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ADVISORY JURISDICTION OF THE STRASBOURG COURT – EFFECTIVENESS AND CHALLENGES

ABSTRACT

The article concerns the practice of the Strasbourg Court in exercising advisory opinion jurisdiction, which has developed since the entry into force of Protocol No. 16 to the European Convention on Human Rights. The purpose of the article is to draw initial conclusions about the effectiveness and the strengths and weaknesses of this new jurisdiction of the European Court. The article reviews not only the cases in which the Grand Chamber of the Court has already issued advisory opinions but also those in which only decisions on admissibility have been made.

The author will look at problematic issues and challenges that have already been identified in practice or are logically expected. These include requests by national courts for advisory opinions on issues already answered in the Strasbourg Court's case-law and which they could have dealt with themselves; difficulties in adequately formulating their questions in accordance with the requirements of Protocol No. 16; the risk of change of the substance of questions asked as a result of reformulating of the questions by the Grand Chamber; the conditionality of the non-binding nature of the opinions of the Grand Chamber and the challenges that may arise from different interpretations of those opinions by national courts and parties to a case. The article critically discusses whether the new jurisdiction directly or indirectly threatens the independence of national courts, particularly in terms of the appearance of independence, as it concerns a kind of interference in the review of cases pending before domestic courts by a Grand Chamber giving guidance. The author also considers the perceived attitude of parties to a case to be problematic, which may arise if the Grand Chamber's opinion is taken or not taken into account by the national court. The question is also raised as to whether the existence of the Grand Chamber's preliminary opinion will have a negative impact on the admissibility of an application filed under Article 34 of the Convention in the same cases, and whether the content of the opinions will predetermine the fate of the application. Attention is also paid to procedural issues. The article contains some scepticism about the necessity and effectiveness of Protocol No. 16.

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I. INTRODUCTION

Immediately after the adoption of Protocol No. 16 of the European Convention on Human Rights, a number of questions arose regarding the advisory opinion jurisdiction of the European Court of Human Rights, including its necessity, effectiveness and whether such a jurisdiction, whose declared aim was to promote the principle of subsidiarity and enhance dialogue with national courts, would interfere with the administration of national justice, even indirectly, by giving guidance to them in concrete pending cases. We therefore observed with great interest how the Strasbourg Court would use these powers in practice. Equally interesting was how frequently the national courts of highest instance would use the possibility of requesting an advisory opinion from the Grand Chamber of the European Court, what questions they would ask, how and in what form, and whether the Strasbourg Court would safely walk on thin ice.

Although there have been only 6 requests[1] for advisory opinions since 2018, some experience has been accumulated, the review of which will hopefully answer at least some of the questions.

II. LEGAL AND HISTORIC BACKGROUND

Protocol No. 16 was opened for signature for the High Contracting Parties on 2 October 2013. On 1 August 2018, the protocol came into force in respect of the 10 countries that have ratified it.[2] The President of the European Court of Human Rights, *Guido Raimondi*, stated: *"The entry into force of Protocol No. 16 will strengthen dialogue between the European Court of Human Rights and the highest national courts. This is a fundamental step in the history of the European Convention on Human Rights and a major development in human rights protection in Europe. It also represents a new challenge for our Court."*[3]

The Protocol has since come into force for six more countries.[4] It is thus in force today for 16 Contracting States out of a total of 46 Contracting States to the Convention. Nine countries have signed the Protocol but have yet to ratify it.[5] Notably, Montenegro

[1] Such statistics existed at the time of writing the article.

[2] These countries are: Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, San Marino, Slovenia, and Ukraine.

[3] Entry into Force of Protocol No. 16 to the European Convention on Human Rights (Council of Europe, 2018), <https://www.coe.int/en/web/tbilisi/-/entry-into-force-of-protocol-no-16-to-the-european-conven tion-on-human-rights#:~:text=Slovenia%20and%20Ukraine> [last accessed on 1 April 2022].

[4] These countries are: Andorra, Bosnia and Herzegovina, Greece, Netherlands, Luxembourg, and the Slovak Republic.

[5] These countries are: Azerbaijan, Belgium, Northern Macedonia, Moldova, Montenegro, Turkey, Romania, Norway, and Italy.

and Turkey signed the Protocol in 2013, while Romania, Norway and Italy in 2014, but despite the long period of time, they have not ratified the Protocol yet and it is not known whether they will ever do. Twenty-one countries have not signed the protocol at all.[6]

These statistics and figures suggest that the Contracting States have shown little enthusiasm for the new possibility for their highest courts to request advisory opinions from the Grand Chamber on cases pending before them. However, what has prompted this, we can surmise much about it. Several academic and judicial comments[7] have already been devoted to Protocol No. 16 to the Convention, but there will definitely be more as precedents accumulate.

As far as the exercise of this jurisdiction in practice is concerned, there is also little activity in this respect. As already mentioned, so far only six such requests have been made. These were from the Court of Cassation of France and the Council of State of France *(Conseil d'État)*, the Constitutional Court of Armenia and the Court of Cassation of Armenia, the Supreme Administrative Court of Lithuania and the Supreme Court of Slovakia. The Grand Chamber has so far issued only two advisory opinions in response to the requests from the Court of Cassation of France and the Constitutional Court of Armenia. Decisions on admissibility in respect of the requests of the *Conseil d'Etat*, the Supreme Administrative Court of Lithuania and the Court of Cassation of Armenia were made by the Panel of the Grand Chamber.[8] By its decision, the request of the Supreme Court of Slovakia was not accepted.[9]

[6] These countries are: Austria, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Germany, Hungary, Iceland, Ireland, Latvia, Liechtenstein, Malta, Monaco, Poland, Portugal, Russia, Spain, Sweden, Switzerland, and the United Kingdom. For updated information, please visit the official website of the European Court of Human Rights.

[7] See, for example, Paul Gragl, "(Judicial) love is not a One-Way Street: The EU Preliminary Reference Procedure as a Model for ECtHR Advisory Opinions under Draft Protocol No. 16" (2013) 38 European Law Review 229-247; Linos-Alexandre Sicilianos, "L'élargissement de la compétence consultative de la Cour européenne des droits de l'homme – A propos du Protocole No. 16 à la Convention européenne des droits de l'homme" (2014) 97 Revue trimestrielle des droits de l'homme 9-29.

[8] The Press Releases of 28 January 2021 (ECHR 033 (2021)) and 12 May 2021 (ECHR 146 (2021)). Press Release 177 (European Court of Human Rights, 3 June 2021) <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7134761> [last accessed on 1 May 2022]; Press Release 033 (European Court of Human Rights, 3 June 2021) <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7020362-9470289> [last accessed on 1 May 2022].

[9] Decision on a Request for an Advisory Opinion under Protocol No. 16 Concerning the Interpretation of Articles 2, 3 and 6 of the Convention Request by the Supreme Court of the Slovak Republic of 14 December 2020 (P16-2020-001) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22003-6951456-9350980%22]}> [last accessed on 18 April 2022].

III. SUBSTANTIVE AND PROCEDURAL FRAMEWORK

Protocol No. 16 allows the highest courts of Contracting States that have ratified Protocol No. 16 to make requests for advisory opinions on questions of principle relating to the interpretation and application of the rights under the Convention and its Protocols.[10] Such requests can only be made in relation to cases pending before the highest courts. The Court has the discretion of whether to accept a request or not. A panel of five judges of the Grand Chamber decides whether to accept the request, and if the panel refuses to accept the request, it gives reasons for such refusal. An advisory opinion is issued by the Grand Chamber. An advisory opinion is reasoned and non-binding. An advisory opinion is published and sent to the requesting court as well as to the High Contracting Party concerned. An individual judge may have a separate opinion. The panel and the Grand Chamber include *ex officio* the judge elected in respect of the country from which the request is made. Prior to the entry into force of the Protocol, the Plenary Court amended the Rules of Court regarding the new procedure. According to the Rules of Court (Rule 93(2)), requests for advisory opinions are examined as a matter of priority. An advisory opinion is an integral part of the Court's case-law. Although it is not binding upon the requesting court, it is beyond dispute that it has a high precedential value.

1. BASIC PRINCIPLES

In the section of an advisory opinion, called "Preliminary considerations", the Grand Chamber explains the scope of its jurisdiction and the purpose of delivering the advisory opinion. It generally identifies the following principles that derive from the text of Protocol No. 16 to the Convention and its Explanatory Report, and which must at this stage be regarded as the Court's basic principles in the area of advisory opinions. In particular, the Grand Chamber pointed out the following in both advisory opinions:

- As stated in the Preamble to Protocol No. 16, the purpose of an advisory opinion is to improve the interaction between the Court and national authorities and reinforce the implementation of the Convention in accordance with the principle of subsidiarity by allowing national courts and tribunals to seek advisory opinions "on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto".[11]

[10] The idea belongs to the Group of Wise Persons, set up by the Committee of Ministers, who proposed in 2006 the introduction of a procedure similar to that of the Court of Justice of the European Union (the Luxembourg Court), a jurisdiction to issue preliminary opinions, that would strengthen dialogue between the courts and the constitutional role of the (European) Court. See Report of the Group of Wise Persons to the Committee of Ministers (Do(2006)203), para 80 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d7893> [last accessed on 18 April 2022].

[11] Article 1, paragraph 1, Protocol No. 16 to the Convention on the Protection of Human Rights and

- Arising "in the context of a case pending before them".[12] The Court relies on paragraphs 1 and 2 of Article 16 of the Protocol to the effect that an advisory opinion given by the Court must be confined to points that are directly connected to the proceedings pending at domestic level.

- According to paragraph 11 of the Explanatory Report, the aim of the procedure is not to transfer the dispute to the (European) Court, but rather to give the requesting court or tribunal guidance on Convention issues when determining the case before it.

- The Court has no jurisdiction either to assess the facts of a case or to evaluate the merits of the parties' observations concerning the interpretation of domestic law in the light of the Convention, or to rule on the outcome of the proceedings. Its role is limited to furnishing an opinion in relation to the questions submitted to it.

- The Court may reformulate questions asked by the requesting court, having regard to the specific factual and legal circumstances in the domestic proceedings, as well as it may combine them.

- It is for the requesting court or tribunal to resolve the issues raised by the case and to draw, as appropriate, the conclusions on the provisions of national law and the outcome of the case, which flow from the opinion prepared by the Court.

- The value of advisory opinions also lies in providing the national courts with guidance on questions of principle relating to the Convention that are applicable in similar cases.[13]

According to the judges of the European Court of Human Rights, advisory opinions are intended to help member States in avoiding future violations, and facilitate the correct interpretation of the Convention within national legal orders.[14]

Fundamental Freedoms (hereinafter referred to as "Protocol No. 16 to the European Convention") <https://matsne.gov.ge/ka/document/view/4287254?publication=0> [last accessed on 18 April 2022].

[12] ibid, Article 1, paragraph 2.

[13] Advisory Opinion Concerning the Recognition in Domestic Law of a Legal Parent-Child Relationship between a Child Born through a Gestational Surrogacy Arrangement Abroad and the Intended Mother Requested by the French Court of Cassation of 10 April 2019 (P16-2018-001), para 25 <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22003-6380464-8364383%22]}> [last accessed on 18 April 2022]; Advisory Opinion Concerning the Use of the "Blanket Reference" or "Legislation by Reference" Technique in the Definition of an Offence and the Standards of Comparison between the Criminal Law in Force at the Time of the Commission of the Offence and the Amended Criminal Law Requested by the Armenian Constitutional Court of 29 May 2020 (P16-2019-001), paras 42-43 <https://hudoc.echr.coe.int/fre#{%22respondent%22:[%22ARM%22],%22documentcollectionid2%22:[%22PROTOCOL16%22],%22itemid%22:[%22003-6708535-9909864%22]}> [last accessed on 18 April 2022].

[14] Siofra O'Leary and Tim Eicke, 'Judges Elected in Respect of Ireland and the United Kingdom, Some Reflections on Protocol No. 16, an Extended Version of the Presentation at the Opening of the Judicial Year on 25 January 2019', 4 <https://www.echr.coe.int/Documents/Speech_20190125_O_Leary_Eicke_JY_ENG.pdf> [last accessed on 18 April 2022].

2. ISSUES TO BE EXAMINED DURING THE ADMISSIBILITY

A panel of five judges of the Grand Chamber, which decides on the admissibility of a request, examines whether the issue has been raised by the national court which had the power to seek an advisory opinion from the Grand Chamber. This is done by verifying whether that court is listed in the relevant ratification document. The Panel examines whether the question asked concerns "the principles relating to the interpretation or application of the rights defined in the Convention or the protocols thereto" and whether they are directly related to "the context of cases pending before them". Questions with very general wording or a high degree of abstraction as well as the verification of national law *in abstracto* are not allowed. If the requirements of admissibility are not met, the panel decides not to accept the request, as in the case of the Supreme Court of Slovakia.

Furthermore, the Court makes it strictly clear that its task is not to reply to all the grounds and arguments submitted to it; that its role is not to rule in adversarial proceedings by means of a binding judicial act but rather, within as short a time frame as possible, to provide the requesting court with guidance enabling it to ensure respect for Convention rights when determining the case before it.[15]

3. EXCLUDING CERTAIN QUESTIONS DESPITE THE ADMISSIBILITY OF A REQUEST BY THE PANEL OF THE GRAND CHAMBER

The Grand Chamber ruled that it was possible to exclude certain questions asked and to refuse to give a reply to them after the panel accepts a request. This was confirmed in the advisory opinion. Four questions were asked in the request from the Constitutional Court of Armenia, and the Panel of the Grand Chamber accepted the request as a whole. However, the Grand Chamber, in its own advisory opinion, considered that two questions did not fulfil the requirements of Protocol No. 16 and did not answer them. However, the Court first proved that it had the relevant power. In particular, it pointed out that:

"A related but separate issue is whether, once a request for an advisory opinion has been brought before it, the Grand Chamber may decide not to answer one or more questions; Article 2 § 1 of Protocol No. 16 specifies that "[the] panel ... shall decide whether to accept a request for an advisory opinion, having regard to Article 1". Article 2 § 2 of Protocol No. 16 provides that "[i]f the panel accepts the request, the Grand Chamber shall deliver the advisory opinion". However, while the panel accepts the request for

[15] See supra note 8, para 34.

an advisory opinion as a whole if it considers at that stage, and without the benefit of written and oral observations, that the request appears to fulfil the requirements of Article 1 of Protocol No. 16, this does not mean that all the questions that make up the request will necessarily fulfil these requirements.[16]

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 (Articles 19 and 32 of the Convention and, by analogy, Article 48). Nor can the panel's decision preclude the Grand Chamber from assessing whether each of the questions composing the request fulfils the requirements of Article 1 of Protocol No. 16, in particular: whether each question concerns "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto" (paragraph 1); whether the opinion has been sought "in the context of a case pending before" the requesting court (paragraph 2); and whether the requesting court has "give[n] reasons for its request and" has "provid[ed] the relevant legal and factual background of the pending case" (paragraph 3).

Also, as already stated above, it follows from paragraphs 1 and 2 of Article 1 of Protocol No. 16 that the Grand Chamber's opinion must be confined to the points that are directly connected to the proceedings pending at domestic level. It thus remains open to the Grand Chamber to verify whether the questions that are the subject of a request fulfil the requirements set out in Article 1 of Protocol No. 16 on the basis of the original request, the observations received and all other material before it. Should it come to the conclusion, taking due account of the factual and legal context of the case, that certain questions do not fulfil these requirements, it will not examine these questions and will make a statement to this effect in its advisory opinion."[17]

Thus, the Grand Chamber reserves the right to reassess the relevance of certain questions to the Convention and not to answer them where appropriate. Leaving this possibility open should of course be considered reasonable.

4. ASSESSMENT ONLY IN RELATION TO ESTABLISHED FACTS, AND TIME LIMITS

According to Protocol No. 16, advisory opinions are only delivered on the basis of the concrete facts of a case and, as explained, this includes established facts, which are considered established by the national courts in at least one instance. This is natural and correct. However, it should be noted that in the second case involving a request from the

[16] See supra note 12, para 46.
[17] ibid, para 47.

Constitutional Court of Armenia, the Grand Chamber had to check the link between the questions submitted and the facts that had not yet been established by the first-instance court. The reason for this was that the first-instance court, which was hearing the case, had suspended the proceedings and applied to the national constitutional court, which in turn exercised its power to request an advisory opinion. In this connection, the Court pointed out the following in its advisory opinion:

"The Constitutional Court has availed itself of the advisory-opinion procedure, which is by its nature preliminary, in the context of proceedings for the review of constitutionality. By their nature these proceedings are also preliminary, in that they are intended to determine a question of domestic law that is relevant for the main proceedings that gave rise to them, namely the criminal proceedings against Mr Kocharyan, pending before the First-Instance Court.[18]

While this double referral does not constitute an obstacle to dealing with the present advisory-opinion request, it nevertheless frames the Court's approach in giving its advisory opinion, in particular where, as in the present case, the main proceedings are pending at a very early stage and the relevant facts have not yet been the subject of any judicial determination (compare and contrast with Advisory opinion P16-2018-001, cited above, §§ 27-33, in which information as to the precise factual circumstances underlying the legal questions raised in the advisory-opinion request was available to the Court). The Court's advisory opinion will proceed on the basis of the facts as provided by the Constitutional Court, although those facts may be subject to subsequent review by the First-Instance Court. It should enable the Constitutional Court to resolve the issues before it, that is, to assess the constitutionality (of respective article of the Criminal Coder) in the light of the requirements flowing from Article 7 of the Convention. In turn, it will be for the First-Instance Court to apply the answer given by the Constitutional Court to the concrete facts of the case against Mr Kocharyan. In the Court's view, such an approach is in line with the principle of subsidiarity on which Protocol No. 16, like the Convention itself, is based."[19]

In this respect, it should be noted that such a problem may often arise in the future, since in all countries where a form of concentrated constitutional review has been established and, consequently, the common courts do not have the power to assess the constitutionality of the applicable norm themselves, there may often be cases before constitutional courts that have not yet been decided on the merits. Accordingly, if the national constitutional court also uses the right to seek an advisory opinion, as happened in the case of Armenia, it turns out that the Grand Chamber of the European Court and its panel will often have to first confirm or reject the link to facts that have not been established yet.

[18] ibid, para 48.
[19] ibid, para 49.

In addition to the fact that it is unknown what effect the advisory opinion will have in the future if these facts have not been confirmed, we should not lose sight of the threat that the advisory opinion procedure may become a reason for the delay of hearings on the merits in national courts, and sometimes even an excuse. Therefore, it is inappropriate for constitutional courts to make requests on cases in which the national court has not delivered a decision on the merits yet.

As regards time limits and the risk of delay, it appears that the Grand Chamber tries to deal with requests from national courts in a timely manner. Both advisory opinions were delivered within less than 1 year of the receipt of the request, and the questions of whether to accept the request or not were decided within a shorter period,[20] but it is unknown whether advisory opinions and panel decisions are published immediately. However, we should not forget that cases are suspended in national courts during that period, including even in first-instance courts, as it happened in the case within which the Constitutional Court of Armenia requested an advisory opinion. Accordingly, it may not always be justified to extend the proceedings even for 1 year in domestic courts, taking into account the interests of the parties. It is the responsibility of domestic courts to assess the relevance and reasonableness of the request for an advisory opinion.

5. WHETHER THE INVOLVEMENT OF THE PARTIES IS ENSURED

This issue has attracted attention from the outset as it was uncertain which path the Grand Chamber would pursue. On the one hand, the advisory opinion procedure, as has been repeatedly explained, is a dialogue between national and international courts, and the Grand Chamber considers the legal question of interest to the national court according to how it sees the problem (if it certainly fulfils other requirements) and on the basis of the facts that it considered established, as well as according to how it brought those facts before the Grant Chamber. However, on the other hand, given that the answers to the questions asked may have a significant impact on the outcomes of the case in domestic proceedings and, then again, bearing in mind that the existence of the advisory opinion of the Grand Chamber in a particular case may subsequently become grounds for the inadmissibility of an individual application under Article 34 of the Convention (at least in the part to which the opinion refers), the involvement of the parties in the advisory opinion procedure has become particularly important.

[20] For example, the Court of Cassation of France requested an advisory opinion on 12 October 2018. The opinion was delivered on 10 April 2019. The Constitutional Court of Armenia requested an advisory opinion on 2 August 2019. The opinion was delivered on 29 May 2020. The Supreme Court of Slovakia requested an advisory opinion on 25 September 2020, and the decision of the Panel of the Grand Chamber was delivered on 14 December 2020. The Supreme Administrative Court of Lithuania requested an advisory opinion on 5 November 2020, and its request, in respect of whether to accept it or not, was granted on 25 January 2021.

The Grand Chamber has already established a practice whereby it gives parties an opportunity to submit written observations. While parties to a case are the parties to the dispute to be handled by the requesting highest court. The practice has shown that the parties mostly make use of this opportunity. The right to submit observations is given to a respondent government and other interested parties.[21] It is indeed important that the Grand Chamber of the Strasbourg Court have the opportunity to examine alternative observations before delivering an opinion. In this regard, it is encouraging that practice has gone in this direction. However, two questions still need to be addressed in this context:

The first is what effect the Grand Chamber's opinion will have on the full enjoyment in the future of the right to submit an individual application, and the second is that while the parties' involvement is helpful in giving an adequate advisory opinion, it must be said that at the same time it practically implies developing the right (in terms of the Convention) position on the legal question, according to which the domestic court has to decide the particular case. The Grand Chamber stressed that "*the Court has no jurisdiction either to assess the facts of a case or to evaluate the merits of the parties' views on the interpretation of domestic law in the light of Convention law*",[22] although the role assigned to it by Protocol No. 16 actually implies interpreting for the national court which legislation would be right or wrong in the light of the Convention.

IV. DIRECT CONNECTION TO THE CASE AT HAND, FORMULATION OF QUESTIONS AND POSSIBILITY OF REFORMULATION

As it turned out, it was also important to reserve to the Grand Chamber the right to reformulate the questions asked to it, as well as to combine them. Already in the first French case, the Grand Chamber needed to reformulate the questions asked by the national court. In the case of the request made by the Constitutional Court of Armenia, the Court considered two of the four questions general, which had no direct connection

[21] As part of the request made by the Court of Cassation of France in the very first case, the Court informed the parties to the domestic proceedings that the President of the Grand Chamber was inviting them to submit to the Court written observations on the request for an advisory opinion. However, within that time limit, written observations were submitted jointly by the defenders of the child's rights (Dominique Mennesson, Fiorella Mennesson, Sylvie Mennesson and Valentine Mennesson). The Principal Public Prosecutor at the Paris Court of Appeal did not submit written observations. The French Government also submitted its written observations to the Grand Chamber. See supra note 12, paras 4-5. In the first Armenian case, since the request was made by the Constitutional Court of Armenia, the Armenian National Assembly and Robert Kocharyan, who submitted their written observations, were considered parties to the case. Written observations were also received from the Armenian Government, the Helsinki Association for Human Rights and the defender of the family members of the victims of the events of 2008. The Constitutional Court of Armenia did not submit and written observations. See supra note 12, paras 6-9.

[22] See supra note 12, para 25.

to the particular case, while in the third case, which concerned the request from the Supreme Court of Slovakia, did not accept the request at all because of the general nature of the question. More specifically:

In the first case, the Court of Cassation of France raised two questions, which were worded as follows:

1. 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 European Convention for the Protection of Human Rights and Fundamental Freedoms? In this connection should a distinction be drawn according to whether or not the child was conceived using the eggs of the "intended mother"?

2. In the event of an answer in the affirmative to either of the 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?"[23]

The Grand Chamber reformulated the raised questions, which it would answer, in the following way:

1. Whether the right to respect for private life, within the meaning of Article 8 of the Convention, of a child born abroad through a gestational surrogacy arrangement, which requires the legal relationship between the child and the intended father, where he is the biological father, to be recognised in domestic law, also requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the "intended mother", who is designated in the birth certificate legally established abroad as the "legal mother", in a situation where the child was conceived using the eggs of a third-party donor and where the legal parent-child relationship with the intended father has been recognised in domestic law.

2. If the first question is answered in the affirmative, it will address the question whether the child's right to respect for his or her private life within the meaning of Article 8 of the Convention requires such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad, or whether it might allow other means to be used, such as adoption of the child by the intended mother.[24]

[23] ibid, para 9.
[24] ibid, paras 32-33.

The Grand Chamber thus combined certain aspects of the first and second questions and, on the contrary, separated some and eventually changed their focus. Furthermore, a significant difference is noticeable: the national court asked whether the non-recognition in domestic law of certain legal facts and circumstances in the context of the child's right to respect for private life fell outside the margin of appreciation of the national authorities; whereas, following the reformulation by the Court, the question took a different form – whether the child's right to respect for private life guaranteed by the Convention required the recognition of the legal event in question.[25] With such reformulation, the Grand Chamber placed the question into the context of the Convention right of the child to respect for private life and clarified whether this Convention right included the fulfilment of a concrete requirement. It is worth noting that both formulations would lead to the same result, because if a certain requirement derives from the Convention and the state does not make provision for its fulfilment, then it means that it violates the Convention requirement. Just as if by failing to make provision for the fulfilment of a relevant requirement, the State oversteps the limits of the margin of appreciation, this constitutes a violation of the Convention. But to answer the question – why such reformulation was needed then – it is necessary to clarify the nuances of the case, which we will try to do below. We can only say at this point that an international court is usually required to be more cautious in assertions as to when a contracting party violates the limits of the national margin of appreciation, than in assertions as to what a certain article of the Convention requires.

As to the second question: The quintessence of the second question asked by the Court of Cassation of France is as follows: if the failure to recognise the requirement in question fell outside the limits of the national margin of appreciation, perhaps another possibility under domestic law (that is the possibility for the "intended mother" to adopt her husband's child) could fill this gap. However, such formulation was not provided, and thus no direct answer was given to the question asked.

Obviously, the possibility of reformulation serves the purpose of bringing the question asked in line with Protocol No. 16, so as not to refuse to give an advisory opinion. However, there is a risk that the national court requesting an advisory opinion on the questions will not always agree to their reformulation and therefore its interest will remain, at least in part, unsatisfied.

In the second advisory opinion, which was prepared on the basis of a request from the Constitutional Court of Armenia, the Court considered that the first two questions of four had no direct connection to the pending case and could not be reformulated in such a way as to enable the Court to exercise its advisory jurisdiction over them. In particular, the Constitutional Court of Armenia raised the following questions:

[25] ibid. The Court's answer to the first question was in the affirmative, and to the second question in the negative.

- Does the concept of "law" under Article 7 of the Convention and referred to in other Articles of the Convention, for instance, in Articles 8-11, have the same degree of qualitative requirements (certainty, foreseeability and stability)?

- If not, what are the standards of delineation?[26]

The Court clarified in its advisory opinion that from the charges brought against *Robert Kocharyan*, the former President of Armenia, could be seen that there was nothing in the factual context of the case that could be perceived as the application of Articles 8 to 11 of the Convention (§ 54); and it found difficult to see which questions the Constitutional Court wished to determine with the help of the Court's advisory opinion. In the Court's opinion, the first and second questions were of an abstract and general nature, thus going beyond the scope of an advisory opinion. Besides, it did not appear possible to reformulate the questions so as to allow the Court to confine its advisory opinion to points that were directly connected to the proceedings pending at domestic level. If the first and second questions asked by the Constitutional Court could be understood as addressing questions of legal certainty and foreseeability, including the limits of interpretation in the context of Article 7, these could be addressed sufficiently in the Court's answer to the third question.[27] Hence, the Court considered that the first and second questions did not fulfil the requirements of Article 1 of Protocol No. 16 and could not be reformulated so as to enable it to discharge its advisory function effectively and in accordance with its purpose. It therefore could not answer the first and second questions.[28]

Here the Grand Chamber failed to understand the Constitutional Court of Armenia, which cited Articles 8-11 only for comparison, because in the case established concerning those Articles, the Court had well elaborated the content of foreseeability of the law and its requirements. The Constitutional Court of Armenia asked a question whether the same criteria (which apply in relation to Articles 8-11) should also be applied in the context of Article 7, and if different criteria were needed, what those criteria were. Nor should the Grand Chamber have excluded out of hand the direct connection with the case, as the main problematic issue for the national court was to assess, in the context of the Convention, which criminal law to apply to the case of *Robert Kocharyan* – the law in force at the time of committing the act or adopted subsequently, as it was difficult to determine whether the old law would be considered more lenient or that adopted subsequently. Therefore, the issue of the foreseeability of the norm and the criteria for assessing it in the context of Article 7 of the Convention could obviously have been of significant importance to the case, and the court's interest was understandable.[29]

[26] ibid, para 11.
[27] See supra note 12, para 55.
[28] ibid, para 56.
[29] The Grand Chamber then clarified that if the Constitutional Court was referring to the context of Article 7, it would find the answer in the answers to questions 3 and 4.

However, the error of the Constitutional Court of Armenia must be considered to have been that it did not adequately explain the direct connection between the first two questions and the determination of the pending case. We may therefore conclude that it is not the Grand Chamber's role to look for these connections and logical links between the questions raised and the outcome of the particular case, and that this is the obligation of the requesting court, the improper performance of which would render the questions raised incompatible with Protocol No. 16. In addition to failure to show a direct connection, an additional reason for rejecting the two questions was their overly broad and general wording, which ultimately led the Grand Chamber to state that it "*finds it difficult to see which questions the Constitutional Court wishes to determine with the help of the Court's opinion*".[30]

As to the third case from Slovakia,[31] as already mentioned, the request for an advisory opinion was not accepted as a whole. Apparently, the Supreme Court of Slovakia raised questions even less skilfully. In particular, it asked a question worded as follows:

"Do procedural actions in criminal proceedings and evidence gathered by agents of the Inspection Service of the Ministry of the Interior, who are directly subordinate in personal and functional terms to the Minister of the Interior, provide evidence and a basis for the lawful, independent and impartial prosecution of officers of the Police Force who are likewise subordinate to him (the Minister of the Interior), in particular for lawful and fair proceedings before a court, including the court's decisions as such, in the light of the guarantees provided by Articles 2 § 1, 3 and/or 6 § 1 of the Convention?" [32] The case concerned the conviction of the defendant (a police officer) in the domestic proceedings by a first-instance court and the failure of his appeal in the second instance. As for the question, it seems that the national court wanted to understand the procedures carried out against the state agent in the light of a fair trial, by assessing their independence, but it failed to demonstrate the problematic nature of the issue for the particular case and failed to correctly highlight the key points, leading to the request being not accepted.

The Panel of the Grand Chamber did not see any connection. In its decision, it pointed out that although the question raised in the request concerned the fairness of the defendant's trial from the angle of Article 6 of the Convention, it was based on and formulated on the basis of Articles 2 and 3, with reference to the Court's case-law, as well as the question raised concerned an effective investigation under those Articles. No procedural background or the arguments of the parties to the domestic proceedings, or any reliance on Articles 2 and 3 on the part of the defendant or any other person, were presented. Therefore, in so far as the request concerned the interpretation of Articles

[30] See supra note 12, para 55.
[31] See supra note 8.
[32] ibid, para 2.

2 and 3, it did not appear related to points that were directly connected to pending proceedings (§19). However, the Panel of the Grand Chamber tried to give an answer at least in part and show a general framework. As it explained, although a fair trial guaranteed by Article 6 essentially meant the proceedings before a tribunal, Article 6 was also relevant during pre-trial proceedings, in so far as the fairness of the trial was likely to be seriously prejudiced at the initial stage. The question to be answered was whether the proceedings as a whole were fair.[33] The Panel eventually ruled that the questions raised in the request, *"on account of their nature, degree of novelty and/or complexity or otherwise, do not 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"*.[34]

The above precedents show that the national courts have not been entirely successful in framing questions in a way that directly satisfies the requirements of Protocol No. 16 – that the questions of principle should relate to the interpretation and application of Convention rights and should be directly connected to the determination of the particular case. The issues seen from the perspective of national courts do not always adequately reflect the precise legal context in the light of the Convention and Protocol No. 16. This difficulty can be easily overcome over time, but it is legitimate to ask whether the national courts have a certain margin of discretion in assessing whether the interpretation requested concerns the pending case and whether it is necessary for the determination of the case. Since a national court raises a certain legal question in the context of a particular case, isn't it reasonable to give it more weight in assessing whether that question is directly connected to the determination of the pending case?

We have to pay attention to another factor: it also seems to be difficult for the highest national courts to avoid generalising and broadly formulating legal questions arising in particular cases, which may be due to a kind of caution on their part, so that asking questions in the context of a particular case is not perceived as direct questions as to what kind of decisions to take in the pending cases during domestic proceedings, which may undermine the idea of judicial independence, as well as the lack of practice and the habit among national judges to have discussed with other judges legal issues related to cases pending before them, including by sharing with other judges the facts of a particular case.

[33] The Grand Chamber clarified that Article 6 required that the court called upon to determine the merits of a charge be independent of the legislature and the executive. The requesting court itself made a distinction between the fair trial aspects from the point of view of the defendant and from the point of view of the victim, thereby emphasising in particular that the guarantee of independence provided to the defendant was unavailable to the victim if the case did not reach the stage of a judicial examination on the merits. ibid, paras 20-22.

[34] ibid, para 23.

V. QUESTIONS TO WHICH THE GRAND CHAMBER HAS GIVEN ANSWERS ON THE MERITS

In this part, our interest is to examine whether it was necessary to apply with respective questions to the Grand Chamber and whether the highest national courts could have answered them themselves, based on the already established case-law of the Strasbourg Court.

1. THE FIRST CASE – REQUEST FROM THE COURT OF CASSATION OF FRANCE[35]

Questions raised

The questions raised by the Court of Cassation of France concern a rare, specific and interesting issue – whether the right to respect for private life of a child born abroad through surrogacy includes the rights to the legal relationship with the "intended father", who is the child's biological father, and with the "intended mother", who has the status of "legal mother" in the birth certificate, in a situation where the child was conceived using the eggs of a donor, and legal relationship with the intended father has been recognised in domestic law. Also, whether a positive answer to the above questions should be understood to imply changes to birth, marriage and death certificates regarding the birth details in a birth certificate legally issued abroad (the Grand Chamber's formulation).

Grand Chambers' answer and substantiation

The Grand Chamber answered the first question in the affirmative and the second question in the negative.

It becomes clear from the advisory opinion[36] that the European Court has already dealt with a number of issues relating to the questions raised by the Court of Cassation of France in the specific case that the request for an advisory opinion concerned. Furthermore, the approaches developed in the relevant judgment and the case-law cited therein already constituted significant jurisprudence on the basis of which the Court of Cassation itself could foresee what opinion the Grand Chamber would deliver. This is also borne out by the fact that the advisory opinion itself used it in answering the questions asked. The case *Mennesson v. France,*[37] is meant here. The Court examined the case of two children

[35] See supra note 12.
[36] ibid.
[37] Judgment of the European Court of Human Rights, Mennesson v. France, no. 65192/11, 26 June 2014, para 40.

born in California (the USA) through a gestational surrogacy arrangement, where their intended parents were unable to obtain the recognition in France of the parent-child relationship legally established between them abroad. According to the European Court, the failure to recognise such a relationship did not violate the right of the children and the parents to respect for their family life, but violated the children's right to respect for their private life. The advisory opinion also shows that the approaches it presented were largely based on the judgment in *Mennesson v. France* and other precedents cited there. Already from this judgment, one could easily guess the likely answer of the Grand Chamber, but let us follow the reasoning behind the advisory opinion.

In addition to the above case, the Grand Chamber used the UN Convention on the Rights of the Child of 20 November 1898, its Optional Protocol on the sale of children, child prostitution and child pornography, the Report of the Special Rapporteur of 15 January 2018 on the above-mentioned issues, and materials. The Court undertook and took into consideration a comparative-law survey covering forty-three member States of the Council of Europe on artificial insemination and surrogacy,[38] materials that were equally available to the Court of Cassation of France for examination or processing.

The Grand Chamber presented in its advisory opinion the approaches well developed in its precedents, which included answers to the questions to be discussed and which were also available to the Court of Cassation of France. In particular, the Court made clear that according to the Court's case-law, Article 8 of the Convention required that domestic law provided a possibility of the recognition of the legality of the relationship between a child born through surrogacy abroad and the intended father where he was the biological father, and that in *Mennesson* it expressly found that the lack of such a possibility constituted a violation of the child's right to respect for his or her private life as guaranteed by Article 8. In addition to the above case, the Court also referred to other cases.[39] In other precedents, it had placed some emphasis on the existence of a biological link with at least one of the parents,[40] referring to the respective case-law, and observed that the present case explicitly included the factual element of a father with a biological link to the child.

The Grand Chamber presented in its advisory opinion the approaches established by its case-law in regard to the issue at hand, in particular, the approach established in *Mennesson* according to *"respect for private life requires that everyone should be able*

[38] ibid, paras 19, 21.

[39] In particular, the Court referred to the following cases: ibid, paras 100-101; Judgment of the European Court of Human Rights, Labassee v. France, no. 65941/11, 26 June 2014; Judgments of the European Court of Human Rights, Foulon and Bouvet v. France, no. 9063/14 and no. 10410/14, 21 July 2016; Judgment of the European Court of Human Rights, Laborie v. France, no. 44024/13, 19 January 2017; Advisory opinion, para 35.

[40] Judgment of the European Court of Human Rights, Paradiso and Campanelli v. Italy, no. 25358/12, 24 January 2017; Advisory opinion, paras 24, 195; Advisory opinion, para 36.

to establish details of their identity as individual human beings, which includes the legal parent-child relationship".[41] Moreover, the Court found that the rights of those children had been substantially affected in France by the non-recognition of the legal parent-child relationship between them and the intended parents.[42] The Grand Chamber then explained that there were two driving issues – the best interests of the child and the margin of appreciation.

As regards the first factor, the Grand Chamber certainly pointed out that it relied on the essential principle, according to which, whenever the situation of a child was in issue, the best interests of that child were paramount, and presented its precedents.[43] The Court observed in *Mennesson* that France wished to deter its nationals from going abroad to take advantage of methods of assisted reproduction that were prohibited on its own territory. However, it stressed that the effects of the non-recognition in French law of the relationship between children and the intended parents concerned not only the parents but also the children whose right to respect for their private life was affected, *"... as it places him or her in a position of legal uncertainty regarding his or her identity within society*".[44] Accordingly, the Court considered that the child's best interests also entailed the identification of the persons responsible for raising him or her, meeting his or her needs and ensuring his or her welfare, as well as the possibility for the child to live in a stable environment. The Court therefore considered that the general and absolute impossibility of obtaining legal recognition of the relationship between a child born through surrogacy abroad and the intended mother was incompatible with the child's best interests, which required at a minimum that each situation be examined in the light of the specific circumstances of the case.[45]

As regards the second factor, the Court observed in *Mennesson* that where there was no European consensus in this respect, and where there was no consensus, particularly where the case raised sensitive moral or ethical issues, the national margin of appreciation would be wide (paragrpah 43). However, the Court also observed in the same judgment that, where a particularly important facet of an individual's identity was at stake, such as

[41] See supra note 36, para 96.

[42] After the judgment in Mennesson, it was already possible to register the particulars of birth in the child's birth certificate for the intended father at the time, as he was, at the same time, their biological father, but in the case of the intended mother the problem remained. The case was brought back before the European Court because the domestic justice system allowed in that case the re-examination of the appeal on points of law. The Court of Cassation resorted to the advisory opinion procedure. Thus, the request concerned the intended mother in relation to whom the issue persisted in domestic law.

[43] In particular, the following cases: supra note 36, para 208; supra note 36, paras 81, 99; supra note 38, paras 60, 78; Judgment of the European Court of Human Rights, X v. Latvia, no. 27853/09, 26 November 2013, para 95; Judgment of the European Court of Human Rights, Wagner and J.M.W.L. v. Luxembourg, no. 65941/11, 28 June 2017, para 133.

[44] See supra note 36, para 40.

[45] ibid, para 42.

the legal parent-child relationship, the margin of appreciation allowed to the State was restricted (paragraph 44). In sum, the requirements of the child's best interests reduced the margin of appreciation and, in a situation such as that referred to by the Court of Cassation and as reformulated by the Grand Chamber, the right to respect for private life, within the meaning of Article 8 of the Convention, of a child born abroad through surrogacy required that domestic law provided a possibility of recognition of a legal parent-child relationship between the child and the intended mother, designated in the birth certificate legally issued abroad as the "legal mother". The Court also observed that although the domestic proceedings did not concern the case of a child born through surrogacy abroad and conceived using the eggs of a third person, where the situation was otherwise similar to that in issue in the present proceedings, the need for recognition applied with even greater force.[46] Thus, as we can see, the Grand Chamber relied almost entirely on the judgment in *Mennesson* and its other precedents in relation to the first question.

As regards the second question (according to its reformulation), the Grand Chamber left it within the limits of the national margin of appreciation. The Court considered that Article 8 of the Convention did not impose a general obligation on States to recognise *ab initio* a parent-child relationship between the child and the intended mother. What the child's best interests (which must be assessed primarily *in concreto* rather than *in abstracto*) required was the recognition of the relationship legally established abroad when it has become a practical reality, and it was not for the Court but for the national courts to assess whether the said relationship has become a practical reality. The child's best interests and his or her right to respect for private life could not be construed in such a way as to entail an obligation for States to register in other documents the details of the birth certificate issued abroad in so far as it designates the "intended mother" as the "legal mother". Depending on the circumstances of each case, other means, including adoption, produced effects similar to the registration of foreign birth certificates.[47]

The Court pointed out that it could not express a view in the context of its advisory opinion on whether French adoption law satisfied the criteria set forth in the opinion, and that it was for the domestic courts to decide, taking into account the vulnerable position of the children concerned while the adoption proceedings were pending.[48]

Lastly, the Court rules that:

- the child's right to respect for private life within the meaning of Article 8 of the Convention required that domestic law provided a possibility of the recognition of the legality of the parent-child relationship with the "intended mother", designated in the birth certificate legally issued abroad as the "legal mother";

[46] ibid, para 47.
[47] ibid, paras 52, 53.
[48] ibid, para 58.

- the child's right to respect for private life within the meaning of Article 8 of the Convention did not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally issued abroad. Another means, such as adoption of the child by the "intended mother", might be used provided that the procedure laid down by domestic law ensured that it can be implemented promptly and effectively, in accordance with the child's best interests (Operative provisions of the opinion, delivered unanimously).

Assessment

Proceeding from the above, the Grand Chamber's answers to the questions raised by the Court of Cassation of France, although reformulated, were fairly foreseeable, drawing on the case of *Mennesson* and other precedents of the Court, and there was no need to address the Grand Chamber with the relevant questions. The case left the impression that the Court of Cassation of France was not seeking more detailed considerations from the Grand Chamber regarding the content limits of the right to respect for private life of a child born through surrogacy abroad, but rather needed a well-reasoned response as to why deciding this issue fell outside the scope of this case, and the refusal to legalise the results of surrogacy carried out abroad outside the limits of the national margin of appreciation, especially as this was an issue on which, as observed in the judgment in *Mennesson*, there was no general European consensus that would determine the limits of the national margin of appreciation. And if such non-recognition was outside the limits of the national margin of appreciation, perhaps there were alternative means of recognition of such relationship, offered by domestic law, which could remedy this deficiency, in particular, the right of the "intended mother" to adopt her husband's biological child. This very context was important for the Court of Cassation of France. This should explain the way the Court of Cassation of France worded the questions in its request for an advisory opinion (whether or not the State was overstepping the margin of appreciation by refusing to recognise the legality of the relationship in question).

This was indeed the most favourable context, where it was more likely that the Grand Chamber would answer that it was not overstepping the limits and, thus, the Convention, than in the case of an answer to the question reformulated in the context of the right, as the first question concerned sensitive moral or ethical issues, on which there was no general European consensus and, supposedly, the margin of appreciation was wide. I believe that the Court of Cassation used the advisory opinion procedure in this case to once again make the subject of discussion whether a Contracting State had the right not to legalise the results of surrogacy arrangements abroad in a situation where surrogacy was prohibited in France; and, if it did not have that right, maybe having alternatives for legalising those results would suffice – for example, adoption, in order to fulfil the

requirements of Article 8 of the Convention to ensure the right to respect for private life of a child born through surrogacy. The Court of Cassation of France seems to have tried to ensure that the determination of this issue was left within the limits of the national margin of appreciation, although this attempt proved unsuccessful.

2. THE SECOND CASE – REQUEST FROM THE CONSTITUTIONAL COURT OF ARMENIA[49]

Questions raised

In its second advisory opinion,[50] the Grand Chamber answered the following two questions raised by the Constitutional Court of Armenia:

- Does the criminal law that defines a crime and contains a reference to certain legal provisions of a legal act with supreme legal force and higher level of abstraction meet the requirements of certainty, accessibility, foreseeability and stability?

- In the light of the principle of non-retroactivity of criminal law (Article 7 § 1 of the Convention), what standards are established for comparing the criminal law in force at the time of committal of the crime and the amended criminal law, in order to identify their contextual (essential) similarities or differences?

Before discussing what and how the Grand Chamber answered, it should be noted that these questions were also formulated in general terms, although the Grand Chamber did not reformulate them, seeing their direct connection to the pending case.

First question

The Grand Chamber's answer and substantiation:

The part of the advisory opinion dealing with the first question reveals that the Grand Chamber's answer is based on a comparative-law survey and the Court's case-law.

In answering the question raised, the Grand Chamber pointed out in its advisory opinion that it primarily undertook and took into consideration a comparative-law survey covering forty-one member States of the Council of Europe and clarified that it used the terminology "blanket reference" and "legislation by reference" technique. It further observed that a large majority of the forty-one member States (namely all except Malta and the Netherlands) made use of the "blanket reference" or "legislation by reference" technique in their criminal law.[51] In two of forty-one legal systems, the use of the

[49] See supra note 19.
[50] See supra note 12.
[51] Inter alia, twenty-one member States used this technique in respect of criminal offences against the

"blanket reference" or "legislation by reference" technique was accompanied by the requirement that referenced legislation outside criminal law met the same standards of accessibility, clarity, certainty and foreseeability as the provisions of criminal law. In addition, some legal systems required that references be explicit, and some required that the referencing provision set out the penalty and the essential elements of the offence. In addition, however the referenced provisions were interpreted, they must not extend the scope of criminalisation as set out in the referencing provision and, most importantly, both provisions taken together must enable the foreseeing of the constituent elements of the offence and what acts or omissions would make the individual criminally liable. There was no consensus regarding the question whether the referenced provisions had to be of a certain nature or hierarchical level.[52]

The Grand Chamber then outlined in detail the principles developed in its case-law as regards legal certainty and foreseeability under Article 7; including that only the law could define a crime and prescribe a penalty; that Article 7 not only prohibited the application of existing provisions to the facts that occurred in the past but also required that the criminal law not be extensively construed to an accused's detriment, for example, by applying a penalty by analogy; that the requirement of certainty was satisfied where it was possible to foresee based on the relevant provision, if need be with the help of appropriate legal advice, what acts would make the individual criminally liable.[53] Then again, it clarified by means of its case-law that "law" comprised the qualitative requirements of accessibility and foreseeability, which referred to both the "offence" and the "penalty", although there had always been more or less vague concepts whose clarification was the subject of judicial interpretation. Although certainty was highly desirable but could entail excessive rigidity, the law had to be able to keep pace with changing circumstances. Article 7 of the Convention could not be read as outlawing the gradual clarification of the provisions of criminal law through judicial interpretation from case to case, provided that the resultant development was consistent with the essence of the offence and could reasonably be foreseen, although the lack of an accessible and reasonably foreseeable judicial interpretation could lead to a finding of a violation.[54] The Court then delved further into these issues by analysing the relevant precedents in detail.

By referring to the relevant cases, the Court clarified that although it had not yet explicitly ruled on referencing provisions or blanket references, there were similar cases that it had

constitutional order. Among those member States making use of this technique in the definition of offences, eleven member States did so by referring either to general principles or to notions of constitutional law and three by making reference to specific rules of constitutional law. References to provisions outside constitutional law could be found in four member States.

[52] See supra note 12, paras 31-35.

[53] ibid, para 60.

[54] ibid.

dealt with in the context of Article 7, which concerned the setting out of the constituent elements of an offence by referring to provisions or principles of constitutional law or to other areas of law.[55] The Court also mentioned that none of those cases had explicitly raised the question whether the referencing technique as such was incompatible with Article 7. They rather concerned the question whether the referencing and referenced provisions, taken together, were sufficiently clear in their application.[56] The Court also held that a reference to the provision of constitutional law of a broad and general nature raised the issue of Article 7 in itself.[57] The Court further observed that in the present case the referenced constitutional provisions might indeed be formulated in a general and very abstract manner. Owing to their high level of abstraction, such provisions were often developed further at lower hierarchical levels, including through non-codified constitutional customs and through the Court's jurisprudence. In the context of fundamental constitutional principles ensuring the separation of powers, the Court had held in *Haarde* that Article 7 of the Convention had not excluded the possibility that evidence of existing constitutional practice could form part of the national court's assessment of the foreseeability of an offence based on a provision of a constitutional nature, and the Court did not see any reason to depart from that finding.[58]

As the Court stated in its advisory opinion, its case-law thus indicated that the use of the "blanket reference" or "legislation by reference" technique in criminal law was not incompatible with Article 7. It accepted the use of this technique, whereas the main issue of foreseeability had to be decided based on the particular case.[59] Moreover, the comparative law analysis showed that most Contracting States used this technique in criminal law in defining offences against the constitutional order.[60] However, in order to comply with Article 7, this technique must fulfil the "quality of law" requirements (precision, accessibility and foreseeability in its application), and both provisions, taken together, had to clarify, if need be with the help of appropriate legal advice, what acts would make the individual criminally liable.[61] Furthermore, the Court considered that the most effective way of ensuring foreseeability was for the referencing provision to set out the constituent elements of the offence, and for the referenced provision to be explicit and not to extend the scope of criminalisation as set out by the referencing provision. In any event, it was up to the national court to assess, on the basis of both provisions taken together, whether criminal liability was foreseeable.[62]

[55] ibid, paras 64-65.
[56] ibid, para 67.
[57] ibid, para 68.
[58] ibid, para 69.
[59] ibid, para 70.
[60] ibid, paras 70-71.
[61] ibid, para 72.
[62] ibid, paras 73-74.

Assessment

The Grand Chamber thus did not give a direct answer to the question of the national court – whether the criminal law that defined a crime and contained a reference to certain legal provisions of a legal act with supreme legal force and higher level of abstraction met the requirements of certainty, accessibility, foreseeability and stability. The Grand Chamber said that a reference to such a provision was not in principle incompatible with Article 7, but it could say nothing whether or not it met the requirements of certainty and foreseeability because that was up to the national court to answer this question and only based on the specific disputed provisions. However, in its advisory opinion, it presented to the national court all its jurisprudence which dealt with the question raised. These precedents were available to the Constitutional Court of Armenia and it could have analysed them itself, as well as conducted a comparative law survey in this field within the Council of Europe and drawn its own conclusions.

The Grand Chamber did indeed walk on thin ice here and did not interfere with the assessment of what the national court was supposed to do, although it is another matter whether or not it has satisfied the national court's interest. This circumstance, at the same time, indicates that the Constitutional Court of Armenia asked a question to which no specific answer could be given. It did not take into account that the foreseeability and certainty of a provision could only be assessed based on specific circumstances, and as regards the criteria to be applied in this respect, the rich case-law of the European Court had already been available to it, which the Grand Chamber presented to it consistently in its advisory opinion.

This and the earlier case raised an important issue: whether the questions submitted by the highest national courts, which, although formulated in accordance with the requirements of Protocol No. 16, relate to issues to which there are already direct answers in the relevant case-law or to which the answers logically follow from it, should be accepted for examination and giving an answer.

Second question

As regards the second question from the Constitutional Court of Armenia, I think it should not have been asked at all, and the European Court should not have accepted it for examination. The question asked and accepted was worded as follows:

In the light of the principle of non-retroactivity of criminal law (Article 7 § 1 of the Convention), what standards are established for comparing the criminal law in force at the time of committal of the crime and the amended criminal law, in order to identify their contextual (essential) similarities or differences?[63]

[63] See supra note 12, para 11.

The factual and legal context of the case: The domestic courts of Armenia had to decide which law (the Criminal Code) to apply to the former President of Armenia *Robert Kocharyan* who was charged with overthrowing the constitutional order – the Criminal Code in force at the time of the commission of the act or the one adopted subsequently, as it became problematic to assess whether the relevant provision of the new criminal code reduced liability for the alleged crime. In turn, this difficulty stemmed from the fact that the provision of the criminal code in force at the time of the commission of the act was broader in that any action aimed at overthrowing the constitutional order was punishable, whereas under the provision adopted later only the *de facto* elimination of the fundamental constitutional principles laid down in the Constitution was punishable. However, the assessment was complicated by the fact that in other respects the provision of the former code was narrower, as it contained an element of violence which was no longer a necessary element for the crime defined in the relevant provision of the new code. Thus, the former code was broader in one respect while it was narrower in another, making it difficult to compare the degrees of the gravity of crimes described on their basis. For this reason, the common court of first instance hearing the case of *Robert Kocharyan* addressed the Constitutional Court, and the latter addressed the Grand Chamber, with a question as to what criteria should be applied in such a case to fulfil the requirements of Article 7 of the Convention, which generally prohibited the retrospective application of the criminal law, but required the retrospective application of the more lenient law.

The Grand Chamber's answer and substantiation: The Grand Chamber noted in its advisory opinion that the law more favourable to the defendant should have been applied and the assessment should have been made on the basis of the principle of concretisation when comparing laws, and that it had already established this rules in its case-law. Although the Court's case-law did not offer a comprehensive set of criteria, it was possible to draw the conclusion based on the approaches established by the Court and the facts considered established by the national courts.[64] The Court further clarified that formal classifications of offences did not matter[65] and that the comparison had to be made not between the definitions of the offence *in abstracto*, but *in concreto*, based on the specific circumstances of the case.[66] In the advisory opinion, the Court presented its precedents in detail where, as a result of an assessment *in concreto,* the Court ruled that the relevant applicant could not benefit from the privilege of a lighter sentence,[67] and further explained that the principle of concretisation, in addition to sentences, equally applied to a comparison between the definitions of the crimes (§ 90). Finally, the Grand Chamber again pointed out that it was for the national courts

[64] ibid, paras 79-80, 86.
[65] ibid, para 87.
[66] ibid, para 88.
[67] ibid, para 89.

to assess which norm they would apply and that this should be done by applying the principle of concretisation, which in this case meant that they had to compare the legal consequences that the application of the old and new criminal codes may entail for the defendant *Robert Kocharyan*. The Grand Chamber further simplified the answer and explained to the national court that if the application of the old code attracted more serious consequences for the accused, then the new code would have to be applied, and if the application of the new code was associated with more serious consequences, the old code would have to be applied.[68]

Assessment

This question and the answer to it is also a prime example of the kind of questions that should not be raised before the Grand Chamber. General questions as to what criteria are used in comparing provisions to identify the lighter one is formally admissible, but, first of all, the basic criteria established by the case-law have been served on a silver platter, and reading and understanding them properly would be quite sufficient to draw conclusions. Second, how the judge of a common court should compare two provisions of criminal law to identify the lighter one is an ordinary theoretical and practical criminal law issue that serves to determine which law should be applied to protect the right of the accused rather than to clarify what the obligation to apply the lighter law generally means and what the requirements of Article 7 of the Convention in this regard are. Even without the case-law of the European Court, it was not difficult to find that such a comparison could only be made on the basis of specific circumstances, and thus to foresee that the Grand Chamber would once again have to present in the advisory opinion its already developed general approaches.

VI. QUESTIONS RAISED IN THE FOURTH, FIFTH AND SIXTH REQUESTS

The fourth request for an advisory opinion was made by the Supreme Administrative Court of Lithuania. It requested guidance to assess the compatibility of impeachment legislation with Article 3 of Protocol No. 1 to the Convention (in particular the right to stand in parliamentary elections). The request was accepted for examination. The exact wording of the question is not available, but the context of the case is known. It concerned the refusal to register the former member of the Lithuanian Seimas (parliament) as a candidate in the 2020 parliamentary elections on the grounds of her impeachment in 2014. This matter was challenged by the former Member of Parliament in the context that the CEC's decision refusing registration did not take into account the impeachment

[68] ibid, paras 90-91.

legislation, which was amended following the judgment of the European Court in 2011 in *Paksas v. Lithuania*, which assessed the permanent and irreversible nature of the disqualification of the former President of Lithuania from holding parliamentary office as a disproportionate restriction and a violation of Article 3 of Protocol No. 1 to the Convention. However, the Constitutional Court found this amendment to be unconstitutional.[69]

Since the exact wording of the questions asked is unknown, we can make assumptions. The first assumption is that the requesting court will raise a question in the light of a conflict of values between the national margin of appreciation, the protection of constitutional values and individual rights, and this context will be used by the requesting court to show the appropriateness of leaving the issue within the limits of the national margin of appreciation, while the Grand Chamber will advise it to apply the principle of proportionality in the issue of deprivation of the right to stand in elections, taking into account the nature and gravity of the violation underlying the impeachment of the official, as well as whether the violations were of criminal nature and whether the person was convicted. It is likely that the Grand Chamber will favour an approach of considering permanent disqualification a disproportionate interference with the right to elections, but will not exclude its compatibility in the case of particularly serious crimes, such as war crimes and crimes against humanity. It will also consider as factors to be taken into account that the impeachment charges and the removal from office are the results of a political process, meaning that the relevant facts have not been established to be reliable and as a result of due process by a court; that impeachment charges in this respect cannot be equated with the facts established in the Court's decision and its legal effects. It will also point to one of the orientations that the matter concerns an elected rather than an appointed position, where the will of the people is decisive. Obviously, it will represent its relevant case-law, including the judgment in *Paksas v. Lithuania*. Therefore, this case will also not be the one for which sufficient criteria cannot be found in the Court's case-law to give an answer.

The fifth request was submitted by the *Conseil d'État*, where it asked the Court regarding the criteria for assessing the compatibility with the Convention of the provisions of the domestic law (the Environmental Code) which the party – the Federation of Private Foresters (Federation Forestiers privés de France) – considered discriminatory in domestic proceedings, in the Council of State, as far as this legislation limited the right of landowners' associations to withdraw their land from the territory of an officially approved hunting association (ACCA), whereas one part of landowners' associations established before their creation could withdraw their land at any time.[70]

[69] See supra note 11.

[70] In particular, the case concerns the approved municipal hunters' association (the ACCA) which is established under the Law of 10 July 1964 and aims at encouraging the rational management of hunting and

Concerning the question of when a legally established difference in treatment constitutes discrimination within the meaning of Article 14 of the Convention, the Strasbourg Court has extensive practice, as well as established assessment criteria and the stages of assessment. It must first be determined whether the difference in treatment does indeed exist, then, if the answer is in the affirmative, it must be determined whether comparable persons are in an analogous or a similar situation, which requires the use of uniform approaches. Then again, if the answer is in the affirmative, it must be determined whether there was an objective and reasonable justification for such difference in treatment in the light of the legitimate aims that the provision establishing a difference in treatment had. It is obscure what else the Grand Chamber could advise the *Conseil d'Etat* without delving into the merits of the case and refraining from assessing national law, regarding which the Court has repeatedly stated that this is not its role. The most that can be offered theoretically is the showing of value preferences, or what is more important – the full realisation of landowners' ownership rights to land and, where applicable, the right to withdraw it from hunters' associations or the public legitimate aims of the restriction of the right, presumably, environmental and resource management aims, which need to be justified in the context of proportionality, and it is clear that the Grand Chamber will not do this in place of the national court. However, it is possible that the Court may develop specific, thematic criteria, which cannot be primary and decisive.

This request has also been accepted for examination and gives rise to questions:

- Why is it better for the highest national courts to seek ready-made guidelines in specific cases instead of conducting adequate research and thus contributing to the development and enrichment of domestic law?

game stocks, in particular by promoting hunting over a fairly extensive area. Landowners were required to join the ACCA in their respective municipalities and to contribute funds with a view to creating a municipal hunting territory. Nevertheless, the Environmental Code (Article L 420-10) stated that when an ACCA was set up, landowners who had strong personal anti-hunting convictions and landlords and associations of holders of hunting rights over areas larger than the minimum areas provided for in the same Code (Article L 422-13) could object to contribute funds. According to the provisions of the version of the same code (Article L 422-18), unlike landowners who could withdraw their land at any time – provided that their land attained the minimum dimensions – only landowners' associations which officially existed on the date of the setting up of the ACCA and whose land attained the said threshold were entitled to withdraw their land, whereby similar associations set up subsequently to that date were not so entitled. The Federation Forestiers privés de France (Fransylva) appealed before the Conseil d'Etat and submitted its observations against abuse of authority, stating that the provision of the current version of the Environmental Code adopted on 24 July 2019 (Article L 422-18) established discrimination incompatible with Article 14 of the Convention and Article 1 of Protocol No. 1 to the Convention by depriving landlords' associations established after the creation of the ACCA of the right to withdraw their land, even where the area of their land satisfied the criterion laid down in the Environmental Code (Article L 422-13). See supra note 7; Request for an Advisory Opinion (no. P16-2021-002) submitted by the Conseil d'Etat by its Decision of 15 April 2021 <https://www.echr.coe.int/Pages/home.aspx?p=ECHRRSSfeeds&c=> [last accessed on 1 May 2022];

- By accepting such requests, is the Court trying not to prevent national courts from losing their enthusiasm and using an opportunity afforded by Protocol No. 16 to request advisory opinions?

The last, sixth request was received from the Court of Cassation of Armenia. The Court of Cassation of Armenia had asked the Court whether the non-application of limitation periods for imposing criminal responsibility in respect of torture or equivalent criminal offences with reliance on international law was compatible with Article 7 of the Convention, if domestic law did not require such non-application of those limitation periods.[71] Having agreed with the prosecutor in the case, the Court of Cassation considered that it was necessary to determine whether the case-law of the European Court and the Convention against Torture fully prohibited limitation periods in respect of torture or other acts of ill-treatment, which was followed by filing a request for an advisory opinion with the Grand Chamber.

While the answer to this question on the part of the Grand Chamber can be regarded as foreseeable because of the *jus cogens* nature of the prohibition of torture and ill-treatment, juxtaposing them in relation to the requirements of Article 7 would be interesting indeed.

VII. ADVISORY OPINION AS GUIDANCE FOR A NATIONAL COURT IN A SPECIFIC CASE

Two issues need to be highlighted in this section of the Article: (1) whether it is justified in general for national courts to seek guidance from the European Court in respect of the pending case and, in particular, issues important for the determination of the case; (2) how conditional is the non-binding character of the Grand Chamber's advisory opinion and how the parties to domestic proceedings will perceive the acceptance or rejection of this opinion by the national court.

[71] The issue was raised in connection with the need to execute the judgment delivered by the Strasbourg Court in 2012 inVirabyan v. Armenia. In that case, the Court qualified the ill-treatment of the applicant by two police officers as "torture". To execute the judgment, a criminal case was instituted against two police officers but terminated in 2012 on the grounds that the limitation period had expired. The prosecutor found that the investigator had failed to examine the acceptability of terminating prosecution in the context of international law, including on the basis of Article 3 of the Convention. The Court of Appeal upheld the judgment of the first-instance court, finding both police officers guilty, but refused to impose criminal liability because of the expiry of the limitation period provided for in the Criminal Code. In his appeal on points of law, the prosecutor argued that the application of limitation periods in respect of acts of torture was prohibited under Article 3 of the Convention, but there was a need to determine whether that was an absolute prohibition. See supra note 7.

The first question concerns the doubts as to whether this violates the fundamental principles of judicial independence, including those guaranteed by Article 6 of the Convention. The concept of judicial independence undoubtedly implies that the judge decides in accordance with the law, the circumstances of the case and his or her inner conviction. Therefore, the question naturally arises whether the fundamental principles of judicial independence are violated in a situation where a judge/judges hearing the case discusses/discuss with other judges, who are not involved in the examination of the case, legal issues important for the determination of the case pending before him/her/them, including by providing the specific legal and factual context of the case. If this is admissible in the format of requesting an advisory opinion from the international court, why cannot we allow the same in the national legal system and give first-instance judges the right to suspend the examination of the case and request an advisory opinion from the court of appeal or the court of cassation on the application and interpretation of the applicable law, and in the case of appellate judges, from the court of cassation?

Less important in this context is that the Grand Chamber's advisory opinion is not binding on the court seeking an advisory opinion, as addressing with a question and the existence of such a possibility is already problematic.

A separate issue is the perception by parties to proceedings of the consideration and non-consideration of the advisory opinion, as both cases – acceptance and rejection – are equally problematic, since it will be sometimes in favour of one party and sometimes of another. In one case, the party affected by the acceptance of the opinion may accuse the court of acting under someone else's dictates, and the principle of appearance of the independence of justice *(Justice must not only be done, it must also be seen to be done)* will be jeopardised. In contrast, when the requesting court rejects the position of the advisory opinion, the party affected by such rejection may complain that the decision delivered in the case does not meet international standards and question the legitimacy of the decision.

A separate issue is whether national judges themselves will easily refuse to accept an advisory opinion if it turns out to be in conflict with their inner convictions, legal views or values. And in such a situation, it does not matter whether they are wrong or not, and if they still take a step contrary to their internal convictions or legal views in such cases, this might be seen as a voluntary denial of the principles of judicial independence. It should also be noted that some judges at the Strasbourg Court themselves see great danger and challenge in a situation where national courts methodically and in principle do not follow the approaches suggested by the advisory opinion, which they consider undoubtedly problematic.[72] This would indeed undermine the credibility of advisory opinions.

[72] See supra note 13, 9.

The jurisprudence established by the European Court of Human Rights is already guidance for national courts, regardless of whether the supremacy of the Constitution or international law has been established and regardless of whether the Convention has been fully incorporated into domestic law. However, this jurisprudence has been established on the basis of the examination of individual applications, where the European Court acts as a court, which, with the involvement of the parties, determines whether the requirements of the Convention have been violated in a particular case, rather than merely as an authoritative interpreter of the Convention in answering questions raised (sometimes incompetently) by national courts, where it acts within the jurisdiction of an advisory opinion. Therefore, this is not problematic in the light of judicial independence, and the application of the European Court's case-law is as common and binding as the application of national law, as opposed to cases where a national court seeks an authoritative position of an authoritative court on a legal issue "directly connected" to the case before it, which it might not even consider.

The fact that the Grand Chamber's advisory opinion is not formally binding on the requesting national court does not detract from the conflict with the principles of judicial independence, which derives from the possibility provided by Protocol No. 16. and the use of this possibility.

There is another issue: whether an advisory opinion will be adequately perceived and interpreted by national courts and whether the parties will have the right to appeal against their interpretations in individual applications under Article 34, and what is expected to be the outcome.

VIII. CONCLUSION

The questions on which the highest national courts have requested an advisory opinion, the answers given or not given, and, on the whole, the content and scope of the advisory jurisdiction set out in Protocol No. 16, show that:

- In most cases, national courts raise questions to which there are direct answers in the Court's case-law or from which those answers logically follow; among them are the questions that the Grand Chamber has accepted for examination and already answered, or has not answered yet. The answers given by the Grand Chamber also show that most of them should not have been raised and that the national courts themselves should have looked for the answers in the Court's rich jurisprudence. Thus, the necessity and effectiveness of the jurisdiction established by Protocol No. 16 are not yet fully apparent.

- It certainly should be taken into account that the Protocol has not been signed or ratified by most of the Contracting States. It is also noteworthy that even in the countries where

the Protocol has been ratified, the new possibility has not generated much enthusiasm among the national courts.

- It can be observed that national courts ask questions in a very generalised way, without showing a direct connection to the determination of the case pending before them, thus leading to a refusal to accept the questions. It does not yet appear that the Grand Chamber leaves any margin of discretion to the court requesting an advisory opinion in finding that the question is directly connected to the pending case.

- The Grand Chamber has established the right to reformulate the questions raised, thus making it possible to exercise advisory jurisdiction; however, sometimes this may also serve the purpose of placing a certain issue into a favourable legal context. Cases, where the court requesting an advisory opinion does not agree with the reformulated questions, may become problematic because it is unknown whether or not the answers given to them will satisfy its interests.

- Practice has confirmed the need for the Grand Chamber to retain the right not to answer one or more questions from the request already accepted, after a panel of the Grand Chamber has found the request admissible, because of the incompatibility of those questions with the requirements of Protocol No. 16, which we consider reasonable.

- The clarifications of the Court concerning its role and scope in accordance with the jurisdiction under Protocol No. 16, in particular the clarification that its aim is not to transfer the dispute to the international court, assess national law in the context of the Convention and to answer questions instead of national authorities, are very important.

- The Grand Chamber examines cases expeditiously and delivers advisory opinions within less than 1 year of receiving the request, and decisions on admissibility in an even shorter period of time.

- The introduction of advisory jurisdiction raises suspicion concerning its conflict with the fundamental principles of judicial independence, as well as the fact that it is problematic for national courts to see an advisory opinion as guidance. It legalises or legitimises the situation where the judge hearing the case discusses with other judges, who are not involved in the examination of the case, legal issues of the pending case and consults with others – the upper court or just competent judges.

- The fact that an advisory opinion is not binding on the requesting court does not dispel doubts about independence; on the contrary, it creates additional difficulties in terms of the principle of appearance of independence, on the one hand, and the perception of this fact by parties to domestic proceedings, on the other. Furthermore, in the case of the acceptance and rejection of the advisory opinion by the national court, the aim of enhancing dialogue between national and international courts or the principle of subsidiarity cannot exclude the legitimacy of such doubts. After the delivery of advisory

opinions, their interpretations, and the parties' refusal to agree with those interpretations, might become problematic for national courts. There is no answer yet to the question of whether the parties will have an opportunity to challenge these interpretations on the basis of Article 34, by filing individual applications.

- The highest national courts should either not use the possibility of requesting an advisory opinion at all or resort to it only in rare, special cases involving such an uncommon question to which the European Court's rich case-law has no answer or regarding which no conclusions can be drawn from its case-law, or where the case involves an important systemic problem that requires a particularly complex approach. The right to request an advisory opinion should not have a negative impact in terms of the development of national law which ultimately feeds the case-law of the European Court and from which a general European consensus emerges.

It is indeed too early to draw definitive conclusions, and the practice accumulated over the next few years will provide more material for reflection for a more comprehensive study to examine the effectiveness and efficiency of Protocol No. 16.