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Dialogue through advisory opinions under Protocol No. 16

An analysis of how advisory opinions contribute to dialogue between the European Court of Human Rights and national authorities, carried out through a case study on the Court's first advisory opinion under the Protocol.

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1 Introduction

1.1 Aims and objectives

The objective of this thesis is the adoption of Protocol No. 16 to the European Convention on Human Rights (the Convention, ECHR) and the use of advisory opinions given by the European Court of Human Rights (the Court). It is, in itself, an aim of the thesis to discuss the Protocol because it is a relatively new part of the Convention system that has not yet been examined in-depth. In addition, I wish to discuss the Protocol in a larger judicial context, tying it together with certain recent trends of the Convention system and the role of the Court.

More specifically, I will examine how the explicit goal of encouraging dialogue between the Court and national authorities is realised through the Protocol as a method to achieve the overarching goal of improving effective implementation of the Convention.

In order to perform this analysis, I will first assess the concept of dialogue in the judicial context and development that preceded the adoption of Protocol No. 16. Then, I will turn to the Protocol itself, identifying certain key elements of the mechanism, before I examine how the Convention is enforced through dialogue in the context of the Court's first advisory opinion.[1] I will conclude with a few more general remarks concerning the use of the Protocol.

1.2 Relevance

Protocol No. 16 (the Protocol) to the Convention entered into force in August 2018.[2] This extended the Court's jurisdiction – allowing the highest courts and tribunals of the Council of Europe (CoE) Member States to request the Court to give advisory opinions on questions of principle in the context of a case pending before it.[3]

As of April 2024, the Court has issued *seven* advisory opinions using this new procedure,[4] two request have been rejected.[5] The opinions given have concerned a diverse range of issues: The legal recognition of the parent-child relationship for a child born through gestational surrogacy abroad; the use of the "legislation by reference" technique in criminal law; impeachment legislation; the applicability of statutes of limitation; entitlements of landowners' associations; proceedings for the adoption of an adult, and denial of authorisation because of affiliation with

[1] P16-2018-001 [GC], upon request from the French Court of Cassation in a case concerning surrogacy.

[2] Elaborated on in chapter 3.

[3] Protocol No. 16 Article 1 § 1.

[4] Upon requests from the French Court of Cassation, the Armenian Constitutional Court, the Supreme Administrative Court of Lithuania, the Court of Cassation of Armenia, the French *Conseil d'État*, the Supreme Court of Finland, and *Conseil d'État* of Belgium.

[5] P16-2020-001 and P16-2023-002, from the Supreme Courts of the Slovak Republic and Estonia, respectively.

a religious movement.[6] Whilst the number of advisory opinions is still limited, the ones that are delivered indicate the Court's current interpretation of the Protocol. The mechanism is slowly taking form, demonstrating the relevance of an analysis of it as such. Especially considering the goal of strengthening the dialogue between the Court and national authorities, the question of its efficiency is appropriate.

1.3 Scope

The goal of the thesis is not to give an exhaustive review of all advisory opinions given under the Protocol. The thesis will focus on the *first* advisory opinion, which was delivered upon request from the French Court of Cassation in a case concerning surrogacy.[7] The opinion is a good fit for the analysis because it was the first time the Court had to interpret and operationalise the contents of the Protocol. The subject of it also illustrates the need for dialogue in a field with no European consensus, where a certain margin of appreciation is granted national authorities.

Focusing on the first advisory opinion gives the thesis an added level of relevance, as surrogacy continues to cause political debate in many Member States. According to the comparative-law survey carried out by the Court in preparation for the first advisory opinion, surrogacy arrangements are permitted in only nine of the forty-three Member States examined.[8] While surrogacy itself may be forbidden in many jurisdictions, the Member States have a range of different approaches to the question of establishing, or recognising, a legal parent-child relationship between children born through surrogacy arrangements and their intended parents. This demonstrates that surrogacy arrangements *do* take place, and recognises that without some form of legal framework, children will be left in a position of legal uncertainty.[9]

The Court held in its first advisory opinion that, despite a certain trend towards the possibility of legal recognition of the relationship between children conceived through surrogacy abroad and the intended parents, the survey showed no consensus in Europe on this issue.[10] Surrogacy also raises complex questions – both practical and ethical – which might call for adjustment over time. The Court itself made a similar reservation in its first advisory opinion, "making it

[6] P16-2018-001 [GC], P16-2019-001 [GC], P16-2020-002 [GC], P16-2021-001 [GC], P16-2021-002 [GC], P16-2022-001 [GC], P16-2023-001 [GC].

[7] P16-2018-001 [GC].

[8] P16-2018-001 [GC], § 23.

[9] E.g., *Mennesson v. France*, § 96.

[10] P16-2018-001 [GC], § 43.

clear that it may be called upon in the future to further develop its case-law in this field, in particular in view of the evolution of the issue of surrogacy".[11]

The goal of the analysis is to discuss – and attempt to answer – how the adoption and use of the advisory opinion mechanism established by the Protocol contributes to dialogue as a method for improving effective implementation of the Convention. Several other international courts and judiciaries have systems for advisory opinions, but a comparative study falls outside the scope of the thesis.[12] International systems are mentioned when it adds to the analysis, but my main focus will remain on the advisory opinion mechanism under the Convention.[13] The same goes for questions relating to the Protocol that were raised in the context of the accession of the European Union to the Convention, which will not be analysed.[14]

1.4 Structure

The thesis will be split into three main parts: First, I will describe the Convention system, the role of the Court and the judicial context of the Protocol. I will elaborate on the development that has been described as the *procedural turn* of the Court's review. Second, I will address the adoption of Protocol No. 16, and assess how its adoption and subsequent use fit into the overall development of the role of the Court. Finally, I will focus more specifically on the Court's first advisory opinion.

Throughout the three main sections of the text, I will provide my own assessments with a view to answer the questions set out at the beginning of the thesis. In the final chapter, I will give some overarching and concluding remarks.

[11] P16-2018-001 [GC], § 36. The Court referred to the work of the Hague Conference on Private International Law (HCCH) on surrogacy, ibid., § 59. The HCCH Working Group on Parentage/Surrogacy is currently working on a proposal for a new legislative instrument on parentage, including legal parentage resulting from an international surrogacy arrangement, HCCH (2024), para. 2.

[12] E.g., preliminary rulings of the Court of Justice of the European Union (CJEU) under Article 267 TFEU, advisory opinions of the International Court of Justice (ICJ) under Article 96 of the UN Charter and advisory opinions of the EFTA Court under Article 34 of the EFTA Surveillance and Court Agreement.

[13] CM(2006)203, para. 80. The CoE *Group of Wise Persons* initially considered a preliminary ruling mechanism based on that of the CJEU, but reached the conclusion that this system was "unsuitable" for transposition to the CoE: The Group considered it incompatible with the judicial control established by the Convention, without it leading to a considerable increase of the Court's workload.

[14] Concerns in this context were raised, e.g., by the CJEU, Opinion 2/13, para. 199, and the EU Delegation to the CoE, 46+1(2022)23.

2 Why dialogue? Judicial context and development

2.1 The Convention system and the principle of shared responsibility[15]

The European Convention on Human Rights was adopted in 1950 and entered into force on 3 September 1953.[16] Article 1 of the Convention demands of the High Contracting Parties that they "secure to everyone within their jurisdiction the rights and freedoms" enshrined in it. By virtue of this provision, "the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities".[17] Through Article 13, the individuals protected are also guaranteed *effective remedy*, in order to ensure that they can successfully enjoys those rights.[18]

These fundamental provisions place the responsibility for implementation *and* safeguarding of the Convention, first and foremost, with national authorities. This responsibility is, however, accompanied by the authority of the Court.

The European Court of Human Rights was established in 1959 by the then 15 Member States of the Council of Europe, and was set to function on a permanent basis with the adoption of Protocol No. 11.[19] The Court was tasked with ensuring "the observance of the engagements undertaken by the High Contracting Parties", with a jurisdiction that "shall extend to all matters concerning the interpretation and application of the Convention".[20]

While the primary responsibility for *implementing and enforcing* the Convention rights lies with national authorities, this mandate gives the Court the main role in the *development* of the Convention through its case-law. This should be done in a dynamic manner: the Convention is a "living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law […]",[21] also in the light of "the ideas prevailing in democratic States today".[22] The work of the Court has therefore vastly contributed to the creation of the comprehensive catalogue of rights that the Convention is today.

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[15] This notion of "shared responsibility" was first set out at the High-level Conference on the future of the Court in Interlaken in 2010, Interlaken Declaration (2010), para. 3. Reiterated in Reykjavík Declaration (2023), Appendix IV (on page 17).

[16] As an international treaty, the Convention must be interpreted in the light of the rules of interpretation set out in the Vienna Convention on the Law of Treaties (VCLT), *Rantsev v. Cyprus and Russia*, § 273.

[17] *Kudła v. Poland* [GC], § 152.

[18] Ibid.

[19] Protocol No. 11 to the Convention entered into force 1 November 1998, replacing the original two-chamber structure with the full-time Court.

[20] Articles 19 and 32 of the Convention.

[21] E.g., *Verein KlimaSeniorinnen Schweitz and Others v. Switzerland* [GC], § 434.

[22] *Fedotova and Others v. Russia* [GC], § 167.

The Court and national authorities are therefore asked to work together to achieve the main objective of the Convention, which is set out in its preamble: To secure "the universal and effective recognition and observance of the Rights therein declared".[23] One could even say that efficient *implementation* of the rights enshrined in the Convention is its very *raison d'être*. The question remains: How is this best ensured?

2.2 The principle of subsidiarity

The idea that the Court and national authorities should work together is reflected in the fundamental Convention principle of subsidiarity.[24] As articulated by former President of the Court, Spano, the principle of subsidiarity is "an institutional norm of power distribution between the States and the Strasbourg Court" with the "ultimate aim of securing to every person within the jurisdiction of a State the rights and freedoms provided by the Convention".[25] This principle is now enshrined in the preamble of the Convention.[26]

The Court's role is therefore *subsidiary* to that of national authorities: It is the remedies available at national level that "constitute the first line of defence of the rule of law and human rights".[27] This fundamental feature to the machinery of protection is confirmed by the admissibility criteria set out in Article 35: The Court may "only deal with the matter after all domestic remedies have been exhausted". [28]

The principle's practical significance can be illustrated by the Court's findings in the recent Grand Chamber decision in *Duarte Agostinho and Others v. Portugal and 32 Others*. The Court declared the application inadmissible, partly because the applicants had not exhausted domestic remedies. On the importance of this admissibility criteria, the Court held:

> Had the applicants complied with this requirement, that would have given the domestic courts the opportunity which the rule of exhaustion of domestic remedies is designed to afford States, […] and, should the applicants have subsequently pursued their complaints before the Court, it would have had the benefit of the factual and legal findings and the assessment of the national courts. Thus, the applicants failed to take appropriate steps to enable the national courts to fulfil their fundamental role in the Convention protection system, that of the Court being subsidiary to theirs.[29]

[23] Preamble of the Convention, para. 3.

[24] Interlaken Declaration (2010), para. 3.

[25] Spano (2018), pages 484 and 492.

[26] Preamble to the Convention, para. 7, as amended by Protocol No. 15.

[27] CM(2006)203, para. 16.

[28] Article 35 § 1; *Vučković and Others v. Serbia* (preliminary objection) [GC], § 69.

[29] *Duarte Agostinho and Others v. Portugal and 32 Others* (dec.) [GC], § 226, with further references.

Hand in hand with the principle of subsidiarity, is the concept of margin of appreciation.[30] Its origins trace back to the beginning of the history of the Convention and has since been developed and confirmed by the Court.[31] The doctrine entails that national authorities enjoy a certain margin, a "room for manoeuvre" when fulfilling their obligation to respect and ensure human rights in accordance with Article 1 of the Convention.[32] How large this room is, depends on a number of factors, and will vary according to the Convention provision concerned.[33]

The margin of appreciation clearly indicates a sequence.[34] However, the substantial aspect of the doctrine entails that the Court's assessment of a case is not only *chronologically* placed after the domestic assessment but should also be *based* on it: It entails that when a sufficient application of the Convention has taken place at the domestic level, the Court will not substitute its own assessments of the merits.[35]

Margin of appreciation as a tool for subsidiarity, does not eliminate the Court's supervision. When committing to the Convention, the High Contracting Parties accepted the establishment of the Court and its binding jurisdiction, in order to "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto".[36] In accordance with Article 32 of the Convention, the Court provides the final authoritative interpretation of the Convention rights and freedoms.[37]

2.3 State sovereignty and democratic legitimacy

The division of responsibilities and the principle of subsidiarity are closely intertwined with the question of *state sovereignty* within international law. The term can be given a variety of meanings: Crawford, for instance, holds that *as a legal* term, sovereignty does not refer to "omnipotent authority", but to "the totality of powers that States may have under international law".[38] For the purpose of this thesis, it suffices to mention that the sovereign authority of states, while not necessarily being *incompatible* with supernational power, certainly creates limits for it:

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[30] *Handyside v. the United Kingdom*, § 49; Brighton Declaration (2012), § 11; *Savran v. Denmark* [GC], § 187.

[31] Spielmann (2014), pages 50–51; *Handyside v. the United Kingdom*, §§ 48–49.

[32] Greer (2000), page 5.

[33] The margin of appreciation is not an "all embracing notion". There are domains to which it has "little application, or none at all", e.g., Article 3, Spielmann (2014), pages 53–54. An example of this dynamic quality of the margin of appreciation can be found in the context of the case study, see chapter 4.4.

[34] Spielmann (2014), page 53.

[35] *Savran v. Denmark* [GC], § 189, further in chapter 2.6.

[36] Article 19 of the Convention.

[37] Article 32 as interpreted by the Court, see e.g., *Humpert and Others v. Germany* [GC], § 69.

[38] Crawford (2007), pages 32–33. He holds that this is the most common modern use of the term, footnote 140.

> All that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.[39]

Accordingly, any successful international supervisory mechanism needs to balance the overarching goal of effective implementation with the sovereignty of its member states. While the Strasbourg Court remains one of the few international courts granted the power to receive complaints from individuals and pass judgments upon Member States, the Courts power relies upon a "bottom-up" approach. In line with the principle of subsidiarity, this ensures implementation not contrary to the Member States, but through their own acceptance.

An essential parameter of success in this context is democratic embedding. In addition to the more general consideration of state sovereignty, the Convention system needs to recognise the interests of *the people* of the Member States. Not only are national authorities better placed than an international court to evaluate domestic needs and conditions; they enjoy, contrary to the Court, *direct democratic legitimation*.[40]

When committing to the Convention, the Member States reaffirmed "their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend".[41] The Court has held that the Convention was "designed to maintain and promote the ideals and values of a democratic society", and that democracy "appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it".[42] The fundamental link between democracy and human rights confirmed by the Convention provisions protecting democratic rights, and is upheld by the Court which consistently underlines the importance of protecting democratic processes throughout its case-law.[43]

In addition, the level of democratic domestic support can severely affect the legitimacy of the Court and the Convention system. Because implementation is ultimately dependant on domestic action, a lack of support for the foundation and the supervisory mechanisms can hinder the necessary domestic follow-up, and in the long run undermine the Convention system as such. On the other hand, the *presence* of such democratic support for the Convention rights and supervisory mechanisms within the Member States can *reinforce* the Court's authority. A focus

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[39] This fundamental principle of international law was defined by the Permanent Court of International Justice in 1927 in the Case of the S.S. "Lotus", page 3.

[40] *Hatton and Others v. the United Kingdom* [GC], § 97.

[41] Preamble of the Convention, para. 5.

[42] *United Communist Party of Turkey and Others v. Turkey*, § 45.

[43] Costa (2008); Background Paper (2022).

on securing the necessary democratic support for the Convention principles at a domestic level can therefore contribute to the overarching goal of effective implementation.

2.4 Successful implementation: what does it entail?

With these prerequisites in mind, I address the overarching goal of efficient implementation. Implementation is only truly successful when the rights guaranteed by the Convention are available and effective in practice for all those protected by it.[44] This explains why implementation is of the essence: it will entail a strengthening of the individual rights and ensure the enjoyment of these for all people within the Member States' jurisdictions.

As set out above, this goal requires action on a national level, under the subsidiary control of the Court. Through its case-law, the Court has established two main routes of contributing to this domestic human rights improvement: directly, when finding a violation in a case brought before it, and indirectly, through developing principles for compliance through its case-law. The direct route is certainly of fundamental importance for the individual applicants. However, implementation of the Convention happens, first and foremost, through the development of the case-law of the Court – with subsequent effect, as precedence, for all Member States, not just the parties to the specific case. This implementation through domestic practice thus has the most important structural, but also *practical* effect on human rights protection.

In both instances, implementation is ultimately dependant on domestic action. The Convention system only works, and implementation of rights can only happen, when the Member States fulfil their obligations: Not just by abiding by the final judgments of the Court in all cases to which they are parties but, in particular, through developing and applying domestic law in accordance with the Convention. Only then can the corrections made by the Court through its judgments have effect, thereby strengthening Convention rights not just in theory, but for the protected individuals within the jurisdictions of the Member States.

2.5 Implications for the Court's workload

Proper distribution of responsibilities between the Court and domestic authorities is not only a question of power, but also one of resources. The measures put in place to achieve the overarching goal of implementation must have regard for the workload placed on the Court: The trend of an increasingly larger backlog of cases has been clear since the 1998 reform, with

[44] *Yüksel Yalçinkaya v. Türkiye* [GC], § 305: The Convention is intended to guarantee "not rights that are theoretical or illusory but rights that are practical and effective".

the adoption of Protocol No. 11, and has been a main focus for the Council of Europe ever since.[45]

This concern was repeated by the *Group of Wise Persons*, which was set up after the Third Summit of Heads of State and Government of the Council of Europe, in Warsaw in 2005. The Group was asked to propose a strategy to secure the long-term effectiveness of the Convention, and to submit, as soon as possible, "proposals which go beyond these measures, while preserving the basic philosophy underlying the ECHR".[46]

The Group later described an "exponential increase in the number of individual applications" that was "seriously threatening the survival of the machinery for the judicial protection and the Court's ability to cope with its workload. This dramatic development jeopardises the proper functioning of the Convention's control system".[47] Further: "The situation, which, despite the various measures taken by the Court, is likely to get worse, is extremely dangerous. If nothing is done to resolve the problem, the system is in danger of collapsing".[48]

This "exponential increase" is largely attributable to the so-called "repetitive cases", which derive from a common dysfunction at the national level.[49] This implies structural issues, and that the findings of the Court are not always followed up on a domestic level. A well-thought-out distribution of responsibility and good-faith follow-up will therefore not only free the Court from an unsustainable workload, but also contribute to the overarching goal of implementation. The opposite poses a serious threat, for the entire functioning of the Convention system.[50]

One mechanism that was introduced to handle this issue is the *pilot-judgment procedure*, which was codified in 2011 through Rule 61 of the Rules of Court.[51] It was proposed and developed to deal with "large groups of identical cases that derive from the same underlying problem", by identifying the structural problems and imposing an obligation on States to address them. Through this procedure, the Court can select one or more cases deriving from the same systemic

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[45] Warsaw Declaration (2005), para. 2, Interlaken Declaration (2010), paras. 7–9. Reykjavík Declaration (2023), Appendix IV (on page 18).

[46] Warsaw Declaration (2005), para. 2; Warsaw Action plan (2005), chapter I, section 1, para. 4.

[47] CM(2006)203, para. 26.

[48] CM(2006)203, para. 28.

[49] Factsheet (2023), page 1.

[50] The Turkish cases concerning convictions for terrorism offences based on use of the encrypted messaging application *ByLock* serve as an illustration: After finding violations of Articles 6, 7, and 11 in *Yüksel Yalçinkaya v. Türkiye* [GC], the Court communicated five cases covering 1,000 other applications. This was described as merely the "first batch" to be communicated to the Turkish Government in this context: https://www.echr.coe.int/w/communication-of-cases-to-turkiye. The Grand Chamber noted that "there are currently over 8,000 applications in the Court's docket involving similar complaints", *Yüksel Yalçinkaya v. Türkiye* [GC], § 414.

[51] Rules of Court, pages 35–36.

issue, and in its judgment seek to find a solution that extends beyond this particular case, thereby avoiding having to deal with a large number of identical applications.[52] In addition to helping the Court manage its workload more efficiently, the mechanism is meant to assist the Member States in solving systemic problems as well as providing a speedier redress to applicants.[53]

2.6 A procedural turn in an effort to find the appropriate balance

2.6.1 Recent tendencies: Review in the "procedural embedding phase"

A tendency that has been identified within jurisprudence in recent years, is that the Court increasingly carries out its functions through *procedural* review.[54] This might have several explanations, one being that it is a suitable approach to finding an appropriate balance between the interests described in this chapter, ultimately ensuring effective implementation of the Convention.

Spano suggests that the Court is currently in the "procedural embedding phase", which represents a shift from the earlier "substantive embedding phase".[55] In this earlier stage, the Court was mainly engaged in "embedding" Convention principles into national systems, in order to create the necessary *foundation* for the realisation of the Convention.[56] Through decades of case law, especially through the principle that the Convention is a "living instrument" which must be interpreted "in the light of present day-conditions", this foundation has been created.[57] The Court can, therefore, at the current stage of development, take on a more "framework oriented role" in its review, truly implementing the principle of subsidiarity in practice.[58]

An analysis of the Court's case-law shows that the Court increasingly relies on the quality of domestic procedures under the systemic element of the margin of appreciation.[59] Rather than independently assessing the "Conventionality" of a domestic measure, the Court concentrates

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[52] Factsheet (2023), page 1 and Information note (2009), para. 1.

[53] Rule 61 § 2 (a), the Court shall seek the views of the parties on whether the procedure is appropriate, and the further process demands close cooperation; Background Paper (2024), Topic 4. Parallel to this procedure, the Court introduced "impact cases" as a new case-processing strategy in order to prioritise "adjudication of those cases which address core legal issues of relevance for the State in question and for the Convention system in general".

[54] Arnadóttir (2017), footnotes 17 and 32; Background Paper (2024), topic 3, footnote 8.

[55] Spano (2018), section 1, elaborated on in sections 2 and 4, respectively. Rui (2013), page 54, describes a similar shift from "an inner, material control of national authorities to an outer, procedural control".

[56] Spano (2018), page 475.

[57] E.g., *Verein KlimaSeniorinnen Schweitz and Others v. Switzerland* [GC], § 434.

[58] Spano (2018), pages 480–481.

[59] Arnadóttir (2017), pages 33–35; Spano (2018), page 481, with reference to the systematic examination of case-law performed by Madsen, which finds that the Strasbourg Court "is indeed providing more subsidiarity" after the 2012 Brighton Declaration, footnote 32.

on whether the issue has been "properly analysed by the domestic decision-maker in conformity with already embedded principles and the States' obligations to secure Convention rights to peoples within their jurisdiction".[60] The Court's focus has thereby shifted towards guiding national authorities on how to be structurally capable of fulfilling the task which they are set to do: effectively securing the Convention rights within their jurisdiction.

In my view, a clear example of this can be found in the case-law development on the right to a fair trial. In *Al-Khawaja and Tahery v. the United Kingdom*, the Court examined whether the reading of a written witness statement given to the police during a trial was compatible with Article 6. The Grand Chamber here explicitly diverted from the previous rule set out in *Lucà*, where the Court clarified that such reading (where the witness statement is considered to be the "sole or decisive evidence", and the witness is absent from trial) was *incompatible* with the guarantees provided by Article 6.[61]

In *Al-Khawaja and Tahery*, the Court relativises the previous rule, stating that the question in each case is "whether there are sufficient counterbalancing factors in place".[62] The principle is elaborated on in *Schatschaschwili*: "The Court's primary concern under Article 6 § 1 is to evaluate *the overall fairness* of the criminal proceedings".[63] Instead of an in-detail examination of the contested domestic measure itself, the Court assesses the process as a whole, focusing on whether the issue has been properly addressed through domestic proceedings. By doing so, the Court allows national courts to fulfil their fundamental role in the Convention protection system.

2.6.2 Different types of procedural review

Arnadóttir makes the distinction between two forms of "proceduralisation": The *procedural rights approach*, "whereby explicit procedural requirements are increasingly interpreted into different Convention provisions". And *procedural review stricto sensu*, where "the focus is not on if and how procedural elements are made explicit as part of the protective scope of Convention rights, but on their significance *among the balance of reasons when the Court pronounces on the substantive merits* and assesses the proportionality or reasonableness of a measure".[64]

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[60] Spano (2018), pages 480–481.

[61] *Al-Khawaja and Tahery v. the United Kingdom* [CG], §§ 146–147, cf. *Lucà v. Italy*, § 40. See also concurring opinion of Judge Bratza, § 3.

[62] *Al-Khawaja and Tahery v. the United Kingdom* [GC], § 147. Rui sees this as an example of the Court's move away from "absolute rules towards relative ones", allowing for greater discretion for national authorities, Rui (2013) page 50.

[63] *Schatschaschwili v. Germany* [GC], § 101 (emphasis added).

[64] Arnadóttir (2017), p. 14.

Spano makes a similar distinction between what he describes as a *process-based* review, and the "proceduralisation" of Convention rights, which he understands as a different jurisprudential development, relating to the importance of procedural safeguards as guarantees for substantive Convention rights.[65] When using the term *process-based* review, he refers not only to review of procedural issues in the traditional sense (i.e., as distinguished from issues of *legal substance*), but to the overarching methodological shift described above.

The first form of "proceduralisation" described by Arnadóttir, the *procedural rights approach*, is generally accepted. This form, which seems to correspond with Spano's understanding of the term "proceduralisation", can be identified on three levels:

First, we find inherent procedural requirements in the individual Convention provisions. For some, these are provided through the wording itself, such is the case for Articles 5, right to liberty and security, and 6, right to a fair trial. The Court has also, increasingly so, developed positive obligations for the Member States through procedural limbs of certain other provisions, in particular for Articles 2, right to life, 3, prohibition of torture, and 8, right to respect for private and family life.[66] Second, the overarching right to an effective remedy set out in Article 13 necessitates a minimum of procedural safeguards in the enjoyment of *all* Convention rights. Third, the Court has developed interpretation principles which facilitate increasing proceduralisation within *all* Convention provisions. For example, a certain procedural focus is required by the fundamental principle that the Convention is intended to guarantee "not rights that are theoretical or illusory but rights that are practical and effective".[67] In order to ensure practical and effective rights, procedural safeguards are imperative.

The second form, what Arnadóttir calls *procedural review stricto sensu*, refers to a type of review "where the quality of domestic decision-making processes is given special significance as an external non-merits reason that either influences the Court's substantive review of the proportionality or reasonableness of a measure, or replaces it".[68] With this analysis, Arnadóttir not only observes that the Court has an increasing focus on domestic procedures, but also describes how the Court *carries out* this procedural review.[69]

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[65] Spano (2018), page 480, footnote 29.

[66] *McCann and Others v. the United Kingdom*, § 161; *Assenov and Others v. Bulgaria*, § 102; *Fernández Martínez v. Spain* [GC], § 147, respectively.

[67] First articulated as such in *Airey v. Ireland*, § 24; *Yüksel Yalçinkaya v. Türkiye* [GC], § 305.

[68] Arnadóttir (2017), page 33.

[69] Otherwise, Arnadóttir and Spano seem to discuss the same phenomenon: an increased focus on the quality of domestic procedures in the Courts assessment of the *substantive* merits of the case.

This is only fair, as an increased focus on the quality of domestic procedures would only be relevant if this in turn can influence the Courts scrutiny. Arnadóttir refers to the *Animal Defenders* judgment as the most explicit expression of this type of procedural review:

> […] in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it […]. The quality of parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation. […] It follows that the more convincing the general justifications for the general measure are, the less importance the Court will attach to its impact in the particular case.[70]

With this in mind, a shift towards procedural review can also serve as an incentive for domestic authorities to ensure Convention compliance, in order to be granted a more lenient subsequent control, in the form of a broader margin of appreciation. Another former President of the Court, Spielmann, has said that the margin of appreciation is thus "neither a gift nor a concession, […] but an incentive to national courts to conduct the requisite Convention review, to balance competing rights, to weigh up rights against other aspects of the public interests, and to scrutinize the proportionality of interferences with human rights".[71] Such an incentive will make it easier for national authorities to fulfil their role as first-line protectors of human rights.

Finally, Arnadóttir describes how the Court, through procedural review, can draw negative inferences from procedural defects, and notes that "[i]t is more contested (…) how positive inferences from due procedural diligence should work".[72] There is, in other words, more reluctancy to let procedural diligence affect the strictness of the Court's scrutiny, than to let it be affected by procedural *defects*.[73]

2.6.3 Implications for the role of the Court and effective implementation

An appropriate question is whether the procedural embedding phase demands that the Court take on a more passive role. Also: If the Court's role in the procedural embedding phase is compatible the overarching goal of effective implementation of the Convention?

Both Arnadóttir and Spano seem to reject this first suggestion. A passive role implies that the Court is "forced" to accept the findings of domestic courts where these appear to be thorough, without conducting its own assessment. Arnadóttir found in her analysis that the tendency described usually does not lead to *complete*, but only to *partial* deference, because the Court

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[70] *Animal Defenders International v. the United Kingdom* [GC], §§ 108–109; *Humpert and Others v. Germany* [GC], § 146.

[71] Spielmann (2014), pages 63–64.

[72] Arnadóttir (2017), pages 14–15.

[73] Arnadóttir (2017), footnotes 12 and 15 provides further examples.

does engage in its own normative assessment of the merits of the case.[74] While Arnadóttir suggests that the Court is "experimenting with taking complete deference into the new area of proportionality assessments by domestic courts – which have hitherto widely been considered the essence of the Court's own judicial task and responsibility", she implies that the ultimate authority remains with the Court, as it "always has the milder option of relying instead on the quality of national decision-making processes as a factor indicating strictness or leniency in its own review (partial deference)".[75] Spano is of the same view, and goes as far as to claim that "the robust and coherent application of the principle of subsidiarity by the European Court of Human Rights has nothing to do with taking power away from the Court".[76]

An increased process-based review necessarily shifts the focus and might therefore indicate a *different* role for the Court. However, this role cannot be described as passive, as the Court retains the ultimate control. A process-based review should not be perceived as contrary to a substantive review: As described above, this is merely a methodological approach, with an increased focus on the quality of domestic procedures in the Courts assessment of the *substantive* merits of the case – not a disregard of the substantive merits themselves.

This means the Court, when approaching a case with a process-based review, cannot limit its assessment to formalities, a simple verification of whether domestic authorities (in particular domestic courts) have considered the proportionality or reasonableness of a measure. This is confirmed by Spano, who held that an application of the principle of subsidiarity and process-based review "in no way gives carte blanche to States Parties in their choice of measures and means that restrict Convention rights, *even where a balancing of interests has taken place at the domestic level*".[77]

Support for this view can be found in the Grand Chamber judgment in *Savran v. Denmark*. The Court insists on a high threshold for exception, but only after establishing strict requirements for domestic courts:

> […] where independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately weighed up the applicant's personal interest against the more general public interest in the case, it is not for the Court to substitute its own assessment

[74] Arnadóttir (2017), pages 33–34.

[75] Arnadóttir (2017), page 34.

[76] Spano (2018), page 492.

[77] Spano (2018), page 493 (emphasis added); Judge Spanos concurring opinions in *Dakir v. Belgium*, § 9 and *Belcacemi and Oussar v. Belgium*, § 9. Rui (2013), page 51 represents a different view: "Provided the reasoning on most points consists of relevant arguments, it will, in accordance with the majority's approach in *Mouvement Raëlien*, be accepted by the Court.", an approach which, in his view, "does not provide for the appropriate supervision of national authorities".

> of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so […].[78]

How much emphasis the Court can place on the domestic assessments, will necessarily vary according to the context of each individual case. For instance, there are good reasons not to place excessive value on domestic considerations in questions concerning vulnerable or minority groups, because democracy does not mean that the views of a majority must always prevail: "The role of the authorities is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other."[79] In this context, parliamentary processes can also serve as important foundation for the Court's assessment, in particular in complex and novel issues.[80]

Recalling the need for democratic legitimacy as a prerequisite for implementation, it is clear that also the solidity of domestic democratic institutions will influence the Court's scrutiny in the procedural embedding phase. Spano makes an interesting link between the question of deference and the principle of rule of law, claiming that the Court may grant deference only if national decision makers are structurally capable of filling that task:

> This means that the foundations of the domestic legal order have to be intact. States that do not respect the rule of law, a fundamental principle that permeates the whole of the Convention system, […] and do not ensure the impartiality and independence of their judicial systems, oppress political opponents or mask prejudice and hostilities towards vulnerable groups or minorities, cannot be afforded deference under process-based review.[81]

What Spano implies is that only national authorities that are able (and willing) to fulfil their primary responsibility to protect human rights within their legal systems, can be "rewarded" with deference under a process-based review. Because process-based review is the mechanism by which the Court implements the principle of subsidiarity in practice,[82] the principle of subsidiarity can only exist when the Member States respect the rule of law, when the domestic judiciary applies the Court's case-law independently and impartially. This condition is

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[78] *Savran v. Denmark* [GC], § 189.

[79] *Hamidović v. Bosnia and Herzegovina*, § 41.

[80] Spano (2018), page 491. Spano mentions the field of bioethics as an example of such issues, in particular a case concerning a domestic ban that prevented the applicant from donating to scientific research embryos obtained from an *in vitro* fertilisation which were not destined for a pregnancy, *Parrillo v. Italy* [GC].

[81] Spano (2018), page 493. Judge Eicke implied a similar link in his separate opinion in *Verein KlimaSeniorinnen Schweitz and Others v. Switzerland* [GC], § 20, referring to the fundamental importance of the concept of "effective political democracy" in the context of the principle of subsidiarity.

[82] Spano (2018), page 481.

reaffirmed by the rule of exhaustion of domestic remedies and its close affinity with the assumption of the existence of effective remedies reflected in Article 13 of the Convention.

The primary responsibility placed upon national authorities to secure the rights and freedoms of the Convention, clearly depends on the existence of an effective domestic remedy available in respect of the alleged violation.[83]

Therefore, the Court's subsequent control depends not only on the quality of the domestic assessment of the case at hand, but also the overall democratic solidity of the structures protecting the Convention rights within that jurisdiction. What is described by Arnadóttir as *partial* deference, can therefore also be labelled *conditional* deference.

If we accept these findings, the answer to the second question is evident: Conditional deference in process-based review *is* compatible with the overarching goal of effective implementation, because it demands domestic assessments that are compliant with the Convention, in order for deference to be "granted" in a subsequent assessment by the Court. Effective implementation in the "procedural embedding phase", is therefore ensured through empowering national authorities to properly implement the Convention rights as they are interpreted through the well-established case-law of the Court.[84] As held by Spano:

> The historical trajectory of the Convention system has, by its very nature and current status, called for a shift of focus to secure the increased effectiveness of human rights protections at national level by moving towards a bottom-up strategy empowering national rights-holders and decision makers to take the lead in securing human rights, albeit ultimately subject to the supervision of the Strasbourg Court as provided for by Articles 19 and 32 of the Convention.[85]

This approach is therefore not only *compatible* with the overarching goal of effective implementation, but it might also be a *necessary* shift in focus, considering the context described in this chapter.

2.7 Dialogue as a tool for effective implementation

Dialogue, or *interaction* between the Court and national authorities, can take many forms, including through forums such as the Superior Courts Network, or more indirect through the Court's participation in discussions with the Member States within the framework of the Council of Europe.[86] In the context of this thesis, however, I address specifically the dialogue

[83] *Vučković and Others v. Serbia* (preliminary objection) [GC], § 69.

[84] Spano (2018), page 492 holds that the goal of increased process-based review is "to increase the general level of Convention protections at domestic level". He notes, however, that "subsidiarity-based deference [is] premised on good faith domestic engagement with Convention principles".

[85] Spano (2018), page 486.

[86] E.g., through "exchange of views" with the representatives of the Member States in the Committee of Ministers.

between the Court and national authorities of the Member States that take place *through the case-law of the Court*.

Dialogue might not be a goal in itself, but it can be a useful tool in achieving effective implementation of the Convention rights under the process-based review approach. Recalling the initial conflict between supranationalism and sovereignty, reluctance within Member States when met with confrontational measures, and the fact that implementation depends on domestic action; increased dialogue can be an appropriate response. The strong emphasis on shared responsibility set out by the Member States at several High-level conferences over the years, represents a move from a strict hierarchy, towards a model of cooperation and dialogue.[87]

When slightly shifting the focus towards whether domestic *proceedings* can guarantee the Convention rights, *the system itself* encourages a certain dialogue between the Court and national authorities. This allows for implementation in accordance with the necessary domestic alterations and Convention compliance with a more robust domestic support (ideally with both authorities and people), which can in turn lead to a more stable implementation of Convention rights.

Such an approach could make it easier for the domestic authorities to accept the findings of the Court. In a way, the division of power described *requires* an element of dialogue, so that Member States are informed, equipped, and entrusted with the power that remains within their margin of appreciation.

Spano argues that a procedural turn, the current "procedural embedding phase", will "sustain and support in the long run the system's overall legitimacy and effectiveness for the peoples of Europe and, hopefully, at the same time result in the progressive decrease in the number of applications to the Strasbourg Court".[88] This approach might therefore be a way of addressing both the issue of legitimacy and backlog of cases, as well as securing effective implementation of the Convention rights – also in a long-term perspective.

A dialogue-based approach to human rights implementation remains a goal for the Council of Europe Member States. The High Contracting Parties recently affirmed the need for a more "co-operative, inclusive and political approach based on dialogue" – this was one of the main goals when the Heads of State and Government recommitted to the Convention system in the Reykjavík Declaration.[89] The Parties also took note of the "comprehensive dialogue" between

[87] Interlaken Declaration (2019), para. 5; Brighton Declaration (2012), para. 12; Reykjavík Declaration (2023), Appendix IV (on page 17).

[88] Spano (2018), page 494.

[89] Reykjavík Declaration (2023), Appendix IV (on page 19).

the Strasbourg Court and domestic courts, and encouraged the strengthening of this dialogue, *inter alia* through the Court's advisory opinions.[90]

[90] Reykjavík Declaration (2023), Appendix IV (on page 19).

3 Protocol No. 16

3.1 Background and adoption

Protocol No. 16 to the Convention allows the highest courts and tribunals of the Member States to request the Court to give advisory opinions on questions of principle in the context of a case pending before it.[91] The main purpose of the Protocol is to reinforce implementation of the Convention, through enhanced interaction between the Court and national authorities.[92]

Even though the Court did not initially support the idea of the Protocol, it did endorse this particular objective. In its initial opinion on the proposal, it mentioned that such a mechanism would reinforce the subsidiary nature of the system.[93] In its later reflection paper, the Court called the proposal a way of creating "an institutionalised dialogue", a description that has been endorsed by national judges.[94] Protocol No. 16 has also been referred to as "the dialogue Protocol".[95]

The adoption of the Protocol followed an initiative set out by the Heads of State and Government at the Warsaw summit, and the work of the already mentioned *Group of Wise Persons*. The Group submitted their report the following year, proposing multiple reform measures, including under the title "Forms of co-operation between the Court and the national courts – Advisory opinions".[96] The Group considered that it would be useful to introduce a system "under which the national courts could apply to the Court for advisory opinions on legal questions relating to interpretation of the Convention and the protocols thereto".[97]

As already indicated, several measures have been implemented over the years to deal with the Court's backlog of cases.[98] The proposal to develop a mechanism for advisory opinions was also meant to contribute to this reduction by facilitating the settlement of cases at a national level before they reached the Court. [99] If the Court could clarify certain issues through advisory opinions, domestic courts could apply the relevant standards and criteria more easily in their

[91] Protocol No. 16 Article 1 §§ 1 and 2.

[92] Preamble to Protocol No. 16, para. 3.

[93] Opinion of the Court (2007), chapter II, section 4.

[94] Reflection Paper (2012), para. 4, with further references; By the First President of the French Court of Cassation, Soulard (2023), page 1.

[95] E.g., O'Leary (2023), Soulard (2023) and Eicke (2023), in the context of the seminar marking the fifth anniversary of the Protocol coming into force.

[96] CM(2006)203, chapter II, section B, heading 4 (paras. 76–86).

[97] CM(2006)203, para. 81.

[98] E.g., the pilot-judgment procedure described in chapter 2.5. Another important mechanism was introduced by Protocol No. 14: the single judge formation, who's competence is now enshrined in Article 27 of the Convention.

[99] Reflection Paper (2012), para. 14, with further references.

own case-law and at an earlier stage.[100] This, however, requires a certain commitment by the Member States, and the effect is difficult both to foresee and determine. The Court, therefore, underlined that the advisory opinion mechanism "would have to be set up in a way as to guarantee that the beneficial effects of it, despite an initially increased workload – characteristic of every reform – would prevail in the long run".[101]

At the same time, the proposal was met with warnings that it could severely *increase* the Court's workload by introducing a completely new type of cases.[102] The Court noted in its reflection paper that the Grand Chamber, which was to have a key role in the proposed mechanism, was already facing a heavy workload.[103] The Court suggested several prerequisites in this regard which found their way into the Protocol text, including limiting the mechanism to the highest courts and tribunals, providing the Court with a possibility to reject a request, and only allowing questions of principle or general interest.[104]

The Committee of Ministers was then invited to draft the text of an optional protocol to the Convention. The final text was done in Strasbourg on 2 October 2013 and opened for signature by the High Contracting Parties. It entered into force upon the 10th ratification on 1 August 2018, according to Article 8 No. 1 of the Protocol.[105] Today, the Protocol has 22 State Parties.[106] An additional three Member States signed the Protocol but have yet to ratify it.[107]

The reluctance among certain Member States to ratify the Protocol undoubtedly has several explanations, one being the aforementioned tension between the Convention system and national sovereignty. Some Member States might be concerned that an extension of the Court's jurisdiction poses a threat to national sovereignty and judicial discretion.[108] As I will show in the following, the Protocol does not limit the power of domestic authorities, but rather grants the highest courts and tribunals of the ratifying Member States a newfound influence within the Convention system.

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[100] Albanesi (2022), page 4.

[101] Reflection Paper (2012), paras. 15–16.

[102] E.g., by The Group of Wise Persons, CM(2006)203, para. 85 and the Court, Reflection Paper (2012), para. 12.

[103] Reflection Paper (2012), para. 13.

[104] Reflection Paper (2012), paras. 26, 34, and 30, respectively.

[105] These first ten ratifying Member States, in chronological order: San Marino, Slovenia, Albania, Georgia, Lithuania, Finland, Armenia, Estonia, Ukraine and France.

[106] After its entry into force an additional 12 Member States ratified the Protocol. In chronological order: the Netherlands, Greece, Andorra, the Slovak Republic, Luxembourg, Bosnia and Herzegovina, Romania, Belgium, the Republic of Moldova, Azerbaijan and North Macedonia.

[107] Italy, Türkiye, and Norway.

[108] Albanesi (2022), pages 5–7. He argues that this reluctance, exemplified with the position of the Italian Government, is unjustified.

3.2 The "dialogue protocol"

The preamble sets out three additional prerequisites for, or elements of, the Protocol's inherent goal of dialogue: The extension of the Court's competence will further enhance interaction "between the Court and *national authorities* and thereby *reinforce implementation* of the Convention, in accordance with the *principle of subsidiarity*".[109]

In accordance with Article 1 § 1, enhancing dialogue is done through allowing the "[h]ighest courts and tribunals" to request advisory opinions. The fact that the preamble mentions dialogue with *national authorities* in general, not only these highest courts and tribunals, reveal that advisory opinions are meant to have an impact also beyond the case which prompts a request with the Court. The domestic impact of an advisory opinion should not end with the requesting Court; its decision must be taken into account by domestic courts on lower levels *and* followed up at a legislative level.

Second, the ultimate goal of this enhanced interaction is to "reinforce implementation of the Convention". It could therefore be argued that dialogue *in itself* is not the primary goal, but simply a measure to ensure implementation.

Third, this should all be done "[i]n accordance with the principle of subsidiarity". The extended jurisdiction of the Court is thus not contrary to the fundamental principle that the High Contracting Parties have the primary responsibility to secure the rights and freedoms of the Convention. The use of the advisory opinion mechanism is, however, a way for the requesting court to engage the Court at an earlier stage, influencing the quality of domestic processes. In fact, the use of advisory opinions is a way for national authorities to perform their responsibility to secure the rights and freedoms of the Convention, *with* the assurance that they are acting in compliance with the Convention, as interpreted by the Court, which is the "final arbiter of the scope and content of the Convention".[110]

In its opinion on the draft protocol, the Court fully subscribed to the aims expressed in in the preamble.[111]

3.3 The Court as advisor, not arbiter

The requesting court or tribunal may, in the context of the Protocol, "seek an advisory opinion *only* in the context of a case pending before it", prohibiting abstract review.[112] The Court should not "assess, in a general way, the rationale and structure of the applicable domestic law. It is to

[109] Preamble to Protocol No. 16, para. 3 (emphasis added).

[110] Spano (2018), page 492.

[111] Opinion of the Court (2013), para. 4.

[112] Protocol No. 16, Article 1 § 2 (emphasis added).

give guidance to the requesting court, so that it can ensure that the proceedings before it are conducted in accordance with the requirements of the Convention as they may arise in the specific circumstances".[113] This demands, in turn, sufficient clarification from the requesting court: The questions asked must be formulated with sufficient precision to "enable the Court to confine its opinions to points that are directly connected to the proceedings pending at domestic level".[114]

At the same time, the Court is not asked to rule in the case, creating somewhat of a contradiction which warrants caution from the Court when giving advice through the mechanism.[115] As reiterated by the Court several times: "The aim of the procedure is not to transfer the dispute to the Court, but rather give the requesting court or tribunal guidance on Convention issues when determining the case before it […]."[116]

If successful in this balance the Court can, in addition to providing guidance to the requesting court, express more general considerations that could easier be applied to other situations, compared to statements given in a judgement or decision.[117]

3.4 Relevant questions in the context of requests under Protocol No. 16

The Protocol allows "[h]ighest courts and tribunals" to request the Court to give advisory opinions on "questions of principle relating to the interpretation or application" of the Convention rights.[118] The wording of Protocol No. 16 is inspired by that of Article 43 of the Convention, which concerns referral to the Grand Chamber.[119] This was a conscious choice, due to the parallels between the two procedures, including but "not limited to the fact that advisory opinions would themselves be delivered by the Grand Chamber".[120]

One such parallel is that both the request by a case party for referral to the Grand Chamber and that of highest courts or tribunals under Protocol No. 16 must be *accepted* by the Court. More specifically, the request must be accepted by a panel of five judges of the Grand Chamber (the Panel).[121] However, refusal of a request for an advisory opinion from a domestic court or

[113] P16-2022-001 [GC], § 60.

[114] Protocol No. 16 Guidelines, para. 6.3.

[115] Soulard (2023), page 3.

[116] E.g., P16-2018-001 [GC], § 25.

[117] Soulard (2023), page 7, arguing that advisory opinions form part of the Court's case-law without containing case-specific considerations, making them easier to apply to other situations.

[118] Protocol No. 16, Article 1 § 1.

[119] The wording of this key provision was suggested by the Group of Wise Persons, CM(2006)203, para. 86, and later endorsed by the Court, Reflection Paper (2012), para. 27.

[120] Explanatory Report, para. 9.

[121] Protocol No. 16, Article 2 § 1.

tribunal must be accompanied by the Panel's reasons for such refusal, contrary to the procedure under Article 43. The purpose of this requirement is to further strengthen the dialogue: an explanation as to why the request was not granted, clarifying the Court's interpretation of how "question of principle relating to the interpretation or application" is meant to be understood, will provide guidance to domestic courts and tribunals when considering whether to make a request and thereby help to deter inappropriate request.[122] Such an explanation could also provide important guidance for the requesting court, which, regardless of the Panel's decision, must rule in the case before it.

In the first of its two rejections, the Panel held that "the question of principle must be considered by the requesting court or tribunal to be necessary for its adjudication of the case".[123] Further, in its latest rejection:

> [Questions of principle] are those which on account of their nature, degree of novelty and/or complexity or otherwise concern an issue on which the requesting court would need the Court's guidance by way of an advisory opinion to be able to ensure respect for Convention rights when determining the case before it.[124]

What the Court suggests here, is that a question can be "of principle" for different reasons: Both an element of novelty *and* of complexity can justify the use of the Protocol, but also any other question which necessitates guidance from the Court. A similar approach was suggested by Soulard – the First President of the French Court of Cassation – at the seminar marking the fifth anniversary of Protocol No. 16 coming into force. He described three types of requests: (i) A completely new question where guidance is needed because there is none in the pre-existing case-law; (ii) a question that is not new, but the requesting court prompts the Court to *revisit* and *re-examine* its existing case-law; (iii) a question in the context of a case which reveals a (domestic) structural problem, where input from the Court can help re-adjust national judges out of an "intellectual dead-end".[125]

The first type of request appears as the most "straight-forward" use of the Protocol. In general, the need for advice is minimal when the necessary guidelines can already be found in the case-law of the Court, and the request should therefore be rejected. The recent rejection of the request

[122] Explanatory Report, para. 15; Opinion of the Court (2013), § 9, the Court noted that this requirement "goes against the opinion expressed by the Court in its reflection paper [Reflection paper (2012)]", but that it could accept "that it may be useful to give reasons" considering the overarching goal of dialogue.

[123] P16-2020-001, § 17; Protocol No. 16 Guidelines, para. 7.

[124] P16-2023-002, § 20.

[125] Soulard (2023), page 7, "une forme d'impasse intellectuelle ou humaine".

from the Estonian Supreme Court concerning the interpretation of "acquittal" in the context of Article 4 of Protocol No. 7,[126] the Court held:

> The overview of the Court's case-law […] demonstrates that the first question asked by the requesting court is the subject of well-established case-law of the Court. The Court notes that, based on the information available to it, the discontinuance at issue in the case pending before the requesting court does not involve any special prosecutorial situation which would call for any further elaboration by the Court of the principles developed in that case-law. […] In the light of the above, the Court concludes that the request does not concern a question of principle within the meaning of Article 1 § 1 of Protocol No. 16, warranting examination by the Court's Grand Chamber.[127]

This approach is in accordance with the practice under the contentious Grand Chamber procedure. [128] Unless the Panel considers it appropriate to develop the Court's case-law, chamber judgments that simply require application of well-established case-law are in principle not referred to the Grand Chamber.[129]

The second type of request invokes further associations to the Grand Chamber procedure. There might be several reasons why the Panel may decide to refer a case to the Grand Chamber, even if it is not, in principle, a new question. In particular, the Panel can refer cases which may be suitable for development of the case-law, for clarifying the principles set forth in previous case-law, and in which the Grand Chamber is called upon to re-examine a development in the case-law endorsed by the Chamber.[130]

If the Panel consider a case suitable for development of the case law, the outcome is, nevertheless, dependent on the ambitions of the Grand Chamber itself: "It goes without saying that in such cases there is nothing to prevent the Grand Chamber from confirming the existing case-law and refusing to endorse the change envisaged by the majority of the Panel."[131] This was confirmed in the context of advisory opinions by the Grand Chamber:

[126] Right not to be tried or punished twice.

[127] P16-2023-002, §§ 30–31.

[128] I am using the term "contentious" as opposed to "advisory" in this context, i.e., the case-law of the Court deriving from individual applications and inter-state cases. See, similarly, Reflection Paper (2012), para. 44 and throughout Rules of Court.

[129] Note prepared by the Registry (2021), para. 45.

[130] Note prepared by the Registry (2021), paras. 24–29.

[131] Note prepared by the Registry (2021), para. 26.

> While the decision to accept the request for an advisory opinion lies with the panel, this cannot deprive the Grand Chamber of the possibility of employing the full range of powers conferred on the Court, including its power in relation to the Court's jurisdiction […].[132]

None of the Panel's rejections were made unanimously.[133] This is different from all seven advisory opinions given by the Grand Chamber, which *were* unanimous. While Article 4 of the Protocol provides for the possibility for individual judges to deliver separate opinions, this has so far been avoided.[134] As noted by the Court, "it has been the practice of the Court when issuing advisory opinions to endeavor to speak with one voice".[135] An advisory opinion containing several conflicting conclusions could provide the requesting court with less guidance. Depending on the reason for the request, the assessment of the Grand Chamber could nevertheless provide useful guidance for the requesting court, even when "speaking with more than one voice".

The third category identified by Soulard, comprises requests made because of a need for institutional support when assessing a structural or systemic problem in a difficult political context. This is an example of the "extended" dialogue that is the ambition of the Protocol.[136] The Court can, by entering into the discussion, enrich the dialogue between judges and public authorities.[137] This is connected to what Soulard describes as an "intellectual dead-end", which may prompt the national court or tribunal to request guidance, not so much for its own use, but as *leverage* in a conflict with other national authorities. As opposed to the types of requests described above, a non-unanimous advisory opinion could, arguably, not be as useful for the requesting court in this context.

In particular, Soulard holds, an advisory opinion can be useful when the national court identifies national norms incompatible with the rights of the Convention.[138] When faced with this discrepancy, the political context might make it extremely difficult for the national court to set aside the domestic law in question. Soulard further admits that the request from the French Court of Cassation on surrogacy, which I will deal with in more detail later, was an example of this.[139]

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[132] P16-2019-001 [GC], § 47, with reference to Articles 19 and 23 of the Convention and, by analogy, Article 48.

[133] P16-2020-001 and P16-2023-002 were both decided "by a majority".

[134] P16-2019-001 [GC] featured the concurring opinion of (ad hoc) judge Sarvarian.

[135] Opinion of the Court (2013), para. 11.

[136] I.e., interaction not only between the Strasbourg Court and the requesting court, but "between the Court and *national authorities*", Preamble to Protocol No. 16, para. 3 (emphasis added).

[137] Soulard (2023), page 7.

[138] Ibid.

[139] Ibid.

Such reasoning for referring a case to the Grand Chamber can be found also under the contentious jurisdiction of the Court.[140] The significant difference, however, is that a domestic court or tribunal is the igniting force, granting them a new role and a newfound influence.[141]

3.5 The non-binding nature of advisory opinions

Article 5 of the Protocol sets out another fundamental aspect of the mechanism: the non-binding nature of advisory opinions. As they are delivered in the context of dialogue, it should be up to the requesting court or tribunal to decide both how to interpret the advisory opinion, and how to implement them in their own rulings.[142] This principle goes hand in hand with the fact that there is no obligation for domestic courts and tribunals to request advisory opinions:[143] If a domestic court can *choose* to request, but is *obliged* to follow it if it does, domestic courts would merely cease to interact with the Court.[144]

It is a known problem that non-compliance with the Court's judgments has serious negative effects that can undermine the authority of the Court.[145] Because of the obligation of the High Contracting Parties to abide by the final judgments of the Court in cases to which they are parties, this is especially damaging when a Member State insists on non-compliance despite extensive measures taken by the Committee of Ministers to ensure execution.[146]

A similar concern was raised in the context of non-binding advisory opinions.[147] By granting domestic courts and tribunals the discretion to incorporate the advice into its own assessment of the case before it, one can argue that the Court renders its authority more vulnerable. However, because of the non-binding nature of advisory opinions, a different approach from domestic courts would not be as confrontational as that of non-compliance following a *violation*. In any event, the Court would be able to "react" in a subsequent individual application in the same case, should the individuals concerned feel dissatisfied with the domestic court's assessments. As expressed by the Steering Committee for Human Rights: "The 'sanction' for

[140] I.e., cases concerning "new" issues, cases raising serious issues of general importance or with significant repercussions, note prepared by the Registry (2021), paras. 33–38.

[141] Further in chapter 5.3.

[142] Opinion of the Court (2013), para. 12; Explanatory Report, para. 25.

[143] Protocol No. 16, Article 1 § 1; Explanatory Report, para. 7.

[144] This illustrates one of the fundamental differences between the Protocol No. 16-mechanism and the jurisdiction of the CJEU in the context of preliminary rulings under Article 267 (3) TFEU. When asked to give its opinion on the draft agreement for the Accession of the EU to the Convention, the CJEU pointed out that this discrepancy creates "a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented […]", Opinion 2/13, para. 198.

[145] CM(2006)203, para. 25; Reykjavík Declaration (2023), Appendix IV (on page 18).

[146] The most evident being non-compliance in the context of the *infringement procedure* enshrined in Article 46 § 4 of the Convention, in particular the case of *Kavala v. Türkiye* (infringement proceedings) [GC].

[147] CDDH Final Report (2012), Appendix V, para. 4, *litra* g (on page 59).

non-compliance with an advisory opinion would be the finding of a violation in a subsequent individual application".[148]

However, the non-binding nature of advisory opinions must not be confused with a lack of authority with regards to the interpretation of the Convention. While not *directly* binding for the parties, advisory opinions *are* authoritative interpretations of the Convention.[149] Therefore, the binding force of advisory opinions for future application of the Convention applies with the same strength as that of contentious case-law of the Court.

> "Despite the fact that its advisory opinions would not be formally binding on the domestic courts, the Court itself should consider them as valid case-law which it would follow when ruling on potential subsequent individual applications. Despite the fact that advisory opinions would not have the binding character of a judgment in a contentious case, they would thus have 'undeniable legal effects' […]."[150]

Given the parallels to the mechanism for referral to the Grand Chamber, the impact of advisory opinions is more precisely compared to the case-law of the Grand Chamber. The advisory opinions are also, in a purely practical manner, delivered by the Court through the formation of the Grand Chamber, making the impact evident. Advisory opinions are, after all, "issued by the Court's most solemn judicial formation of 17 judges".[151]

The effect of advisory opinions in the eyes of domestic courts and other national authorities when interpreting and applying the Convention, is therefore significant. Further, it applies with the same force for all Member States, regardless of whether they ratified the Protocol or not – as is the case for the impact of contentious case-law.[152] The same was pointed out by Albanesi, who held that certain Member States that did not yet ratify the Protocol "[apparently] did not realize that advisory opinions under Protocol No. 16 legally affect *all* Contracting States to the ECHR, including those which have not ratified the Protocol".[153]

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[148] CDDH Final Report (2012), Appendix V, para. 20b (on page 62); Explanatory Report, para. 26.

[149] Albanesi (2022), section 3 (starting on page 7), referring to the 'vertical' non-binding effect and the 'horizontal' legal effect of advisory opinions.

[150] Explanatory Report, para. 27; Reflection Paper (2012), para. 44, referring to an analysis of the (also non-binding) mechanisms of the Inter-American Court of Human Rights and the ICJ, footnotes 46 and 47.

[151] O'Leary (2023).

[152] Because advisory opinions relate to the interpretation and application of the Convention, which all Member States have committed to. The Court provides the final authoritative interpretation of the rights and freedoms defined in the Convention, *Humpert and Others v. Germany* [GC], § 69 and Article 1 of the Convention.

[153] Albanesi (2022), page 2.

3.6 Subsequent individual applications

Because the requesting court can only seek an advisory opinion in the context of a case pending before it, and the procedure does not prevent a party to that same case from subsequently exercising their right to an individual application, the Court may be asked to review an application in a case where it has already voiced its opinion on through the advisory opinion mechanism. As set out in the Explanatory Report:

> [W]here an application is made subsequent to proceedings in which an advisory opinion of the Court has effectively been followed, it is expected that such elements of the application that relate to the issues addressed in the advisory opinions would be declared inadmissible or struck out.[154]

How such a situation is dealt with by the Court remains to be seen. However, if the Court follows the approach suggested in the Explanatory Report, this would be a clear example of letting due procedural diligence affect the subsequent control exercised by the Court. Recalling how the Court can draw positive and negative inferences depending on the quality of domestic proceedings, this would be a way for the Court to draw positive inferences from procedural diligence, a dimension under procedural-based review for which Arnadóttir, as previously mentioned, indicated a certain reluctance.[155]

However, in this scenario, the Court is not *truly* replacing its substantive review of a measure with that of domestic decision-makers. Given the prerequisite that the advisory opinion of the Court has been "effectively followed", the Court is in reality replacing its review with that of the Grand Chamber in the preceding advisory opinion, *as implemented by domestic authorities*.

The opposite scenario, where a subsequent individual application follows non-compliance with an advisory opinion, is not elaborated on in the Explanatory Report. The Steering Committee for Human Rights indicated the unlikeliness of such a scenario, because of the voluntary nature of requests:

> Since it would be optional for the national court to request an advisory opinion, however, it seems unlikely that a national court would delay proceedings in order to request one and then not follow it.[156]

This may be true where compliance only depend on the requesting court's decision, but should be nuanced for more complex issues: Cases that prompt requests in the "third category" – those revealing a structural problem, perhaps in a difficult political context – might require the national authorities to initiate further and diverse steps of implementation with corresponding

[154] Explanatory Report, para. 26.

[155] Arnadóttir (2017) page 15.

[156] CDDH Final Report (2012), Appendix V, para. 20b (on page 62).

risks for non-compliance. The Court *may* therefore have to deal with subsequent individual applications deriving from this scenario. A complete disregard of the considerations of the Court given in the advisory opinion could also constitute what the Court might consider a procedural defect, which again could lead to stricter scrutiny. Depending on the level of non-compliance, it should therefore come as no surprise if the Court found a violation while also referencing its advisory opinion, notwithstanding the fact that advisory opinions "shall not be binding" by virtue of Article 5. In any event, the Court "retains in every case the final say on whether the result arrived at domestically is fraught with unreasonableness, regardless of the reasoning deployed by the national decision-maker".[157]

[157] Spano (2018), page 488. This remains the Court's discretion, because the proposal to add thorough domestic proceedings to the list of admissibility criteria was rejected by the Member States, CDDH Final Report (2012), Appendix III, section 5 (starting on page 37); Rui (2013) pages 36–37.

4 Case study: the first advisory opinion

4.1 Why the first advisory opinion is suitable for analysis

In the following, I will take a closer look at the first advisory opinion given by the Court under the Protocol, upon request from the French Court of Cassation in a case concerning surrogacy.[158] The aim of this case study is to examine some of the questions raised in the previous chapters in the context of a specific advisory opinion. In accordance with the overall objective, I will focus on how the use of the Protocol contributes to enforcement and implementation of the Convention through dialogue.

There are several reasons why I chose to examine this advisory opinion. The opinion has an obvious symbolic value, being the first one given under the new protocol just over six months after it entered into force. The Court also had to interpret the provisions of the Protocol in general terms, more so than in later opinions.[159] Additionally, by being the earliest opinion it has had more time to affect later procedures, both within Member States and before the Court.[160]

The subject of the opinion is also important. The advisory opinion concerned the recognition of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother. Regulation on surrogacy in Europe is an emerging issue, and it is only recently that such cases have been dealt with by the Court.[161]

Cases concerning recognition of legal parent-child relationships are also cases where there is a prominent element of *irreversibility*, because of the close link between such legal recognition and the *de facto* relationship between the parent and the child. Advisory opinions can be particularly useful in these cases, because of the irreversible consequences of an inadequate assessment at the domestic level.[162]

Finally, the case examined by the French Court of Cassation leading up to the request for an advisory opinion in 2018, derives from the same case as the one concerned in the *Mennesson* judgment, which I will expand upon below. There is a line from the original complaint and violation to the subsequent domestic proceedings leading to the request and advisory opinion. This makes the opinion even more relevant to a study in a dialogue perspective.

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[158] P16-2018-001 [GC].

[159] P16-2018-001 [GC], § 25.

[160] Further in chapter 4.5.

[161] Overview of the Court's case-law: https://ks.echr.coe.int/documents/d/echr-ks/surrogacy.

[162] Both the first advisory opinion and a more recent one delivered upon request from the Supreme Court of Finland concerning the procedural status and rights of a biological parent in proceedings for the adoption of an adult are examples of this, P16-2018-001 [GC] and P16-2022-001 [GC].

4.2 Mennesson v. France

The first judgments of the Court that explicitly concerned questions relating to surrogacy, were delivered in 2014 in the cases of *Mennesson v. France* and *Labassee v. France*.[163] The applications from the two families both concerned the refusal to grant legal recognition in France to parent-child relationships between children born through gestational surrogacy arrangements, and their intended parents.[164] In both cases, the parent-child relationship had already been legally established in the United States, where the surrogacy procedures had taken place. When the families returned to France, they were unable to obtain recognition for this relationship.

In *Mennesson*, the Court found that domestic courts had struck a fair balance concerning the right to *family life*, but that the respondent State had overstepped its margin of appreciation considering the consequences for the children's right to *private life* under Article 8.[165] The Court found a violation because the French system completely prevented the establishment of a parent-child relationship between children born through gestational surrogacy arrangements and their intended parents. The Court did not, however, suggest how this recognition should be done.

The Court held that respect for private life requires "that everyone should be able to establish details of their identity as individual human beings".[166] By refusing to recognise the legal parent-child relationship in these circumstances, French authorities denied the children an essential aspect of their identity.

Further, the Court accepted that France might "wish to deter its nationals from going abroad to take advantage of methods of assisted reproduction that are prohibited on its own territory".[167] Nevertheless, it held that the non-recognition had negative effects also on the children, which the authorities had no reason to punish. This raised a "serious question" concerning compatibility with the children's best interests, "respect for which must guide any decision in their regard".[168]

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[163] Delivered jointly on 26 June 2014.

[164] Gestational surrogacy refers to the process where a fertilized egg (embryo) is transferred to the surrogate, as opposed to "traditional surrogacy", where the surrogate mother is artificially inseminated. The term "intended parents" refers to the persons which the parental rights are forfeited in favor of, similarly in "Key Theme" paper, https://ks.echr.coe.int/documents/d/echr-ks/surrogacy.

[165] *Mennesson v. France*, § 94 and §§ 100–101.

[166] *Mennesson v. France*, § 96.

[167] *Mennesson v. France*, § 99.

[168] *Mennesson v. France*, § 99. In particular, the uncertainties as to the possibility of obtaining recognition of French nationality and the consequences of inheritance rights described in §§ 97–98.

4.3 Two main questions from the requesting court

The subsequent request from the French Court of Cassation was made in the context of domestic proceedings designed to "re-examine the appeal on points of law by the applicants in the case of *Mennesson*".[169] Since the judgment, domestic case-law had evolved.[170] It was now possible to register the details of the birth certificate of a child born through surrogacy abroad, as long as the certificate designated the intended father as the child's father where he was the biological father.[171] The same was, however, still impossible regarding the intended mother.[172]

The Court was therefore asked to give advice on two main questions, which both addressed the current legal situation in France. The first one concerned the practice of refusing to register the intended mother along with the intended father in the birth certificate of a child born through surrogacy:

> By refusing to enter in the register of births, marriages and deaths the details of the birth certificate of a child born abroad as the result of a gestational surrogacy arrangement, in so far as the certificate designates the 'intended mother' as the 'legal mother', while accepting registration in so far as the certificate designates the 'intended father', who is the child's biological father, is a State Party overstepping its margin of appreciation under Article 8 of [the Convention]? In this connection should a distinction be drawn according to whether or not the child was conceived using the eggs of the 'intended mother'?[173]

The second question, *assuming* an obligation to recognise the relationship between the child and the intended mother, was:

> In the event of an answer in the affirmative to either two questions above, would the possibility for the intended mother to adopt the child of her spouse, the biological father, this being a means of establishing the legal mother-child relationship, ensure compliance with the requirements of Article 8 of the Convention?[174]

The Panel decided to accept the request in accordance with Article 2 § 3 of the Protocol and explained how it would deal with the two issues raised by the requesting court. First, the question of whether the Convention requires that the legal relationship between the child and the intended mother be recognised, when this is required for the father.[175] Second, if such a

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[169] P16-2018-001 [GC], § 27.

[170] The developments within domestic legislation were noted by the Court already in *Foulon and Bouvet v. France* but held that these were still of "hypothetical character", § 56.

[171] P16-2018-001 [GC], § 14.

[172] Ibid.

[173] P16-2018-001 [GC], § 9.

[174] Ibid.

[175] P16-2018-001 [GC], § 32.

recognition must be done through entry into the birth certificate, or if other means (such as adoption) would suffice in order to comply with the requirements of the Convention.[176]

4.4 The Court's advisory opinion

When answering the first question, the Court refers to its judgment in *Mennesson*, as well as the changes that took place within French law since this judgment.[177] Then, the Court presents the relevant international sources, as well as its own comparative-law survey on the subject.[178] The comparative-law survey conducted showed that the procedure for establishing or recognising parent-child relationships between children born through surrogacy and their intended parents, varied from one State to another, and that several different procedures were available within a single State.[179]

Before expressing its opinion on the questions presented, the Grand Chamber had certain preliminary considerations. Recalling the preamble to the Protocol, it held that "[t]he aim of the advisory-opinion procedure is to further enhance the interaction between the Court and national authorities and thereby reinforce implementation of the Convention, in accordance with the principle of subsidiarity […]".[180] The Court underlined the balance it has to strike in order to do so:

> The aim of the procedure is not to transfer the dispute to the Court, but rather to give the requesting court or tribunal guidance on the Convention issues when determining the case before it. […] It is for the requesting court or tribunal to resolve the issues raised by the case and to draw, as appropriate, the conclusions which flow from the opinion delivered by the Court for the provisions of national law invoked in the case and for the outcome of the case.[181]

Turning to the request at hand, the Court referred to its previous judgment in *Mennesson*. As illustrated by the request, two questions remained unanswered: is legal recognition also required with regards to the mother, and is a genetic bond between her and the child decisive? And if such recognition is required, is the possibility for adoption sufficient for compliance?

The Court admits that it has previously placed "some emphasis […] on the existence of a biological link with at least one of the intended parents".[182] The Court then proceeds to answer the first question with this in mind, thereby implying that the answer (i.e., with regards to the

[176] P16-2018-001 [GC], § 33.
[177] P16-2018-001 [GC], §§ 10–18.
[178] P16-2018-001 [GC], §§ 19–21 and §§ 22–24.
[179] P16-2018-001 [GC], § 24.
[180] P16-2018-001 [GC], § 25.
[181] Ibid.; Explanatory Report, para. 11.
[182] P16-2018-001 [GC], § 36, with further references.

intended *mother*) might be different if the intended *father* did not have a biological link to the child in question.[183] The Court identifies two key factors that will "carry particular weight" in the assessment: "the child's best interests and the scope of the margin of appreciation available to the States Parties".[184]

As for the first factor, the Court reiterated the "position of legal uncertainty regarding his or her identity within society".[185] While the child's best interest *not necessarily* weigh in favour of recognising the relationship, an absolute impossibility of this is "incompatible with the child's best interests, which require at a minimum that each situation be examined in the light of the particular circumstances of the case".[186]

Concerning the scope of the margin of appreciation, the Court points to the question of whether there is consensus among the Member States on the issue at hand. In general, the lack of such European consensus usually makes the Court more lenient in its scrutiny, providing a broader margin of appreciation for domestic authorities. This applies in particular where the case raises "sensitive moral or ethical issues".[187]

However, as already held in *Mennesson*, the Court found aspects of the case to suggest the opposite: Questions concerning legal parent-child relationship are questions "where a particularly important facet of an individual's identity [is] at stake", which normally restricts the margin of appreciation.[188] The Court also found support in the fact that the issues at stake went "beyond the question of the children's identity", and concluded that the margin of appreciation in this case was *reduced*.[189]

With these prerequisites in mind, the Court found that the Convention requires domestic law to provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the "legal mother".[190]

Regarding the second issue, whether Article 8 of the Convention requires a certain *method* of such recognition, the Court concluded that it did not. Again, the Court referred to the lack of European consensus. However, the margin of appreciation remained for this question, because "an individual's identity is less directly at stake where the issue is not the very principle of the

[183] P16-2018-001 [GC], § 36.

[184] P16-2018-001 [GC], § 37.

[185] P16-2018-001 [GC], § 40, with further references.

[186] P16-2018-001 [GC], §§ 41–42.

[187] P16-2018-001 [GC], § 43.

[188] P16-2018-001 [GC], § 44.

[189] P16-2018-001 [GC], § 45.

[190] P16-2018-001 [GC], § 46. The Court also added, *obiter dictum*, that this applies with even greater force in a case where the child was conceived using the eggs of the intended mother, § 47.

establishment or recognition, of his or her parentage, but rather the means to be implemented to that end".[191]

The Court did, however, outline certain elements of this assessment. With regard to the child's best interests, the Court held that the uncertainty surrounding their relationship with the intended mother should be "as short-lived as possible".[192] Further, what the child's best interests entail "must be assessed *in concreto* rather than *in abstracto*".[193] In accordance with the principle of subsidiarity, national authorities are best placed to make this assessment:

> Depending on the circumstances of each case, other means [than to register the details of the foreign birth certificate] may also serve those best interests in a suitable manner, including adoption, which, with regard to the recognition of that relationship, produces similar effects to registration of the foreign birth details.[194]

While the method is up to domestic authorities to determine, the Court stresses that "an effective mechanism should exist enabling that relationship to be recognised".[195] The Court then makes certain specifications as to what an adoption alternative should include, in order to meet that requirement.[196]

With this, the advisory opinion contributed to a *clarification*: It is difficult to say whether the use of the mechanism *influenced* the margin of appreciation, but it certainly made it easier for domestic authorities to take advantage of it, adapting the Convention as interpreted by the Court within the domestic context. When the scope of the margin of appreciation is unclear, the national judge can either *overestimate* it, thereby providing too little protection to the individual concerned, or *underestimate* it, requiring too much from national authorities in order to avoid a subsequent violation. Both risks may be reduced through the use of the advisory opinion mechanism, because the clarification makes the national judge better equipped to balance the rights and interests at stake.

Soulard suggested that clarification of the margin of appreciation might even be the aim of the requesting court when using the advisory opinion mechanism.[197] The fact that the Court of

[191] P16-2018-001 [GC], § 51.
[192] P16-2018-001 [GC], § 49.
[193] P16-2018-001 [GC], § 52.
[194] P16-2018-001 [GC], § 53.
[195] P16-2018-001 [GC], § 54.
[196] Ibid.
[197] Soulard (2023), page 9.

Cassation explicitly asked the Court to confirm whether national authorities acted within their margin of appreciation, illustrates this very point.[198]

Finally, the Court reiterated that it was not for the Court to "express a view in the context of its advisory opinion on whether French adoption law satisfies the criteria set forth […] above. That is a matter for the domestic courts to decide, […] taking into account the vulnerable position of the children concerned while the adoption proceedings are pending."[199]

4.5 Some examples of immediate impact

4.5.1 Impact in France

The most obvious subsequent impact of the advisory opinion is the follow-up from the requesting court. In its judgment following the advisory opinion of the Court, the Court of Cassation held that the existence of a surrogacy arrangement cannot, in itself, prevent the transcription of the foreign birth certificate.[200] Whether such transcription is necessary, or if it is sufficient that adoption is available to the intended mother, relies on an *in concreto* assessment based on the principles set out by the Court in its advisory opinion.

The Court of Cassation went on to overturn the decision of the court of appeal *and* ruled on the merits. Following the principles set out by the Strasbourg Court in the advisory opinion, the Cort of Cassation held that, considering the longevity of the proceedings, it would not be proportionate to require of the intended (and at this point *de facto*) mother that she undergo adoption proceedings to establish a legal relationship with her children. It was therefore necessary to transcribe the details of the foreign birth certificate.[201]

4.5.2 Impact in other Member States

Beyond this particular case, other national courts have drawn to the first advisory opinion when assessing similar questions. Just a few months after the first advisory opinion was issued, the Swedish Supreme Court dealt with a similar case, also concerning surrogacy abroad and the requirements for domestic legal recognition. The Supreme Court reiterated the principles laid out in *Mennesson* and the subsequent advisory opinion, and even recognised, more generally, that advisory opinions may be deemed to have "a significant value as a legal source in

[198] P16-2018-001 [GC], § 9.

[199] P16-2018-001 [GC], § 58.

[200] French Court of Cassation (2019), *Motivation*, para. 6; Soulard (2023), page 5.

[201] French Court of Cassation (2019), *Motivation*, para. 19.

conjunction with the interpretation of the Convention".[202] Both the Italian Constitutional Court and Court of Cassation have made similar references.[203]

4.5.3 The Court's subsequent case-law

The Strasbourg Court has also dealt with quite a few cases concerning surrogacy in the years after delivering its first advisory opinion. *C and E v. France*, where the situation was similar to the one in *Mennesson*, was found manifestly ill-founded and declared inadmissible: The Court found that the existence of a possibility for adoption was sufficient to satisfy the Convention, and that expecting the applicants to initiate such proceedings did not place an excessive burden on the children concerned.[204] This ultimately concludes the question that was left unanswered in the advisory opinion – whether French adoption law satisfied the criteria set forth by the Court. Contrary to the French Court of Cassation in the 2019 assessment, the Court did not find it disproportionate to require that the applicants settled for adoption.

An example in a case concerning a different Member State is *A.M. v. Norway*, where the Court also examined whether the refusal to recognise the applicant's motherhood amounted to a violation of Article 8. The advisory opinion, building on the *Mennesson* judgment, serves as the fundamental legal basis when assessing the necessity of the contested measures.[205] At the same time, the Court emphasises that the advisory opinion did not deal with the issue of intended parents' rights, and that the application at hand did not relate to any rights of the child under Article 8, thereby illustrating the *limits* of the influence of the advisory opinion.[206]

4.6 An example of successful dialogue between the Court and national authorities?

Two questions remain. First: Did this first example of use of the advisory opinion mechanism contribute to dialogue between the Court and national authorities? Was it truly dialogue, or just another platform for the Court? Second: is it an example of a *successful* dialogue? I.e., did this dialogue contribute to the overarching goal of effective implementation of the Convention?

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[202] Supreme Court of Sweden (2019), paras. 26–36; ibid., para. 31: "[B]etydande rättskällevärde vid en tolkning av Europakonventionen i nu aktuellt hänseende"; O'Leary (2023), page 3.

[203] Sciarra (2023) with further references in footnotes 10–13; Albanesi (2022) section 4.

[204] *C and E v. France* (dec.), §§ 42–43.

[205] *A.M. v. Norway*, § 126. See also similar references in *D v. France* §§ 51–54 and *C v. Italy*, §§ 48–53.

[206] *A.M. v. Norway*, §§ 126-127; The judgment also demonstrates partial, or *conditional* deference under process-based review: The balancing exercise required in the case was, according to the Court, "meticulously carried out by the Borgarting High Court". The Court further held that the outcome "must be considered to fall within the margin of appreciation afforded to domestic authorities" in cases raising sensitive ethical questions where no European consensus exists", § 134, with reference to § 131.

First, the use of the mechanism *inherently* demonstrates dialogue. Through the procedure described, the requesting court is allowed to explain the case as it appears before it in the domestic context.[207] The importance of this was underlined by the First President of the French Court of Cassation.[208] Then, it is up to the Strasbourg Court to express its views on the questions of principle *without* transferring the dispute to itself. Finally, it remains for the requesting court to rule on the merits, in light of the Court's guidance on Convention issues.[209] Already through the system of the Protocol, there is dialogue between the requesting court and the Strasbourg Court.

Second, the subsequent *use* of the advisory opinion in the domestic context constitutes dialogue in practice. When the French Court of Cassation examined the case that triggered the request under the Protocol in the first place, it actively used the findings of the Strasbourg Court and made reference to the advisory opinion in its judgment.[210] As held by its First President, such reference to the advisory opinion in the requesting court's judgment, allowed a greater influence from the Strasbourg Court.[211]

Third, a later application to the Court in a similar case, gives the Court the final say in the matter. In the already mentioned decision in the case of *C and E*, the Court dismissed the complaint, confirming that the French adoption law satisfied the criteria set out in *Mennesson* and the advisory opinion.[212] After the ruling of the requesting court, the Strasbourg Court is given the floor one last time, in the context of a subsequent individual application in a similar case. This dynamic confirms that dialogue through the advisory opinion mechanism happens in line with the fundamental principles described above: The primary responsibility of national authorities, and the Court's subsidiary supervision, acting as the final arbiter of the scope and content of the Convention.

The First President of the French Court of Cassation presented three questions that could serve as "measurements" for the success of their request: Was the opinion useful for the requesting court's judgment? Did the opinion give additional legitimacy to the judgment? Did it spark interest in the context of the existing public debate in France?[213] Soulard then concluded that in the case of this first advisory opinion, all three questions can be answered in the affirmative. [214]

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[207] Protocol No. 16, Article 1 § 3.

[208] Soulard (2023), page 4.

[209] Explanatory Report, para. 11; P16-2018-001 [GC], § 58.

[210] French Court of Cassation (2019), *Motivation*, paras. 4–5.

[211] Soulard (2023), page 6.

[212] *C and E v. France* (dec.), §§ 42–45.

[213] Soulard (2023), page 6.

[214] Ibid.

In particular, this third parameter is a good measure for the dialogue that the use of advisory opinions is meant to contribute to, which is not only that between the Court and the requesting court, but dialogue between the Court and *national authorities* in general. By establishing an institutionalised dialogue between the national judge and the Court, the Protocol can indirectly also restore dialogue with other national authorities.[215] This opportunity for indirect dialogue happens when the requesting court *uses* the advisory opinion, which strengthens the authority of the national judge.[216]

The comments of the First President of the requesting court suggest that this indirect dialogue and added authority made it easier for his court to pass a Convention-compliant judgment in a delicate political context in the context. In particular, he implies that the lack of dialogue with the public authorities, might have been the origin of the "impasse intellectuelle" in which the national judge found himself when trying to conform with the Convention.[217] This is supported by the intentions of the French Government described in *Foulon and Bouvet v. France* that the Court took due note of, but did not find to be substantial enough to avoid violation.[218]

An added authority can be valuable when a requesting court has to "confront" other national authorities through its judgments. Through this added authority, domestic courts can *facilitate* dialogue between the Court and national authorities by requesting an advisory opinion.

Finally, this dialogue does not only provide the requesting court with a valuable backing which may grant authority. A successful dialogue through the advisory opinion mechanism can also contribute to the strengthening of the legitimacy of the Strasbourg Court, by reaffirming its authority in a domestic context. Reiterating the importance of democratic support for the Convention system also among national authorities, the use of the Protocol can contribute to the long-term stability and effectiveness of the Convention.

The question then remains, how did the dialogue contribute to the overarching goal of effective implementation of the Convention? In my view, it is safe to say that this particular dialogue, that happened in the context of the first advisory opinion, succeeded in this task. The legal framework that led to the finding of a violation in *Mennesson* is now changed, granting children born through surrogacy arrangements the right to have their parentage recognised in French law. And more than that, it happened *without* the Court finding a second violation of the Convention.

[215] Soulard (2023), page 7.

[216] Soulard (2023), page 6.

[217] Soulard (2023), page 1.

[218] *Foulon and Bouvet v. France*, § 56.

5 Concluding remarks

5.1 The continuous need for "faithful guardians"[219]

As shown, the use of the advisory opinion mechanism under Protocol No. 16 *can* facilitate dialogue between the Court and national authorities. Whether this happens in practice depends on national authorities acting "in good faith" with the Convention system, that is, working together with the Court towards the overarching goal of effective implementation of the Convention.

In the context of advisory opinions, implementation might be even more dependent on this cooperation through shared responsibility than in the context of the contentious jurisdiction of the Court. This is because, despite how the mechanism lets the Strasbourg Court influence the process through an advisory opinion, it remains the task of the requesting court or tribunal to "resolve the issues raised by the case and to draw, as appropriate, the conclusions which flow from the opinion delivered by the Court for the provisions of national law invoked in the case and for the outcome of the case".[220]

This demands even more of national authorities than when executing a binding judgment of the Court: It requires that the requesting court independently resolves the issues raised by the case, drawing its own conclusions from the opinion of the Court. To further complicate the task, the requesting court must do all this in accordance with the principle of subsidiarity *and* in good faith with the Convention system.

Circling back to the analysis of the procedural turn, it must be reiterated that only authorities fulfilling this task can be "rewarded" with deference under a process-based review.[221] The partial, or *conditional* deference presupposes solid democratic structures and the rule of law. Protecting the independence and solidity of domestic courts is imperative for the successful implementation of the Convention. As reiterated by the Court, "the Convention system cannot function properly without independent judges".[222]

The same goes for the *indirect* dialogue described by Soulard, which also demands a certain trust – as well as distribution of responsibility and power – between the requesting court and other national authorities. The overall goal of effective implementation of the Convention

[219] A term used by Hersch Lauterpacht when asked to give his thoughts on "The Proposed European Court of Human Rights" in 1949, Lauterpacht et al. (1949), page 34, and reiterated by President O'Leary at the Opening of the Judicial Seminar 2024, O'Leary (2024).

[220] P16-2018-001 [GC], § 25.

[221] Spano (2018), page 493.

[222] *Grzęda v. Poland* [GC], § 324.

within Member States cannot be fulfilled where good faith domestic judgments are met with reluctance with executive or legislative branches of government.

An example of this bay, arguably, be found in the context of the urgent interim measure against the United Kingdom granted in an application concerning the removal of an Iraqi national to Rwanda in 2022.[223] The Court's decision to grant an interim measure was met with strong opposition from British authorities and the domestic removal policy is still heavily debated.[224] However, the same reluctance is not found within domestic courts: In November 2023, the UK Supreme Court found the Government's policy "unlawful", partly due to the United Kingdom's obligations under the Convention.[225]

On the other hand, one might find that advisory opinions might be particularly useful where there is reluctance among national authorities, because it can be perceived as less "confrontational" than a judgment. The same principles coming from a judgment of a national court or tribunal of the highest instance, even if "influenced" by the Strasbourg Court through an advisory opinion, might be more acceptable among domestic authorities where there is reluctance.

Recalling the view of the Steering Committee on Human Rights, suggesting that it is highly unlikely that requesting courts will not follow the Court's opinion, because requests are put forward voluntarily.[226] This is confirmed by the fact that each and every Member State independently decides to ratify the Protocol. Its ratification is not imposed on them, and the use of it is not imposed on the highest courts and tribunals.[227]

The antithesis of this analysis is that national authorities, for a number of reasons, will simply decide to not ratify the Protocol, thereby preventing the highest courts or tribunals of their jurisdiction to confer with the Court. If the reluctance lies with these domestic courts or tribunals, they are also not obliged to take advantage of this competence. In this regard, it can

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[223] *N.S.K. v. the United Kingdom* (interim measure).

[224] After two years of back and forth in the British parliament, the much-disputed *Rwanda Bill* was approved just after midnight 23 April 2024, in an attempt to overcome the legal obstacles pointed out by both the Strasbourg Court and the UK Supreme Court. Concerns were raised by the CoE Commissioner for Human Rights, in particular relating to that the bill "prevents individuals from having any meaningful recourse to UK courts" and the apparent disregard of the binding force of interim measures: https://www.coe.int/en/web/commissioner/-/serious-human-rights-concerns-about-united-kingdom-s-rwanda-bill.

[225] UK Supreme Court (2023), §§ 26 and 149; Rui (2013), pages 52–54 provide further examples of decisions from the Court that have been met with strong opposition in the Member States concerned.

[226] CDDH Final Report (2012), Appendix V, para. 20b (on page 62).

[227] This can be modified by the "horizontal" effect explained in chapter 3.4 above, advisory opinions form part of the case-law of the Court alongside its judgments and decisions. While this effect does not require ratification, it might indicate a somewhat exaggerated focus on the voluntary nature of the Protocol.

be useful to compare the still quite short list of countries that have already used the Protocol, with that of the highest contributors to the Court's 65,700 pending cases.[228] A continuous use of the Protocol is not a "quick fix" of any of the challenges described and will keep requiring good-faith implementation by the Member States.

5.2 Advisory opinions as a domestic tool in political sensitive matters

One use of the advisory opinion mechanism that sticks out, is as a tool for the requesting court to obtain authoritative support in politically sensitive matters. The first advisory opinion can be a seen as a clear example of this, a view that was endorsed by the First President of the requesting court.[229] He held that the question of principle that was posed before the Court in the context of the first advisory opinion was "extremely delicate", concerning rules based on very strong ethical considerations.[230]

The use of the advisory opinion mechanism can in such cases, *outsource* the debate, thereby removing any political questions that may paralyse the debate on a national level.[231] It has been pointed out that several of the requests put forward under the mechanism were also of such a political sensitive nature, suggesting that this might be the motive of the requesting court.[232] However, as the Court pointed out in its advisory opinion upon on the applicability of statutes of limitation, upon request from the Armenian Court of Cassation: "[I]t is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation."[233]

5.3 Domestic courts' newfound competence

The Protocol gives domestic courts a brand-new power, namely the ability to put questions before the Strasbourg Court in the Grand Chamber formation. Under the contentious mechanism, only the applicant can decide to bring a case, and thereby a legal problem, before the Court. Through Protocol No. 16, certain domestic courts and tribunals are also given the opportunity to contribute to the creation of the Court's case-law.

This was discussed by the French Court of Cassation before their request for the first advisory opinion: It considered that by requesting an advisory opinion, the issue would have impact also outside the domestic assessment of the case. The advisory opinion would thereby become part of the Court's case-law, impacting all the Member States, regardless of whether they ratified

[228] As of 31 March 2024: https://www.echr.coe.int/documents/d/echr/stats-pending-month-2024-bil.

[229] Soulard (2023), page 7.

[230] Soulard (2023), page 4.

[231] Soulard (2023), pages 4 and 7.

[232] Krommendijk (2024), referring to, in particular, P16-2019-001 [GC] and P16-2020-002 [GC].

[233] P16-2021-001 [GC], § 70.

Protocol No. 16.[234] I have already described the actual impact this had, both in France and other Member States.[235] The ability for domestic courts to contribute to creating case-law via judicial dialogue was also pointed out by Albanesi as a good reason for States to *ratify* the Protocol.[236]

This new competence is limited, as the Strasbourg Court in its assessment of a request can decide whether to accept the request, what parts of the request to answer, and how to answer the relevant questions. However, the ability to propose a question of principle for the Court to assess provides an inherent influence.

In the first advisory opinion, the Court expressed itself in quite general terms, conducted a comparative-law survey and looked at the questions in a principal manner. By doing so, the Court allowed the question put forward by the domestic court to have general impact. While the Court pointed out that its opinion "must be confined to points that are directly connected to the proceedings pending at domestic level", the value of the Court's advisory opinions "also lies in providing the national courts with guidance on questions of principle relating to the Convention applicable in similar cases".[237]

This newfound competence is therefore an additional way the adoption and use of the Protocol contributes to dialogue – not only in the specific case, but as a part of the overall development of the Courts case-law under the Convention.

[234] Soulard (2023), page 4.

[235] See chapter 4.5.

[236] Albanesi (2022), page 14.

[237] P16-2018-001 [GC], § 26.

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