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Protocol 16 ECHR. Background, meaning, effects and experiences

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Table of contents

Summary

Background

On 1 August 2018, Protocol 16 (hereinafter also referred to as 'Protocol') to the European Convention on Human Rights (ECHR) entered into force. Five years later, the Protocol has been ratified by 19 of the 46 member states of the Council of Europe, including the Netherlands. In the countries that have ratified the Protocol, designated highest courts can apply to the European Court of Human Rights (ECtHR) for an advisory opinion on the interpretation or application of the ECHR in a pending case. This advisory opinion procedure aims to strengthen the dialogue between national highest courts and the ECtHR, thereby enhancing the protection of ECHR rights at the national level. It is also considered that the number of complaints to the ECtHR can be reduced when the ECHR already can be applied correctly at the national level.

So far, the Dutch courts with competence to request an advisory opinion (the Supreme Court, the Administrative Jurisdiction Division of the Council of State, the Central Appeals Tribunal, the Appeals Tribunal for Trade and Industry and the Joint Court of Aruba, Curaçao, Sint Maarten and of Bonaire, Sint Eustatius and Saba) have not made use of the possibility to request an advisory opinion from the ECtHR. This is different for judges in other states. Since the entry into force of Protocol 16 (and until 1 June 2023), eight requests for an advisory opinion have been submitted by states that have ratified the Protocol. This has so far resulted in six advisory opinions from the ECtHR, namely in response to two requests from Armenia, two from France, one from Lithuania and one from Finland. In one case, the ECtHR refused to consider the request. This request was made by a Slovakian court. On 16 May 2023, the ECtHR announced that a new request for an advisory opinion had been accepted for consideration, namely a request made by the Belgian Council of State.

This research focuses on identifying and analysing first experiences with the Protocol at the national level. More specifically, the question has been posed by the Netherlands Scientific Research and Data Centre (WODC) as to **how Protocol 16 ECHR has been implemented and applied so far and whether its use can be improved**.

Research approach

To answer the research question, the background and objectives of the Protocol, the organisation of the advisory procedure and the current application of the Protocol by the ECtHR have been researched. In addition, possible explanations for the limited signing and ratification of the Protocol have been examined. To this end, experts and governmental stakeholders from six States have been asked to complete a qualitative questionnaire. Finally, research has been conducted into how the opportunities offered by the Protocol are being used both within and outside the Netherlands and into courts' experiences with the advisory opinion procedure to date. Semi-structured interviews have been held with judges, an Advocate-General and members of the registry at the five highest courts in the Netherlands competent to submit a request for an advisory opinion. Similarly, interviews have been conducted with judges, court clerks and/or Advocate-Generals at the foreign courts that have submitted requests for an advisory opinion.

The present study has focused on ratification and application practices until 1 June 2023. This means that the evaluation is made just five years after the Protocol's entry into force. As a result, the data available for drawing conclusions is relatively limited. In addition, the study only covers national experiences with the advisory opinion procedure and the interpretation given by the ECtHR to the advisory opinion procedure in the opinions issued so far. The (perceived) consequences of Protocol 16 for the practice of the ECtHR are therefore beyond the scope of this study.

Evaluation in the light of the objectives of Protocol 16

An important aim of the study was to evaluate the implementation and application of Protocol 16 so far. This evaluation was carried out in light of the two main objectives of the Protocol: (1) to strengthen the dialogue between highest national courts and the ECtHR and thereby achieve better implementation of the ECtHR and (2) to increase the efficiency of the ECtHR.

Dialogue function

The study of the ratification process at the national level showed that there is **much debate about the consequences of Protocol 16 for the relationship between national and European judges and for the implementation of the ECHR**. In quite some ratification debates, concerns have been expressed that the procedure could result in the ECtHR becoming too involved in national fundamental rights issues. As a consequence, in some States it is felt that Protocol 16 is at odds with national sovereignty and the national primary power to interpret the ECHR. To some extent, this also seems to be a consideration among some Dutch courts. Several respondents at the Dutch highest courts indicated that it is primarily up to them to interpret and apply national law. For some courts, this makes them reluctant to use the Protocol, even though they value the ideas behind it.

At the same time, **all Dutch and foreign courts acknowledge the value and significance of the Protocol when it comes to new legal questions that go to the heart of a case presented and on which there is no clear ECtHR case law yet**. Not only does the procedure then make it easier to give a proper judgment in national proceedings, it also prevents individual complainants from having to go to Strasbourg at a later stage to obtain clarity on the interpretation of the ECHR. An argument that was hardly presented by interlocutors at the Dutch courts, but all the more often by foreign respondents, is that **the Protocol allows the ECtHR to provide extra legitimacy in relation to questions that lead to strong ((legal-)political) controversy at the national level**. Importantly, doing so is not one of the express aims of Protocol 16, nor is this function easily compatible with the notion of subsidiarity. The ECtHR itself has so far seen no reason to reject requests for an advisory opinion if they are clearly related to a national (legal) political issue. However, in such cases it has opted for a purely legal approach, leaving aside the political aspects of the matter. It is not inconceivable that it is thereby implicitly trying to make clear that the procedure is not aimed at resolving national political issues. However, without further research at the ECtHR, this remains somewhat speculative.

In sum, on the basis of the limited number of opinions requested and issued so far, **it cannot be concluded unequivocally whether the advisory procedure contributes positively to the implementation of the ECHR at the national level and to increasing dialogue between national and EU courts**.

Efficiency function

The study further has found that **the efficiency function of Protocol 16 can be seriously doubted**. In many ratification debates, it was expressly questioned that the procedure could lead to a reduction of the number of individual applications lodged at the ECtHR. Quite to the contrary: according to many stakeholders, the handling of requests for advisory opinions might put a considerable strain on the already limited capacity of the ECtHR, as the requests must always be handled by the Grand Chamber. Respondents for the Dutch courts have indicated that this is indeed a relevant consideration when it comes to submitting a request for an advisory opinion.

The submitted requests further show that these are not about issues that are central to a large number of similar, pending cases. Rather, they concern unique cases with a political character or issues concerning very specific ambiguities in existing ECtHR jurisprudence. Many respondents at the Dutch highest courts indicated that they see the added value of the procedure if it concerns an issue that is the subject of much litigation. Nevertheless, for them it is ultimately always the question whether a request for an advisory opinion is really necessary to obtain clarity

in the case at hand. Whether the advisory procedure could lead to efficiency gains in the future is therefore uncertain at present.

Towards an improved use of Protocol 16?

In addition to evaluating the implementation and application of Protocol 16 so far, the research has focused on whether the possibilities of the Protocol could be used more fully in the future.

Interviews with the Dutch highest courts have revealed that **it is partly practical considerations that stand in the way of submitting requests for an advisory opinion. At the same time, these seem to be surmountable**. Respondents at several courts have indicated, for example, that it will be a challenge to formulate a request in such a way that a useful and meaningful advice follows. At the same time, they have stated that there is enough experience with the preliminary ruling procedure and sufficient knowledge of the ECHR to formulate good requests. Similarly, internal regulations or protocols are currently lacking, but there is a willingness to create them and to consult with other courts if a request for an advisory opinion is considered. Concerns about long processing times and possible delays can also be put into perspective: at present the duration of the advisory opinion procedure is shorter than the preliminary ruling procedure at the Court of Justice of the European Union (CJEU). Hence, practical concerns as such do not have to stand in the way of submitting a request for an advisory opinion. However, based on experiences in other States, there appears to be room for improvement when it comes to the way in which the ECtHR deals with the procedure, especially when it comes to communication with the national courts.

In addition, some criteria of a more substantive nature can be formulated that have to be met to benefit from the possibilities of submitting a request for an advisory opinion. These criteria are related to the expected added value of an advisory opinion and its perceived costs. The criteria listed below are strongly supported by both the Dutch respondents and the foreign courts; the latter indicated that they have either already directly taken these criteria into account in their decision to file a request for an advisory opinion or plan to do so (even better) in the future.

Arguably, **there is value in submitting a request for an opinion under Protocol 16 if the following four criteria are met**:

1. Obtaining a clear ECHR interpretation must have real added value for the pending case (and any similar cases pending at lower courts). Such added value can be seen if there is contradictory or inconsistent case law of the ECtHR on the matter at hand, or if there is still very little ECtHR case law on a particular issue. The latter may be the case with new questions that the ECtHR has not yet been able to address, for example questions related to technological issues or new investigative methods.
2. The request for an advisory opinion should concern a general question of interpretation that cannot be answered even on the basis of careful analysis of case law and that can be translated well to the context of the advisory opinion procedure. Preferably, there should be some precedential value in the sense that the advisory opinion is relevant to a larger number of cases.
3. The ECHR issue should be a core aspect of the case.
4. It must be clear that there are no EU law aspects to the case; if there are, the preliminary ruling procedure is preferable.

These four criteria fit well with the main objectives of the Protocol. Moreover, they are well-suited to the division of tasks between national courts and the ECtHR and between the ECtHR and the CJEU. There is therefore every reason to make these criteria the starting point for the future. Perhaps this will not lead to a much higher number of requests for an advisory opinion, but that is not an end in itself either. **However, taking these criteria into account does mean that requests for an advisory opinion will be made where it adds value and is appropriate.**

1. Introduction

1.1 Background

On 1 August 2018, Protocol 16 (hereinafter also: 'Protocol' or 'P16') to the European Convention on Human Rights (hereinafter: 'ECHR' or 'Convention') entered into force.[1] Meanwhile, the Protocol has been ratified by 19 of the 46 member states of the Council of Europe.[2] Designated highest courts in these 19 member states may, under the Protocol, apply to the European Court of Human Rights (hereinafter: 'ECtHR' or 'Court') for an advisory opinion on the interpretation or application of the ECHR in a pending case. The Protocol aims to facilitate dialogue between national supreme courts and the ECtHR, thereby enhancing the protection of ECHR rights at the national level.[3] It is also thought that the number of complaints to the ECtHR can be reduced where good opportunities already exist at the national level to ensure the proper application of the ECHR. [4]

At the time this report was finalised (June 2023), 19 out of 46 states had ratified the Protocol. In contrast, 6 states had signed but not ratified the Protocol. 21 States had not signed the Protocol. The non-signatory States included countries such as Denmark, Germany, Ireland, Austria, Spain, the United Kingdom and Switzerland.

Up until June 2023, eight requests for an opinion had been submitted from States that did ratify the Protocol since the entry into force of Protocol 16. At the time of writing, the ECtHR had been able to issue an opinion in six cases, namely in response to two requests from Armenia, two from France, one from Lithuania and one from Finland.[5] In one case, the ECtHR refused to consider the application – made from Slovakia.[6] On 16 May 2023, the ECtHR announced that a new request for an opinion had been accepted for consideration, namely a request made by the Belgian Council of State.[7]

For the Netherlands, Protocol 16 entered into force on 1 July 2019. By then, the treaty approval procedure had been completed, the relevant law had been published in the Official Journal [*Staatsblad*], and the necessary information had been transmitted to the Secretary-General of the Council of Europe.[8] For the Netherlands, the Supreme Court [*Hoge Raad*], the Administrative Jurisdiction Division of the Council of State [*Afdeling Bestuursrechtspraak Raad van State*], the Central Appeals Tribunal [*Centrale Raad van Beroep*], the Appeals Tribunal for Trade and Industry

[1] *Tractatenblad* 2013, 241 and *Tractatenblad* 2014, 74; ETS 214, see www.conventions.coe.int.
[2] www.conventions.coe.int.
[3] See in particular the *CDDH Final Report on measures requiring amendment of the European Convention on Human Rights* (Strasbourg, 15 February 2012), CDDH(2012)R74 Addendum I, https://rm.coe.int/168045fdc5. A detailed description of the objectives can be found in Section 2.1.2.
[4] Ibid.
[5] Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, requested by the French Court of Cassation, ECtHR (GC) 10 April 2019, P16-2018-001; Advisory Opinion concerning the use of the 'blanket reference' or 'legislation by reference' technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of commission of the offence and the amended criminal law, requested by the Armenian Constitutional Court, ECtHR (GC) 29 May 2020, P16-2019-001; Advisory Opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings, requested by the Lithuanian Supreme Administrative Court, ECtHR (GC) 8 April 2022, P16-2020-002; 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, requested by the Armenian Supreme Court, ECtHR (GC) 26 April 2022, P16-2021-001; Advisory opinion on the difference in treatment between landowners' associations "having a recognised existence on the date of the creation of an approved municipal hunters' association" and landowners' associations set up after that date, requested by the French Council of State, ECtHR (GC) 13 July 2022, P16-2021-002; Advisory opinion on the procedural status and rights of a biological parent in proceedings for the adoption of an adult, requested by the Finnish Supreme Court, ECtHR (GC) 13 April 2023, P16-2022-001.
[6] Decision on a request for an advisory opinion under Protocol No. 16 concerning the interpretation of Articles 2, 3 and 6 of the Convention, Request by the Supreme Court of the Slovak Republic, ECtHR (Panel) 14 December 2020, P16-2020-001.
[7] See ECHR press release of 16 May 2023, 'The Court has accepted a request for an advisory opinion from the Belgian *Conseil d'État',* ECHR 148 (2023).
[8] *Staatsblad* 2019, 8; see also www.conventions.coe.int.

[*College van Beroep voor het Bedrijfsleven*] and the Common Court [*Gemeenschappelijk Hof*] of Aruba, Curaçao, Sint Maarten and of Bonaire, Sint Eustatius and Saba are authorised to submit requests for opinions. So far, none of these courts has made use of this possibility.

Several questions and concerns have emerged during the Dutch ratification process of the Protocol.[9] First of all, the question was raised both from the House of Representatives [*Tweede Kamer*] and by various scholars as to whether the system of advising would actually achieve its objectives and whether it might not lead to an increase in the workload of the ECtHR.[10] In addition, there was some uncertainty about the expected application of the Protocol by the Court. In particular, there were some doubts about the (formally) non-binding nature of opinions and how the ECtHR would interpret this.[11] After all, the ECtHR has held in its judgments that they can have at least some *res interpretata* effect. This means that general principles and principles formulated in judgments have a binding character, even if the final opinion does not have that binding character.

1.2 Purpose and question of the study; delineation

Against the background outlined above – in particular the questions that have emerged in the ratification process in the Netherlands – this study focuses on mapping and analysing the first experiences with the Protocol at the national level. More specifically, the commissioning body (the Netherlands Research and Data Centre, WODC), posed the questions as to *how Protocol 16 to the ECHR has been implemented and applied so far and how the utilisation of the Protocol can be improved*.

In connection with the debates that have arisen in the Dutch ratification process and to answer the central research question, the current study first looks at possible explanations for the limited signing and ratification of the Protocol at the national level. In doing so, it compares the arguments exchanged in the Dutch ratification process with the considerations that did or did not lead to ratification in other States. In addition, it examines how the ECtHR has interpreted the Protocol in its opinions as delivered until June 2023 with the aim of clarifying how the advisory procedure is taking shape in practice. Finally, it examines how the possibilities offered by the Protocol are used both inside and outside the Netherlands.

The study focuses on ratification and application practices until 1 June 2023. Developments that occurred after this date are not included. This means that the evaluation spans a mere five years since entry into force; indeed, for the Netherlands, the Protocol has only been in force for four years. With new procedures of this kind often taking a relatively long time to become known and established, and processing times both at the ECtHR and in national courts being relatively long, this unavoidably means the study has limitations. In particular, only for four of the now seven submitted and admissible advisory requests had the proceedings been fully completed at the national level at the time of writing. As a result, the amount of data on the basis of which conclusions can be drawn about the national experience is relatively limited. This should be taken into account when valuing the results of this study.

It is furthermore important to note that this study only concerns national practice and the interpretation given by the ECtHR to the advisory competence through the opinions issued until 1 June 2023. The study explicitly does not focus on the (perceived) consequences of Protocol 16 for the practice of the ECtHR itself. Therefore, no interviews were conducted at the ECtHR, nor did the study look into quantative data on the Court's workload or into how the ECtHR refers to its own opinions in its case law. This would require a separate evaluation study.

[9] These are discussed in more detail in Chapter 4 of this report.
[10] See contribution by Mr Groothuizen (D66) to the parliamentary debate on the adoption proposal: *Parliamentary Papers II* 2016/17, 34235, no. 7, p. 8. See further, among others, J.H. Gerards, '[Protocol 16 EVRM: baat het niet, dan schaadt het ook niet?]' [*Protocol 16 ECHR: does it not help, then it does not harm?*], *Montaigne Centre Blog* 11 July 2018.
[11] See in particular the contribution of Mr Koopmans (VVD) during the parliamentary debate on the approval proposal: *Kamerstukken II* 2016/17, 34235, no. 7, p. 7.

1.3 Approach and methods

Several research methods were employed to answer the central question of the study. First, desktop research was conducted to identify the background and objectives of the Protocol, the organisation of the advisory procedure and the current application practice of the Protocol by the ECtHR. In particular, this research involved the following documents:

- Academic literature on the purpose and function of the Protocol and on the initial opinions issued by the ECtHR.
- Policy documents surrounding the creation and application of Protocol 16, such as the *Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the Convention* (ECHR 18 September 2017), #5864582, available at https://www.echr.coe.int/Documents/Guidelines_P16_ENG.pdf
- Statistical information on numbers of opinions and judgments at the ECtHR, as available from the ECtHR website (www.echr.coe.int > statistics) and the HUDOC database (www.hudoc.echr.coe.int).
- The six opinions issued by the ECtHR until 1 June 2023 and the rejection of one request for an opinion, as available via the HUDOC database and as commented on in various annotations and blog posts.
- The judgments of the national highest courts that requested the six issued opinions, to the extent that they were found to be available and retrievable. These was the case for four judicial decisions.

Interviews were conducted to identify national experiences with the advisory procedure. For the Netherlands, interviews were conducted with a total of 11 persons (State Councillors [*Staatsraden*], judges, an advocate-general and staff) at the five highest courts with jurisdiction over requests for an advisory opinion. Most of these interviews were conducted on location. In two cases, respondents were interviewed online, via Microsoft Teams, and in one case the questionnaire was completed in writing.

In addition to the interviews at Dutch highest courts, interviews were conducted with judges, court clerks and/or advocate-general at the foreign courts that submitted requests for opinions. These are (1) the French Council of State, (2) the French Supreme Court, (3) the Armenian Constitutional Court, (4) the Armenian Supreme Court, (5) the Lithuanian Supreme Administrative Court, and (6) the Finnish Supreme Court. The interviews were conducted online, via Microsoft Teams. For the French Court of Cassation and the Finnish Supreme Court, the questionnaire was completed in writing.

A list of those who participated in the study as respondents can be found in Annex 1 to this report. As not all respondents agreed to have their names or agencies mentioned in the actual text of the report, efforts have been made to report about the research findings in such a way that they cannot be traced back to the person or organisation from which information was obtained.

A semi-structured questionnaire was used to conduct the interviews.[12] This means that the questions were determined and sequenced in advance and the interviewers used the same questionnaire to ensure that interviews could be approached in the same way each time. At the same time, the nature of the questionnaire left room for further questioning on relevant points and for respondents to complete topics.

An interview guide was also prepared for the interviews and written questionnaires, setting out the approach to the interviews and explaining the forms used to ensure that respondents could give informed consent. It also states how the information obtained will be handled. This interview guide is included as Annex 6 to this study.

For the second part of the current study, which concerns the ratification process, a similar approach has been taken. Desktop research here concerned Dutch parliamentary documents surrounding ratification were studied, supplemented by literature research. To place the ratification process in

[12] The questionnaires can be found in Annexes 2 and 3.

the Netherlands in a broader perspective and to gain insight into the motives of States to ratify or not ratify the Protocol, experts and governmental stakeholders from six States were interviewed in writing, using a questionnaire.[13] These were Albania, Belgium, Denmark, Estonia, Luxembourg and Norway. These six countries were chosen because the national debate there resulted in the Protocol not being ratified (Denmark and Norway), the process of signature and ratification taking a relatively long time (Belgium and Luxembourg) or, on the contrary, going quite smoothly (Albania and Estonia). In addition, the selection of the six countries sought to ensure some geographical spread. Where public information was available on the ratification process or national discussions, this also was drawn upon.

1.4 Outline

By way of introduction, Chapter 2 of this report provides a description of the background and objectives of the Protocol and an explanation of the organisation of the advisory opinion procedure. Chapter 3 examines the advisory opinions issued by the ECtHR until June 2023, or, in other words, the application practice of the ECtHR. This includes the reasons it has given for considering or not considering a request for an advisory opinion and its substantive assessment of opinion requests. Chapter 4 focuses on the adoption of the Protocol in the Netherlands, with the aim of providing insight into the various discussion points that surrounded the ratification of the Protocol. Chapter 5 concerns a similar analysis of the rationale and motives that led to relatively quick, slow or non-ratification in other countries. Chapter 6 describes the current application practice in the Netherlands based on the insights that emerged from the interviews with interlocutors at the highest courts empowered to submit a request for an opinion, supplemented by an analysis of what has been noted in court decisions and in the literature in this regard. Chapter 7 presents the findings from the interviews with judges and staff at foreign courts which have filed an advisory opinions request. To conclude, Chapter 8 lists the main findings.

[13] A list of the experts and government representatives consulted is included in Annex 1. These individuals were found by drawing on the researchers' and guidance committee's network. The questionnaires used are included in Annexes 4 and 5.

2. Protocol 16 ECHR – a *tour d'horizon*[14]

2.1 Background and objectives of Protocol 16

2.1.1 Establishment history and context

Protocol 16 makes it possible for designated highest courts of ratifying States to ask the ECtHR in a pending case to advise them on the interpretation or application of the Convention. Protocol 16 was drafted and adopted in response to several developments and concerns about the future sustainability of the Court and the implementation of ECHR judgments at the national level.

Those concerns were (and are) primarily related to the Court's large case load and limited capacity to dispose of all cases. At some point in 2012, there were nearly 160,000 complaints pending before the Court.[15] Despite many efforts to speed up the handling of cases,[16] there is still a workload of 75,000 cases to be adjudicated. Moreover, cases are constantly being added each year. In 2012, some 60,000 complaints per year were registered with the Court; currently, there are around 45,000 per year.[17] Between 200 and 400 cases are also brought annually from the Netherlands, which are assigned to one of the formations of the ECtHR.[18] All these complaints are highly diverse and concern all areas of law, ranging from criminal law to administrative law and from tenancy law to civil procedural law. Many Dutch cases deal with migration and asylum and procedural issues in criminal law, but there are also cases of principle on extraterritorial application of the ECHR, technical issues on pensions or fundamental procedural questions on journalistic source protection.[19] This combination of factors, together with a particularly low operating budget, means that processing times at the ECtHR are problematically long and there is great pressure on the limited capacity of the ECtHR.

A second relevant background factor concerns the frequently poor or delayed national implementation of judgments. In a number of countries, such as the Netherlands, implementation is usually undertaken willingly and energetically, but it is much more problematic in some other States.[20] Several countries seriously struggle to address systemic, structural human rights problems and have difficulties in providing proper legal protection; in some cases, moreover, the willingness to follow-up on the Court's rulings is limited.[21] It is then not surprising that (alleged) victims of human rights continue to lodge applications at the Court in the hope of being offered the legal protection and redress there that they are unable to secure at the national level. With its judgments,

[14] This chapter is based with appropriate updates and changes on Gerards 2013, Gerards 2017 and Gerards 2020.
[15] CDDH 2015, para 75.
[16] For an overview, see e.g. Glass 2016; Glass 2020.
[17] Statistical data can be found at www.echr.coe.int > Statistics. For a recent overview, see *ECHR - Analysis of Statistics 2022*, at https://echr.coe.int/Documents/Stats_analysis_2022_ENG.pdf.
[18] See *ECHR – Analysis of Statistics 2022*, https://echr.coe.int/Documents/Stats_analysis_2022_ENG.pdf, p. 13. Per 1 April 2023, there were 95 cases pending for the Netherlands (*ibid.*, p. 12). Actually, the number of applications lodged with the ECtHR may be higher; many cases are disposed of administratively because they do not meet the formal requirements and then never reach a formation of the Court. No precise statistics of this by country are published, but in 2022, a total of 14,400 complaints were dealt with administratively (see the document mentioned, p. 3). This still puts the number of submitted applications at around 60,000 per year.
[19] See, e.g., ECtHR 11 June 2013 (dec.), no. 65542/12, ECLI:CE:ECHR:2013:0611DEC006554212 (*Stichting Mothers of Srebrenica and Others v. the Netherlands*); ECtHR 23 October 2012 (dec.), no. 34880/12, ECLI:CE:ECHR:2012:1023DEC003488012 (*Ramaer and Van Willigen v. the Netherlands*), «EHRC» 2013/46 (case note Leijten), *USZ* 2013/55 (case note Van der Mei), *AB* 2013, 43 (case note Leijten); ECtHR 22 November 2013, no. 39315/06, ECLI:CE:ECHR:2013:1122JUD003931506 (*Telegraaf Media Nederland Landelijke Media B.V. and others v. the Netherlands*), «EHRC» 2013/36 (case note Poppelaars), *NBSTRAF* 2013/408 (case note Verbaan), *NJ* 2013, 252 (case note Dommering); ECtHR 9 February 2021, no. 10982/15, ECLI:CE:ECHR:2021:0209JUD001098215 (*Maassen v. the Netherlands*), *EHRC Updates* 2021/63 (case note Crijns, via https://www.ehrc-updates.nl/commentaar/211404); ECtHR 19 January 2021, no. 2205/16, ECLI:CE:ECHR:2021:0119JUD000220516 (*Keskin v. the Netherlands*), *EHRC Updates* 2021/44 (case note Van Toor, via https://www.ehrc-updates.nl/commentaar/211180), *NJ* 2021/94 (case note Vellinga).
[20] See further Lambrecht 2022; see also previously Kivalov 2012.
[21] Ibid.

the ECtHR can provide that legal protection in the individual case, although it can hardly solve any underlying systemic problems – that really has to be done at the national level.[22] For this reason, efforts have long been made to strengthen national responsibility for and willingness to offer ECHR protection at the national level, and various ways of increasing national engagement are being experimented with.[23]

A third factor determining the position and role of the ECtHR concerns the tension between effective legal protection and respect for national sovereignty.[24] As a supranational human rights court, the ECtHR often has to adjudicate in cases concerning a conflict between fundamental rights or that are about specific fundamental rights issues on which opinions differ widely within the Council of Europe. In doing so, the Court must strive for a high level of fundamental rights protection, but at the same time it must take into account the political realities in the States. On this point, the Court regularly faces criticism. Some consider that the Court does not go far enough in its fundamental rights protection, while others argue that the Court does not take sufficient account of its position vis-à-vis the States and its role as a court.[25] The responsible ministers of Council of Europe States have highlighted this tension several times. For instance, at an important summit in Brighton (2012), while ministers expressed explicit support for the ECHR and its system of individual application, they also stressed the principle of sovereignty of States when it comes to regulating fundamental rights issues.[26] According to the ministers, the ECtHR must ensure that national regulations and decisions are compatible with the ECHR, but it must do so while respecting its 'subsidiary' position.

The drafting and adoption of Protocol 16 must be understood against the background of the factors mentioned above. The possibility of facilitating and strengthening the interaction between national courts and the ECtHR has long been considered an interesting vehicle for addressing some of the pressing issues the Court is confronted with. Indeed, national courts have proven to be generally good 'partners' of the ECtHR in implementing ECtHR judgments.[27] They often speak the Court's 'language' better than political actors do and they are able to logically incorporate its rulings into their own case law.[28] Through their national judgments they can also sometimes offer critical responses to the Court's interpretations in a way that the ECtHR can relate to well.[29] As a result, in practice, a type of 'judicial dialogue' between national courts and the ECtHR has emerged that benefits the protection of ECHR rights while still befitting the interrelationship between the national and supranational levels.[30]

In line with this dialogic type of thinking, in 2006, the first concrete proposals were made to facilitate the 'conversations' between national courts and the ECtHR by creating an advisory opinion procedure.[31] National courts could then ask the ECtHR in pending national judicial proceedings to advise them on the correct interpretation and application of the Convention. These first ideas were followed in 2009 by a Norwegian-Dutch proposal detailing such a procedure.[32] An advisory opinion procedure was also mentioned at the Izmir Summit in 2011,[33] and a year later, at a Summit in

[22] Ibid.
[23] The various declarations adopted at the 'summits' of European ministers clearly show this (Interlaken (2010), Izmir (2011), Brighton (2012), Oslo (2014), Brussels (2015), Copenhagen (2018)); for an overview with all declarations, see https://echr.coe.int/Pages/home.aspx?p=basictexts/reform&c=.
[24] See further Gerards 2023, Chapter 1.
[25] See further Gerards & Terlouw 2012; Spijkerboer 2012; Myjer 2012; Piret 2012, p. 77ff; Flogaitis, Zwart & Fraser 2013; Gerards & Fleuren 2014; Popelier & Lambrecht 2016.
[26] Brighton Declaration 2012, adopted at the Brighton High Level Conference (19-20 April 2012), https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf, para 12(d), paras. 1-3.
[27] See further Gerards 2014 and more generally Gerards & Fleuren 2014. See also Lambrecht 2022.
[28] Ibid.
[29] Gerards 2014; Glas 2016.
[30] Ibid.
[31] See, among others, Swaanenburg-Van Roosmalen & Vermeulen 2019, p. 4-5.
[32] Meeting DH-S-GDR, 28-30 January 2009, DH-S-GDR(2009)004.
[33] Group of Wise Persons 2006; Izmir Declaration adopted at the High Level Conference on the Future of the European Court of Human Rights in Izmir (26-27 April 2011), para. D. See more extensively O'Leary & Eicke 2018, p. 2-4; Wąsek-Wiaderek 2019, p. 642-644.

Brighton, it was concretely proposed to take up implementation of the idea in the form of a new protocol.[34] Eventually this has resulted in Protocol 16, which is the focus of this report. [35]

2.1.2 Main objectives

The various documents surrounding Protocol 16 and scientific literature have essentially identified two main goals for the Protocol, which are closely connected to the factors discussed in the previous subsection:

1. Promoting national protection and implementation through dialogue | The advisory opinion procedure has been created first and foremost on the basis that national judges sometimes find it difficult to apply the ECHR correctly because they may have questions about its correct interpretation. The ECtHR could help answer those questions by means of an advisory opinion.[36] As the preamble to Protocol 16 states, this could lead to improvements in national implementation of the ECHR.[37]

On this point, the advisory procedure is in line with the idea that national courts are (or can be) natural partners of the ECtHR and that they have a shared responsibility for achieving adequate fundamental rights protection in Europe.[38] National courts generally apply ECtHR jurisprudence conscientiously, regardless of their constitutional powers and regardless of the more monistic or dualistic nature of the legal system.[39] This is not a one-way street: in turn, the Court is significantly influenced by national jurisprudence.[40] When the Court decides a case, it has already been judged by a highest court at the national level and the Court has been sensitive to those national judgements.[41] It generally appreciates a correct ECHR interpretation positively, but if the Convention has been misapplied, it looks closely into the reasons given by the domestic court.[42] If a misapplication seems to stem from a lack of due care or clear neglect of the Court's standards, the Court is critical of it.[43] If, on the other hand, a divergent ECHR application stems from a well-considered assessment and is strongly supported by arguments, the Court may sometimes accept it and possibly even adjust its own jurisprudence. [44]

The advisory procedure reflects this interaction and aims to facilitate and strengthen it.[45] It is therefore often referred to as the 'dialogue protocol'.[46] Indeed, national court can, at a relatively early stage and of their own accord, seek to engage in a dialogue with the ECtHR by submitting requests for an advisory opinion. In turn, the ECtHR can respond to this by providing a general, guiding interpretation.[47] It is then up to the national court to assess how it will fit this interpretation into its own legal system and case law.[48] This system is well suited to the notion that States have the primary responsibility to protect ECHR rights and thus, ultimately, it fits well with the subsidiary role of the Court.[49] An additional advantage is that the ECtHR's interpretation will not only be relevant for the highest court in the State that requested the opinion. Judges in other States may also

[34] Wąsek-Wiaderek 2019, p. 643; see also extensively Milner 2014.
[35] See further e.g. Gerards 2013; Jóźwicki 2015, p. 185-186.
[36] Cf. CDDH 2012, para. 52 and para. B.3; Brighton Declaration 2012, adopted at the Brighton High Level Conference (19-20 April 2012), https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf, para. 12(d); ECHR 2013, para. 4; see also Voland & Schiebel 2017, p. 80.
[37] Further on this, see, among others, Sicilianos 2014, p. 14; Jóźwicki 2015; Thorarensen 2016; Gerards 2019, paras. 30ff; Glas & Krommendijk 2022, p. 314. These authors have also warned against too high expectations on this point; see also Jóźwicki 2015, p. 205.
[38] Gerards 2014; Sicilianos 2014, p. 12-13.
[39] Gerards & Fleuren 2014, Chapter 9; Lambrecht 2022.
[40] See further Gerards 2014.
[41] See, e.g., ECHR 18 January 2011, no. 39401/04, ECLI:CE:ECHR:2011:0118JUD003940104 (*MGN Limited v. the United Kingdom*), «EHRC» 2011/69 (case note Smet and Voorhoof) paras. 144-150.
[42] Gerards 2014, para 5.2.
[43] Ibid.
[44] Gerards 2014, paras 6.2.2-6.2.4
[45] Sicilianos 2014, p. 13.
[46] Speech by ECHR President Spielman for the CDDH, 27 June 2013, #4439316, http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/discours%20Spielmann%20EN.pdf. See also ECHR 2012, para. 9 and see e.g. Dicosola, Facone and Spigno 2015, p. 1390-1391.
[47] This strengthens the constitutional function of the ECtHR; see, e.g., Moonen & Lavrysen 2021, p. 774.
[48] CDDH 2012, paras 3(d) and (f); ECHR, para 6.
[49] Cf. Jóźwicki 2015, p. 191; O'Leary & Eicke 2018, p. 4; Lemmens 2019, p. 694.

consider the interpretation and application suggested by the ECtHR in their rulings.[50] In turn, this may promote sound national implementation of the ECHR.

2. Efficiency | A second aim of the Protocol is to alleviate the Court's case load indirectly and in the longer term.[51] The basis for this idea can be found in the 'pedagogical' potential and constitutional value of the ECtHR's advisory opinions. Should the Court succeed in providing greater clarity on the interpretation of the ECtHR through its opinions, national courts can apply the relevant criteria and factors in their own judgments. If this is done properly, and redress and judicial protection are duly offered at the national level, in the end, fewer cases would come before the Court. This was thought to be the case especially if many similar cases are pending at national level, all related to a fundamental rights issue on which the Court can provide clarification. Taking into account the Court's advisory opinion, all these cases could be disposed of at the national level in a Convention compliant manner. The incentive for people to then file further applications in Strasbourg thus could be removed. Moreover, in this type of situation, the Court could easily hold individual applications to be inadmissible because they have already been sufficiently assessed by a national court.[52]

The feasibility of achieving this second objective has been questioned by scholars and judges of the Court. Indeed, it even has been pointed out that the procedure potentially places a considerable strain on the Court's capacity, especially since requests for opinions will have to be dealt with by the Grand Chamber and will often involve complex issues.[53] Moreover, it has been argued to be unlikely that all requests for opinions will actually concern questions of law relevant to a (much) larger number of cases.[54]

2.2 The advisory opinion procedure

2.2.1 Formal and procedural requirements

Section 2.1 indicated that Protocol 16 is intended to allow highest national courts to request advisory opinions from the ECtHR.[55] The main reason for the limitation to highest national courts is to avoid that the Court is overwhelmed by requests for opinions.[56] It is up to States to determine which highest courts may actually be granted this competence. [57]

Requests for an advisory opinion must concern the interpretation or application of the Convention.[58] They should not concern abstract or hypothetical issues, but must arise from a concrete case pending before the national court.[59] In connection with this, the requesting court must provide information to the ECtHR on the relevant legal and factual background of the case before it so as to provide the ECtHR with sufficient context to give a proper opinion.[60] The Court has emphasised the importance of adequate information provision in its practice guidelines for Protocol 16 applications (hereinafter: 'the Guidelines').[61] Only if it has sufficient understanding of the case before it can it provide useful

[50] Moonen & Lavrysen 2021, p. 774.
[51] CDDH 2012, para. 52 and Appendix 5, para 3(a) and (c); ECHR 2012, para. 2; Voland & Schiebel 2017, p. 79.
[52] CDDH 2012, para. 52; Sicilianos 2014, p. 14.
[53] See, e.g., Sicilianos 2014, p. 20 ; Gerards 2013, p. 518; Dzehtsariou & O'Meara 2014, p. 468; Jóźwicki 2015, p. 197-198. This risk is exacerbated now that some States have declared many courts competent to file requests for an advisory opinion; O'Leary & Eicke (2018, p. 5) and Wąsek-Wiaderek (2019, p. 648) point out, for example, that Romania has declared 15 courts competent in addition to the Supreme Court and the Constitutional Court. As a result, there is considerable potential for submitting requests for opinions, although it remains to be seen whether the competence will actually be used.
[54] Jóźwicki 2015, p. 198.
[55] Article 1 P16.
[56] Explanatory Memorandum, para. 8; see also O'Leary & Eicke 2018, p. 5. For the complexities this requirement poses for some States (especially those with a constitutional court), see Dicosola, Fasone & Spigno 2015, p. 1404ff.
[57] Article 10 P16; see also Explanatory Memorandum, para. 8 and cf. Sicilianos 2014, p. 16. For lists of courts granted with this competence, see https://conventions.coe.int, CETS No 214 > Reservations and declarations.
[58] Article 1(1) P16. For further details of the various requirements, see Gerards 2021.
[59] Article 1(2) P16.
[60] Article 1(3) P16; Rule 92(2) Rules of Court; *Guidelines* paras 12-13. See also O'Leary & Eicke 2018, p. 9-10.
[61] *Guidelines on the implementation of the advisory-opinion procedure*, adopted by the Plenary Court on 18 September 2017 and updated on 18 October 2021, https://www.echr.coe.int/Documents/Guidelines_P16_ENG.pdf.

and valuable advice on the interpretation and application of the ECHR.[62] The Court therefore suggests that national courts should only submit a request for an opinion once all the relevant facts and points of law in the case have been identified.[63] The question to what extent courts may or should submit a request of their own accord and to what extent the parties to a case are involved in the submission and formulation of the request for an opinion is not answered in the Protocol itself.[64] This is left to the discretion of the competent courts.

Requests for an advisory opinion may be drafted in the official language used in the proceedings before the national highest court. If that language is not English or French (the official working languages of the ECtHR), the requesting court must provide a translation into one of those languages.[65] There are no further costs associated with the advisory procedure under Protocol 16. If such costs do arise at the national level (e.g. to provide a translation of documents), it is not for the Court to resolve them.[66]

2.2.2 Decision on the request for an advisory opinion

The ECtHR is not obliged to provide an advisory opinion upon each request.[67] This is decided by a panel of five judges of the Court. When a panel receives a request, it will first consider whether it meets the formal and procedural requirements set out in the Protocol.[68] For example, if a request has been submitted by a court that is not on the list or if the national court has not provided enough information on the background of the pending case, the panel may refuse to consider the request. The same applies if the panel discovers that a request does not actually arise from or is insufficiently related to proceedings pending at the national level. [69]

Protocol 16 contains no information on possible substantive grounds for refusal of requests for advisory opinions. The Protocol notes that they should be questions of principle on the interpretation or application of the ECHR, but does not state, for example, that they should be questions on systemic, structural or repetitive fundamental rights problems.[70] Scholars expect that panels will base their decisions on criteria similar to the grounds they use to admit referrals under Article 43 ECHR.[71] Under that provision, a case adjudicated by a Chamber of the Court may be referred to the Grand Chamber in a number of situations, namely if the case raises important questions regarding the interpretation and application of the ECHR, if the case gives rise to the adjustment of well-established case law, or if the case concerns an issue of public interest. [72]

More or less by extension, the Court has explained in the Guidelines that a request for an advisory opinion may be referred to the Court if it concerns a novel question of ECHR law, if the facts of the case do not appear to lend themselves to easy national application of the ECHR or if the ECtHR's case law appears to be inconsistent on a particular point.[73] One of the open questions surrounding the adoption of the Protocol was whether and how panels would apply these criteria in their assessment of requests for advice.[74] Indeed, some speculated that the ECtHR would not want to discourage states from submitting advisory requests,[75] and, therefore, the ECtHR would possibly accept requests that do not fit very well within the criteria mentioned above, at least in the initial period of 'getting used to' the advisory opinion procedure.[76]

[62] Guidelines, para. 13.
[63] Ibid.
[64] O'Leary & Eicke 2018, p. 10-11.
[65] Rule 34(7) Rules of Court; Guidelines, para. 18.
[66] Rule 95 Rules of Court; Guidelines, para. 23. See also Sicilianos 2014, p. 22.
[67] Article 2 P16.
[68] Rule 93(3) Rules of Court; Guidelines, para. 7.
[69] Guidelines, para. 6. See also Sicilianos 2014, p. 18; Glas & Krommendijk 2021, fn. 10.
[70] See Group of Wise Persons 2006, p. 339; Sicilianos 2014, p. 17.
[71] See further Gragl 2013, p. 234; Gerards 2014, p. 514; Giannopoulos 2015, p. 339-340; Jóźwicki 2015, p. 193-194; Paprocka & Ziółkowski 2015, p. 287-88; O'Leary & Eicke 2018, p. 7.
[72] See also ECHR 2012, paras. 20, 22 and 30.
[73] Guidelines, para 5.
[74] Or any other criteria; see e.g. Gerards 2017. See also Glas & Krommendijk 2021.
[75] Cf. Glass & Krommendijk 2022, p. 324, who talk about a period of 'confidence-building'. See also, e.g., Dicosola, Fasone & Spigno 2015, p. 1407.
[76] Cf. Swaanenburg-Van Roosmalen & Vermeulen 2019, p. 11.

The ambiguity about the admissibility criteria to be applied will be resolved over time, as Protocol 16 requires the panels to reason and publish their decisions rejecting a request for an advisory opinion.[77] However, the Court itself warned even before the Protocol entered into force that such reasoning would not be extensive.[78] The idea is mainly to avoid friction with the national court by explaining why its request will not be granted after all.[79] Section 3.2 of this report further discusses how the Court has dealt with this matter so far and how a decision of the ECtHR on the admissibility of a request for an advisory opinion is substantiated.

2.2.3 The advisory opinion procedure at the Court

If a request for an advisory opinion is granted, the Grand Chamber (17 judges) will engage in writing the opinion.[80] The Grand Chamber thereby must give priority to the opinion, although no deadlines are set.[81] If the national court considers that the request has an even greater urgency, it can communicate this to the Court, giving reasons.[82] It is then for the Court to determine whether an even further expedited procedure is indeed appropriate. [83]

The President of the Grand Chamber may ask the requesting court to submit additional information if this is deemed necessary. In addition, the President may invite the parties to the domestic proceedings to submit written observations and, if appropriate, to participate in a hearing.[84] During the consideration of the advisory opinion request, the government of the requesting State and the Council of Europe's Human Rights Commissioner may submit observations.[85] Moreover, if the President of the Court considers it necessary, other States and persons may be authorised to intervene.[86] This is mainly because a request for an advisory opinion may raise an issue that may also be of interest to other States and actors.[87]

According to the Guidelines*,* the Court's eventual advisory opinion is strictly limited to answering the questions contained in the request.[88] This means that the Court will not assess the facts of a case or comment on the merits of the parties' submissions.[89] How the Court would deal with interpretation issues in its opinions and how it would incorporate doctrines such as the margin of appreciation doctrine was difficult to predict before the Protocol's entry into foce, just like whether the Court would leave certain questions unanswered, whether (and to what extent) it would rephrase advisory questions, and whether the Court would raise *ex officio* ECHR issues not explicitly mentioned in the advisory request.[90] Nor is there any detail in the Protocol or the Guidelines on how and to what extent interventions by other States or third parties should be included in an advisory opinion.[91] Based on the advisory opinions issued until 1 June 2023, Section 3.3 looks in more detail at the Court's practice in this respect.

Each advisory opinion has to be reasoned and published.[92] The comprehensiveness of the reasoning has been predicted to depend on whether the opinion is on a new topic or rather a fairly straightforward interpretation of precedents.[93] If the advisory opinion is not unanimous, separate

[77] Article 2(1) P16.
[78] ECHR 2013, para. 9.
[79] Sicilianos 2014, p. 21.
[80] Article 2(2) P16.
[81] Rule 93(2) Rules of Court in conjunction with Rule 41 Rules of Court; see also O'Leary & Eicke 2018, p. 12.
[82] Guidelines, para. 15; O'Leary & Eicke 2018, p. 14.
[83] Guidelines, para. 29; O'Leary & Eicke 2018, p. 14.
[84] Article 3 P16; Rule 94(3) Rules of Court.
[85] Article 3 P16; Explanatory Memorandum, para. 14; ECHR 2012, para. 36; Gragl 2013, p. 238-39.
[86] Article 3 P16.
[87] Sicilianos 2014, p. 24.
[88] Guidelines, para 6.2.
[89] Ibid.
[90] See e.g., Dzehtsariou & O'Meara 2014, p. 466; O'Leary & Eicke 2018, p. 13; Vogiatzis 2021, p. 148.
[91] O'Leary & Eicke 2018, p. 16.
[92] Article 4 P16.
[93] Sicilianos 2014, p. 22.

opinions may be published.[94] In this respect, an advisory opinion resembles an 'ordinary' judgment of the Grand Chamber of the ECtHR.

2.2.4 Procedure after the advisory opinion; legal nature of advisory opinions

Advisory opinions are not binding on the national court that requested them.[95] Thus, once the highest national court is informed of the opinion, it can decide for itself whether to follow it or not.[96] The Guidelines issued by the Court for the procedure request the national court to inform it of the action taken on the opinion and to provide it with a copy of the final judgment or decision.[97]

At the same time, the explanatory text to the Protocol emphasises that there is no substantial difference in legal effect between an interpretation given in an advisory opinion or in a judgment.[98] The starting point is that *res interpretata* or interpretative authority accrues to the Court's well-established interpretations of the ECHR, which means that they are *de facto* binding on the national authorities of all States Parties.[99] A well-established interpretation is in fact part of the Convention as such, and thus has a similar binding force as the ECHR provisions themselves have. The Parliamentary Assembly of the Council of Europe recognised this notion of *res interpretata* in 2000, followed in 2010 by the ministers of all States Parties in the Interlaken Declaration.[100] Since the legal effect of the Court's advisory opinions is similar to that of the judgments, the general principles as formulated in the advisory opinions will have *res interpretata*.[101] Indeed, two judges at the ECtHR have suggested that the general principles laid down in opinions may even have a higher precedential value than those in regular decisions of Chambers and Committees of the Court.[102]

In practice, this means for that a distinction must be made between the general principles of interpretation and application that the Court defines in its advisory opinion and the actual opinion on their concrete application to the facts of the case at hand. The general principles will have authority of interpretation and are therefore *de facto* binding on national courts – not only in the State where an opinion has been requested, but also in other States.[103] Ignoring or rejecting these principles would be contrary to the ECHR.[104] Hence, only a concrete proposal to apply a certain interpretation to the facts of a pending case is actually advisory in nature.

Even if the national highest court has asked the Court for an advisory opinion, the possibility remains for the individual parties to the case to complain to the Court after the national proceedings have been concluded.[105] After all, it may happen that the national court does not follow the Court's opinion and a party finds that their rights have been violated as a result.[106] Individual parties may also find it important for the Court to take another look at their case if they believe that the national court has misinterpreted or misapplied the Court's advisory opinion. A third reason for lodging an individual application with the Court may be that the individual party considers aspects of the case relevant that were not raised in request and that the Court, for that reason, has not addressed in its advisory opinion.

[94] Article 4(2) P16.
[95] Article 5 P16.
[96] Article 5 P16; Guidelines, para. 6.2.
[97] Guidelines, para 31.
[98] Explanatory Memorandum, para. 27. See earlier ECHR 2012, para. 44.
[99] Bodnar 2014; Gerards 2014, p. 21ff; Jóźwicki 2015, p. 194; Paprocka & Ziółkowski 2015, p. 291.
[100] See PACE Resolution 1226/2000, para. 3 and the Interlaken Declaration – Action Plan adopted at the High Level Conference in Interlaken (19 February 2010), https://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf, para. B.4.c.
[101] ECHR 2013, para. 44.
[102] O'Leary & Eicke 2018, p. 9.
[103] ECHR 2013, paras. 5 and 44; see also Voland & Schiebel 2017, p. 83.
[104] This also applies to courts in States that are not themselves involved in the opinion request. See in more detail Bodnar 2014, p. 223-262; Gerards 2023, p. 97-99. See also CDDH 2012, para. 20(b).
[105] Explanatory Memorandum, para 26.
[106] Ibid. See also Lemmens 2019, p. 703; Glas & Krommendijk 2022, p. 332.

If an individual application is filed after there has been an advisory opinion procedure, the Court may have to rule twice on the same factual issue.[107] However, the perspective usually will be different. For example, the individual case may be about the correctness of the national interpretation or application of the Court's opinion, rather than about the ECtHR's interpretation given earlier. Moreover, if the Court considers that there is too significant overlap, it may decide to declare some aspects of the case inadmissible because it has already ruled on them.[108]

[107] Sicilianos (2014, p. 27) has pointed out that another situation may also arise, namely where the Court is presented with a request for an advisory opinion relating to the same subject matter as a number of individual complaints already pending. His proposed solution in such cases is either to give priority to dealing with the request for an opinion and then have the individual cases decided by a Committee of three judges with reference to the general principles of interpretation in the opinion, or to refuse a request for an opinion so as not to pre-empt the decision in an individual case.

[108] Explanatory Memorandum, para. 26; Thorarensen 2016, pp. 79-100. In this way, it may also prevent the opinion it has issued from becoming indirectly binding after all, namely if it were to rule that by acting in violation of the opinion, the State has also violated the ECHR; on this, see Milner 2014, p. 45 and 47-48.

3. The advisory opinion procedure in practice: opinions issued by the ECtHR

3.1 Introduction

Up until 1 June 2023, the ECtHR had issued six advisory opinions and rejected one request for an opinion. As Protocol 16 entered into force on 1 August 2018, this means that the ECtHR has so far issued an average of 1.2 advisory opinions per year. This number is dwarfed by the number of judgments the ECtHR issues each year in relation to individual applications.[109] It is even a rather small number when compared to the number of Grand Chamber judgments issued per year. In 2022, for example, this number was nine.[110]

Looking at the turnaround time of the advisory opinion procedure, so far, it is considerably shorter than that of an individual application. On average, it has taken 2.3 months for a panel of five judges to decide whether to accept an advisory request. Between the filing of the request for an opinion and the final opinion, there is an average of 11.5 months.

The six opinions were issued at the request of the French Court of Cassation, the Armenian Constitutional Court, the Supreme Administrative Court in Lithuania, the Armenian Court of Cassation, the French Council of State and the Finnish Supreme Court. The questions the ECtHR has had to answer at the request of these judges are very diverse in nature. Briefly, they concerned the legal recognition of parenthood in a surrogacy arrangement (Article 8 ECHR), the use of the 'legislation by reference' technique and the prohibition of retroactivity in criminal law (Article 7 ECHR), a restriction on the right to stand for election (Article 3 Protocol 1 ECHR), limitation periods for acts qualifying as torture (Article 7 ECHR), the unequal treatment of certain associations (Article 14 taken in conjunction with Article 1 Protocol 1 ECHR) and the procedural status and rights of a birth mother in the adoption procedure of an adult child (Articles 6 and 8 ECHR). The only request for an opinion rejected by the ECtHR to date concerns a request from the Slovakian Supreme Court on the requirements arising from Articles 2, 3 and 6 ECHR regarding guarantees of independence and impartiality in pre-trial criminal proceedings.

The remainder of this chapter discusses how the advisory opinion procedure has been given shape in the first five years of the Protocol's existence, on the basis of the opinions issued by the ECtHR and the reasons for the rejected application. Attention is paid both to considerations for whether or not to consider an application for an advisory opinion and the approach taken by the Court in dealing with it (Section 3.2) and to the form and content of the advisory opinions issued (Section 3.3).

3.2 Handling of requests for an advisory opinion

3.2.1 Decision on whether to consider a request for an advisory opinion

It was discussed in Section 2.2.2 that the Protocol provides little clarity on possible substantive grounds for refusal of requests for advice. All that follows from the relevant documents is that a request for an advisory opinion must deal with issues of principle relating to the interpretation or application of the ECHR. The ECtHR has shown itself aware of this lack of clarity. In this regard, it has considered that its obligation to give reasons for the decision to reject a request for an advisory opinion is intended, in part, to explain the meaning of the requirement that it relates to 'questions of principle'.[111] With, until 1 June 2023, only one case in which a request for an opinion has not been accepted, the Court has only been able to provide such clarification to a limited extent. One

[109] In 2022, the ECtHR ruled in 4,168 cases and declared 35,402 complaints inadmissible or struck them out of its list (ECtHR, *Analysis of statistics 2022*, January 2023).
[110] ECHR, *Annual report 2022*, January 2023, p. 35.
[111] Decision on a request for an advisory opinion under Protocol No. 16 concerning the interpretation of Articles 2, 3 and 6 of the Convention, requested by the Slovakian Supreme Court, ECtHR 14 December 2020, P16-2020-001, para. 13. This is also in line with the Explanatory Memorandum which notes that it is for the ECtHR to further clarify the type of question that may be asked under Article 1 P16.

explanation for this is that the duty to state reasons only applies to the rejection of a request for advice.[112] When a request for advice is accepted, the panel does not have to reason this decision.

From the reasoning of the rejection of the Slovakian Supreme Court's request for an advisory opinion, some information can be deduced about the cases in which the ECtHR will or will not grant a request for an advisory opinion. In its assessment of the Slovakian request on the requirements arising from Articles 2, 3 and 6 ECHR in terms of guarantees of independence and impartiality for pre-trial criminal investigations, the competent panel of the Court first cited Article 1 of Protocol 16. This Article provides that a request for an advisory opinion must contain questions of principle on the interpretation or application of the ECHR in a concrete case.[113] The panel also recalled paragraph 6.2 of the Guidelines, which states that an answer to the questions of principle must be considered necessary by the requesting court in order to decide the case.[114] After these general considerations, the panel decided not to deal with the part of the request for an advisory opinion on Articles 2 and 3 ECHR, because the domestic proceedings were primarily concerned with the fairness of the trial in the light of Article 6 ECHR. Also, the information available to the Court would not contain any indications that the parties to the domestic case had invoked Articles 2 and 3 ECHR. This part of the request for an opinion was thus rejected as it did not address issues directly related to the pending proceedings at the national level.[115] Subsequently, the panel also decided not to consider the part of the request for advice that concerned Article 6 ECHR. According to the panel, the Slovakian Supreme Court itself had already provided relevant guidance on how to answer the question in a summary judgment, making the provision of guidance by the ECtHR unnecessary. [116]

These considerations of the panel with regard to the Slovakian request show that the rejection of the request for an advisory opinion was not so much motivated by the fact that the request did not concern a question of principle, but rather by the fact that the questions raised were not sufficiently directly related to the national proceedings and an advisory opinion was not considered necessary for the national court to be able to reach a judgment in the case.[117] Consequently, the Court did not see occasion in the Slovakian request to remove the above-mentioned ambiguity on questions of principle.

Another reason for not considering a request for an advisory opinion may be that the national court has not provided sufficient insight into the facts of the case before it.[118] This can cause difficulties in cases where an advisory request involves a 'double' reference. Such a double reference can occur in some States when a lower court has referred preliminary questions to a constitutional court, and the constitutional court then submits a request for an advisory opinion. In such cases, the facts may not yet be finally determined. From the opinions issued, this has so far not prevented the consideration of a request for an opinion. When the facts are not yet established, the Court has relied on the facts as presented by the national constitutional court. It will then be up to the domestic courts to further establish the facts and apply the constitutional court's preliminary ruling to them in the light of the ECtHR's opinion.[119]

[112] Article 2(1) P16; Explanatory Memorandum, para. 15.
[113] Decision on a request for an advisory opinion under Protocol No. 16 concerning the interpretation of Articles 2, 3 and 6 of the Convention, requested by the Slovakian Supreme Court, ECtHR 14 December 2020, P16-2020-001, para. 16.
[114] Ibid., para. 17.
[115] Ibid., para. 19.
[116] Ibid., paras. 22-23.
[117] See also Glas & Krommendijk 2021, para. 10; they are critical of the rejection decision, partly because of its lack of comprehensive justification.
[118] See more on this in Section 2.2.1.
[119] Advisory Opinion concerning the use of the 'blanket reference' or 'legislation by reference' technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of commission of the offence and the amended criminal law, requested by the Armenian Constitutional Court, ECHR (GK) 29 May 2020, P16-2019-001, para 49.

3.2.2 Handling requests for an advisory opinion

As discussed in relation to the Slovakian request for an advisory opinions, the Court has inferred from Articles 1(1) and 2 of the Protocol that an opinion must be limited to points directly related to the case pending at the national level.[120] On this basis, the Court considers itself competent to reformulate or merge questions, for example where questions are very general in nature. [121]

The Court has further considered that even if a panel of five judges has approved a request for an advisory opinion, the Grand Chamber retains the power to rule that certain questions do not meet the requirements of Article 1 of Protocol 16.[122] Thus, the Grand Chamber can then still assess whether the questions in a request for an advisory opinion qualify as a question of principle concerning the interpretation or application of the ECHR, whether an advisory opinion is sought in a concrete case, and whether the requesting court has given sufficient reasons for its request and provided adequate information on the legal and factual background of the case.[123] For example, in the opinion on the use of the 'legislation by reference' technique in criminal law, the Grand Chamber decided not to answer two of the four questions in the national court's request, because these questions were not directly related to the proceedings at the national level. More specifically, they related to a general interpretation of the legality requirement contained in the second paragraph of Articles 8 to 11 ECHR, while the Court saw no reason to believe that these provisions played a role in the proceedings at the national level. Due to the lack of a sufficient link to the proceedings at national level, an answer to the questions would be abstract and general in nature and thus, according to the Court, the questions fell outside the scope of the advisory opinion procedure.[124]

Similarly, in the opinion on limiting the right to stand for election, the Grand Chamber decided not to answer one of the two questions contained in the request. This time, the reason was that the question was related to problems the national authorities were experiencing in implementing an earlier ECtHR ruling; the legislative process concerning the implementation of this judgment had not yet been completed.[125] The Court rejected consideration of this question because the advisory opinion procedure is not intended to be a tool in the implementation procedure. [126]

In addition to not answering one or more questions, the Grand Chamber sometimes appears to choose to answer questions that were not, strictly speaking, raised by the requesting court. For example, the Court can choose to deal with a preliminary question that it considers relevant to answering the questions in the request made by the national court. In the French case on unequal treatment of landowners' associations, the requesting court had limited itself to the question of what are the relevant criteria for assessing whether a distinction made by the legislature is justified within the meaning of Article 14 in conjunction with Article 1 Protocol 1 ECHR. Nevertheless, the Court considered it important to first explain how the national court should assess whether Article 14 in

[120] Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, requested by the French Court of Cassation, ECHR (GK) 10 April 2019, P16-2018-001, para. 26; Advisory Opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings, requested by the Lithuanian Supreme Administrative Court, ECHR (GK) 8 April 2022, P16-2020-002, para. 62; 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, requested by the Armenian Supreme Court, ECHR (GK) 26 April 2022, P16-2021-001, para. 54; Advisory opinion on the procedural status and rights of a biological parent in proceedings for the adoption of an adult, requested by the Finnish Supreme Court, ECHR (GK) 13 April 2023, P16-2022-001, para. 45.

[121] Advisory Opinion concerning the use of the 'blanket reference' or 'legislation by reference' technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of commission of the offence and the amended criminal law, requested by the Armenian Constitutional Court, ECHR (GK) 29 May 2020, P16-2019-001, para 45.

[122] Idem, para 47.

[123] Idem, para 47.

[124] Idem, paras 53-56. For a critical analysis of this decision, see Cnossen & Gerards 2020, margins 11-12.

[125] Advisory Opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings, requested by the Lithuanian Supreme Administrative Court, ECHR (GK) 8 April 2022, P16-2020-002, paras 98-100.

[126] Idem, para 63. Broeksteeg, Glas and Krommendijk did cast doubts on this decision, questioning whether the question was really about the adequacy of the enforcement of an earlier ruling (Broeksteeg, Glas & Krommendijk 2021, para 5).

conjunction with Article 1 Protocol 1 applied to the unequal treatment at all and on the basis of which criteria the national court should assess whether the cases were sufficiently analogous.[127]

3.2.3 Proceedings before the ECtHR

The description of the advisory opinion procedure before the ECtHR contained in the Court's opinions shows that in five of the six requests for an advisory opinion, the government of the requesting state used the possibility to submit comments during the consideration of the request. The Human Rights Commissioner of the Council of Europe has so far not used this possibility. In relation to one of the requests, other States have intervened as third parties.[128] In relation to this request and two others, civil society organisations have been allowed to intervene as third parties.[129] Concerning five of the six requests, parties involved in the proceedings at the national level submitted written comments.[130]

As discussed in Section 2.2.3, neither the Protocol nor the Guidelines say anything about how and to what extent interventions by other States or third parties should be included or dealt with in an advisory opinion. Although the advisory opinions delivered so far do not contain a summary of the content of the interventions, the opinions do provide some clarity on this point. The Court has considered that while it takes due account of the comments received when formulating its opinion, it does not see it as its task in an advisory opinion procedure to respond to all comments or to comprehensively set out the basis for the opinion.[131] To justify this, the Court stresses that the main purpose of the advisory opinion procedure is to provide guidance to the requesting court and thereby enable it to respect the Convention when rendering a judgment.[132]

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[127] Advisory Opinion on the difference in treatment between landowners' associations "having a recognised existence on the date of the creation of an approved municipal hunters' association" and landowners' associations set up after that date, requested by the French Council of State, ECtHR (GC) 13 July 2022, P16-2021-002, para. 57.

[128] Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, requested by the French Court of Cassation, ECtHR (GC) 10 April 2019, P16-2018-001.

[129] Advisory Opinion concerning the use of the 'blanket reference' or 'legislation by reference' technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of commission of the offence and the amended criminal law, requested by the Armenian Constitutional Court, ECtHR (GC) 29 May 2020, P16-2019-001; 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, requested by the Armenian Supreme Court, ECtHR (GC) 26 April 2022, P16-2021-001.

[130] This was only not the case in Advisory Opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings, requested by the Lithuanian Supreme Administrative Court, ECtHR (GC) 8 April 2022, P16-2020-002.

[131] Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, requested by the French Court of Cassation, ECtHR (GC) 10 April 2019, P16-2018-001, para. 34; Advisory Opinion concerning the use of the 'blanket reference' or 'legislation by reference' technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of commission of the offence and the amended criminal law, requested by the Armenian Constitutional Court, ECtHR (GC) 29 May 2020, P16-2019-001, para. 51; Advisory Opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings, requested by the Lithuanian Supreme Administrative Court, ECtHR (GC) 8 April 2022, P16-2020-002, para. 67; 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, requested by the Armenian Supreme Court, ECtHR (GC) 26 April 2022, P16-2021-001, para. 55; Advisory opinion on the procedural status and rights of a biological parent in proceedings for the adoption of an adult, requested by the Finnish Supreme Court, ECtHR (GC) 13 April 2023, P16-2022-001, para. 46.

[132] Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, requested by the French Court of Cassation, ECtHR (GC) 10 April 2019, P16-2018-001, para. 34; Advisory Opinion concerning the use of the 'blanket reference' or 'legislation by reference' technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of commission of the offence and the amended criminal law, requested by the Armenian Constitutional Court, ECtHR (GC) 29 May 2020, P16-2019-001, para. 51; Advisory Opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings, requested by the Lithuanian Supreme Administrative Court, ECtHR (GC) 8 April 2022, P16-2020-002, para. 67; 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, requested by the Armenian

It further follows from the description of the procedure that all advisory proceedings were conducted in writing. Thus, the Court did not avail itself of the option of organising a hearing. [133]

3.3 Form and content of advisory opinions issued so far

The opinions issued by the ECtHR until 1 June 2023 provide insight into the substantive assessment of a request for an opinion and the form the opinions ultimately take.

In terms of form, the six opinions issued have a similar structure. First, the proceedings before the ECtHR are briefly described, followed by a presentation of the questions contained in the request. Subsequently, the background to the proceedings at the national level is outlined and an overview of relevant national and international law is provided. In most advisory opinions, findings from a comparative law study carried out by the Court in the context of the request for an opinion are then presented. At the heart of the opinion is the reasoning, in which the Court first summarises the general principles it has formulated in its previous case law on the topic before it, which can be assumed to have *res interpretata*. The Court then argues how, in the light of those general principles, the questions raised in the request should be answered. The opinions conclude with a dictum summarising the Court's opinion. The voting pattern within the Grand Chamber on the various requests for advice then disclosed and some opinions contain separate opinions by judges who disagree with the outcome or reasoning of the majority of the Grand Chamber.[134] The structure of the opinions is thus very comparable to the structure of judgments of the Grand Chamber in relation to individual applications.

When it comes to dealing with the substance of the request for an advisory opinion, the Court consistently reiterates and emphasises the principles set out in Protocol 16 and its accompanying documents.[135] For instance, one of the Court's now established considerations is that it does not have the power to assess the facts of a case or the positions of the parties, nor to rule on the outcome of the proceedings conducted at the national level.[136] In line with this, the Court has stressed in its opinions that the purpose of the advisory opinion procedure is not to transfer the case to the Court, but to provide the requesting court with tools ('guidance') to enable it to settle the case at the national level. [137]

Supreme Court, ECtHR (GC) 26 April 2022, P16-2021-001, para. 55; Advisory opinion on the procedural status and rights of a biological parent in proceedings for the adoption of an adult, requested by the Finnish Supreme Court, ECtHR (GC) 13 April 2023, P16-2022-001, para. 46.

[133] Article 3 P16; Explanatory Memorandum, para. 21.

[134] So far, all opinions have been adopted unanimously, but there have been two occasions when a judge would have preferred a different reasoning to underpin the opinion; see Judge Sarvarian's concurring opinion to Advisory Opinion concerning the use of the 'blanket reference' or 'legislation by reference' technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of commission of the offence and the amended criminal law, requested by the Armenian Constitutional Court, ECtHR (GC) 29 May 2020, P16-2019-001 and Judge Harutyunyan's concurring opinion to 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, requested by the Armenian Supreme Court, ECtHR (GC) 26 April 2022, P16-2021-001.

[135] See further Section 2.2.

[136] Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, requested by the French Court of Cassation, ECHtR (GC) 10 April 2019, P16-2018-001, para. 25; Advisory Opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings, requested by the Lithuanian Supreme Administrative Court, ECtHR (GC) 8 April 2022, P16-2020-002, para. 61; 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, requested by the Armenian Supreme Court, ECtHR (GC) 26 April 2022, P16-2021-001, para. 53; Advisory opinion on the procedural status and rights of a biological parent in proceedings for the adoption of an adult, requested by the Finnish Supreme Court, ECtHR (GC) 13 April 2023, P16-2022-001, para. 44.

[137] Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, requested by the French Court of Cassation, ECtHR (GC) 10 April 2019, P16-2018-001, par. 25; Advisory Opinion concerning the use of the 'blanket reference' or 'legislation by reference' technique in the definition of an offence and the

This same principle is visible in the substantive answers the Court gives to the questions presented in a request. Unlike in a ruling in complaint proceedings, where the Court first formulates some general principles of interpretation and then applies them to the facts of the case, in opinions, the Court limits itself to the formulation of general principles of interpretation and only gives a suggestion to the questions raised in the request should be answered.[138] The opinions find themselves at a relatively high level of generality,[139] as the Court really leaves the final application of the general principles of interpretation to the facts of the case to the national court.[140] This can be illustrated by the opinion on the use of the 'legislation by reference' technique and the prohibition of retroactivity in criminal law. In the this opinion, the Court considered that the use of references to other criminal law provisions did not in itself violate Article 7 ECHR. Crucially, however, citizens must be able to foresee what conduct is punishable, which meant that referencing legislation itself must meet the requirements of clarity and foreseeability. According to the Court, the most effective way to meet these requirements was by explicitly referring to the underlying provision(s) in the criminal law provision in which the norm would find its origin. Furthermore, it held that the criminal law provision must contain the (punitive) components of the offence, so that the underlying provision(s) can only elaborate on the offence.[141] The Court then left it to the national court to assess whether these requirements have been met.[142]

A similar approach is visible in the opinion on unequal treatment of landowners' associations. In that opinion, the Court left it to the requesting court – the French Council of State – to assess whether the distinction made complied with Article 14 in conjunction with Article 1 Protocol 1 ECHR.[143] The opinion of the ECtHR only provided a framework of assessment for this evaluation and offered a number of relevant general standards. [144]

The Court may further mention the margin of appreciation doctrine in the reasoning of its opinions. By doing so, it makes clear how much leeway the national court has in the ultimate application of the general standards in the concrete circumstances of the case. For example, in the opinion on legal recognition of a parent-child relationship in the case of children born of surrogate motherhood, the Court considered that it must be possible under national law for the relationship between the child and the intended mother to be legally recognised. According to the Court, States have a fairly wide margin of appreciation as to how exactly legal recognition should be given shape, allowing choices to be made in this regard at national level. More specifically, the Court held, this means that

standards of comparison between the criminal law in force at the time of commission of the offence and the amended criminal law, requested by the Armenian Constitutional Court, ECtHR (GC) 29 May 2020, P16-2019-001, para. 43; Advisory Opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings, requested by the Lithuanian Supreme Administrative Court, ECtHR (GC) 8 April 2022, P16-2020-002, para. 61; 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, requested by the Armenian Supreme Court, ECtHR (GC) 26 April 2022, P16-2021-001, para. 53; Advisory opinion on the procedural status and rights of a biological parent in proceedings for the adoption of an adult, requested by the Finnish Supreme Court, ECtHR (GC) 13 April 2023, P16-2022-001, para. 44.

[138] This was already noted by Gerards and Mak in their case note on the first opinion issued by the ECtHR (Gerards & Mak 2019, para. 11). See also Buyse 2019 and Lavrysen 2019.

[139] With regard to the opinion on legislation by reference technique, for example, Cnossen and Gerards have argued that the ECtHR gives substantive advice, but does so at such a level of abstraction that it basically just passes the hot potato back to the constitutional court (Cnossen & Gerards 2020, para. 8).

[140] This approach has been criticised in the literature; see, e.g., Buyse 2019; Lavrysen 2019; Lavrysen 2020.

[141] Advisory Opinion concerning the use of the 'blanket reference' or 'legislation by reference' technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of commission of the offence and the amended criminal law, requested by the Armenian Constitutional Court, ECtHR (GC) 29 May 2020, P16-2019-001, paras 70-74. See also Cnossen & Gerards 2020, paras. 22-23.

[142] Advisory Opinion concerning the use of the 'blanket reference' or 'legislation by reference' technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of commission of the offence and the amended criminal law, requested by the Armenian Constitutional Court, ECtHR (GC) 29 May 2020, P16-2019-001, para 74.

[143] Advisory Opinion on the difference in treatment between landowners' associations "having a recognised existence on the date of the creation of an approved municipal hunters' association" and landowners' associations set up after that date, requested by the French Council of State, ECtHR (GC) 13 July 2022, P16-2021-002, para. 111.

[144] See also Askin 2023.

adoption by the intended mother can be a possible way to achieve legal recognition, as long as such a procedure meets the requirements of promptness and effectiveness and is consistent with the best interests of the child.[145] It was for the requesting national court to assess whether these requirements were met in the circumstances of the case. [146]

Hence, especially in more controversial issues, the Court only defines general standards in its advisory opinions. It is up to national courts to make their own choices, while taking into account the criteria formulated by the Court.

3.4 Conclusion

The advisory opinions issued until 1 June 2023 and the decision rejecting the Slovakian request for an advisory opinion show that in applying the advisory procedure, the ECtHR closely follows the structure of the advisory opinion procedure as set out in the Protocol and related documents. In deciding whether to consider requests for an advisory opinion, the Court gives considerable weight to whether the questions are sufficiently directly related to the domestic proceedings and whether answers to the questions are necessary for the domestic court to reach a judgment. In addition, even after the panel has accepted a request for an opinion, the Grand Chamber still considers itself competent not to consider or to reformulate certain questions, or, on the contrary, to add a question of its own.

The form and structure of the opinions is very similar to that of judgments of the Grand Chamber in individual complaint proceedings. When it comes to the substantive assessment, a clear difference is visible, however, in that the opinions have a relatively high level of abstraction and the Court chooses to focus on defining general principles of interpretation. The application is explicitly left to the national courts, which are often also granted a certain margin of appreciation. Thus, the Court does no more than provide the applicant court with some guidance for resolving the case at national level.

[145] Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, requested by the French Court of Cassation, ECtHR (GC) 10 April 2019, P16-2018-001, para. 55.
[146] See also Buyse 2019; Gerards and Mak 2019; Lavrysen 2019.

4. Approval and implementation of the Protocol in the Netherlands[147]

4.1 Introduction

For the Netherlands, the Protocol has entered into force at 1 July 2019. At that date, the treaty approval procedure had been completed, the approval act had been published in the Official Gazette [*Staatsblad*] and the necessary information about the designation of competent highest courts had been transmitted to the Secretary General of the Council of Europe.[148] Partly because Protocol 16 ECHR leaves some room for national interpretation of the procedure,[149] the approval law and its parliamentary history contain some interesting elements. In particular, the parliamentary documents show that in the bill of approval, the government has made some choices that seem to be based on the original Dutch-Norwegian proposal that formed the basis of the Protocol.[150] In addition, there was an extensive debate in the House of Representatives [*Tweede Kamer*] during the consideration of the approval law. The House of Representatives passed the approval bill on 16 May 2017. In the end, political parties CDA, D66, GroenLinks, SP, PvdA, PvdD and DENK voted in favour, while SGP, PVV, Forum voor Democratie, 50Plus, ChristenUnie and VVD voted against. The Senate accepted the proposal as a hammer piece, so no vote took place.[151] However, the PVV, SGP and ChristenUnie were granted an 'annotation' [*aantekening*], meaning that it was noted that if a vote had taken place on the bill, they would have voted against it.

To gain a good understanding of the Dutch parliamentary debate, as well as the Dutch highest courts' approach to their newly gained competence, it is worth discussing the choices made in relation to the procedure and some practical aspects (Section 4.2) and the more substantive discussions and the arguments exchanged there (Section 4.3).

4.2 Procedure and practicalities

The explanatory memorandum to the Adoption Act first clarifies which courts are authorised to submit requests for opinions to the Court. These are:

1. the Supreme Court [*Hoge Raad*]
2. the Administrative Law Division of the Council of State [*Afdeling bestuursrechtspraak van de Raad van State*]
3. the Central Board of Appeal [*Centrale Raad van Beroep*]
4. the Trade and Industry Appeals Tribunal [*College van Beroep voor het bedrijfsleven*]
5. the Common Court of Justice of Aruba, Curaçao, Sint Maarten and of Bonaire, Sint Eustatius and Saba [*het Gemeenschappelijk Hof van Justitie van Aruba, Curaçao, Sint Maarten en van Bonaire, Sint Eustatius en Saba*].[152]

At the time of ratification, a statement was made in which the government explained that the aforementioned courts do not have the authority to request an opinion if they are not acting as the court of last instance in the case before them.[153] The reason for this is cassation proceedings sometimes still can be brought before the Supreme Court when a case has been decided by one of the competent highest courts. This is the case, for example, for judgments of the Common Court and the Central Appeals Council, so that the Supreme Court should be considered the highest court in those cases. For the Common Court in particular, this means that its power to request opinions is largely limited to its role in the field of administrative law, now that cassation appeals to the Supreme Court can be lodged in most other (e.g. civil law) cases.

[147] This chapter is an edited version of Gerards 2017.
[148] *Staatsblad* 2019, 8; see also www.conventions.coe.int.
[149] Cf. also Thorarensen 2016, p. 87.
[150] The proposal bears number DH-S-GDR(2009)004, but does not appear to be digitally accessible. However, the key points can be found in CDDH 2012 and ECtHR 2012.
[151] See *Handelingen Eerste Kamer* 2018/2019, no 10, item 5.
[152] Explanatory Memorandum, *Kamerstukken II* 2014/15, 34235, no. 3, pp. 5-6.
[153] Explanatory Memorandum, *Kamerstukken II* 2014/15, 34235, no. 3, p. 6. On this criterion, see further Sicilianos 2014, p. 16; O'Leary & Eicke 2018, p. 5.

The explanatory memorandum to the approval bill contains a number of clarifications regarding the procedure that has to be followed in the Netherlands when making a request for an advisory opinion is considered. According to the government, when a competent court is considering this, it must discuss this with the parties, also in view of the delay that a request for an advisory opinion will cause in the proceedings. If the parties object, it is nevertheless up to the court to assess whether it wants to file the request anyway. [154]

Once the highest court has decided that it wants to request an opinion, it will have to collect and present all necessary information on the relevant legal and factual background of the case before it. According to the government, the relevant documents may be drafted in Dutch.[155] The government has left open who is responsible for translating these documents into one of the official working languages of the ECtHR.

The request for an opinion should, according to the explanatory memorandum, at least address the legal question in the pending case, the relevant facts as established in the national proceedings, the relevant provisions of national laws and regulations, the relevant Convention provisions at issue, a summary of the legal arguments of the litigants, and, if possible and to the extent appropriate, a statement of the highest court's own analysis.[156] When opting to make such a preliminary analysis, according to the government, the highest court does have to be careful not to be accused of bias.[157] Indeed, the court should not prejudge the final assessment it will make once it has received the Court's opinion. Furthermore, the government considers it reasonable for the court to submit the factual record to the parties before sending it to the ECtHR. It is not clear from the explanatory memorandum what should happen if a dispute arises between the parties about the representation of the facts.

Once the ECtHR has completed the procedure, the resulting advisory opinion will be sent directly to the requesting court.[158] The explanatory memorandum states that the Ministry of Justice and Security will provide a translation of the advisory opinion into Dutch, which it will send to the competent court within 30 days.[159] According to the government, the highest court can then be expected to form its opinion on the case and render judgment with due regard to the opinion given by the Court.[160]

4.3 Points of discussion surrounding the approval of Protocol 16 in the Netherlands

In the parliamentary debate on the approval of Protocol 16, several points of discussion emerged. The various contentious points and the expectations expressed in the approval process regarding the Protocol are reviewed below. Issues and risks that have been raised in the literature, but do not play a specific role in the Dutch debate, are not specifically discussed.[161]

4.3.1 Dialogue and subsidiarity

Section 2.1.2 showed that the main objective of Protocol 16 is to facilitate a dialogue between national highest courts and the ECtHR.[162] There was quite some debate in the House of Representatives about this objective. The PVV and SGP claimed that the Protocol could have the effect that a non-democratically legitimised body could set aside democratically legitimised

[154] This is less obvious than it seems; see further Thorarensen 2016, p. 96.
[155] Explanatory Memorandum, *Kamerstukken II* 2014/15, 34235, no. 3, p. 7.
[156] Ibid.
[157] Ibid.
[158] Article 4(3) P16.
[159] Explanatory Memorandum, *Kamerstukken II* 2014/15, 34235, no. 3, p. 9.
[160] Ibid.
[161] See in this regard, e.g. Dicosola, Fasone & Spigno 2015, p. 1405f, where they discuss the strategic use that highest courts in some States may make of the protocol to determine their position vis-à-vis that of other national highest courts. To the extent relevant, these points are addressed in Section 6.4, discussing the considerations that highest courts themselves have put forward in order to submit requests for opinions to the ECtHR.
[162] Preamble Protocol 16; CDDH 2012, para. B.3; ECtHR 2012, paras. 6-9; ECtHR 2013, para. 4. See further Gerards 2013 and 2014; Paprocka & Ziółkowski 2015, p. 277. See also already the Brighton Declaration, High Level Conference about the Future of the ECtHR, 19-20 April 2012, para 12(d). Extensively on the background: Dzehtsariou & O'Meara 2014, p. 453ff; Voland & Schiebel 2017, p. 75ff.

legislation.[163] On the contrary, a majority in parliament supported the idea of judicial review of ECHR rights, whether through the ECtHR or by national courts. [164]

A related debate concerned the subsidiary position of the ECtHR, also mentioned in Chapter 2. On this point, the government emphasised that the basic premise of the ECHR system is that fundamental rights protection should be provided primarily by national authorities,[165] but it did acknowledge that the Convention explicitly established an interpretative and supervisory role for the ECtHR.[166] According to both the government and the Advisory Division of the Council of State [*Afdeling Advisering van de Raad van State*], the value of the Protocol is that each court can properly perform its own duties, in line with the principle of subsidiarity.[167] Nevertheless, the fear of some Members of Parliament and also of the Advisory Division of the Council of State was that the national courts' own space could be limited because of the *res interpretata* of the well-established, general principles developed by the ECtHR.[168] However, the government noted that it had no reason to believe that Protocol 16 would suddenly put national courts on a tighter leash, or that the ECtHR would leave national courts with much less margin of appreciation in requests for opinions than in judgments.[169] On the contrary, the government emphasised: by means of a request for an advisory opinion, the national highest courts could themselves take the lead in the dialogue with Strasbourg by making clear which questions they would like to see answered.[170] This would allow them more control over the dialogue than when an individual application would be lodged after all domestic remedies had been exhausted.[171]

4.3.2 Political waters

A second topic of discussion concerned the perceived risk that national courts would start passing on sensitive, political issues to the Court via a request for an advisory opinion.[172] This could put the ECtHR in a difficult position, especially as it was already often criticised for its rulings. Both the Council of State's Advisory Division and some political groups were concerned about this.[173] However, the government hardly saw any risk here and called it speculative.[174] It also pointed out that controversial issues could already come to the Court through the regular individual applications procedure.[175]

4.3.3 (Non-)binding nature of advisory opinions

As discussed in Chapter 2, when interpreting and applying an advisory opinion under Protocol 16, the national court is bound to comply with the well-established interpretations given by the ECtHR.[176] However, the national court may deviate from the concrete suggestions made by the ECtHR to apply this interpretation in the circumstances of the case. This being the case, there was some discussion during the deliberations on the approval bill as to how 'open' the actual opinion would actually be. The Advisory Division of the Council of State noted that there would in fact not be that much room to deviate from the ECHR opinion, as individual litigants could still file an application at the ECtHR afterwards. According to the Advisory Division, there would not be much chance that the ECtHR would then accept a deviation from its opinion as compatible with the Convention. As a result, even

[163] Or, in the words of the PVV: 'Like a hungry tiger devours its prey, the judges of the ECHR have invalidated laws as we in the Chamber have democratically made them' (*Handelingen II* 2016/17, 73, item 7, p. 2).
[164] *Handelingen II* 2016/17, 73, item 7, p. 8 and 10.
[165] See further Gerards 2014, p. 17f.
[166] Ibid; see Article 32 ECHR.
[167] See the Preamble to the Protocol and see *Kamerstukken* 2014/15, 34235, no. 4, p. 4. Cf. also Thorarensen 2016, p. 80.
[168] E.g. *Handelingen II* 2016/17, 73, item 7, p. 1 (VVD).
[169] *Nota naar aanleiding van het Eindverslag*, *Kamerstukken II* 2014/15, 34235, no 7, pp 2-3.
[170] *Handelingen II* 2016/17, 73, item 7, p. 9 and 11.
[171] Not all MPs believe in this, by the way; see *Handelingen II* 2016/17, 73, item 7, p. 11 (SGP).
[172] See also Gerards 2017, p. 318; Eckhardt & Bakker 2018, p. 1885; Glas & Krommendijk 2022, p. 329.
[173] *Kamerstukken II* 2014/15, 34235, no. 4, p. 5.
[174] Nader Report, *Kamerstukken II* 2014/15, 34235, no. 4, p. 7 and 11. Glas & Krommendijk (2022, p. 333-334) also indicated that they consider this risk to be limited.
[175] Ibid.
[176] Ibid, p. 10. On this, see also Section 1.2.4.

the opinion itself might *de facto* turn out to be binding after all.[177] In response to questions about this from several political parties,[178] the government expressed little concern; it expected the Court to show an understanding of national considerations.[179]

The government did recognise that the *res-interpretata* nature of the Court's advisory opinions would mean that they could have wider relevance than just for the pending court case. It considered it not inconceivable that adjustments to legislation or policy might be useful or necessary to do justice to the ECtHR's interpretation, because the requests for opinions would often concern issues of principle and importance.

In the end, although the government advised against this,[180] the House of Representatives subsequently accepted a parliamentary request [*motie*] by MP Özütok, asking the government to inform it when an advisory opinion was issued.[181] This would then allow the House of Representatives to debate the consequences of the opinion with the government.

4.3.4 Impact on workload at the ECtHR

Paragraph 2.1.2 discussed that the drafters of the Protocol expected that – in the longer term – the advisory opinion procedure could lead to a reduction in the case load of the ECtHR.[182] However, both the Advisory Division of the Council of State and several political groups expressed concern that in the short term the requests for an opinion would lead to an additional burden – the so-called 'bow wave effect'.[183] Dealing (with priority) with the requests for opinions would seem to be quite demanding for the Court.

In its response, the government stressed that certain issues of principle and difficult interpretation could lead to many similar cases.[184] If the Court would receive all these as individual applications, it would have a lot of work in having to dispose of all of them individually. A request for an advisory opinion would allow such an issue to be referred to the ECtHR at an early stage and allow it to give an authoritative opinion on it. National courts could then apply the Court's interpretation not only in the specific case, but also in all other similar cases. If that were done properly, those cases would ultimately not have to go to the ECtHR or could be easily held to be inadmissible.[185] Or, as the States of Aruba put it in their Report accompanying the approval proposal: in many cases, the Protocol could save people a costly and lengthy trip to Strasbourg.[186]

4.3.5 Delays in national judicial procedures

Another issue concerned the consequences of the delay in the national proceedings that requesting an advisory opinion would inevitably cause.[187] In an opinion issued in the context of the adoption procedure, the Council for the Judiciary [*Raad voor de Rechtspraak*] estimated the delay to be two years.[188] Some political parties questioned whether the national highest court (or eventually even the ECtHR) should count the duration of those proceedings towards the reasonable time requirements of Article 6 ECHR.[189] However, the government considered it plausible that the delay

[177] *Kamerstukken II* 2014/15, 34235, no. 4, p. 7-8. The literature has also sometimes assumed that the legal significance will be greater than that of an 'ordinary' judgment; see, e.g., Voland & Schiebel 2017, p. 83; Swaanenburg-Van Roosmalen & Vermeulen 2019, p. 10.
[178] *Verslag*, *Kamerstukken II* 2014/15, 34235, no. 5, p. 2-3 (VVD, PvdA); *Handelingen II* 2016/17, 73, item 7, p. 4 (SGP).
[179] *Verslag*, *Kamerstukken II* 2014/15, 34235, no. 7, p. 2-3.
[180] *Handelingen II* 2016/17, 73, item 7, p. 12.
[181] *Kamerstukken II* 2016/17, 34235, no. 11; *Handelingen II* 2016/17, 75, item 14, p. 1.
[182] See, e.g., CDDH 2012, para. 3a, but also 4b and 4c; ECtHR 2012, paras 13-16; Gerards 2013, p. 518. See also *Verslag*, *Kamerstukken II* 2014/15, 34235, no. 7, p. 4.
[183] *Handelingen II* 2016/17, 73, item 7, p. 9.
[184] *Verslag*, *Kamerstukken II* 2014/15, 34235, no. 7, p. 4.
[185] *Handelingen II* 2016/17, 73, item 7, p. 9.
[186] *Kamerstukken II* 2014/15, 34235, no 6.
[187] See further Jóźwicki 2015, p. 200.
[188] This was supported by the government; cf. *Explanatory Memorandum*, *Kamerstukken II* 2014/15, 34235, no. 3, p. 8; *Handelingen II* 2016/17, 73, item 7, p. 9. The ECtHR itself also sees the importance of this; see ECtHR 2012, para. 39; ECtHR 2013, para 13.
[189] E.g. *Verslag*, *Kamerstukken II* 2014/15, 34235, no. 5, p. 6 (CDA, D66). On this risk, see also Thorarensen 2016, p. 92; Eckhardt & Bakker 2018, p. 1884.

in the domestic proceedings need not count towards the reasonable time requirement, at least not any more than it does when preliminary questions have been referred to the Court of Justice of the European Union (hereinafter: CJEU).[190] Moreover, should it take too long for the ECtHR to issue an advisory opinion, the national highest court could always withdraw the request for an opinion. [191]

4.3.6 Limited relevance to the Netherlands

Another debate in the House of Representatives concerned whether the Protocol, given its objectives, would be relevant for the Netherlands in the first place. Some members of parliament argued that Dutch courts already do very well when it comes to ECHR implementation and application. The need for effective implementation, and thus for an effective dialogue between ECtHR and national judges, would, according to some political parties, be much greater in states where there are structural problems with ECHR application, such as Azerbaijan or Turkey. They therefore wondered whether an investment should not rather be made in stimulating ratification of the Protocol by those States[192] – but the government noted this was beyond its control[193] .

4.3.7 Concurrence with the preliminary ruling procedure before the CJEU

Finally, there was a discussion about the possible concurrence with a preliminary ruling procedure at the CJEU in Luxembourg. Neither the Protocol itself nor the explanatory memorandum to it contained any information about the relationship between the two European courts.[194] The Protocol therefore did not provide any answer to the question of what should happen if a national court first requests an advisory opinion from the Strasbourg Court and then submits another preliminary ruling request to the Luxembourg Court, or vice versa, or at the same time.[195] The government did not address this issue in its explanatory memorandum to the approval bill.[196] In the parliamentary debate, the members of parliament for the SP asked whether the proceedings before the CJEU should take precedence because they are 'compulsory', but the minister left this question unanswered.[197] The Advisory Division of the Council of State only indicated in its opinion that it would not be desirable for judges to go to the two courts at the same time.[198] The government ultimately indicated that it would leave it to the courts themselves to assess how they should deal with this.[199]

4.4 Conclusion

In the Dutch ratification process, numerous points of discussion have been raised. In part, these were substantive in nature, especially when it came to the added value attributed to a constructive dialogue on fundamental rights between national highest courts and the ECtHR. In another part, the arguments were more practical or related to the uncertain effects of the Protocol. For example, it was not clear at the time of ratification how much need there would be for the dialogue procedure, what impact it might have on pending domestic proceedings, what the consequences would be for the ECtHR and how the preliminary ruling procedure and the advisory opinion procedure would relate to each other. Nor was it clear at the time of ratification how often the procedure would actually be

[190] *Explanatory Memorandum*, *Kamerstukken II* 2014/15, 34235, no. 3, p. 8. See in this sense also Swaanenburg-van Roosmalen & Vermeulen 2019, p. 16; Glas & Krommendijk 2022, p. 323.
[191] *Verslag*, *Kamerstukken II* 2014/15, 34235, no. 7, p. 8. This is confirmed by the *Explanatory Memorandum*, para. 7. See also Thorarensen 2016, p. 89.
[192] *Verslag*, *Kamerstukken II* 2014/15, 34235, no. 7, p. 10 (CDA), p. 4; *Handelingen II* 2016/17, 73, item 7, p. 3 (PVV).
[193] *Verslag*, *Kamerstukken II* 2014/15, 34235, no. 7, p. 10.
[194] The CJEU found herein an argument for advising against the EU's accession to the ECHR on the basis of the draft Accession Agreement; see Opinion 2/13 of the CJEU of 18 December 2015, «EHRC» 2015/65 (case note Krommendijk, Beijer & Van Rossem), *NJ* 2015/140 (case note Alkema), paras. 196-199. See also Dicosola, Fasone & Spigno, p. 1412-1413.
[195] On these scenarios and the possibilities for national courts of forum shopping, see Gerards 2014b; Eckhardt & Bakker 2018, p. 1886; Voland & Schiebel 2017, p. 89; Lemmens 2019, p. 707ff.
[196] *Kamerstukken II* 2014/15, 34235, no. 4, p. 9
[197] *Handelingen II* 2016/17, 73, item 7, p. 6. Moreover, this solution has more often been proposed as a possibility to overcome the blockade of EU accession to the ECHR; see, e.g., Peers 2014; Jóźwicki 2015, p. 204.
[198] *Kamerstukken II* 2014/15, 34235, no. 4, p. 10.
[199] *Kamerstukken II* 2014/15, 34235, no. 3, p. 4. See also Eckhardt & Bakker 2018, p. 1886.

used. This makes it the more interesting to examine how the newly created power is handled in practice. That question is addressed in chapters 6 and 7 of this report.

5. Ratification in other countries

5.1 Introduction

Not only in the Netherlands, but also in many other countries, there has been discussion around the ratification of Protocol 16. In 27 States, that discussion has resulted in the Protocol not (yet) being signed and/or ratified, such as in Denmark and Norway.[200] In other countries, the process of signature and ratification has taken a long time. In Belgium, for example, the Protocol, which was opened for signature in October 2013, was signed on 8 November 2018. Only five years later, on 1 March 2023, the Protocol entered into force for Belgium. In a third group of States, the ratification process went quite smoothly. Albania and Estonia, for example, signed the Protocol in 2014 and approval there followed in 2015 and 2017, respectively. Luxembourg signed the Protocol relatively late, in 2018, but then ratified it in 2020. Especially in the States that adopted the Protocol relatively soon after signing, there proved to be little objection in parliament to the advisory opinion procedure. In Estonia, the adoption of the Protocol was supported by a significant majority. The Estonian parliament, consisting of 101 parliamentarians, adopted the approval law by 80 votes to 7, with 14 members not being present at the vote. In Luxembourg, interlocutors indicated that the approval was even unanimously supported. In Belgium, although the Belgian ratification process took a long time, in the end there was considerable support for it: the bill of approval was passed by the parliamentary committee for foreign affairs with 10 votes in favour and 3 abstentions.[201]

The often somewhat erratic processes and the large differences between Council of Europe Member States show that the Protocol is not uncontroversial. In the light of the debate in the Netherlands, it may be interesting to know what considerations and discussions have arisen in other countries and what arguments have been important in not signing and/or ratifying the Protocol or doing so with significant delays, or, on the contrary, having a smooth process of approval. To identify and understand the various considerations and arguments, experts and government stakeholders from six states have been interviewed in writing for the purpose of this study: Albania, Belgium, Denmark, Estonia, Luxembourg and Norway.[202] The findings from the respondents' written reports are presented thematically below. Where public information is available on the ratification process or national discussions, this has also been drawn from. Only in those cases is the information traceable to the respective State.

5.2 Arguments and considerations in ratification debates in other countries

5.2.1 Dialogue and enhanced fundamental rights protection

In almost all national ratification debates studied, it was argued that the main added value of the Protocol would be to promote (constructive) dialogue between the (courts in the) States and the ECtHR. In addition, it was mentioned as an advantage in several countries that fundamental rights issues can already be resolved at the national level. One respondent noted that this could improve the level of fundamental rights protection, while another stressed that it could promote a debate on a universal understanding of human rights and bring the ECHR system closer to citizens.

For several countries, respondents further pointed at the advantage for litigants of clarity on a fundamental rights issue without having to go through the lengthy proceedings before the ECtHR themselves. For example, in the Norwegian discussion (which, eventually, has not led to ratification) it was mentioned that it will be advantageous for parties if an opinion is requested, as it can take a long time after a final judgment by the highest national court for the ECtHR to rule on an individual

[200] Per 1 June 2023, of the 46 Member States of the Council of Europe, 19 have ratified the Protocol. There are 6 States that have signed but not ratified the Protocol, including Norway. Of the 46 Member States, 21 have not signed the Protocol, including Denmark. For the current status of signature and ratification, see www.conventions.coe.int.

[201] See Draft Law on Consent to Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Strasbourg on 2 October 2013, Report on behalf of the Committee on External Relations, 25 May 2022, Doc. 55 2631/002, p. 9-10.

[202] For a detailed description of the methods, see Section 1.3.

application.[203] In the meantime, moreover, national law might change without the legislature being able to take into account the ECtHR's ruling. Then, when an ECtHR judgment would eventually be handed down, the consequences might be unclear for the parties involved and others in a similar position. That situation could be avoided if an advisory opinion could be requested already during national proceedings.

Moreover, some mentioned that the early clarification of interpretation matters could be beneficial not only for litigants, but also for the State. The reason for this is that already having provided an advisory opinion in some situations could prevent the ECtHR from finding that the State has violated the ECHR in individual application proceedings. [204]

In addition, the argument has been made that the opinions could benefit the quality of the national legal system as a whole. Specifically for Norway, it was pointed out that it is now possible for the national highest court to leave certain issues of principle unaddressed because international law does not prescribe an unequivocal outcome.[205] This was argued to the case in climate cases, for example, which could easily lead to a legal void. Requesting an advisory opinion could help clarify the interpretation of international law and could thus lead to more unambiguous and clearer national case law. However, this argument has not prompted ratification in Norway.

Unlike the governments of ratifying States, the Danish government saw no added value of the Protocol for dialogue and legal protection.[206] The Danish Supreme Court had already noted in an opinion to the government that it deemed the advisory procedure before Danish highest courts unnecessary. The Supreme Court did not feel it lacked such a procedure or needed further explanation of the ECHR. In addition, the Supreme Court expected that requests for opinions would probably only be made in exceptional cases.[207] The Danish justice minister embraced these considerations and decided that there was no reason to submit the protocol for parliamentary approval.

5.2.2 Subsidiarity; impact on national sovereignty and autonomy of national courts

In several States the approval of the Protocol has been debated in terms of the principle of subsidiarity. In these debates, the arguments appear to go two ways. On the one hand, a number of national discussions highlighted the benefits of the Protocol from the perspective of subsidiarity.[208] In two States, there was enthusiasm for the greater degree of participation that the Protocol would offer national courts and other national actors in the ECtHR proceedings, especially compared to the individual application procedure at the Court. On the other hand, in several States the risk of excessive interference by the ECtHR in national law was highlighted, as well as of a lack of respect for the principle of subsidiarity, national sovereignty and the autonomy of national highest courts. In Belgium, some politicians even feared that the ECtHR could issue advisory opinions that would be an attack on national democracy.[209] There was also some apprehension that the ECtHR could become overly controlling if many requests for advisory opinions were addressed to the Court.[210] This could be particularly problematic if the advisory opinions were strictly worded, leaving little room for interpretation by national courts.

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[203] Haukeland Fredriksen 2021.
[204] E.g. Danish Human Rights Institute, *Consultation on Protocol No 16 to the European Court of Human Rights*, 3 September 2013, at https://menneskeret.dk/sites/menneskeret.dk/files/media/researchpublications/hoeringssvar/høringsvar_afgivet_i_2013/september_2013/90_b_emrk_protokol_16.pdf.
[205] Haukeland Fredriksen 2021.
[206] See Justitsministeriet – Lovafdelingen [Law Department of the Ministry of Justice of Denmark], *Notits om protokol nr. 16 til Den Europæiske Menneskerettighedskonvention* [Notice on Protocol No. 16 to the European Convention on Human Rights], 9 May 2016, Retsudvalget 2015-16 REU Alm.del Bilag 362 Offentligt, via https://www.ft.dk/samling/20151/almdel/REU/bilag/362/1646344/index.htm.
[207] Ibid., quoting Danish Supreme Court opinion.
[208] See e.g. Draft Law on Consent to Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Strasbourg on 2 October 2013, Report on behalf of the Committee on External Relations, 25 May 2022, Doc. 55 2631/002, pp. 4-5.
[209] Ibid., p. 9.
[210] Ibid., p. 5.

In Denmark, such a discussion about the relationship between the national highest courts and the ECtHR seems to be an important explanation for Denmark's lack of ratification. In an opinion to the government, the Danish Human Rights Institute had recommended adopting the Protocol, not only because it would promote a constructive dialogue, but also because the Protocol could reduce the risk of Danish highest courts going against the rulings of the ECtHR with their judgments – something that has already happened a number of times.[211] However, the Danish Supreme Court indicated that it did not need the ECtHR's opinions, a position that the Danish government supported.[212]

Respondents further pointed to the general political and policy context within certain States as an explanation for the lack of ratification. According to them, the lack of enthusiasm for the Protocol might reflect general political trends and the judicial climate in the States. According to these respondents, many politicians object to the idea of transferring powers to a supranational level. In one State, political parties in recent years even advocated the denunciation of the ECHR because of its impact on national law and policy. For the same State it was also reported that there seemed to be misgivings about active cooperation with European and international institutions more generally. In such a climate, it is difficult to find support for ratification.

5.2.3 (Non-)binding nature of advisory opinions

In several States the issue has been raised of the ECtHR advisory opinions being not binding, but having some binding legal force nonetheless. In this regard, one respondent pointed out that it is difficult to see how a national court could apply the binding general principles in the concrete case without coming to the same conclusion as the ECtHR in its non-binding advisory opinion. Another respondent noted that the outcome proposed by the Court in an advisory opinion would probably also be the outcome it would reach in an individual application procedure. According to this respondent, and knowing that Protocol 16 allows an individual applicant to start proceedings in Strasbourg even after an advisory opinion procedure, it would therefore be prudent for national judges to follow the Court's advice. Hence, these respondents considered the opinions (indirectly) to be quite strongly binding, but they also stated that this factor did not play a very large role in the national discussions about ratification.

The Danish Human Rights Institute, in its opinion on the ratification of Protocol 16, argued that it was actually unfortunate that the opinions are not binding.[213] If a national court does not follow an opinion, this might necessitate or incentivise an individual party to still file an application with the ECtHR. If the advisory opinions had been given binding legal force, moreover, the Council of Europe's Committee of Ministers could have been tasked with supervising national compliance. This could have relieved the ECtHR of a considerable burden. However, the reports obtained do not indicate to what extent this argument played a role in the ratification debate in Denmark or elsewhere.

5.2.4 Impact on the ECtHR's workload and the proceedings before the ECtHR

The potential workload implications of Protocol 16 for the ECtHR are estimated and assessed differently in the different countries. In some States it has been suggested that the case load could be reduced if the procedure is used properly, as national highest courts can submit questions of

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[211] Menneskeret [Human Rights Institute of Denmark], Høring om protokol nr. 16 til den Europæiske Menneskerettighedsdomstol, *Consultation on Protocol No. 16 to the European Court of Human Rights*, 3 September 2013, at https://menneskeret.dk/sites/menneskeret.dk/files/media/researchpublications/hoeringssvar/høringsvar_afgivet_i_2013/september_2013/90_b_emrk_protokol_16.pdf.

[212] Justitsministeriet - Lovafdelingen [Law Department of the Ministry of Justice of Denmark], *Notits om protokol nr. 16 til Den Europæiske Menneskerettighedskonvention* [Notice on Protocol No. 16 to the European Convention on Human Rights], 9 May 2016, Retsudvalget 2015-16 REU Alm.del Bilag 362 Offentligt, via https://www.ft.dk/samling/20151/almdel/REU/bilag/362/1646344/index.htm.

[213] Menneskeret [Human Rights Institute of Denmark], Høring om protokol nr. 16 til den Europæiske Menneskerettighedsdomstol, *Consultation on Protocol No. 16 to the European Court of Human Rights*, 3 September 2013, at https://menneskeret.dk/sites/menneskeret.dk/files/media/researchpublications/hoeringssvar/høringsvar_afgivet_i_2013/september_2013/90_b_emrk_protokol_16.pdf.

interpretation to the ECtHR at a relatively early stage and can heed the Court's interpretation in their judgments. As a result, especially in repetitive or trivial cases, fewer individual complaints could ultimately be brought against the State in question. However, this argument does not seem to have had much significance in national approval discussions. Only a member of the parliamentary committee in Belgium noted that the limited number of opinions issued up until that moment (May 2022) showed that little seemed to come of the hoped-for beneficial impact on the Court's workload.[214]

In Denmark, the Human Rights Institute, in an opinion to the government, pointed out the risk of increasing the workload at the ECtHR, especially due to the possibility of lodging an individual application after the opinion.[215] This could be unnecessarily time-consuming, as, according to the Human Rights Institute, there would be a high probability that the ECtHR will rule in line with the national court following an advisory opinion. Thus, the added value of such an individual application would be limited. The number of individual applications to be filed after an advisory opinion procedure could be lowered if litigants were given the opportunity to file their own observations in the advisory opinions procedure.[216]

5.2.5 Impact on national procedures

In several States, it has been objected that the advisory opinion procedure could lead to more lengthy domestic proceedings since the opinion of the ECtHR will have to be awaited before a final judgment can be made. According to one respondent, it took considerable time and energy in the ratification process to convince concerned actors that the usefulness of the advisory procedure would outweigh the disadvantages in terms of longer duration of the national procedure. At the same time, another respondent pointed out – without further argument – that ratification could lead to speeding up national procedures on fundamental rights.

The procedure was also said to potentially increase the workload of national highest courts. In Denmark, for example, it has been pointed out that it would put a considerable strain on the available time and capacity of the Danish highest courts if parties were to ask for an advisory opinion.[217] In Belgium, too, some politicians mentioned the additional costs that would be involved in preparing a request for an advisory opinion.[218]

A Norwegian expert has argued that the Protocol also could save time for highest courts if used properly.[219] The argument is that debates and deliberations on questions of principle in highest courts are very time-consuming, especially if the largest formations of the domestic court are involved. If some of these questions could be referred to the ECtHR, the Norwegian Supreme Court could decide to hear the case in a smaller formation, thus freeing up judicial resources to hear more cases in other areas of law.

5.2.6 National procedural constraints

In several States, adjustments to national procedural rules appeared necessary to facilitate the entry into force of Protocol 16. For instance, legislation had to be adapted to give the designated highest

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[214] Ibid.
[215] Menneskeret [Human Rights Institute of Denmark], Høring om protokol nr. 16 til den Europæiske Menneskerettighedsdomstol, *Consultation on Protocol No. 16 to the European Court of Human Rights*, 3 September 2013, at https://menneskeret.dk/sites/menneskeret.dk/files/media/researchpublications/hoeringssvar/høringsvar_afgivet_i_2013/september_2013/90_b_emrk_protokol_16.pdf.
[216] That possibility already exists, as discussed in Section 2.2.3.
[217] Justitsministeriet – Lovafdelingen [Law Department of the Ministry of Justice of Denmark], *Notits om protokol nr. 16 til Den Europæiske Menneskerettighedskonvention* [Notice on Protocol No. 16 to the European Convention on Human Rights], 9 May 2016, Retsudvalget 2015-16 REU Alm.del Bilag 362 Offentligt, via https://www.ft.dk/samling/20151/almdel/REU/bilag/362/1646344/index.htm
[218] See Draft Law on Consent to Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Strasbourg on 2 October 2013, Report on behalf of the Committee on External Relations, 25 May 2022, Doc. 55 2631/002, p. 5.
[219] Haukeland Fredriksen 2018.

courts also national jurisdiction to submit a request for an advisory opinion. In Belgium, an issue surrounding the national division of jurisdiction between highest courts even seems to be the main explanation for the long duration of the approval process. Indeed, the question soon arose as to how the advisory procedure should fit into the relations between the Belgian Constitutional Court and the Belgian highest courts that also have jurisdiction for constitutional review: the Court of Cassation and the Council of State.[220] In the end, the outcome of the discussion on this subject was, in the (translated) words of the explanatory memorandum, that "the Court of Cassation and the Council of State are obliged to consult the Constitutional Court first and comply with this response, before sending a request for an opinion to the European Court".[221]

5.2.7 Uncertainty about consequences

Finally, several reports reveal that there is considerable uncertainty at the national level about the consequences of the advisory procedure. Some States first want to see how the advisory procedure takes shape in practice and what consequences it has, before they concretely consider ratifying the Protocol. To some extent, moreover, in non-ratifying States, it appears relevant that other, like-minded States have also not yet decided to ratify the Protocol. This could lead to States waiting for each other. In response, the argument has been raised that ratification could serve as an example. Arguably, for instance, ratification by a State like Norway could put some pressure on Council of Europe Member States that have so far not been so interested in the Protocol.[222] Nevertheless, such arguments have not yet convinced the Norwegian government that the Protocol should be approved. Although a new cabinet took office in 2021, it has not yet made any moves towards ratification.[223]

In this context, it is notable that in Belgium, which ratified the Protocol only after the ECtHR had already issued two advisory opinions, there is no mention in public documents of these opinions and the Court's approach to them. This is all the more surprising as there some hesitations were expressed earlier in the debate about how the ECtHR would handle its new competence. Were it to formulate its advisory opinions very strictly and in great detail, the government felt there would be little room for interpretation for the states and that could be problematic.[224] In the end, however, the Court's approach in the first two opinions did not have any noticeable impact on the debate.

Nevertheless, one respondent has pointed out that the opinions offer a lot of room for national courts to apply them in their own national context. According to this respondent, the opinions strike a good balance between providing direction and being general in nature. In addition, according to the respondent, it should be taken into account that the Court itself is also still somewhat uncertain when it comes to shaping its opinions. Another respondent pointed out that an important innovation of the procedure is that reasoned admissibility decisions are given by a panel. Moreover, by making it clear whether opinions are unanimous or only supported by a majority, and by making it possible to add separate opinions, the Court could offer considerable clarity on the meaning of an advisory opinion. For States that have yet to ratify the Protocol, this kind of nuance could be significant.

5.3 Conclusion

The discussions in six European states show that many of the exchanged arguments and concerns mirror the ones expressed in the Dutch approval process. In most States, there was at least some discussion about the benefits of the Protocol in terms of dialogue, improved legal protection, reduced burden on litigants, subsidiarity, and reduction of the Court's workload, but also about its disadvantages in terms of impact on national (judicial) sovereignty and autonomy, costs and delays in national proceedings and increased workload.

[220] On this debate in general terms, see Popelier 2016. See specifically on Protocol 16 Draft Law on Consent to Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Strasbourg on 2 October 2013, Explanatory Memorandum and Opinion of the Council of State, 14 April 2022, Doc 55 2631/001.
[221] Ibid., p. 6.
[222] Haukeland Fredriksen 2018.
[223] Haukeland Fredriksen 2021. On the plans of the preceding cabinet, see Kolsrud 2018.
[224] Draft law giving assent to Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Strasbourg on 2 October 2013, Explanatory Memorandum, 14 April 2022, Doc. 55 2631/001, p. 5.

In the States that have not (yet) ratified the Protocol, the main explanation for their reluctance seems to be that the added value of the advisory power is considered relatively limited, whereas there are major concerns about the unclear consequences of the Court's advisory competence and the risks to national sovereignty and autonomy. Especially in these States, there is a wish to wait and see how the procedure develops and which other states ratify the Protocol.

For Belgium, the long duration of the ratification procedure is mainly explained by the question of how the power of highest courts to request advisory opinions relates to the respective powers of those highest courts and the Belgian Constitutional Court to review the Constitution in fundamental rights cases. That issue does not arise in the Netherlands, at least until a constitutional court is established.

In the states that ratified quickly, the approval processes were without exception swift and smooth. While some concerns were raised there too, extensive discussions rarely took place. Moreover, as in the Netherlands, the counterarguments there did not produce any tangible obstacles.

Finally, it is interesting to note that none of the national respondents' reports discussed in detail the concurrence with the preliminary ruling procedure before the CJEU. While it has sometimes been speculated that this point might influence ratification debates,[225] and indeed this point was raised in the Dutch parliamentary deliberations on approval, this does not emerge from the reports for the six States surveyed.

[225] Haukeland Fredriksen 2018.

6. Requests for advisory opinions in the Netherlands

6.1 Introduction

In its opinion on the adoption of Protocol 16, the Council for the Judiciary [*Raad voor de Rechtspraak*] noted that it expected that the Central Appeals Council [*Centrale Raad van Beroep*, hereinafter 'CRvB'] and the Administrative Law Division of the Council of State [*Afdeling Bestuursrechtspraak van de Raad van State*, hereinafter: 'ABRvS'] together would submit some six to seven requests for an advisory opinion to the ECtHR per year.[226] So far, this expectation has not materialised: since the Protocol entered into force for the Netherlands on 1 July 2019, not a single request for an advisory opinion has been submitted to the ECtHR from the Netherlands. However, an earlier study by Lize Glas and Jasper Krommendijk did yield 11 cases delivered until 1 May 2021 that mentioned the advisory opinion procedure.[227] For the purpose of the present study, their research methodology was repeated for 1 May 2021 – 1 May 2023. During that period, the procedure was mentioned in four cases, two of which were on the same issue. One of those four cases involved a decision of the CRvB, the others involved opinions of Advocates General (hereinafter: AGs) at the Supreme Court [*Hoge Raad*; in references: 'HR']. Combined with the findings by Glas and Krommendijk this shows that in most cases the advisory opinion procedure is mentioned in an opinion of an AG at the Supreme Court. In the AG opinions that mentioned the advisory opinion option, this was always because the parties had argued that the ECtHR should be asked for an opinion. During this period, moreover, all such suggestions have been rejected, almost always on the grounds that there would be no good reason to refer the matter to the ECtHR.[228] Only in one case, in a brief consideration, an AG advised the Supreme Court to request an opinion from the ECtHR under Protocol 16.[229] Without giving reasons, the Tax Chamber [*Belastingkamer*] of the Supreme Court did not follow the AG's opinion on this point and assessed the case itself.

This brief overview shows that the advisory procedure is not yet in demand by the competent highest courts. To gain more insight into their considerations for not (yet) using the procedure, semi-structured interviews have been conducted with a total of ten state councillors, judges, an AG and staff members of the five highest courts that are competent to submit requests for advice.[230] Below is a summary of the main lines and insights that can be derived from the interviews conducted. These data have been supplemented with information that emerged from the analysis previously conducted by Glas and Krommendijk.[231] In addition, use was made of a Q&A note prepared by Marjolein Swaanenburg-van Roosmalen and Ben Vermeulen for the purpose of a joint symposium of the designated highest courts on Thursday 18 April 2019 in The Hague.[232]

6.2 When to submit a request for an advisory opinion?

For all courts, the respondents indicated that, at least in general terms, the question of whether it might be useful to submit a request for an advisory opinion to the ECtHR occasionally has been discussed. The possibilities offered by the Protocol to do so are in themselves positively appreciated. Parties do appear to sometimes invite a highest court to submit a request for an advisory opinion, but this does not happen very often. A possible explanation for the limited number of requests from

[226] Implicitly, the government denied that these volumes would be involved; see *Nota naar aanleiding van het Eindverslag*, *Kamerstukken II* 2014/15, 34235, no. 7, p. 8.
[227] Glas & Krommendijk 2022.
[228] CRvB 4 August 2022, ECLI:NL:CRVB:2022:1701, para. 3.3.4; Opinion AG Harteveld of 4 October 2022, ECLI:NL:PHR:2022:887, para. 3.25; Opinion AG Aben of 10 January 2023, ECLI:NL:PHR:2023:21, para. 30; Opinion AG Harteveld of 28 March 2023, ECLI:NL:PHR:2023:344, para. 4.14; Opinion AG Harteveld of 28 March 2023, ECLI:NL:PHR:2023:351, para. 7.17.
[229] Opinion AG Ettema of 16 June 2021, ECLI:NL:PHR:2021:611, para. 3.35; HR 24 September 2021, ECLI:NL:HR:2021:1351.
[230] A detailed description of the methods is given in Section 1.3. A list of respondents is given in Annex 1.
[231] Glass & Krommendijk 2022; their research incorporated judgments in the period June 2019-May 2021. In doing so, they searched www.rechtspraak.nl for the keywords Protocol 16'; '16e Protocol', 'zestiende protocol'; 'advisory opinion & EHRM'; 'adviesverzoek & EHRM'.
[232] Swaanenburg-van Roosmalen & Vermeulen 2019.

parties given by the respondents is that litigants may not yet know about the advisory opinion procedure. They are usually much more familiar with the preliminary ruling procedure and therefore, if they ask for further clarification by a supranational court at all, they usually rely on EU law.

To the extent that invitations to request an advisory opinion did come from the parties, respondents were critical of it. In many cases, such invitations are poorly drafted or the case can be disposed of without responding to the invitation.

The highest courts have so far consistently found no cases that would lend themselves well to a request for an advisory opinion or that raised particular issues touching on the interpretation of the ECHR.[233] However, respondents indicated that they would be willing to submit a request for an advisory opinion of their own accord if a case was well-suited for doing so. In one highest court, a case occurred where the submission of a request for an advisory opinion was seriously considered because a key ECtHR precedent did not offer clarity on a crucial element of the case. This led the court to conduct internal research into the possibilities offered by the Protocol, the requirements for a request for an advisory opinion, the consequences that using the procedure would have and the possible concurrence with the preliminary ruling procedure before the ECJ. Ultimately, the judges opted for a strategy of disposing of the case that did not require the further interpretation of the ECHR.

None of the competent courts currently has an internal protocol or guidelines for submitting requests for opinions. In one highest court, an internal report was written on the circumstances in which filing a request for an advisory opinion might be useful. That report is accessible within the judicial organisation and can be consulted when judges consider using the advisory procedure. Other respondents indicated that they would like to wait until a concrete request is considered and only then consider whether a guideline could be drafted based on experience. In addition, one respondent indicated that when Protocol 16 entered into force for the Netherlands, it was agreed between the highest courts that if one of them would consider asking the Strasbourg Court for an opinion, this would be discussed and coordinated with the other highest courts.[234]

6.3 Considerations for not submitting requests for an advisory opinion

The interviews revealed that within the Dutch highest courts, there are three main considerations for not yet submitting a request for an opinion. Briefly, these are (a) the lack of need for further explanation of the Convention; (b) the major role that EU law (and the preliminary ruling procedure at the CJEU) plays in fundamental rights cases; and (c) practical considerations, such as the expected length of the advisory opinion procedure. These three considerations are discussed in more detail below.

6.3.1 Absence of need for further ECHR interpretation

The basic assumption of several respondents is that their highest court can determine for itself how the law (and thus also the ECHR) reads and, in doing so, it can provide its own interpretation of that law. Some respondents hinted that the advisory opinion procedure relates somewhat uncomfortably with this judicial autonomy to interpret and apply national law. One respondent explained that while the premise of the Protocol is to promote an open dialogue between national courts and the ECtHR, Dutch highest courts do not always perceive it that way. They do not see the ECtHR as a logical interlocutor so much as a controlling body.

There is confidence that Dutch judges generally have sufficient knowledge and understanding of ECtHR case law to duly interpret and apply the Convention.[235] As a result, respondents see only room for submitting a request for an advisory opinion if it is really necessary to obtain clarity. Even

[233] This is evident both from interviews and AGs' conclusions and court decisions; with examples from the period 2019-2021, see Glass & Krommendijk 2022, p. 336ff and see more recently e.g. Opinion AG Harteveld of 28 March 2023, ECLI:NL:PHR:2023:344, para. 4.14 and Opinion AG Harteveld of 28 March 2023, ECLI:NL:PHR:2023:351, para. 7.17.
[234] A joint symposium of the designated highest courts to discuss the functioning and meaning of the protocol already took place on 18 April 2019; see Swaanenburg-Van Roosmalen & Vermeulen 2019.
[235] Cf. also Glas & Krommendijk 2022, p. 342-343.

then, however, the courts' own autonomy and position play a role in the background. For example, in the only case where, according to the interviews conducted, a request for an advisory opinion was specifically considered, it was important that it concerned a specific ECHR issue that had not yet been clarified in the ECtHR's case law. One of the considerations in the highest court was that the individual party concerned – if ruled against – might still be able to submit an individual complaint to the ECtHR. Should the ECtHR then come to a different interpretation than the Dutch supreme court, this would be interpreted as 'falling through' or being exposed as incompetent. In slightly similar vein, some respondents mentioned that they would be very annoyed if they filed a request for an opinion and a panel of the ECtHR declared it inadmissible; that would be a disgrace to the requesting court.

At another highest court it was mentioned that it is only useful to file a request for an opinion if there is an expectation that the court will really be able and willing to do something with the answers given by the ECtHR. If this is in doubt – for example, if the highest court thinks it will receive an undesirable answer – respondents at this court thought it would be better not to use the procedure and decide on the case themselves.

Much ECtHR case law available | Almost all respondents pointed out that a large amount of ECtHR case law is readily available on most fundamental rights topics.[236] In practice, their work mainly comes down to systematising that case law and distilling the applicable factors and criteria from it. Cases involving a new or highly principled issue around the interpretation or application of the ECHR only rarely arise, according to respondents, although many eventually did mention issues where some clarification might be useful. Furthermore, respondents noted that some fundamental rights cases can be readily decided under domestic law, meaning that an interpretation of the ECHR would not be necessary to answer the legal questions presented.[237]

Expected mismatch between need and advice | One concern expressed by respondents was that submitting a request for advice means handing over the case without knowing what the ECtHR will come up with. This was expressed as there being a certain risk that the ECtHR would 'run with it'. Moreover, several respondents stressed that ECtHR rulings are often very strongly linked to the facts of a case, and they expected this to be not very different for advisory opinions. The reason for this is that Protocol 16 requires the national court to provide the necessary information about the underlying dispute and the facts of the case. In contrast, at the national level, factual issues may not always matter that much in the highest courts. Sometimes only questions of law come into play and procedural technique is very important.[238] As a result, a case involving ECHR issues is sometimes very precisely framed and hardly relates to the application of the law to the facts. As a result, these respondents question whether an advisory opinion would add the desired legal and interpretative value. According to some respondents, this makes the procedure as such less useful for the Dutch judicial practice, as many ECHR issues addressed by the highest courts concern rather minor or technical legal questions. Recourse to the ECtHR would be too heavy a remedy in such cases. In addition, according to one respondent, it should not be encouraged that such trivial or rather technical questions are always labelled as 'fundamental rights' issues.

By contrast, but relatedly, other respondents pointed out that cases pending before the highest national court still may be highly focused on particular facts and related matters of legal qualification. According to the respondents, a procedure such as that under Protocol 16 then offers a misfit: it forces the court to formulate a generally worded request for an opinion, whereas the case before it requires a concrete approach focused on the individual case. This makes formulating the request difficult. This also applies if there are many similar cases pending. Admittedly, a request for an advisory opinion may then clarify the interpretation of the ECHR in a general sense, but all pending

[236] On this point, the findings from the interviews correspond to Glas's and Krommendijk's findings as derived from their examination of case law and opinions of AGs; see Glas & Krommendijk 2022, p. 337.
[237] See, for example, Opinion AG Paridaens of 14 April 2020, ECLI:NL:PHR:2020:365, para. 21; see further Glass & Krommendijk 2022, p. 337 and cf. Eckhardt & Bakker 2018, p. 1884.
[238] Cf. on this point earlier also Swaanenburg-Van Roosmalen & Vermeulen 2019, p. 11.

cases then still will have to be decided on the basis of their own facts and circumstances. A request for an advisory opinion thus provides little efficiency in such cases for the national courts.

Limited confidence in helpfulness of an advisory opinion | Several respondents expressed limited confidence in the extent to which an ECtHR opinion could help them decide a case before them. It was pointed out from one court that the ECtHR's case law is not always clear and consistent as it is. The narrative style of argumentation can make it difficult to fathom exactly how a judgment should be read and how it should be applied in a case involving narrowly defined questions of law or in cases where the facts are different from a precedent referred to by the ECtHR. Based on this experience, these respondents expected that the Court's advisory opinion would be worded rather vaguely or ambiguously, making them difficult to apply in a concrete case at hand. In comparison, the respondents in this court found the CJEU's preliminary rulings more legally insightful and predictable. They also indicated that they would benefit more from handbooks and commentaries that systematically list the ECtHR's case law, rather than from additional explanations from the ECtHR itself.

6.3.2 Main role for EU law

A second important explanation for the lack of requests for an advisory opinion is that – depending on the issues with which a highest court is primarily concerned – most fundamental rights cases primarily or at least also deal with EU law. In those cases, not only the Convention applies, but also the EU Charter on Fundamental Rights or secondary EU legislation of a fundamental rights nature. If there is ambiguity about the interpretation of a particular fundamental right in those cases, respondents say the obvious way to proceed is to use the preliminary ruling procedure at the CJEU. Litigants also request this in many cases. Moreover, respondents pointed out that if there is genuine doubt about the interpretation of a fundamental right in a case that comes within the scope of EU law, as highest courts they are obliged to refer preliminary questions. [239]

According to one respondent, if national supreme courts were to proceed with a combination of procedures or to give priority to the advisory procedure before the ECtHR, they would unduly interfere with what this respondent perceived as the 'competitive relation' between the ECtHR and the CJEU. Another respondent said that in one case the highest court had considered using both options simultaneously, but had rejected that option because of its time-consuming and complex nature. With parallel or sequential use of the procedures therefore ruled out and a choice having to be made, the decision tends to fall in favour of the EU route. Nevertheless, one respondent did suggest asking the CJEU in preliminary ruling proceedings how it would view the use of the advisory procedure of Protocol 16.

More generally, several respondents noted in this context that the ECHR has lost some importance for Dutch litigation as compared to EU fundamental rights law. Litigants are increasingly familiar with EU law and the EU Charter of Fundamental Rights, and they often base their claims and arguments on them. As a result, there is less need to request further explanations on the ECHR, whereas there may be a need for asking for clarity on EU fundamental rights.

6.3.3 Practical considerations

An advisory request delays the procedure | A third main consideration relates to the practicalities of filing a request for advisory opinion. Several respondents expected the procedure under Protocol 16 to be time-consuming. This would be problematic in cases involving special urgency, such as sases concerning restrictions or deprivation of property (under Article 1 of Protocol No. 1 ECHR), authorisations for compulsory hospitalisation (under Article 8 ECHR) or immigration cases. The delay that would occur when a request for an advisory opinion is submitted is then not in the interest of

[239] On this point, see also Opinion AG Harteveld of 1 October 2019, ECLI:NL:PHR:2019:951, para. 7.4. See further Glas & Krommendijk 2022, p. 339.

the parties.[240] Respondents thereby estimated the duration of the advisory opinion procedure as longer than it actually is. Upon being informed that the average processing time so far is 11.5 months, they indicated that this is not so bad and that this surprises them. Moreover, some respondents said that while the procedure may take some time and lead to delays, this would not be a reason to not ask for an advisory opinion if there are otherwise good reasons to seek one. Others noted that the advisory procedures so far seem to have passed-off smoothly, with little difference with the preliminary ruling procedure at the CJEU.[241]

Nevertheless, for quite a few respondents, the expected delay still plays a role in the decision not to file requests for an advisory opinion. This is particularly the case in matters where many similar cases are pending (e.g. in lower courts) and where the stakes for the parties are high. One respondent pointed out that in such cases, the hearing of the similar cases would have to be stayed until the highest court would have assessed the case based on the ECtHR's advisory opinion. Even if the ECtHR opinion would be given relatively quickly, this would result in a delay of at least half a year to a full year in a potentially large number of cases. It was pointed out that if the stayed cases are criminal cases where people are in pre-trial detention, this is a long period of time. The expected delay will then be a major argument for not requesting an opinion.

Another consideration may be that the main point of a case may be lost if an ECHR opinion is awaited. This occurred, for example, in the *Urgenda* climate case.[242] At issue in that case was the fact that Urgenda had requested that the State be ordered to reduce CO_2 emissions by a certain percentage by 2020. If the Supreme Court had requested an ECHR opinion in that case, it could not have been given in time for this request to still be meaningful.[243]

Finally, one respondent pointed out that 'the clock of the "reasonable time limit" is also ticking'.[244] Surely the government pointed out in the ratification process that, according to ECtHR jurisprudence, the reasonable time requirements should not prevent the filing of the request for an opinion, as was discussed in Section 4.3.5. Nevertheless, the respondent's comment shows that this expected risk may still play a role in practice.

Lack of familiarity with the procedure | A second practical consideration has to do with the fact that there is still little experience with the advisory opinion procedure. Respondents find the information provided by the ECtHR through the Guidelines and on its website sufficiently clear. They also stressed that they have sufficient knowledge and experience to formulate good requests, not in the least because of their experience with the preliminary ruling procedure. At the same time, almost all respondents indicated that they had not yet really delved into the procedure. They are more familiar with the procedure at the CJEU for preliminary rulings and do not know whether other requirements apply in the case of a request for an advisory opinion, such as with regard to the language of the requests for an advisory opinion or the extent to which the underlying procedural file must also be translated.

Some respondents assumed that – if they were to proceed with a request for advice – they would be supported in the proceedings by the agent for the Netherlands at the ECtHR and by the Ministry of Foreign Affairs. Others indicated that it would be problematic if the costs that may be associated with translations would have to be borne by the court in question. Especially if a choice is possible in a case between the advisory opinion procedure of Protocol 16 and the preliminary ruling procedure, they would therefore prefer the latter.

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[240] See previously Swaanenburg-Van Roosmalen & Vermeulen 2019, p. 15. They have pointed out that in cases where an opinion is requested on an issue on which many cases are pending at the time, decision-making in all parallel cases will also be delayed.
[241] See, e.g., Spronken 2019, p. 1131. See also Glas & Krommendijk 2022, p. 340.
[242] HR 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), *AB* 2020/24 (case note Van der Veen and Backes), *NJ* 2020/41 (case note Spier), «JOM» 2020/257 (case note Sanderink).
[243] *Urgenda*, para. 5.6.4 ('The Supreme Court considers the answer to this question sufficiently clear. It will therefore answer this question itself and not submit it to the ECtHR for a so-called "advisory opinion", as is possible but not mandatory under Protocol No 16 to the ECHR, which entered into force on 1 June 2019. In addition, both parties have asked the Supreme Court to rule still in 2019, this in view of the timing of the regional court's order upheld by the appeals court, the end of 2020.'). See further and along the same lines AGs Langemeijer's and Wissink's Opinion of 13 September 2019, ECLI:NL:PHR:2019:887, para. 6.15.
[244] See also Eckhardt & Bakker 2018, p. 1884; Swaanenburg-Van Roosmalen & Vermeulen 2019, p. 16.

Writing a good request is difficult | Several respondents stressed that writing a good request for an advisory opinion will be difficult. It requires pioneering and figuring out through trial and error what such a request should look like and how general or concrete it should be.[245] In any case, the requesting court would have to formulate very clearly what it wants to know, especially since international judges such as those on the ECtHR do not know the Dutch procedural and substantive context. There is an expected risk that the ECtHR may interpret the request differently than intended and thus might come up with an opinion that is not very useful in the concrete case.[246] There is also the perceived risk of the ECtHR declaring an advisory request inadmissible, as was mentioned in Section 5.3. A request for an opinion must therefore be carefully considered and reasoned, which is time-consuming and costly. For this reason alone, respondents expected an advisory opinion to be requested only in special cases.

Working process at the ECtHR | Finally, one respondent noted that the working process within the ECtHR itself would be quite disrupted by requests for opinions.[247] For this reason alone, in this respondent's view, national courts should be cautious about submitting requests for an advisory opinion.[248]

6.4 Considerations and conditions for submitting future requests for an advisory opinion

Although the competent highest Dutch courts have not submitted any requests for opinions so far, they certainly see opportunities to use the procedure in the future. Nevertheless, they will mainly consider this once some more experience has been gained with the procedure. Put differently: they may want to wait and see what requests come from foreign courts and how the ECtHR deals with them. Respondents acknowledge that their reluctance is partly due to cold feet, partly because it is not yet clear what exactly can be expected from the courts and from the ECtHR. As practice and experience grow, and with it more insight is obtained into the costs and benefits of the proceedings, respondents predict there is a greater chance that the Protocol 16 procedure will be used.[249]

Respondents expressed a high degree of consensus on four conditions that must be met to proceed with a request for an advisory opinion:

1. Obtaining a clear ECHR interpretation must have real added value for the pending case (and any similar cases pending at lower courts). Such added value can be seen if there is contradictory or inconsistent case law of the ECtHR on the matter at hand, or if there is still very little ECtHR case law on a particular issue. The latter may be the case with new questions that the ECtHR has not yet been able to address, for example questions related to technological issues or new investigative methods.
2. The request for an advisory opinion should concern a general question of interpretation that cannot be answered even on the basis of careful analysis of case law and that can be translated well to the context of the advisory opinion procedure. Preferably, there should be some precedential value in the sense that the advisory opinion is relevant to a larger number of cases.
3. The ECHR issue should be a core aspect of the case.
4. It must be clear that there are no EU law aspects to the case; if there are, the preliminary ruling procedure is preferable.

According to most respondents, it is not particularly relevant to their formulating an advisory opinion request whether a particular question of interpretation also plays out in other States and the

[245] See also Swaanenburg-Van Roosmalen & Vermeulen 2019, p. 11.
[246] This risk was also identified by Eckhardt & Bakker 2018, p. 1884.
[247] To some extent, this corresponds to the fear previously expressed by AG Harteveld that a large number of advisory requests in conjunction with the Court's case load could lead to long delays; see Opinion of 1 October 2019, ECLI:NL:PHR:2019:951, para. 7.3 and see Glass & Krommendijk 2022, p. 340.
[248] De Groot, the present President of the Supreme Court, also noted this in a 2016 publication on Protocol 16: De Groot 2016, p. 11.
[249] This corresponds to Glas's and Krommendijk's finding that seeking advice essentially requires a cost-benefit analysis; see Glas & Krommendijk 2022, p. 341.

Netherlands can play a pioneering role in helping to clarify ECHR jurisprudence.[250] While it is acknowledged that the Netherlands could have a pioneering or 'guiding country' role on certain issues – such as the restrictive measures during the Covid-19 pandemic – the decisive factor will always be whether an opinion would have sufficient value for Dutch cases.

Several respondents further stressed the need to take account of the position of parties. As long as the processing times of the opinions are as short as they currently are, the advisory opinion procedure is considered interesting, but the procedure will become less attractive the longer it takes for the ECtHR to issue its opinion. Moreover, even with the relatively short current duration of the procedure under Protocol 16, it must always be considered whether the parties' interests are not unduly affected compared to the value an advisory opinion can bring to legal development.

A few respondents see a stronger reason to file a request for an advisory opinion if – in addition to the four points mentioned above – it is likely that a litigant will lodge an individual application at the ECtHR after the judgment of the highest court. In that case, 'stacking' proceedings could be very burdensome and costly for the party concerned. Moreover, it would then take even longer to clarify the correct ECHR interpretation in a concrete matter. The national highest court could provide earlier clarity in such cases through a request for an opinion, especially in important issues on which the ECtHR has not been able to rule very often. Several respondents stressed that this consideration would play a role especially if there are a large number of pending cases on a similar topic. An advisory procedure could then save many people the effort of having to access the ECtHR. Even though respondents stress that after such an ECtHR opinion, all these cases would still have to be assessed individually, they see that in bulk cases, direct input from the ECtHR could be useful to speed up their disposal.

Finally, from the position of two courts it was added to the above points that a request for an opinion could be useful if a pending case could lead to far-reaching positive obligations for the State or if a sensitive issue is involved. An ECtHR opinion could then give the national court additional backing by making it clear that a particular (potentially controversial) positive obligation or interpretation actually follows from the ECHR.[251]

6.5 Dealing with the ECtHR's advisory opinions

Although the ECtHR has not yet been able to issue opinions in response to requests submitted from the Netherlands, respondents agree that – if it were to do so – those opinions would be seriously considered in judging the pending case. The guiding principle expressed by the respondents is that a court that requests an opinion should actually want to take the resulting advice seriously. As a result, respondents see that opinions will easily have a 'semi-binding' or 'de facto binding' effect. This confirms, according to one respondent, that submitting a request for an opinion should always be carefully considered, as should defining the questions to be asked.

6.6 Conclusion

Although Dutch highest courts with the power to file requests for opinions show themselves favourably disposed towards the Protocol 16 advisory procedure, they have not yet filed any requests for an advisory opinion, not even when litigants requested them to do so or when invited to do so by an Advocate General. From the interviews conducted and an analysis of relevant case law, it can be inferred that there are three main considerations that have stood in the way of utilising the procedure. First, according to the highest courts, no issues have yet arisen that they could not satisfactorily resolve themselves, based on their own analysis of the ECtHR's case law and the Convention. Second, many cases that come before the highest courts have primarily, or at least also, an EU law component. In those cases, the highest courts consider it appropriate – where necessary – to use only the preliminary ruling procedure before the CJEU. Thirdly, there is a

[250] Similarly, Glas & Krommendijk 2022, p. 437, referring to De Groot 2016, p. 10.
[251] Again, this is consistent with the analysis of Glas & Krommendijk 2022, p. 345-346, pointing to opinions of AGs where this argument is named as a reason for submitting an advisory request.

perception among some respondents that the proceedings before the ECtHR may lead to undesirable delays in national proceedings. There is also some hesitation when it comes to the formulation of the advisory questions. So far, it is not very clear how best to phrase them, while it is understood that the formulation of the request will strongly determine the Court's eventual advisory opinion.

According to the respondents, whether requests for an advisory opinion will be made in the future depends very much on the factors mentioned in Section 6.5. An advisory request will be made if it is clear that a case raises a question of principle, importance and novelty of the ECHR that national courts cannot properly answer, while the case does not also have an EU component. Moreover, it should be clear that the case can tolerate some delay and that it is possible to formulate the question at the appropriate level of generality.

In the vast majority of cases, a fairly practical cost-benefit analysis will be made in deciding whether or not to file a request for an opinion. It can be noted in this respect, on the one hand, that an advisory opinion can not only provide clarity, but also work to the advantage of litigants, as they do not have to wait years for a Strasbourg ruling after exhausting the highest Dutch court. On the other hand, there are disadvantages, such as the delay in the proceedings, the efforts that must be made to formulate the request properly, and the possible risk of losing face if the ECtHR does not consider the request for an opinion. These advantages and disadvantages must be weighed up on a case-by-case basis.

7. Requests for an advisory opinion in other countries

7.1 Introduction

To mirror the findings from the interviews at the Dutch highest courts and to gain a more complete insight into the motives of courts for submitting or not submitting a request for an advisory opinion, semi-structured interviews were also conducted with judges, advocate-generals and/or staff members of foreign courts that submitted a request for an advisory opinion.[252] As these foreign courts have gone through the entire advisory procedure, these interviews also offer insight into the experiences with the actual advisory opinion procedure, including the follow-up of the Court's opinions. In order to properly map the latter, national judgments following the ECtHR opinion were studied insofar as available.

This chapter discusses the main lines and insights that can be derived from the information collected. First, the considerations for submitting an advice request are discussed (Section 7.1). Next, experiences with the advice procedure and the implementation of the advice are discussed (Section 7.2).

7.2 Considerations for submitting a request for an advisory opinion

7.2.1 When and where to submit a request for an advisory opinion?

For most requests for opinions submitted, the initiative was taken by the national courts *proprio motu*. In one case, a request for an opinion was made because the parties had requested it. In another case, the request for an opinion was instigated by an Advocate-General in an opinion in a case before the national highest court.

Court are sometimes unsure what is the best forum to ask for clarification of international law. This uncertainty seems to be particularly prevalent in States that are not members of the European Union. There, consideration was given to submitting a request for an opinion (also) elsewhere, such as to the Venice Commission. To the requesting court, the Venice Commission seemed appropriate to act as *amicus curiae*, as the case before it concerned a (sensitive) national constitutional issue. Another respondent shared the observation that the courts can easily retrieve significant and useful information from the Superior Courts Network (SCN), making an advisory request not always necessary. Interviews with States that are members of the European Union did not disclose any experienced difficulties of concurrence between the advisory opinion procedure and the preliminary ruling procedure in Luxembourg, possibly due to the fact that this was not an issue in the case in which the advisory request was made.

7.2.2 Substantive considerations

For the national courts surveyed, obtaining clarity on the interpretation and application of the ECHR in a given matter was the main reason for asking the Court for an opinion. According to all respondents, this clarity did not follow (sufficiently) from the ECtHR case-law, which was why they considered an opinion necessary or at least useful to reach a solution in the concrete dispute.

Besides this substantive legal reason, the majority of the cases that led the courts to request an advisory opinion also involved a political aspect. In some cases this political aspect was very concrete, for example because the conflict concerned the prosecution of a politician or denial of the right to stand for election to a member of parliament. In other cases the political aspect is more subtle. It was observed, for example, that there might be political or national judicial opposition to a certain line of case law, or a controversy over the incorrect or incomplete implementation of ECHR jurisprudence by the legislature. In such cases it appears that national courts may see it as useful to be able to get some backing from the ECtHR in assessing the case in the form of an advisory opinion. Respondents indicated that they regard the ECtHR as an objective and relative outsider,

[252] For a detailed description of the methods, see Section 1.3.

which can provide valuable assistance in settling a complex national issue. Similarly, if, in the opinion of the highest court, politicians have not properly implemented previous ECtHR jurisprudence, that highest court may seek the ECtHR's fiat for its own interpretation.

Moreover, in politically tinted cases, an ECtHR opinion can act as a kind of shield against political authorities; the acceptance of a particular judicial doctrine (developed by the national court) may thereby be promoted.

Thus, in all these cases, an opinion of the Court may provide additional support for a highest court's own argument or position. The interlocutors expressly emphasised, however, that while the political dimension might play a role in the submission of the request for an opinion, it was not decisive in any of the requests presented to the Court.

In one case, a factor in deciding to file a request for an advisory opinion was that the national court considered it likely that the litigant concerned would eventually file a complaint in Strasbourg. Therefore, the court wanted to ensure that the national proceedings were as careful as possible. In addition, the advantage would be that the ECtHR could give an early opinion on the case, so there would be less chance that – if an application were still to be filed – a violation would be found.

7.2.3 Practical considerations

When deciding whether to request an advisory opinion, almost all respondents saw the delay to the national procedure caused by requesting an opinion as the main stumbling block. Most respondents said that the advisory procedure would take about the same time as the preliminary ruling procedure in Luxembourg, which would delay the case by 1-2 years. Whether this is perceived as long depends on the procedure. In one case, the potential delay was initially seen as a major objection, because national law required a judgment to be delivered within a very short timeframe. In the end, however, the relevant highest court decided that clarity on the ECHR took precedence over the speed of proceedings.

A second drawback noted by the respondents is that the Protocol 16 procedure is costly, both in financial terms (e.g. due to the need to have certain documents translated) and in terms of capacity. Therefore, according to several respondents, they would only file a request for an advisory opinion in the future if there is a clear ECHR aspect to the case and the ECtHR's interpretation and advice are really needed to decide the case, for instance because the Court's case law is unclear. The benefits justify the costs only in exceptional cases.

The capacity burden was noted mainly in relation to formulating the questions in the request for an opinion, which is quite often (but certainly not by all respondents) perceived as difficult. Some respondents noted that it is a challenge to formulate questions in such a way that they invite a useful opinion. At the same time, judges are keen to submit a request for an opinion only when they are sure that it is formulated in such a way that it will be considered by the ECtHR. Indeed, a rejection as inadmissible may feel like a slap on the wrist and as implying that the highest court has not sufficiently understood Protocol 16. This psychological effect is nuanced, however, by the observation made by some that the Luxembourg Court, too, may decide not to consider some issues or reformulate questions.

Adding to the complexity of formulating questions is that there are still few requests for opinions available to serve as examples. As a result, it is also somewhat uncertain which requests for opinions will be accepted. However, from States that are also members of the EU, it has been indicated that experiences with formulating preliminary rulings could be used. In addition, it was mentioned that it also depends on the knowledge of the people working with the procedure whether the novelty of the procedure is perceived to be a problem. If a case lawyer or judge has experience with proceedings at the ECtHR, there will be a better insight into what the Court might need and formulating good questions is easier.

7.2.4 Procedural complications

For several States, it has been mentioned that national procedural rules and restrictions might complicate making request. For example, it has been indicated several times that a particular court

did not have jurisdiction to determine or assess the facts of a specific case, while Protocol 16 requires that a statement of the facts of the case must be presented to the Court. A more significant problem arises in cases where a highest court of first and only instance has jurisdiction to give an opinion. Unlike in cases where a supreme court acts as a court of cassation or as a court of last instance, in those cases the facts have not already been determined in lower courts, but the determination and qualification of facts is actually a full part of the proceedings. According to one respondent, the ECtHR could best rejecting such 'immature', insufficiently fact-founded requests for opinions. By contrast, another respondent noted that the advisory procedure might be just as or more useful for lower courts. The reason given for this was that lower courts may fully apply the ECHR, even in cases that never reach a supreme court, and often have significant fact-finding powers.

In some States, complicated situations may arise if, for a question on the interpretation or application of the ECHR, the highest court can submit a request for an advisory opinion to the ECtHR and, for a question on the interpretation or application of the Constitution, it has to ask the constitutional court for an opinion. In such cases, the competent highest national court may first be confronted with the question of whether legislation is in conformity with the ECHR and submit a request for an opinion on it to Strasbourg, and during or after the advisory opinion procedure then be presented with the question of whether legislation is in conformity with the Constitution. A complex trialogue can then develop rather than just a dialogue with the ECtHR. In the case in which this was at issue, the ECtHR dealt with this by waiting for the national constitutional court to give its opinion, so that it could include this in its own advisory opinion. That the ECtHR chose this path, rather than the other way around, was obvious, as the national constitutional court had to rule within three months.

According to one respondent, there is a perception among some Eastern European courts that they may only submit requests for advisory opinions if they are expressly authorised to do so in the Constitution or in legislation. In the absence of such legislation, these national courts are unlikely to request an advisory opinion, even though they do have that power under Protocol 16.

7.3 Experiences from the Protocol 16 proceedings

In general, the information available on the advisory opinion procedure is perceived by respondents as clear. In particular, the information available on the ECtHR website, such as the Guidelines, contributes to this. However, it did come as an (unpleasant) surprise to some interlocutors that, contrary to the preliminary ruling procedure in Luxembourg, documents have to be translated into one of the two official languages of the Court, which is a costly and time-consuming process. This only became clear when the ECtHR requested additional documents.

Communication from the ECtHR about the course of the proceedings could be improved, according to almost all respondents. In particular, it would be appreciated if a faster confirmation of receipt of the request for an advisory opinion were sent and if there were more frequent communication about intermediate steps in the procedure. An acknowledgement of receipt of, or first response to, the advice request took 1 to 2 months in some cases. Such a rather long period silence from the ECtHR could make the national court somewhat uncertain about the status and handling of the request for an opinion.

Respondents perceived it as positive that the ECtHR delivers its opinion relatively quickly, whereas it was usually expected that the processing of the request for an opinion would take quite a long time.

7.4 Implementation of the advisory opinion

For the six substantive opinions that the ECtHR has since published, per 1 June 2023, in four cases a final judgment was issued by the national court. In one case, the judgment implemented the opinion has been acknowledged to be long overdue. According to the respondent, this can be explained by a difference of opinion at national level on how to apply the Court's advisory opinion.

This is not due to the form and content of the advisory opinion as such, but is related to the complexity and political sensitivity of the issue. The Court's opinions are also generally considered clear and useful. They provide a welcome clarification of the general principles that apply to a given issue and thus provide national courts with greater insight and guidance in applying the ECHR. However, the opinions are sometimes considered to be rather technical and in other cases rather general.

As also discussed in section 3.3, the concrete application by the ECtHR of the opinions is clearly left to the national courts. This is well understood by respondents in light of the purpose of the advisory procedure and the principle of subsidiarity. At the same time, the interviews reveal that national courts would appreciate more concrete guidance.

The published judgments and the interviews conducted further show that national courts make extensive reference to the Court's advisory opinion in their judgments. Most references are made to the general principles, as the concrete application is left to the national courts. This concrete assessment then takes place using the standards set out by the ECtHR in the opinion. The rulings of the French Court of Cassation and the French Council of State can further illustrate this. As discussed in Section 3.3, in its first opinion under Protocol 16, the ECtHR considered that States have a wide margin of discretion when it comes to how legal recognition of a parent-child relationship in the case of children born of surrogacy should take shape. Consequently, legal recognition may take place through adoption, although the adoption procedure then must be speedy and effective, and should respect the best interests of the child. Referring to the opinion of the ECtHR, the French Court of Cassation held that adoption would not be the appropriate route, as it would require a new, lengthy procedure.[253] This led the Court of Cassation to adopt a different approach: it held that registration in the registers of civil status of the birth certificate drawn up abroad could no longer be annulled.[254]

Similarly, the opinion of the ECtHR on unequal treatment of landowners' associations was extensively referred to by the requesting court, the French Council of State, in its final judgment.[255] Relying on the standards set out and refined by the ECtHR in its opinion, the French Council of State ruled that the contested difference in treatment was justified.[256]

According to the respondents, in none of the cases was the binding nature of the opinion explicitly discussed when it was implemented. For all courts, it is clear that the actual opinion is not binding for the requesting courts. However, it was noted in this context national judges would have to be of very strong character to disregard an opinion. Moreover, the importance of dialogue between the ECtHR and national courts, and of maintaining a good relationship, would stand in the way of not complying with the Court's opinion.

7.5 Conclusion

It can be inferred from the interviews conducted with foreign courts' interlocutors that obtaining clarity on the interpretation or application of the Convention in a given matter is the main reason for requesting an advisory opinion. In most cases, there was also a political aspect involved, but apparently, in none of the cases was this the decisive reason for submitting a request for an opinion.

Although all respondents see room for improvement, their experiences with the advisory procedure are generally positive and the opinions are considered clear and of added value. According to the respondents, the courts that already have experience with the advisory procedure in Strasbourg would therefore certainly consider submitting a request for an advisory opinion to the ECtHR again in the future. However, they note that this will mainly be the case when an exceptional, principled case arises. Here, they think of cases where ECtHR case law dictates no clear solution, cases which, because of their subject matter, are also relevant to other Convention States, or cases where additional support for the domestic court's argumentation is needed. In this context, one of the

[253] French Supreme Court, 4 October 2019, ECLI:FR:CCASS:2019:AP00648, especially paras 4-6.
[254] Ibid., para 19.
[255] French Council of State, 23 March 2023, ECLI:FR:CECHR:2023:439036.20230323, para 3.
[256] Ibid., paras 4-7.

respondents noted that the relevant supreme court is not very often faced with such exceptional cases, so the number of cases in which an opinion would again be sought is likely to be extremely limited. Finally, it was noted that the majority of cases can be resolved using existing ECtHR case law.

8. Conclusion

8.1 Summary of findings

Five years after the entry into force of Protocol 16 ECHR (and four years after its entry into force for the Netherlands), it is possible to make a tentative first assessment of how that Protocol is being applied. The primary aim of this study was to report on the first experiences with the Protocol at the national level. It did not consider the experiences and effects at the ECtHR, but focused only on the domestic application and effects.

This report addressed three main issues. First, it provided an overview of the Advisory Protocol and examined how the ECtHR has interpreted the Protocol in its opinions delivered until the cut-off date of 1 June 2023 (Chapters 2 and 3). Second, attention was paid to the political discussions that have taken place in the Netherlands and six other States on the desirability of adopting the Protocol (Chapters 4 and 5). Thirdly, it examined the considerations that have led Dutch highest courts not yet to make use of the possibility of submitting requests for opinions and the experiences of foreign courts that have already used the advisory opinion procedure (Chapters 6 and 7). In summary, this led to the following findings.

8.1.1 Application of the advisory procedure by the ECtHR

Protocol 16 and various explanatory documents set out in detail how the advisory procedure should work. In particular, the Explanatory Memorandum to Protocol 16, the Court's Rules of Procedure and its Guidelines for submitting requests for an advisory opinion provide national judges with the necessary guidance for shaping their requests for an advisory opinion. The opinions issued until 1 June 2023 – six in total – and the one advisory request rejected by the ECtHR further clarify how the ECtHR uses the new procedure and its new competence.

It is not yet fully clear what interpretation should be given to the requirement that the requests for an opinion submitted must relate to a 'question of principle' on the interpretation or application of the ECHR. In none of the studied opinions the ECtHR has explicitly addressed this question. However, in deciding whether to consider requests for an advisory opinion, the ECtHR does give serious consideration to whether the questions raised are sufficiently directly related to the domestic proceedings and whether answers to the questions are necessary for the national court to reach a judgment in the case. Furthermore, the Grand Chamber considers itself empowered not to take up certain questions contained in a request or to reformulate them, or, on the contrary, to add a question of its own.

The form and structure of the opinions is similar to that of judgments of the Grand Chamber in individual complaint proceedings. When it comes to the substantive assessment, a clear difference is visible, however, in that advisory opinions have a relatively high level of abstraction and the Court tends to restrict itself to formulating general principles of interpretation. The application is explicitly left to the national courts, which are often given a certain margin of appreciation. The Court thus does no more than provide the requesting court with the necessary, yet quite general guidance to settle the case at national level.

8.1.2 Points of debate regarding ratification of Protocol 16

In the Netherlands, there has been much debate in Parliament on the bill to approve Protocol 16. On the one hand, expectations were quite high, while on the other, some thought the need for clarity quite small, especially for Dutch judges. Not all political parties saw the added value of a constructive dialogue on fundamental rights between national supreme courts and the ECtHR.

Other arguments exchanged in the deliberations were more practical in nature and related to the uncertain effects of the Protocol. For example, it was not clear at the time of ratification how much need there would be for the advisory opinion procedure, what impact it might have on pending national proceedings, what the consequences would be for the ECtHR and how the preliminary ruling

procedure and the advisory opinion procedure would relate to each other. Similarly, it was not clear at the time of ratification how often the procedure would actually be used.

Many of these arguments and concerns were also mentioned in the approval debates in other European States. In most countries surveyed, there was discussion about the advantages of the Protocol in terms of dialogue, improved legal protection, reduced burden on litigants, subsidiarity and reduction of the Court's workload, and about its disadvantages in terms of impact on national (judicial) sovereignty and autonomy, costs and delays in national proceedings and increased workload. Unlike in the Netherlands, however, in the other States surveyed the topic of concurrence with the preliminary ruling procedure before the CJEU does not seem to have been addressed specifically.

In the States that ratified the Protocol quite quickly, the approval processes went smoothly. While some concerns were raised there too, extensive discussions rarely took place. Moreover, as in the Netherlands, the counterarguments did not produce any tangible obstacles. In the States that have not (yet) ratified the Protocol, the main factor seems to be that the added value of the advisory power is considered relatively limited, while there are major concerns about the consequences of the advisory power and the risks to national sovereignty and autonomy. In these States, there is a strong desire to wait and see how the procedure develops.

8.1.3 Experiences and considerations of highest courts in applying Protocol 16

The Dutch highest courts surveyed are generally positive about the Protocol 16 procedure and its objectives. Nevertheless, they have not submitted any requests for opinions as yet. From the interviews conducted and an analysis of relevant case law, it can be deduced that there are three main considerations that have stood in the way of utilising the procedure. First, according to the highest courts, no issues have yet arisen that they could not satisfactorily resolve based on their own analysis of the Convention and the ECtHR's case law. Second, many cases that come before the highest courts have primarily, or at least also, an EU law component. In those cases, the highest courts consider it appropriate – where necessary – to use only the preliminary ruling procedure before the CJEU. Thirdly, there is a perception that proceedings before the ECtHR may lead to undesirable delays in national proceedings.

The foreign courts that submitted requests for opinions were shown to have done so mainly to obtain clarity on the interpretation or application of the ECHR. Most of the cases also involved a political aspect, but in none of the cases was this the decisive reason for submitting a request for an opinion. Experiences with the advisory opinion procedure are generally positive and the opinions are considered relatively clear and of added value. However, the procedure could be smoother on a number of points, especially when it comes to communication from the ECtHR about the course of the proceedings.

At the moment of writing there were too few domestic judgments available in response to ECtHR opinions to be able to say to what extent and how the Court's opinions are followed. However, it did become clear from the interviews that all courts surveyed are well aware that only the general principles of interpretation – and not the opinions as such – have a certain binding effect.

8.2 Evaluation against the objectives of Protocol 16

The main objective of this study was to assess how the introduction and application of Protocol 16 to the ECHR has proceeded so far and how the utilisation of the Protocol could be improved. The summary provided above shows that the Protocol is in force only in relatively few States. The number of requests for opinions submitted is limited, as is the number of opinions issued. No requests for advice have been submitted from the Netherlands so far.

These findings on the Protocol's implementation and application can be evaluated in the light of the two main purposes of Protocol 16, as set out in Section 2.1.2:

1. The Protocol aims to strengthen the dialogue between national highest courts and the ECtHR in order to achieve better national implementation of the ECHR. By allowing top national judges to request clarification or explanations from the ECtHR in pending cases, the ECtHR can explain at an early stage how the ECHR should be applied. National courts can then decide for themselves how to apply the opinion in the concrete case at hand. This allows States to properly fulfil their primary function in protecting fundamental rights and – aided by the ECtHR from its subsidiary function – to achieve proper implementation of the ECHR. At the same time, the procedure enables the ECtHR to play a pioneering role when it comes to new and important questions on fundamental rights issues.
2. The Protocol may help increase the efficiency of case disposal at the ECtHR. The idea is that cases in which the ECtHR has already adopted an advisory opinion will only rarely come before the Court in the form of individual applications. Moreover, the clarification provided by the ECtHR in a multitude of similar cases (either pending in the State that has requested an advisory opinion or in other States) could lead to cases being disposed of at the national level in accordance with the standards defined by the ECtHR in its opinion.

The implications of Protocol 16 for the relationship between national and European courts and for the implementation of the ECHR appear to be the subject of much domestic debate. In quite a few ratification debates, concerns have been expressed that the procedure could result in the ECtHR becoming overly involved in national fundamental rights issues. This would put Protocol 16 at odds with national sovereignty and the primary power of national courts to apply the ECHR. To some extent, this also seems to be a consideration among several Dutch judges, which may explain why they have not yet submitted requests for opinions. Several respondents in the Dutch highest courts indicated that it is primarily up to them to interpret and apply national law, including the ECHR. For some judges, this makes them reluctant to use the Protocol, although they like the premise on which it is based.

At the same time, respondents for all Dutch and foreign courts see the added value of the Protocol when it comes to new legal questions that go to the heart of a case presented and on which there is no clear ECtHR case law yet. Almost unanimously, they say that the Protocol can have added value precisely in those circumstances. Not only does it then make it easier to give a proper judgment, but it also prevents individual applicants from having to go to Strasbourg at a later date to get clarity on their case.

An argument that hardly arises among Dutch courts but was mentioned all the more frequently by foreign interlocutors, is that through its opinions, the ECtHR can provide additional legitimacy in issues that lead to strong (political) controversy at the national level. This is not actually what the Protocol is intended for, nor is this function easily compatible with the notion of subsidiarity. The ECtHR itself has so far seen no reason to reject requests for an advisory opinion if they are clearly linked to a national (legal) political issue. However, it does appear to take a purely legal approach in those cases, leaving aside the political aspects of the issue. It is not inconceivable that it is thereby implicitly trying to make clear that the proceedings are not there to resolve national political issues. However, without further research at the ECtHR itself, this remains somewhat speculative.

In view of the limited number of opinions requested and issued so far, it is not possible to say whether the advisory procedure contributes positively to the implementation of the ECHR at the national level and leads to an increased dialogue between national and European judges.

The study further has found that there are significant hesitations about the efficiency function of Protocol 16. Many ratification debates have expressly questioned whether the procedure can reduce the number of individual complaints the ECtHR would have to deal with. On the contrary, it has been stressed that the advisory opinion procedure could have a considerable impact on the already limited capacity of the ECtHR, as the requests always have to be dealt with by the Grand Chamber and they may not be relevant to large numbers of cases. Dutch interlocutors have indicated that for them, this is a relevant consideration when it comes to whether to submit requests for an advisory opinion. The submitted requests for opinions further show that, for the time being, these are not issues where large numbers of similar cases are pending. Rather, these are unique cases with a political character or issues concerning very specific ambiguities in existing ECtHR jurisprudence. Most Dutch

respondents in the highest courts indicated that they see an added value of the procedure when it comes to issues that are the subject of much litigation. Ultimately, decisive for them is whether an advisory opinion is really necessary to obtain clarity in the case at hand.

It can be concluded from this that it is uncertain at present whether the advisory procedure will be able to lead to efficiency gains in the future.

8.3 Towards better utilisation of Protocol 16?

For the Netherlands, one of the main questions for the current study was whether the possibilities of Protocol 16 ECHR can be better utilised in the future. In the light of the Protocol's objectives, this should be interpreted as meaning that Dutch highest courts will actually submit requests for opinions if this is appropriate in the light of the dialogue and implementation function and if this could possibly contribute to the efficiency of the proceedings before the ECtHR. At the same time, this should be done in such a way that the primary competence and responsibility of Dutch judges to properly interpret the ECHR is not impaired. An additional factor – which does not appear play a pronounced role in many other countries surveyed – is the need to ensure proper coordination between the advisory opinion procedure and the preliminary ruling procedure.

Interviews with the Dutch highest courts demonstrated that some of the considerations that stand in the way of filing requests for opinions are practical ones. These all seem to be surmountable. Interlocutors indicated that it will be a challenge to formulate the requests for opinions in such a way that a useful and meaningful opinion follows. At the same time, they stated that there is sufficient experience with the preliminary ruling procedure and sufficient knowledge of the ECHR present to formulate good requests for opinions. Internal frameworks or protocols are lacking for the time being, but there is a willingness to create them and to consult with other judges if a request for an opinion is specifically considered. Concerns about long processing times and possible delays can also be put into perspective: for now, the duration of the advisory procedure is similar to and even shorter than that at the CJEU. As such, therefore, these practical concerns need not stand in the way of filing a request for an opinion. However, based on experiences in other States, it can be assumed that there is room for improvement in the way the ECtHR itself implements the procedure, especially when it comes to communication. On that point, further evaluation studies of the procedure at the ECtHR level could be useful. In addition, Dutch courts could keep a close eye on whether processing times at the ECtHR increase and, where necessary, act accordingly.

In addition to these more practical elements, four criteria can be formulated of a more substantive nature that must be met in order for a highest court to meaningfully request an advisory opinion. These criteria are related to the expected added value of an advisory opinion and its perceived costs. The criteria listed below have been mentioned by both the Dutch respondents and the foreign interlocutors; the latter indicated that they have either already taken these criteria into account in their decision to file a request for an advisory opinion or will do so (even better) in the future.

A request for an opinion under Protocol 16 can be usefully made if the following four criteria are met:

1. Obtaining a clear ECHR interpretation must have real added value for the pending case (and any similar cases pending at lower courts). Such added value can be seen if there is contradictory or inconsistent case law of the ECtHR on the matter at hand, or if there is still very little ECtHR case law on a particular issue. The latter may be the case with new questions that the ECtHR has not yet been able to address, for example questions related to technological issues or new investigative methods.
2. The request for an advisory opinion should concern a general question of interpretation that cannot be answered even on the basis of careful analysis of case law and that can be translated well to the context of the advisory opinion procedure. Preferably, there should be some precedential value in the sense that the advisory opinion is relevant to a larger number of cases.
3. The ECHR issue should be a core aspect of the case.

4. It must be clear that there are no EU law aspects to the case; if there are, the preliminary ruling procedure is preferable.[257]

These four criteria fit well with the two main objectives of the Protocol. Moreover, they suit the division of tasks between national courts and the ECtHR and between the ECtHR and the CJEU. There is therefore every reason to make these criteria an important starting point for the future. Perhaps this will not lead to a much higher number of requests for opinions, but that is not an end in itself. However, observing these criteria does mean that requests for advice will be submitted where it has added value and is appropriate. Thus, propagating them is certainly valuable.

[257] In this context, it is worth bearing in mind that the revised draft agreement on the EU's accession to the ECHR includes a provision excluding the use of the advisory procedure in cases with an EU law component (see Article 5 Draft revised agreement on the accession of the EU to the ECHR (version 30 March 2023).

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Annex 1. Respondents

Courts in the Netherlands

Supreme Court
Vincent van den Brink
Mariken van Hilten
Martijn Polak
Taru Spronken

Administrative Law Division of the Council of State
Ramiro Fernandez
Nico Verheij

Central Appeals Board
Marleen van Dalen-van Bekkum
Roelien Roeland

Trade and Industry Appeals Tribunal
Theo Simons

Common Court of Aruba, Curaçao, Sint Maarten and Bonaire, Sint Eustatius and Saba
Jan de Boer
Gerard Lewin

Foreign courts

Armenia - Constitutional Court
Vahe Grigoryan

Armenia - Supreme *Court*
Arnold Vardanyan

Belgium - Council of State
Luc Vermeire

Finland - Supreme Court
Paula Jutila

France - Court of Cassation
Agnès Martinel

France - Council of State
Stéphane Hoynck

Lithuania - Supreme Administrative Court
Audronė Gedmintaitė

Slovakia - Supreme Court
Viktor Kobielsky

Foreign ratification debates

Albania
Evis Alimehmeti
Besmir Beja

Belgium
Sarah Lambrecht
Isabelle Niedlispacher

Denmark
Jens Elo Rytter
Nina Holst-Christensen

Estonia
Tim Kolk

Luxembourg
Veronique Bruck

Norway
Hella Aase Falkenberg
Halvard Haukeland Fredriksen

Annex 2. Interview questions on advisory opinion requests (Dutch courts)

QUESTIONS	INTERVIEW REPORT
a. Introduction	
1. What is your role within the court you are involved in?	
b. General questions on Protocol 16	
2. How familiar are you with the aims and procedure of Protocol 16?	
3. Overall, how do you feel about the opportunities offered by Protocol 16?	
c. Considerations when submitting a request for an opinion	
4. Have you yourself been involved in a discussion about submitting an advice request?	
4.1 If yes, in what capacity and how?	
5. Have litigants ever explicitly requested an advisory request?	
5.1 If yes, was this discussed internally (in the chambers or in the judicial organisation)?	
6. In your opinion, what are the main reasons why no requests for opinions have yet been submitted to the ECtHR from your court?	
6.1 Do you see any concrete objections to submitting a request for advice?	
7. What do you expect from the proceedings at the ECHR? Do you have enough information to be able to estimate how much time and energy it will take?	
8. What would you see as conditions or circumstances that would make	

your court *do* file an advisory petition?	
9. Where do you stand on Protocol 16 compared to the preliminary ruling procedure at the ECJ?	
10. Are there any other points you would like to raise regarding Protocol 16?	

Annex 3. Interview questions on advisory opinion requests (foreign courts)

QUESTIONS	INTERVIEW REPORT
a. Introduction	
1. What is your function or role within your judicial institution?	
b. General questions about Protocol 16	
2. How would you describe your knowledge of the objectives and procedure of Protocol 16?	
3. What is - in general - your opinion on the possibilities offered by Protocol 16?	
c. Considerations regarding submitting a request for an advisory opinion	
4. Have you been involved in submitting the request for an advisory opinion?	
4.1 If yes, in which capacity and how?	
5. In the case in which you requested advisory opinion, did the parties to the case invite you to submit a request, or did you decide on this ex officio?	
5.1 Was the request expressly discussed within the chamber or internally, within your court?	
5.2 If yes, what importance do such requests by the parties have for your decision to submit a request for an advisory opinion?	
6. What, in your opinion, were the most important reasons for submitting the request?	
7. What, in your opinion, are the most important disadvantages of	

submitting a request for an advisory opinion in a concrete case?	
d. Experiences with the procedure before the ECtHR	
8. What did you think of information provided by the Court about the procedure and the requirements for submitting a request for an advisory opinion?	
8.1 Did you feel empowered or supported by this information?	
8.2 Did something hinder you in submitting the request?	
8.3 How easy or difficult was it to prepare the file and questions for submitting the request?	
9. How did you experience the procedure before the ECtHR?	
9.1 How did you experience the first part of the procedure, that is, the process of deciding on the admissibility of the request?	
9.2 How did you experience the procedure after the request for an advisory opinion was accepted? You can think here of your own involvement in the procedure, the involvement of third parties, the duration of the procedure etc.	
9.3 How did you experience the communication by the ECtHR about procedural steps and the actual advisory opinion?	

10. Did experiences with the preliminary ruling procedure of the CJEU play any role in requesting an advice or preparing the request?	
10.1 Compared to the preliminary ruling procedure, how do you evaluate the Protocol 16 procedure? Is it easier or more difficult / more or less demanding / more or less time consuming?	
f. Experiences with implementing the advisory opinion	
11. In your opinion, how useful was the advisory opinion to deciding the case pending at your court?	
11.1 Did the advisory opinion provide you with useful background and interpretative information?	
11.2 Did the advisory opinion contain a concrete advice that you could use directly in deciding the case before you?	
12. Has there been a discussion within your court on the binding legal nature of the ECtHR's advisory opinion?	
12.1 Was it relevant to your court that, formally, there is a difference between the non-binding nature of the actual advice and the binding nature of the well-established general principles the Court formulated or repeated in its advisory opinion?	
12.2 Did your court take an express and conscious decision to either or not follow the Court's advice?	

12.3 If so, what were the reasons for either or not following the Court's advice?	
13. Has there been a discussion within your court on how to refer to the ECtHR's advisory opinion in the final judgment?	
13.1 Has your court made express reference to the ECtHR's advisory opinion?	
13.2 If so, how extensive was this reference?	
13.3 If not, what were the reasons for this?	
g. Final questions	
14. Do you have any other comments related to Protocol 16 that could be of relevance to our study?	

Annex 4. Questionnaire for ratifying States

QUESTIONS	ANSWERS
General questions about Protocol 16	
1. How would you describe your knowledge of the objectives and procedure of Protocol 16?	
2. What is - in general - your opinion on the possibilities offered by Protocol 16?	
Process of ratification of Protocol 16	
3. Was the process of ratification a rather smooth one or were there particular difficulties?	
3.1 If there were difficulties, could you describe them?	
3.2 Was the ratification supported by a strong majority?	
4. Which arguments and expectations played a role in the debates on ratification?	
4.1 What objectives did the various parties involved see for the Protocol?	
4.2 What expectations did the various parties have of the effects of the Protocol?	
4.3 Which other arguments were mentioned in the ratification process? Was any of these decisive?	
Effects of Protocol 16	
5. What is your view on the use that competent national highest courts have made of the advisory opinion procedure so far?	

5.1 Have more or less advisory opinions been requested than you had expected, or does the number correspond with your expectations?	
5.2 Have advisory opinions been requested in the types of case that you had expected?	
5.3 Do you have any explanations for the degree to which and the way in which the advisory opinion procedure has been used so far by national courts?	
6. How do you evaluate the ECtHR's advisory opinions so far?	
6.1 What do you think of the ECtHR's overall style of reasoning?	
6.2 What do you think of the concrete advice the Court has offered?	
6.3 What do you think of the degree to which the ECtHR's advisory opinions can actually be considered binding (as regards general interpretative principles) or non-binding (as regards the concrete advice).	

Annex 5. Questionnaire for non- or late-ratifying States

QUESTIONS	ANSWERS
General questions about Protocol 16	
1. How would you describe your knowledge of the objectives and procedure of Protocol 16?	
2. What is - in general - your opinion on the possibilities offered by Protocol 16?	
Process of signature of Protocol 16	
3. Was the process of *signing* Protocol 16 a rather smooth one or were there particular difficulties?	
3.1 If there were difficulties, could you describe them?	
3.2 What were the main arguments for or against signature?	
Process of ratification of Protocol 16	
4. Can you explain what steps (if any) have been taken to ratify Protocol 16 so far?	
4.1 Is the debate still ongoing?	
5. What could explain why the process of ratification has taken a long time or has not resulted in ratification at all?	
5.1 Did the objectives of the Protocol play a role in the ratification debate?	
5.2 Did views on national sovereignty and the role of national courts and/or the ECtHR play a role in the ratification debate?	

5.3 Did views on the national or ECtHR procedures play a role in the ratification debate?	
5.4 Did views on the (supposed) binding nature of the advisory opinions of the ECtHR play a role in the ratification debate?	
5.5 Did any other arguments play a role in the ratification debate?	
5.6 Was any of these arguments decisive or more important than others?	
6. Do you think the first experiences with the advisory opinion procedure have (had) an impact on the ratification debate?	
7. How do you evaluate the ECtHR's advisory opinions so far?	
7.1 What do you think of the ECtHR's overall style of reasoning?	
7.2 What do you think of the concrete advice the Court has offered?	
7.3 What do you think of the degree to which the ECtHR's advisory opinions can actually be considered binding (as regards general interpretative principles) or non-binding (as regards the concrete advice).	
8. Would there be any changes in Protocol 16, the procedure, or the Court's approach that would make the State change its opinion regarding ratification?	

Annex 6. Interview guide for interviews (F2F or online)

1. Prior to the interview

Overview
To keep track of the interviews, we provide a table on Surfdrive, which specifies which subtopic or set the interview belongs to, with whom the interview takes place, which organisation the respondent works for, the date and time an interview is scheduled, and the nature of the interview (face-to-face or via Teams). Each interview is also given a code therein, which should correspond to the code on the report form (consisting of a set code (AN - Advisory requests Netherlands; AA - Advisory requests other states; RR - Ratifying ratifying states; RN - Ratifying non-ratifying states), a country code, and a number.

Informed consent; consent form
Before the interview actually takes place, the interviewer gives the respondent general information about the project and its purpose. The interviewer also requests permission to conduct the interview, record it, process the data and how to mention it. We send the consent form by email a week before the interview and request that it be read, completed and signed and mailed back. In case this has not been done – or if additional persons appear to be attending the interview – we still submit the form on the spot (in the case of a face-to-face interview) or request verbal consent and ask for the consent form to be signed and e-mailed back to the interviewer as soon as possible after the interview.

Permission for audio/video recording
Our aim is to make an audio or MS Teams recording of all interviews. The consent form contains a separate box to be ticked for this purpose. To ensure that respondents are not put off, when the respondent asks questions, we will provide the following information:

- Only the researchers and possibly a research assistant will have access to the interview material. The purpose of such access is purely technical (for transcription) and content-related (to check notes or review quotes, for example). The interview recordings will be used exclusively for the purpose of the current evaluation project and any resulting publications.
- The recordings are encrypted and kept in a secure Surfdrive folder during the investigation.
- Within three months of the completion of the research project, audio recordings from the Surfdrive the researchers work with will be deleted, in accordance with the GDPR.
- A respondent can request to temporarily pause the recording during the interview.
- A respondent has the right to withdraw, including during or after the survey. This right also includes the right to have the audio file deleted.

If a respondent really does not want the interview to be recorded, we honour this request. If it is known in advance that someone does not want the interview to be recorded, we make sure there are two interviewers, with one interviewer able to conduct the interview and the other to take extensive notes.

Recording and storage
For the face-to-face interviews, we use local recording on a mobile phone using the Voice Memos app (iOS) or Call Recorder (Android), or recording via MS Teams. These apps do not force the user to place the recordings in an unsecured cloud, but do allow an encrypted file to be uploaded to the secure Surfdrive.

2. During the interview

We use a list of interview questions with a set structure and a number of questions that should at least be covered in the interview. This often includes one or more follow-up questions or sub-questions. Sometimes it happens that a previous question already answers a subsequent question. In that case, there is no need to ask that question again separately, unless information may still be

missing. The semi-structured format gives the interviewer room to ask additional questions where necessary or to vary the order of the questions. Nevertheless, the focus should be on the questions listed and all of them should be addressed.

To keep the conversations as open as possible, the interviews really have the character of a questionnaire. It is not to the interviewers to give an opinion on any of the respondent's answers or to start a discussion about them. However, if an answer is unclear, it is possible to ask further questions or to ask additional questions to gain more depth on a particular topic.

The interviews always last between 45 and a maximum of 60 minutes. For the sake of time management, we make it clear to interviewees in advance that a number of main points will be covered (corresponding to the headings in the questionnaires). It is important that the first, introductory block of questions does not take up too much time. If, during the interview, it appears that a particular topic leads to very extensive answers, the interviewer can indicate that it is time to move on to the next main topic.

3. After the interview

The audio or MS Team recording of the interview is transferred to the Surfdrive encrypted as soon as possible after the interview. Encryption is done via Bitlocker (Windows) or FileVault (Mac). Once this is done, the audio recording on the mobile phone or the Teams recording is deleted from the Teams environment. Notes typed during the conversation are also put in the Surfdrive folder. If notes are handwritten, a scan is taken and uploaded to the Surfdrive folder. The handwritten notes are then destroyed.

For each interview, a separate file is created for the questionnaire. Based on the notes and the audio or Team recording, the interviewer creates a report of the interview. For this purpose, the right-hand column of the questionnaires and report forms included in Annexes 1-4 is used. When completing these, key points are named, striking a balance between summarising and synthesising information and retaining relevant details, nuances and interesting viewpoints. The 'architecture' of a respondent's answer is retained as much as possible, albeit succinctly.

For each interview, at least 5 verbatim quotations that are particularly illustrative or representative of a particular point, which itself is significant for the subject or for the respondent, are also indicated in the report form. Examples given can be particularly useful quotations, as they can be illuminating while clearly expressing an opinion or point of view. As far as possible, quotations are distributed across the different content areas of the interview.