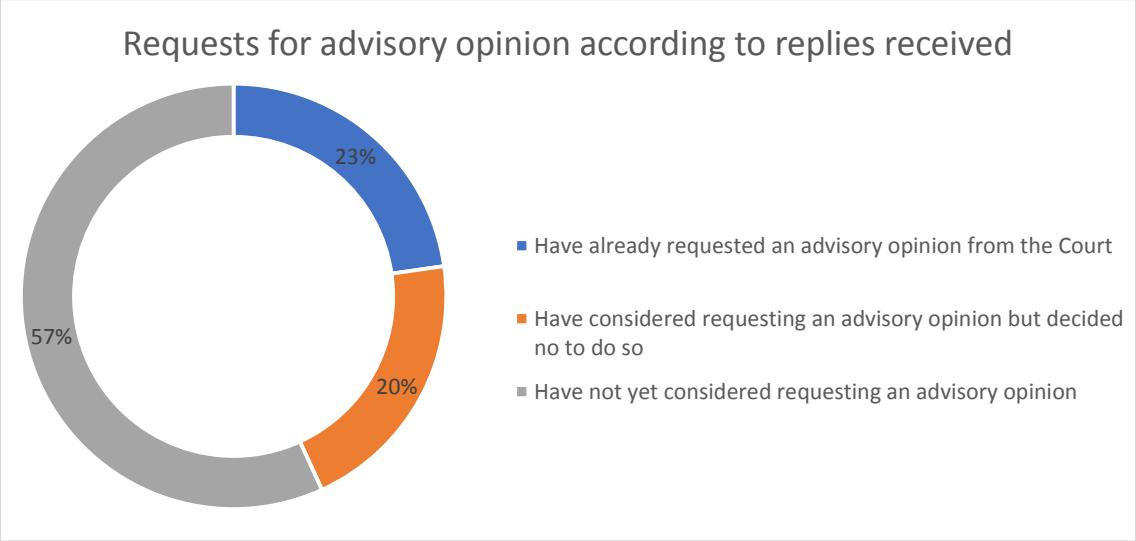
[7] Czech Republic, Italy, Poland, Switzerland.

implications of the question raised or the Government's interpretation of the Court's jurisprudence. The Government's views are also of relevance when the questions raised in the request for an advisory opinion are specific and do not relate to repetitive cases as well as to help the Court to relate to legal, political and social peculiarities and to respect national identity and constitutional foundations. Some replies noted that it may be delicate for the Government of a State Party to provide its interpretation in a procedure initiated by the highest national court pertaining to that State. Others mentioned that the Government's agent role should be assessed on a case-by-case basis, that Government's observations should not comment on ongoing domestic proceedings but rather be confined to questions of interpretation and application of the Convention.

Replies from highest courts and tribunals

9. 44 of the 56 designated courts replied to the questionnaire. Questions 1 and 2 were answered by both courts which have requested an advisory opinion from the Court and those which have not done so yet. Questions 3, 4 and 5 were answered primarily by the designated courts which had requested an advisory opinion.

10. In response to question 1, 10 of the designated courts noted that they have requested an advisory opinion from the Court. The latter delivered its opinions in respect of seven requests, it rejected two, while one request is pending.[8] One of the designated courts stated that it had indicated its views in its request on the question posed to the Court. Two others noted that they had refrained from doing so to ensure their impartiality and objectivity and not to prejudice the opinion of the Court.



[8] Court of Cassation of Armenia, Armenian Constitutional Court, Conseil d'État of Belgium, Supreme Court of Finland, French Conseil d'État, French Court of Cassation and Supreme Administrative Court of Lithuania. The requests of the Supreme Court of Estonia and Slovak Supreme Court were rejected by the Court. The request of the High Court of Cassation and Justice of Romania was lodged on 6 February 2024.

11. Nine designated courts explained that they had considered requesting an opinion from the Court, primarily on the basis of motions by the parties to the relevant cases, but had decided not to do so.[9] One designated court had resolved two questions in pending cases following the principles contained in advisory opinions delivered by the Court in respect of requests from a designated court pertaining to another State Party. This had been the reason for not requesting an advisory opinion of its own initiative. In response to the second question regarding the reasons for such decision some courts noted various issues, for example that they had considered the parties' motions/arguments in the relevant cases to request an advisory opinion as unjustified, the cases before them as not raising questions of interpretation of the Convention, the question/s proposed to be included in a possible request for advisory opinion as not necessary to the resolution of cases pending before them, or that they had already resolved that there had been no violations of the Convention rights. One court noted that it had not proceeded with the submission of a request for an advisory opinion given the recommending nature of such opinion which would not be able to change existing case law of the constitutional court establishing the constitutional conformity of the legislative provisions challenged in the relevant case.

11. In response to question 3 regarding the effect of the advisory opinions of the Court on the outcome of the cases in relation to which they had been requested, one designated court noted that the opinion led to national legislation being invalided; three others that the opinions delivered to them separately had served as a basis for their subsequent holding on the relevant cases; another one that it had relied on the opinion to elucidate its judgement of the case and that it had proceeded to bringing more coherence in its jurisprudence which in turn clarified the analysis to be carried out by the national judge when faced with questions relation to the Convention; another one that it was too early to take a view on this question given the recent delivery of the advisory opinion by the Court. One designated court which had not yet requested an advisory opinion, noted that the advisory opinion mechanism would be used in a limited number of cases relating to the Convention and its protocols.

12. The question about the wider impact of advisory opinions on the wider national legal order (part of question 3) was addressed in concrete terms in the replies of two superior courts. One noted that the opinion was recent and consequently had no impact on the national legal order. Another one underlined the fact that an abstract analysis of the conformity of legislation with the Convention in the context of an advisory opinion of the Court is easier to transpose in situations other than the one in relation to which the opinion was requested. In this case, the advisory opinion had reinforced the authority of the subsequent judgement of that designated court taking into account the fact that the question asked in the request for the advisory opinion had led internal doctrinal debates on the precedential value of judgements of the Court on the same case. In relation to the same advisory opinion, the designated court noted that the principles of the opinion had served as benchmarks to the legislator which had acted on the subject matter. Two designated courts noted more broadly speaking that it would be assumed that the content of an advisory opinion would have an impact in the practice of law at the domestic level and that the advisory opinions may serve as precedent in subsequent cases in the national legal order.

[9] 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.

13. Six designated courts stated in their responses to question 4 regarding any possible undue delays to the final determination of the case at the domestic level resulting from the process of requesting an advisory opinion that this had not been the case. One stated that the advisory opinion procedure had led to a delay given that two years had passed from the suspension of the domestic proceedings and the judgement of that court. This was considered, however, as justified given the importance of the question raised and the impact of the advisory opinion of the Court beyond the case in question. Another superior court stated that the advisory opinion was adopted approximately one year and a half after its referral of the request. However, that court had been prepared to apply judicial remedies *ex officio* if after receiving the advisory opinion it would find a violation of the applicant's Convention rights.

14. Five designated courts answered question 5 regarding the impact of the advisory opinion of the Court as regards achieving a better implementation of the Convention in your country. They underlined the jurisprudential authority and value of advisory opinions of the Court as well as their potential for enhancing the implementation of the Convention standards in compliance with the case law of the Court and for assisting domestic courts in applying the Convention and avoiding future violations of the Convention. One designated court noted that the legislator of the State Party to which it pertained had relied on the principles of the advisory opinion delivered by the Court when enacting legislation on the questions addressed by the request which in turn contributed to the construction of a Convention-based legal order. One designated court noted that the fact that it had submitted a request for an advisory opinion could have some influence on the general awareness on the Convention and the Court as well as on their importance and weight. Five designated courts which have not yet requested an advisory opinion from the Court noted that advisory opinions could pre-empt violations of the Convention and reduce the number of cases lodged with the Court, promote uniform interpretation of human rights standards in domestic legal systems and serve as a source in the interpretation and application of domestic law.

2. Replies by member States

Questions addressed to all State Parties to the Convention

1. *What are the main reasons for which your country has ratified / not yet ratified Protocol No. 16?*

2. *Has the advisory opinion procedure under Protocol No.16 contributed to a better implementation of the Convention in your country?*

3. *What is your evaluation of the results of the advisory opinion as regards achieving a reduction in the number of applications from your State Party lodged with the Court?*

4. *What should be the role of the Government Agent in the procedure under Protocol No. 16: is there a need for a Government's view on the question posed by the requesting Court?*

Armenia

Has the advisory opinion procedure under Protocol No.16 contributed to a better implementation of the Convention in your country?

In view of the number of opinions requested and issued so far (two requests were submitted by the Armenian superior courts), at this stage it is objectively not possible to state clearly whether the advisory procedure has contributed positively to the implementation of the Convention in Armenia. These considerations primarily stem from the fact that the requested opinions concern very specific issues of principle related to the interpretation or application of rights and freedoms defined in the Convention (see for example, 1) 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; 2) the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture). In other words, the opinions requested so far did not deal with the repetitive cases raising questions of very broad complex issues under the Convention that comprise the essence of the majority of the applications submitted to the Court.

What is your evaluation of the results of the advisory opinion as regards achieving a reduction in the number of applications from your State Party lodged with the Court?

In the same manner, it is still uncertain whether the advisory opinion procedure has contributed to the reduction of the proceedings before the Court. The evaluation of the reduction in the number of applications lodged with the Court would be possible after the passage of certain time when it be obvious that the issues with regard to which the Court has provided advisory opinions are being communicated in less amount of applications compared to the period of time preceding the advisory opinions.

At the same time, it is important to note that the Advisory opinion requested by the

Constitutional Court of the Republic of Armenia served as a basis for the resolution of the case at the domestic level. Thus, it can be inferred that the advisory opinion of the Court on 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 served as a "legal obstacle" for submitting an application on the same subject matter before the Court.

What should be the role of the Government Agent in the procedure under Protocol No. 16: is there a need for a Government's view on the question posed by the requesting Court?

The need of the Government's view on the question posed by the requesting court is predicated by the importance of the Government's position on the issues concerning the interpretation or application of rights and freedoms defined in the Convention, as those issues in view of their specific and non-repetitive nature require the complete overview of the issue at hand. It is also noteworthy that the Government's position on the questions posed by the requesting court could serve as a balancing factor for the Court while issuing an advisory opinion.

In the light of the aforementioned, it should also be noted that in Armenia specifically, the Government Agent has assumed the responsibility for human rights general implementation (Article 9 of the Law on the Representative on International Legal Matters of the Republic of Armenia) and, therefore, the Agent's involvement in the procedure under Protocol No. 16 of the Convention has a positive impact on the execution of his/her authorities at the domestic level.

Azerbaijan

What are the main reasons for which your country has ratified / not yet ratified Protocol No. 16?

Azerbaijan recognizes that ratifying Protocol No. 16 aligns with its commitment to upholding human rights and promoting a robust legal framework domestically. The decision reflects a proactive stance in contributing to the development of international human rights jurisprudence.
By enabling the highest domestic courts to seek advisory opinions from the European Court of Human Rights, Azerbaijan aims to enhance the coherence and consistency of human rights jurisprudence. This mechanism can also foster collaboration between domestic courts and the European Court of Human Rights, promoting a harmonized approach to addressing complex human rights issues, and promoting a better understanding and application of human rights principles enshrined in the European Convention.

Has the advisory opinion procedure under Protocol No. 16 contributed to a better implementation of the Convention in your country?

While the advisory opinion procedure under Protocol No. 16 has yet to be utilized, Azerbaijan believes in its potential to elevate the implementation of the Convention. The procedure offers a mechanism for domestic courts to seek guidance on intricate human rights matters, promoting a more nuanced and consistent application of the Convention's principles within the national legal framework. This collaborative approach aims to enhance legal certainty and effectiveness in protecting human rights, thereby enhancing the protection of individuals within the domestic legal framework and reduction in the number of applications lodged with the Court.

What is your evaluation of the results of the advisory opinion as regards achieving a reduction in the number of applications from your State Party lodged with the Court?

Azerbaijan anticipates that the advisory opinion procedure, once adopted, could have a positive impact on reducing the number of applications to the European Court of Human Rights. By addressing legal uncertainties at the domestic level, the procedure can serve as a preventive measure, avoiding the need for repetitive or unnecessary cases to reach the international court. This aligns with Azerbaijan's commitment to streamlining human rights litigation and contributing to the overall efficiency of the European Court of Human Rights.

What should be the role of the Government Agent in the procedure under Protocol No. 16: is there a need for a Government's view on the question posed by the requesting Court?

In the procedure under Protocol No. 16, the Government, being the executive branch, should not intervene directly in the advisory opinion procedure under Protocol No. 16. The advisory opinion mechanism operates independently of the specific views or perspectives of the involved Government. However, once the request for advisory opinion proceeds to the ECtHR, the Government, as an interested party to the case, may be provided with the opportunity to get notified by the European Court and present its observations if they wish so. This can facilitate that the European Court of Human Rights receives comprehensive information and insights from the state involved in the advisory opinion process, contributing to a balanced and informed consideration of the human rights issues at hand.

Belgium

1. Quelles sont les principales raisons pour lesquelles votre pays a ratifié / pas encore ratifié le Protocole n° 16 ?

La Belgique a ratifié le Protocole 16 compte tenu de ce que l'instrument permet aux cours supérieures d'initier un dialogue précontentieux avec la Cour qui peut avoir pour effet d'éviter qu'un contentieux ne se développe devant la Cour européenne des droits de l'Homme, consolide les interactions entre les cours nationales supérieures et la Cour et renforce la mise en œuvre de la Convention dans le respect du principe de subsidiarité. Le délai entre la signature (le 8/11/2018) par la Belgique du Protocole 16 et son entrée en vigueur (le 1er mars 2023) s'explique, en plus de la durée administrative habituelle, notamment par des doutes préalables des cours nationales supérieures sur le risque de ralentissement de la procédure interne dans l'attente de l'avis ainsi que par des discussions internes entre nos hautes juridictions.

2. La procédure d'avis consultatif prévue par le Protocole n° 16 a-t-elle permis une meilleure mise en œuvre de la Convention dans votre pays ?

Le seul avis demandé par l'Etat belge l'a été par le Conseil d'Etat en avril 2023. Obtenu le 14 décembre 2023, nous ne pouvons pas encore en apprécier l'impact sur la mise en œuvre de la Convention en Belgique dans la mesure où l'affaire dans le cadre de laquelle il a été demandé n'a pas encore donné de décision définitive.

Nous pouvons cependant supposer qu'il contribuera à une meilleure mise en œuvre de la Convention dans notre pays. Il permettra en effet aux hautes juridictions de s'assurer que des facteurs compensatoires suffisants, de nature à contrebalancer les effets des restrictions apportées aux droits de l'intéressé, ont été appliqués ou qu'ils le seront lorsque la procédure en instance reprendra. Ainsi, les contours donnés par l'avis donneront les outils nécessaires à ces juridictions afin de réaliser sa mise en balance avant de prendre une décision, à la lumière de la Convention telle qu'interprétée par l'avis de la Cour.

3. Comment évaluez-vous les résultats de l'avis consultatif portant sur la baisse du nombre de requêtes introduites auprès de la Cour par votre État partie ?

Nous escomptons que l'avis de la Cour ait un effet sur les requêtes introduites contre la Belgique dans la mesure où les principes dégagés dans la réponse à la demande d'avis rappellent le processus décisionnel à respecter pour délimiter des droits et libertés et pourront être utilisés au-delà du cas d'espèce.

4. Quel rôle, l'Agent du gouvernement devrait-il jouer dans la procédure prévue par le Protocole n° 16 : l'avis donné par un gouvernement sur la question posée par la juridiction requérante, est-il nécessaire ?

L'avis donné par un gouvernement sur la question posée par la juridiction nationale présente l'utilité d'éclairer la Cour sur l'interprétation par celui-ci de la jurisprudence européenne. Il nous semble cependant délicat de donner cette interprétation gouvernementale dans une affaire interne alors qu'une haute juridiction nationale la demande justement à la Cour.

Bosnia and Herzegovina

In response to question no. 1, the advisory opinions of the European Court of Human Rights obtained on the basis of Protocol no. 16 can play a significant role in strengthening the implementation of the European Convention, which, according to the Constitution of Bosnia and Herzegovina, is directly applicable and has priority over all other laws. Advisory opinions can help ensure uniform interpretation of human rights standards within the domestic legal system and provide useful insight into the development of human rights case-law.

However, since none of the highest courts in Bosnia and Herzegovina had asked the European Court of Human Rights for an advisory opinion on questions of principle relating to the interpretation or application of the rights and freedoms defined by the Convention and its Protocols in the context of the cases that were conducted before these courts, we cannot provide answer to the remaining questions set out in email dated 8 February 2024.

Croatia

1. What are the main reasons for which your country has ratified / not yet ratified Protocol No. 16?

The Republic of Croatia has not yet ratified Protocol No. 16. The interministerial procedure prior to tabling the draft law on ratification of the Protocol 16 to the ECHR is currently underway.

4. What should be the role of the Government Agent in the procedure under Protocol No. 16: is there a need for a Government's view on the question posed by the requesting Court?

In the procedure under Protocol No. 16 the Government Agent should be given the opportunity to provide the view of the High Contracting Party to which the requesting Court pertains, on the question posed by this Court.

Czech Republic

1. What are the main reasons for which your country has not yet ratified Protocol no. 16?

The Czech Republic has not yet signed or ratified Protocol No. 16. This state can be attributed to a combination of factors.

First, for a long time, it was not possible to initiate the ratification process because there existed disagreement between the three highest courts (the Constitutional Court, the Supreme Court, and the Supreme Administrative Court) regarding which of them should be authorized to request advisory opinions. However, in the last year, this question seemed to have been resolved – at least at the working level among the presidents of these courts. But still, even among the three presidents, however, there was no unity regarding the support for ratification. Moreover, in August 2023, a new president of the Constitutional Court was appointed, whose position on the issue is not yet known. But if he sticks to his predecessor's stance, this obstacle could be resolved with the result that all three highest courts shall be authorizes to request advisory opinions.

Second, initial reluctance in ratifying the Protocol No. 16 can also be explained by interim unclarity about the way how the advisory opinion mechanism will work in practice. In this regard, the Czech Government very much welcome the establishment of DH-SYSC-PRO with a mandate to examine the practical effects of its operation so far. We believe that the result of this analytical work and sharing experiences can significantly contribute to the willingness to accede to the Protocol. At least, the Czech Office of the Government Agent is determined to launch a debate amongst relevant stakeholders as a follow-up. According to Czech constitutional law, the ratification of Protocol No. 16 will re-quire the consent of both chambers of the Parliament. The ratification itself shall then be carried out by the President.

Third, another obstacle seems to be the low level of familiarity with what the ratification of Protocol No. 16 really means. There exists a number of myths and prejudices in this context. Their systematic refutation seems to be quite a challenge. Advisory opinions are perceived as analogous to pre-liminary references to the CJEU, whose judgments are binding and requests for preliminary references in some cases mandatory. A not insignificant part of the public and political representatives thus supposes that by ratifying the Protocol, the State transfers powers in the area of judiciary to the European level with the inherent loss of national sovereignty. Changing mindsets of domestic decision-makers is likely to be one of the biggest challenges on the way to ratification.

2. Has the advisory opinion procedure under Protocol No.16 contributed to a better implementation of the Convention in your country?

As the Czech Republic has not ratified Protocol No. 16, it cannot be said that the advisory opinions directly contributed to a better implementation of the Convention at the national level. But indirectly, yes. Advisory opinions, depending on their relevance in the Czech context, are annotated by the Office of the Government Agent. Their summaries are therefore available in the Czech language. Even if they have a non-binding nature, they are part of the Strasbourg jurisprudence and as such they may be useful for various legal professionals. One example for all, advisory opinion of 10 April 2019 (P16-2018-001) was taken into account when considering national draft law on surrogacy.

3. What is your evaluation of the results of the advisory opinion as regards achieving a reduction in the number of applications from your State Party lodged with the Court?

Since the Czech Republic is not bound by the Protocol, it is not possible to trace the change in the volume of applications to the ECtHR after the entry into force.

4. What should be the role of the Government Agent in the procedure under Protocol No. 16: is there a need for a Government's view on the question posed by the requesting Court?

Although advisory opinions are non-binding, they are part of the Strasbourg jurisprudence. It can therefore be expected that the Court will follow them in the future. It is therefore important that the process is adversarial, i.e. that Government concerned has the ample opportunity to comment on requests for advisory opinions made by designated national courts. Their observations should be confined to the interpretation and application of the Convention in the given context. By contrast, they should under no circumstances comment on specific factual circumstances of the ongoing domestic proceeding. Other Governments should also be duly informed and allowed to intervene.

Denmark

1. What are the main reasons for which your country has ratified / not yet ratified Protocol No. 16?

As notified to the Danish Parliament's Legal Affairs Committee on 15 June 2016 (see appendix no. 362 to the Legal Affairs Committee, the parliamentary session of 2015-16) Denmark has not ratified Protocol No. 16 to the European Convention on Human Rights. As described in said notification to the Danish Parliament's Legal Affairs Committee, the Danish government asked a number of authorities and organisations for comments on the matter before deciding whether to ratify the protocol or not. The Danish government mainly put emphasis on the comments from the Danish Supreme Court, since the opportunity to request the European Court of Human Rights (the Court) for advisory opinions is aimed at the highest courts and tribunals of a State Party, cf. article 1 of the protocol.

The Danish government has in particular put emphasis on that the Danish Supreme Court informed the government that Danish courts so far have not missed such an opportunity to ask questions to the Court. The Danish Supreme Court also stated that such an opportunity is only

expected to be utilised in a limited number of cases. Furthermore, the Danish Supreme Court noted that a possible ratification will presumably impose an additional strain on the Danish courts in terms of resources, because the opportunity to ask the Court for an advisory opinion may lead to a number of requests submitted on behalf of a party to the Danish courts on getting an advisory opinion from the Court. In addition, the Danish Supreme Court noted that the opportunity to ask the Court for an advisory opinion must also be assumed to entail a certain lengthening of the processing time in cases where questions arise regarding the possibility of requesting the Court for an advisory opinion. In the cases where it is decided to submit such a request the processing time of a case must be expected to be significantly longer.

On the basis of the comments from the Danish Supreme Court, the Danish government at the time found that Denmark should not ratify Protocol No. 16. Reference is made to the Ministry of Justice's notification to the Danish Parliament's Legal Affairs Committee of 16 May 2016.

2. Has the advisory opinion procedure under Protocol No.16 contributed to a better implementation of the Convention in your country?
N/A

3. What is your evaluation of the results of the advisory opinion as regards achieving a reduction in the number of applications from your State Party lodged with the Court?
N/A

4. What should be the role of the Government Agent in the procedure under Protocol No. 16: is there a need for a Government's view on the question posed by the requesting Court?
N/A

Finland

1. What are the main reasons for which your country has ratified / not yet ratified Protocol No. 16?

Finland ratified Protocol No. 16 in 2015. In Finland, four highest courts have competence to submit a request for an advisory opinion: the Supreme Court, the Supreme Administrative Court, the Insurance Court and the Labour Court.

The reasons why Finland ratified Protocol No. 16 can be summarised as follows: (1) supporting the long-term reform of the system of the European Convention on Human Rights, (2) promoting judicial dialogue between national highest courts and the European Court of Human Rights, and (3) enhancing the realisation of human rights and improving the legal protection of rights-holders.

Finland considers it important to secure the conditions for the effective functioning of the European Court of Human Rights. For this reason, the Government supported the long-term reform of the system of the European Convention on Human Rights, the so-called Interlaken Process. In Finland, the adoption and entry into force of Protocol No. 16 was seen as one of the concrete reform measures through which the Government could share joint responsibility and promote the efficiency of the European Court of Human Rights.

Finland considered that Protocol No. 16 would have a positive long-term effect: it can be estimated that the advisory opinion procedure in the European Court of Human Rights will reduce the number of individual applications due to its general guiding effect. This, in turn, speeds up the processing of applications in the European Court of Human Rights in general.

Enabling and promoting judicial dialogue between national highest courts and the European Court of Human Rights was an important reason for ratifying Protocol No. 16. The case law of the European Court of Human Rights has had extensive legal effects on the case law of Finnish courts. Therefore, all measures that are conducive to increasing interaction between national highest courts and the European Court of Human Rights and to facilitating the understanding and application of the interpretation of the European Convention on Human Rights by highest courts are supported.

The legal interpretation and position of the European Court of Human Rights is often still developing or unspecified when a national court has to take a stand on the application of an obligation arising from the European Convention on Human Rights. Later, however, the decision of the national court may have to be assessed in the light of evolving European case law which, at the time of the national decision, was only in its early stages or did not exist. The evolving interpretation is often brought to the attention of the national court several years later than the problem had already had to be solved at the national level.

If the European Court of Human Rights arrives at a different outcome from that of a national court in a decision that has already had a preliminary ruling value at national level, the outcome considered incorrect by the European Court of Human Rights may have already been reflected in a number of individual judgments, some of which may have also been appealed to the European Court of Human Rights.

The Government considered that the advisory opinion procedure contained in Protocol No. 16 would reply to some of the challenges mentioned above by creating a new channel for the judicial dialogue between the highest courts and the European Court of Human Rights. When considering the ratification of Protocol No. 16, the Government gave particular weight to the views of the Supreme Court and the Supreme Administrative Court on the usefulness and usability of the advisory opinion procedure.

Protocol No. 16 makes it possible for a national court to obtain the advice of the European Court of Human Rights where there is a risk that the State would commit a human rights violation as a result of an interpretation subsequently found to be unsuccessful by a national court. For this reason, the advisory opinion procedure specifically improves the legal protection of the individual – both the individual whose case is concerned and all those who are in the same position with him or her. This procedure improves the realisation of his or her human rights.

2. Has the advisory opinion procedure under Protocol No. 16 contributed to a better implementation of the Convention in your country?

So far, only one advisory opinion has been requested by a Finnish court. The questions asked by the Supreme Court were specific to a concrete case and not rooted in any topical issues of wider dimensions.

3. What is your evaluation of the results of the advisory opinion as regards achieving a reduction in the number of applications from your State Party lodged with the Court?

Please see a reply to question number 2.

4. What should be the role of the Government Agent in the procedure under Protocol No. 16: is there a need for a Government's view on the question posed by the requesting Court?

In the above-mentioned request of the Supreme Court concerning a very specific individual case, it was difficult to define the Government Agent's role in the procedure. The European Court of Human Rights provided the possibility of intervention in the case, but the Finnish Government Agent did not exercise this right due to the special nature of the case.

The Government Agent may have a role in the advisory opinion procedure, but it must be assessed on a case-by-case basis.

France

1. Quelles sont les principales raisons pour lesquelles votre pays a ratifié le Protocole n° 16 ?

Le nombre croissant de requêtes communiquées à la France a été une des raisons principales à la signature du Protocole, ainsi que la volonté de résoudre en amont les difficultés d'interprétation de la Convention. Le protocole n° 16 n'impliquait en outre aucune modification juridique de nature législative ou réglementaire dans l'ordre interne, de sorte que sa ratification ne posait aucune difficulté pratique.
Par ailleurs, le Gouvernement avait prévu de désigner, comme juridictions habilitées à faire usage du protocole, la Cour de cassation, le Conseil d'Etat et le Conseil constitutionnel. Si le Conseil d'Etat et la Cour de cassation avaient vocation, en leur qualité de juridictions suprêmes des ordres juridictionnels administratif et judiciaire à être désignées, la question pouvait se poser s'agissant du Conseil constitutionnel dont la jurisprudence sépare nettement le contrôle de constitutionnalité de la loi, qui relève du seul juge constitutionnel, et le contrôle du respect des engagements internationaux, qui relève des juridictions ordinaires. Toutefois, il était entendu que la désignation du Conseil constitutionnel lui permettrait d'obtenir un éclairage de la Cour sur l'interprétation des droits protégés par la convention, en raison notamment de la proximité avec les questions dont le juge constitutionnel peut être saisi. Le Gouvernement avait également à l'esprit que cela permettrait au Conseil constitutionnel de participer aux nouvelles perspectives d'échanges, ouvertes par le protocole, entre les plus hautes juridictions chargées de la protection des droits fondamentaux en Europe.

2. La procédure d'avis consultatif prévue par le Protocole n° 16 a-t-elle permis une meilleure mise en œuvre de la Convention dans votre pays ?

Cette procédure n'a pas fait l'objet de nombreux avis de la Cour depuis l'entrée en vigueur du protocole n°16. Toutefois, le Gouvernement constate que l'assemblée plénière de la Cour de cassation avait saisi la Cour d'une demande d'avis consultatif relatif à la gestation pour autrui, qui a entraîné un changement de jurisprudence puis de loi, plus conforme au respect des droits prévus dans la Convention notamment l'article 8 en l'espèce.

3. Comment évaluez-vous les résultats de l'avis consultatif portant sur la baisse du nombre de requêtes introduites auprès de la Cour par votre État partie ?

Pour l'instant il est trop tôt pour le dire, la procédure d'avis consultatif n'ayant été appliquée qu'une fois par la Cour de cassation et une fois par le Conseil d'Etat.

4. Quel rôle, l'Agent du gouvernement devrait-il jouer dans la procédure prévue par le Protocole n° 16 : l'avis donné par un gouvernement sur la question posée par la juridiction requérante, est-il nécessaire ?

Un avis pourrait être utile afin d'apporter des explications ou du contexte supplémentaire, notamment sur la législation existante et l'application faite en jurisprudence interne sur la question donnée. Eventuellement, il peut amener un éclairage sur la pratique dans les autres Etats européens sur la question posée.

Georgia

QUESTION 1 - What are the main reasons for which your country has ratified / not yet ratified Protocol No. 16?

Georgia ratified Protocol No. 16 of the European Convention on Human Rights ('Convention'/'ECHR') on 4 March 2015, with the understanding that broadening the capacity of the European Court of Human Rights ('Court'/ECtHR') to provide advisory opinions would strengthen the collaboration between the Court and Georgian authorities. Ratifying Protocol No. 16,[10] shall enhance application by Georgian courts of high standards established in the work of the ECtHR and in its case law.[11] To these ends, Georgia designated Supreme Court of Georgia and Constitutional Court of Georgia as domestic courts that may request the European Court of Human Rights to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or protocols thereto.[12]

The authority of the Supreme Court of Georgia and the Constitutional Court of Georgia to address the Court is provided in the following legal instruments:

Organic Law of Georgia on the Constitutional Court of Georgia[13]
Article 21[3]
1. The Constitutional Court may, after a constitutional claim under Article 19(e) of this Law is admitted for consideration on the merits, apply to the European Court of Human Rights for an advisory opinion regarding those crucial case-related issues that are related to the interpretation or application of the rights and freedoms provided for under the Convention for the Protection of Human Rights and Fundamental Freedoms and the protocols thereto.
2. The Constitutional Court shall substantiate the request for its application to the European Court of Human Rights for an advisory opinion, and shall submit appropriate case-related legal and factual circumstances to the European Court of Human Rights.

[10] Full list - Treaty Office (coe.int)
[11] https://info.parliament.ge/file/1/BillReviewContent/54725?
[12] *Ibid*.
[13] https://matsne.gov.ge/en/document/view/32944?publication=25

3. The Constitutional Court shall notify the parties of its application to the European Court of Human Rights for an advisory opinion.
4. The advisory opinion of the European Court of Human Rights shall have a non-binding nature.
5. The running of the time limit under Article 22(1) of this Law shall be suspended from when the Constitutional Court applies to the European Court of Human Rights for an advisory opinion until when the advisory opinion is obtained. (Shall become effective immediately after Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms becomes effective in relation to Georgia)]

Civil Procedure Code of Georgia[14]
Article 402[1] – Applying to the European Court of Human Rights for an advisory opinion
1. The Cassation Court may, after a cassation appeal becomes pending, apply to the European Court of Human Rights for an advisory opinion regarding those crucial case-related issues that are related to the interpretation or application of the rights and freedoms provided for under the Convention for the Protection of Human Rights and Fundamental Freedoms and the protocols thereto.
2. The Cassation Court shall substantiate the request for its application to the European Court of Human Rights for an advisory opinion, and shall submit appropriate case-related legal and factual circumstances to the European Court of Human Rights.
3. The Cassation Court shall notify the parties of its application to the European Court of Human Rights for an advisory opinion.
4. The advisory opinion of the European Court of Human Rights shall have a non-binding nature.
5. The running of the time limits under Articles 391(6) and 401(3) of this Code shall be suspended from when the Cassation Court applies to the European Court of Human Rights for an advisory opinion until when the advisory opinion is obtained.

Criminal Procedure Code of Georgia[15]
Article 304[1] – Applying for an advisory opinion of the European Court of Human Rights
1. After a case and an appeal are submitted to the court of cassation, the court of cassation may apply for an advisory opinion to the European Court of Human Rights on important aspects of the interpretation or application of the rights and freedoms provided for by the Convention for the Protection of Human Rights and Fundamental Freedoms and related Protocols.
2. The court of cassation shall provide reasons for its request for an advisory opinion of the European Court of Human Rights and provide the Court with relevant legal and factual circumstances relating to the case.
3. The court of cassation shall notify the parties of its application for an advisory opinion of the European Court of Human Rights.
4. An advisory opinion of the European Court of Human Rights shall not be binding.
5. The running of the time limit provided for by Article 303(8) of this Code shall be suspended from the moment when the court of cassation applies to the European Court of Human Rights for an advisory opinion until it receives the advisory opinion.

Administrative Procedure Code of Georgia[16]
Article 34 – Admissibility of appeals and cassation appeals
[...] 3[1]. The time limit for verifying admissibility under paragraph 3 of this article shall not exceed

[14] https://matsne.gov.ge/en/document/view/29962?publication=159
[15] https://matsne.gov.ge/en/document/view/90034?publication=151
[16] ADMINISTRATIVE PROCEDURE CODE OF GEORGIA (matsne.gov.ge)

three months.
4. Regarding the matters of administrative proceedings, the time limit for granting leave to a cassation appeal and the time for rendering a decision on the appeal shall be six months.
5. If the Cassation Court applies to the European Court of Human Rights for an advisory opinion, the running of the time limits under paragraphs 3^1 and 4 of this article shall be suspended until the advisory opinion is obtained.

QUESTIONS 2 AND 3

Has the advisory opinion procedure under Protocol No.16 contributed to a better implementation of the Convention in your country?

What is your evaluation of the results of the advisory opinion as regards achieving a reduction in the number of applications from your State Party lodged with the Court?

The Constitutional Court and the Supreme Court of Georgia have not yet requested advisory opinion from the Court.

QUESTION 4 - What should be the role of the Government Agent in the procedure under Protocol No. 16: is there a need for a Government's view on the question posed by the requesting Court?

Current legislation does not define the role of the Government Agent in the procedure under Protocol No.16.

Germany

1. What are the main reasons for which your country has ratified / not yet ratified Protocol No. 16?

The Federal Constitutional Court has the power to review domestic legislation. Any such review will include scrutiny of the compatibility with the Convention as interpreted by the ECHR. Domestic courts which deem legislative provisions in violation of the Fundamental law or the Convention will have to submit those provisions to the Federal Constitutional Court under section 100 of the Fundamental Law.

Article 100 [Concrete judicial review] :
(1) If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the Land court with jurisdiction over constitutional disputes where the constitution of a Land is held to be violated or from the Federal Constitutional Court where this Basic Law is held to be violated. This provision shall also apply where the Basic Law is held to be violated by Land law and where a Land law is held to be incompatible with a federal law.
(2) If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court.
(3) If the constitutional court of a Land, in interpreting this Basic Law, proposes to derogate from a decision of the Federal Constitutional Court or of the constitutional court of another Land, it shall obtain a decision from the Federal Constitutional Court.

Having regard to the existing remedies, the Federal Government has concluded that currently there is no need to ratify Protocol 16.

4. What should be the role of the Government Agent in the procedure under Protocol No. 16: is there a need for a Government's view on the question posed by the requesting Court?

In the view of the Federal Government, it should be obligatory to request the Government's view on questions of national legislation and administrative practice in order to ensure that the Grand Chamber is fully informed about the legal and political implications of the question raised by the requesting Court.

Greece

Question 1

Greece ratified Protocol No. 16 primarily because it was convinced that, as stated in the Preamble of the Protocol, the extension of the Court's competence to give advisory opinions would further enhance the interaction between the Court and national authorities and thereby reinforce implementation of the Convention, in accordance with the principle of subsidiarity. The State Party also considered, along the same lines as the PACE's Opinion 285 (2013), that the Protocol would not only strengthen the link between the Court and States' highest courts through judicial dialogue, but also contribute to shifting from ex post to ex ante the resolution of a number of questions of interpretation of the Convention and its Protocols arising in the context of domestic judicial proceedings, thereby saving in the long run the valuable resources of the Court and reinforcing the principle of subsidiarity.

Questions 2, 3

A relevant assessment is not possible, given that, so far, no request for an advisory opinion has been submitted by the competent Greek courts.

Question 4

From articles 2 and 3 of the Protocol, and the relevant paras. of its Explanatory Report, as well as Rules 91-95 of the Rules of Court, and the advisory opinions already delivered by the Court, it follows that:

- at the stage of examination by the panel of five judges of the question whether to accept the request for an advisory opinion, no one has the possibility of intervening;
- at the stage following the panel's acceptance of a request, the Government of the State Party to which the requesting court pertains has always the possibility to intervene and present its views, and should do so, in case it is invited by the Court to submit written comments,
- the Court, depending on the nature of the dispute and the jurisdiction of the requesting court, may invite the Government to submit written comments, in its capacity as a party to the relevant case before the requesting court,
- in case of questions submitted by criminal courts, the Court has invited the Prosecutor of the requesting court to submit written comments, and
- there is no obligation for the Court to communicate in every case the submitted question to the Agent of the Government of the State Party to which the requesting court pertains.

In view of the above, the existing legal framework is considered as sufficient, since it leaves intact the nature of the advisory jurisdiction of the Court as a non-contentious procedure, allows the participation of Governments if they so wish, and prevents the expression of

overlapping views by Governments and other national authorities that may be invited by the Court to express their views. The cooperation of the Agent, as a leading expert on the Court's case law, with other national authorities invited to express their views, can be ensured at the national level.

The only addition that, in our opinion, would be useful, is the introduction of the obligation of the Registry of the Court to communicate, in every case, the submitted questions to the Government of the State Party to which the requesting court pertains, so as to provide the opportunity for coordinating the actions of the national authorities involved with the Government Agent.

Ireland

1. What are the main reasons for which your country has ratified / not yet ratified Protocol No. 16?

Ireland has neither signed nor ratified Protocol No. 16.

The Government has taken note of the Court's developing jurisprudence under Protocol No. 16, as well as the Court's seminar on 'Judicial dialogue through the advisory opinion mechanism under Protocol No. 16', held on 13 October 2023.

Any future decision by the Government with respect to Ireland's possible signature and/or ratification of Protocol No. 16 will be informed by the report of the Steering Committee for Human Rights evaluating the first effects of Protocols Nos. 15 and 16.

2. Has the advisory opinion procedure under Protocol No.16 contributed to a better implementation of the Convention in your country?

Not applicable.

3. What is your evaluation of the results of the advisory opinion as regards achieving a reduction in the number of applications from your State Party lodged with the Court?

Not applicable.

4. What should be the role of the Government Agent in the procedure under Protocol No. 16: is there a need for a Government's view on the question posed by the requesting Court?

As Ireland is not a party to Protocol No. 16 it respectfully reserves its position as to the role of a Government agent under the advisory opinion mechanism.

Italy

1. What are the main reasons for which your country has not yet ratified Protocol No. 16?

The questions of a possible ratification of Protocol 16 are pending to the attention of the Italian Parliamentary instances. In the meantime, the Italian Constitutional Court had the opportunity

to acknowledge that the "opinions" of ECHR enter the legal discourse as res interpretata and acquire legal standing – not merely factual, persuasive or moral one – within the spectrum of the Convention's case law. To further discuss the matter exchange visits are in the meanwhile held in the network of the European Supreme Courts. Notwithstanding the non-ratification of Protocol 16, two opinions of the ECHR in foreign cases were used as grounds in Italian domestic decisions. Possible relations between ex post Constitutional controls (existing in the Italian system) and ex ante controls (not existing in the Italian system) are also matter of discussion.

4. What should be the role of the Government Agent in the procedure under Protocol No. 16: is there a need for a government's view on the question posed by the requesting Court?

Currently the "Avvocatura Generale dello Stato", while assuming the role of the Government's Agent before the ECHR, is at the same time part of the constitutional trial before the Italian Constitutional Court, supporting the constitutionality of the existing law. In this function, the "Avvocatura" might want to file its observations to the ECHR if an Italian existing law is challenged both before the Constitutional Court and before the ECtHR under Protocol 16.

Lithuania

1. What are the main reasons for which your country has ratified / not yet ratified Protocol No. 16?

Lithuania has ratified Protocol No. 16 in the hope that the expansion of the Court's competence by granting the authority to provide advisory opinions will further strengthen the interaction between the Court and national authorities and thus help to better ensure the implementation of the provisions of the Convention in accordance with the principle of subsidiarity.

2. Has the advisory opinion procedure under Protocol No.16 contributed to a better implementation of the Convention in your country?

The Government is of the view that the advisory opinion procedure under Protocol No. 16 has the potential and could have a positive impact to a better implementation of the Convention in Lithuania depending on the context of the case, especially when dealing with a systemic problem or the issue of legal regulation. In this context it should be recalled that in 2020 the Supreme Administrative Court of Lithuania has applied for an advisory opinion on impeachment legislation (advisory opinion no. P16-2020-002), however, the advisory opinion was provided in an extremely narrow area, thus, it is difficult to draw a conclusion based on it.

3. What is your evaluation of the results of the advisory opinion as regards achieving a reduction in the number of applications from your State Party lodged with the Court?

The Government considers that the advisory opinion can contribute to a reduction in the number of applications from the State Party lodged with the Court in similar and recurring cases, especially when the question posed by the highest national court would have an impact on harmonization of the case-law.

4. What should be the role of the Government Agent in the procedure under Protocol No. 16: is there a need for a Government's view on the question posed by the requesting Court?

The Government observe that the active role of the Government Agent in the procedure under Protocol No. 16 might be valuable and important, as the Agent could provide the Court with a more comprehensive and detailed picture, including contextual information. Also, the possibilities of the Government to comment on different aspects are much wider compared to that of the highest national court in the context of the specific case pending before it. The Government's view in an advisory opinion procedure could help the Court correspond to the legal, political, and social peculiarities and, at the same time, to respect national identity and constitutional foundations.

Monaco

1. Quelles sont les principales raisons pour lesquelles votre pays a ratifié / pas encore ratifié le Protocole n° 16 ?

La ratification du Protocole 16 par Monaco est actuellement à l'étude et devrait être effectuée prochainement. En attendant cette ratification, le Gouvernement monégasque continue de prêter une attention particulière aux avis rendus par la Cour européenne des droits de l'Homme et au fonctionnement général de la procédure mise en place par le Protocole n° 16.

2. La procédure d'avis consultatif prévue par le Protocole n° 16 a-t-elle permis une meilleure mise en œuvre de la Convention dans votre pays ?

Le Gouvernement monégasque a pris connaissance des sept avis consultatifs rendus, auxquels s'ajoute la décision de rejet d'une demande d'avis, et considère que ces derniers contribuent positivement à la jurisprudence de la Cour.

3. Comment évaluez-vous les résultats de l'avis consultatif portant sur la baisse du nombre de requêtes introduites auprès de la Cour par votre État partie ?

En tant qu'Etat non Partie au Protocole n° 16, cette question n'est pas applicable à Monaco.

4. Quel rôle, l'Agent du gouvernement devrait-il jouer dans la procédure prévue par le Protocole n° 16 : l'avis donné par un gouvernement sur la question posée par la juridiction requérante, est-il nécessaire ?

La possibilité prévue à l'article 3 du Protocole n° 16 qui permet à un Gouvernement de présenter des observations écrites dans le cadre d'une demande d'avis émanant d'une juridiction relevant de son Etat a été employée dans cinq procédures sur les sept avis rendus à ce jour. Cette faculté peut s'avérer utile pour un Gouvernement afin de présenter à la Cour des éléments de contexte qui ne sont pas présents ou mentionnés dans la saisine pour avis.

Netherlands

1. What are the main reasons for which your country has ratified / not yet ratified Protocol No. 16?

The Netherlands ratified Protocol No. 16 on 12 February 2019. The two main reasons for

ratifying the protocol were promoting judicial dialogue and reducing the Court's workload (see Explanatory Memorandum to the relevant act approving ratification, Parliamentary Proceedings 2014/15, 34235, no. 3). The introduction of a system of advisory opinions was perceived as aiming to promote the dialogue between the Court on the one hand and national authorities on the other. As such the principle of subsidiarity enshrined in the Convention could be enhanced, so the Government believed. In this respect the Government noted in particular that in making a request for an advisory opinion a national court has the opportunity to indicate to the Court why it needs guidance on the existing body of case law from the Court, or how it interprets the State's obligations under the Convention. This would allow the Court to become better acquainted than before with the views of the highest national courts on the application and interpretation of the Convention.

Another important reason for the Netherlands to become a party to the Protocol was the fact that the advisory opinion procedure aimed to substantially reduce the Court's workload in the medium term. The idea is that a domestic court faced with a systemic problem can seek an opinion from the Court and then, while applying the Court's interpretation of the Convention, can decide all similar cases at the domestic level. This could potentially keep large numbers of identical applications relating to systemic problems away from the Court as it can be expected that an individual application on such a matter will be declared inadmissible or struck out of the list where the domestic court has given effect to the advisory opinion in the domestic proceeding(s).

2. Has the advisory opinion procedure under Protocol No.16 contributed to a better implementation of the Convention in your country?

Dutch courts have so far not made use of the advisory opinion procedure. There are thus no Dutch examples of domestic proceedings in which an advisory opinion of the Court was directly applied to decide a case. The Government notes that Dutch courts have in certain cases considered making a request, but ruled that the case could be decided without such request. An example is the judgment of the Supreme Court in the Dutch climate case Urgenda (Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, para. 5.6.4). Recent research of Utrecht University also shows in all competent Dutch courts at least in general terms, there has been some discussion of whether it might be useful to make a request for an advisory opinion to the Court (See J.H. Gerards and C.M.S. Loven, Protocol 16 EVRM. Achtergronden, betekenis, effecten en ervaringen. Utrecht 2023, p. 43)

It is not possible for the Government to assess in detail if and if so how the opinions thus far issued by the Court at the request of domestic court of other Convention Parties, contributed to a better implementation of the Convention in the Netherlands. The Government can only refer to incidental proof in this respect. For example in respect of Advisory Opinion P16-2019-001 (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) it was noted in Dutch legal academia that this Advisory opinion may also be of relevance for the Dutch legal order (P. van Sasse van Ysselt, 'Advies protocol 16 EVRM inzake de adviesprocedure en wetgevingstechniek van doorverwijzing naar constitutionele normen in het licht van het strafrechtelijk legaliteitsbeginsel' ('Opinion Protocol 16 ECHR on the advisory procedure and legislative technique of referral to constitutional norms in the light of the legality principle of criminal law'), NTM/NJCM-Bull. 2020, p. 498-512, online available (in Dutch) at: = https://njcm.nl/wp-content/uploads/2021/03/2.-Van-Sasse-van-Yssel_NTM-45-4_def-g.pdf).

3. What is your evaluation of the results of the advisory opinion as regards achieving a reduction in the number of applications from your State Party lodged with the Court?

As noted above, Dutch courts have so far not made use of the advisory opinion procedure. It is not possible for the Government to establish whether the general principles as set out in the advisory opinions issued thus far in cases concerning other Convention Parties, have resulted in a reduction in the number of applications.

4. What should be the role of the Government Agent in the procedure under Protocol No. 16: is there a need for a Government's view on the question posed by the requesting Court?

As Dutch courts have so far not made any requests for an advisory opinion, the Government of the Netherlands does not have any experience yet in this respect. The Government sees that there may be added value in sharing the Government's observations on the question posed in such a procedure with the Court. This may be particularly so where systemic issues are at stake. At the same time the Government sees that there may be reasons related to the separation of powers or the fact that the procedure may be primarily perceived as a judicial dialogue, for withholding from submitting any such Government's observations in a given case.

Norway

1. What are the main reasons for which your country has ratified / not yet ratified Protocol No. 16?

Norway has so far decided to wait and see how the Protocol would function in practice.

2. Has the advisory opinion procedure under Protocol No.16 contributed to a better implementation of the Convention in your country?

N/A

3. What is your evaluation of the results of the advisory opinion as regards achieving a reduction in the number of applications from your State Party lodged with the Court?

N/A

4. What should be the role of the Government Agent in the procedure under Protocol No. 16: is there a need for a Government's view on the question posed by the requesting Court?

N/A

Poland

1. What are the main reasons for which your country has ratified / not yet ratified Protocol No. 16?

Poland has not ratified nor signed Protocol no. 16 and the matter is still being analysed. No final decisions as to ratify or not have been taken so far.

The matter of ratification has been left for further consideration in order to observe and analyse the evolving practice of the Court and other States that ratified the instrument in question.

The accession by Poland to Protocol no. 16 would first require legislative changes in the acts governing the relevant procedures before civil, criminal and administrative courts. The Council of Europe could support this process by gathering and sharing information on the domestic regulations adopted by States that have already ratified Protocol no. 16.

In particular, it would be necessary to establish a domestic procedure for requesting an advisory opinion, including:
- identify the courts competent to address such a request – e.g. whether only the Constitutional Tribunal, the Supreme Court and the Supreme Administrative Court Administrative Court or all courts of second (last) instance;
- the prerequisites for making a request to the ECHR;
- rules governing the staying of the relevant domestic proceedings if a request for an advisory opinion is lodged;
- the right of a party/participant to the proceedings to apply to the court to request such an advisory opinion.

One of the crucial issues that have to be addressed is whether lower-instance (first-instance) court could also initiate the procedure for seeking the Court's advisory opinion, for instance by submitting to the Supreme Court or the Supreme Administrative Court a legal question asking for resolving a legal issue that raises doubts in light of the Convention.

One of the procedural issues that deserves closer attention is the extent to which domestic court should be bound to follow the party's requests to seek an advisory opinion. The Strasbourg Court has already adopted some judgments in which it considered under Article 6 of the Convention the situations of refusal by domestic courts to address preliminary questions to the Court of Justice of the EU (among others, Dhahbi v. Italy, no. 17120/09, 8 April 2014, Rutar and Rutar Marketing d.o.o. v. Slovenia, no. 21164/20, 13 December 2022) . It could not be ruled out that there could be similar applications to the Court invoking the domestic courts' refusal/failure to make use of the procedure under Protocol no. 16.

Also, the issue of the language in which requests for advisory opinions are to be formulated by courts would require specific regulation bearing in mind that in principle the court proceedings in Poland are conducted exclusively in Polish. Similarly, there is a question of how the advisory opinion adopted by the Court could be integrated in the domestic legal system and implemented.

Also the following considerations were raised by the consulted entities as important issues that merit analysis when taking a decision on a possible accession to Protocol no. 16:

Many of the courts and other authorities consulted in process of preparing the present reply invoked the possible length of the proceedings before the ECtHR and expressed fears that ratification of Protocol no. 16 could further prolong the domestic proceedings pending the completion of the advisory opinion procedure. Especially, if the prolongation of the proceedings could have a negative outcome on the substance of the case before the domestic authorities (for instance in matters related to the contacts between parents and children or in immigration cases related to foreigners or in cases concerning persons deprived of liberty etc.), the length of the proceedings before the Court could act as a dissuasive factor.

A priori, however, this argument in itself was not considered sufficient to reject the very usefulness of the advisory opinions if they could eventually contribute to the better respect for the Convention at the domestic level. The authorities however stressed the need to ensure appropriate resources for the Court and to introduce appropriate organisational arrangements in its proceedings and working methods that would make it possible to complete the examination of requests for advisory opinions in reasonable time-frames. The need to take such arrangements would be even more evident if the number of requests for advisory opinions from the current Contracting Parties or especially if the number of State Parties to Protocol no. 16 would increase. If the duration of the proceedings under Protocol no. 16 were to be similar as the average duration of proceedings conducted based on individual applications, there would be a need to take in advance measures to further reform the Court and accelerate its proceedings.

It was also signalled that there may be a need for legal arrangements – both at the national level and that of the Court – that would prevent the institution of advisory opinions from being used by the parties to obstruct the domestic proceedings and delay their completion or by the judicial bench to evade its own responsibility (and shift it to the Court) for the efficient handling and resolving a difficult case.

It was also considered that the possibility to request advisory opinions should be used by domestic courts in principle mainly in case of emergence of new legal issues that have not been addressed in the Court's case-law yet. In other matters they should first try to rely on the existing case-law of the Court.

Fears were also expressed that the adoption by the domestic court of a decision that is not in line with the Court's advisory opinion could automatically result in a violation judgment being issued by the Court if the matter is referred to it by the applicant. There should however be no such automatism as otherwise this would be against a non-binding nature of advisory opinions. Moreover, the presentation by the requesting court of the case in its request for advisory opinions may reflect only the current stage of the domestic proceedings or even the position of only one of the parties, i.e. that interested in advisory opinion. The final ruling of domestic courts could however be based on a broader picture and broader evidence that the one on which the Court relied when issuing its advisory opinion. Therefore, the departure from the advisory opinion by the domestic court should be a legitimate option and not automatically be treated by the Court as an argument for finding a violation.

It would also be important to preserve the voluntary character of the advisory opinion procedure in line with the principles of subsidiarity and margin of appreciation. The analysis of the Court's, and notably the Grand Chamber's, practice may lead to the conclusion that it is ready to enter into dialogue with domestic supreme courts in order to establish such interpretation of the Convention that takes into account also the national context, e.g. the specificity of the model of

penal procedure envisaged in a given State. The optional nature of the procedure for advisory opinion is a good basis on which it may become a useful instrument of inter-court cooperation, supporting domestic courts in resolving new, difficult matters related to the application of the Convention.

2. Has the advisory opinion procedure under Protocol No. 16 contributed to a better implementation of the Convention in your country?

At present, as Poland is not a party to Protocol no. 16, the impact of the advisory opinion procedure on Poland could be at the most indirect, i.e. it may constitute a source of information for the domestic courts and the law-maker on the general trends and progress in the Court's interpretation of the Convention.

It could be considered that the interpretation of the Convention and its protocols offered by the Court in its advisory opinions delivered in respect of other States has a similar importance and impact as interpretation of the Convention and protocols in the Court's judgments and decisions concerning other States. Domestic courts in Poland in general make use of the Court's jurisprudence when resolving the cases before them.

Occasionally the Polish courts already do refer to the Court's advisory opinions delivered under Protocol no. 16. For instance, in a resolution adopted on 2 December 2019 (ref. no. II OPS 1/19) the Polish Supreme Administrative Court referred to the Court's advisory opinion adopted in case no. P-16-2018-001, considering it a part of the acquis developed by the ECtHR. In view however of the limited number of such advisory opinions as to this date and the fact that they have been adopted only recently, the general impact is rather narrow at this stage.

It should also be observed that despite the fact that Poland is not a party to Protocol no. 16, parties to the proceedings before domestic courts already request for initiation by the courts of the advisory opinion procedure. Such requests, obviously, are rejected by courts as inadmissible in the current legal state but they demonstrate that citizens may be interested in this procedure.

So far the Court has adopted not more than 7 advisory opinions, therefore the impact of this procedure has not been significant yet. According to the majority of the consulted authorities, this does not however put into question the general usefulness of the procedure – notably as a tool for judicial dialogue between Strasbourg and national legal systems. In the opinion of many of the consulted courts, such dialogue may in turn contribute to strengthening one of the key principles on which the Strasbourg human rights protection system is based, i.e. the principle of subsidiarity. Protocol no. 16 offers a possibility for new avenues of cooperation between CoE Member States and the Court and for more effective and speedy implementation of the Convention standards of human rights protection at the domestic level. Many of the courts consulted in the preparation of this opinion stressed the potential of the advisory opinion procedure in strengthening awareness, interest and ownership of the Convention on the part of the domestic courts and may in longer term contribute to a more frequent reliance on the Convention standards and Court's case-law in the domestic judicial practice.

Some of the authorities consulted in the process of preparing the present reply noted however that the advisory opinions already adopted by the Court had omitted some of the questions posed by the requesting courts. The Court did not reply to the questions considered as abstract or unrelated to the case. In this context it should be, however, borne in mind that if a requesting

court decides to address a question to the ECtHR, risking thus the prolongation of the domestic proceedings, usually there must be some important reasons why a certain question is posed. The lack of reply may diminish the significance of advisory opinions as a tool for judicial dialogue between the national courts and the ECtHR and the interest of the former in using this mechanism. Therefore, the possibility for the Court to omit some of the questions should be considered as really exceptional and in general the methodology of the adoption of the advisory opinions should be improved so that it could serve as a genuine tool for dialogue.

It was also noted by the consulted courts that the idea on which Protocol no. 16 is based is that only some selected highest courts are authorised to address requests for advisory opinions under Protocol no. 16. The impact of the case-law of the highest courts on the case-law of common courts in Poland is, however, itself only indirect one. The influence of the case-law of the Supreme Court on the case-law of common courts relies generally and primarily on the recognition of the authority of the highest judicial instance but formally there is no obligation on lower courts to follow the approach of the Supreme Court, even if it follows the approach of the Strasbourg Court. Apart from rulings issued in specific cases which directly bind the ordinary courts (e.g. resolutions issued as a result of specific legal questions), the case-law of the Supreme Court does not have a formal binding force vis-à-vis ordinary courts, even in similar cases. It is therefore not realistic to expect that the institution of an advisory opinion could play automatically a role of a mechanism ensuring the consistency of the national legal system with the provisions of the Convention, in the sense given to them in the case law of the ECtHR. Rather, it is still a role of the legislator to ensure such consistency of the domestic law.

3. What is your evaluation of the results of the advisory opinion as regards achieving a reduction in the number of applications from your State Party lodged with the Court?

It is difficult to evaluate the results of the advisory opinions even in case of State Parties to Protocol no. 16, this evaluation being even more difficult in case of Poland (a non-Contracting Party) as the impact of the advisory opinion procedure on our country is only indirect.

The advisory opinion procedure may contribute to the resolution by domestic court of an individual case in conformity with the provisions of the Convention and thus it may prevent at least the submission of an individual application to the ECHR by the parties to the domestic proceedings at stake.

Whether the procedure may have a wider impact on the number of new cases before the ECtHR, is closely related to the content and scope of requests for advisory opinions coming from requesting national courts. If such advisory opinions are addressed in matters of a limited scope and outreach or in matters that have mainly impact on one individual case pending before the requesting court or are specific to the national system in question only, obviously the impact on the number of applications coming to the Court will be limited as well. If in turn national courts approach the ECtHR with questions related to fundamental issues of a wider scope of application, consequently, the procedure for advisory opinions has a potential to prevent the high number of potential new applications to the Strasbourg Court.

The advisory opinion procedure may also facilitate the development by the Court of the Convention standard more promptly (i.e. before the completion of the domestic proceedings) than in case of its standard procedure based on individual applications (which normally reach the Court only after domestic remedies have been exhausted). It may thus also give the Court a possibility to signal to the State Party the existence of a systemic problem at an early stage –

before numerous applications start coming to Strasbourg, thus the Protocol no. 16 procedure has the potential for accelerating the implementation of remedial measures on the part of the domestic law-maker. This in turn may limit the number of new cases before the ECtHR.

The number of new applications will, of course, depend also on the ensuing domestic proceedings and whether the requesting court has appropriately accommodated the conclusions transpiring from the Court's advisory opinion.

The level of compliance with the Court's position as expressed in the advisory opinion does not depend only on the factors on the side of the domestic legal system (political will, the content of domestic law etc.) but also on the manner in which the advisory opinion is formulated (its clarity, abstract or operational nature, fitting into the national context etc.).

Nevertheless, even the full compliance by the domestic court with the advisory opinion does not guarantee that an application is not lodged with the Court and if lodged, that it is declared inadmissible. Therefore, it is not possible to consider a priori that the use of Protocol no. 16 procedure should necessarily diminish the number of cases lodged with the Court. On the other hand however, some of the parties may refrain from lodging an application with the Court if it is evident to them in light of the advisory opinion that their case is doomed to failure.

The advisory opinion procedure can in itself generate additional case-load for the ECtHR – not only due to the requests for advisory opinion lodged by domestic courts but also due to the applications complaining about the domestic court's refusal to seek an advisory opinion. The Court has already adopted judgments (e.g. in cases of Dhahbi v. Italy, no. 17120/09, 8 April 2014, Rutar and Rutar Marketing d.o.o. v. Slovenia, no. 21164/20, 13 December 2022), in which it found violation of Article 6 of the Convention on the account of the shortcomings surrounding the failure of the domestic court to seek a preliminary ruling of the Court of Justice of the EU. One could not rule out a possibility that the Strasbourg Court may treat similarly the shortcomings related to the failure to make use of the Protocol no. 16 procedure.

On the other hand, so far, only eight requests for advisory opinions have been lodged by domestic courts of State Parties to Protocol no. 16. This may suggest that domestic courts apply the new tool in a prudent way. Nothing suggests at this stage that the Court may be "flooded" with the excessive number of requests for advisory opinions, posing additional significant workload on the Court. The fact that the number of requests has been rather limited so far could also be due to the fact that the Court's jurisprudence is already rich and well-developed offering in most cases sufficient point of reference without the need to resort to the Protocol no. 16 procedure.

In general, it could be assumed that the impact of the advisory opinion procedure on the number of applications is not evident and in any case probably not decisive.

4. What should be the role of the Government Agent in the procedure under Protocol No. 16: is there a need for a Government's view on the question posed by the requesting Court?

We discern a need for the Government's role in the procedure under Protocol no. 16. In particular the Government Agent should have a right, ex officio and without separate request, to submit observations. Observations of the Government could address the questions posed by the requesting court and additional questions by the Court.

The involvement of the Government Agent could be conducive to a more comprehensive assessment of the legal issues by the ECtHR. Observations of the Government could help identify a more general context of the legal issues referred to the Court and complement the approach of the requesting court (which may be narrow and focused only on the specific issues related to the particular case pending before it).

In general, national bodies that have expert knowledge in the domestic legal system and experience under the Convention system should have a right to present positions and opinions on matters covered by a request for advisory opinion. The Government Agent's role is to coordinate this process and present the results thereof.

The Government Agent could help clarify the content of domestic legal provisions and inform the Court of their interpretation and practice of their application by courts or other authorities. The objective of the procedure under Protocol no. 16 is not only to enhance the judicial dialogue between national courts and the Strasbourg Court but also to enhance standards of human rights protection in a given State, this task being realised also by the Government.

There should also be a possibility for governments of all State Parties to intervene in proceedings conducted on the basis of Protocol no. 16, bearing in mind that the advisory opinion eventually adopted by the Court may have a significant impact on all State Parties to the Convention. Therefore it would be useful to apply a similar solution as in case of preliminary-ruling proceedings before the Court of Justice of the European Union.

On the other hand and for the record, it may be interesting to note that some of the consulted courts expressed an opinion that the involvement of the Government may unnecessarily prolong the procedure and some noted that such a possibility may be perceived as intervention of the executive branch in the judicial dialogue between independent courts. Some of the courts proposed that the role of the Government Agent be limited to merely informing the Court of the content of the domestic regulations and the specificity of the legal situation of a given State.

Portugal

1. What are the main reasons for which your country has ratified / not yet ratified Protocol No. 16?

Portugal has not ratified Protocol 16 given the fact that, due to its non-binding nature, the real effectiveness of the mechanism it establishes for enhancing the rights enshrined in the provisions of the ECHR is unclear.
The advantages deriving from the ratification of this Protocol may not be significant if we take into account the burden that adhering to this mechanism (either for national jurisdictions or for the European Court) entails, especially because it remains unclear if an enhanced reinforcement of the guarantees of human rights and fundamental freedoms will actually follow from such ratification. The non-binding nature of the opinions to be delivered by the ECtHR further suggests that their effectiveness is not guaranteed.
There are also concerns regarding the set of criteria that allow the ECtHR to refuse the request for an opinion, which, not being sufficiently detailed, leaves a margin of discretion that could, on the one hand, lead to a risk of overloading the workload of the Court and, on the other hand, give rise to some legal uncertainty.

2. Has the advisory opinion procedure under Protocol No.16 contributed to a better implementation of the Convention in your country?

Not applicable, considering that Portugal has not ratified Protocol No.16.

3. What is your evaluation of the results of the advisory opinion as regards achieving a reduction in the number of applications from your State Party lodged with the Court?

Not applicable, considering that Portugal has not ratified Protocol No.16.

4. What should be the role of the Government Agent in the procedure under Protocol No. 16: is there a need for a Government's view on the question posed by the requesting Court?

Not applicable, considering that Portugal has not ratified Protocol No.16.

Republic of Moldova

1. What are the main reasons for which your country has ratified Protocol No. 16?

On 27 April 2023 the Parliament of the Republic of Moldova ratified Protocol No. 16 to the European Convention on Human Rights. This measure is intended to improve the domestic courts' capacities to examine cases and issue solutions in compliance with the Convention standards and, hence, avoid any possible violations of the Convention at national level. This mechanism also aims at strengthening the link between the European Court of Human Rights and the domestic superior courts, by creating a dialogue platform and facilitating the correct implementation of the Convention by the domestic courts. The ratification of Protocol no. 16 could also diminish the number of applications lodged with the European Court of Human Rights, since it allows a transition from ex-post to ex-ante, by solving problems of interpretation of the Convention in the national legal system, thus saving previous resources of the European Court and allowing a faster resolution of cases at domestic level, which also comes to strengthen the principle of subsidiarity provided by Protocol No. 15 to the Convention.

2. Has the advisory opinion procedure under Protocol No.16 contributed to a better implementation of the Convention in your country?

Since Protocol No. 16 has entered into force for the Republic of Moldova quite recently, i.e. on 1 October 2023, the competent domestic courts have not used so far the advisory opinion procedure established by Protocol No. 16. Therefore, it is premature to make any observations on how the ratification of Protocol No. 16 by the Republic of Moldova contributed to a better implementation of the Convention at domestic level.

3. What is your evaluation of the results of the advisory opinion as regards achieving a reduction in the number of applications from your State Party lodged with the Court?

Similar to the previous answer, given that Protocol No. 16 has entered into force for the Republic of Moldova as of October 2023, it is premature to assess the results of the advisory opinion procedure at domestic level, all the more since the competent courts of law have not availed themselves so far of the possibility to request an advisory opinion from the European

Court of Human Rights in the cases pending before them.

4. What should be the role of the Government Agent in the procedure under Protocol No. 16: is there a need for a Government's view on the question posed by the requesting Court?

In the framework of the ratification of Protocol No. 16 by the Republic of Moldova, the national law regulating the Government Agent's attributions in the field of implementing the Convention provisions at domestic level has been amended. Therefore, the law now provides the Government Agent's duty to submit written observations and to attend the hearings held by the European Court of Human Rights in the process of examination of the requests for advisory opinions formulated by the competent domestic court. The law currently in force also provides the Government Agent's duty to translate any advisory opinions issued by the Court as a result of the examination of requests for advisory opinions formulated by the domestic courts and to publish them on his/her official website.

Romania

1. What are the main reasons for which your country has ratified / not yet ratified Protocol No. 16?

Romania ratified Protocol No. 16 by Law no. 172 of 2022. Romania also adopted Law no. 173 of 2022 on the adoption of measures necessary for the implementation of Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms.
The ratification of Protocol No. 16 was part of Romania's constant commitment to the European Convention of Human Rights. Since becoming part of the Convention, Romania ratified all protocols to, whether procedural or substantive.
Romania fully endorsed the Brighton Declaration, which, inter alia, encouraged the introduction of advisory opinions on the interpretation of the Convention in the context of a specific case at domestic level, thus encouraging the dialogue of judges of the Court and of the national courts.
Given that a similar procedure also exists al EU level (preliminary ruling proceedings), the national judges were acquainted with such proceedings.

2. Has the advisory opinion procedure under Protocol No.16 contributed to a better implementation of the Convention in your country?

So far, the Romanian judges did not ask for any advisory opinion, according to Protocol No. 16.

3. What is your evaluation of the results of the advisory opinion as regards achieving a reduction in the number of applications from your State Party lodged with the Court?

Given that Romania did not ask for any advisory so far, it is not possible to observe a reduction in the number of applications related to Protocol No. 16.

4. What should be the role of the Government Agent in the procedure under Protocol No. 16: is there a need for a Government's view on the question posed by the requesting Court?

According to the Romanian legislation, the Government Agent may submit written observations and take part in hearings in advisory opinion proceedings initiated by a Romanian court, with the approval of the Minister of Foreign Affairs, after consultation with the competent domestic

authorities relevant in the area concerned by the request for an opinion.

Also, the Government Agent has the role of translating the advisory opinion of the Court and ensuring that the translation is published in the Official Gazette.

There is no intention to change the legislation for the time being.

San Marino

1) The Republic of San Marino has ratified Protocol 16 because it strengthens the relations between the European Court of Human Rights and the domestic courts, since the Supreme Courts of a High Contracting Party may suspend domestic proceedings and ask the European Court for an opinion on the interpretation or application of the Convention and/or additional protocols, with the objective to avoid violations of the Convention. The advisory opinion is a valuable instrument that has been made available to high national courts for the interpretation of the ECHR, facilitating the dialogue between the European Court and the judicial authorities of the States Parties.

2) No requests for advisory opinions have been sent yet to the European Court of Human Rights from the San Marino Tribunal.

3) The advisory opinions delivered until now give directions on the interpretation of the European Court on certain issues.

4) It might be useful for the European Court to have the view of the Government. It also depends on the question submitted.

Serbia

In the Republic of Serbia, the acceptance of Protocol no. 16 with the European Convention for the Protection of Human Rights and Fundamental Freedoms is in progress, especially in the context of the competences and jurisdiction of the Constitutional Court of the Republic of Serbia (as the last instance before presenting a dispute before the European Court of Human Rights), the issue of identifying the courts that would be authorised to request an advisory opinion, of the decision-making procedure on submitting a request for an advisory opinion, as well as the procedure after the issuance of an advisory opinion.

For the acceptance of Protocol no. 16, it is necessary to provide a mechanism for seeking and considering the adopted advisory opinion, for which it is necessary to amend certain laws in the field of justice. The Republic of Serbia will certainly not be bound by Protocol no. 16 until the aforementioned issues are considered and all the necessary conditions for its effective application are provided.

Slovak Republic

1. What are the main reasons for which your country has ratified / not yet ratified Protocol No.

16?

The Slovak Republic signed the Protocol on the day it was opened for signature, on 2 October 2013 in Strasbourg, on the basis of the consent of the Government of the Slovak Republic to the signature of the Protocol (Resolution of the Government of the Slovak Republic No. 546 of 18 September 2013). After the Parliament (the National Council of the Slovak Republic) gave its consent to the ratification of Protocol No. 16, the President of the Slovak Republic ratified it on 28 November 2019. As it follows from the explanatory reports of the national authorities from the ratification process, the reason for the Slovak Republic's accession to Protocol No. 16 was to enable the highest judicial authorities in the Slovak Republic to request an advisory opinion from the Court on fundamental questions concerning the interpretation or application of the rights and freedoms set out in the Convention or its Protocols which have arisen in proceedings pending before them. The Slovak Republic fully endorsed the reasons for the adoption of the Protocol. It considered that the opportunity for the highest national courts to ask the European Court for an advisory opinion strengthens the dialogue between national courts and the European Court, while at the same time create an opportunity to seek advice from a judicial body that was established precisely to ensure the protection of human rights and fundamental freedoms enshrined in the Convention or its Protocols.

2. Has the advisory opinion procedure under Protocol No.16 contributed to a better implementation of the Convention in your country?

Ratification of the Protocol required the adoption of legislative amendments to ensure its application and effective use. The bodies entitled in the Slovak Republic to request an advisory opinion from the European Court are the Supreme Court of the Slovak Republic and the Constitutional Court of the Slovak Republic. The regulation in relation to the Supreme Court of the Slovak Republic is contained in the Civil Procedure Code, the Administrative Procedure Code and the Code of Criminal Procedure. Act No. 314/2018 Coll. on the Constitutional Court of the Slovak Republic and on Amendments and Additions to Certain Acts contains the necessary regulation for proceedings before the Constitutional Court of the Slovak Republic. So far, the Slovak Republic has used the possibility to seek an advisory opinion from the European Court once. The request was submitted on 25 September 2020 by the Supreme Court of the Slovak Republic. It was made in the context of criminal proceedings instituted by the domestic authorities against a police officer. The requesting court inquired as to whether the status of the Inspection Service was in compliance with the Convention requirement of an effective investigation. The European Court decided not to accept the request for an advisory opinion as it did not meet the requirements of Article 1 of Protocol No. 16. The European Court considered that the questions raised in the request, on account of their nature, degree of novelty and/or complexity, did not concern an issue on which the requesting court would need the European Court’s guidance by way of an advisory opinion to be able to ensure respect for Convention rights when determining the case before it. As the Slovak Republic has not yet developed a broader practice of using the possibility to request an advisory opinion from the European Court, it is impossible to assess the impact of Protocol No. 16 on the implementation of the Convention in the country.

3. What is your evaluation of the results of the advisory opinion as regards achieving a reduction in the number of applications from your State Party lodged with the Court?

As mentioned above, the highest judicial authorities in the Slovak Republic have so far used the opportunity to request an advisory opinion from the European Court only once. In the absence

of a wider practice of using the possibility to request an advisory opinion from the European Court, it is not possible to assess the impact of Protocol No. 16 on the reduction of the number of applications filed against the Slovak Republic before the European Court.

4. What should be the role of the Government Agent in the procedure under Protocol No. 16: is there a need for a Government's view on the question posed by the requesting Court?

The need for the Government's view on the question posed by the requesting court can be assessed in each individual case, as it depends on the nature of the question posed, the possible wider effects of the Court's advisory opinion, etc. The European Court can assess the existence of such a need and, depending on it, invite the Government to submit their view, or the European Court can give the Government the opportunity to assess the existence of such a need and then express its view on the question posed. In any case, the Government should at least be informed that a request has been submitted to the European Court under Protocol No. 16 by one of the highest courts in the country, even if this request does not meet the requirements.

Slovenia

1. What are the main reasons for which your country has ratified / not yet ratified Protocol No. 16?

Protocol No 16 to the European Convention on Human Rights provides the highest national courts and tribunals of a High Contracting Party of the Council of Europe with the possibility to request the European Court of Human Rights (hereinafter: Court) to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or its protocols.

Since Protocol 16 enables highest courts to seek guidance from the Court in clarifying the provisions of the Convention we found it important to enable this option to our Supreme and Constitutional courts by ratifying the Protocol. In the ratification procedure it was considered important that requesting court remains independent as it is not bound to follow the opinion, and that the advisory opinion does not prejudge any future decisions of the Court in the case, should the parties subsequently bring a dispute before it.

Equally important was considered a possibility for a High Contracting Party to submit written comments or take part in the hearing in accordance with Article 3 of the Protocol.

2. Has the advisory opinion procedure under Protocol No.16 contributed to a better implementation of the Convention in your country?

In Slovenia Supreme Court of the Republic of Slovenia and the Constitutional Court of the Republic of Slovenia have the competence to submit a request for an advisory opinion, but until now - in the light of information in the public domain - they did not submit any request pursuant to Protocol 16. Nevertheless, we consider it important, that the Highest courts and tribunals of a High Contracting Party, when deciding on the rights and freedoms defined in the Convention or its Protocols, are aware that they can foster a constructive dialogue between the European Court and them, in line with the principle of subsidiarity, and thereby further strengthen the

implementation of the Convention at the domestic level. The opinions already delivered by the Court and requested by the Highest courts of the other High Contracting Parties can be of great assistance in their decisions.

3. What is your evaluation of the results of the advisory opinion as regards achieving a reduction in the number of applications from your State Party lodged with the Court?

The advisory opinion procedure has certainly had a positive impact, but we are not in a position to make this assessment.

4. What should be the role of the Government Agent in the procedure under Protocol No. 16: is there a need for a Government's view on the question posed by the requesting Court?

There is no provision foreseen for the Slovenian Government to submit written comments and take part in the hearing if the Slovenian courts request an advisory opinion from the Court. However, it is very likely that the Government will follow the practice it has in relation to the preliminary ruling procedure at the Court of Justice in Luxembourg, where the Government can submit statements or written observations in these proceedings.

The Slovenian Government is also likely to respond if, in the interest of the proper administration of justice, the President of the Court invites it to submit written comments or take part in the hearing under Article 3 of the Protocol.

The role of the Government Agent in the procedure under Protocol No. 16 would therefore be in preparing written comments or take part in the hearing on behalf of the Government.

Sweden

Sweden has not yet ratified Protocol No. 16.

However, in March 2023 a Ministry Memorandum (Ds 2023:7) was finalised at the Ministry of Justice. In the memorandum it is, inter alia, proposed that the Riksdag approve Protocol No.16 and adopt amendments to the Act on the European Convention for the Protection of Human Rights and Fundamental Freedoms. As a result of the amendments, the Additional Protocol would apply as Swedish law. It is also proposed that the Riksdag adopts a new Act on the Advisory Opinion of the European Court of Human Rights.

The question is currently under consideration within the Government Offices.

Due to the fact that Sweden has not yet ratified Protocol No 16, the Government refrains from answering Questions 2 and 3.

As regards Question 4, the Government is of the view that it should at least be given opportunity to comment on a question posed by a requesting Court. The main purpose would be to provide the Government with the opportunity to make factual clarifications and amendments. However, depending on the circumstances of the case at hand, there may be strong reasons against commenting on the interpretation of the Convention at this stage.

Switzerland

1. Quelles sont les principales raisons pour lesquelles votre pays a ratifié / pas encore ratifié le Protocole n° 16 ?

Avant d'adhérer au Protocole, le Gouvernement tient à analyser les conséquences de l'adhésion sur la base des premiers avis rendus par la Cour en application du Protocole. Il examinera prochainement l'opportunité de signer et de ratifier ce dernier.

2. La procédure d'avis consultatif prévue par le Protocole n° 16 a-t-elle permis une meilleure mise en œuvre de la Convention dans votre pays ?

La Suisse n'ayant pas adhéré au Protocole, ce dernier n'a pas eu jusqu'ici d'impact important sur la pratique des tribunaux internes. Toutefois, la pratique développée par la Cour dans le cadre des avis consultatifs est prise en compte par les juridictions internes au même titre que les arrêts et décisions de la Cour.

3. Comment évaluez-vous les résultats de l'avis consultatif portant sur la baisse du nombre de requêtes auprès de la Cour ?

La Suisse n'ayant pas adhéré au Protocole, il nous est difficile de répondre à cette question. A notre avis, le Protocole a certes permis de clarifier, en amont de la procédure de requête individuelle, certaines questions de principe. Nous ne sommes toutefois pas certains qu'il ait significativement réduit le nombre de requêtes adressées à la Cour jusqu'ici.

4. Quel rôle, l'Agent du gouvernement devait-il jouer dans la procédure prévue par le Protocole n°16 : l'avis donné par un gouvernement sur la question posée par la juridiction requérante, est-il nécessaire ?

Selon l'article 3 du Protocole, la Haute Partie contractante dont relève la juridiction qui a procédé à la demande a le droit de présenter des observations écrites et de prendre part aux audiences. De l'avis du Gouvernement, il paraît utile à première vue que ces observations soient présentées par l'agent du Gouvernement, lequel dispose d'une connaissance approfondie des enjeux du système de la Convention. Il peut en effet notamment apporter, le cas échéant, des éclairages sur une pratique interne ou une modification législative en cours. Toutefois, dans d'autres situations, l'Agent n'aura peut-être rien à contribuer à la procédure et renoncera à se prononcer.

United Kingdom

1. What are the main reasons for which your country has ratified / not yet ratified Protocol No. 16?

The United Kingdom has not ratified Protocol No.16 and has no current plans to do so. We are grateful that, in part through the Brighton Declaration, it was possible to bring to fruition, the long-running debate about a system of advisory opinions. However, we have not seen sufficient evidence demonstrating that Protocol No.16 has yet had a significant impact either in reducing the volume of cases brought before the Court, or in enhancing the dialogue between the Court and the highest national courts. We note that the United Kingdom consistently has the lowest

number of applications per capita to the Court of all States Parties, and there is already a rich and fruitful dialogue – both formal and informal – between our highest national courts and the Court.

Our position in respect of potential ratification has consistently been that we would wait to see how Protocol No.16 works in practice, and the Court has to date issued only seven advisory opinions, most recently in December 2023. We shall continue to monitor the effect of advisory opinions on the Court's workload and the implementation of the Convention by ratifying States.

2. Has the advisory opinion procedure under Protocol No.16 contributed to a better implementation of the Convention in your country?

Given that the United Kingdom has not ratified Protocol No.16, and that none of the seven advisory opinions delivered to date has had particular significance for our legal systems, the advisory opinion procedure has not had any discernible effect on the implementation of the Convention at national level.

It should also be noted that domestic legislation in the form of the Human Rights Act 1998 (HRA) gives further effect to the rights and freedoms set out in the ECHR. It makes it unlawful for any public authority to act in a way which is incompatible with a Convention right, save where required to do so by primary legislation. Under section 3 of the HRA, legislation must be read and given effect, so far as possible, in a way which is compatible with the Convention rights.

The United Kingdom's record at the European Court of Human Rights demonstrates our commitment to implementing judgments of the Court. Currently, only 11 judgments (5 of which are grouped cases), against the UK are still under the supervision of the Committee of Ministers. This is lower than almost all member States with similar population size.

3. What is your evaluation of the results of the advisory opinion as regards achieving a reduction in the number of applications from your State Party lodged with the Court?

N/A. The United Kingdom currently has the lowest rate of applications to the Court per million inhabitants (3.0 per million in 2023). There are very few judgments that find violations by the UK – 2 were given in 2022 and 1 in 2023.

4. What should be the role of the Government Agent in the procedure under Protocol No. 16: is there a need for a Government's view on the question posed by the requesting Court?

We note that it is already possible for a Government to provide its view on the question posed by the Court either through its own volition or by invitation from the President of the Court. We recall Article 3 of Protocol No.16 which sets out:
"The High Contracting Party of which a court or tribunal requested an advisory opinion shall have the right to submit written comments and take part in any hearing. 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."

In the absence of any requirement to the contrary, this would also apply in circumstances where the High Contracting Party had not been involved in the domestic proceedings that gave rise to the request for an advisory opinion. Therefore, given that being able to provide a view on the

question posed by the requesting court is a right afforded to High Contracting Parties under the Convention, and that those views would naturally be presented to the Court by the Government Agent. It is our view that the role of Government Agent in the procedure under Protocol No.16 is sufficiently clear and there would be no need to consider any additional role for the Government Agent beyond that set out above. Therefore, the question on the role of the Government Agent in the procedure under Protocol No.16 or whether there is a need for a Government's view is not applicable in this regard.

3. Replies by designated highest courts and tribunals

Questions to the designated highest national courts

1. *Has your Court considered whether the resolution of a question arising in a pending case may be assisted by an advisory opinion of the European Court of Human Rights? If so, what was the nature of the question/s? Has your Court given its view on the question posed and, if not, for what reasons?*

2. *If such consideration resulted in a decision not to request an advisory opinion of the European Court of Human Rights, what were the reasons for this?*

3. *If an advisory opinion was requested and delivered, what effect did it have on the outcome of the case in relation to which it was requested? Has the advisory opinion had any wider impact in the national legal order?*

4. *Did the process of requesting an advisory opinion under Protocol No. 16 result in any undue delay to the final determination of the case at domestic level?*

5. *What impact has the advisory opinion of the European Court of Human Rights had as regards achieving a better implementation of the Convention in your country?*

Supreme Court of the Republic of Albania

Albania has ratified Protocol No. 16 to the European Convention on Human Rights, with Law No. 48/2015 "On the ratification of Protocol 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms."
Since the Supreme Court of the Republic of Albania is the highest court under Article 10 of Protocol 16, a new Article in the Code of Civil Procedure (Law No. 44/2021) was added, Article 483/a, entitled "Preliminary proceedings", which authorizes the Supreme Court to suspend the examination of a judicial case and address it to the European Court of Human Rights for an advisory opinion on fundamental issues related to the interpretation or application of rights and freedoms set out in the Convention or its protocols.
Until now, considering the judicial experience of the Supreme Court of the Albanian Republic, no pending case was considered to arise a question deemed necessary to be assisted by an advisory opinion of the European Court of Human Rights.

Article 483/a

Preliminary proceedings
(Added by law no. 44/2021, Article 26)

1. If the Civil or the Joint Chambers of the High Court, during the examination of the case, in the counselling chamber or in the court hearing, decide to address the European Court of Human Rights or other international courts, according to the obligations deriving from international agreements ratified by the Republic of Albania, shall take a decision to suspend the examination of the case.
2. The decision on suspension lasts until the decision of the international court. The decision of

the international court shall be notified to the parties together with the date of the hearing.

Constitutional Court of the Republic of Albania

1. Has your Court considered whether the resolution of a question arising in a pending case may be assisted by an advisory opinion of the European Court of Human Rights? If so, what was the nature of the question/s? Has your Court given its view on the question posed and, if not, for what reasons?

Article 17 of the Constitution, regarding the limitation of the fundamental rights and freedoms of the individual, has placed the European Convention on Human Rights (ECHR) on the same level as the Constitution itself. Emphasizing this special status of the Convention in the internal order, the Constitutional Court, in the interpretation of Articles 5, 116, 122 and 17 of the Constitution, has also recognized the exclusive competence of the European Court of Human Rights (ECtHR) in our legal system and the direct effect of its decisions on the interpretation of constitutional standards of human rights.

In accordance with the provisions of Protocol no. 16 of the ECHR, which recognizes the right of the highest courts of the Member States to seek advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms provided for by the Convention or its Protocols, as amended in 2016, the Organic Law of the Constitutional Court, no. 8577, dated 10.02.2000, “On the Organization and Functioning of the Constitutional Court of the Republic of Albania”, provides that if, during the examination of a case, the Constitutional Court decides to seek an advisory opinion from the ECtHR on the implementation of the rights and freedoms provided for in the Convention, It shall suspend the examination of the case until It has received this opinion (Article 44/b of the Organic Law). The legal provisions are detailed in the Rules for Judicial Procedures of the Court, which provide for the right of the Court to decide ex officio or based on the request of the parties, as well as the procedure followed in such a case (Article 35 of the Rules of the Court).

In its practice, the Constitutional Court has not considered on its motion whether the resolution of a question arising in a pending case required the assistance of an advisory opinion from the ECtHR. However, in a concrete case under examination before it, namely the checking of Constitutional compliance of the Protocol signed between the Government of the Italian Republic and the Council of Ministers of the Republic of Albania, “On strengthening cooperation in the field of migration”, by the applicants (a group of Members of the Parliament) the Constitutional Cour has been requested to address the ECtHR for an advisory opinion regarding the implementation of the rights and freedoms of the ECHR on the fundamental rights of migrants. The applicants have argued the request based on the specific nature of this case, the absence of previous precedents of the Constitutional Court, the limited jurisprudence of the ECtHR in this regard, the exclusive jurisdiction of the latter for the interpretation of the ECHR and its protocols, as well as the interest of the Albanian state, which may face complaints for violations of the Convention.

Regarding this application, the Constitutional Court decided to dismiss it, as it considered that in this case it was not considered necessary to obtain an advisory opinion from the ECtHR.

2. If such consideration resulted in a decision not to request an advisory opinion of the European Court of Human Rights, what were the reasons for this?

See the answer to question 1.

3. If an advisory opinion was requested and delivered, what effect did it have on the outcome of the case in relation to which it was requested? Has the advisory opinion had any wider impact in the national legal order?

There has not been such a case.

4. Did the process of requesting an advisory opinion under Protocol No. 16 result in any undue delay to the final determination of the case at domestic level?

According to Article 44/b of the organic law of the Constitutional Court and Article 35 of the Rules for Judicial Procedures of the Court, in cases when the examination of the case is suspended because the Court decides to request an advisory opinion, the hearing is reopened only after such an opinion is received. Consequently, the continuation of the examination and the duration depend to some extent on the time it takes the ECtHR to examine the request.
However, as long as there has not been such a case, there can be no response regarding the impact of this procedure on the overall duration of the examination of the case in the Constitutional Court.

5. What impact has the advisory opinion of the European Court of Human Rights had as regards achieving a better implementation of the Convention in your country?

There has not been such a case.

Constitutional Court of Andorra

1. Votre Cour a-t-elle examiné si la résolution d'une question soulevée dans une affaire pendante pouvait être facilitée par un avis consultatif de la Cour européenne des droits de l'homme ? Dans l'affirmative, quelle était la nature de la/des question(s) ? Votre Cour a-telle donné son avis sur la question posée, et dans le cas contraire, pour quelles raisons ?

Le Tribunal constitutionnel de l'Andorre n'a pas encore eu à se prononcer.

5. Quel est l'impact de l'avis consultatif de la Cour européenne des droits de l'homme sur l'amélioration de la mise en œuvre de la Convention dans votre pays ?

Jusqu'à présent le Tribunal Constitutionnel d'Andorre n'a pas été saisi d'une affaire nécessitant l'avis consultatif de la Cour Européenne des Droits de l'Homme.

La plus grande partie de son travail est constitué par des recours d'empara (recours en protection des droits fondamentaux) essentiellement portant sur la protection du droit à un procès équitable garanti par l'article 10 de la Constitution.

La question d'un éventuel recours à un tel avis consultatif n'a jamais fait l'objet d'une discussion au sein du Tribunal.

Comme dit ci-avant, aucune affaire soumise au Tribunal Constitutionnel n'a présenté ni la

complexité, ni de différences d'analyse entre les magistrats (même s'ils sont issus de cultures juridiques différentes) entrainant la nécessité de l'avis consultatif.

En conséquence, la suite du questionnaire est sans objet en ce qui concerne le Tribunal Constitutionnel d'Andorre.

High Court of Justice of Andorra

Le protocole n° 16 à la Convention Européenne de Sauvegarde des Droits de l'Homme et des Libertés Fondamentales, entré en vigueur le 1er août 2018, permet aux plus hautes juridictions des États signataires d'adresser à la Cour Européenne des Droits de l'Homme des demandes d'avis consultatifs sur des questions de principe relatives à l'interprétation ou à l'application des droits et libertés définis par la convention et ses protocoles.

En application de ce Protocole, le législateur andorran a introduit quelques mois plus tard, un nouvel article 8 bis dans la Loi qualifiée de la justice, permettant ainsi au Tribunal Supérieur de Justice la possibilité de recourir à ce système. Depuis cette introduction, notre Tribunal Supérieur n'a pas eu, à ce titre, à saisir la Cour. Nous n'avons pas connu de question inédite, ou de question où la juridiction nationale souhaiterait que la Cour revienne sur une jurisprudence établie. Raison pour laquelle nos réponses au questionnaire de référence sont toutes négatives.

Ce protocole, fondé sur le principe de la subsidiarité, s'inscrit dans l'idée d'une responsabilité partagée entre la Cour et les au1orités judiciaires nationales dans la protection de la Convention. Il doit permettre de favoriser, en amont des requêtes individuelles, un dialogue entre la Cour et les Hautes juridictions nationales afin d'aider le juge national à bien interpréter la Convention.

À ce titre, il nous semble donc que le Protocole n°16 est un bon instrument, qui par le dialogue qu'il ouvre, permet de renforcer tant l'autorité des juridictions nationales comme garantie des droits de l'homme, que celle de la Cour Européenne, qui en se prononçant sur des questions de principe peut y trouver un vecteur pour y affirmer un ordre public européen des droits de l'homme, applicable à l'ensemble des Etats parties.

Constitutional Court of the Republic of Armenia

We would like to convey that within the framework of the investigation "On the case of conformity of Article 300.1 of the Criminal Code of the Republic of Armenia with the Constitution on the basis of the applications of Robert Kocharyan and the First Instance Court of General Jurisdiction of Yerevan " In accordance with Article 16 of Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms of July 18, 2019, based on the Decisions PDCC-81 and PDCC-82, the Constitutional Court of the Republic of Armenia applied to the European Court of Human Rights for an advisory opinion.

The Constitutional Court of the Republic of Armenia, in view of Article 300.1 of the Criminal Code, applied to the European Court of Human Rights for an advisory opinion on the following questions:
- Does the concept of "law" under Article 7 of the Convention and referred to in other Articles of the Convention, for instance, in Articles 8 – 11, have the same degree of qualitative

requirements (certainty, accessibility, foreseeability and stability)?
- If not, what are the standards of delineation?
- Does the 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 meet the requirements of certainty, accessibility, foreseeability and stability?
- In the light of the principle of non-retroactivity of criminal law (Article 7, Part 1 of the Convention), what standards are estableshed for comparing the criminal law in force at the time of committal of the crime and the amended criminal law, in order to identify their contextual (essential) similarities or differences?

The Constitutional Court of the Republic of Armenia gave its view on the question posed.

The Constitutional Court decided to suspend accordingly the proceedings on the case “On determining the issue of conformity of Article 300.1 of the Criminal Code of the Republic of Armenia with the Constitution on the basis of Robert Kocharyan’s appeal” and the proceedings on the case “On determining the conformation of Part 1 of Article 300.1 of the Criminal Code of the Republic of Armenia with the Constitution on the basis of the First Instance Court of the General Jurisdiction of the city of Yerevan "before receiving the advisory opinions of the European Court of Human Rights and the Venice Commission. Considering the fact that the Advisory Opinion of the European Court of Human Rights was published on May 29, 2020, and the Advisory Opinion of the Venice Commission - on June 18, 2020, the Constitutional Court, by its Procedural Decisions PDCC-136 and PDCC-137 of June 22, 2020, stated that the grounds for the termination of proceedings in the above cases disappeared, and decided to resume the examination.

The advisory opinion had an effect on the outcome of the case. As a result of the investigation of the case Article 300.1 of the Criminal Code of the Republic of Armenia was declared contradicting Articles 78 and 79 of the Constitution and was void by the decision of the Constitutional Court.

The process of requesting an advisory opinion under Protocol No. 16 did not result in any undue delay to the final determination of the case at domestic level.

The advisory opinion of the European Court of Human Rights had an impact on better implementation of the Convention.

Court of Cassation of the Republic of Armenia

1. Has your Court considered whether the resolution of a question arising in a pending case may be assisted by an advisory opinion of the European Court of Human Rights? If so, what was the nature of the question/s? Has your Court given its view on the question posed and, if not, for what reasons?

By the decision of January 27, 2021, emphasizing dialogue with the European Court of Human Rights (hereinafter referred to as ECtHR) the Criminal Chamber of the RA Court of Cassation (hereinafter referred to as the Cassation Court), within the framework of the execution of the ECtHR judgment of October 2, 2012 in the case of Virabyan v. Armenia, submitted a request for an advisory opinion. Referring to the international documents regarding the prohibition of torture as a jus cogens norm of international law, the Cassation Court raised the issue whether non-application of statutes of limitation for criminal responsibility for torture or any other crimes

equated thereto by invoking the international law sources would be compliant with Article 7 of the European Convention, if the domestic law provides for no requirement for non-application of statutes of limitation for criminal responsibility.

2. If such consideration resulted in a decision not to request an advisory opinion of the European Court of Human Rights, what were the reasons for this?

According to the article 384.1. of Criminal procedural code “Any judge may submit a proposal to obtain an advisory opinion, on which the Court of Cassation makes a decision”. Until now, there has been no proposal to obtain an Advisory Opinion, which was rejected by the Cassation Court.

3. If an advisory opinion was requested and delivered, what effect did it have on the outcome of the case in relation to which it was requested? Has the advisory opinion had any wider impact in the national legal order?

On April 26, 2022 the Grand Chamber of the European Court delivered 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, which has served as an important source for holding the decision in Viarabyan case by the Cassation Court on December 22, 2023.

4. Did the process of requesting an advisory opinion under Protocol No. 16 result in any undue delay to the final determination of the case at domestic level?

Considering the complexity of the case and the importance of the subject matter the case was determined within a reasonable time frame, so the process of requesting an advisory opinion under Protocol No. 16 did not result in any undue delay to the final determination of the case at domestic level.

5. What impact has the advisory opinion of the European Court of Human Rights had as regards achieving a better implementation of the Convention in your country?

Definitely, the successful practice of requesting an advisory opinion from ECHR, will provide a wider scope for the implementation of the rights and freedoms enshrined in the European Convention strictly in compliance with the case-law of the ECtHR. This example of productive cooperation will serve as an incentive for the highest national courts or tribunals to launch this valuable tool while dealing with the rights and freedoms guaranteed by the ECtHR in domestic proceedings. Furthermore, the advisory opinions will channel the judicial discourse on legal concepts from the initial stages and will assist the highest domestic courts to apply the ECtHR standards and to avoid future violations.

When it comes to the impact of advisory opinion of the European Court of Human Rights, it is important to recognize that although not binding, these opinions nevertheless do have jurisprudential authority and value. Adhering to the principles of the European Convention, the Cassation Court follows the advisory opinions made on the basis of the 16th Protocol, regardless of which country applied for an advisory opinion. Those advisory opinions reflect the case-law of ECtHR and serve as a legal source for prevention of human rights violations.

Supreme Court of the Republic of Azerbaijan

Protocol No. 16 of the Convention for the Protection of Human Rights and Fundamental Freedoms was signed by the Republic of Azerbaijan on November 18, 2021, and ratified by Law No. 821-VIQ on February 24, 2023. The protocol came into force in Azerbaijan on November 1, 2023.

While Protocol No. 16 has been in force for a short period in Azerbaijan, amendments to domestic legislation regarding the procedure for seeking advisory opinions from the European Court of Human Rights by Azerbaijani courts have not yet been fully completed. Consequently, it is currently not possible to appeal to the European Court regarding advisory opinions from the Supreme Court of Azerbaijan.

Nonetheless, the Supreme Court remains committed to the Convention system, viewing Protocol No. 16 as crucial for fostering dialogue among judges and enhancing human rights protection in the country.

Constitutional Court of the Republic of Azerbaijan

In its decisions, the Constitutional Court of Azerbaijan frequently references the case law of the European Court of Human Rights, broadly applying the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms in its practice.

The Constitutional Court relies on the "HUDOC" search system on the European Court of Human Rights' official website and the "CODICES" database system by the Venice Commission of the Council of Europe for Constitutional Courts to access relevant decisions and literature.

Furthermore, in line with Article 8 of Protocol No. 16 of the Convention, which entered into force in Azerbaijan on November 1, 2023, the Constitutional Court may seek advisory opinions from the European Court of Human Rights on fundamental issues pertaining to the interpretation or application of rights and freedoms defined in the Convention or its Protocols in connection with ongoing cases. The Constitutional Court intends to utilize this opportunity within the framework of pending cases.

Constitutional Council of Belgium

1. Has your Court considered whether the resolution of a question arising in a pending case may be assisted by an advisory opinion of the European Court of Human Rights? If so, what was the nature of the question/s? Has your Court given its view on the question posed and, if not, for what reasons?

Since the entry into force of Protocol No 16 in Belgium on March 1st 2023, no formal request for an advisory opinion has been raised in a pending case, either by one of the parties or ex officio by the Court itself. Informal considerations in this regard, if any, are part of the secrecy of deliberation and therefore cannot be shared with the Committee.

Court of Cassation of Belgium

Première question.

Au cours de l'année écoulée, la Cour de cassation n'a pas adressé de demande d'avis consultatif à la Cour européenne des droits de l'homme. Si le pourvoi en cassation soulève des questions de droit de principe quant à l'interprétation ou à l'application des droits et libertés consacrés dans la Convention de sauvegarde des droits de l'homme et des libertés fondamentales ou ses protocoles, la Cour peut recourir d'office à cette possibilité. Par ailleurs, les parties peuvent aussi inviter la Cour, dans le pourvoi en cassation ou dans le mémoire en réponse, à adresser une demande d'avis consultatif à la Cour européenne des droits de l'homme. La Cour décide ensuite s'il y a lieu d'accueillir cette demande. Le Protocole nº 16 n'étant entré en vigueur pour la Belgique que le 1er mars 2023, il est impossible de procéder d'ores et déjà à une évaluation, vu la brièveté de sa mise en œuvre. En tout état de cause, les parties litigantes n'ont pas encore pris l'habitude de demander à la Cour d'appliquer le Protocole nº 16. Les réponses fournies ci-après abordent donc in abstracto un certain nombre de possibilités et de problèmes qui sont susceptibles d'accompagner l'utilisation de la demande d'avis consultatif prévue dans le Protocole nº 16. En l'absence de cas d'application, la Cour de cassation de Belgique n'est pas en mesure de tirer des enseignements d'une pratique existante.

La plupart des droits fondamentaux contenus dans la Convention sont également garantis par la Constitution belge. Il ressort des travaux préparatoires de la loi belge portant assentiment du Protocole nº 16 que l'on part du principe, en cas de concours de droits fondamentaux, que la Cour de cassation et le Conseil d'État doivent d'abord poser une question préjudicielle à la Cour constitutionnelle et attendre l'arrêt de cette dernière avant de pouvoir saisir la Cour européenne des droits de l'homme. La Cour ne partage pas cette opinion. En effet, les objectifs du protocole ne sauraient être suffisamment atteints si la Cour de cassation et le Conseil d'État ne sont à même d'entamer un dialogue avec la Cour européenne des droits de l'homme qu'après que la Cour constitutionnelle a statué sur le conflit éventuel entre la loi et les dispositions de la Constitution dont elle doit assurer le respect. La demande d'avis consultatif à la Cour européenne des droits de l'homme est un nouvel instrument permettant de cerner, à un stade précoce de la procédure, la portée exacte des droits et libertés consacrés dans la Convention et ses protocoles. Il convient dès lors de pouvoir en faire une utilisation efficace. Le texte de l'article 26, § 4, de la loi spéciale sur la Cour constitutionnelle n'empêche pas non plus la Cour de cassation ou le Conseil d'État de soumettre une question préjudicielle à la Cour constitutionnelle et d'adresser simultanément une demande d'avis consultatif à la Cour européenne des droits de l'homme.

La possibilité pour la Cour de cassation ou le Conseil d'État de solliciter un avis dès le début de la procédure se traduira également par un gain d'efficacité à l'échelle nationale. Tout d'abord, la juridiction qui sollicite l'avis de la Cour européenne des droits de l'homme pourra en disposer plus rapidement, ce qui permettra de raccourcir la durée de la procédure. Ensuite, la Cour constitutionnelle aura également plus rapidement entre les mains l'avis de la Cour européenne des droits de l'homme qui pourra lui servir de guide, dans la réponse à donner à la question préjudicielle, quant à l'interprétation des droits et libertés constitutionnels qui sont analogues aux droits fondamentaux de la Convention européenne des droits de l'homme. L'on évitera ainsi, dans la mesure du possible, toute contradiction entre l'interprétation directrice de la Cour européenne des droits de l'homme et la jurisprudence de la Cour constitutionnelle ou d'une autre juridiction suprême.

Deuxième, troisième et quatrième question.

Bien que la Cour de cassation soit favorable à de véritables interactions et à un dialogue efficace entre les plus hautes juridictions nationales et la Cour européenne des droits de l'homme et que la demande d'avis adressée à celle-ci soit précisément un outil important au service du dialogue judiciaire, il est à prévoir que cet avis ne sera utilisé que dans un nombre limité d'affaires de principe touchant à la Convention et à ses protocoles. Il appartient aux juridictions nationales de mettre en balance, dans un cas concret, l'avantage de l'obtention rapide de l'avis faisant autorité de la Cour européenne des droits de l'homme et le retard ainsi occasionné dans le règlement du litige. La circonstance que, dans la pratique, la Cour européenne des droits de l'homme réponde à une demande d'avis dans un délai relativement bref incitera sans aucun doute les plus hautes juridictions belges à faire usage de cet instrument. Dans ce contexte, il est intéressant de relever que, dans un arrêt du 4 avril 2023, le Conseil d'État a été la première juridiction suprême belge à faire usage de la possibilité de solliciter l'avis de la Cour européenne des droits de l'homme. La Grande Chambre de cette cour ayant communiqué sa réponse le 14 décembre 2023, la prolongation de huit mois de la durée de la procédure n'était pas déraisonnable. Le retard causé par une demande d'avis dans cette affaire était en effet moins important que celui qui résulte habituellement d'une question préjudicielle.

Cinquième question.
Compte tenu du nombre restreint d'avis demandés et émis, il est jusqu'à présent difficile de se prononcer sur la contribution de la procédure consultative à la mise en œuvre de la Convention parmi les États membres du Conseil de l'Europe. Il est permis de penser, sans aucune certitude, qu'une utilisation intensive du protocole entraînera une diminution du nombre de procédures portées devant la Cour européenne des droits de l'homme.

State Council of Belgium

1. Votre Cour a-t-elle examiné si la résolution d'une question soulevée dans une affaire pendante pouvait être facilitée par un avis consultatif de la Cour européenne des droits de l'homme ? Dans l'affirmative, quelle était la nature de la/des question(s) ? Votre Cour a-t-elle donné son avis sur la question posée, et dans le cas contraire, pour quelles raisons ?

Le Conseil d'État de Belgique a soumis à la Cour européenne des droits de l'homme une première demande d'avis consultatif le 4 avril 2023 (arrêt n° 256.222 du 4 avril 2023). Cette procédure juridictionnelle pendante devant le Conseil d'État a pour objet la suspension et l'annulation d'une décision de la ministre de l'Intérieur retirant à une personne, considérée par la Sûreté de l'État belge comme étant partisane de l'idéologie salafiste « scientifique », une carte d'identification lui permettant d'exercer des fonctions consistant à assurer la sécurité des infrastructures ferroviaires belges et des personnes qui les fréquentent, et de lui refuser une seconde carte d'identification en tant qu'agent de gardiennage. La question posée dans la demande d'avis consultatif était la suivante :

« La seule proximité ou appartenance à un mouvement religieux, considéré par l'autorité administrative compétente, compte tenu de ses caractéristiques, comme présentant à moyen ou à long terme une menace pour le pays, constitue-t-elle au regard de l'article 9 § 2 (droit à la liberté de pensée, de conscience et de religion) de la Convention un motif suffisant pour prendre une mesure défavorable à l'encontre de quelqu'un, telle que l'interdiction d'exercer la profession d'agent de gardiennage ? ».

Dans la demande d'avis transmise à la Cour, le Conseil d'État a décrit les faits de la cause, a exposé le contexte juridique de l'affaire et a également fait part des arguments juridiques développés par les parties. Le Conseil d'État n'a pas souhaité, à ce stade de la procédure, prendre attitude sur la question posée afin d'éviter que l'on puisse lui reprocher un manque d'impartialité ou d'objectivité et de vouloir déjà préjuger.

2. Si un tel examen a entraîné une décision de ne pas demander d'avis consultatif à la Cour européenne des droits de l'homme, quelles en ont été les raisons ?

Dans certaines affaires autres que celle visée à la question 1, des parties au litige ont évoqué la possibilité de solliciter l'avis de la Cour en se prévalant du Protocole n°16 et le Conseil d'État a jugé que cette demande d'avis n'était pas nécessaire à la résolution du litige car la Cour avait déjà examiné le problème soulevé et que sa jurisprudence était transposable au cas d'espèce (arrêt n°256.322 du 21 avril 2023). Dans une autre affaire, le Conseil d'État a jugé que la demande d'un avis consultatif formulée par une partie au litige n'était pas recevable car cette partie n'indiquait pas pourquoi cela était nécessaire en l'espèce (arrêt n°258.260 du 19 décembre 2023).

3. Si un avis consultatif a été demandé et rendu, quelle incidence a-t-il eu sur l'issue de l'affaire pour laquelle il avait été demandé ? L'avis consultatif a-t-il eu un impact plus large dans l'ordre juridique national ?

L'avis de la Cour européenne des droits de l'homme a été rendu le 14 décembre 2023. Une nouvelle audience va être organisée par le Conseil d'État pour permettre aux parties au litige de faire valoir leurs observations sur l'avis de la Cour, dans le respect du principe des débats contradictoires et des droits de la défense. À ce stade, il est donc encore trop tôt pour se prononcer sur l'incidence de cet avis sur la jurisprudence du Conseil d'État.

4. La procédure de demande d'avis consultatif au titre du Protocole n° 16 a-t-elle entraîné un retard injustifié dans la résolution finale de l'affaire au niveau national ?

Non pas spécifiquement. Il est de l'intérêt des parties au litige que le Conseil d'État puisse trancher leur différend en étant parfaitement éclairé notamment lorsque des questions touchant aux droits et libertés fondamentaux sont en cause.

5. Quel est l'impact de l'avis consultatif de la Cour européenne des droits de l'homme sur l'amélioration de la mise en œuvre de la Convention dans votre pays ?

Ce dialogue de juge à juge offre l'avantage au juge national de pouvoir directement attirer l'attention de la Cour sur des questions inédites ou des difficultés d'interprétation de sa jurisprudence. Inversement, l'avis donné par la Grande Chambre de la Cour au juge national, permet à ce dernier de renforcer l'autorité de sa décision. L'intégration de la Convention dans l'ordre juridique interne est ainsi facilitée.

Constitutional Court of Bosnia and Herzegovina

The Constitutional Court of Bosnia and Herzegovina replied that in its case-law to date it has not considered the possibility of solving a certain legal issue with the help of the advisory opinion of

the European Court of Human Rights, which is why it is not possible to give an answer to *questions no. 2 and 3.*

In response to *question no. 4*, the Constitutional Court considers that Protocol no. 16 has been designed to facilitate cooperation and encourage common understanding of human rights principles between domestic courts and the European Court of Human Rights. Therefore, they conclude that the intention of this Protocol is not to delay domestic proceedings unjustifiably, but to ensure a harmonized and consistent interpretation of rights from the Convention. Although the process of submission of the request under Protocol no. 16 may cause a slightly longer duration of proceedings before a domestic court, its overall impact on the delay in making a final decision at the domestic level should be balanced against the benefits of the previously mentioned common understanding of human rights principles and consistent interpretation of the Convention rights. The Constitutional Court is of the view that one could not talk about an unjustified delay if the European Court ensures timely and efficient resolution of requests referred to in Protocol no, 16.

In response to *question no. 5*, the Constitutional Court points out that the European Court of Human Rights to date has not issued a single advisory opinion in relation to Bosnia and Herzegovina, so there is no case-law on the basis of which one could talk about the real impact this Protocol has on the implementation of the Convention in Bosnia and Herzegovina. In the absence of concrete results and experience, we can hypothetically say that the advisory opinions of the European Court of Human Rights obtained on the basis of Protocol no. 16 can play a significant role in strengthening the implementation of the European Convention, which, according to the Constitution of Bosnia and Herzegovina, is directly applicable and has priority over all other laws. Advisory opinions can help ensure uniform interpretation of human rights standards within the domestic legal system and provide useful insight into the development of human rights case-law. Also, the Constitutional Court considers that the advisory opinion has a preemptive effect in preventing possible violations of human rights.

Supreme Court of the Federation of Bosnia and Herzegovina

The response of the Supreme Court of the Federation of BiH is that to date they have not asked the European Court of Human Rights for an advisory opinion on questions of principle relating to the interpretation or application of the rights and freedoms defined by the Convention and its Protocols in the context of the cases that were conducted before that court, nor has such a possibility been considered. The Supreme Court of the Federation of BiH has particularly pointed out that, although they currently do not have accurate indicators of the duration of the procedure for issuing an advisory opinion before the European Court of Human Rights, they believe that submitting a request for an advisory opinion would certainly lead to a prolongation of the completion of the specific case, but that this prolongation could not automatically be considered an unjustified delay in the final decision of the case at the domestic level".

Supreme Court of Republika Srpska

The RS Supreme Court states that the possibility of submitting a request for an advisory opinion of the European Court of Human Rights for the purpose of resolving a specific case and relating to the application of Convention rights, has not been considered in its case-law to date.

Supreme Court of Estonia

1. *Has your Court considered whether the resolution of a question arising in a pending case may be assisted by an advisory opinion of the European Court of Human Rights? If so, what was the nature of the question/s? Has your Court given its view on the question posed and, if not, for what reasons?*

The Supreme Court has once referred a case to the European Court of Human Rights for an advisory opinion. In its appeal, the party relied on the case law of the European Court of Human Rights but did not request an advisory opinion. The Supreme Court did so on its own initiative by order of 27. November 2023. Translation of the order into English and the relevant questions (in relation to Article 4(1) of Protocol No 7 to the European Convention on Human Rights, ne bis in idem principle) are attached to this letter (please see Annex No 1).

Annex No 1

Insurance Court of Finland

Thank you for the questionnaire and possibility to deliver an opinion about the first effects of Protocol No.16 to the European Convention on Human Rights.

The Insurance Court of Finland inform, that we haven't requested any advisory opinion of the European Court of Human Rights.

The Insurance Court of Finland handles over 3 000 cases per annum and court members (one to five judges depending on the group and the type of case) make decisions independently. That's why it is difficult to assess, if the decision-making body has considered whether the resolution of a question arising in a pending case could be assisted by an advisory opinion. To our knowledge, no such consideration has been made at the Insurance Court of Finland.

We wish to emphasise that the possibility to request an advisory opinion of the European Court of Human Rights is extremely important and it will provide support, if necessary, at implementation of the Convention. However, we would note the fact that requesting an advisory opinion under Protocol 16 will cause delay to the final determination at domestic level, and that is slightly concerning.

2. *If such consideration resulted in a decision not to request an advisory opinion of the European Court of Human Rights, what were the reasons for this?*

We do not have such information. These considerations are protected by the duty of confidentiality of deliberations and therefore cannot be disclosed.

3. *If an advisory opinion was requested and delivered, what effect did it have on the outcome of the case in relation to which it was requested? Has the advisory opinion had any wider impact in the national legal order?*

As we have not yet received the advisory opinion from the European Court of Human Rights, it is too early to answer that question. Theoretically, it can be assumed that the content of the advisory opinion may have an impact on the practice of law more broadly than in a specific criminal case.

4. *Did the process of requesting an advisory opinion under Protocol No. 16 result in any undue delay to the final determination of the case at domestic level?*

Please see the previous answer.

5. *What impact has the advisory opinion of the European Court of Human Rights had as regards achieving a better implementation of the Convention in your country?*

Please see the previous answer. We cannot comment on the questions asked by other countries, as this impact has not been studied.

Labour Court of Finland

So far, the Labour Court has not considered requesting an advisory opinion.

Supreme Administrative Court of Finland

1. *Has your Court considered whether the resolution of a question arising in a pending case may be assisted by an advisory opinion of the European Court of Human Rights? If so, what was the nature of the question/s? Has your Court given its view on the question posed and, if not, for what reasons?*

No. N/A. N/A.

2. *If such consideration resulted in a decision not to request an advisory opinion of the European Court of Human Rights, what were the reasons for this?*

N/A.

3. *If an advisory opinion was requested and delivered, what effect did it have on the outcome of the case in relation to which it was requested? Has the advisory opinion had any wider impact in the national legal order?*

N/A.

4. *Did the process of requesting an advisory opinion under Protocol No. 16 result in any undue delay to the final determination of the case at domestic level?*

N/A.

5. *What impact has the advisory opinion of the European Court of Human Rights had as regards achieving a better implementation of the Convention in your country?*

N/A.

Supreme Court of Finland

1-2. Firstly, the Supreme Court of Finland has submitted one request under Article 1 of Protocol No. 16 to the convention (Request no. P16-2022-001). Unfortunately, there is no systematic and public information available concerning the discussions within the individual panels in concrete cases. Therefore, we cannot assess if there have been other cases that have included questions where a request could have been of use. Generally, the experience from the first request were positive and there is no reason to doubt that requests wouldn't be made in the future when suitable questions arise.

3. The advisory opinion (Request no. P16-2022-001) was explained in the Supreme Courts Published decision (KKO 2024:18, available ín Finnish only). The Supreme Court of Finland stated (31) that the advisory opinion is not binding but that there are grounds to take the advisory opinion in to account when assessing the human rights requirements on the national legislation. The Supreme Court took advantage of the opinion in its own argumentation.

4. There was little or no delay in the decision making other than what time it took to prepare the request and receive the opinion.

5. It is difficult to identify other impact in achieving a better implementation of the Convention in Finland than the impact in this individual case. The fact that the Supreme Court has submitted a request could have had some influence on the general awareness on the Convention and the ECHR as well as their importance and weight.

French Constitutional Council

1. Votre Cour a-t-elle examiné si la résolution d'une question soulevée dans une affaire pendante pouvait être facilitée par un avis consultatif de la Cour européenne des droits de l'homme ? Dans l'affirmative, quelle était la nature de la/des question(s) ? Votre Cour a-t-elle donné son avis sur la question posée, et dans le cas contraire, pour quelles raisons ?

Quoiqu'il n'entre pas dans son office, tel que le lui assigne la Constitution française, de juger de la compatibilité des lois nationales avec la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, le Conseil constitutionnel a été saisi à deux reprises de conclusions l'invitant à saisir sur le fondement du protocole n° 16 à la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, de saisir la Cour européenne des droits de l'homme d'une demande d'avis consultatif.

Par sa décision n°2018-745 QPC du 23 novembre 2018, il a écarté une telle demande visant à recueillir de la Cour une interprétation du protocole n°7 à la Convention, en constatant qu'aucun

motif ne le justifiait en l'espèce (paragr. 5).

Il en a jugé de même par sa décision n°2019-772 QPC du 5 avril 2019, en réponse à une demande de saisie de la Cour pour interprétation de plusieurs articles de la Convention.

Le Conseil constitutionnel a, ce faisant, fait apparaître que les justiciables sont recevables à saisir le Conseil constitutionnel de conclusions aux fins de transmissions de telles demandes pour avis dans le cadre d'une question prioritaire de constitutionnalité et qu'il n'excluait nullement la possibilité d'y faire droit.

2. Si un tel examen a entraîné une décision de ne pas demander d'avis consultatif à la Cour européenne des droits de l'homme, quelles en ont été les raisons ?

Le Conseil constitutionnel s'est déterminé au regard de la substance même des débats portés devant lui, en constatant que leur règlement ne justifiait pas la consultation de la Cour.

3. Si un avis consultatif a été demandé et rendu, quelle incidence a-t-il eu sur l'issue de l'affaire pour laquelle il avait été demandé ? L'avis consultatif a-t-il eu un impact plus large dans l'ordre juridique national ?

Sans objet.

4. La procédure de demande d'avis consultatif au titre du Protocole n° 16 a-t-elle entraîné un retard injustifié dans la résolution finale de l'affaire au niveau national ?

Sans objet.

5. Quel est l'impact de l'avis consultatif de la Cour européenne des droits de l'homme sur l'amélioration de la mise en oeuvre de la Convention dans votre pays ?

Après l'adoption de la loi n° 2018-237 du 3 avril 2018 autorisant la ratification du protocole n° 16, la France l'a ratifié le 12 avril 2018, en formulant alors une déclaration selon laquelle les « plus hautes juridictions » qui, en application de son article 1er, sont susceptibles d'adresser à la Cour européenne des droits de l'homme des demandes d'avis consultatifs, sont le Conseil constitutionnel, le Conseil d'État et la Cour de cassation.

Consulté dans cette perspective par le Gouvernement français, le Conseil constitutionnel lui avait fait connaître son souhait d'être ainsi désigné au nombre des hautes juridictions nationales au seins du protocole n°16, exprimant par là son analyse de l'utilité de ce mécanisme du point de vue de la protection des droits de l'homme en Europe.

French State Council

1. Votre Cour a-t-elle examiné si la résolution d'une question soulevée dans une affaire pendante pouvait être facilitée par un avis consultatif de la Cour européenne des droits de l'homme ? Dans l'affirmative, quelle était la nature de la/des question(s) ? Votre Cour a-t-elle donné son avis sur la question posée, et dans le cas contraire, pour quelles raisons ?

A ce jour, la procédure de demande d'avis consultatif à la Cour européenne des droits de l'homme a été utilisée par le Conseil d'Etat dans une affaire, qui concernait la législation relative

au droit de chasse, et plus particulièrement les modalités selon lesquelles des propriétaires privés peuvent être contraints de rejoindre des associations ayant pour but de constituer des territoires de chasse.

Dans l'affaire en cause, une demande d'avis a été adressée sur la conventionnalité du droit des associations communales de chasse agréées au regard de la combinaison des articles 1er du 1er protocole additionnel (P1) et 14 de la Convention. Cette question avait déjà donné lieu à une jurisprudence relativement nourrie du Conseil d'Etat et de la Cour européenne des droits de l'homme, mais une nouvelle intervention du législateur a fait émerger une question nouvelle.

La combinaison de ces articles implique qu'une distinction entre des personnes placées dans une situation analogue est discriminatoire, au sens de ces stipulations, si elle n'est pas assortie de justifications objectives et raisonnables, c'est-à-dire si elle ne poursuit pas un objectif d'utilité publique ou si elle n'est pas fondée sur des critères objectifs et rationnels en rapport avec les buts de la loi. Dans un arrêt précédent (CEDH [GC], 4 octobre 2012, Chabauty c/ France, 57412/08), la CEDH avait eu l'occasion de juger en Grande chambre que la restriction d'usage des biens subie par les seuls petits propriétaires ne méconnaissait pas l'article 14 de la convention combinée avec l'article 1er P1, car cette différence de traitement poursuivait un objectif d'utilité publique fondé sur des critères objectifs et raisonnables en rapport avec les buts de la loi (permettre une meilleure organisation de la chasse en évitant le morcellement du territoire).

Le renvoi d'une demande d'avis en la matière à la CEDH se justifiait par la densité juridique et jurisprudentielle de la question, la Cour ayant élaboré au fil des années une jurisprudence nourrie sur ces pans du droit conventionnel, sans toutefois que le CE puisse y trouver la réponse adéquate à la question qui lui était posée dans le cadre du litige. Le nouvel état du droit interne comportait en effet une nouvelle distinction entre les propriétaires, fondée sur un nouveau critère. Il était possible d'estimer que cette nouvelle distinction répondait au même objectif légitime de manière efficace, mais il n'était pas évident, malgré la marge d'appréciation reconnue par la Cour, de considérer qu'elle se fondait sur un critère objectif ou raisonnable. La demande d'avis renvoyée par le CE invitait ainsi la CEDH à préciser les critères pertinents, au-delà de ceux déjà reconnus dans sa jurisprudence, pour apprécier si une différence de traitement établie par la loi poursuit un objectif d'utilité publique fondée sur des critères objectifs et rationnels en rapport avec les buts de la loi l'établissant.

Le Conseil d'Etat n'exprime pas, dans l'éventualité où celui-ci est déjà orienté, son point de vue sur la réponse à apporter à sa demande d'avis pour ne pas laisser penser qu'il préjuge de la réponse apportée. Son arrêt avant dire droit se borne à exposer le problème, en restituant la portée des dispositions litigieuses dans le contexte juridique national, l'état du droit conventionnel et de la jurisprudence de la CEDH et les arguments des parties, avant de mettre en exergue la difficulté qui justifie le renvoi d'une demande d'avis.

Il est en revanche loisible au rapporteur public, qui conclut à l'audience, de donner son point de vue personnel et de formuler des observations sur la question posée, ce qu'il a fait succinctement en l'espèce.

2. Si un tel examen a entraîné une décision de ne pas demander d'avis consultatif à la Cour européenne des droits de l'homme, quelles en ont été les raisons ?

Le Conseil d'Etat, lorsqu'il fait le choix de ne pas renvoyer à la CEDH une demande d'avis

fondée sur le protocole n° 16, ne détaille pas spécifiquement sa réponse sur ce point.

Les conclusions des rapporteurs publics, qui concluent en toute indépendance à l'audience sur la réponse que leur paraît devoir appeler une affaire, comportent parfois des indications sur ce point, notamment lorsque les parties avaient évoqué la question du renvoi d'une demande d'avis à la CEDH dans leurs écritures. Ils tiennent notamment compte, à cet égard, de la jurisprudence existante de la Cour pour vérifier si la question de droit de la conv. EDH posée par le dossier peut être résolue à sa lumière.

Par exemple, dans une affaire qui posait la question de savoir si la mise en demeure adressée à une chaîne de télévision en raison d'un défaut de mesure dans le traitement d'une procédure judiciaire portait une atteinte disproportionnée à la liberté d'expression, la rapporteure publique a considéré que la question ne lui paraissait « pas sans réponse au regard de la jurisprudence de la Cour », avant de faire référence, en particulier, à l'arrêt Bédat c. Suisse (CEDH, 29 mars 2016, n° 56925/08) (concl. Barrois de Sarigny sur CE, 13 mai 2019, France Télévision, n° 421779, A).

Dans une récente affaire relative aux modalités de prise en charge des enfants présentant des variations du développement génital (Association Alter Corpus, n° 470546, audience du 17 janvier 2024, décision non encore rendue), le rapporteur public, Thomas Janicot, analysait la demande de saisine de la CEDH sur le fondement du protocole n° 16 que présentait l'association requérante. Pour proposer de ne pas y faire droit, il mobilisait la jurisprudence de la Cour sur les personnes intersexes.

3. Si un avis consultatif a été demandé et rendu, quelle incidence a-t-il eu sur l'issue de l'affaire pour laquelle il avait été demandé ? L'avis consultatif a-t-il eu un impact plus large dans l'ordre juridique national ?

L'avis rendu par la CEDH dans l'affaire mentionnée en réponse à la question n° 1 a fourni une grille d'analyse extrêmement utile pour le Conseil d'Etat, qui a pu s'appuyer sur les éléments développés dans l'avis pour éclairer le jugement de l'affaire. Le Conseil d'Etat a ainsi suivi la méthode d'analyse proposée par la Cour en tenant compte, en outre, des réponses des parties à la communication de l'avis de la Cour, ainsi que, par ailleurs, de la décision rendue par le Conseil constitutionnel en parallèle de la demande d'avis, qui portait sur les mêmes dispositions, dans le cadre d'une autre affaire.

S'il n'est pas possible de savoir ce qu'aurait jugé le Conseil d'Etat s'il avait dû trancher le litige sans disposer de l'avis de la CEDH, on peut toutefois noter que les conclusions du rapporteur public soulignent que la réponse apportée a permis, en complément d'autres éléments, de lever les incertitudes dont il faisait état lors de la séance ayant abouti au renvoi.

L'affaire en cause est encore relativement récente, et elle a abouti au rejet de la requête et du moyen d'inconventionnalité, de sorte que l'avis rendu par la CEDH n'a pas eu, à ce stade, d'impact étendu sur l'ordre juridique national.

L'avis rendu par la Cour a été tout à fait précieux pour les juges chargés de mettre en œuvre ces articles du droit conventionnel, car la Cour a procédé à un travail de mise en cohérence et en perspective de sa jurisprudence qui a permis de clarifier l'analyse à laquelle doit se livrer le juge national en présence de telles questions.

4. La procédure de demande d'avis consultatif au titre du Protocole n° 16 a-t-elle entraîné un retard injustifié dans la résolution finale de l'affaire au niveau national ?

La procédure de demande d'avis a entraîné un délai supplémentaire de jugement dans le traitement de l'affaire au niveau national, puisqu'environ deux ans se sont écoulés entre l'arrêt avant dire-droit du Conseil d'Etat et l'issue de l'affaire. Ce retard n'apparaît pas injustifié au regard de l'importance de la question renvoyée et de la portée de la réponse apportée par la Cour, qui dépasse le seul cadre du litige.

Cette durée de traitement comprend le délai de jugement de la CEDH (saisine du 15 avril 2021, avis rendu le 13 juillet 2022) auquel s'ajoute le temps nécessaire à une mesure supplémentaire d'instruction visant à faire dialoguer les parties sur l'avis rendu par la Cour. Cette dernière phase a prolongé l'instruction de près de neuf mois mais a permis d'éclairer le juge sur les modalités selon lesquelles la méthodologie proposée par la Cour pouvait être mise en œuvre, tout en assurant le plein respect du principe du contradictoire.

5. Quel est l'impact de l'avis consultatif de la Cour européenne des droits de l'homme sur l'amélioration de la mise en œuvre de la Convention dans votre pays ?

L'avis de la Cour, qui synthétise et clarifie la jurisprudence de la Cour EDH en matière d'application de l'article 14 de la Convention, constitue désormais un outil précieux pour les juridictions chargées d'appliquer cet article, en leur offrant une grille d'analyse claire et explicite.

French Court of Cassation

1. Votre Cour a-t-elle examiné si la résolution d'une question soulevée dans une affaire pendante pouvait être facilitée par un avis consultatif de la Cour européenne des droits de l'homme ? Dans l'affirmative, quelle était la nature de la/des question(s) ? Votre Cour a-t-elle donné son avis sur la question posée, et dans le cas contraire, pour quelles raisons ?

Oui. Deux mois après l'entrée en vigueur du protocole n° 16, l'assemblée plénière de la Cour de cassation a saisi la Cour européenne des droits de l'homme d'une première demande d'avis consultatif relatif à la gestation pour autrui.

Cette demande s'inscrivait dans le cadre du réexamen de l'affaire dite « Mennesson », relative à la reconnaissance de la filiation de deux enfants nées aux Etats-Unis d'une GPA et issues des gamètes du père d'intention et d'une tierce donneuse.

Elle visait à faire préciser la situation de la mère d'intention et en particulier la conventionalité de la solution conduisant à imposer à celle-ci l'engagement d'une procédure d'adoption pour faire établir sa filiation.

Les questions étaient libellées de la manière suivante :
« 1. En refusant de transcrire sur les registres de l'état civil l'acte de naissance d'un enfant né à l'étranger à l'issue d'une gestation pour autrui, en ce qu'il désigne comme étant sa « mère légale » la « mère d'intention », alors que la transcription de l'acte a été admise en tant qu'il désigne le « père d'intention », père biologique de l'enfant, un État-partie excède-t-il la marge d'appréciation dont il dispose au regard de l'article 8 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales ?

À cet égard, y a-t-il lieu de distinguer selon que l'enfant est conçu ou non avec les gamètes de la « mère d'intention » ?

2. Dans l'hypothèse d'une réponse positive à l'une des deux questions précédentes, la possibilité pour la mère d'intention d'adopter l'enfant de son conjoint, père biologique, ce qui constitue un mode d'établissement de la filiation à son égard, permet-elle de respecter les exigences de l'article 8 de la Convention ? »

La saisine pour avis est apparue comme particulièrement opportune sur ce sujet où le juge national était confronté à des textes portant des exigences qui pouvaient paraître inconciliables avec la mise en œuvre des droits fondamentaux.

La Cour n'a pas donné son propre avis sur la question posée.

Il doit être relevé que la demande d'avis se situait dans le contexte particulier d'une demande de réexamen après une première condamnation de la France et alors même que la jurisprudence avait d'ores et déjà évolué.

A cet égard, la demande d'avis ne s'inscrivait pas tant dans la perspective de la jurisprudence nationale à adopter que dans celle d'une validation de la jurisprudence nationale déjà acquise puisque la Cour de cassation avait d'ores et déjà procédé à un revirement de jurisprudence tirant les conséquences de la censure de 2014.

Dans son arrêt posant la demande d'avis, la Cour s'est donc conformée aux seules exigences du protocole en motivant et contextualisant celle-ci dans le souci de permettre un dialogue des juges le plus efficace possible.

Ainsi il avait été rappelé que cette demande d'avis intervenait dans le contexte d'un réexamen de l'affaire après une première censure de la Cour européenne des droits de l'homme. Il avait été également précisé l'évolution jurisprudentielle intervenue en France à la suite de cette première condamnation, avant d'arriver à la question résiduelle posée par la présente espèce.

2. Si un tel examen a entraîné une décision de ne pas demander d'avis consultatif à la Cour européenne des droits de l'homme, quelles en ont été les raisons ?

Sans objet.

3. Si un avis consultatif a été demandé et rendu, quelle incidence a-t-il eu sur l'issue de l'affaire pour laquelle il avait été demandé ? L'avis consultatif a-t-il eu un impact plus large dans l'ordre juridique national ?

La procédure d'avis a été très utile à la formation de jugement en tant qu'elle a fixé une orientation claire, qui faisait défaut jusqu'alors, sur la situation de la mère d'intention et l'éventuelle obligation de transcription à son égard.

Ainsi, la Cour européenne des droits de l'homme avait répondu que :
1. le droit au respect de la vie privée de l'enfant, au sens de l'article 8 de la Convention, requiert que le droit interne offre une possibilité de reconnaissance d'un lien de filiation entre cet enfant et la mère d'intention, désignée dans l'acte de naissance légalement établi à l'étranger comme étant la « mère légale » ;

2. le droit au respect de la vie privée de l'enfant ne requiert pas que cette reconnaissance se fasse par la transcription sur les registres de l'état civil de l'acte de naissance légalement établi à l'étranger ; elle peut se faire par une autre voie, telle que l'adoption de l'enfant par la mère d'intention, à la condition que les modalités prévues par le droit interne garantissent l'effectivité et la célérité de sa mise en œuvre, conformément à l'intérêt supérieur de l'enfant.

Dans l'arrêt qu'elle a rendu à la suite de cet avis, la Cour de cassation a posé comme principe que l'existence d'une convention de GPA ne peut, à elle seule, faire obstacle à la transcription de l'acte de naissance établi par les autorités de l'Etat étranger, en ce qui concerne le père biologique de l'enfant, ni à la reconnaissance du lien de filiation à l'égard de la mère d'intention mentionnée dans l'acte étranger, laquelle doit intervenir au plus tard lorsque ce lien entre l'enfant et la mère d'intention s'est concrétisé.

Elle a en conséquence cassé l'arrêt de la cour d'appel qui avait refusé la transcription au seul motif de l'existence d'une convention de GPA.

La Cour de cassation a ensuite statué elle-même au fond, comme le lui permet le code de l'organisation judiciaire, sans renvoyer l'affaire à une autre cour d'appel. Faisant une appréciation in concreto du principe de proportionnalité, elle a jugé que, compte du fait que la procédure durait depuis 15 ans, obliger Mme Menesson a entamé une procédure d'adoption aurait des conséquences excessives par rapport au droit au respect de la vie privée et qu'il fallait en l'espèce transcrire l'acte d'état civil établi à l'étranger.

L'avis rendu n'avait certes pas épuisé toutes les questions qu'a dû résoudre la Cour de cassation dès lors que celui-ci n'intégrait pas une analyse concrète de la situation.

Toutefois, la question de l'appréciation de la situation factuelle à partir des critères définis par la Cour Européenne des droits de l'homme a été facilité par l'avis. Ce partage des rôles paraît pleinement s'inscrire dans une logique de respect du principe de subsidiarité.

L'avis lui-même a eu un impact plus large dans l'ordre juridique national à plusieurs égards.

D'une part, il peut être relevé que la procédure d'avis en livrant une analyse abstraite de la conventionalité d'une législation interne, dépouillée de considérations d'espèce, est plus facilement transposable à d'autres situations. Tel a été le cas en matière de gestation pour autrui où cet avis a pu être rappelé dans d'autres espèces.

D'autre part, il est certain que l'avis consultatif a permis à la Cour de cassation de donner une autorité supérieure à son arrêt, conférant ainsi une forme de brevet de conventionalité à la solution préconisée, dans le contexte particulier où la question posée avait donné lieu à un fort débat en doctrine, sur la portée des précédents arrêts rendus dans la même affaire par la Cour européenne des droits de l'homme.

Enfin, les lignes définies dans le cadre de la procédure d'avis ont servi de repères au-delà de la Cour de cassation au législateur, qui est intervenu en 2021 dans ce débat pour préciser la législation à cet égard, prenant appui, ainsi qu'en témoignent les travaux parlementaires, pour référence les lignes posées par la Cour européenne des droits de l'homme.

4. La procédure de demande d'avis consultatif au titre du Protocole n° 16 a-t-elle entraîné

un retard injustifié dans la résolution finale de l'affaire au niveau national ?

Non. La demande d'avis est intervenue en octobre 2018. L'avis lui-même a été rendu en avril 2019 et la Cour de cassation a statué de manière définitive en octobre 2019.

Le délai de six mois entre la demande d'avis et la date à laquelle la Cour de cassation a pu statuer paraît tout à fait satisfaisant eu égard à la complexité de la situation et à la durée globale de ce contentieux.

5. Quel est l'impact de l'avis consultatif de la Cour européenne des droits de l'homme sur l'amélioration de la mise en œuvre de la Convention dans votre pays ?

L'expérience de la saisine pour avis en matière de gestation pour autrui a permis d'instaurer dans un premier temps un dialogue entre les juridictions françaises et la Cour européenne mais aussi dans un second temps entre la Cour et le législateur français, lequel s'est appuyé sur les lignes définies par la Cour européenne des droits de l'homme pour légiférer sur cette question délicate.
D'une manière générale, il peut être observé que l'avis présente l'avantage d'être une analyse abstraite de la conventionalité d'une législation interne. Dépouillée de considérations d'espèce, il paraît plus facilement transposable à d'autres situations, que ce soit dans l'état concerné par la demande d'avis ou à l'étranger. En ce sens, il participe de la construction d'un ordre public conventionnel.

Supreme Court of Georgia

Georgia's highest Courts are unable to provide information on the matters raised in the questionnaire as Georgia has not yet employed the mechanism under Protocol No. 16 to the Convention and, thus, there does not exist any practice in this regard.

Constitutional Court of Georgia

Georgia's highest Courts are unable to provide information on the matters raised in the questionnaire as Georgia has not yet employed the mechanism under Protocol No. 16 to the Convention and, thus, there does not exist any practice in this regard.

Hellenic Council of State

Question 1:

Our Court has considered whether it should send a request to the ECHR for an advisory opinion in six cases, the four of them being more or less similar.
I. In a recent judgment of the Grand Chamber the Court had to deal with the following issue: Is a request of a student for exception from the compulsory (according to the Constitution, as construed by the Court) for Orthodox Christians teaching of Orthodox faith in conformity with articles 2 of the first protocol and 9 of the Convention if the student (or his parents) has to declare that he wants to be excepted "for reasons of religious consciousness" or "for reasons of

consciousness", or only a simple request without any explanation is in conformity with the aforementioned provisions ? The Court held that a request mentioning "reasons of religious consciousness" is in conformity with those provisions.
II. In four cases the issue was: If the request for annulment of an act of the administrative authorities was considered the be overdue in those cases, the right of access to a court would be violated? The Court held that this right, as enshrined in the Constitution, would not be violated.
III. In another case the issue was: The mere fact that the administrative court held that some facts took place, while a penal court had already held, by an irrevocable judgment, that the same facts had not taken place, is contrary to the presumption of innocence, as enshrined in the EU law and article 6 par. 2 of the Convention? The Court held that there was no violation of the presumption of innocence.

Question 2:

Our Court did not send a request to the ECHR for an advisory opinion in any of those cases, for the following reasons:
I. The grounds of the applicants that the administrative authorities violated the articles 2 of the first protocol and 9 of the Convention were unsound.
II. The grounds of the applicants about violation of the right of access to a court, as enshrined in the Constitution, were unsound. For this reason there was no such issue under the Convention either.
III. The issue fell in the ambit of primary EU law on fundamental rights. The argument was that if the Court had to send a request to ECJ for a preliminary ruling, it could not send a request to the ECHR for an advisory opinion. The judgment mentions the explanatory report on law 4596/2019 implementing Protocol 16 of the Convention, which endorses this opinion. It seems that the idea is that if the Court has no doubt about the meaning of a fundamental right enshrined in primary EU law (and, consequently, does not send a request to ECJ for a preliminary ruling), it also does not have a doubt about the meaning of the same right, as enshrined in the Convention.

Questions 3, 4 and 5 cannot be answered, since no advisory opinion was ever requested.

Constitutional Court of the Republic of Lithuania

1. Has your Court considered whether the resolution of a question arising in a pending case may be assisted by an advisory opinion of the European Court of Human Rights? If so, what was the nature of the question/s? Has your Court given its view on the question posed and, if not, for what reasons?

According to Item 3 Paragraph 2 of Article 28 (wording of 11 June 2015) of the Law on the Constitutional Court of the Republic of Lithuania, the consideration of a case may be adjourned upon the decision of the Constitutional Court if in the course of the consideration of a case, the Constitutional Court decides to apply to the European Court of Human Rights and request an advisory opinion on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention for the Protection of Human Rights and Fundamental Freedoms or the protocols thereto (https://lrkt.lt/en/about-the-court/legal-information/the-law-on-

the-constitutional-court/193). This possibility for such a request become effective on the date of entry into force of the Protocol No. 16 to the Convention for the Republic of Lithuania. This happened on 1st of August 2018 (https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/498b9d80a07211e49dedcf791a151bf8?jfwid=-ucusi46i7).

Until this time, in 2017 the Constitutional Court of the Republic of Lithuania once during its hearing was requested by the representatives of the party concerned to ask the European Court of Human Rights for such advisory opinion. However, the Court by its decision refused to grant this request, especially due to the reason that Protocol No. 16 to the Convention did not enter into force. In addition, the Constitutional Court did not have doubts about the interpretation or application of the provisions of the Convention.

The constitutional justice case concerned the issue whether concrete actions of the member of the Parliament against whom an impeachment case has been instituted are in conflict with the Constitution of the Republic of Lithuania. In its conclusion of 19 December 2017 the Constitutional Court concluded that the actions of this member of the Parliament are in conflict with the Constitution and by these actions this member of the Parliament has grossly violated the Constitution and breached the oath.

As the Constitutional Court did not have doubts about the interpretation or application of the provisions of the Convention, including its Article 6 (which was mentioned in the request of the representatives of the party concerned), the Constitutional Court did not consider whether the resolution of a question raised by representatives of the party concerned in a pending case may be assisted by an advisory opinion of the European Court of Human Rights.

2. If such consideration resulted in a decision not to request an advisory opinion of the European Court of Human Rights, what were the reasons for this?
The reasons for decision to refuse to grant the request of an advisory opinion are revealed in Answer to Question No. 1.

3. If an advisory opinion was requested and delivered, what effect did it have on the outcome of the case in relation to which it was requested? Has the advisory opinion had any wider impact in the national legal order?
As it was afore-mentioned, an advisory opinion of the European Court of Human Rights was not requested.

4. Did the process of requesting an advisory opinion under Protocol No. 16 result in any undue delay to the final determination of the case at domestic level?
As it was afore-mentioned, an advisory opinion of the European Court of Human Rights was not requested.

5. What impact has the advisory opinion of the European Court of Human Rights had as regards achieving a better implementation of the Convention in your country?

As it was afore-mentioned, an advisory opinion of the European Court of Human Rights was not requested.

Nevertheless, a role of Convention for the Protection of Human Rights and Fundamental Freedoms is significant to Lithuania. In the official constitutional jurisprudence the Convention is characterised as a peculiar source of international law (the Constitutional Court‘s conclusion of

24 January 1995; after this conclusion (which recognised compliance of the impugned provisions of this Convention and its Protocol No 4 with the Constitution), the Convention was ratified by the Parliament of Lithuania in April 1995). In addition, the jurisprudence of the European Court of Human Rights is treated as a source of interpretation of law which is also important for interpretion and application of Lithuanian law (the Constitutional Court‘s ruling of 8 May 2000, etc.). Summarising referring to international legal instruments in the Constitutional Court's final acts, it is obvious that Convention for the Protection of Human Rights and Fundamental Freedoms, as well relevant case law of the European Court of Human Rights – one of the most frequently used international instruments protecting human rights in the practice of the Constitutional Court.

Supreme Administrative Court of Lithuania

1. Has your Court considered whether the resolution of a question arising in a pending case may be assisted by an advisory opinion of the European Court of Human Rights? If so, what was the nature of the question/s? Has your Court given its view on the question posed and, if not, for what reasons?

The Supreme Administrative Court of Lithuania (“the Court”) has already sought an advisory opinion under Protocol No. 16 to the Convention.

On 2 October 2020 the Supreme Administrative Court of Lithuania has submitted request to the European Court of Human Rights (“the ECtHR”) to provide an advisory opinion on impeachment legislation. Request was made in the context of a case brought by a former member of the Seimas (the Lithuanian Parliament) who had been impeached and was running for election again in 2020. In the case the former member of the Seimas brought a complaint about the Central Electoral Commission’s (“the CEC”) refusal to register her as a candidate in elections to the Seimas following a Constitutional Court ruling of 2014 finding that she had breached the oath and grossly violated the Constitution by failing to attend many sittings of the Seimas. In particular according to her the CEC decision failed to take into account the legislation on impeachment as amended following the European Court’s judgment in the case of Paksas v. Lithuania of 2011, the Constitutional Court having subsequently found that the new legislation was in conflict with the Constitution. In the Paksas judgment the Court held that the permanent and irreversible disqualification of a former President from taking a seat in the Seimas following impeachment proceedings had been disproportionate, in violation of the European Convention. In its questions, the Supreme Administrative Court has asked for guidance from the European Court on the criteria to be applied when assessing the compatibility of the legislation on impeachment, as currently applied, with Article 3 of Protocol No. 1 (right to free elections) to the Convention.

On 8 April 2022 the ECtHR has delivered, unanimously, its response, concluding that any decision on whether a ban on the exercise of a parliamentary mandate had exceeded what was acceptable under Article 3 of Protocol No. 1 (right to free elections) to the Convention should take into account the events which had led to impeachment and the future position sought, from the perspective of the constitutional system and democracy as a whole in the State concerned.

The dispute was finally settled by the Supreme Administrative Court of Lithuania in its judgment of June 29, 2022. The Court applied the objective criteria indicated by the ECtHR to the circumstances of the dispute and ruled that the rights of the applicant were not breached. This

was because, at the time, the duration of the applied ban (which was 6 years at the time) to become a candidate was considered to be in compliance with the principle of proportionality.

2. If such consideration resulted in a decision not to request an advisory opinion of the European Court of Human Rights, what were the reasons for this?

As it was mentioned in previous answer, The Court decided to request an advisory opinion of the European Court of Human Rights.

3. If an advisory opinion was requested and delivered, what effect did it have on the outcome of the case in relation to which it was requested? Has the advisory opinion had any wider impact in the national legal order?

Advisory opinion delivered by the ECtHR is interpreted as an important argument, a significant guideline for interpretation, especially when deciding on human rights issues protected by the European Convention on Human Rights.
In the latter case, the Court relied on the ECtHR's interpretations, applied the objective criteria indicated in the advisory opinion by the ECtHR to the circumstances of the dispute and ruled that the rights of the applicant were not breached.

As regards the wider impact in the national legal order, the advisory opinion may serve as precedent in subsequent cases, as the national court adopted the ECtHR's interpretations in its judgement.

International reputation is also worth mentioning, as compliance with the recommendations of advisory opinion enhance a state's international reputation and demonstrate its commitment to upholding human rights standards.

4. Did the process of requesting an advisory opinion under Protocol No. 16 result in any undue delay to the final determination of the case at domestic level?

In the above-mentioned case, the Court, after referring the case to the ECtHR, suspended the administrative case until the European Court of Human Rights delivers its opinion. The advisory opinion was adopted approximately 1.5 years after the Court’s referral to the ECtHR. Immediately thereafter, the Court resumed the proceedings and 2.5 months later the case was finally decided.
It is also interesting to note that according to the regulations in force at the time, appeals against decisions of the Central Electoral Commission had to be examined by the Supreme Administrative Court of Lithuania no later than 48 hours from its submission. Given this timeframe, requesting an advisory opinion effectively meant that it would be received after the election had taken place. In response, the Supreme Administrative Court of Lithuania noted that it was ready to apply compensatory judicial remedies ex officio as a means to redress the consequences of violations of rights guaranteed by the Convention if, after receiving the advisory opinion, it was concluded that the candidate was precluded from participating in the elections without due reason.

5. What impact has the advisory opinion of the European Court of Human Rights had as regards achieving a better implementation of the Convention in your country?

As far as the above-mentioned case is concerned, the advisory opinion helped the Court to

adopt a decision in line with the case law of the ECtHR. This decision may become a precedent in the subsequent cases.
In general, advisory opinions could prevent national courts from making decisions contrary to the practices of the ECtHR, because it is possible for the court before which the proceedings are conducted to receive guidelines related to the interpretation or application of the Convention before the proceedings end.
The advisory opinion was referenced by the Agent of the Government of the Republic of Lithuania before the European Court of Human Rights in the Action Report concerning the Execution of the ECHR Judgment in the Case of Paksas v. Lithuania (No. 34932/04) submitted to the Department for the Execution of Judgments of the ECHR (DH-DD(2022)688 29/06/2022). Additionally, it was acknowledged by prominent scholars who analysed the constitutional amendments in the context of legislative procedures aimed at fully implementing the judgment in the Paksas case.

Cour of Cassation of Luxembourg

1. Votre Cour a-t-elle examiné si la résolution d'une question soulevée dans une affaire pendante pouvait être facilitée par un avis consultatif de la Cour européenne des droits de l'homme ? Dans l'affirmative, quelle était la nature de la/des question(s) ? Votre Cour a-t-elle donné son avis sur la question posée, et dans le cas contraire, pour quelles raisons ?

Le Protocole n°16 est entré en vigueur à l'égard du Grand-Duché le 1er septembre 2020.

Depuis cette date, la Cour de cassation du Grand-Duché n'a pas encore eu l'opportunité d'examiner la question de savoir si la résolution des questions soulevées dans une affaire pouvait être facilitée par une demande d'avis consultatif.

2. Si un tel examen a entraîné une décision de ne pas demander d'avis consultatif à la Cour européenne des droits de l'homme, quelles en ont été les raisons ?

N/A

3. Si un avis consultatif a été demandé et rendu, quelle incidence a-t-il eu sur l'issue de l'affaire pour laquelle il avait été demandé ? L'avis consultatif a-t-il eu un impact plus large dans l'ordre juridique national ?

N/A

4. La procédure de demande d'avis consultatif au titre du Protocole n° 16 a-t-elle entraîné un retard injustifié dans la résolution finale de l'affaire au niveau national ?

N/A

5. Quel est l'impact de l'avis consultatif de la Cour européenne des droits de l'homme sur l'amélioration de la mise en œuvre de la Convention dans votre pays ?

N/A

Constitutional Court of Luxembourg

1. Votre Cour a-t-elle examiné si la résolution d'une question soulevée dans une affaire pendante pouvait être facilitée par un avis consultatif de la Cour européenne des droits de l'homme ? Dans l'affirmative, quelle était la nature de la/des question(s) ? Votre Cour a-t-elle donné son avis sur la question posée, et dans le cas contraire, pour quelles raisons ?

Le Protocole n°16 est entré en vigueur à l'égard du Grand-Duché le 1er septembre 2020.

Depuis cette date, la Cour constitutionnelle du Grand-Duché n'a pas encore eu l'opportunité d'examiner la question de savoir si la résolution des questions soulevées dans une affaire pouvait être facilitée par une demande d'avis consultatif.

2. Si un tel examen a entraîné une décision de ne pas demander d'avis consultatif à la Cour européenne des droits de l'homme, quelles en ont été les raisons ?

N/A

3. Si un avis consultatif a été demandé et rendu, quelle incidence a-t-il eu sur l'issue de l'affaire pour laquelle il avait été demandé ? L'avis consultatif a-t-il eu un impact plus large dans l'ordre juridique national ?

N'A

4. La procédure de demande d'avis consultatif au titre du Protocole n° 16 a-t-elle entraîné un retard injustifié dans la résolution finale de l'affaire au niveau national ?

N/A

5. Quel est l'impact de l'avis consultatif de la Cour européenne des droits de l'homme sur l'amélioration de la mise en œuvre de la Convention dans votre pays ?

N/A

Court of Appeal of Luxembourg

1. Votre Cour a-t-elle examiné si la résolution d'une question soulevée dans une affaire pendante pouvait être facilitée par un avis consultatif de la Cour européenne des droits de l'homme ? Dans l'affirmative, quelle était la nature de la/des question(s) ? Votre Cour a-t-elle donné son avis sur la question posée, et dans le cas contraire, pour quelles raisons ?

Le Protocole n°16 est entré en vigueur à l'égard du Grand-Duché le 1er septembre 2020.

Depuis cette date, la Cour d'Appel du Grand-Duché n'a pas encore eu l'opportunité d'examiner la question de savoir si la résolution des questions soulevées dans une affaire pouvait être

facilitée par une demande d'avis consultatif.

2. Si un tel examen a entraîné une décision de ne pas demander d'avis consultatif à la Cour européenne des droits de l'homme, quelles en ont été les raisons ?

N/A

3. Si un avis consultatif a été demandé et rendu, quelle incidence a-t-il eu sur l'issue de l'affaire pour laquelle il avait été demandé ? L'avis consultatif a-t-il eu un impact plus large dans l'ordre juridique national ?

N/A

4. La procédure de demande d'avis consultatif au titre du Protocole n° 16 a-t-elle entraîné un retard injustifié dans la résolution finale de l'affaire au niveau national ?

N/A

5. Quel est l'impact de l'avis consultatif de la Cour européenne des droits de l'homme sur l'amélioration de la mise en œuvre de la Convention dans votre pays ?

N/A

Constitutional Court and the Supreme Court of Montenegro[17]

I avail myself of the opportunity to inform you that neither the Constitutional Court of Montenegro nor the Supreme Court of Montenegro considered to request an advisory opinion of the European Court of Human Rights (hereinafter: „European Court") under Protocol No. 16 to the European Convention on Human Rights (hereinafter: „the Convention")

Namely, in the letter of 25 December 2023, submitted to the Office of the Representative of Montenegro on 9 February 2024, the president of the Constitutional Court of Montenegro stated that the Constitutional Court until then had not requested from the European Court an advisory opinion under Protocol No. 16 to the Convention and pointed out to the fact that that possibility represented a significant benefit for the work on cases and that in future the Constitutional Court would have the opportunity and reason to address the European Court.

Furthermore, on 25 December 2023, the acting president of the Supreme Court of Montenegro submitted a letter to the Office of the Representative of Montenegro in which she highlighted that the Department for Monitoring the case-law of the European Court and EU rights within the Supreme Court of Montenegro supervised the harmonisation of domestic case-law with the case-law of the European Court and undertook activities aimed at improving the application of standards in the area of the protection of human rights and fundamental freedoms and that the Supreme Court of Montenegro until then had not requested from the European Court an

[17] Reply received from the member of Montenegro in the CDDH.

advisory opinion under Protocol No. 16 to the Convention.

In conclusion, I use this opportunity to emphasize that the authorities strongly believe that the possibility of requesting an advisory opinion would contribute to the development and improvement of human rights' standards, which would not only effect the decision on the given case, but also contribute to the wider application of these standards at the national level.

Supreme Court of the Netherlands

1. Has your Court considered whether the resolution of a question arising in a pending case may be assisted by an advisory opinion of the European Court of Human Rights? If so, what was the nature of the question/s? Has your Court given its view on the question posed and, if not, for what reasons?

The Supreme Court of the Netherlands has not (yet) requested the European Court of Human Rights for an advisory opinion.

In several cases, advisory opinions of an Advocate General mention the possibility of requesting the European Court of Human Rights for an advisory opnion (see e.g. attachment to advisory opinion of 22 December 2023, ECLI:NL:PHR:2023:1221, para. 8.24, advisory opinion of 16 June 2021, ECLI:NL:PHR:2021:611, para 3.35, in Dutch; advisory opinion of 1 October 2019, ECLI:NL:PHR:2019:951.

2. If such consideration resulted in a decision not to request an advisory opinion of the European Court of Human Rights, what were the reasons for this?

To our knowledge, there are no judgments of the Supreme Court of the Netherlands pertaining to considerations not to request an advisory opinion of the European Court of Human Rights.

The Dutch institute *Wetenschappelijk Onderzoek- en Datacentrum* (WODC, please refer to the WODC website in English) has published a report on Protocol 16 ECHR (mainly in Dutch, only a summary is available in English, please refer to pages 9-11 of the report). The WODC is a research institute in the area of the Dutch Ministry of Justice and Security.

To gain more insight into the considerations of Dutch courts that may request an advisory opinion of the EctHR, the WODC conducted semi-structured interviews (please refer to Attachment (in Dutch: Bijlage) 1 of the report for an overview of the interviewees). The interviews indicated that there are three main considerations for not submitting a request for an advisory opinion (please refer to page 44 of the report). Briefly, these are:
(a) the lack of need for further explanation of the Convention, having regard to the available case-law of the ECtHR;
(b) 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
(c) practical considerations, such as the suspected long duration of the advisory procedure.
These three considerations are discussed in more detail in the report (please refer to pages 44-48, in Dutch).

3. If an advisory opinion was requested and delivered, what effect did it have on the outcome of the case in relation to which it was requested? Has the advisory opinion had any

wider impact in the national legal order?

Not applicable

4. Did the process of requesting an advisory opinion under Protocol No. 16 result in any undue delay to the final determination of the case at domestic level?

Not applicable

5. What impact has the advisory opinion of the European Court of Human Rights had as regards achieving a better implementation of the Convention in your country?

Not applicable

Administrative Jurisdiction Division of the Council of State of the Netherlands

1. Has your Court considered whether the resolution of a question arising in a pending case may be assisted by an advisory opinion of the European Court of Human Rights? If so, what was the nature of the question/s? Has your Court given its view on the question posed and, if not, for what reasons?

Yes, the Administrative Jurisdiction Division of the Council of State (AJD) has considered asking an advisory opinion in 2021, in three similar asylum cases. The cases concerned asylum seekers suffering from a disease that, if left untreated, would lead to their death in the short term. However, as long as they received treatment, the asylum seekers would survive and not die prematurely. The parties agreed that the asylum seekers could not afford the necessary medical treatment in their country of origin. The key question in the cases was whether the Deputy Minister of Security and Justice had obtained adequate “individual and sufficient assurances”, as required by paragraph 191 of the Paposhvili judgment (ECLI:CE:ECHR:2016:1213JUD004173810). The Deputy Minister argued that he had met this requirement because he was willing to pay for the treatment in the country of origin for a period of three months. The asylum seekers argued that the Deputy Minister did not meet the requirement, because it was foreseeable that they would die after those three months.

The AJD considered asking an advisory opinion, because the case law of the ECHR did not give enough guidance to settle the dispute. The AJD had doubts about whether under EU law there was an obligation to refer the cases to the Court of Justice for a preliminary ruling. In the end the AJD decided not to request an advisory opinion because the cases could be ruled with a reasoning in which the posed questions did not need to be answered.

The AJD did not give its view on the question posed. The Deputy Minister changed his policy and withdrew the cases before the AJD could issue a ruling.

Recently the Research and Documentation Centre of the Dutch Ministry of Justice and Security published a report by professor J.H. Gerards and professor A. Buyse on how Protocol 16 has been implemented and applied so far in the Netherlands and whether its use can be improved. An English summary can be downloaded at: https://repository.wodc.nl/handle/20.500.12832/3293.

2. If such consideration resulted in a decision not to request an advisory opinion of the

European Court of Human Rights, what were the reasons for this?

See the answer to the first question.

3. If an advisory opinion was requested and delivered, what effect did it have on the outcome of the case in relation to which it was requested? Has the advisory opinion had any wider impact in the national legal order?

The AJD has never requested an advisory opinion.

4. Did the process of requesting an advisory opinion under Protocol No. 16 result in any undue delay to the final determination of the case at domestic level?

The AJD has never requested an advisory opinion.

5. What impact has the advisory opinion of the European Court of Human Rights had as regards achieving a better implementation of the Convention in your country?

The AJD has never requested an advisory opinion.

Administrative High Court of the Netherlands

1. Has your Court considered whether the resolution of a question arising in a pending case may be assisted by an advisory opinion of the European Court of Human Rights? If so, what was the nature of the question/s? Has your Court given its view on the question posed and, if not, for what reasons?

No, our Court has not considered asking a advisory opinion, yet. There has not been a case or a set of cases in which it could have been helpful to ask an advisory opinion.

2. If such consideration resulted in a decision not to request an advisory opinion of the European Court of Human Rights, what were the reasons for this?

Because of the answer of question 1, it does not seem relevant to answer the other questions.

Administrative High Court for Trade and Industry of the Netherlands

Since the answer to the first question is no, there is no need to consider the other questions.

Constitutional Court of the Republic of Moldova

1. Had the Constitutional Court of Moldova analyzed whether a possible advisory opinion of the European Court of Human Rights could contribute to the solution of a problem arising in a case under examination? If so, what was the nature of the problem/s? Had the Constitutional Court expressed its opinion on the issue and, if so, for what reasons?

The Constitutional Court of the Republic of Moldova would have made several requests for

advisory opinions from the European Court of Human Rights, especially in electoral matters. However, the Republic of Moldova ratified Protocol no. 16 recently, after the Constitutional Court had its sittings. For this reason, the Court did not have the opportunity to effectively formulate the requests in question.

5. What impact did the advisory opinion of the European Court of Human Rights have on achieving a better implementation of the Convention in your country?

In a recent judgment, Judgment no. 16 of October 3, 2023 (https://constcourt.md/ccdocview.php?tip=hotariri&docid=834&l=ro), the Constitutional Court declared unconstitutional provisions of the Electoral Code. In its analysis, the Court took into account the considerations of the Advisory Opinion of April 8, 2022 for the Supreme Administrative Court of Lithuania, issued by the European Court of Human Rights.

Supreme Court of Justice of the Republic of Moldova

The Protocol No. 16 to the European Convention on Human Rights was ratified by the Republic of Moldova by Law No. 100 of 27 April 2023. The procedure for requesting the advisory opinions of the European Court of Human Rights is regulated by Law on the Supreme Court of Justice No. 64 of 30 March 2023. According to Article 7 para. (4) (i) of the Law, the Plenum of the Supreme Court of Justice may request the advisory opinion.

Therefore, in view of the final and transitory provisions of Law No. 64 of 30 March 2023 (Article 13 para. (4)), the Plenum of the Supreme Court of Justice cannot currently meet. For this reason, an advisory opinion of the European Court of Human Rights at this moment cannot be requested.

High Court of Cassation and Justice of Romania

Question no. 1. Has your Court considered whether the resolution of a question arising in a pending case may be assisted by an advisory opinion of the European Court of Human Rights? If so, what was the nature of the question/s? Has your Court given its view on the question posed and, if not, for what reasons?

Question no. 2. If such consideration resulted in a decision not to request an advisory opinion of the European Court of Human Rights, what were the reasons for this?

At the level of the Administrative and Fiscal Division of the High Court of Cassation and Justice of Romania, there were several cases in which the parties asked that the panel dealing with the appeals (fr. pourvois en cassation) request an advisory opinion from the European Court of Human Rights.

Out of the 17 cases in which the parties made such requests, in only one case did the Court admitted the request and decided to ask to the European Court of Human Rights to give an advisory opinion.

In this case, the advisory opinion was requested on the following questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention for the

Protection of Human Rights and Fundamental Freedoms or in the Protocols thereto:

1. Can the wealth assessment procedure (fr. la procédure d'évaluation des patrimoines) under Law No 176/2010, which, under national law, is a civil procedure, be classified, in the light of the criteria developed by the case-law of the European Court of Human Rights, in particular that of the seriousness of the penalty, as a criminal procedure to which the guarantees laid down in Article 6 of the Convention apply?

2. Can a procedure such as that in the present case, which is unrelated to a criminal offence and which allows the court to order, if it is established that the acquisition of certain specific assets or a share of an asset is not justified, their confiscation without being required to consider the proportionality of that measure, constitute a breach of Article 1 of Protocol 1 to the Convention?

In the other 16 cases, the decision of the competent panel not to request an advisory opinion from the European Court of Human Rights, as it appears from the grounds of the judgments delivered in those cases, was essentially based on the fact that the conditions of Article 1 of Protocol 16 and Article 2 of Law no. 173/2022, were not fulfilled. There were no questions of interpretation which could create a difficulty in the interpretation of a legal text or which would require a clarification. Also, in other cases, the requests of the parties for an advisory opinion were not connected with and were not capable of contributing to the resolution of the case.

At the level of the Criminal Division of the High Court of Cassation and Justice of Romania, one of the parties, in their capacity as appellant-indictee, made an application for an advisory opinion from the European Court of Human Rights.

The question proposed by the party read as follows: whether, in the light of Article 6 paragraph (2) on the presumption of innocence, Article 7 on the principle of legality of criminal offences and punishments of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the judgment of the Grand Chamber of the European Court of Human Rights of 28 June 2018 in the case of G.I.E.M. SRL and Others v. Italy, and the judgment of the European Court of Human Rights of 24 March 2014 in the case of Varvara v. Italy, when, without considering the judicial inquiry, ordering the termination of the criminal proceedings against the defendant, following the expiry of the limitation period for criminal liability, and the special confiscation of the defendant's assets, without considering the defendant's guilt, represents a violation of the rights of the defendant under Article 6 paragraph (2) and Article 7 of the Convention?

The panel which dealt with the case rejected the appellant-indictee's request for an advisory opinion from the European Court of Human Rights, in view of the subject-matter of the application, which did not represent a genuine question of principle concerning the interpretation or application of the rights and freedoms defined in the European Convention for the Protection of Human Rights and Fundamental Freedoms or the protocols thereto.

In that regard, the panel which dealt with the case noted that the application did not seek an interpretation in abstracto, an advisory opinion on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto, but in practice sought an implicit resolution of questions relating to the specifics of the merits of the case.

Next, the panel held that this mechanism could not lead to a direct resolution of questions related to the merits of the case at hand, and secondly, in the light of the case-law of the European Court of Human Rights, also referred to in the application, with regard precisely to the issues raised by the appellant-indictee, the High Court did not identify any problems of interpretation giving rise to real difficulties which would lead to the application for advisory opinion being admitted as formulated by the party.

Question no. 3. If an advisory opinion was requested and delivered, what effect did it have on the outcome of the case in relation to which it was requested? Has the advisory opinion had any wider impact in the national legal order?

Up until the moment of preparing this letter, the High Court of Cassation and Justice of Romania did not receive an advisory opinion from the European Court of Human Rights, given that the relevant panel of the Administrative and Fiscal Division sent the request to the European Court of Human Rights on 6 February 2024.

Question no. 4. Did the process of requesting an advisory opinion under Protocol No. 16 result in any undue delay to the final determination of the case at domestic level?

In the case of the Administrative and Fiscal Division of the High Court of Cassation and Justice, in which an application was made for an advisory opinion of the European Court of Human Rights, the competent panel ordered that the appeal be stayed (fr. la chambre compétente a sursis à statuer sur le pourvoi), pursuant to Article 2 paragraph (8) of Law No 173/2022.
The suspension of the appeal was also ordered in another case with the same subject matter as the one in which the advisory opinion was requested, but the basis for the suspension was different, and the suspension was ordered until the case in which the advisory opinion was requested would be solved.
Given the time at which the High Court of Cassation and Justice of Romania sent the first request for an advisory opinion to the European Court of Human Rights, 6 February 2024, and given that the proceedings are still at an early stage, it is not possible, at this moment, to express a view on whether using this interpretative mechanism would cause undue delay in the final determination of the case.

Question no. 5. What impact has the advisory opinion of the European Court of Human Rights had as regards achieving a better implementation of the Convention in your country?

So far, no advisory opinion has been issued by the European Court of Human Rights following the request of the High Court of Cassation and Justice of Romania, but it is expected that the impact of this interpretative instrument would be a positive one, on a large scale, in terms of improving the implementation of the Convention in Romania.

Court of the Republic of San Marino

1. The Court of the Republic of San Marino has resolved two questions in pending cases by following the principles contained in advisory opinions delivered by the European Court of Human Rights. In particular, the advisory opinion of 10 April 2019 requested by the French Conseil d'État and the advisory opinion of 13 April 2023 requested by the Supreme Court of

Finland.

The cases before the Court concerned:
a) enforcement of a foreign judgement on the recognition of a filiation bond between a child born through surrogacy and the intended parent;
b) enforcement of a foreign judgement on the adoption of an adult and rights of the biological parent.
The San Marino Court pronounced the judgements n.145 of 3 July 2023 and n.297 of 21 December 2023.

2. In the abovementioned cases the advisory opinion has not been requested because the issues had already been addressed by the advisory opinions requested by the French Conseil d'État and the Supreme Court of Finland.

3. The advisory opinion has not been requested for the abovementioned reasons.

4. See point 3

5. Although not requested by the San Marino Court and not having a binding nature, the principles contained in the cases mentioned in point 1 have been implemented, as the jurisprudence of the European Court of Human Rights, allowing a correct application and implementation of the European Convention on Human Rights.

Supreme Court of the Slovak Republic

1. Yes, in 2020 the Supreme Court of the Slovak Republic considered whether to request an advisory opinion of the ECHR and decided to submit such a request in a pending criminal case. The question contained in the request for an advisory opinion dealt with the institutional lawfulness of the Inspection Service of the Ministry of the Interior, its power to investigate police officers, and its independence and impartiality in such a case. To be exact, the question submitted to the EXHR read as follows:

"Do procedural actions in criminal proceedings and evidence gathered by agents of the Inspection Service of the Ministry of the Interior, who are directly subordinate in personal and functional terms to the Minister of the Interior, provide evidence and a basis for the lawful, independent and impartial prosecution of officers of the Police Force who are likewise subordinate to him (the Minister of the Interior), in particular for lawful and fair proceedings before a court, including the court's decisions as such, in the light of the guarantees provided by Articles 2 § 1, 3 and/or 6 § 1 of the Convention?"

The request contained the opinion of the requesting party, stating that the unifying opinion no. Tpj 62/2015 issued by the Criminal Law Bench of the Supreme Court on 29 September 2015 (declaring inter alia that the Inspection Service had been set up lawfully and that the members of that service were police officers authorised to engage in criminal prosecutions under the Code of Criminal Procedure) had not resolved the issue with regard to the effectiveness of the investigation, and the requesting party stated that it harboured "serious doubts that the ... Inspection Service ... meet[s] the criteria laid down by the Convention for an independent authority designated for the investigation of crimes committed by police officers".

2. Such consideration did not result in a decision not to request an advisory opinion of the ECHR, a request for an advisory opinion of the ECHR was submitted in September 2020.

3. The request for an advisory opinion was rejected by the ECHR on 1 March 2021 on the grounds that the question raised did not concern an issue on which the requesting court would need the Court's guidance to be able to ensure respect for Convention rights when determining the case pending before it. In other words, it did not concern "questions of principle relating to the interpretation and application of the rights and freedoms defined in the Convention or the Protocols thereto" and pertain "only in the context of a case pending before [the requesting court]". Therefore, the effect on the outcome of the pending case was minimal at best, and it did not have any wider impact on the national legal order. The pending case was decided shortly after the ECHR had pronounced that it had not accepted the request for an advisory opinion, with the pending appeal on points of law being dismissed in the end.

4. No, the process of requesting an advisory opinion under Protocol no. 16 did not result in any undue delay to the final determination of the case at domestic level.

5. As the request for an advisory opinion has been rejected it has had hardly any impact as regards achieving a better implementation of the Convention in our country.

Supreme Administrative Court of the Slovak Republic

1.
The Supreme Administrative Court of the Slovak Republic has so far once considered requesting the European Court of Human Rights to give an advisory opinion in accordance with Protocol No. 16 to the Convention. The question that the Supreme Administrative Court of the Slovak republic considered asking concerned the decision-making of administrative courts reviewing the legality of decisions of administrative authorities in a restitution matter. The essence of the matter was that the administrative authority decided that the applicant (plaintiff) did not meet the conditions for the return of two original plots of land, or for the award of compensation for these plots of land on the grounds that other plots of land had already been returned to him in another restitution proceeding. The appellate administrative body and the first-instance administrative court shared this opinion as well. It emerged from the decisions of the administrative authorities and the first-instance court that although the restitution claim had been lodged in due time, legitimately and by the person entitled, the application was nevertheless rejected because the applicant (plaintiff) had already been granted land in another restitution proceeding in the maximum area possible under the Restitution Act. The restitution claim was lodged by the applicant (plaintiff) at a time when the law did not contain the determination of the maximum possible area of land that could be issued to the restituent. However, the restitution claim was decided by the administrative authorities at a time when legislation containing the maximum possible area of land to be handed over was in force.

The Supreme Administrative Court of the Slovak Republic was interested in whether the Slovak legislation in the Restitution Act was in accordance with the Convention (Article 1 of the Additional Protocol No. 1), according to which the maximum limit of issued land should also apply to those cases where the restitution claim was made at a time when the law did not include the condition of the maximum possible area of land to be issued, but this restitution claim will be decided only after this legislative change, so that the condition of the maximum area of land to be issued will be taken into account. The alternative version of the question concerned the consideration of this legislation by the administrative court, and thus whether the

administrative court, on the basis of the Convention (Article 1 of the Additional Protocol No. 1), should take into account the condition of the maximum possible amount given by the restitution law for such an applicant when deciding on the legality of the restitution decision of the administrative body, who made a claim at a time when the law did not include the condition of the maximum possible area of land to be issued, but the administrative authorities decided on the restitution claim only subsequently when they were bound by the condition of the maximum possible area of land to be issued.

The legal assessment of the Supreme Administrative Court of the Slovak Republic was also part of the prepared request for the issuance of an advisory opinion, in which it was inclined to the opinion that the applicant (plaintiff) could not be considered as a person whose property would be affected in a manner incompatible with Article 1 of the Additional Protocol No. 1 of the Convention on the grounds that his restitution claim was not satisfied in full. The Supreme Administrative Court of the Slovak Republic believed in this case the restitution claim was not satisfied to a marginal extent, or that the restitution claim was satisfied to a greater extent than it would have been de lege lata. At the same time, the Supreme Administrative Court of the Slovak Republic stated that the opposite opinion would, in its essence, prioritize the private interest of the restituent over the public interest of the legislator to legislatively determine the scope and conditions of compensation for injustices from the period of totalitarianism.

2.
Ultimately, after careful consideration, the Supreme Administrative Court of the Slovak Republic did not proceed with the submission of the request for the issuance of an advisory opinion on the grounds that the advisory opinion under Protocol no. 16 of the Convention has only a recommendatory character, which would not be able to break the statutory binding nature of the decision of the Constitutional Court of the Slovak Republic, in which the Constitutional Court of the Slovak Republic dealt with the constitutional conformity of the provisions of the Restitution Act, which were the subject of the present proceeding.

3.
Since the Supreme Administrative Court of the Slovak Republic has not yet proceeded to submit a request for the issuance of an advisory opinion, we cannot answer this question.

4.
Since the Supreme Administrative Court of the Slovak Republic has not yet proceeded to submit a request for the issuance of an advisory opinion, we cannot answer this question.

5.
Since the Supreme Administrative Court of the Slovak Republic has not yet proceeded to submit a request for the issuance of an advisory opinion, we cannot answer this question.

Constitutional Court of the Slovak Republic

1. Has your Court considered whether the resolution of a question arising in a pending case may be assisted by an advisory opinion of the European Court of Human Rights? If so, what was the nature of the question/s? Has your Court given its view on the question posed and, if not, for what reasons?

To this date, the Constitutional Court has not used the opportunity to request an advisory

opinion from the European Court of Human Rights in accordance with Protocol no. 16. The aforementioned has not even been the subject of deliberations by the plenary session of the Constitutional Court. The decision-making activity of the Constitutional Court reflects on the existing case-law of the European Court of Human Rights, its interpretation and the implementation of the articles of the European Convention on Human rights.

2. If such consideration resulted in a decision not to request an advisory opinion of the European Court of Human Rights, what were the reasons for this?

To this date, the consideration of asking the European Court of Human Rights for an advisory opinion has not been the subject of discussion by the plenary session of the Constitutional Court yet.

3. If an advisory opinion was requested and delivered, what effect did it have on the outcome of the case in relation to which it was requested? Has the advisory opinion had any wider impact in the national legal order?

4. Did the process of requesting an advisory opinion under Protocol No. 16 result in any undue delay to the final determination of the case at domestic level?

5. What impact has the advisory opinion of the European Court of Human Rights had as regards achieving a better implementation of the Convention in your country?

In view of the responses to questions 1 and 2 of the questionnaire, it is not possible to answer questions 3 - 5 in a relevant manner.

Supreme Court of the Republic of Slovenia

1. Has your Court considered whether the resolution of a question arising in a pending case may be assisted by an advisory opinion of the European Court of Human Rights? If so, what was the nature of the question/s? Has your Court given its view on the question posed and, if not, for what reasons?

So far, the Supreme Court of the Republic of Slovenia has never considered whether the resolution of a question arising in a pending case may be assisted by an advisory opinion.

2. If such consideration resulted in a decision not to request an advisory opinion of the European Court of Human Rights, what were the reasons for this?

N/A.

3. If an advisory opinion was requested and delivered, what effect did it have on the outcome of the case in relation to which it was requested? Has the advisory opinion had any wider impact in the national legal order?

N/A.

4. Did the process of requesting an advisory opinion under Protocol No. 16 result in any undue delay to the final determination of the case at domestic level?

N/A.

5. What impact has the advisory opinion of the European Court of Human Rights had as regards achieving a better implementation of the Convention in your country?

N/A.

Constitutional Court of the Republic of Slovenia

1. Has your Court considered whether the resolution of a question arising in a pending case may be assisted by an advisory opinion of the European Court of Human Rights? If so, what was the nature of the question/s? Has your Court given its view on the question posed and, if not, for what reasons?

The Slovene Constitutional Court has not yet submitted any request for an advisory opinion to the European Court of Human Rights under Protocol No. 16. However, we believe that this possibility entails an important tool at the disposal of national courts when they encounter difficult issues and can significantly contribute to the promotion of human rights and further the implementation of the Convention at national level.

2. If such consideration resulted in a decision not to request an advisory opinion of the European Court of Human Rights, what were the reasons for this?

As the judges' deliberations are confidential, we cannot share concrete details on the pertinent cases, but the possibility of making a request has indeed been raised two times in deliberations, but only in discussion, not with an actual motion to submit a request by the reporting judge or another judge. Again, it is difficult to be more specific on the concrete reasons both for raising the possibility in the first place and not pursuing it further – in both instances, the judges did not find an advisory opinion to be needed in order to decide the case, so to date no request has been seriously contemplated or attempted.

3. If an advisory opinion was requested and delivered, what effect did it have on the outcome of the case in relation to which it was requested? Has the advisory opinion had any wider impact in the national legal order?

Although the Constitutional Court has not submitted a request for an advisory opinion yet, the Convention and the case law of the European Court of Human Rights play an important role in its decision-making. This is most evident from the relatively frequent references to positions adopted by the European Court of Human Rights in the reasoning of the decisions of the Constitutional Court.

4. Did the process of requesting an advisory opinion under Protocol No. 16 result in any undue delay to the final determination of the case at domestic level?

NA

5. What impact has the advisory opinion of the European Court of Human Rights had as

regards achieving a better implementation of the Convention in your country?

NA

Supreme Court of Ukraine

Currently, the Supreme Court has not had any cases that would require an appeal to the European Court of Human Rights (ECtHR) with a request for an advisory opinion in the manner specified by Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (answer to question No. 1 of the Questionnaire).

Given the absence of such cases before the Supreme Court, it is not possible to provide answers to questions No. 2-5 of the Questionnaire.

In general, we believe that the procedure of applying to the ECtHR with a request for an advisory opinion in accordance with Protocol No. 16 to the Convention is appropriate and useful, and the mechanism is generally understandable.

Using the opportunity to communicate with the Drafting Group on the evaluation of the first effects of Protocols No. 15 and No. 16 to the Convention (DH-SYSC-PRO), the Supreme Court considers it appropriate to clarify the issue regarding the direct subject of the appeal from the higher court with a request for an advisory opinion, in particular, it should be the president of the higher court or the judge himself, in whose proceedings the relevant case is pending.

4. Reply by the European Court of Human Rights

Questions to the European Court of Human Rights

1. What is the Court's evaluation of the first effects of Protocol No. 16?

2. How has the Court's approach to dealing with requests for advisory opinions evolved since Protocol No. 16 came into force? Does the treatment of requests for advisory opinions under Protocol No. 16 absorb a significant amount of time and resources? Does the Court consider that the application of the advisory opinion procedure under Protocol No. 16 represents an efficient use of its time and resources?

3. Has the advisory opinion procedure under Protocol 16 contributed perceptibly to an enhanced implementation of the Convention in those States Party whose courts have had recourse to the procedure?

4. Has the advisory opinion procedure under Protocol No. 16 contributed to a reduction of the number of individual applications lodged with the Court?

5. Has the Court received an individual application arising from a domestic case in the context of which it had previously delivered an advisory opinion? If so, had the domestic court followed the Court's advice? What was the outcome of the application?

6. What jurisprudential status does the Court give to advisory opinions within its overall caselaw? Has the Court referred to advisory opinions delivered under Protocol No. 16 in its decisions in contentious proceedings, including in cases in which the respondent State has not ratified Protocol No. 16?

7. Is there a need for a Government's view on the question posed by the requesting Court?

The reply was submitted in French language only. An English translation was carried out by the CDDH Secretariat (see page 92 below).

Lors de sa 99e réunion (28 novembre – 1er décembre 2023), le Comité directeur pour les droits de l'homme (CDDH) du Conseil de l'Europe a été mandaté par le Comité des Ministres, sous l'autorité duquel il opère, de préparer, avant juin 2025, un rapport visant à évaluer les premiers effets du Protocole n°16 à la Convention européenne des droits de l'homme. À ce titre, le CDDH a préparé un questionnaire qu'il a transmis à la Cour le 18 décembre 2023, en l'invitant d'y répondre. À la demande de la Présidente de la Cour, le Greffe de la Grande Chambre a préparé - sous l'autorité de la Greffière de la Cour - la présente note, qui contient les réponses aux différentes questions posées. L'objet de cette note est de proposer au CDDH quelques éléments de réflexion sur des questions de procédure et de pratique dans le cadre du traitement des demandes relevant du Protocole n° 16 ou de manière plus générale, sans

toutefois interférer dans l'exercice, par la Cour, de sa fonction consultative ou judiciaire, qui est la sienne, ou préjuger son résultat.

1. Quelle est l'évaluation de la Cour au sujet des premiers effets du Protocole n° 16 ?

1. Depuis l'entrée en vigueur du Protocole n° 16, la Cour s'est employée à établir un dialogue sincère et loyal avec les cours et tribunaux supérieurs nationaux qui l'ont saisi, en gardant à l'esprit plusieurs impératifs majeurs (voir le § 57 de *l'Avis consultatif no P16-2021-002 relatif à la différence de traitement entre les associations de propriétaires « ayant une existence reconnue à la date de la création d'une association communale de chasse agrée » et les associations de propriétaires créées ultérieurement,* 13.07.2022). Tout avis rendu par la Grande Chambre doit se limiter aux points qui ont un lien direct avec le litige en instance au plan interne ; la procédure d'avis doit permettre à la Cour de donner à la juridiction dont émane la demande les orientations nécessaires pour garantir le respect des droits protégés par la Convention lorsqu'elle jugera le litige en instance, et sans pour autant transférer ce litige à la Cour ; les avis de la Cour doivent pouvoir constituer une source d'inspiration pour d'autres juridictions nationales confrontées à des questions similaires ; le processus interne de traitement, par la Cour, d'une demande d'avis doit être organisé de façon à permettre d'éviter tout retard injustifié dans la procédure interne qui a donné lieu à une demande d'avis ; le temps et les ressources de la Cour affectées au traitement des demandes d'avis doivent permettre d'assurer un traitement efficace et de qualité de chaque demande.

2. À ce jour, la Cour a reçu neuf demandes d'avis consultatifs provenant de différentes cours suprêmes nationales[18]. La Cour a accepté sept demandes et en a rejeté deux (lien vers la page des avis consultatifs). La Cour a par ailleurs rendu 7 avis consultatifs (lien), qui ont porté sur les questions suivantes :

- la reconnaissance juridique du lien de filiation pour un enfant né d'une gestation pour autrui à l'étranger (Cour de Cassation française);
- l'utilisation de la technique de la "législation par référence" en droit pénal (Cour Constitutionnelle d'Arménie)
- la législation sur les élections dans le cadre d'une procédure d'impeachment (Cour Suprême Administrative de Lituanie)
- l'applicabilité des délais de prescription s'agissant des infractions constitutives, en substance, d'actes de torture (Cour de Cassation d'Arménie)
- les droits des associations de propriétaires fonciers (Conseil d'État français)
- la procédure d'adoption d'un adulte (Cour Suprême de Finlande)
- le refus d'autoriser l'exercice des certaines professions par les personnes proches de certains mouvements religieux ou appartenant à ceux-ci (Conseil d'État de Belgique).

3. Ces différents exemples d'avis attestent que le nouveau mécanisme d'avis institué par le Protocole n° 16 a d'ores et déjà porté ses premiers fruits, ayant permis aux cours et tribunaux nationaux de rechercher, de manière proactive, les conseils et l'assistance de la Cour, qu'ils ont pu « insuffler » dans la procédure nationale pendante avant qu'une décision définitive ne soit

[18] la Cour de Cassation française, la Cour Constitutionnelle d'Arménie, la Cour de Cassation d'Arménie, la Cour Suprême Administrative de Lituanie, la Cour Suprême de Slovaquie, le Conseil d'État français, la Cour Suprême de Finlande, le Conseil d'État de Belgique et la Cour Suprême d'Estonie

prise au niveau national (voir §§ 28-31 ci-après). Il y a lieu de souligner à cet égard que certaines juridictions suprêmes se sont prévalues de la latitude qui leur était réservée d'inclure dans leur demande d'avis un exposé de leur propre avis sur la question[19], y compris toute analyse qu'elles avaient pu en faire (article 92, point 2.1 e) du règlement de la Cour et les paragraphes 12 et 13 des Lignes directrices), ce qui a permis de nourrir la réflexion de la Cour sur la question posée et la manière d'y répondre. Les décisions à travers lesquelles le collège de la Grande Chambre a conclu à l'irrecevabilité d'une demande d'avis[20] ont, elles-aussi, participé à ce dialogue entre la Cour et les cours et juridictions nationales suprêmes: appelé à examiner si une demande d'avis remplit les conditions énoncées à l'article 1 du Protocole n° 16 et à décider si elle doit ou non être admise pour examen par la Grande Chambre (articles 2 du Protocole n° 16 et 93 du règlement de la Cour), le collège de la Grande Chambre a pris soin d'expliquer, exemples de jurisprudence à l'appui, les raisons pour lesquelles il lui a semblé que certaines questions n'étaient pas des « questions de principe », au sens de l'article 1 du Protocole n°16. Comme § 15 du Rapport explicatif au Protocole n° 16 l'avait préconisé, ces décisions ont permis d'apporter des éclaircissements de la notion de « questions de principe concernant l'interprétation et l'application de la Convention », de telles clarifications pouvant s'avérer utiles pour tous les autres cours et tribunaux nationaux suprêmes qui envisagent de faire usage de la procédure d'avis.

4. Si, comme il sera détaillé dans les réponses aux prochaines questions, l'apport actuel du Protocole n° 16 est surtout qualitatif – plus de dialogue judiciaire entre la Cour et les cours et tribunaux nationaux (voir notamment les §§ 5-7, 11 et 28-31 ci-après) – cet apport participe à la mise en œuvre du principe de subsidiarité, inscrit désormais dans le préambule de la Convention à la suite de l'entrée en vigueur, le 1er aout 2021, du Protocole n° 15 amendant la Convention en ce sens. Au fil des années, la Cour a été amenée à renforcer la mise en œuvre de ce principe, en valorisant de plus en plus le rôle des juridictions internes en tant que juge de droit commun de la Convention[21] et en prenant en compte, dans le cadre de sa pratique contentieuse, la qualité du processus décisionnel national[22]. Il n'est pas possible pour le greffe de spéculer sur l'issue que la Cour pourrait donner à une requête qui serait introduite à l'issue d'une procédure judiciaire où la Cour a rendu un avis. Il n'est toutefois pas exclu, sur la base de la pratique de la Cour dans le traitement des affaires, qu'une juridiction qui applique de bonne foi les critères et les orientations fournis par la Cour dans un avis se voie reconnaître une plus large marge d'appréciation (voir § 27 ci-après, voir aussi le paragraphe 26 du Rapport explicatif au Protocole n° 16) [23].

5. Les présidents des cours suprêmes nationales des États membres et des juges de la Cour réunis lors d'un séminaire marquant le cinquième anniversaire de l'entrée en vigueur du

[19] Tel est le cas de la récente demande d'avis de la Cour suprême d'Estonie, ou de la demande d'avis de la Cour Suprême de Finlande

[20] Décision n° P16-2023-002 relative à une demande d'avis consultatif concernant l'interprétation de l'article 4 du Protocole n° 7 à la Convention (Cour suprême d'Estonie), 19 février 2024, et Décision P16-2020-001 relative à une demande concernant l'interprétation des articles 2, 3 et 6 de la Convention (Cour suprême de la République slovaque), 14 décembre 2020

[21] Voir, pour un rappel récent des principes relatifs au rôle juridictions nationales et au contrôle subsidiaire de la Cour, les §§ 159-162 de l'arrêt *Halet c. Luxembourg* [GC], no 21884/18, 14 février 2023

[22] Voir, par exemple, *Hatton et autres c. Royaume-Uni* [GC] (n° 36022/97, CEDH 2003-VIII, *Animal Defenders International c. Royaume-Uni* [GC], n° 48876/08, §§ 108 and 110, CEDH 2013 (extraits)); voir aussi, plus recemment, *Bărbulescu c. Roumanie* [GC], nº 61496/08, §§ 120-123, 5 septembre 2017; *López Ribalda et autres c. Espagne* [GC], nºs 1874/13 et 8567/13, §§ 114-117, 17 octobre 2019 ; *M.A. c. Danemark* [GC], nº 6697/18, §§ 185-195, 9 juillet 2021; *Savran c. Danemark* [GC], nº 57467/15, §§ 189 et 196, 7 décembre 2021 et *L.B. c. Hongrie* [GC], nº 36345/16, §§ 124-125, 9 mars 2023

[23] Voir aussi, s'agissant de la manière dont la Cour a effectué son contrôle d'un jugement national rendu à l'issue d'un premier arrêt qu'elle avait rendu dans la même affaire, *Bochan c. Ukraine (nº 2)* [GC], nº 22251/08, CEDH 2015, et *Moreira Ferreira c. Portugal (nº 2)* [GC], nº 19867/12, 11 juillet 2017.

Protocole n° 16 et du mécanisme d'avis consultatif (ci-après « le séminaire du 13 octobre 2023 »)[24] ont salué les premiers effets du Protocole n° 16. Différentes interventions lors de ce séminaire attestent que l'application de la procédure d'avis consultatif prévue par le Protocole n° 16 s'est à ce jour avérée utile dans un certain nombre de situations, par exemple, dans de procédures judiciaires où les juridictions nationales se retrouvaient à devoir confronter la mise en œuvre des droits de la Convention avec des règles de droit interne relevant de l'ordre public, par exemple en matière d'éthique ou de sûreté nationale[25]. Le Premier président de la Cour de cassation française voyait dans les demandes d'avis formulées en lien avec un contexte national politiquement tendu ou impliquant de vives controverses, une marque de confiance de la part des différentes cours suprêmes envers la Cour [26], appelée à soutenir et à légitimer, par son intervention, les décisions nationales à prendre. Le Président de la Cour Constitutionnelle slovène a mis en exergue l'impact du Protocol n° 16 dans des affaires nationales pendantes. Même si une juridiction nationale décide de ne pas demander un avis consultatif, ce protocole l'amène toutefois à réfléchir quant à la possible réponse que la Cour donnerait à une question, si elle lui était posée.

6. La possibilité pour des juridictions suprêmes nationales de prendre l'initiative et de demander en temps utile un avis consultatif s'est également avérée une option particulièrement utile pour aider les juridictions nationales à résoudre des difficultés liées à l'exécution des précédents arrêts de la Cour[27], dans de situations où l'évolution de la jurisprudence avait généré d'autres questions ou nécessité des éclaircissements au regard de circonstances nouvelles. Si la possibilité de demander un avis n'existait pas, l'obtention de clarifications supplémentaires d'un arrêt de la Cour ou de ses implications ne dépendrait que de l'introduction de nouvelles requêtes individuelles et de la décision que la Cour aurait alors à prendre. Toutefois, il convient de souligner que la procédure de demande d'avis consultatif n'a pas été conçue comme un mécanisme pour résoudre des difficultés rencontrées au niveau national lors de l'exécution des arrêts de la Cour.

7. En 2023, la présidente de la Cour Constitutionnelle d'Italie, dans son discours à l'audience solennelle de la Cour européenne des droits de l'homme[28], citait deux arrêts récents rendus par la Cour de cassation et par la Cour Constitutionnelle italiennes qui s'étaient appuyées de façon déterminante sur l'Avis consultatif n° P16-2018-001, afin de souligner que le Protocole n° 16 pouvait, d'ores et déjà, être considéré comme étant un instrument significatif dans le contexte du droit international des droits de l'homme.

2. Comment l'approche de la Cour a-t-elle évolué depuis l'entrée en vigueur du Protocole n° 16 concernant le traitement des demandes d'avis consultatifs ? Le traitement des demandes d'avis consultatif prévu par le Protocole n° 16 implique-t-il beaucoup de temps et de ressources ? Est-ce que la Cour considère que l'application de

[24] Séminaire intitulé « Le dialogue judiciaire par le biais du mécanisme d'avis consultatif en vertu du Protocole nº 16 » pour marquer le cinquième anniversaire de l'entrée en vigueur du Protocole n° 16 et du mécanisme d'avis consultatif », Palais des droits de l'homme, Strasbourg, 13 octobre 2023. Le programme du séminaire et les allocations des intervenants sont disponibles via ce lien : Séminaire pour marquer le 5e anniversaire de l'entrée en vigueur du Protocole n° 16 - ECHR - ECHR / CEDH (coe.int)

[25] La première demande d'avis soumise par la Cour de cassation française et la demande du Conseil d'État belge relative étaient de cette nature.

[26] Christophe Soulard, premier président de la Cour de cassation française, voir les exemples cités lors de son discours au Séminaire du 13 octobre 2023 consultable via ce lien : Discours de Christophe Soulard

[27] Voir les exemples cités dans le Discours de Pauliine Koskelo, juge à la Cour, au séminaire du 13 octobre 2023

[28] Discours de Mme Silvana Sciarra, présidente de la Cour constitutionnelle italienne, publié dans le Rapport annuel de la Cour pour l'année 2023, consultable à ce lien Rappports annuels - ECHR - ECHR / CEDH (coe.int) pages 17-21.

la procédure d'avis consultatif prévue par le Protocole n° 16, représente une utilisation efficace de son temps et de ses ressources ?

A. L'approche juridictionnelle

8. Les neuf demandes d'avis introduites à ce jour à la Cour lui ont permis de définir quels était son rôle dans le cadre d'une telle procédure et quels étaient les paramètres du cadre juridique applicable à chaque stade de la procédure d'avis. La Cour a ainsi précisé que l'objectif de la procédure d'avis consultatif était de donner à la juridiction dont émane la demande les moyens nécessaires pour garantir le respect des droits protégés par la Convention lorsqu'elle jugera le litige en instance, sans pour autant transférer le litige à la Cour. Elle a indiqué en ce sens qu'elle n'était compétente ni pour se livrer à une analyse des faits, ni pour apprécier le bien-fondé des points de vue des parties relativement à l'interprétation du droit interne à la lumière du droit de la Convention, ou pour se prononcer sur l'issue de la procédure. Son rôle se limite à rendre un avis sur les questions qui lui sont posée. C'est à la juridiction dont émane la demande qu'il revient de résoudre les questions que soulève l'affaire et de tirer, selon le cas, toutes les conséquences qui découlent de l'avis donné par la Cour pour les dispositions du droit interne invoquées dans l'affaire et pour l'issue de l'affaire. [29]

9. Confrontée, dans le cadre des demandes d'avis formulées par les juridictions demanderesses, à certaines questions de caractère vague ou général, la Cour a déduit de l'article 1 §§ 1 et 2 du Protocole n° 16 que les avis qu'elle était amenée à rendre en application de ce protocole devaient se limiter aux points qui ont un lien direct avec le litige en instance au plan interne. Elle en a également déduit qu'elle avait le pouvoir de joindre certaines questions ou de les reformuler en tenant compte des circonstances factuelles et juridiques particulières de l'affaire pendante au niveau interne[30].

10. Sur la question de savoir si, une fois saisie d'une demande d'avis consultatif, la Grande Chambre pouvait s'abstenir de répondre à une ou plusieurs des questions posées, la Cour a estimé que, si la décision d'accepter ou non la demande d'avis consultatif appartenait au collège, la Grande Chambre n'était pas pour autant privée de la possibilité d'utiliser tous les pouvoirs qui sont conférés à la Cour, notamment celui relatif à sa compétence (articles 19 et 32 et, par analogie, article 48 de la Convention). La décision du collège ne saurait donc empêcher la Grande Chambre d'apprécier si chacune des questions qui composent une demande d'avis satisfait aux conditions de l'article 1 du Protocole n° 16, et en particulier si elle porte sur des « questions de principe relatives à l'interprétation ou à l'application des droits et libertés définis par la Convention ou ses protocoles » (paragraphe 1), si l'avis est sollicité « dans le cadre d'une affaire pendante devant » la juridiction dont émane la demande (paragraphe 2) et si ladite juridiction a « motiv[é] sa demande d'avis et produit les éléments pertinents du contexte juridique et factuel de l'affaire pendante » (paragraphe 3). Il reste ainsi possible pour la Grande Chambre de vérifier si les questions qui font l'objet de la demande satisfont aux conditions énoncées à l'article 1 du Protocole n° 16 au vu de la demande initiale, des observations reçues et de tous les autres éléments à sa disposition. Si elle parvient à la conclusion que, compte tenu du contexte factuel et juridique de l'affaire, certaines questions ne satisfont pas à ces

[29] Voir, entre autres, pour un rappel récent des différents principes, *l'Avis consultatif* P16-2023-001 délivré à la demande du Conseil d'État de Belgique le 14 décembre 2023

[30] Voir, par exemple, les §§ 44-47 de *l'Avis consultatif* P16-2019-001 demandé par la Cour constitutionnelle arménienne, 29 mai 2020

conditions, elle peut décider de ne pas les examiner, s'exprimant en ce sens dans son avis consultatif[31].

11. S'agissant des critères destinés à assurer le filtrage des demandes d'avis, la Cour a précisé que les « questions de principe » au sens de l'article 1 § 1 du Protocole n° 16 étaient les questions qui, compte tenu de leur nature, de leur degré de nouveauté et/ou de leur complexité, ou pour d'autres raisons, portent sur une question pour laquelle la juridiction demanderesse aurait besoin d'une orientation donnée par la Cour au moyen d'un avis consultatif de manière à lui permettre de garantir le respect des droits de la Convention lorsqu'elle jugera le litige en instance[32]. Pour la Cour, la juridiction demanderesse devrait considérer l'avis sur ces « questions de principe » comme nécessaire pour trancher l'affaire en instance devant elle[33].

B. L'approche procédurale

12. Animée par la volonté de faire fonctionner le processus mis en place par le Protocole n° 16, la Cour a déployé depuis son entrée en vigueur des efforts considérables pour concevoir et améliorer ses méthodes de travail internes. Elle a adapté et simplifié la procédure utilisée par la Grande Chambre dans le traitement des affaires afin d'assurer la résolution avec célérité des demandes d'avis. À titre d'exemple, l'avis relatif à la demande de la Cour Suprême de Finlande a été rendu environ six mois après la réception de la demande et l'avis rendu sur demande du Conseil d'État de Belgique a été rendu environ huit mois après la saisine de la Cour. Les éventuelles décisions d'irrecevabilité relatives aux demandes d'avis ont été prises, quant à elles, encore plus rapidement, alors même qu'il s'agit de décisions motivées. La récente décision relative à la demande d'avis de la Cour Suprême d'Estonie a, par exemple, été adoptée par le collège de la Grande Chambre moins de six semaines après la date de la réception, par la Cour, de la demande de la juridiction demanderesse assortie d'une traduction dans l'une des langues officielles du Conseil de l'Europe et des documents pertinents (article 92 § 2.2 du règlement de la Cour et § 14 des Lignes directrices).

13. Le fait que la Cour n'a pas tenu d'audience publique dans les procédures relevant du Protocole 16 dont elle a été saisie a permis d'accélérer le processus, l'examen des demandes d'avis jugées recevables s'étant fondé sur des informations et des observations écrites fournies à la Cour par la juridiction interne demanderesse, par les parties à la procédures internes, par le gouvernement de la Haute Partie contractante dont relève la juridiction qui a fait la demande, et par des éventuels Gouvernements tiers autorisés à intervenir[34]. Le même juge rapporteur est désormais désigné pour traiter une demande aux différents stades de la procédure (devant le collège de la Grande Chambre et devant la Grande Chambre elle-même si la demande est recevable).[35] Dans la mesure du possible, la Grande Chambre a cherché à adopter le projet soumis par le juge rapporteur lors d'un seul tour des délibérations. Il faut souligner, toutefois, que cette pression du temps rend la tâche de la Grande Chambre particulièrement difficile et, confrontée à une demande d'avis particulièrement complexe ou exigeant une réponse à plusieurs questions, il pourrait s'évérer difficile pour la Cour d'adopter un projet d'avis après un

[31] Voir § 47 de *l'Avis consultatif* P16-2019-001 demandé par la Cour constitutionnelle arménienne, 29 mai 2020

[32] Voir §§ 18 et 20 de la Décision n° P16-2020-001 relative à une demande d'avis consultatif formée par la Cour suprême d'Estonie, 19 février 2024

[33] Voir § 17 de la Décision n° P16-2020-001 relative à une demande d'avis consultatif formée par la Cour suprême de la République slovaque, 14 décembre 2020

[34] À titre d'exemple, dans le cadre de la demande d'avis consultatif n P16-2018-001, des observations écrites avaient été reçues des gouvernements britannique, tchèque et irlandais qui avaient demandé à intervenir dans la procédure, alors que ces trois États n'avaient pas ratifié le Protocole n 16

[35] Article 93 1.1 b) du règlement

seul tour de délibérations. Il convient également de mentionner que la Grande Chambre a cherché jusqu'à présent de rendre ses avis consultatifs à l'unanimité.[36]

14. Pour rédiger ses avis, la Grande Chambre a adopté un style de raisonnement plus concis que ce qui est habituel dans le contexte de ses arrêts ; ce style est caractérisé par l'usage d'une forte dose d'abstraction qui reflète la nécessité, pour la Cour, de fournir des orientations utiles en réponse à une « question de principe », et pour permettre à ses avis d'être une source d'inspiration pour d'autres juridictions nationales confrontées à des questions similaires. Dès qu'ils sont adoptés, les avis sont communiqués par écrit aux parties ou prononcés publiquement par le/la Président de la Cour[37]. Les deux derniers avis ont été rendus publiquement par la Présidente de la Cour, une marque supplémentaire de l'importance que la Cour octroie à cette procédure.

15. Une mise à jour des lignes directrices visant à offrir aux juridictions concernées une assistance pour l'introduction et la poursuite des procédures prévues par le Protocole n° 16 a été publiée le 24 octobre 2023, après avoir reçu l'approbation de la Cour plénière. Cette mise à jour faisait suite au séminaire susmentionné (paragraphe 5 ci-dessus), qui avait donné à la Cour l'occasion de prendre note des expériences des juridictions nationales cinq ans après l'entrée en vigueur du protocole. Reflétant les éléments de pratique développés par la Cour sous le Protocole n° 16, les lignes directrices révisées ont été mises à la disposition des juridictions nationales (et du public au sens large) sur la page dédiée aux avis consultatifs du site Internet de la Cour.

C. Les ressources

16. En termes de ressources, la pratique atteste que le traitement d'une demande d'avis mobilise une quantité assez considérable du temps et des ressources dont la Cour dispose. Les questions posées à la Cour s'avèrent souvent assez complexes, et nécessitent parfois des recherches en droit international ou comparé. La préparation du projet – confiées à un juge rapporteur et aux juristes chevronnés du Greffe, avec l'assistance des greffiers de la Grande Chambre - constitue une tâche très minutieuse et difficile, une forte dose d'abstraction étant souvent nécessaire pour permettre à ses avis d'être une source d'inspiration pour d'autres juridictions nationales confrontées à des questions similaires. Un travail de rédaction en filigrane sur les paragraphes clé de l'avis consultatif et sur les dispositions opératives est nécessaire pour s'assurer que la Cour n'impiète dans le cadre de cette procédure consultative ni sur le rôle de juridictions nationales dans la résolution du litige au niveau interne, ni sur son propre rôle en tant que dernier juge de la Convention si l'affaire revient devant la Cour par la voie d'une procédure contentieuse.

17. Si la Cour reste animée par la volonté de continuer et de développer le dialogue entamé avec les juridictions nationales par le biais du mécanisme institué par le Protocole n° 16, il n'en reste pas moins que, si une demande d'avis est déclarée recevable par le collège, la procédure mobilise la formation judiciaire de la Grande Chambre, et donc 17 juges plus trois juges suppléants. L'arrivée d'un nombre important de demandes d'avis pourrait fortement affecter le travail de cette formation judiciaire ainsi que le délai nécessaire à la Grande Chambre pour rendre des décisions et des arrêts dans les affaires dont elle est saisie à la suite d'une demande de renvoi acceptée par le collège ou d'un dessaisissement d'une chambre au profit de la Grande Chambre. Si la Cour est en train de récupérer le nombre de postes de juristes

[36] Une opinion séparée (concordante) a été jointe à deux sur les sept avis consultatifs rendus à ce jour (demandes nº P16-2019-001 et nº P16-2021-001).

[37] Voir paragraphes 32 des Lignes directrices (mises à jour le 25 septembre 2023)

affectés au greffe de la Cour à la suite d'une augmentation budgétaire (fruit du 4ème sommet des chefs d'État et de gouvernement du Conseil de l'Europe)[38], il n'en reste pas moins que la nouvelle fonction non-contentieuse lui avait été confiée par la voie du Protocole n° 16 sans aucune augmentation du nombre de juristes susceptibles de traiter, au niveau de la Grande Chambre, ce type de demandes.

3. La procédure d'avis consultatif prévue par le Protocole n° 16 a-t-elle sensiblement contribué à améliorer la mise en œuvre de la Convention dans les États parties dont les tribunaux ont eu recours à cette procédure ?

18. Il est certes trop tôt pour tirer des conclusions à caractère général et le greffe de la Cour n'est pas à même de répondre à cette question. Quelques exemples concrets émanant de la jurisprudence de la Cour et de la pratique nationale permettent néanmoins d'y esquisser une réponse affirmative.

19. Le 16 juillet 2020, une chambre de la Cour a conclu à une non-violation de l'article 8 de la Convention dans l'affaire *D c. France*, n° 11288/18, après avoir noté une évolution du droit et de la pratique internes allant dans le sens indiqué par la Cour dans son avis consultatif n° P16-2018-001. L'affaire portait sur le refus de transcription sur les registres de l'état civil français des actes de naissance des enfants nés d'une gestation pour autrui réalisé à l'étranger – refus basé sur la contrariété de la convention de gestation pour autrui aux principes essentiels du droit français (voir §§ 66 et 67 de l'arrêt de chambre). En considérant cet avis, l'Assemblée plénière de la Cour de cassation a souligné qu'il se déduisait de l'article 8 de la Convention qu'au regard de l'intérêt supérieur de l'enfant, la circonstance que la naissance d'un enfant à l'étranger ait pour origine une convention de gestation pour autrui, prohibée en droit français, ne pouvait, à elle seule, sans porter une atteinte disproportionnée au droit au respect de la vie privée de l'enfant, faire obstacle ni à la transcription de l'acte de naissance établi par les autorités de l'État étranger, en ce qui concerne le père biologique de l'enfant, ni à la reconnaissance du lien de filiation à l'égard de la mère d'intention mentionnée dans l'acte étranger, laquelle devait intervenir au plus tard lorsque ce lien entre l'enfant et la mère d'intention s'est concrétisé (voir aussi § 32 ci-après). Cette évolution venait combler un vide juridique de longue date, comme cela a été rappelé par le premier président de la Cour de cassation française, dans son discours au séminaire du 13 octobre 2023. Se référant alors à l'expérience de la saisine de la Cour pour avis en matière de gestation pour autrui, il souligna qu' « on ne pou[vait] être que frappé dans ce contentieux par le fait que le législateur, qui s'était abstenu d'intervenir pendant plus de trente ans » (…) ne viendrait combler le vide législatif que lorsqu'il a pu se prévaloir des lignes définies par la Cour européenne des droits de l'homme dans son avis » (paragraphe 5 ci-dessus, avec ses références).

20. De façon intéressante, les avis rendus à ce jour par la Cour semblent avoir permis de contribuer à la mise en œuvre de la Convention non seulement dans les États parties dont les tribunaux ont eu recours à cette procédure, mais aussi dans d'autres États qui n'avait pas ratifié ce protocole, et qui se trouvèrent confrontés à des questions similaires. Comme cela a été indiqué plus haut, la présidente de la Cour Constitutionnelle d'Italie a cité, en 2023, dans son discours à l'audience solennelle de la Cour, deux arrêts récents rendus par la Cour de cassation et par la Cour Constitutionnelle italiennes qui s'étaient appuyées de façon déterminante sur l'Avis consultatif n° P16-2018-001 sur la reconnaissance juridique du lien de filiation pour un enfant né d'une gestation pour autrui à l'étranger pour traiter des questions

[38] 4e Sommet des chefs d'État et de gouvernement du Conseil de l'Europe, Reykjavík, 16 et 17 mai 2023

similaires ayant surgi en droit interne, alors même que l'Italie n'avait pas ratifié ce protocole (voir § 7 ci-dessus et les références citées). Dans ce contexte, elle précisait que, « malgré leur caractère non contraignant, les avis de la Cour « diffusaient en substance des effets généraux ».

21. Dans un rapport annuel 2022[39], la Cour Suprême de Suède a cité l'exemple d'une affaire où elle s'était fondée sur l'avis consultatif n° P16-2018-001 délivré par la Cour, alors même que la Suède n'avait pas ratifié le Protocole n° 16. Dans le cadre de son arrêt, cette juridiction suprême a précisé qu'un tel avis consultatif pouvait être considéré comme ayant « une valeur significative en tant que source juridique en liaison avec l'interprétation » de la Convention[40].

22. Ces différents exemples attestent que les avis consultatifs, en s'intégrant dans la jurisprudence de la Cour, ont eu un impact positif sur la législation et la pratique des États membres, qu'ils aient ratifié, ou non, le Protocole n° 16 (voir également, sur ce point, la réponse à la question n° 6 ci-après). Si ces avis intéressent naturellement l'ensemble des États parties à la Convention, y compris ceux qui n'ont pas ratifié le Protocole n 16, c'est pour la simple et bonne raison que la Cour y interprète les dispositions de la Convention et des protocole additionnels qui les lient en vertu du Protocole n° 11. Les États membres autres que celui dont relève la juridiction ayant demandé l'avis – qui sont avertis de toute nouvelle demande d'avis par le biais d'un communiqué de presse – peuvent demander l'autorisation d'intervenir en tant que tierce partie lors d'une procédure consultative en cours (article 3 du Protocole n° 16). Dans la pratique, il est arrivé que des gouvernements tiers aient demandé d'intervenir dans la procédure d'avis, une marque supplémentaire de leur intérêt pour les avis de la Cour et pour leurs éventuelles conséquences au niveau interne[41].

4. La procédure d'avis consultatif prévue par le Protocole n° 16 a-t-elle contribué à réduire le nombre de requêtes individuelles introduites auprès de la Cour ?

23. Les statistiques de la Cour pour l'année 2023[42] révèlent une diminution du nombre de nouvelles requêtes attribuées à une formation judiciaire. Toutefois, cela s'explique par le retrait de la Russie du système de la Convention, par une baisse du nombre de requêtes en provenance de certains États qui n'ont pas ratifié le Protocole n° 16 (notamment la Türkiye et la Serbie) ou dont les juridictions n'en ont pas encore fait usage (par exemple, la Grèce). Cette baisse n'a pas de lien direct ou indirect avec l'une ou l'autre des procédures d'avis consultatif.

24. S'agissant plus précisément des États qui ont ratifié le Protocole n° 16 et dont les juridictions ont saisi la Cour d'une demande d'avis consultatif, les effets des procédures d'avis consultatif sur le nombre de requêtes individuelles dirigées contre les États concernés restent limités, voire imperceptibles. La nature très technique de certaines questions posées à la Cour (par exemple l'utilisation de la technique de « législation par référence » pour la définition d'une infraction[43]) ou le fait qu'elles ait porté sur des situations plutôt rares dans la pratique (par exemple, une procédure d'adoption d'un adulte, ou une destitution dans le cadre d'une procédure d'impeachment) expliquent l'absence d'effets notoires sur le nombre de requêtes

[39] Activity report - The Supreme Court (domstol.se)
[40] NJA 2019, affaire « *California Surrogacy Arrangement* », p. 504, § 31, citée au Rapport annuel 2022 de la Cour suprême de Suède, p. 21
[41] À titre d'exemple, dans le cadre de la demande d'avis consultatif no P16-2018-001, des observations écrites avaient été reçues des gouvernements britannique, tchèque et irlandais qui avaient demandé à intervenir dans la procédure, alors que ces trois États n'avaient pas ratifié le Protocole n 16.
[42] Voir les données et analyses sur le site internet de la Cour Statistiques - la CEDH - ECHR - ECHR / CEDH (coe.int)
[43] Avis consultatif n° P16-2019-001, à la demande de la Cour constitutionnelle arménienne, 29 mai 2020

portant sur des questions similaires.

25. Quant aux questions susceptibles d'affecter un plus grand nombre de personnes physiques ou morales qui ont à ce jour posées à la Cour (par exemple la question de la reconnaissance en droit interne d'un lien de filiation entre un enfant né d'une gestation pour autrui pratiquée à l'étranger et la mère d'intention, ou la différence de traitement entre différentes associations de propriétaires par rapport à la date de leur création), elles n'avaient pas donné lieu à une affluence de requêtes individuelles avant qu'elles ne fassent l'objet d'une demande d'avis consultatif. Dès lors, le fait que la Cour ait rendu un avis sur ces questions n'a pu avoir qu'une incidence limitée sur le nombre de requêtes individuelles similaires pendantes au rôle de la Cour. Quelques requêtes individuelles portant sur une problématique similaire à celle ayant fait l'objet à l'un ou l'autre des procédures consultatives de cette nature ont néanmoins donné lieu à un constat de violation ou de non-violation des dispositions de la Convention par des chambres de sept juges[44], voire à un constat d'irrecevabilité en comité de trois juges[45], sur la base des principes mis en exergue par les avis consultatifs pertinents.

26. En bref, le Protocole n°16 n'a pas eu des effets sur le volume d'affaires portées devant la Cour. L'apport à ce stade du Protocole n° 16 est surtout qualitatif (voir § 4 ci-dessus). Il est néanmoins important, au terme d'une pratique somme toute assez limitée, de ne pas sous-estimer l'effet sur la charge de travail de la Cour d'un futur avis consultatif qui viendrait clarifier une question de principe d'intérêt général qui a donné lieu ou qui serait susceptible de donner lieu à une affluence de requêtes individuelles. Jusqu'à présent, les demandes d'avis n'ont pas été de cette nature.

5. La Cour a-t-elle été saisie d'une requête individuelle découlant d'une affaire nationale dans le cadre de laquelle elle avait déjà émis un avis consultatif ? Dans l'affirmative, la juridiction nationale a-t-elle suivi l'avis de la Cour ? Quelle a été l'issue de la requête ?

27. La Cour n'a pas encore été saisie d'une requête individuelle à l'issue de l'une ou l'autre des procédures judiciaires dans le cadre desquelles elle a été appelée à rendre un avis consultatif. Selon les informations transmises à la Cour par les juridictions demanderesses ou qu'elle a pu elle-même se procurer, les juridictions qui se sont prévalu de la possibilité de demander un avis consultatif en ont tiré des enseignements pour fonder leur décision après avoir repris l'examen de l'affaire au niveau interne.

28. En atteste l'exemple de l'arrêt du 4 octobre 2019[46] de la Cour de Cassation française, qui, par un arrêt avant-dire-droit du 5 octobre 2018, avait transmis à la Cour la demande d'avis n° P16-2018-001 relative à la reconnaissance en droit interne d'un lien de filiation entre un enfant né d'une gestation pour autrui pratiquée à l'étranger et la mère d'intention. En considérant l'avis de la Cour, l'Assemblée plénière de la Cour de cassation a jugé qu'en annulant la transcription de l'acte de naissance étranger des enfants Mennesson au motif qu'elles étaient nées à la suite d'une convention de gestation pour autrui (GPA), la cour d'appel avait méconnu l'article 8 de la Convention. Elle a estimé que, s'agissant d'un contentieux qui perdurait depuis plus de quinze ans, en l'absence d'autre voie permettant de reconnaître la filiation dans des conditions qui ne porteraient pas une atteinte disproportionnée au droit au respect de la vie privée des enfants

[44] Voir, par exemple, l'affaire *D. c. France D c. France*, n° 11288/18, le 16 juillet 2020, *D.B. et autres c. Suisse*, nos 58817/15 et 58252/15, 22 novembre 2022. Voir aussi, *Pantalon c. Croatie*, no 2953/14, § 45, 19 novembre 2020, et *Tristan c. République de Moldova* (no 13451/15) §§ 47 et 52, 4 juillet 2023.
[45] *S.C. et autres c. Suisse*, n° 26848/18, (déc.), 28 novembre 2023
[46] https://www.legifrance.gouv.fr/juri/id/JURITEXT000039213459/

nés d'une GPA à l'étranger consacré par l'article 8 de la Convention, et alors qu'il y avait lieu de mettre fin à cette atteinte, la transcription sur les registres de l'état civil de Nantes des actes de naissance établis à l'étranger ne saurait être annulée. Ensuite, statuant au fond, la Cour de cassation a infirmé le jugement rendu le 13 décembre 2005 par le tribunal de grande instance de Créteil et a rejeté la demande d'annulation de la transcription formée par le procureur général près la cour d'appel de Paris.

29. La Cour Constitutionnelle d'Arménie - qui avait saisi le 18 juillet 2021 la Cour d'une demande d'avis consultatif relatif à l'utilisation de la technique de « législation par référence » pour la définition d'une infraction, a invalidé l'article 300.1 du code pénal comme étant contraire à la Constitution en mobilisant, dans sa décision du 26 mars 2021[47], les critères indiqués par la Cour dans son avis pour comparer la loi pénale telle qu'elle était en vigueur au moment de la commission de l'infraction et la loi pénale telle que modifiée.

30. Le Conseil d'État français a rappelé au § 3 de sa décision du 23 mars 2023[48], rendue dans la procédure sur le fond qui fait suite à la l'avis rendu par la Cour le 13 juillet 2022, les critères indiqués par la Cour pour statuer sur la compatibilité, au regard de l'article 14 de la Convention combiné avec l'article 1 du Protocole n° 1, d'une différence de traitement résultant du troisième alinéa de l'article L. 422-18 du code de l'environnement entre les associations ayant une existence reconnue à la date de création de l'association communale de chasse agréée (ACCA) et les associations créées postérieurement, avant de rejeter, au fond, la requête de Forestiers privés de France tendant à l'annulation pour excès de pouvoir d'un décret relatif aux missions de service public des fédérations départementales des chasseurs.

31. Par son arrêt du 28 février 2024, la Cour suprême de Finlande[49], qui avait saisi la Cour d'une demande d'avis dans le contexte d'une procédure qui concernait l'adoption d'un adulte engagée au titre de la loi finlandaise relative à l'adoption, a confirmé la décision de la cour d'appel du 5 novembre 2021 selon laquelle la mère naturelle n'avait pas le droit d'interjeter appel contre le jugement rendu par le tribunal de district. S'appuyant sur l'avis consultatif délivré par la Cour, elle estima que, si la perte éventuelle du statut de parent à la suite d'une procédure adoption pouvait être constitutive d'une ingérence dans la vie privée de la mère naturelle, telle que garantie par l'article 10 de la Constitution et par l'article 8 de la Convention, cette dernière disposition n'exigeait pas, en soi, un droit de recours pour le parent biologique dans une telle procédure. Pour la Cour suprême de Finlande, le droit du parent biologique au respect de son autonomie personnelle, élément central de sa vie privée, est délimité par l'autonomie personnelle et la vie privée de l'adoptant et de l'adopté, également protégées par l'article 8 de la Convention. Dans une telle procédure relative aux relations familiales entre adultes, les principes du libre arbitre et de l'autonomie personnelle de l'adoptant et de l'adopté étaient, selon elle, déterminants.

32. La procédure judiciaire qui a donné lieu à l'avis consultatif relatif au refus d'autoriser une personne à exercer la profession d'agent de sécurité ou de gardiennage en raison de sa proximité avec un mouvement religieux ou de son appartenance à celui-ci, est à ce jour encore pendante au rôle du Conseil d'État de Belgique.

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[47] Voir point 3 (p. 7) de la décision du 26 mars 202 accessible sur le site de la Cour Constitutionnelle d'Arménie : https://www.concourt.am/decision/full_text/6462127ddfe53_DCC-1586.pdf

[48] La décision du Conseil d'État français est accessible à ce lien : Conseil d'État, Chambres réunies, 23 mars 2023, 439036 (pappers.fr).

[49] L'arrêt du 28 février 2024, la Cour suprême de Finlande est accessible à ce lien (en finlandais) : https://korkeinoikeus.fi/fi/index/ennakkopaatokset/kko202418.html

6. Quel statut la Cour accorde-t-elle aux avis consultatifs dans l'ensemble de sa jurisprudence ? La Cour s'est-elle référée à des avis consultatifs rendus conformément au Protocole n° 16 dans ses décisions relatives à des procédures contentieuses, y compris dans des affaires dans lesquelles l'État défendeur n'a pas ratifié le Protocole n° 16 ?

33. Lors de l'adoption du Protocole n 16, il avait été indiqué que si « [les] avis consultatifs en vertu du présent protocole n'ont aucun effet direct sur d'autres requêtes ultérieures, (...) [ils] s'insèrent toutefois dans la jurisprudence de la Cour, aux côtés de ses arrêts et décisions » (point 27 du Rapport explicatif du Protocole n 16). Il avait alors été expressément précisé que « [l']interprétation de la Convention et de ses protocoles contenue dans ces avis consultatifs est analogue dans ses effets aux éléments interprétatifs établis par la Cour dans ses arrêts et décisions » (*ibidem)*. Le rapport représentait donc la position qui avait été prise par la Cour elle-même au § 44 de sa Note de réflexion de la Cour sur la proposition d'étendre sa compétence en matière consultative, qui précise que « même si les avis consultatifs n'auront pas le caractère contraignant d'un arrêt dans une affaire contentieuse, ils auraient des « effets juridiques indéniables »)[50]. Bien évidemment, en vertu des articles 19 et 32 de la Convention, il incombait à la Cour, dans des formations judiciaires d'interpréter et appliquer la Convention.

34. Depuis l'adoption du premier avis, la pratique de la Cour dans la procédure contentieuse fait état de nombreux exemples où la Cour s'est référée dans ses arrêts à un avis consultatif rendu sur le fondement du Protocole n° 16 afin d'exposer les lignes directrices de sa jurisprudence et d'en tirer des conséquences. Voir, parmi d'autres exemples, les arrêts suivants:

- *Vavřička et autres c. République tchèque* [GC], no 47621/13 et 5 autres, § 287, 8 avril 2021, qui se réfère à *l'Avis consultatif n° P16-2018-001 relatif à la reconnaissance en droit interne d'un lien de filiation entre un enfant né d'une gestation pour autrui pratiquée à l'étranger et la mère d'intention*; *voir aussi D. c. France,* no 11288/18, §§ 51-53, 64 et 66-67, 16 juillet 2020, où une chambre de la Cour mobilise l'Avis consultatif n° P16-2018-001, précité, de manière décisive pour fonder un constat de non-violation de l'article 8 de le la Convention ;
- *Pantalon c. Croatie*, no 2953/14, § 45, 19 novembre 2020, *N.Š. c. Croatie*, no 36908/13, § 83, 10 septembre 2020, et *Tristan c. République de Moldova* (no 13451/15) §§ 47 et 52, 4 juillet 2023 qui font référence à *l'Avis consultatif* no P16-2019-001 *relatif à l'utilisation de la technique de « législation par référence » pour la définition d'une infraction et aux critères à appliquer pour comparer la loi pénale telle qu'elle était en vigueur au moment de la commission de l'infraction et la loi pénale telle que modifiée* ;
- *Vegotex International S.A. c. Belgique* [GC], no 49812/09, §§ 116, 120 et 121, 3 novembre 2022, et *M.S. c. Italie*, no 32715/19, § 137, 7 juillet 2022, qui se fondent sur l'*Avis consultatif n P16-2021-001 concernant l'applicabilité de la prescription aux poursuites, condamnations et sanctions pour des infractions constitutives, en substance, d'actes de torture* ;
- *Pinkas et autres c. Bosnie-Herzégovine*, no 8701/21, §§ 58 et 60, 4 octobre 2022, qui s'appuie sur l'*Avis consultatif no P16-2021-002 relatif à la différence de traitement entre*

[50] Voir aussi, sur cette question, les discours de S. O'Leary, présidente de la Cour, et de Tim Eicke, juge à la Cour, lors du Séminaire du 13 octobre 2023 ; discours sont disponibles à ces liens : Discours de Síofra O'Leary ; Discours de Tim Eicke

les associations de propriétaires « ayant une existence reconnue à la date de la création d'une association communale de chasse agrée » et les associations de propriétaires créées ultérieurement.

- *Executief van de Moslims Van België et autres c. Belgique* (nos 16760/22 et 10 autres), 13 février 2024, § 117, qui fait référence à l'*Avis consultatif sur le refus d'autoriser une personne à exercer la profession d'agent de sécurité ou de gardiennage en raison de sa proximité avec un mouvement religieux ou de son appartenance à celui-ci* [GC], demande no P16-2023-001, Conseil d'État de Belgique, § 114, 14 décembre 2023.

35. Les avis rendus sur le fondement du Protocole n 16 ne s'adressent pas qu'aux seules juridictions nationales qui les sollicitent, mais ils produisent des effets y compris dans les affaires dirigées contre des États qui ne l'ont pas ratifié[51]. En atteste notamment la pratique de la Cour consistant à interroger les parties, au stade de la communication des requêtes individuelles, sur la prise en compte des avis consultatifs par les autorités de l'ensemble des États parties (voir, par exemple, *S.C. et autres c. Suisse*, n° 26848/18*,* (déc.), 28 novembre 2023, *A.M. c. Norvège*, n° 30254/18, 24 juin 2022, et *K. K. et autres c. Danemark*, no 25212/21, 6 mars 2023 ; dans ces différentes affaires, les questions posées aux parties lors de la communication[52] font référence explicite à l'Avis consultatif n° P16-2018-001, alors qu'il s'agit des États qui n'ont pas ratifié le Protocole n°16). Il est arrivé que l'une chambre de la Cour fonde son constat de violation (dans le chef d'un enfant) et de non-violation (dans le chef des parents) d'une disposition de la Convention s'appuyant sur l'avis consultatif rendu par la Cour en vertu du Protocole n° 16, alors même que le pays défendeur dans l'affaire en question n'avait pas signé et ratifié ce Protocole (voir, par exemple, l'affaire *D.B. et autres c. Suisse*, 58252/15 et 58817/15, §§ 79-81, 85, 87 et 88, 22 novembre 2022, relative à la non-reconnaissance prolongée du lien de filiation entre un enfant né d'une gestation pour autrui à l'étranger et le père d'intention; voir aussi, pour une constat d'irrecevabilité rendu par un comité de trois juges dans une autre affaire similaire , l'affaire *S.C. et autres c. Suisse*, n° 26848/18, (déc.), 28 novembre 2023).

36. Les exemples précités, provenant de la pratique de différentes formations judiciaires de la Cour, confirment que l'interprétation des normes de la Convention et de ses Protocoles additionnels donnée par la Cour dans ses avis consultatifs s'intègre dans la « jurisprudence » de cette dernière, au même titre que ses arrêts et décisions. Cette intégration des avis consultatifs dans la « jurisprudence » de la Cour s'avère naturelle, et ce pour plusieurs raisons.

37. La Cour interprète les dispositions de la Convention de la même façon, que cela soit fait dans le cadre consultatif ou dans le cadre contentieux. Autrement dit, l'interprétation de la Convention ne varie pas en fonction de la forme (avis consultatif, d'un côté, ou arrêt ou décision, de l'autre) sous laquelle cette interprétation est énoncée.

38. Une autre raison, et probablement la plus importante, tient à la formation de la Cour qui est habilitée à rendre un avis consultatif. Il convient de rappeler que les avis consultatifs relèvent de la compétence exclusive de la Grande Chambre conformément à l'article 2 § 2 du Protocole n° 16. L'autorité qui s'attache à ces avis découle dès lors également de la prééminence de cette formation au sein de la Cour. La Grande Chambre constitue, en effet, la plus haute formation

[51] Voir aussi, sur cette question, les discours d'Enrico Albanesi, professeur de droit constitutionnel, université de Gênes de lors du Séminaire du 13 octobre 2023, qui mentionnait l' « effet vertical » et l' « effet horizontal » du Protocole n° 16, ce dernier 'constituant, à ses yeux, une raison solide pour les États qui e l'avaient pas encore fait de ratifier le Protocole n° 16 : Discours d'Enrico Albanesi

[52] https://hudoc.echr.coe.int/eng?i=001-210998 ;https://hudoc.echr.coe.int/eng?i=001-196317 ; https://hudoc.echr.coe.int/eng?i=001-203833

judiciaire de la Cour, et elle est, à ce titre, appelée à assumer une fonction régulatrice du droit de la Convention.

39. Enfin, jusqu'à présent, la Cour, en appliquant sa propre jurisprudence aux différentes affaires dont elle a été saisie, n'a jamais fait de distinction selon le moment où l'État défendeur est devenu Partie contractante à la Convention ou avait accepté le droit de recours individuel et la compétence obligatoire de la Cour[53].

7. Est-il nécessaire que le gouvernement donne son avis sur la question posée par la juridiction demanderesse ?

40. Le gouvernement de la Haute Partie contractante dont relève la juridiction qui a procédé à une demande d'avis a le droit de présenter des observations écrites (article 3 du Protocole n° 16) et, dans la pratique, il est systématiquement invité à se prévaloir de cette possibilité lorsqu'une demande d'avis est acceptée par le collège de la Grande Chambre. La pratique atteste que les Gouvernements de la Haute Partie contractante sont intervenus dans six sur les sept demandes d'avis déclarées recevables. Même si, en conformité avec le style adopté par la Grande Chambre pour rédiger ses avis, un résumé des éventuelles observations et avis du Gouvernement n'est pas inclus dans l'avis de la Cour, ces observations et avis sont dûment pris en considération par la Cour, étant inclues dans le dossier des délibérations des membres de la composition de la Grande Chambre (voir aussi le paragraphe 13 ci-dessus).

41. Comme cela avait été souligné au § 40 de la Note de réflexion de la Cour sur la proposition d'étendre sa compétence en matière consultative, l'implication du Gouvernent est utile pour nourrir la réflexion de la Cour quant à la réponse à donner à la question posée par la juridiction demanderesse. Tandis que la juridictions demanderesse est appelée à calibrer sa demande et ses questions par rapport à la procédure judiciaire en cours et aux « points qui ont un lien direct avec le litige en instance au plan interne »[54], les observations du Gouvernent peuvent, quant à elles, avoir un caractère plus théorique et général, afin de couvrir, le cas échéant, un spectre plus large des implications de la question posée au niveau législatif, judiciaire et/ou exécutif. Elles donnent ainsi au Gouvernement l'occasion de fournir des éclairages complémentaires à ceux fournis par la juridiction demanderesse, permettant à ce que l'ensemble des informations fournies à la Cour la placent dans la meilleure position possible pour pouvoir fournir les orientations interprétatives requises. Le choix de présenter des observations écrites ou un avis au sujet d'une demande d'avis reste à la latitude du gouvernement.

[53] Le Protocole n° 11, entrée en vigueur le 11 novembre 1998, a supprimé deux clauses jusqu'alors facultatives de la Convention ; depuis son entrée en vigueur, le droit de recours individuel n'est plus conditionné par une déclaration d'acceptation de la compétence de la Cour par l'État défendeur et la compétence de la Cour est devenue obligatoire.

[54] Voir, entre autres, Avis consultatif P16-2018-001, précité, § 26

English version

At its 99th meeting (28 November - 1 December 2023), the Council of Europe's Steering Committee for Human Rights (CDDH) was instructed by the Committee of Ministers, under whose authority it operates, to prepare, by June 2025, a report assessing the initial effects of Protocol No. 16 to the European Convention on Human Rights. To this end, the CDDH prepared a questionnaire which it sent to the Court on 18 December 2023, inviting it to respond. At the request of the President of the Court, the Registry of the Grand Chamber has prepared - under the authority of the Registrar of the Court - this note, which contains the answers to the various questions asked. The purpose of this note is to offer the CDDH some food for thought on questions of procedure and practice in the context of the processing of requests under Protocol No. 16 or more generally, without however interfering in the exercise by the Court of its advisory or judicial function or prejudging its outcome.

Questions and answers

1. What is the Court's evaluation of the first effects of Protocol No. 16?

42. Since the entry into force of Protocol No. 16, the Court has endeavoured to establish a sincere and fair dialogue with the superior national courts and tribunals that have referred cases to it, bearing in mind several major imperatives (see § 57 of *Advisory Opinion no. P16-2021-002 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,* 13.07.2022). Any advisory opinion given by the Grand Chamber must be confined to points that have a direct bearing on the dispute pending at domestic level; the advisory opinion procedure must enable the Court to provide the court from which the request emanates with the guidance it needs to ensure respect for the rights protected by the Convention when it rules on the dispute pending before it, without transferring that dispute to the Court; the Court's advisory opinions must be able to serve as a source of inspiration for other national courts faced with similar questions; the internal process for the Court's handling of a request for an advisory opinion must be organised in such a way as to avoid any unjustified delay in the domestic proceedings which gave rise to a request for an advisory opinion; the Court's time and resources allocated to the handling of requests for advisory opinions must be such as to ensure that each request is dealt with efficiently and to a high standard.

43. To date, the Court has received nine requests for advisory opinions from various national supreme courts.[55] The Court has accepted seven requests and rejected two (link to the page of advisory opinions). The Court has also issued 7 advisory opinions (link) on the following issues:

[55] 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 and the Supreme Court of Estonia

- legal recognition of the parent-child relationship for a child born through gestational surrogacy abroad (French Court of Cassation);
- the use of the "legislation by reference" technique in criminal law (Constitutional Court of Armenia)
- legislation on elections in the framework of an impeachment proceeding (Supreme Administrative Court of Lithuania)
- the applicability of limitation periods to offences constituting, in substance, acts of torture (Court of Cassation of Armenia)
- the rights of landowners' associations (French Council of State)
- the adult adoption procedure (Supreme Court of Finland)
- the refusal to authorise the exercise of certain professions by persons close to or belonging to certain religious movements (Belgian Council of State).

44. These various examples of advisory opinions show that the new advisory opinion mechanism introduced by Protocol No. 16 has already borne fruit, enabling national courts and tribunals to proactively seek the Court's advice and assistance, which they have been able to "inject" into the pending national proceedings before a final decision is taken at national level (see §§ 28-31 below). In this respect, it should be noted that some supreme courts have availed themselves of the discretion reserved to them to include in their request for an advisory opinion a statement of their own views on the question,[56] including any analysis they may have made of it (Rule 92(2.1)(e) of the Rules of Court and paragraphs 12 and 13 of the Guidelines), which has provided food for thought for the Court on the question raised and the way in which it should be answered. The decisions in which the Grand Chamber found a request for an advisory opinion to be inadmissible[57] also contributed to this dialogue between the Court and the supreme national courts and jurisdictions called upon to examine whether a request for an advisory opinion fulfils the conditions set out in Article 1 of Protocol No. 16 and to decide whether or not it should be admitted for examination by the Grand Chamber (Article 2 of Protocol No. 16 and Article 93 of the Rules of Court). The panel of the Grand Chamber took care to explain, with examples of case-law to support it, the reasons why it considered that certain questions were not "questions of principle" within the meaning of Article 1 of Protocol No. 16. As § 15 of the Explanatory Report to Protocol No. 16 had advocated, these decisions have made it possible to clarify the concept of "questions of principle relating to the interpretation or application of the Convention", and such clarifications may prove useful for any other supreme national courts and tribunals considering making use of the advisory opinion procedure.

45. Although, as will be detailed in the answers to the next questions, the current contribution of Protocol No. 16 is mainly qualitative - more judicial dialogue between the Court and national courts and tribunals (see in particular §§ 5-7, 11 and 28-31 below) - this contribution contributes to the implementation of the principle of subsidiarity, which is now enshrined in the preamble to the Convention following the entry into force on 1st of August 2021 of Protocol No. 15 amending the Convention to that effect. Over the years, the Court has been led to strengthen the implementation of this principle, by increasingly emphasising the role of the domestic courts as the ordinary law judge of the Convention[58] and by taking into account, in its contentious

[56] This is the case with the recent request for an advisory opinion from the Supreme Court of Estonia, or the request for an advisory opinion from the Supreme Court of Finland.

[57] Decision No. P16-2023-002 concerning a request for an advisory opinion on the interpretation of Article 4 of Protocol No. 7 to the Convention (Supreme Court of Estonia), 19 February 2024, and Decision No. P16-2020-001 concerning a request for an advisory opinion on the interpretation of Articles 2, 3 and 6 of the Convention (Supreme Court of the Slovak Republic), 14 December 2020.

[58] For a recent reminder of the principles relating to the role of the national courts and the Court's subsidiary review, see §§ 159-162 of the *Halet v. Luxembourg* [GC], no. 21884/18, 14 February 2023.

practice, the quality of the national decision-making process.[59] It is not possible for the Registry to speculate on the outcome that the Court might give to a request lodged at the end of judicial proceedings in which the Court has delivered an advisory opinion. However, it cannot be ruled out, on the basis of the Court's practice in dealing with cases, that a court which applies in good faith the criteria and guidelines provided by the Court in an advisory opinion may be accorded a wider margin of appreciation (see § 27 below, see also paragraph 26 of the Explanatory Report to Protocol No. 16).[60]

46. The Presidents of the national supreme courts of the member States and judges of the Court, meeting at a seminar marking the fifth anniversary of the entry into force of Protocol No. 16 and the advisory opinion mechanism (hereinafter "the seminar of 13 October 2023")[61] welcomed the first effects of Protocol No. 16. Various statements made at the seminar show that the request of the advisory opinion procedure provided for in Protocol No. 16 has so far proved useful in a number of situations, for example in judicial proceedings where national courts have had to reconcile the implementation of Convention rights with rules of domestic law relating to public policy, for example in matters of ethics or national security.[62] The First President of the French Court of Cassation saw requests for advisory opinions made in a politically tense national context or involving high controversy as a sign of confidence in the Court on the part of the various supreme courts,[63] which is called upon to support and legitimise, through its intervention, the national decisions to be taken. The President of the Slovenian Constitutional Court highlighted the impact of Protocol No. 16 in pending national cases. Even if a national court decides not to request an advisory opinion, this protocol nevertheless leads it to reflect on the possible answer that the Court would give to a question, if it were submitted to it.

47. The possibility for national supreme courts to take the initiative and request an advisory opinion in due course has also proved to be a particularly useful option for helping national courts to resolve difficulties relating to the execution of previous judgments of the Court,[64] in situations where developments in the case law have given rise to further questions or require clarification in the light of new circumstances. If the possibility of requesting an advisory opinion did not exist, obtaining further clarification of a Court judgment or its implications would depend only on the lodging of new individual applications and the decision that the Court would then have to take. However, it should be emphasised that the procedure for requesting an advisory opinion was not designed as a mechanism for resolving difficulties encountered at national level in the execution of the Court's judgments.

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[59] See, for example, *Hatton and Others v. the United Kingdom* [GC] (no. 36022/97, ECHR 2003-VIII, *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, §§ 108 and 110, ECHR 2013 (extracts)); see also, more recently, *Bărbulescu v. Romania* [GC], nº 61496/08, §§ 120-123, 5 September 2017; *López Ribalda and Others v. Spain* [GC], nºs 1874/13 and 8567/13, §§ 114-117, 17 October 2019; *M.A. v. Denmark* [GC], nº 6697/18, §§ 185-195, 9 July 2021; *Savran v. Denmark* [GC], nº 57467/15, §§ 189 and 196, 7 December 2021 and *L.B. v. Hungary* [GC], nº 36345/16, §§ 124-125, 9 March 2023.

[60] See also, as regards the manner in which the Court carried out its review of a domestic judgment given following an earlier judgment it had delivered in the same case, *Bochan v. Ukraine (no.º 2)* [GC], no.º 22251/08, ECHR 2015, and *Moreira Ferreira v. Portugal (no.º 2)* [GC], no.º 19867/12, 11 July 2017.

[61] Seminar entitled "Judicial dialogue through the advisory opinion mechanism under Protocol No. 16" to mark the fifth anniversary of the entry into force of Protocol No. 16 and the advisory opinion mechanism, Palais des droits de l'homme, Strasbourg, 13 October 2023. The seminar programme and speakers' allocations are available via this link: Seminar to mark the fifth anniversary of the coming into force of Protocol No. 16

[62] The first request for an advisory opinion submitted by the French Cour de cassation and the related request from the Belgian Conseil d'Etat were of this nature.

[63] Christophe Soulard, First President of the French Court of Cassation, see the examples given in his speech at the Seminar on 13 October 2023, available at this link: Speech by Christophe Soulard

[64] See the examples cited in the speech by Pauliine Koskelo, Judge at the Court, at the seminar on 13 October 2023.

48. In 2023, the President of the Italian Constitutional Court, in her speech to the solemn hearing of the European Court of Human Rights,[65] cited two recent judgments delivered by the Italian Court of Cassation and Constitutional Court, which had relied decisively on Advisory Opinion No. P16-2018-001, to emphasise that Protocol No. 16 could already be considered a significant instrument in the context of international human rights law.

2. How has the Court's approach to dealing with requests for advisory opinions evolved since Protocol No. 16 came into force? Does the treatment of requests for advisory opinions under Protocol No. 16 absorb a significant amount of time and resources? Does the Court consider that the application of the advisory opinion procedure under Protocol No. 16 represents an efficient use of its time and resources?

A. The jurisdictional approach

49. The nine requests for advisory opinions submitted to the Court to date have enabled it to define its role in such a procedure and the parameters of the legal framework applicable at each stage of the advisory procedure. The Court thus clarified that the purpose of the advisory opinion procedure was to provide the court from which the request emanated with the necessary means to ensure respect for the rights protected by the Convention when determining the case before it, without, however, transferring the dispute to the Court. In this regard, the Court indicated that it had 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. Its role is limited to giving an advisory opinion on the questions submitted. It is for the court from which the request emanates to resolve the issues raised by the case and to draw, as appropriate, all the consequences which flow from the advisory opinion given by the Court for the provisions of domestic law relied on in the case and for the outcome of the case.[66]

50. Faced, with certain vague or general questions made by the applicant courts in the context of requests for advisory opinions, the Court deduced from Article 1 §§ 1 and 2 of Protocol No. 16 that the advisory opinions that it was called upon to give pursuant to that Protocol should be limited to points which had a direct bearing on the dispute pending at domestic level. It also inferred that it had the power to join certain questions or to reformulate them in the light of the particular factual and legal circumstances of the case pending at domestic level.[67]

51. In one request for advisory opinion, on the question whether the Grand Chamber could refrain from replying to one or more of the questions raised, the Court held that, while it was for the panel to decide whether or not to accept the request for an advisory opinion, the Grand Chamber was not deprived of the possibility of using all the powers conferred on the Court, in particular that relating to its jurisdiction (Articles 19 and 32 and, by analogy, Article 48 of the Convention). The panel's decision cannot therefore prevent the Grand Chamber from assessing whether each of the questions that make up a request for an advisory opinion fulfils the

[65] 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.
[66] For a recent reminder of the various principles, see, among others, *Advisory Opinion* P16-2023-001 issued at the request of the Belgian Council of State on 14 December 2023.
[67] See, for example, §§ 44-47 of *Advisory Opinion* P16-2019-001 requested by the Armenian Constitutional Court, 29 May 2020.

requirements of Article 1 of Protocol No. 16, and in particular whether it concerns " questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto" (paragraph 1), if the advisory opinion is requested " in the context of a case pending before" the court or tribunal from which the request emanates (paragraph 2) and if that court or tribunal has "give[n] reasons for its request and [provided] the relevant legal and factual background of the pending case" (paragraph 3). It thus remains possible for the Grand Chamber to ascertain whether the questions which are the subject of the request fulfils the conditions set out in Article 1 of Protocol No. 16 in the light of the initial request, the observations received and all the other elements at its disposal. If it comes to the conclusion that, having regard to the factual and legal context of the case, certain questions do not fulfil those conditions, it may decide not to examine them, expressing itself to that effect in its advisory opinion. [68]

52. With regard to the criteria for screening requests for advisory opinions, the Court specified that "questions of principle" within the meaning of Article 1 § 1 of Protocol No. 16 were questions which, having regard to their nature, their degree of novelty and/or their complexity, or for other reasons, concerned a matter in respect of which the requesting court would need guidance from the Court by way of an advisory opinion so as to enable it to ensure respect for Convention rights when deciding the case pending before it.[69] In the Court's view, the requesting court should regard the advisory opinion on these "questions of principle" as necessary in order to decide the case pending before it.[70]

B. The procedural approach

53. Driven by the desire to make the process established by Protocol No. 16 work, the Court has made considerable efforts since its entry into force to devise and improve its internal working methods. It has adapted and simplified the procedure used by the Grand Chamber in dealing with cases in order to ensure that requests for advisory opinions are resolved expeditiously. For example, the advisory opinion on the request from the Supreme Court of Finland was delivered approximately six months after receipt of the request, and the advisory opinion on the request from the Belgian Council of State was delivered approximately eight months after the case was referred to the Court. Inadmissibility decisions relating to requests for advisory opinions were taken even more quickly, even though they were reasoned decisions. The recent decision on the request for an advisory opinion from the Supreme Court of Estonia, for example, was adopted by the Grand Chamber less than six weeks after the Court received the request from the requesting court, together with a translation into one of the official languages of the Council of Europe and the relevant documents (Rule 92 § 2.2 of the Rules of Court and § 14 of the Guidelines).

54. The fact that the Court has not held a public hearing in the proceedings under Protocol No. 16 referred to it has made it possible to accelerate the process, since the examination of requests for advisory opinions deemed admissible has been based on information and written observations provided to the Court by the requesting domestic court, by the parties to the domestic proceedings, by the government of the High Contracting Party to which the requesting

[68] See § 47 of *Advisory Opinion* P16-2019-001 requested by the Armenian Constitutional Court, 29 May 2020.
[69] See §§ 18 and 20 of Decision No. P16-2020-001 on a request for an advisory opinion from the Supreme Court of Estonia, 19 February 2024.
[70] See § 17 of Decision No P16-2020-001 on a request for an advisory opinion from the Supreme Court of the Slovak Republic, 14 December 2020.

court belongs, and by any third Governments authorised to intervene.[71] The same judge rapporteur is now appointed to deal with a request at the various stages of the proceedings (before the panel of the Grand Chamber and before the Grand Chamber itself if the request is admissible).[72] As far as possible, the Grand Chamber has sought to adopt the draft submitted by the judge-rapporteur in a single round of deliberations. It should be emphasised, however, that this pressure of time makes the Grand Chamber's task particularly difficult and, faced with a particularly complex request for an advisory opinion or one requiring a response to several questions, it could prove difficult for the Court to adopt a draft advisory opinion after a single round of deliberations. It should also be mentioned that the Grand Chamber has so far sought to deliver its advisory opinions unanimously.[73]

55. In drafting its advisory opinions, the Grand Chamber has adopted a more concise style of reasoning than is usual in the context of its judgments; this style is characterised by the use of a high degree of abstraction which reflects the Court's need to provide useful guidance in response to a "question of principle", and to enable its advisory opinions to be a source of inspiration for other national courts faced with similar issues. As soon as they are adopted, the advisory opinions are communicated in writing to the parties or delivered in public by the President of the Court.[74] The last two advisory opinions were delivered publicly by the President of the Court, a further indication of the importance the Court attaches to this procedure.

56. An update of the guidelines for the provision of assistance to the courts concerned in bringing and pursuing proceedings under Protocol No. 16 was published on 24 October 2023, following approval by the Plenary Court. This update followed the above-mentioned seminar (paragraph 5 above), which had given the Court the opportunity to take note of the experiences of national courts five years after the entry into force of the Protocol. Reflecting the elements of practice developed by the Court under Protocol No. 16, the revised guidelines have been made available to national courts (and to the public at large) on the Advisory Opinions page of the Court's website.

C. Resources

57. In terms of resources, practice shows that dealing with a request for an advisory opinion takes up a considerable amount of the Court's time and resources. The questions put to the Court are often quite complex and sometimes require research into international or comparative law. The preparation of the draft - entrusted to a judge-rapporteur and the Registry's senior lawyers, with the assistance of the Grand Chamber's Registrars - is a very detailed and difficult task, with a high degree of abstraction often required to enable its advisory opinions to be a source of inspiration for other national courts faced with similar questions. A great deal of careful drafting of the key paragraphs of the advisory opinion and of the operative provisions is necessary to ensure that the Court does not, in the course of this advisory procedure, impinge either on the role of national courts in resolving the dispute at domestic level, or on its own role as the final judge of the Convention if the case returns to the Court by way of contentious proceedings.

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[71] For example, in the context of the request for an advisory opinion (P16-2018-001), written observations were received from the British, Czech and Irish governments, which had asked to intervene in the procedure, even though these three States had not ratified Protocol 16.

[72] Article 93 1.1 b) of the Regulation

[73] A separate (concurring) opinion has been attached to two of the seven advisory opinions issued to date (applications nº P16-2019-001 and nº P16-2021-001).

[74] See paragraphs 32 of the Guidelines (updated on 25 September 2023)

58. While the Court remains motivated by the desire to continue and develop the dialogue initiated with the national courts through the mechanism established by Protocol No. 16, the fact remains that, if a request for an advisory opinion is declared admissible by the panel, the procedure mobilises the judicial formation of the Grand Chamber, and therefore 17 judges plus three substitute judges. The arrival of a large number of requests for advisory opinions could have a major impact on the work of this judicial formation, as well as on the time required for the Grand Chamber to deliver decisions and judgments in the cases referred to it following a request for referral accepted by the panel or the relinquishment of jurisdiction by a chamber in favour of the Grand Chamber. Although the Court is in the process of recovering the number of legal posts assigned to the Court's registry following a budget increase (the result of the 4th Summit of Heads of State and Government of the Council of Europe),[75] the fact remains that the new non-contentious function was entrusted to the Court under Protocol No. 16 without any increase in the number of legal staff able to deal with this type of request at Grand Chamber level.

3. Has the advisory opinion procedure under Protocol 16 contributed perceptibly to an enhanced implementation of the Convention in those States Party whose courts have had recourse to the procedure?

59. It is certainly too early to draw general conclusions, and the Court Registry is not in a position to answer this question. However, a few specific examples from the Court's case law and national practice suggest that the answer may be in the affirmative.

60. On 16 July 2020, a Chamber of the Court found no violation of Article 8 of the Convention in *D v. France*, no. 11288/18 after noting a development in domestic law and practice along the lines indicated by the Court in its Advisory Opinion No. P16-2018-001. The case concerned the refusal to register in French civil status registers the birth certificates of children born abroad as the result of a gestational surrogacy arrangement - a refusal based on the fact that the gestational surrogacy agreement was contrary to the essential principles of French law (see §§ 66 and 67 of the Chamber judgment). In considering this advisory opinion, the Plenary Assembly of the French Cassation Court emphasised that it follows from Article 8 of the Convention that, with regard to the best interests of the child, the fact that the birth of a child abroad originated from a surrogacy arrangement, prohibited under French law, could not, on its own, without disproportionately infringing the child's right to respect for his or her private life, 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 (see also § 32 below). This development filled a long-standing legal vacuum, as the First President of the French Court of Cassation pointed out in his speech at the seminar on 13 October 2023. Referring to the experience of the Court's referral to it for an advisory opinion on gestational surrogacy, he emphasised that "one could only be struck in this case by the fact that the legislature, which had refrained from intervening for more than thirty years" (...) would only fill the legislative vacuum when it was able to rely on the lines defined by the European Court of Human Rights in its advisory opinion" (paragraph 5 above, with references).

61. Interestingly, the Court's advisory opinions to date appear to have contributed to the implementation of the Convention not only in those States Parties whose courts have used this procedure, but also in other States which have not ratified the Protocol and which are faced with

[75] 4e Summit of Heads of State and Government of the Council of Europe, Reykjavík, 16 and 17 May 2023

similar issues. As mentioned above, in 2023 the President of the Italian Constitutional Court cited in her speech at the solemn hearing of the Court two recent judgments delivered by the Italian Court of Cassation and Constitutional Court, which had relied decisively on Advisory Opinion no. P16-2018-001 on the legal recognition of a legal parent-child relationship for a child born through gestational surrogacy abroad to deal with similar issues that had arisen in domestic law, even though Italy had not ratified the Protocol (see § 7 above and the references cited). In this context, it stated that, "despite their non-binding character, such opinions "in substance sent general effects".

62. In a 2022 annual report,[76] the Swedish Supreme Court cited the example of a case in which it had relied on advisory opinion No. P16-2018-001 issued by the Court, even though Sweden had not ratified Protocol No. 16. In its judgment, the Supreme Court stated that such an advisory opinion could be considered to have "a significant value as a legal source in conjunction with the interpretation" of the Convention.[77]

63. These various examples show that the advisory opinions, by becoming part of the Court's case law, have had a positive impact on the legislation and practice of the member States, whether or not they have ratified Protocol No. 16 (see also, on this point, the reply to question No. 6 below). These advisory opinions are naturally of interest to all the States Parties to the Convention, including those which have not ratified Protocol No. 16, for the simple reason that the Court interprets in them the provisions of the Convention and the additional protocols which are binding pursuant to Protocol No. 11. Member States other than that of the court requesting the advisory opinion - which are notified of any new request for an advisory opinion by means of a press release - may request permission to intervene as a third party in ongoing advisory proceedings (Article 3 of Protocol 16). In practice, third-party governments have sometimes asked to intervene in the advisory opinion procedure, a further sign of their interest in the Court's advisory opinions and their possible consequences at domestic level.[78]

4. Has the advisory opinion procedure under Protocol No. 16 contributed to a reduction of the number of individual applications lodged with the Court?

64. The Court's statistics for 2023[79] show a decrease in the number of new requests attributed to a judicial formation. However, this can be explained by Russia ceasing to be a Party to the Convention system, by a decrease in the number of applications from certain States which have not ratified Protocol No. 16 (in particular Türkiye and Serbia) or whose courts have not yet made use of it (for example, Greece). This decrease is not directly or indirectly linked to any of the advisory opinion procedures.

65. With regard more specifically to the States that have ratified Protocol No. 16 and whose courts have referred a request for an advisory opinion to the Court, the effects of the advisory opinion procedures on the number of individual applications against the States concerned remain limited, if not imperceptible. The highly technical nature of some of the questions put to the Court (e.g. the use of the "legislation by reference" technique in the definition of an offence

[76] Activity report - The Supreme Court (domstol.se)

[77] NJA 2019, "*California Surrogacy Arrangement*" case, p. 504, § 31, cited in Supreme Court of Sweden Annual Report 2022, p. 21.

[78] For example, in the context of the request for advisory opinion No. P16-2018-001, written observations were received from the British, Czech and Irish governments, which had asked to intervene in the proceedings, even though these three States had not ratified Protocol No. 16.

[79] See data and analyses on the Court's website Statistics - the ECHR - ECHR / CEDH (coe.int)

[80]) or the fact that they relate to situations that are rather rare in practice (e.g. adult adoption proceedings or impeachment proceedings) explain the absence of any noticeable effect on the number of applications concerning similar issues.

66. As for the questions likely to affect a larger number of natural or legal persons that have so far been referred to the Court (for example, the question of recognition in domestic law of a parent-child relationship between a child born as a result of gestational surrogacy carried out abroad and the intended mother, or the difference in treatment between landowners' associations in relation to the date of their creation), they had not given rise to an influx of individual applications before they were the subject of a request for an advisory opinion. Consequently, the fact that the Court issued an advisory opinion on these issues could only have a limited impact on the number of similar individual applications pending before the Court. A few individual applications concerning issues similar to those which had been the subject of one or other of the advisory procedures of this kind nevertheless gave rise to a finding of violation or non-violation of the provisions of the Convention by Chambers of seven judges,[81] or even to a finding of inadmissibility by a Committee of three judges,[82] on the basis of the principles highlighted by the relevant advisory opinions.

67. In short, Protocol No. 16 has had no effect on the volume of cases brought before the Court. Protocol No. 16's contribution at this stage is mainly qualitative (see § 4 above). Nevertheless, it is important not to underestimate the effect on the Court's workload of a future advisory opinion clarifying a question of principle of general interest which has given rise or is likely to give rise to an influx of individual applications. To date, requests for advisory opinions have not been of this nature.

5. Has the Court received an individual application arising from a domestic case in the context of which it had previously delivered an advisory opinion? If so, had the domestic court followed the Court's advice? What was the outcome of the application?

68. The Court has not yet received an individual application following any of the judicial proceedings in which it has been asked to give an advisory opinion. According to the information sent to the Court by the requesting courts or obtained by the Court itself, the courts which have availed themselves of the possibility of requesting an advisory opinion have used it as a basis for their decision after re-examining the case at domestic level.

69. This is evidenced by the example of the judgment of 4 October 2019[83] of the French Court of Cassation, which, by a preliminary ruling of 5 October 2018, had referred to the Court the request for advisory opinion No P16-2018-001 relating to the recognition in domestic law of a parent-child relationship between a child born as a result of gestational surrogacy carried out abroad and the intended mother. In considering the Court's advisory opinion, the Plenary Assembly of the Cassation Court ruled that by cancelling the transcription of the foreign birth certificates of the Mennesson children on the grounds that they had been born as a result of a gestational surrogacy agreement, the Court of Appeal had breached Article 8 of the Convention. It held that, as this was a dispute that had been ongoing for over fifteen years, in the absence of any other means of recognising filiation under conditions that would not disproportionately

[80] Advisory opinion no. P16-2019-001, requested by the Armenian Constitutional Court, 29 May 2020
[81] See, for example, *D v. France*, no. 11288/18, 16 July 2020, *D.B. and others v. Switzerland*, nos. 58817/15 and 58252/15, 22 November 2022. See also *Pantalon v. Croatia*, no. 2953/14, § 45, 19 November 2020, and *Tristan v. Republic of Moldova* (no. 13451/15) §§ 47 and 52, 4 July 2023.
[82] *S.C. and Others v. Switzerland*, no. 26848/18, (dec.), 28 November 2023
[83] https://www.legifrance.gouv.fr/juri/id/JURITEXT000039213459/

infringe the right to respect for the private life of children born as a result of gestational surrogacy abroad enshrined in Article 8 of the Convention, and as it was necessary to put an end to this infringement, the transcription of the birth certificates drawn up abroad into the Nantes civil status registers could not be annulled. Subsequently, ruling on the merits, the Court of Cassation overturned the judgment delivered on 13 December 2005 by the Créteil *Tribunal de grande instance* and dismissed the application for annulment of the transcription made by the public prosecutor at the Paris court of appeal.

70. The Constitutional Court of Armenia - which had requested an advisory opinion from the Court on 18 July 2021 on the use of the technique of "legislation by reference" in the definition of an offence - invalidated Article 300.1 of the Criminal Code as being contrary to the Constitution by using, in its decision of 26 March 2021,[84] the criteria indicated by the Court in its advisory opinion to compare the criminal law as it stood at the time the offence was committed and the criminal law as amended.

71. In § 3 of its decision of 23 March 2023,[85] delivered in the proceedings on the merits following the Court's advisory opinion of 13 July 2022, the French *Conseil d'État* referred to the criteria indicated by the Court for ruling on the compatibility, in the light of Article 14 of the Convention combined with Article 1 of Protocol No. 1, of a difference in treatment resulting from the third paragraph of Article L. 422-18 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, before rejecting, on the merits, the application by *Forestiers privés de France* for annulment on the grounds of *ultra vires* of a decree relating to the public service missions of the departmental hunters' federations.

72. In its judgment of 28 February 2024, the Supreme Court of Finland,[86] which had requested the Court's advisory opinion in the context of proceedings concerning the adoption of an adult under the Finnish Adoption Act, upheld the Court of Appeal's decision of 5 November 2021 that the biological mother did not have the right to appeal against the district court's judgment. Relying on the advisory opinion issued by the Court, it held that, while the possible loss of parental status as a result of adoption proceedings could constitute interference with the birth mother's private life, as guaranteed by section 10 of the Constitution and Article 8 of the Convention, the latter provision did not in itself require a right of appeal for the birth parent in such proceedings. For the Supreme Court of Finland, the right of the biological parent to respect for his or her personal autonomy, a central element of his or her private life, was delimited by the personal autonomy and private life of the adopter and the adopted person, which were also protected by Article 8 of the Convention. In such proceedings concerning family relationships between adults, the principles of free will and personal autonomy of the adopter and the adopted person were, in her view, decisive.

73. The legal proceedings that gave rise to the advisory opinion on the refusal to authorise a person to work as a security guard or guard on the grounds of his or her closeness to or membership of a religious movement are still pending before the Belgian Council of State.

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[84] See point 3 (p. 7) of the decision of 26 March 202 available on the website of the Constitutional Court of Armenia: https://www.concourt.am/decision/full_text/6462127ddfe53_DCC-1586.pdf

[85] The decision of the French Council of State can be accessed at this link: Council of State, Combined Chambers, 23 March 2023, 439036 (pappers.fr).

[86] The judgment of 28 February 2024 by the Supreme Court of Finland can be accessed at this link (in Finnish): https://korkeinoikeus.fi/fi/index/ennakkopaatokset/kko202418.html

6. What jurisprudential status does the Court give to advisory opinions within its overall caselaw? Has the Court referred to advisory opinions delivered under Protocol No. 16 in its decisions in contentious proceedings, including in cases in which the respondent State has not ratified Protocol No. 16?

74. When Protocol No. 16 was adopted, it was stated that although "advisory opinions under this Protocol would have no direct effect on other later applications, ... [they] would however, form part of the case-law of the Court, alongside its judgments and decisions" (paragraph 27 of the Explanatory Report on Protocol No. 16). It was then expressly stated 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" (*ibid.)*. The report thus represented the position taken by the Court itself in § 44 of its Reflection Note on the proposal to extend the Court's competence in advisory matters, which states that "despite the fact that advisory opinions would not have the binding character of a judgment in a contentious case, they would thus have "undeniable legal effects".[87] Obviously, under Articles 19 and 32 of the Convention, it was the Court's responsibility, in judicial formations, to interpret and apply the Convention.

75. Since the adoption of the first advisory opinion, the Court's practice in contentious proceedings has given numerous examples of the Court referring in its judgments to an advisory opinion delivered on the basis of Protocol No. 16 in order to set out the guidelines for its case-law and to draw conclusions from them. See, among other examples, the following judgments:

- *Vavřička and Others v. the Czech Republic* [GC], no. 47621/13 and 5 others, § 287, 8 April 2021, which refers to *Advisory Opinion No. P16-2018-001 on the recognition in domestic law of a parent-child relationship between a child born as a result of gestational surrogacy carried out abroad and the intended mother*; *see also D. v. France,* no. 11288/18, §§ 51-53, 64 and 66-67, 16 July 2020, in which a Chamber of the Court relied decisively on Advisory Opinion No. P16-2018-001, cited above, as a basis for finding no violation of Article 8 of the Convention;
- *Trousers 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 which refer to *Advisory Opinion* no. P16-2019-001 on the *use of the technique of "legislation by reference" for the definition of an offence and the criteria to be applied when comparing the criminal law as it was in force at the time of the commission of the offence and the criminal law as amended* ;
- *Vegotex International S.A. v. Belgium* [GC], no. 49812/09, §§ 116, 120 and 121, 3 November 2022, and *M.S. v. Italy*, no. 32715/19, § 137, 7 July 2022, relying on *Advisory Opinion no. P162021-001 -concerning the applicability of the statute of limitations to proceedings, convictions and sanctions for offences constituting, in substance, acts of torture*;
- *Pinkas and Others v. Bosnia and Herzegovina*, no. 8701/21, §§ 58 and 60, 4 October 2022, which relies on *Advisory Opinion no. P16-2021-002 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.*

[87] See also, on this issue, the speeches by S. O'Leary, President of the Court, and Tim Eicke, Judge of the Court, at the Seminar on 13 October 2023; speeches are available at these links: Speech by Síofra O'Leary; Speech by Tim Eicke

- *Executief van de Moslims Van België and Others v. Belgium* (nos. 16760/22 and 10 others), 13 February 2024, § 117, which refers to the *Advisory Opinion on the refusal to authorise a person to work as a security guard or guard on account of his or her closeness to or membership of a religious movement* [GC], application no. P16-2023-001, Council of State of Belgium, § 114, 14 December 2023.

76. Advisory opinions given on the basis of Protocol No. 16 are not addressed only to the national courts that request them, but also have an effect in cases against States that have not ratified the Protocol.[88] This is borne out in particular by the Court's practice of asking the parties, at the stage of communicating individual applications, whether the authorities of all the States Parties have taken account of the advisory opinions (see, for example, *S.C. and Others v. Switzerland*, no. 26848/18 , (dec.), 28 November 2023, *A.M. v. Norway*, no. 30254/18, 24 June 2022, and *K. K. and Others v. Denmark*, no. 25212/21, 6 March 2023; in these various cases, the questions put to the parties at the time of the communication[89] explicitly refer to Advisory Opinion no. P16-2018-001, even though these are States that have not ratified Protocol No. 16). It has happened that a Chamber of the Court has based its finding of a violation (in respect of a child) and of non-violation (in respect of the parents) of a provision of the Convention on the Advisory Opinion delivered by the Court under Protocol No. 16, even though the respondent country in the case in question had not signed and ratified that Protocol (see, for example, the case of *D.B. and Others v. Switzerland ,* 58252/15 and 58817/15, §§ 79-81, 85, 87 and 88, 22 November 2022, concerning the prolonged non-recognition of the parent-child relationship between a child born by gestational surrogacy abroad and the intended father; see also, for a finding of inadmissibility by a committee of three judges in another similar case, the case of *S.C. and Others v. Switzerland*, no. 26848/18, (dec.), 28 November 2023).

77. The above-mentioned examples, taken from the practice of various judicial formations of the Court, confirm that the interpretation of the standards of the Convention and its Additional Protocols given by the Court in its advisory opinions forms part of the Court's "case-law", in the same way as its judgments and decisions. This incorporation of advisory opinions into the Court's "case-law" is natural, for several reasons.

78. The Court interprets the provisions of the Convention in the same way, whether it does so in an advisory capacity or in a contentious context. In other words, the interpretation of the Convention does not vary according to the form (advisory opinion, on the one hand, or judgment or decision, on the other) in which that interpretation is set out.

79. Another reason, and probably the most important, relates to the formation of the Court which is empowered to give an advisory opinion. It should be recalled that advisory opinions fall within the exclusive jurisdiction of the Grand Chamber under Article 2 § 2 of Protocol No. 16. The authority attaching to such advisory opinions therefore also derives from the pre-eminence of that formation within the Court. The Grand Chamber is, in fact, the highest judicial formation of the Court and, as such, is called upon to assume a regulatory function in respect of Convention law.

80. Lastly, the Court, in applying its own case-law to the various cases brought before it, has never made any distinction depending on when the respondent State became a Contracting

[88] See also, on this issue, the speeches by Enrico Albanesi, Professor of Constitutional Law, University of Genoa, at the Seminar of 13 October 2023, who mentioned the "vertical effect" and the "horizontal effect" of Protocol No. 16, the latter, in his view, "constituting a solid reason for States that have not yet done so to ratify Protocol No. 16": Speech by Enrico Albanesi.

[89] https://hudoc.echr.coe.int/eng?i=001-210998 ; https://hudoc.echr.coe.int/eng?i=001-196317 ; https://hudoc.echr.coe.int/eng?i=001-203833

Party to the Convention or had accepted the right of individual petition and the compulsory jurisdiction of the Court.[90]

7. Is there a need for a Government's view on the question posed by the requesting Court?

81. The Government of the High Contracting Party to whose jurisdiction a request for an advisory opinion has been made has the right to submit written observations (Article 3 of Protocol No. 16) and, in practice, is systematically invited to avail itself of this possibility when a request for an advisory opinion is accepted by the panel of the Grand Chamber. Practice shows that the Governments of the High Contracting Party have intervened in six of the seven requests for advisory opinions declared admissible. Even if, in accordance with the style adopted by the Grand Chamber in drafting its advisory opinions, a summary of any observations and advisory opinions of the Government is not included in the Court's advisory opinion, such observations and advisory opinions are duly taken into consideration by the Court, being included in the record of the deliberations of the members of the Grand Chamber (see also paragraph 13 above).

82. As was emphasised in § 40 of the Court's Reflection Note on the proposal to extend its advisory jurisdiction, the Government's involvement is useful in feeding the Court's thinking on the response to be given to the question put by the requesting court. While the requesting court is called upon to calibrate its request and its questions in relation to the judicial proceedings in progress and the "points that are directly connected to the proceedings pending at domestic level",[91] the Government's observations may be of a more theoretical and general nature, in order to cover, where appropriate, a broader spectrum of the implications of the question raised at legislative, judicial and/or executive level. In this way, they give the Government the opportunity to provide additional clarification to that provided by the requesting court, ensuring that all the information supplied to the Court places it in the best possible position to provide the interpretative guidance required. The Government may choose whether to submit written observations or an advisory opinion on a request for an advisory opinion.

[90] Protocol No. 11, which entered into force on 11 November 1998, removed two previously optional clauses from the Convention; since its entry into force, the right of individual petition is no longer conditional on a declaration of acceptance of the Court's jurisdiction by the respondent State, and the Court's jurisdiction has become compulsory.

[91] See, *inter alia*, Advisory Opinion P16-2018-001, cited above, § 26.