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Contribution to the Conference on the Principle of Subsidiarity, Skopje, 1-2 October 2010[1]

"Strengthening Subsidiarity: Integrating the Strasbourg Court's Case law into National Law and Judicial Practice"

Contents

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[1] Conference organised by the authorities of 'the former Yugoslav Republic of Macedonia', during the country's chairmanship of the Committee of Ministers of the Council of Europe.

[2] French translation of presentation made by Mr Pourgourides available on the Assembly's website: http://assembly.coe.int/ASP/NewsManager/FMB_NewsManagerView.asp?ID=5930.

I. Presentation by Mr Christos Pourgourides, Chairperson of the Committee on Legal Affairs and Human Rights (AS/Jur), Parliamentary Assembly of the Council of Europe

Ladies and gentlemen,

We have a very important topic to discuss today. The principle of subsidiarity could indeed be the key to saving the Strasbourg Court from drowning in large numbers of repetitive cases. So please allow me to go straight to the heart of the subject-matter.

As a practising lawyer, I should like to be practical: how can we prevent the Court from dealing – again and again - with similar violations occurring in different countries although the meaning of Convention standards is often abundantly clear in the light of previous cases decided by the Court?

The answer resides in a somewhat forgotten principle – that of the "*res interpretata"* authority of the Court's judgments. It means nothing more and nothing less than the duty for national legislators and courts to take into account the Convention as interpreted by the Strasbourg Court – even in judgments concerning violations that have occurred in other countries.

Here are two examples:

The Court held as early as in 1979, in *Marckx v. Belgium*, that children born out of wedlock must not be discriminated. French law was similarly discriminatory. But the necessary changes were made only after France herself was condemned by the Court in the case of *Mazurek v. France*, in 2000! It was obvious, already back in 1979, what the Court's position would be. Twenty years lost for the victims of such discrimination, and many years of unnecessary litigation before the Court in Strasbourg.

The second example concerns my own country: whilst the Court had already decided in 1981, in *Dudgeon v. the United Kingdom*, that homosexual acts between consenting adults must not be criminalised, Cyprus waited until the *Modinos v. Cyprus* judgment in 1993 to finally decriminalise such acts – and even then, I recall it well, without much enthusiasm.

Such practice is simply unacceptable if we agree that the common objective of all Parties to the Convention, under its first article, is to "secure" the rights and freedoms laid down in the Convention. This means that human rights violations must first and foremost be ***avoided*.** Effective remedies to provide redress when a violation has nevertheless occurred are only second-best. And only when these remedies do not function at the national level must the Strasbourg Court step in. This is what the principle of subsidiarity means.

The successful implementation of this principle, which best serves both the respect of national sovereignty and the protection of human rights, depends on two conditions:

The first is that the national legislatures and courts are aware of, and give due consideration to the case law of the European Court of Human Rights, including cases concerning other countries.

The second condition is that the Strasbourg Court exercises appropriate self-restraint in the interpretation of the Convention, respecting the States Parties' margin of appreciation that the Court has itself stipulated in its well-established case law. This is especially true in sensitive cases concerning fundamental moral issues or deep-rooted national traditions. Here I have in mind cases such as *Lautsi v. Italy*, presently before the Grand Chamber.

This being said, let us be clear that the Strasbourg Court is the one body that is invested with the authority to interpret the Convention. Article 19 of the Convention is clear on this.

This is undisputed among the Contracting Parties. In Interlaken, they clearly reaffirmed their commitment to

"tak[e] into account the Court's developing case law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another state, where the same problem of principle exists within their own legal system."[3]

The UK Human Rights Act of 1998 stipulates that UK "**must take into account**" the Convention as interpreted by the Court.

In Ukraine, a 2006 law even elevates the case law of the Strasbourg Court to the status of a "**source of law**".

For its part, the EU Charter of Fundamental Rights has recognised that it is the role of the European Court of Human Rights to create a "**common European denominator**" – thus not excluding higher standards – for the interpretation of basic rights in Europe. Given that the EU is not yet a Party to the Convention, this is particularly remarkable.

Not surprisingly, the Grand Chamber of Strasbourg Court itself has upheld this position. Let me quote, for example, from the recent judgment in *Rantsev v. Cyprus and Russia*:

"The Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties."

The path was paved, for the Grand Chamber, by the Chamber judgment in the case of *Opuz v. Turkey* (2009): "…bearing in mind that the Court provides final authoritative interpretation of the rights and freedoms defined in Section I of the Convention, the Court will consider whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, **even when they concern other states**" (§ 163).

We could think of the Convention's protection regime as a "body" of law: the text of the Convention's articles are the bare bones, and the Court's judgments the flesh on those bones.

The "*res interpretata*" authority of the Court's judgments must not be confounded with legally binding effects - "*erga omnes*" - which the Court's judgments do not have. Under Article 46 of the Convention, judgments are binding "*inter partes*". But as we have seen, "*res interpretata"* authority is based on Articles 1 and 19 of the Convention, not Article 46.

That said, I ask myself the question: are not all Parties to the Convention bound by the findings of the Strasbourg Court in the *Mamatkulov & Askerov case v. Turkey* (Grand Chamber, 2005), to the effect that ignoring provisional measures ordered by the Strasbourg Court leads to a violation of the effective exercise of the right of individual application (Article 35 of the Convention)? Can one not here talk of "*de facto - erga omnes"* effect of Strasbourg Court judgments?

Having established what could be termed as the "persuasive authority" of the Court's judgments in all States Parties to the Convention, all of which have – without exception – incorporated the Convention in to domestic law, let us have a practical look at how we can improve its implementation.

Firstly, however trivial this may sound, relevant judgments of the Strasbourg Court must be accessible to the legislative and judicial authorities in all countries which are potentially concerned – including in a language understood by those who are expected to take them into account. This is a field where there is still much room for progress – to put it diplomatically. Why not create Strasbourg 'case law monitoring units' in the Executive, perhaps attached to the Government Agent's Office, with a duty to report either to the Government or to Parliament, or to both? This process could be aided by such actors as parliamentary research and documentation services, legal journals, and the like. The Court itself should be given the resources to at least translate key extracts from important judgments into both official languages of the Council of Europe, not just those rendered by the Grand Chamber. Lawyers also have an important role to play: they should not fail to plead

[3] Interlaken Action Plan, paragraph 4c, http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/texts_&_documents/CAHDI%20_2010_%20Inf%206%20Interlaken%20Declaration_EN.pdf

pertinent Strasbourg case law that sheds light on the interpretation of the Convention in their pleadings before national jurisdictions, even if the cases cited by them concern other countries. This presupposes that they are themselves properly informed of the Court's case law – which opens a wide field of action for continued legal training bodies, NGO's and well-targeted publications.

Secondly, it is the responsibility of national parliaments, in particular their legal affairs and human rights committees, to follow closely the evolution of the Strasbourg Court's case law in order to detect areas in which legislation and administrative practice in their countries need to be adjusted. Examples of good practice can be found in the United Kingdom and the Netherlands, in which the Strasbourg case law is regularly scrutinised.

Here, it is important to 'impose' on national parliaments to set-up "specific mechanisms and procedures for effective parliamentary oversight of the implementation of the Court's judgments on the basis of regular reports by responsible ministers": Parliamentary Assembly Resolution 1516 (2009, § 22.1), not only limited to cases involving the countries concerned.

Thirdly, in my view, the highest national courts have a duty to ensure that lower courts are aware of and respect Strasbourg case law. Here, I can refer to the Russian Supreme Court's Plenum Decree No. 5 of 2003, in which Russian courts are instructed to take into account the case law of the Strasbourg Court. The text of this provision, as well as a considerable number of other important documents, legal texts and extracts from national court decisions concerning the "*res interpretata"* authority of the Strasbourg Court's judgments can be found in a 'Background Document" in your files which was prepared – upon my request - by the Secretariat of the Assembly's Legal Affairs and Human Rights Department[4].

Fourthly, there must exist a constant dialogue between the Strasbourg Court and States Parties (including their highest courts) in the constantly evolving legal landscape of Europe. The necessary dialogue between Strasbourg and national courts could be facilitated by more frequent "third party interventions", which serve to spread "ownership" of the resulting judgments beyond the original parties to a case.

A good recent example of this is the case of *M.S.S v. Belgium and Greece*, in which not only the UNHCR and the Council of Europe's Human Rights Commissioner intervened as 'third parties', but also the governments of the United Kingdom and The Netherlands.

Finally, the Committee of Ministers' supervision of the execution of judgments provides ample opportunities for member states' representatives specialising in human rights matters to learn about key cases whose significance often extends beyond the country which has been found in violation. The Hurst judgment concerning prisoners' right to vote in general elections springs to mind in this context. Such knowledge acquired at the executive level should find its way into the legislative process, possibly through the briefings on execution issues at parliamentary level, which I intend to suggest in my forthcoming report on the implementation of the Strasbourg Court's judgments.

These are only some possible avenues to promote the authority of the Strasbourg Court's judgments as *"res interpretata"*. Let us use the next two days to explore what else can be done – for the sake of further strengthening the protection of human rights throughout Europe and preserving the subsidiary character of the Convention system!

[4] An up-dated version of this compilation can be found in Part II of the present document at pages 5 to 44.

II. The interpretative authority (*res interpretata*) of the Strasbourg Court's judgments: compilation of background material[5]

[5] All highlighting (in bold) and underlining in the texts has been added by the secretariat

A. Introductory remarks

The Interlaken Declaration of 19 February 2010 specifies, in its Preamble, "*the subsidiary nature of the supervisory mechanism established by the Convention and notably the fundamental role which national authorities, i.e., governments, courts and parliaments, must play in guaranteeing and protecting human rights at the national level".* Also, the Interlaken Action Plan calls upon member states to commit themselves to take into account "*the Court's developing case law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system*." (Point B. Implementation of the Convention at the national level, §4.c).

It follows that, when the authorities in a State Party to the Convention (the executive, the courts, the legislature) are aware of standards stemming from the ECHR case law in cases concerning not only their own country but also other states, and these standards are applied, this invariably has the potential for limiting the number of applications brought before the European Court of Human Rights based on the latter's well-established case law.

An increasing number of examples exist in the practice of the States Parties of how the interpretative authority (*res interpretata)* of the Strasbourg Court is now taking root.

The ECHR case law - especially that of the Grand Chamber's judgments of principle - creates a body of law which encompasses 'common European standards' by which states, and in particular their judicial authorities, are bound. This European supervision functions without prejudice to the advisability of ensuring higher standards of human rights protection, where possible (Article 53 of the Convention).

B. Extracts from selected Council of Europe texts

1. Report of the Wise Persons to the Committee of Ministers of 15 November 2006

CM(2006)203, paragraphs 66-68

https://wcd.coe.int/ViewDoc.jsp?id=1063779&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75

"B. Concerning the relations between the Court and the States Parties to the Convention

3. Enhancing the authority of the Court's case law in the States Parties

66. The dissemination of the Court's case law and recognition of its authority above and beyond the judgment's binding effect on the parties would no doubt be important elements in ensuring the effectiveness of the Convention's judicial control mechanism.

67. It was with this in mind that, in the interim report, the Group referred to the possibility of making certain recommendations on "judgments of principle".

68. After discussing the matter in greater depth, the Group believes that it would be difficult to arrive at a precise definition of this category of judgments. Furthermore, it is not always possible to identify in advance all the cases that might give rise to judgments of principle.

69. The Group therefore does not make any proposal as to a specific procedure for dealing with such cases. It merely recommends that judgments of principle – like all judgments which the Court considers particularly important – be more widely disseminated.

70. The authority of the Court's case law could also be enhanced through judicial co-operation with national courts. This aspect is dealt with in paragraphs 76 et seq.

71. The Group considers that national judicial and administrative institutions should be able to have access to the case law of the Court in their respective language. This would assist them in identifying any judgments which might be relevant to deciding the cases before them."

2. The authority of the case-law of the ECHR, speech by Mr. Jean-Paul Costa, President of the European Court of Human Rights, 20 September 2007

Regional Conference, The role of Supreme Courts in the domestic implementation of the ECHR, Belgrade, 20 September 2007

Extracts taken from Reforming the European Convention on Human Rights – A work in progress – a compilation of publications and documents relevant to the ongoing reform of the ECHR, prepared by the Steering Committee for Human Rights (CDDH), 2009, pp. 288-292

Translation revised by President's Office.

http://www.echr.coe.int/library/DIGDOC/DG2/ISBN/COE-2009-EN-9789287166043.pdf

Original French version available at: http://www.echr.coe.int/NR/rdonlyres/0157C854-37BA-485C-AB8C-5C12FF78C4DC/0/2007Belgrade2021septembre.pdf

I turn to the authority of the judgments. That authority has the consequence that a state which is found to have violated the Convention must execute the decision of the Court. […] It is quite common for a state to be required to amend its domestic legal system in order to comply with a judgment of the Court and avoid repeating the human-rights violation found by the Court.

However, the authority of the judgments has limits: the Court's judgments are binding only on the parties and not generally binding. Thus, in law at least, only states found to have violated the Convention are bound by the Court's decision.

Sometimes, however, the law of other states is similar to the law which gave rise to the finding against the state concerned.

In the absence of generally binding - *erga omnes* - effect, states not directly concerned by judgments are not obliged to comply with them. One possible consequence of this is that after the court has found against a state and that state has amended its system, there can be among the States Parties to the Convention those whose legislation has been amended on the basis of the Court's case law and those that continue to operate a system that has been found contrary to the Convention.

[…]

I should add that countries increasingly seek to forestall never-welcome Strasbourg violation findings, with the result that, at least de facto, the Court's judgments carry some force even with countries which are not parties to the particular dispute. That authority is reinforced, moreover, by the role which the Committee of Ministers plays in ensuring the execution of judgments. […]

[…]

What about the authority of the case law, which is my second topic and which, to my mind, is further-reaching than the authority of the judgments? It is real and extends beyond the specific case.

I have mentioned the Netherlands in connection with children conceived outside marriage. **Horizontal application** of the Court's judgments is increasing: there is a tendency for states not been found to have violated the Convention to align themselves nevertheless on the Court's case law. The situation has therefore changed for the better and it is really possible to speak of the case law as having authority.

In France, for instance, in matters of respect for private and family life (Article 8 of the Convention), the courts and parliament have taken into account the Court's case law on the law relating to aliens, with the Council of State basing its position on Court case law which protects the rights of aliens forcibly removed from national territory. (In the light of the 1988 *Moustaquim v. Belgium* judgment, the French Council of State amended its case law on the deportation of aliens in 1991.)

This **horizontal application** of the Court's case law means that states have to pay close attention to the case law in order to see how it might apply to them.

However, there is an important time dimension to the Court's case law as well.

The courts of the member states, and here I give all due credit to the Supreme Courts, are now anticipating developments in the Strasbourg case law, even in matters on which the Court has yet to deliver a ruling. Again, the domestic courts, proceeding by analogy, are taking pointers from the Court's general case law in developing their own case law. Examples of this are the broad construction of the notion of possessions, which encompasses enforceable claims and even the legitimate expectation of owning an asset, or recognition that the principle of freedom of expression prevails over the exceptions provided for in paragraph 2 of Article 10, or the understanding of judicial impartiality and procedural fairness.

This close interest in the case law is natural, as the domestic courts have the right and the duty to ensure primacy of the Convention.

In most member states the Convention is daily invoked before the Supreme Courts (and indeed the ordinary ones) and applied by them irrespective of whether there is established Strasbourg case law in the relevant area.

To take an example, in the United Kingdom, where the Convention has been directly applicable only since 2000, with the adoption of the Human Rights Act, the House of Lords anticipates the Court's case law in the context of anti-terrorist measures.

The corollary of the domestic courts' readiness to accommodate the Court's case law is the fact that the Court itself sometimes draws on domestic decisions.

The *Von Maltzan and Others v. Germany* decision, to which I have already referred, concerned compensation for persons whose property had been expropriated either between 1945 and 1949 in the Soviet Occupied Zone in Germany following the agrarian reform or after 1949 in the German Democratic Republic (GDR). In that case the Court clearly and expressly relied on the case law of the Karlsruhe Constitutional Court, which placed emphasis on the wide discretion enjoyed by Parliament for purposes of arriving at comprehensive solutions to consequences of German reunification.

The Court in Strasbourg has no hesitation in following to the letter, where appropriate, the reasoning applied by a national court, […]

[…]

The authority of the case law is therefore an established fact. How can it be reinforced?

That unquestionably depends on the member states and domestic courts being better informed. […]

Every day, in the domestic courts of our member states, the European Convention on Human Rights is invoked by lawyers and cited and applied by the judges. That, in my view, is the most significant advance of these forty five years' case law: law which not long ago was regarded as external has penetrated judicial thinking to such an extent as now to have a key bearing on courts' decisions.

A genuine dialogue between national judge and European judge has come about. That dialogue is indispensable, and the international judges are often former national judges, of course. The national courts have a primary responsibility to interpret and apply a treaty such as the European Convention on Human Rights: it must not be forgotten that the Court in Strasbourg is careful to observe the principle of subsidiarity, which, as Mr Philippe Boillat pointed out, is crucial to the system of human-rights protection.

However, it does ultimately fall to the Court to perform European-level review. That role firstly operates with regard to the domestic courts. Although we must not set ourselves up as a fourth instance rehearing what has already been heard in the domestic courts, we do have a duty to oversee the requirements of fair trial as guaranteed by Article 6 of the Convention. In that context I cannot overstate the need for independence and impartiality of the national courts. Without competent judges, without independent judges, there cannot be any respect for procedural fairness or, ultimately, proper respect for human rights. My distinguished predecessor, Rene Cassin, was fond of saying that Article 6 occupied a central place in the Convention as the absence of fair trial rendered domestic protection of human rights illusory. The Court also has a review function vis-à-vis national legislatures, and that role is essential if we are to maintain and develop a Europe based on human rights. The Convention and the protocols to it as applied and interpreted by the Court should be regarded by states as establishing minimum standards. It is worth pointing out that, in the light of Article 53 of the Convention, there is clearly nothing to prevent member states from exceeding those standards and providing even greater protection for Convention rights. "

3. Memorandum of the President of the Strasbourg Court to states with a view of preparing the Interlaken Conference, 3 July 2009

http://www.echr.coe.int/NR/rdonlyres/80B918C6-6319-4D50-B37B-5F951C1C5B30/2792/03072009_Memo_Interlaken_anglais1.pdf

Pages 6-7: Short and Medium term changes: "In addition, consensus could make it possible to give binding effect to the Court's judgments in respect of their interpretation of the Convention. This would strengthen the States' obligation to prevent Convention violations. It is no longer acceptable that States fail to draw the consequences as early as possible of a judgment finding a violation by another State when the same problem exists in their own legal system. **The binding effect of interpretation by the Court goes beyond *res judicata* in the strict sense.** Such a development would go hand in hand with the possibility for citizens to invoke the Convention directly in domestic law ("direct effect") and the notion of ownership of the Convention by the States. It will constitute a new step in the evolution of Convention law, whose effectiveness and positive consequences for all concerned should not be underestimated."

4. Interlaken Action Plan of 19 February 2010

http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf

"B. Implementation of the Convention at the national level

4. The Conference recalls that it is first and foremost the responsibility of the States Parties to guarantee the application and implementation of the Convention and consequently calls upon the States Parties to commit themselves to:

[…]

b) fully executing the Court's judgments, ensuring that the necessary measures are taken to prevent further similar violations;

c) **taking into account the Court's developing case law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State**, where the same problem of principle exists within their own legal system;"

5. The Convention as a Subsidiary Source of Law, Speech by Michael O'Boyle, Deputy Registrar of the European Court of Human Rights, 1-2 October 2010

Delivered at the conference on subsidiarity, 1-2 October 2010 in Skopje

"Consideration of the concept of subsidiarity leads inevitably into a discussion of the proper role of the European Court of Human Rights under the Convention and into the general philosophy of the Convention system itself. The central question that emerges is a deceptively simple one: How is the Convention system actually meant to operate? Let us stand back and look at this enticing question for a moment.

As my starting point, I refer to a description of how the Convention system operates by the Evaluation Group that was set up in 2001 to report on the Court's growing difficulties. The Group summarized the role of the Convention system in the following way:

*"The **European Court of Human Rights** is the nerve centre of a system of human rights protection which radiates out through the domestic legal orders of virtually all European States. It **sets common legal standards which permeate the legal orders of the Contracting States**, standards which influence and shape domestic law and practice in areas such as criminal law, the administration of justice in criminal, civil and administrative matters, family law, aliens' law, media law, property law. Over the years and **through its case law**, the European Convention on Human Rights has become deeply entrenched in the legal and moral fabric of the societies of the older Council of Europe States and this same process is well under way in newer State Parties. Its crucial role in securing the peaceful development of greater Europe is a model for a system of strong and effective international justice".*

I consider this to be a perceptive description of how the system is designed to work and, to some extent, how it has been working in practice over the last 50 years. The key idea is that the Convention has become a system of legal principles – a **corpus of law in its own right – that signals to the Contracting States, through the judgments of the Court interpreting the principles set out in the Convention, a wide variety of principles to be respected in all fields of law and practice**. It has become entrenched in the legal and moral fabric of our societies and has become a force for peace throughout Europe.

According to this description, the **leading cases** decided by the Court against a limited number of States, for example, in the areas of fair trial and freedom of expression or the right to vote or to form and join a trade union, **evolve into a series of guiding principles to be taken into account by national judges**, legislators and administrators in all of the Contracting Parties. The cases decided by the Court against States X and Y concerning, for example, political expression radiate a message for the entire Convention community of States that restrictions on political speech will be strictly scrutinized by the Court. The same can be said for the duty to carry out an effective investigation into allegations of torture or into killings or disappearances – to give some other well -known and topical examples. **It then falls to the States to absorb and integrate these leading principles into the national legal system**.

Of course there are some notable examples of Contracting Parties acting to amend their law or practice to bring it into line with the Convention following judgments in cases to which they have not been a party. For example the Netherlands amended their law concerning the time limit within which a suspect must be brought before a court in the light of the Brogan case. They also amended their legislation on children born out of wedlock as a consequence of the Marckx judgment. We have also heard this morning about the laudable efforts made by the Croatian Constitutional Court to give full effect to

Strasbourg judgments. There are many other examples. It would be useful in this Interlaken follow-up process to systematically compile other such examples concerning the practice of other states.

According to this descriptive theory of the way the Convention operates - the **judgments of the Court, though only binding on the respondent State, have thus what we can describe as an *erga omnes* effect to some extent at least**. Judge Lazarova Trajkovska has usefully cited some pertinent examples of leading cases that have had this effect."

6. Ways and means to recognise the interpretative authority of judgments against other states, speech by Ms. Mirjana Lazarova Trajkovska, judge of the European Court of Human Rights, 1-2 October 2010

Delivered at the conference on subsidiarity, 1-2 October 2010 in Skopje

"[T]he effect of the interpretative authority (*res interpretata*) cannot be analyzed independently from another dimension of [the] principle [of subsidiarity], which is the *erga omnes* effect of the Court's judgments.

[…]

1. Legal basis of the principle of subsidiarity

The legal basis of the principle of subsidiarity of the Court is articulated in Articles 1, 13 and 35 of the Convention.

In the judgment *Scordino v. Italy* [(Application no. 36813/97, judgment of 26.03.2006)], the Court reiterated that "the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights". The Court should intervene "only where the domestic authorities fail in that task" .

[…]

Setting off from the procedural and substantial subsidiarity we are […] interested in […] strengthening the implementation of the Court's judgments analyzed from the aspect of the primary responsibility of all the States Parties, that should also take due notice of judgments against other states. This requires an analysis of the *erga omnes* effect of the Court's judgments with special emphasis on the effect of *res interpretata*.

2. *Erga omnes* effects of the Court's judgments

The possible *erga omnes* effect of the Court's judgments is a subject of debate between academics, but also between the Judges of the ECHR. I agree that the ***erga omnes* effect of the Court's judgments is not clearly articulated in Article 46 of the Convention**, […] I consider however that we should keep in mind the general responsibility of the States, which is articulated in the Article 1 of the Convention: […]

Although the Court's **judgments do not have '*de jure erga omnes* effect'**, the judicial practice has shown that some of the judgments have had a **strong '*de facto erga omnes* effect'**. A judgment adopted by the Court can have stronger effects than the one initially foreseen. For example the judgments *Kudla v. Poland*, *Scordino v. Italy*, *Zoltuhin v. Russia* have enhanced reform processes in many European countries.

With the **Interlaken Declaration the States Parties committed themselves to taking into account the Court's developing case law**, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system. **This practically means that with the Declaration the *erga omnes* effect of the Court's judgments has been by and large accepted by the States Parties to the Convention**. Therefore this effect should be analyzed in correlation to the *res interpretata* effect of the judgments against other States.

3. Ways and means to recognise the interpretative authority of judgments against other states

[…] The Court's judgments are not only aimed at providing for judicial disposal of an application pending before the Court, but also at contributing to the spreading out of some largely accepted standards and principle so that those become an integral part of the law theory of the States Parties to the Convention.

The **judiciary of the States Parties to the Convention should take into account the Court's developing case law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of**

principle exists within their own legal system, which practically means that they should take due notice of all the Grand Chamber judgments.

The practice of the *res interpretata* effect of the Court's judgments involves their dissemination in the national languages of the States Parties. The members of the relevant professional groups do not always have sufficient knowledge of the Court's official languages and States should therefore ensure that both the judgments handed down against one State and the most important judgments related to changes in the Strasbourg Court's case law are translated into the national languages. […]

Concluding observations […]

The States Parties should draw conclusions from a judgment finding a violation of the Convention by another State, and take as soon as possible ¨remedial action in respect of cases which could give rise to similar issues.' If *res interpretat*a was properly implemented in the past years, for example after the adoption of judgments in the cases *Botazzi v. Italy* or *Lukenda v. Slovenia*, the Court would not have received thousands of applications concerning the violation of the reasonable time requirement".

7. Strengthening Subsidiarity: Integrating the Court's case law into national law and judicial practice, speech by Mr. Peer Lorenzen, Chamber President, of the European Court of Human Rights, 1-2 October 2010

Delivered at the conference on subsidiarity, 1-2 October 2010 in Skopje

"An important issue is how the Court's case law is applied at the domestic level. Under Article 46 of the Convention Member States are only formally bound to abide by final judgments in cases where they are parties. But **national legislatures - and where possible national courts – should take action to remedy shortcomings in their legal system which will be in breach of the Convention even if it only follows from a judgment against another State**. And it would be a positive development if **national authorities** based on the **Court's case law sometimes try to foresee possible future violations even in situations where the Court has not yet had the opportunity to rule**. There are examples of such progressive case law by national courts. When applying the Convention national authorities should not always limit themselves to the minimum. This is in fact what Article 53 of the Convention encourages them not to do."

"It is very important that national authorities are currently kept informed about Convention standards and developments in the Court's case law. One cannot expect courts and other organs vested with judicial power to apply the Convention correctly, if the Strasbourg case law is not accessible. […] for many countries it is therefore indispensable that the Government undertake to provide translations into the national language of at least the most important judgments. As **Convention law is part of the law in the member States, which judges are obliged to know**, they should have easy access to it and not just rely on what is presented to them during pleadings."

8. Interlaken follow-up, principle of subsidiarity. Note by the Jurisconsul, European Court of Human Rights, 8 July 2010

Impact of the Court's judgments

"It is in the first place for parliaments and national governments to make such amendments as may be needed to the laws and regulations in force in order to prevent a recurrence of similar breaches of the Convention. Sometimes – and highly commendably – the legislature takes pre-emptive action to prevent a ruling against the country in question in Strasbourg when the Court has found a violation against another Contracting State. This is what could be termed the **"*de facto erga omnes* effect"** of the Court's judgments. In addition, the Interlaken Conference expressly invited States to "tak[e] into account the Court's developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system" (point 4 c) of the Action Plan)".

9. Additional background reading/documents

See also:

Alleweldt, Ralf/ Emmert , Frank/ Hammer, Leonard and Marcus, Isabel (eds.): The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe, Eleven International Publishing, Utrecht, 2010 (forthcoming)

European Court of Human Rights (2010): Principle of Subsidiarity, Interlaken Follow-Up, Doc. 3188076 of 8 July 2010

European Court of Human Rights (2010): Clarity and Consistency of the Courts Case Law, Interlaken Follow-Up, Doc. 3197955 of 8 July 2010

Fura-Sandstrom,Elisabet (2008): Amplifying the effect of the Court's case law in the States Parties, keynote speech at Stockholm Colloquy 9-10 June 2008, in: Reforming the European Convention on Human Rights – A work in progress – a compilation of publications and documents relevant to the ongoing reform of the ECHR, prepared by the Steering Committee for Human Rights (CDDH), 2009, pp. 511-514, available at: http://www.echr.coe.int/library/DIGDOC/DG2/ISBN/COE-2009-EN-9789287166043.pdf

Malinverni, Giorgio (2008): Ways and means of strengthening the implementation of the European Convention on Human Rights at national level, keynote speech at Stockholm Colloquy 9-10 June 2008, in: Reforming the European Convention on Human Rights – A work in progress – a compilation of publications and documents relevant to the ongoing reform of the ECHR, prepared by the Steering Committee for Human Rights (CDDH), 2009, pp. 511-514, available at: http://www.echr.coe.int/library/DIGDOC/DG2/ISBN/COE-2009-EN-9789287166043.pdf

Polakiewicz, Jörg (2009): International Law and Domestic (Municipal) Law, Law and Decisions of International Organizations and Courts, in: Max Planck Encyclopaedia of Public International Law, (www.mpepil.com)

Keller, Helen / Stone Sweet, Alec: A Europe of rights - the impact of the ECHR on national legal systems, Oxford University Press, 2008

C. Extracts from Parliamentary Assembly texts

1. The future of the Strasbourg Court and enforcement of ECHR standards: reflections on the Interlaken process. Conclusions of the Chairperson of the Committee of Legal Affairs and Human Rights (AS/Jur), Mrs. Herta Däubler-Gmelin, of the hearing held in Paris on 16 December 2009

AS/Jur (2010) 06, of 21 January 2010, declassified by the AS/Jur Committee on 26 January 2010

http://assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12221.pdf

"IV. The authority and effectiveness of the ECHR at the national level: stemming the flood of applications

12. These two subjects were dealt together at the hearing; both touch upon issues in relation to which we parliamentarians – in our dual capacity as national legislators and members of the Assembly – have a crucial role to play. They also concern the "principle of subsidiarity", in that states have primary responsibility to prevent human rights violations and to remedy them when they occur.

13. National parliaments can and should ensure the compatibility of draft laws, existing legislation and administrative practice with Convention standards, and in particular possess "specific mechanisms and procedures for effective parliamentary oversight of the implementation of the Court's judgments on the basis of regular reports by the responsible ministries" (Assembly Resolution 1516 (2006), paragraph 22.1). For present purposes suffice to recall work we have been undertaking on this subject since 2000, the hearing we had in November 2009 on "parliamentary scrutiny of ECHR standards" (highlighting the effectiveness of parliamentary procedures in the United Kingdom and in the Netherlands), and the fact that too few parliaments have, to date, set up appropriate oversight mechanisms to ensure the rapid and effective implementation of Strasbourg Court judgments.

14. The Strasbourg supervisory mechanism is "subsidiary" in nature. States are responsible for the effective implementation of the Convention and it is the shared duty of all state organs (the executive, the courts and the legislature) to prevent or remedy human rights violations at the national level. This is principally, but not exclusively, the responsibility of the judiciary. […]

15. One subject of particular significance, discussed at the hearing, was the need to enhance the authority and direct application of the Strasbourg Court's findings in domestic law. Rather than refer to the *erga omnes* effect of Grand Chamber judgments of principle, it is probably more accurate to refer to its interpretative authority (*res interpretata*) within the legal orders of states other than the respondent state in a given case. Here, I have in mind the United Kingdom's 1998 Human Rights Act, Section 2 § 1 of which specifies that national courts "must take into account" Strasbourg Court judgments, and Article 17 of Ukrainian Law No.3477–IV of 2006, which reads: "Courts shall apply the Convention [ECHR] and the case law of the [Strasbourg] Court as a source of law". This subject merits special attention in Interlaken."

2. Report: Effective implementation of the European Convention on Human Rights: the Interlaken process, 2010

Assembly Doc. 12221, of 27 April 2010

http://assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc10/EDOC12221.htm

"B. Explanatory memorandum by Mrs Bemelmans-Videc, rapporteur

[…]

11. With respect to the texts adopted at Interlaken, I wish to draw the Committee's – and the Assembly's – attention to the following matters:

• I find it inappropriate for the Action Plan to refer, in its paragraph 9.b, to the Court's role as being subsidiary in the "interpretation" of the ECHR. This is simply legally wrong: see Article 19 of the Convention, which states that the Court was established to "ensure" the observance of the engagements undertaken by the High Contracting Parties. I do not find satisfactory the (purported) justification to have kept this word in the text by assuming that it refers only to issues of admissibility. Indeed, I consider the tenor of paragraph 9 somewhat dirigiste with respect to an independent judicial body, even though the veiled criticism directed at the Court is somewhat camouflaged by reference to shared responsibility "between the States Parties and the Court".

[…]

21. Here, I fully endorse the views of Mr Christos Pourgourides, the Chairperson and rapporteur of the Legal Affairs Committee on the implementation of judgments of the Court, who – in all his country visits – systematically stresses the (urgent) need to reinforce parliamentary involvement in [the implementation of the Courts judgments]. He has even gone so far as to suggest that "the Assembly may – in the future – seriously need to consider suspending the voting rights of a national delegation where its national parliament does not seriously exercise parliamentary control over the executive in cases of non-implementation of Strasbourg Court judgments". This thinking is in line with the strong position our Committee appears to be taking on this subject as I had the opportunity to explain at a colloquy organised in Stockholm, in June 2008, entitled "Towards stronger implementation of the ECHR at national level".

[…]

25. Paragraph 4.c of the Action Plan touches upon, what I believe, is a subject that merits specific attention, namely the need to ensure, in a clear fashion, the interpretative authority (*res interpretata*) of the Court's Grand Chamber judgments of principle within the legal orders of states other than the respondent state in a given case. Here, I refer, in particular, to what the Court's President, Jean-Paul Costa, has written: "[I]t is no longer acceptable that States fail to draw the consequences as early as possible of a judgment finding a violation by another State when the same problem exists in their own legal system". "Subsidiarity" requires that the authority of the Court's case law be reinforced in national law, as was also highlighted by experts in the hearing our Committee had on the "Interlaken process" in December 2009 (see Mrs Däubler- Gmelin's "Reflections" in Appendix II, paragraph 15), as well as by the Secretary General in his Interlaken contribution. This merits perhaps being one of the key subjects of discussion at a conference "the former Yugoslav Republic of Macedonia" (the in-coming Chairmanship of the Committee of Ministers) is to organise on [1-2 October] 2010, entitled "Strengthening subsidiarity – integrating the Strasbourg Court's case law in national law and practice."

D. Pertinent extracts from Strasbourg Court judgments

Judgments can be retrieved from:
http://www.echr.coe.int/ECHR/EN/Header/Case law/Hudoc/Hudoc+database/

1. *Ireland v. United Kingdom* (1978)

Judgment of 18 January 1978, Application. No. 5310/71, Series A No. 25

Paragraph 154: "Nevertheless, the Court considers that the responsibilities assigned to it within the framework of the system under the Convention extend to pronouncing on the non-contested allegations of violation of Article 3. The Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (Article 19)

The conclusion thus arrived at by the Court is, moreover, confirmed by paragraph 3 of Rule 47 of the Rules of Court. If the Court may proceed with the consideration of a case and give a ruling thereon even

in the event of a "notice of discontinuance, friendly settlement, arrangement" or "other fact of a kind to provide a solution of the matter", it is entitled a fortiori to adopt such a course of action when the conditions for the application of this Rule are not present."

2. *Ahmet Sadik v. Greece* (1996), Partly Dissenting Opinion of Judge Sirbrand K. Martens, joined by Judge Isi Foighel

Annexed to judgment of 25 October 1996

Paragraph 11: "It follows that under the Convention the same rule applies as has been accepted by the Court of Justice of the European Communities with respect to Community law: in those cases where domestic courts, under their national law, are in a position to apply the Convention ex officio, those courts must do so under the Convention. That is an obvious demand of the effectiveness both of the Convention as a constitutional instrument of European public order (ordre public) and of the "national human right systems"."

Paragraph 12: "[...] I do suggest [...] is that in a case where an applicant has taken his case to the appropriate domestic courts and where, under domestic law, those courts were - either under their national law or, as indicated in paragraph 11 above, under the Convention - bound to apply the Convention even when the applicant failed to invoke it, in the Strasbourg proceedings the respondent State should not be permitted to rely on the non-exhaustion of domestic remedies rule. Admittedly, in such cases the applicant's lawyer was in default, but so were the domestic courts and under a true *pro victima* interpretation of Article 26 (art. 26) the latter default should prevail: I do not see why the principle of *nemo auditur propriam turpitudinem allegans* should not apply to States."

Paragraph 14: "There is one more remark to be made on the onus in the present context. In my opinion the distribution of proof is such that it is for the applicant to satisfy the Court that, in principle, the domestic courts were in a position to apply the Convention *ex officio*, whilst -once this burden of proof has been discharged - it is incumbent on the Government which nevertheless maintain their objection to establish that, due to the special circumstances obtaining in the concrete case, the domestic courts were not in a position to base their judgment on such *ex officio* application of the Convention."

3. *Pretty v. United Kingdom* (2002)

Judgment of 29 April 2002, Application. No. 2346/02

Paragraph 75: "The applicant's counsel attempted to persuade the Court that a finding of a violation in this case would not create a general precedent or any risk to others. It is true that it is not this Court's role under Article 34 of the Convention to issue opinions in the abstract but to apply the Convention to the concrete facts of the individual case. However, judgments issued in individual cases establish precedents albeit to a greater or lesser extent and a decision in this case could not, either in theory or practice, be framed in such a way as to prevent application in later cases."

4. *Opuz v. Turkey* (2009)

Judgment 9 June 2009, Application No. 33401/0

163. "In carrying out this scrutiny, and bearing in mind that the Court provides final authoritative interpretation of the rights and freedoms defined in Section I of the Convention, the Court will consider whether the national authorities have" sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concern other States.

5. *Rantsev v. Cyprus and Russia* (2010)

Judgment of 7 January 2010, Application. No. 25965/04

Paragraph 197: "Finally, the Court reiterates that its judgments serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (see *Ireland v. the United Kingdom*, 18 January 1978, § 154, Series A no. 25; *Guzzardi v. Italy*, 6 November 1980, § 86, Series A no. 39; and *Karner v. Austria*, no. 40016/98, § 26, ECHR 2003-IX). Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (see Karner, cited above, § 26; and *Capital Bank AD v. Bulgaria*, no. 49429/99, §§ 78 to 79, ECHR 2005-XII (extracts))."

E. Selection of examples/extracts from constitutional/legislative provisions and from decisions of national courts (and comments thereon)

1. Austria

Domestic Remedies: The Austrian Experience, Speech by Ms. Ingrid Siess-Scherz, Head of the Legal, Legislative and Research Service of the Austrian Parliament, former Vice-Chair of the Steering Committee for Human Rights (CDDH)

Extracts taken from Reforming the European Convention on Human Rights – A work in progress – a compilation of publications and documents relevant to the ongoing reform of the ECHR, prepared by the Steering Committee for Human Rights (CDDH), 2009, pp. 496-502

http://www.echr.coe.int/library/DIGDOC/DG2/ISBN/COE-2009-EN-9789287166043.pdf

"A real story of success was the establishment of the so-called independent administrative tribunals in 1988. These tribunals were introduced because of judgments by the Court against other member states. The case of *Benthem v. the Netherlands*, which stated that certain administrative, public, measures had to be regarded as "civil rights" within the meaning of Article 6 of the Convention, prompted Austria to start the process of completely changing the structure of our system of domestic remedies, including the structure of public authorities, in this field. […] The process of introducing the necessary amendments in our constitution started in 1985, and in 1988, these provisions were already adopted by parliament. After three further years of preparation, these tribunals started to operate on 1 January 1991. I would assume that only three years of discussions, deliberations and negotiations with all relevant stakeholders, including all nine Lander are a very short time for such a far reaching change in the constitutional structure of a member state. "

2. Belgium

Cour de cassation de Belgique,* arrêt P.09.0547.F *(2009)

Cour de cassation de Belgique, arrêt, P.09.0547.F, 10 juin 2009

"En raison de l'autorité de la chose interprétée qui s'attache actuellement à cet arrêt et de la primauté, sur le droit interne, de la règle de droit international issue d'un traité ratifié par la Belgique, la Cour est contrainte de rejeter l'application des articles 342 et 348 du Code d'instruction criminelle en tant qu'ils consacrent la règle, aujourd'hui condamnée par la Cour européenne, suivant laquelle la déclaration du jury n'est pas motivée. "

3. Croatia

Ways and means to recognise the interpretative authority of judgments against other states – the experience of the constitutional court of Croatia, Report by Ms. Jasna Omejec, President of the Constitutional Court of the Republic of Croatia, 1-2 October 2010

See also speech delivered at the conference on subsidiarity, 1-2 October 2010 in Skopje

"7. The **Constitutional Court of the Republic of Croatia** (hereinafter referred as to "the CCRC") […] **accepted the binding interpretative authority of all the judgments and decisions of the European Court, irrespectively of the states in relation to which the judgments and decisions were passed**, for two reasons. The first reason lies in the approach of the Republic of Croatia to international treaties. The second reason lies in the approach of the CCRC to the Convention. […]

10. Formally, the Convention has a sub-constitutional status in Croatia: it is above law in terms of legal effect, but under the Constitution.

11. In fact, however, the Convention has a quasi-constitutional status in Croatia, which the CCRC instituted in the Croatian legal order in its case law. […]

13. Starting from the conception of legal monism, the effectively quasi-constitutional status of the Convention in the Croatian legal order and the constitutional demand for the direct application of the Constitution, the CCRC has so far referred to the European Court and its case law in more than 750 decisions and rulings. **Among the decisions and judgments of the European Court to which the CCRC has referred in its decisions and rulings there are incomparably more those that the European Court passed in relation to other contracting states to the Convention than those that it passed in relation to Croatia**.

14. This is primarily the result of a specific approach to the Convention and a particular understanding of the obligations for the Republic of Croatia that emerge from it. This approach cumulatively covers the following standpoints:

A. Most important for the obligations of the CCRC under the Convention is Article 1.

B. The Convention must be approached as an international human rights treaty.

C. The European Court's judgments transcend the boundaries of a particular case.

D. The European Court's judgments start from the "democratic society" as a framework for advancing Convention rights.

E. National constitutional courts and the European Court perform similar tasks on different levels. […]

18. [Croatia can only be an “owner” of the convention through] establishing effective remedies, execute[ing] the Court's judgments and recognising their interpretative authority. […]

20. […] the CCRC accepts the long-established rule that the judgments of the European Court transcend the boundaries of the particular cases brought before it […]

25. […] the CCRC explicitly accepts the Convention as the "constitutional instrument of European public order", and the European Court as the creator of "European constitutional standards". […]

26. If the Convention is perceived in this way, it is **by the nature of things not possible to talk about complying with the Convention, i.e. about applying the case law of the European Court, if the contracting state limits itself only to the judgments that the Court passes in relation to itself. European constitutional standards emerge from the totality of the case-law of that court.** […]

30. In conclusion, the case-law of the European Court may be qualified as the "European Constitutional Court's case law" only if it is perceived in its totality, independently of the contracting states in relation to which it was created. By the nature of things it does not permit a partial approach, i.e. being limited only to the part that concerns one contracting state. […]

31. In its case law to date the CCRC has adopted several ways of integrating in its decisions the legal opinions of the European Court expressed in judgments against other states. It applies them in the abstract control of the constitutionality of laws, in individual constitutional complaints and in other proceedings that the CCRC implements within its jurisdiction. […]

32. Most often the CCRC integrates European Court case law against other states into its decisions in the following ways:

a) describing the principle adopted by the European Court in its approach to a specific Convention rule or institute (e.g. taxation) and referring to the relevant case law – […];

b) directly citing in their entirety the legal opinions of the European Court from a particular judgment or decision – […];

c) describing in detail the whole case before the European Court and directly citing the relevant legal opinions of the European Court in the respective judgment or decision – […];

d) showing the development of a particular legal institute in the case law of the European Court as the European Court itself showed it (for example, the development of "legitimate expectations" in the light of Article 1 of Protocol No. 1 to the Convention) – […];

e) showing a legal opinion of the European Court with a listing of several cases from its case law in which it applied that opinion – […]

f) showing the legal opinions of the European Court in connection with the positive obligations of the contracting states – […];

g) expressing a legal opinion of the CCRC and at the same time referring to a relevant judgment or decision of the European Court expressing an identical opinion – […];

h) interpreting the structure of the relevant provisions of the Constitution of the Republic of Croatia in keeping with the interpretation of the structure of comparable Convention provisions given by the European Court – […]

33. When the CCRC integrates the European Court's case law in its decisions in the various ways shown above, this case law is shown in Croatian. However, in many of its decisions the CCRC also used the following techniques:

i) besides the European Court's legal opinion given in Croatian, the original text of the opinion is also given in parentheses in English – […]

j) besides the European Court's legal opinion given in Croatian, the key concept or some sentences or its most important part is given in parentheses in English –[…],

k) besides the European Court's legal standpoint given in Croatian, the key concept is given in parentheses in English and in French – […].

34. The Constitutional Court Records and Documents Department includes:

a) a liaison officer engaged on work connected with membership of the Republic of Croatia in the Venice Commission of the Council of Europe,[6] including work connected with the "Venice Forum";

b) a senior legal adviser who:

- monitors the case law of the European Court on a daily basis,
- selects important judgments that could have implications for Croatia,
- makes written summaries of them in Croatian and saves them in the CCRC electronic database which is accessible to all the judges and legal advisers at all times,
- every week advises the judges about new judgments at the regular meeting of judges.

35. The CCRC contracts authorised translators to translate entire judgments of the European Court into Croatian.

36. […] the CCRC considers that the European Court's judgments transcend the boundaries of an individual case. They create "European constitutional standards" that underlie the "European public order". The "constitutional instrument" of this order is the Convention and its fundamental characteristic is the "democratic society" which serves as a framework for advancing Convention rules. This approach to the Convention makes it impossible for the CCRC to limit itself only to compliance with the judgments that the European Court passes in relation to Croatia. Only the European Court's total jurisprudence, irrespective of the state to which a specific judgment or decision of the European Court refers, enables the contracting states to fulfil their obligations. […]

38. The way in which the CCRC integrates the European Court's judgments and decisions into its own case law has for now shown itself efficient enough to satisfy the demand of the Council of Europe for compliance with the binding interpretative authority of the judgments of the European Court in which it has found a violation of the Convention committed by another state.

39. As for the responsibilities of the parliaments and governments of the contracting states in accomplishing the same demand, I consider it opportune – for want of experience and practice in the Republic of Croatia – to show here the recommendations made by the Human Rights Joint Committee of the House of Commons and House of Lords of the UK Parliament in the report already mentioned, "Enhancing Parliament's role in relation to human rights judgments". They may serve as a guiding principle for the parliaments, governments and courts of all the contracting states, including the Republic of Croatia.

a. U-I/988/1998 and others, 17 March 2010 – abstract control of constitutionality of the Pension Insurance Act

(Official Gazette Nos. 102/98, 127/00, 59/01, 109/01, 147/02, 117/03, 30/04, 177/04, 92/05, 43/07-decision of the Constitutional Court, 79/07 and 35/08)

"14.5. In this light we must answer the following question: ... is there a general minimum of pension benefits which, if exceeded, would entail a violation of human rights enshrined in the Constitution? The Constitutional Court did not address this issue in its previous case law. On the other hand, the European Court has a developed case law on this subject."

b. U-III-1897/2008, 20 May 2008 – constitutional complaint (extension of detention after the court of first instance had passed judgment)

"5.4. With reference to the second part of Article 102 paragraph 1 indent 3 of the Criminal Procedure Act, under which if detention is ordered for reasonable suspicion that a person has committed an offence "special circumstances" justifying such suspicion must be shown, it is necessary to recall the judgments of the European Court of Human Rights in the application of Article 5 paragraph 1c of the European Convention on Human Rights."

[6] The Venice Commission, together with constitutional courts and courts of equivalent jurisdiction, has established a network of liaison officers with the prime goal of producing the *Bulletin on Constitutional Case law* and the database CODICES. *See* Overview of Co-operation with Constitutional Courts. Functions of liaison officers, Venice Commission, CDL-JU(2005)011, Strasbourg, 6 June 2005.

4. Czech Republic

Act no. 82/1998 as amended by Act no. 160/2006

Act no. 82/1998 on liability of the State for damage caused by wrongful decisions or acts of public authorities was amended in 2006 by Act no. 160/2006, which introduced the right to just satisfaction for non-pecuniary damage. The legislative amendment was enacted with a delay of two years as a reflex to *Scordino v. Italy* (no. 1) (Application no. 36813/97, judgment of 29 July 2004). The effectiveness of this Act (that it provides an effective remedy within the meaning of Art. 13 ECHR in the length of proceedings cases) was confirmed by a decision of the ECHR in the case of *Vokurka v. Czech Republic* on 16 October 2007 (Application no. 40552/02).

5. Cyprus

a. Electoral Law Amendment of 2006

Council of Europe document DH-PR (2006)004 rev.

In the light of the judgment of the ECHR in the case of *Hirst v. The United Kingdom*, the Electoral Law of Cyprus was amended following legal advice from the Human Rights Sector on behalf of the Attorney-General, so as to give the right to prisoners to vote in elections (parliamentary, presidential and local elections). The Law was enacted before the Parliamentary elections held in May 2006 and prisoners were able to, at an early stage, the possible negative effects of this judgment (in which Cyprus was not party) on Cyprus domestic legal order.

Relevant passage from *Hirst v.UK* (Judgment of 6 October 2005, Application vote under the amended law. This is of course very important since the Human Rights Sector in Cyprus identified No. 74025/01) that pushed for the legislative change:

"33. According to the Government's survey based on information obtained from its diplomatic representation, eighteen countries allowed prisoners to vote without restriction (Albania, Azerbaijan, Croatia, the Czech Republic, Denmark, Finland, the Former Yugoslav Republic of Macedonia, Germany, Iceland, Lithuania, Moldova, Montenegro, the Netherlands, Portugal, Slovenia, Sweden, Switzerland, Ukraine), in thirteen states all prisoners were barred from or unable to vote (Armenia, Belgium, Bulgaria, Cyprus, Estonia, Georgia, Hungary, Ireland, Russia, Serbia, Slovakia, Turkey, the United Kingdom), while in 12 states the right to vote of prisoners could be limited in some other way (Austria, Bosnia and Herzegovina, France, Greece, Italy, Luxembourg, Malta, Norway, Poland, Romania, Spain.

34. Other material before the Court indicates that in Romania prisoners may be debarred from voting if the principal sentence exceeds two years, while in Latvia prisoners serving a sentence of imprisonment in penitentiaries are not entitled to vote, as are prisoners in Liechtenstein."

b. Yiallourou v. Evgenios Nicolaou (2001)

Judgment of 8 May 2001, Civil Action No. 9931

http://infoportal.fra.europa.eu/InfoPortal/caselawFrontEndAccess.do?id=177

In the case of *Yiallourou v. Evgenios Nicolaou*, which concerned a civil claim for damages brought by an individual against another individual, for violation of his right to private life contrary to Articles 15(1) and 17 of the Constitution, the Supreme Court established a court remedy for human rights violations. The Supreme Court held that claims for human rights violations were actionable rights that can be pursued in civil courts, by instituting civil proceedings for recovering damages and for other appropriate relief for the violation either against the State or private individuals. Civil proceedings can result in a judgment regarding the alleged violation and in adequate redress. Such a judgment is based on Article 35 of the Constitution, which is analogous to Article 1 of the ECHR. It places a duty on the legislative, executive and judicial authorities in Cyprus, to secure within the limits of their respective competence, the efficient application of the constitutional provisions safeguarding fundamental rights and liberties.

The Supreme Court held that the effect of Article 35 is to render the protection and effective application of fundamental rights and liberties, a primary obligation of the State in all its functions, and that the ascertainment of violation of rights and the grant of a remedy, falls within the ambit of the functions of the judiciary, without any need to resort to any statutory provisions. In determining the matter, the Supreme Court took into account the case law of the ECHR, and applied ECHR criteria concerning the interpretation of Article 13 of the ECHR. It added that district courts also have a duty under Article 13 of the ECHR, which forms part of the domestic law, to provide an effective remedy for violation of human rights provisions corresponding to those of the ECHR. As a result of the judgment, district courts can apply Article 35 of the Constitution in civil proceedings, to secure the effective application of fundamental rights and liberties safeguarded by the Constitution and the ECHR. The practical effect of this ruling is

that claims of violation of human rights can be pursued in civil courts in the absence of additional legislation creating specific private law causes of action for the particular violation.

c. Additional information

See also:

Paraskeva, Costas: The Relationship Between Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights: With a Case Study on Cyprus and Turkey, Intersentia, 2010, at. pp. 113-159.

6. France

a. Act of 4 March 2002 on family names

Following *Burghartz v. Switzerland* (2004), France passed a law of 4 March 2002 on the change of names and surnames. (see also: Keller, Helen / Stone Sweet, Alec (2008): A Europe of rights - the impact of the ECHR on national legal systems, Oxford University Press, at p. 126.)

b. Decree No. 87-634

Decree No. 87-634 of 4 August 1987

Following *Luedicke, Belkacem and Koc v. Germany* (1987), France made changes in the law regulating costs of translation in the criminal trial.

c. Additional information

See also:

The authority of the case-law of the ECHR, speech by Mr. Jean-Paul Costa, President of the ECHR, 20 September 2007 (above)

Lambert, Elisabeth/ Jonathan, Gérard Cohen/ Flauss, Jean-François (1999) : Les effets des arrêts de la Cour européenne des droits de l'homme, Bruxelles, Bruylant, as of p. 340

The Website of the Court de Cassation offers an overview of the most important judgments of the ECHR every two month. See for example:
http://www.courdecassation.fr/publications_cour_26/publications_observatoire_droit_europeen_2185/

7. Germany

a. Görgülü judgment (2004)

BVerfG, 2 BvR 1481/04 of 14 October 2004

http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html

"Head Notes

1. The principle that the judge is bound by statute and law (Article 20.3 of the Basic Law (Grundgesetz – GG)) includes taking into account the guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the decisions of the European Court of Human Rights (ECHR) as part of a methodologically justifiable interpretation of the law. **Both a failure to consider a decision of the ECHR and the "enforcement" of such a decision in a schematic way, in violation of prior-ranking law, may violate fundamental rights in conjunction with the principle of the rule of law."**

2. In taking into account decisions of the ECHR, the state bodies must include the effects on the national legal system in their application of the law. […]

paragraph 35: "[T]he Basic Law aims to integrate Germany into the legal community of peaceful and free states, but does not waive the sovereignty contained in the last instance in the German constitution. There is therefore no contradiction with the aim of commitment to international law if the legislature, exceptionally, does not comply with the law of international agreements, provided this is the only way in which a violation of fundamental principles of the constitution can be averted."

paragraph 46: "The obligation of the States parties, integrated into federal law by the consent Act, to create a domestic instance at which the person affected can have an "effective remedy" against particular conduct by the state (Article 13 of the Convention) already extends into the domestic structure of the state system and is not restricted to the executive branch, which is competent to act externally. In addition, the States parties must guarantee the "effective implementation of any of the provisions" of the European Convention on Human Rights in their domestic law (see Article 52 of the Convention), which is possible in a state under the rule of law governed by the principle of the separation of powers only if

all the organisations responsible for sovereign power are bound by the guarantees of the Convention (on this, see Order of the Second Senate of the Federal Constitutional Court (preliminary examination committee) of 11 October 1985 – 2 BvR 336/85 – Pakelli, Europäische Grundrechte-Zeitschrift 1985, p. 654 (656)). **In this view, the German courts too are under a duty to take the decisions of the ECHR into account**."

Paragraph 63: "Against this background, it must at all events be possible, on the basis of the relevant fundamental right, to raise the objection in proceedings before the Federal Constitutional Court that state bodies disregarded or failed to take into account a decision of the ECHR. In this process, the fundamental right is closely connected to the priority of statute embodied in the principle of the rule of law, under which all state bodies are bound by statute and law within their competence (see BVerfGE 6, 32 (41))."

b. Vienna Convention on Consular Relations judgment (2006)

BVerfG, 2 BvR 2115/01 of 19 September 2006

http://www.bverfg.de/entscheidungen/rk20060919_2bvr211501.html

Paragraph 43: "Das Bundesverfassungsgericht hat sich mehrfach mit dem Grundsatz der **Völkerrechtsfreundlichkeit** des Grundgesetzes befasst und daraus die **Pflicht der Fachgerichte zur Berücksichtigung der Entscheidungen eines völkervertraglich ins Leben gerufenen internationalen Gerichts abgeleitet** (vgl. BVerfGE 74, 358 <370>; 111, 307 <315 ff.> zur Berücksichtigung der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte). Es hat festgestellt, dass diese **verfassungsunmittelbare Berücksichtigungspflicht**, die auch bei der Anwendung der Grundrechte zum Tragen kommt (BVerfGE 111, 307 <329>), nicht für jede Bestimmung des Völkerrechts anzunehmen ist, sondern nur, soweit dies von dem in den Art.23 bis 26 GG sowie in den Art. 1 Abs. 2, Art.16 Abs. 2 Satz 2 GG niedergelegten Konzept des Grundgesetzes verlangt wird (BVerfGE 112, 1 <25>). Sind diese Bereiche betroffen, muss es nach der Rechtsprechung des Bundesverfassungsgerichts jedenfalls möglich sein, gestützt auf das einschlägige Grundrecht, in einem Verfahren vor dem Bundesverfassungsgericht zu rügen, staatliche Organe hätten eine Entscheidung des zuständigen internationalen Gerichts missachtet oder nicht berücksichtigt (BVerfGE 111, 307 <329 f.>)."

Paragraph 54: "d) Das Grundgesetz legt die deutsche öffentliche Gewalt programmatisch auf die internationale Zusammenarbeit (Art. 24 GG) und die europäische Integration (Art. 23 GG) fest und bindet sie darüber hinaus an das Völkervertrags- (Art. 20 Abs. 3 GG in Verbindung mit Art. 59 Abs. 2 Satz 1 GG) und Völkergewohnheitsrecht (Art. 20 Abs. 3 GG in Verbindung mit Art. 25 GG). Es ist Ausdruck der Völkerrechtsfreundlichkeit des Grundgesetzes, dass dieses nach Möglichkeit so auszulegen ist, dass ein Konflikt mit völkerrechtlichen Verpflichtungen der Bundesrepublik Deutschland nicht entsteht. Hieraus ergibt sich eine verfassungsunmittelbare Pflicht der deutschen Gerichte, einschlägige Judikate der für Deutschland zuständigen internationalen Gerichte zur Kenntnis zu nehmen und sich mit ihnen auseinanderzusetzen."

Paragraph 55: "aa) Ungeachtet des Umstands, dass die Gewährleistungen der Menschenrechtskonvention in ihrer Auslegung durch den Europäischen Gerichtshof für Menschenrechte kein unmittelbarer verfassungsrechtlicher Prüfungsmaßstab sind (BVerfGE 74, 102 <128>; 111, 307 <317>), hat das Bundesverwaltungsgericht zutreffend festgestellt, dass die deutschen Gerichte eine Pflicht zur vorrangigen Beachtung gefestigter Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte zur Menschenrechtskonvention treffe (BVerwGE 110, 203 <210>). Der Auslegung der Konvention durch den Gerichtshof kann über den entschiedenen Einzelfall hinaus eine normative Leitfunktion beigemessen werden, an der sich die Vertragsparteien zu orientieren haben. Diesem Ansatz hat sich der Bundesgerichtshof angeschlossen (vgl. BGHSt 45, 321 <328 ff.>; 47, 44 <47 ff.>)."

Paragraph 56: "Internationale Gerichtshöfe im Sinne von Art. 16 Abs. 2 Satz 2 GG können Urteile mit unmittelbarer Wirkung für Einzelne erlassen. Ihre Rechtsprechung ist von deutschen Gerichten zu beachten, die das internationale Strafrecht der Bundesrepublik Deutschland anzuwenden haben (vgl. Beschluss der 4. Kammer des Zweiten Senats des Bundesverfassungsgerichts vom 12. Dezember 2000 - 2 BvR 1290/99 -, NJW 2001, S. 1848 <1849>). Für den Bereich der internationalen Strafgerichtsbarkeit bildet Art. 16 Abs. 2 Satz 2 GG damit die Grundlage der verfassungsrechtlichen Pflicht zur Berücksichtigung der Entscheidungen der zuständigen internationalen Gerichte und Tribunale auch bei der Auslegung der Grundrechte (vgl. BVerfGE 112, 1 <25>)."

Paragraph 61: "**Für Staaten, die nicht an einem Verfahren beteiligt sind, haben die Urteile des Internationalen Gerichtshofs Orientierungswirkung, da die darin vertretene Auslegung Autorität bei der Auslegung der Konvention entfaltet**. Die besondere Bedeutung der Entscheidungen ergibt sich ferner aus der institutionellen Stellung des Internationalen Gerichtshofs als

"Hauptrechtsprechungsorgan der Vereinten Nationen" (Art. 92 UN-Charta), das nach Art. I des Fakultativprotokolls zum Konsularrechtsübereinkommen zur gerichtlichen Beilegung von Streitigkeiten über die Auslegung oder Anwendung des Übereinkommens berufen ist. Faktisch müssen sich die Vertragsstaaten, schon um die künftige Feststellung von Konventionsverletzungen gegen sich zu vermeiden, daher auch nach Urteilen richten, die gegen andere Staaten ergangen sind."

Paragraph 69: "bb) Der Bundesgerichtshof hat [...] zwar einführend auf das LaGrand-Urteil verwiesen und zutreffend festgestellt, dass Art. 36 Abs. 1 WÜK auch subjektive Rechte eines einzelnen Staatsangehörigen begründen könne. Im Zusammenhang mit der eigentlich entscheidungserheblichen Frage nach dem Schutzzweck der Belehrungspflicht hat [der Bundesgerichtshof] sich jedoch nicht mit den Schlussfolgerungen des Internationalen Gerichtshofs auseinandergesetzt. [...] Die angegriffenen Beschlüsse des Bundesgerichtshofs sind daher nicht mit der verfassungsunmittelbaren Pflicht zur Berücksichtigung der Urteile des Internationalen Gerichtshofs in den Fällen "LaGrand" und "Avena" vereinbar."

8. Greece

a. Administrative First Instance Court in Athens, Decision no. 15006/2008

In order to assess whether the plaintiffs had encountered an undue delay in their proceedings which could result in the necessity for compensation, the court referred to the criteria developed by the Strasbourg Court. In particular it made reference to *X. v. France* (judgment of 31.03.1992, application no. 18020/91)

b. Legal Opinion 463/2007 of Legal Council of State, 7 December 2007

Summary and translation provided by Fatma Benli, Attorney at Law, Greek Helsinki Monitor

"On 7 December 2007, the Legal Council of State (NSK) issued Legal Opinion […] on the consequence of the ordination of a court clerk as a priest. The state's top legal advisory institution, based on Articles 13, 20 and 87ff of the Constitution, Articles 1, 6 and 9 ECHR, as well as ECHR case law, decided by a majority vote that a clerk with his appearance when wearing the frock makes evident his religious beliefs and can thus be considered to influence citizens who are tried by a court or otherwise deal with the court registry where he serves. In such way he may cause concerns of partiality or lack of objectivity at the expense of persons with different religious beliefs than his. Hence, the NSK concluded that he can continue to exercise his functions only without wearing the frock, as the only means to secure the citizens' right to an objective and impartial administration of justice, guaranteed by Articles 20 and 87ff of the Constitution and Article 6 ECHR. The Court is requested to note that the NSK's minority opinion was that the mere coexistence of the two functions (court clerk and priest) in the person concerned was a public expression of religious beliefs and thus he could no longer hold the clerk's position. The NSK's legal opinion included an expressed reference to the ECHR's emphasis on the role of the state as neutral and impartial regulator of the way various religious and other beliefs will be expressed in public functions and a reference to the Case of *Leyla ahin v. Turkey* (application 44774/98, Grand Chamber judgment 10 November 2005)"

9. Ireland

a. European Convention on Human Rights Act 2003

http://www.oireachtas.ie/documents/bills28/acts/2003/a2003.pdf

"Section 4: Judicial notice shall be taken of the Convention provisions and of

(a) any declaration, decision, advisory opinion or judgment of the European Court of Human Rights.

[…]

and a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments.

Section 5,

[…]

(5) In advising the Government on the amount of compensation for the purposes of subsection (4), an advisor shall take appropriate account of the principles and practice applied by the European Court of Human Rights in relation to affording just satisfaction to an injured party under Article 41 of the Convention."

b. Electoral (Amendment) Act 2006

Electoral (Amendment) Act 2006, No. 33 of 2006, 11 December 2006

http://www.oireachtas.ie/documents/bills28/acts/2006/a3306.pdf

In the light of the judgment of the ECHR in the case of *Hirst v. The United Kingdom*, the Electoral Law of Ireland was amended as it had a blanket voting ban upon prisoners beforehand.

See also: House of Commons (2010): Prisoners' Voting Rights, Standard note SN/PC/01764, p. 4 http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-01764.pdf

10. Netherlands

***a.* Speech of Mr. Geert Cortens, President of the Supreme Court of the Netherlands, 'Dialogue between Judges', seminar organised by the Strasbourg Court, 29 January 2010**

Original French version: http://www.echr.coe.int/NR/rdonlyres/B7BAA2F0-EAB2-4B27-9298-781BB0FB310E/0/20100129_Discours_President_Corstens_Seminaire.pdf

"The implications of the subsidiarity principle are diverse. [...]

(i)the member States [...] must also follow the case law of the Court closely and apply it diligently;

(ii)the Court must steer the protection of human rights by delivering clear and well-reasoned judgments that enable the domestic authorities and courts to ascertain how the Convention should be interpreted in specific cases.

[...]

[**The Court's] mission is to guide this legal protection** by delivering clear judgments on the interpretation of the Convention in specific cases which **indicate the precedent to be followed**. These judgments must then be executed quickly by the member States, with the domestic courts, the national legislatures and the national authorities being bound to comply with that case law.

Allow me to give you a number of examples from my country. [...] Immediately after [the Strasbourg Court had delivered its leading judgment in *Salduz v. Turkey* (2008)], the Netherlands Supreme Court amended its case law, making express reference to it. In a judgment of 30 June 2009 [(LJN BH3079)], it undertook a thorough examination of the implications of the Salduz judgment for judicial practice in the Netherlands, as much at the request of the trial judges as at that of the Public Prosecution Service and the Bar. A swift reaction like that serves society best. Indeed, after the Court had settled the urgent question, the Supreme Court assumed its responsibility at national level, as required by the subsidiarity principle. Thus did it accomplish the task of, I quote, "securing the rights and liberties it [the Convention] enshrines". Applications to "Strasbourg" were thus, I am sure, avoided in many cases.

There are many other examples of the subsidiarity principle being implemented, not only by the courts but also by the legislature and the executive. I shall briefly refer to some here.

[...]

[Another example is *Goodwin v. the United Kingdom* (1996) judgment] on freedom of the press. Within six weeks the Supreme Court of the Netherlands had delivered a judgment in which it adapted its established case law[7].

The *Brogan and Others v. the United Kingdom* [(1988)] case also received a lot of publicity [...]. Although it was not a party to the case, it made the Netherlands aware that it did not always comply with the provision of Article 5 of the Convention which says that any arrested person must be brought promptly before a judge. An authoritative commission (the Moons Commission) was then instructed to give an emergency opinion to the legislature, which then took the necessary steps[8]. The Public Prosecution Service and the police did not wait, moreover, for the amendment to take effect before following the Court's case law[9].

[...]

All these examples show that, after a leading judgment has been delivered by the Court, each and every member State should ask itself to what extent its practices are in conformity with the case law thus established. This approach may lead the domestic courts to adapt their established case law – as happened after the Salduz case, concerning assistance by a lawyer during police custody – or the

[7] LJN ZC2072, NJ 1996, p. 578.
[8]. This rule, laid down in Article 59a of the Code of Criminal Procedure, came into force on 1 October 1994.
[9]. The Public Prosecution Service had already laid down a policy to be followed on the basis of the judgment in question.

legislature to amend the law – as happened with regard to the question raised by the Benthem case – or the prosecution to adapt its practices – as required by the Brogan and Others case. It is, moreover, highly likely that one and the same judgment will require action by two, or even three, of these actors. Citizens are entitled to demand that administrators of justice respect human rights, firstly because that is a legitimate requirement but also because it is a declaration of the principle of subsidiarity. Accordingly, the cause of human rights will be swiftly and effectively served and the Court will be able to fulfil the mission vested in it: interpreting human rights and giving them form. The core of its activities should not consist in repeating – because States have failed to comply with them – decisions that it has already taken. It should be pointed out, lastly, **that States should not confine themselves to reacting only in those cases in which they are directly concerned. That would be too severe a limitation on the value of the Court's case law, and on the principle of subsidiarity**. As certain examples given here have shown, the Netherlands does not in any way – whether it be in the courts or in academic debate or in any other context – draw a distinction between cases that concern them directly and judgments concerning another State.

[...]

The frequency of repetitive applications is proof that certain **member States do not properly comply with their obligations to apply the Court's case law**.

b. Additional information

See *Sanoma v. Netherlands*, judgment of 14 September 2010, application no. 38224/03, paragraph 36

"36.[...] The principle [that a journalist had to disclose its sources when asked ask as witness] was overturned by the Supreme Court in a landmark judgment of 10 May 1996 on the basis of the principles set out in the Court's judgment of 27 March 1996 in the case of *Goodwin v. the United Kingdom* [...]. In this ruling, the Supreme Court accepted that, pursuant to Article 10 of the Convention, a journalist was in principle entitled to non-disclosure of an information source unless, on the basis of arguments to be presented by the party seeking disclosure of a source, the judge was satisfied that such disclosure was necessary in a democratic society for one or more of the legitimate aims set out in Article 10 § 2 of the Convention (Nederlandse Jurisprudentie (Netherlands Law Reports, "NJ") 1996, no. 578)."

See also for examples on how Dutch courts react to the Strasbourg Court's Landmark Judgments in *Salduz v. Turkey* and *Panovits v. Russia*: de Swart, A.J.M. (2010): Toch nog een raadsman bij het politieverhoor? Enkele ontwikkelingen na Salduz/Panovits, Nederlands Juristenblad, 2010, afl. 4, p. 223-226.

11. Poland

Current developments

Examples provided by Dr. Adam Bodnar, Warsaw University

1. The Polish Constitutional Court makes frequent reference to 'body' of the whole case-law of the European Court of Human Rights (ECtHR) in adjudication, mostly in cases where it has to interpret domestic constitutional provisions. The case-law of the ECtHR is used as a subsidiary source or as guidance for such interpretation. Such practice is especially visible in cases concerning right to a court, criminal defence rights, prohibition of torture, inhuman or degrading treatment, freedom of speech, freedom of assembly. With respect to some issues, Polish standards are more advanced than ECtHR standards.

In case P 8/04[10], the Polish Constitutional Court formulated the following principle regarding applicability of human rights standards:
"Necessity to take into account the existence of the judgment of the ECtHR into the activity of the internal organs of the state creates an obligation for the Constitutional Court to use in the constitutional control such principles and methods of interpretation which may smooth potential conflicts between standards stemming from Polish law and ECHR standards".

The case law of the ECtHR is also used when there is a need to fill in a launa that exists in Polish law, i.e. there is a need to apply the Convention standard directly in view of the missing legislative provision. One of the first cases, when the Convention was referred to, was adjudicated in this way. In the case of Chinese couple which was about to be extradited, the Polish Supreme Court referred to the standard in *Soering v. UK*[11] and refused extradition. As a consequence, the application was struck off the list of

10 Judgment of the Polish Constitutional Court of 18 October 2004, No. P 8/04.
11 Soering v. UK, judgment of 7 July 1989, Application No 14038/88, Series A, No 161.

cases pending before the (now defunct) European Commission of Human Rights.[12]

2. New standards established in cases concerning other states are quite often referred to in the legislative process or are even a source of inspiration for taking certain issue to the public agenda. Below are three examples of such an approach:

(i) Following *Copland v. UK*[13], the Ombudsman initiated discussion on the need to regulate in detail different aspect of privacy of employees at the workplace.[14] This issue has been followed by scholars, NGOs as well as the General Inspector of Data Protection. The *Copland* standard was also referred in one of the leading cases concerning collection of biometric data by an employer.[15] As a result, a need to change the Labour Code and to precisely regulate the issue of employees' privacy is presently seriously discussed at the governmental level.

(ii) Nearly two weeks after the Chamber judgment in *Kiss v. Hungary* was rendered[16], the Ombudsman requested a statement by the Minister of Justice as regards compliance of the Polish Constitution (Article 62, Section 2) with the Convention.[17] The Constitution deprives all persons with mental incapacity (*ubezwłasnowolnienie*) of the right to vote. The similar regulation exists in Hungary (Article 70, Section 5, of the Hungarian Constitution). The ECtHR declared that such automatic deprivation of the right to vote violates Article 3 of Protocol No.1 of the Convention. Discussion on the need to change the Polish Constitution is now pending.[18] Also, the Ministry of Labour, in the name of the Government, declared that work is under way concerning potential implementation of *Kiss v. Hungary*.[19]

(iii) Following the recent Chamber judgment in the case of *Uzun v. Germany*[20], discussion has started whether Poland should regulate in detail the manner in which the GPS system is used in the surveillance of suspects.[21] It seems that Polish law is well behind German standards in this regard. It is the interesting example, because the ECtHR did not find a violation of Article 8 of the Convention. However, the assessment of the quality of the German legislation made by the ECtHR should be also taken into account by other states in order to avoid future violations of the Convention. The Helsinki Foundation for Human Rights (Warsaw), relying on the above judgment, requested appropriate changes in the Polish law and strict regulation how and when different technical means of surveillance may be used by police and special services.[22]

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12 Mandugequi and Jinge v. Poland, Application No. 35218/97, decision of 19 September 2007.

13 Copland v. UK, judgment of 3 April 2007, application No. 62617/00 (IV. Section).

14 Letter by the Ombudsman to the Minister of Labour of 20 December 2007, letter No. 561580-III-07/MRP.

15 Judgment of the Supreme Administrative Court of 1 December 2009, I OSK 249/09.

16 Kiss v. Hungary, application No. 38832/06, judgment of 20 May 2010.

17 Statement by the Deputy Ombudsman Stanisław Trociuk to the Minister of Justice of 1 June 2010, No. RPO- 647849- I/10/AB

18 Adam Bodnar, *Zmiana Konstytucji jako konsekwencja wykonania wyroku Europejskiego Trybunału Praw Człowieka. Glosa do wyroku Europejskiego Trybunału Praw Człowieka w sprawie Alajos Kiss przeciwko Węgrom* [Necessity to change Constitution as a consequence of implmentation of judgment in case Kiss v. Hungary], Europejski Przegląd Sądowy [European Court Review], No. 10/2010; see also a commentary in the Polish press: Ewa Siedlecka, *Ubezwłasnowolniony też wyborca* [Incapacitated person is also a voter], Gazeta Wyborcza, 20 May 2010, available at http://wyborcza.pl/1,75478,7912624,Ubezwlasnowolniony_tez_wyborca.html.

19 Statement by Jarosław Duda, Undersecretary of State in the Ministry of Labour of 18 August 2010, directed to the Helsinki Foundation for Human Rights, available at http://www.hfhrpol.waw.pl/precedens/images/stories/Odpowiedz_MPiPS_18_08_2010.pdf

20 Uzun v. Germany, application No. 35623/05, judgment of 2 September 2010.

21 See e.g. comment at leading blog of Mr. Piotr Waglowski devoted to issues at intersection of law and IT technologies - http://prawo.vagla.pl/node/9193. See also Ewa Siedlecka, Całe nasze życie na podglądzie [Whole Our Life Surveilled], Gazeta Wyborcza of 7 October 2010, available at http://wyborcza.pl/1,75478,8475018,Cale_nasze_zycie_na_podgladzie.html

22 See the letter by the Helsinki Foundation for Human Rights to the Prime Minister of 14 October 2010, available at http://www.hfhrpol.waw.pl/precedens/images/stories/file/pismo_2538_2010_DP.pdf.

12. Russian Federation

a. Article 15 of the Constitution of 12 December 1993

http://www.constitution.ru/en/10003000-01.htm

Art. 15 (4): "Universally recognized principles and norms of international law as well as international agreements of the Russian Federation shall be an integral part of its legal system. If an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of the international agreement shall be applied."

b. Supreme Court judgment, 21-Г10-2 of 27 July 2010

In this case the Supreme Court refers to judgements of the European Court of Human Rights not limiting itself to cases brought against the Russian Federation. It referred in particular to the ECHR judgement in the case *Castells v. Spain* (1992).

c. Current developments in the case law of the Constitutional Court

The Constitutional Court of the Russian Federation in its rulings regularly takes into account the reasoning of the European Court of human rights, irrespective of the state against which the judgment was rendered. (See, in this connection, the speech made by the Constitutional Court's President Valery Zorkin "Rule of Law and Legal Awareness" (2007) (http://www.stetson.edu/artsci/polsci/media/worldruleoflaw.pdf, p. 46))

Subsequent examples provided by Professor Mark L. Entin, Director of the Institute of European Law, Moscow:

1.In a judgment of 26 February 2010 the Constitutional Court referred specifically to the interpretation of the ECHR in the cases *Hornsby v. Greece* and *Ryabykh v. Russia*.

2.The Constitutional Court ruling 524-О-П/2010 of 08 April 2010 took into account ECHR judgements *Keegan v. the United Kingdom* of 18 July 2006, *Gebermedhin v. France* of 26 April 2007, *Ormanni v. Italy* of 17 July 2007 and *Hammern v. Norway* of 11 February 2003. (decision in Russian: http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=73258)

3.In the decision 8-П/2010 of 19 April 2010 the Court referred to the ECHR judgements *De Cubber v. Belgium* of 26 October 1984, *Remli v. France* of 23 April 1996 and *Sander v. the United Kingdom* of 9 May 2000. (decision in Russian: http://files.sudrf.ru/169/norm_akt/doc20100524-140230.doc)

4.In another recent decision of 08.06.2010 the Court stated that, "Article 8 of the European Convention of Human Rights, establishing the right to respect of private and family life, as interpreted by the European Court of Human Rights, obliges national authorities to ensure the fair balance between competing interests and in determination of such a balance to accord high importance to the fundamental interests of a child, which, depending on their nature and significance, could take priority over interests of his or her parents"

*5.*In its decision *15-П/2010 of 13 July 2010 t*he Court referred to referred to the ECHR judgements *Sunday Times v. the United Kingdom (No. 1)* of 26 April 1979, *Baranowski v. Poland* of 28 March 2000 and *Jecius v. Lithuania* of 31 July 2000 (d*ecision in Russian: http://www.rg.ru/printable/2010/07/23/ks-sud-dok.html*)

d. Supreme Court Resolution on the application by courts of general jurisdiction of the commonly recognized principles and norms of the international law and the international treaties of the Russian Federation (2003)

Supreme Court Plenum Decree/Practice Direction No. 5, 10 October 2003

(unofficial English translation)

http://www.medialaw.ru/e_pages/laws/russian/supc-10-10-2003.htm

(Decision in Russian: http://www.rg.ru/2003/12/02/pravo-doc.html)

Preamble: "Commonly recognized principles and norms of the international law and the international treaties under Item 4 of Article 15 of the Constitution of the Russian Federation are a component part of its legal system.

[…]

1. […] [T]he rights and liberties of man in conformity with commonly recognized principles and the norms of the international law, as well as the international treaties of the Russian Federation shall have direct effect within the jurisdiction of the Russian Federation. They shall determine the meaning, content and application of the laws, and the activities of the legislative and executive branches and local governments, and shall be secured by the judiciary.

[…]

The commonly recognised principles of the international law, in particular, comprise the principle of universal respect for human rights and the principle of fair implementation of international obligations.

[…]

10. To clarify to courts that the interpretation of an international treaty should be [carried out] in accordance with the Vienna Convention on the Law of the Treaties of 23 May, 1969 (Section 3; Articles 31-33).

In accordance with Sub item «b» of Item 3 of Article 31 of the Vienna Convention, in interpreting the international treaty, one should, together with its context, take into account the follow-up practice of the treaty which establishes an agreement of its members with regard to its interpretation.

The *Russian Federation*, as a member-state of the Convention on Protection of Human Rights and Basic Freedoms **recognises the jurisdiction of the European Court on Human Rights as mandatory with respect to interpretation and application of the Convention and Protocols** thereof in the event of an assumed breach by the Russian Federation of provisions of these treaty acts when the assumed breach has taken place after their entry into force in respect to the Russian Federation (Article 1 of the Federal Law "On Ratification of the Convention on Protection of Human Rights and Fundamental Freedoms and Protocols thereof » No 54-FZ of 30 March, 1998). **That is why the application by courts of the said Convention should take into account the practice of the European Court on Human Rights to avoid any violation of the Convention on Human Rights and Fundamental Freedoms.**

11. […] The courts within their scope of competence should act so as to ensure the implementation of obligations of the State stemming from the participation of the Russian Federation in the Convention on Protection of Human Rights and Fundamental Freedoms."

Hereinafter, the Supreme Court of the Russian Federation describes what national courts must take into account when resolving various issues. Its ruling mentions: "**legal positions worked out by the European Court on Human Rights**" (paragraph 12, alike paragraph 14), "**taking into consideration decisions of the European Court on Human Rights**" (paragraph 13), "**the practice of application of the [Convention] by the European Court on Human Rights**" (paragraph 15), "**requirements contained in decisions of the European Court on Human Rights**" (paragraph 15)

"16. In case difficulties arise in interpreting commonly recognised principles and norms of the international law, the international treaties of the Russian Federation the courts should be recommended to use acts and decisions of international organisations [...].

17. [...] To recommend to the Judicial Department under the Supreme Court of the Russian Federation: in co-ordination with the Commissioner of the Russian Federation [(Ombudsman)]to the European Court on Human Rights to inform judges on the practice of the European Court on Human Rights, especially with regard to [judgments] regarding the Russian Federation by distributing authentic texts and their Russian translations; to provide on a regular and timely basis the judges with authentic texts and official translations of the international treaties of the Russian Federation and other acts of the international law."

e. Supreme Court Resolution on Judicial Practice At Disposal Of Cases on Protection of Honour and Dignity of Persons, and Also Business Reputation of Persons and Legal Entities (2005)

Supreme Court Plenum Decree/Practice DirectionNo. 3, 24 February 2005

(unofficial English translation)

http://www.medialaw.ru/e_pages/laws/russian/supc-24-2005.htm

Preamble: "At the same time the provisions of the given norm should be interpreted according to the legal position of the European Court on Human Rights, expressed in its judgments.

Taking this into account, the Plenum of the Supreme Court of the Russian Federation with a view of maintenance of correct and uniform application of the legislation regulating specified legal relations, d e c i d e s to give to the courts the following explanations:"

Paragraph 1: "[Russian] courts should be guided not only by the norms of the Russian legislation [...], but also by virtue of article 1 of the Federal law dated March, 30, 1998 No. 54-FZ «On the Ratification of the Convention on Protection of Human Rights and Fundamental Freedoms and its Protocols» to take into account legal position of the European Court of Human Rights, expressed in its decisions concerning questions of interpretation and application of the given Convention [...]."

f. Additional information

See also:

Burkov, Anton: The Impact of the European Convention on Human Rights on Russian Law, ibidem, Stuttgart, 2007

Marochkin, Sergei Yu (2007): International Law in the Courts of the Russian Federation: Practice of Application, Chinese Journal of International Law, Vol. 6 No. 2, 329-344

13. Slovenia

a. Article 15 of the Slovenian Constitution of 1991

http://www.servat.unibe.ch/icl/si00000_.html

Note: Constitution predates the accession to the European Convention on Human Rights in 1994

"Article 15 (Exercise and Limitation of Rights)

(1) Human rights and fundamental freedoms shall be exercised directly on the basis of the Constitution. […]

(5) No human right or fundamental freedom regulated by legal acts in force in Slovenia may be restricted on the grounds that this Constitution does not recognise that right or freedom or recognises it to a lesser extent."

b. Implementing European Standards into the Case law of the Constitutional Court, Presentation by Ciril Ribičič, Judge of the Constitutional Court of the Republic of Slovenia, 1 October 2004

http://www.us-rs.si/o-sodiscu/konference/pcceu-bled-30-september-2-oktober-2004/presentation-by-dr-ciril-ribicic-judge-of-the-cons-3379/

"From the viewpoint of the future role of the Constitutional Court, while resolving individual disputes it has been most important to consider the European Convention on Human Rights and the case law of the European Court of Human Rights, not only regarding constitutional complaints but also when reviewing the constitutionality of regulations. […]

Minimum standards for the protection of human rights determined in the case law of the European Court of Human Rights, are binding on all the member states of the Council of Europe. […]

The [Constitutional Court has directly cited and referred to the Convention and the Strasbourg Court's case law] in the reasoning of its decisions. […] Furthermore, it must be considered that often the expert materials (the reports which are drafted by the legal advisers of the Constitutional Court), which are a basis for the decisions of the Constitutional Court, contain an overview of the case law of the European Court of Human Rights without always directly mentioning such in the text of the decision. Since the ratification of the European Convention on Human Rights in 1994, references to the Convention and the case law of the European Commission for Human Rights and the European Court of Human Rights has continuously increased, and as a consequence in recent years there has hardly been any important decision which has not arisen from an analysis of the decisions of the European Court of Human Rights. Thus, the Constitutional Court has referred to the European Convention on Human Rights and the case law of the European Court of Human Rights ***also in cases in which the complainants have not mentioned them in their applications***.

The Constitutional Court is naturally not restricted to cases in which the European Court of Human Rights decided on the basis of applications from Slovenia, although the Court pays particular attention to them. [...]

[I]n Slovenia the European Convention on Human Rights is a binding legal act, superior to national legislation. **Moreover, it is also entirely undisputed that regarding the interpretation of the European Convention on Human Rights, the opinion of the European Court of Human Rights is decisive**. Such interpretation is not formally binding on the Constitutional Court, however in reality it must nevertheless be respected considering similar subsequent cases if the Court does not wish to risk Slovenia being found in violation before the European Court of Human Rights.

[…]

Moreover, the Constitutional Court refers to the Constitution in cases in which the Constitution guarantees a higher level of the protection of an individual right compared to the European Convention on Human Rights. **In cases in which the European Convention on Human Rights is more demanding than the Constitution or the case law of the European Court of Human Rights guarantees a higher level of protection of rights, the Constitutional Court refers to the European Convention on Human Rights and the decisions of the European Court of Human Rights.** Only such manner of deciding by the Constitutional Court is in compliance with the last paragraph of Article 15 of the Constitution, which explicitly determines that no rights regulated by legal acts in force in Slovenia (the European Convention on Human Rights is undoubtedly such an act) may be restricted on the grounds that this Constitution does not recognize that right or recognizes it to a lesser extent."

c. Additional information

Letnar Cernec, Jernej/Avbelj, Matej (2010): Implementation of the European Convention on Human Rights and Fundamental Freedoms in Slovenia, in: Alleweldt, Ralf/ Emmert , Frank/ Hammer, Leonard and Marcus, Isabel (eds.): The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe, Eleven International Publishing, Utrecht, forthcoming

Extracts:

"The Constitutional Court has dealt intensively with the ECHR. The Court referred to the ECHR even before it became binding on Slovenia. [...]The Court noted that while Slovenia had not yet signed and ratified the Convention, considering its desire and need to join the Council of Europe, the Slovenian legislation had to be adjusted to meet the criteria of the Convention as soon as possible.

It is estimated that the Constitutional Court has so far referred to the ECHR in more than 600 cases and relied on the ECHR jurisprudence in more than 100 cases. […] Moreover, the Constitutional Court carefully scrutinizes the jurisprudence of the ECHR before handing down any potentially more important and resounding decision. […]

While there are no written limits to the effect of the ECHR rulings in Slovenia, the ECHR is generally assumed to lay down only minimum standards of human rights protection that are normally surpassed by the national constitutional standards. Therefore the Constitutional Court usually grants precedence to the Constitution, unless the ECHR as expounded in the Strasbourg jurisprudence provides for a higher standard of protection. […]

However, if a case arises in which the Constitution would not explicitly contain a right stemming from the ECHR as expounded by the ECHR, the Constitutional Court would rely directly on the ECHR following the mandate of Article 15 of the Constitution on the basis of which no human right or fundamental freedom regulated by legal acts in force in Slovenia may be restricted on the grounds that the Constitution does not recognize that right or that is recognized to a lesser extent. This occurred in case Up-555/03 and Up-827/04 where a petitioner relied on the ECHR Article 13 containing, inter alia, the right to an independent thorough and efficient investigation of the circumstances in which a person lost his life during a police action. As the state had not provided for such an investigation, the Constitutional court issued a declaratory judgment identifying its breach of Article 15 of the Constitution in combination with Article 13 of the ECHR."

14. Sweden

a. Swedish Supreme Court Ruling T 333-09 of 16 June 2010

With reference to Swedish Supreme Court Ruling B 5498-09 of 31 March 2010

http://www.hogstadomstolen.se/Domstolar/hogstadomstolen/Avgoranden/2010/2010-06-16%20T%20333-09%20Dom.pdf

The Swedish Supreme Court adopted a judgment regarding the just satisfaction in a tax related length-of-proceeding case. In that judgment, the Supreme Court cited directly the Court's judgments in the cases *Kudla v. Poland* (Application no. 30210/96 judgment of 26 October 2000), *Zulo v. Italy* (Application no. 64897/01judgment from 29 March 2006) and *Doran v. Ireland* (Application no. 50389/99 judgment from 23 July 2003) (paragraph 13). Consequently the Supreme Court found a violation of the Articles 6 and 13 of the Convention and awarded a just satisfaction.

b. Additional information

Skarhed, Anna (2008): Domestic Remedies: the Swedish Experience, in: Reforming the European Convention on Human Rights – A work in progress – a compilation of publications and documents relevant to the ongoing reform of the ECHR, prepared by the Steering Committee for Human Rights

(CDDH), 2009, pp. 503-505, available at: http://www.echr.coe.int/library/DIGDOC/DG2/ISBN/COE-2009-EN-9789287166043.pdf

"The two supreme courts in Sweden – the Supreme Court and the Supreme Administrative Court – have both shown to be unwilling to interpret domestic law in a way that could risk their decisions being rejected by the European Court. To avoid this, they have attached special importance to the Convention in their application of the law, and they have been prepared to take measures in order for their decisions to accord with the provisions of the Convention.

This has been the case even when the applicable Swedish law has recommended a different solution or when the result has meant that the plaintiff has been awarded a right that was not grounded in Swedish national law.

Let me give you four examples:

1. In order to ensure the right to a fair and public hearing in matters concerning civil rights, as laid down in Article 6 (1) of the Convention, the Supreme Administrative Court has decided that plaintiffs should have a right to appeal decisions, in spite of the fact that no such right existed under the applicable Swedish laws (RA 1997 ref 65 and RA 2001 ref 56). […]

[…] There have been a number of cases before the Supreme Court in recent years concerning the possibility for individuals to claim financial compensation in a Swedish court based directly on the Convention. [e. g. NJA 2003 p. 217, NJA 2005 p. 462, NJA 2007p. 295] The main reason for these claims has been that, according to the Swedish Tort Liability Act, compensation for violations of human rights and fundamental freedoms as defined in the Convention does not include compensation for non-pecuniary damage and also requires "fault or negligence" on the part of the state […].

[In those examples mentioned the applications where awarded compensation according to the principles established through the Strasbourg Court's case law. The Supreme Court made in particular reference to the judgment *Kudla v. Poland*.]"[Henceforth, the Swedish Courts have established a domestic remedy in line with Article 41 of the Convention based on the jurisprudence of the Strasbourg Court.]

15. Switzerland

***a. Federal Court decision* ATF 112 (1986) 290**

http://relevancy.bger.ch/php/clir/http/index.php?lang=de&type=show_document&page=1&from_date=&to_date=&from_year=1954&to_year=2010&sort=relevance&insertion_date=&from_date_push=&top_subcollection_clir=bge&query_words=&part=all&de_fr=&de_it=&fr_de=&fr_it=&it_de=&it_fr=&orig=&translation=&rank=0&highlight_docid=atf%3A%2F%2F112-IA-290%3Ade&number_of_ranks=0&azaclir=clir#id11606

In the decision the Swiss Federal Court amended its own case law in the wake of the judgments of *De Cubber and Piersack v. Beligum*. (See also: ATF 113 (1987) 72 and ATF 114 (1988) 50)

Page 297: "Le poids de cette argumentation ne saurait être ignoré, compte tenu des critiques formulées par la doctrine (cf. consid. 3d ci-dessus) et des récentes décisions rendues par les organes de la Convention européenne des droits de l'homme (arrêts précités Piersack et, surtout, De Cubber). La jurisprudence du Tribunal fédéral doit donc être soumise à un nouvel examen. […]De la même manière, la question de savoir si les critères retenus dans l'arrêt De Cubber permettent ou non de maintenir la jurisprudence définissant la portée de l'art. 58 Cst. ne doit pas être examinée abstraitement. Il convient, bien plutôt, de rechercher si le droit valaisan a assuré au recourant un juge satisfaisant aux exigences qui découlent de la garantie d'impartialité."

***b. Federal Court decision* ATF 125 (1999) 417**

Federal Court decision ATF 125 (1999) 417

http://relevancy.bger.ch/php/clir/http/index.php?lang=de&type=show_document&page=1&from_date=&to_date=&from_year=1954&to_year=2010&sort=relevance&insertion_date=&from_date_push=&top_subcollection_clir=bge&query_words=&part=all&de_fr=&de_it=&fr_de=&fr_it=&it_de=&it_fr=&orig=&translation=&rank=0&highlight_docid=atf%3A%2F%2F125-II-417%3Ade&number_of_ranks=0&azaclir=clir

The Swiss Supreme Court has in this judgment on the confiscation of propaganda material explicitly referred to the case law of the Strasbourg Court regardless against which state the judgments where rendered.

Page 421: (only in German) "Zur Zeit liegen - soweit ersichtlich - keine Entscheide der Strassburger Organe vor, die Massnahmen zur inneren und äusseren Sicherheit eines Staates generell vom

Anwendungsbereich von Art. 6 Ziff. 1 EMRK ausschlössen. Vielmehr ist der Europäische Gerichtshof in einem Entscheid, der die Anordnung von Überwachungsmassnahmen aus Gründen der Staatssicherheit betraf, von der grundsätzlichen Anwendbarkeit von Art. 6 Ziff. 1 EMRK ausgegangen, wobei er allerdings offen liess, ob im konkreten Fall auf Art. 6 oder auf Art. 13 EMRK abzustellen war (Urteil i.S. Klass c. Deutschland vom 6. September 1978, Serie A, Band 28, Ziff. 68 f., 71 und 75)

c. Federal Court decision ATF 131 (2005) 455

http://relevancy.bger.ch/php/clir/http/index.php?lang=fr&type=show_document&page=1&from_date=&to_date=&from_year=1954&to_year=2010&sort=relevance&insertion_date=&from_date_push=&top_subcollection_clir=bge&query_words=&part=all&de_fr=&de_it=&fr_de=&fr_it=&it_de=&it_fr=&orig=&translation=&rank=0&highlight_docid=atf%3A%2F%2F131-I-455%3Afr%3Aregeste&number_of_ranks=0&azaclir=clir

Chapeau “Art. 3 et 13 CEDH, art. 10 al. 3 Cst., art. 88 OJ; traitement dégradant, enquête.

Celui qui prétend de manière défendable avoir été traité d'une façon dégradante par un fonctionnaire de police a droit à une enquête officielle effective et approfondie (consid. 1.2.5). En l'occurrence, ce droit n'a pas été respecté (consid. 2).””

Le tribunal fonde sa décision sur de nombreux arrêts de la Cour européenne des droits de l'homme contre d'autres Etats.

Page 462 “1.2.5 Gemäss Art. 3 EMRK darf niemand der Folter oder unmenschlicher oder erniedrigender Strafe oder Behandlung unterworfen werden. Dies gewährleistet ebenso Art. 10 Abs. 3 BV.

Nach der **Rechtsprechung des Europäischen Gerichtshofes für Menschenrechte** hat dann, wenn jemand in vertretbarer Weise ("de manière défendable") behauptet, von der Polizei in einer Art. 3 EMRK verletzenden Weise misshandelt worden zu sein, eine wirksame und vertiefte amtliche Untersuchung ("une enquête officielle approfondie et effective") stattzufinden. Die Untersuchung muss zur Ermittlung und Bestrafung der Verantwortlichen führen können. Verhielte es sich anders, wäre das Verbot der Folter und der unmenschlichen oder erniedrigenden Bestrafung oder Behandlung - trotz seiner grundlegenden Bedeutung - in der Praxis wirkungslos.

Diese Rechtsprechung zu Art. 3 EMRK hat der Europäische Gerichtshof im Urteil in Sachen **Assenov gegen Bulgarien** vom 28. Oktober 1998 entwickelt (Recueil CourEDH 1998-VIII S. 3264, Ziff. 102 ff.). Er stützte sich dabei auf seine entsprechende Praxis zu Art. 2 EMRK, der das Recht auf Leben gewährleistet (dazu insbesondere Urteil i.S. **McCann gegen Vereinigtes Königreich** vom 27. September 1995, Serie A, Bd. 324, Ziff. 161 ff.). Der Gerichtshof hat diese Rechtsprechung in der Folge mehrfach bestätigt (vgl. Urteile i.S. **Labita gegen Italien** vom 6. April 2000, Recueil CourEDH 2000-IV S. 25, Ziff. 131 ff.; i.S. **Dikme gegen Türkei** vom 11. Juli 2000, Recueil CourEDH 2000-VIII S. 181, Ziff. 101 ff.; i.S. **Caloc gegen Frankreich** vom 20. Juli 2000, Recueil CourEDH 2000-IX S. 1, Ziff. 88 ff.; i.S. **M.C. gegen Bulgarien** vom 4. Dezember 2003, Recueil CourEDH 2003-XII S. 45, Ziff. 151; i.S. Slimani gegen Frankreich vom 27. Juli 2004, Ziff. 31).

[…]

Der Europäische Gerichtshof leitet den Anspruch auf eine vertiefte und wirksame Untersuchung bei vertretbarer Behauptung einer

[Page 463] Art. 3 EMRK verletzenden Behandlung ebenso ab aus dem Recht auf eine wirksame Beschwerde nach Art. 13 EMRK. Diese Bestimmung verlangt überdies den wirksamen Zugang des Klägers zum Untersuchungsverfahren ("un accès effectif du plaignant à la procédure d'enquête"; Urteil i.S. Assenov, a.a.O., Ziff. 117 f.; vgl. auch Urteile i.S. **Aksoy gegen Türkei** vom 18. Dezember 1996, Recueil CourEDH 1996-VI S. 2260, Ziff. 98; i.S. **Aydin gegen Türkei** vom 25. September 1997, Recueil CourEDH 1997-VI S. 1866, Ziff. 103 ff.; i.S. **Cakici gegen Türkei** vom 8. Juli 1999, Recueil CourEDH 1999-IV S. 657, Ziff. 113; i.S. **Ilhan gegen Türkei** vom 27. Juni 2000, Recueil CourEDH 2000-VII S. 315, Ziff. 97 ff.).

d. Projet de Loi portant réforme du mariage et de l’adoption, 2010

No. 6172, Chambre des Députés, Session ordinaire 2009-2010, 21.9.2010

p. 15 Exposé des motifs

La cadre général de la reforme

“Comme l’a juste rappelé la Cour européenne des droits de l’homme, l’adoption a pour but de “donner une famille à un enfant et non un enfant à une famille …””

[…]

Les dispositions principales de la réforme

La réforme de l'adoption

p. 18 "En ce qui concerne l'adoption plénière, le Gouvernement a annoncé ce que suit dans son programme gouvernemental:

> «Conformément à la jurisprudence de la Court européenne des droits de l'homme, la législation déterminera les modalités permettant à une personne agissant seule d'effectuer une adoption plénière, y compris celle des enfants du partenaire.»

La Cour européenne des droits de l'homme a condamné le Luxembourg pur violation des articles 5, 8 et 14 de la Convention européenne des droits de l'homme par arrêt rendu en date du 7 juin 2007 dans l' affaire «W» et «JMWL» contre Luxembourg."

16. "the former Yugoslav Republic of Macedonia"

a. Case no. 232/2008, judgment of the Bitola Court of Appeal

Extract:

"By a decision K. no. 477/04, the Basic Court convicted the defendant I.H. and N.P. as co-perpetrators of the criminal offence of unauthorized production and distribution of narcotic drugs […]

One of the defendants lodged an appeal […] The complainants consider that the judgment cannot be based on this evidence, because it was adduced contrary to the rules of Article 256, paragraph 1 of LCP [Law on Criminal Procedure]. In particular, the expert examination has not been ordered by a written order of the court, and it has been conducted and done by MoI [the Ministry of Interior]. In such a way there has been a violation of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, [as] the parties in the proceedings have not had the benefit of equality of arms. Then the complainant quotes the judgment of the European Court of Human Rights no. 17995/02 of 5.4.2007.

RM [the Republic of Macedonia] is a member party to the Council of Europe and in such a way the **European Convention for the Protection of Human Rights is an integral part of the legal order of RM**. In this connection, the **Supreme Court of RM accepted legal opinions is that this Convention is directly applicable for all rights and freedoms which are regulated by the Convention and the protection of which is achieved through the European Court of Human Rights**. In accordance with the provisions of LCP**, courts should invoke decisions of the European Court of Human Rights in their decisions**, **as they constitute a source of law**. Thus, the complainant had that right to invoke judgments of the Strasbourg Court. […]

b. Nenovski case, decision PSSR no. 76/2009 of the Supreme Court of 1 June 2009:

"B. Merits:

[…] The Supreme Court of the Republic of Macedonia bases its assessment of the reasonableness of the length of the criminal proceedings on the following criteria: complexity of the case, conduct of the parties in the proceedings, and the conduct of the court which has dealt with the case (see *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II).

I. In the particular case the proceedings has began on 13.03.1997 when the defendant has been deprived of his liberty and ended on 30.01.2009 when the person who now lodges a request has been served with the judgment of the Court of Appeal of 30.10.2008, thereby ending this proceedings. The period which falls within the Court's jurisdiction begins on 10 April 1997, after the right to individual petition entered into force in respect of Macedonia (see *Dika v. Republic of Macedonia*, 13270/02, § 51, 31 May 2007). In assessing the reasonableness of the length of the period which has passed after that date, regard must be had to the state of the case on 10 April 1997 (see *Milosevic v. Macedonia*, no. 15056/02, § 21, 20 April 2006; *Styranowski v. Poland*, no. 28616/95, § 46, ECHR 1998-VIII; and *Foti and Others v. Italy*, judgment of 10 December 1982, Series A no. 56, p. 18, § 53). In this connection, in the period after entry into force of the Convention, the proceedings has lasted 29 (twenty nine) days during which period the defendant has been detained on remand. […]"

c. Politekhna case, decision PSSR no. 12/2009 of the Supreme Court of 1 June 2009:

"B. Merits:

E. Just satisfaction

[…] In accordance with the case law of the European Court of Human Rights, a person lodging a request for protection of the right to trial within a reasonable time is entitled to reimbursement of costs

only in case of establishing that they were actually and necessarily incurred and reasonable as to quantum (see *Éditions Plon v. France*, no. 58148/00, § 64, ECHR 2004-IV). […]"

d. Ways and means to recognise the interpretative authority of judgments against other states, Comments made by Ms. Radica Lazareska Gerovska, 1-2 October 2010

Delivered at the conference on subsidiarity, 1-2 October 2010 in Skopje

"We in the Republic of Macedonia are fully aware that it was not easy to face the fact that fulfilling the Conventions' principles, completely had changed the domestic legal system, and first couple of years was experienced as intruding of foreign elements that stir up the clarity of domestic legal system.

For **our judges**, which up to then apply only the Macedonian Constitution and laws, now were **obliged to follow and obey the ECHR judgments not [only] regarding their own country, but [also] the judgments of the Courts' Grand Chamber as well**.

Aware on the commitments undertaken that rise from the Convention membership […] [the] Republic of Macedonia put forward huge efforts to set in motion access to the Courts' case law. […]

On the Ministry of justice web site all Court's judgments and decisions are published, normally translated in Macedonian, with an aim to bring closer to the professional as well the general public, the practice of the ECHR and their way of reasoning of the Convention. […]

Major progress was made in the area of Information technology. The access to Internet was enabled for the each judge, but the linguistic barrier still stands [...] Indeed, it is a very low number of judges and prosecutors, which can follow the Court's case law regarding other states, directly on daily basis.

Therefore, as the Minister already said, for us it is a huge achievement, to start up with the publication of the Grand Chamber translated judgments, starting with 20 of them. The main goal is to bring up closer to the domestic institutions, the case -law of the Court, especially from the reasoning aspect.

Republic of Macedonia (that is not a common law system) has accepted revolutionary solution by introducing the legal provision of the **Article 36 of the Law on Courts**, that **enables** for the first time in our legal system **direct implementation of the rules and practice of the ECHR**, by the Supreme Court of the Republic of Macedonia, ruling over length of proceedings cases. For us it is a **pioneer step and more free penetration of the case law as source of the law** in the Republic of Macedonia. […]"

17. The Slovak Republic

Case extracts were provided by Ms Marica Pirosikova, Government Agent before the European Court of Human Rights, Ministry of Justice of the Slovak Republic

a. Constitutional Court's finding file no. I. ÚS 67/03 of 11 March 2004

"Pursuant to Article 152 § 4 of the Constitution, interpretation and application of constitutional laws, laws and other generally binding regulations must be in compliance with the Constitution and simultaneously pursuant to Article 154c § 1 of the Constitution, the respective international treaties including the Convention shall have preference over the laws, if they provide for a broader scope of constitutional right and freedoms. It results from conjunction of these provisions that **the Convention and the related case law constitute for domestic authorities, which apply laws, binding interpretation regulations for interpretation and application of legislation concerning fundamental rights and freedoms enacted in** Chapter Two of the Constitution, and thus they determine the framework that cannot be exceeded by these authorities in concrete cases (e.g. I. ÚS 36/02)."

b. Constitutional Court's decision file no. I. ÚS 6/02 of 4 October 2004

In decision I. ÚS 6/02 of 4 December 2002 the Constitutional Court noted that the Code of Criminal Procedure did not explicitly require that a decision on extension of an accused person's detention be given in cases where an indictment had been filed and where the detention, both at preliminary stage and during the trial, had not exceeded two years. In its judgment the Constitutional Court referred in particular to the guarantees laid down in Article 5 § 1 of the Convention and the Court's judgment in *Stašaitis v. Lithuania*, no. 47679/99 (judgment of 21 March 2002, §§ 59-61).

c. Speech of Mr Štefan Harabin, Deputy Prime Minister and Minister for Justice of the Slovak Republic, 2008

Seminar: The role of government agents in ensuring effective human rights protection, Bratislava, 3-4 April 2008

http://www.coe.int/t/e/human_rights/awareness/9._publications/bratislava/PROCEEDINGS&COVER.pdf

Pages 14-15: "Naturally, the wording itself of a law, no matter how much in harmony with international guarantees, is not sufficient. It must be linked to such application by the domestic bodies that would equally re**spect the established case law of the European Court of Human Rights**. For this purpose, **it is necessary to ensure that domestic bodies of law application first know and secondly respect this case law**. In this context, the extended information on judgments of the European Court of Human Rights becomes more significant. Therefore, in scope of execution of a specific judgment in the Slovak Republic, the latter is translated into the Slovak language and through minister's or agent's letter the judgment is distributed to the domestic bodies concerned, in particular to the courts. **The domestic bodies must also, however, be acquainted with judgments against other states, since they also may, with regard to the interpretation powers of judgments of the European Court of Human Rights, affect the Slovak application practice**. In the Slovak Republic, the general information on the case law of the European Court of Human Rights is also provided through publication of judgments in the journal for judicial practice named "The Judicial Revue" (Justična revue) the publisher of which is the Ministry of Justice. This journal publishes the Slovak translations of all the judgments and selected decisions against the Slovak Republic, as well as the Slovak translations of selected judgments against other states. […] This journal is distributed to all the courts in the Slovak Republic and equally available to any and all of the barristers, public prosecutors and other legal professions, including the public at large.

[…] Government agent[s] also participate[] at regular meetings of the presidents of district and regional courts. At the meetings, the government agents can inform on the latest case law of the European Court of Human Rights that must be respected without delay, and [they] can also point out to some defects in the judicial practice, and he/she equally can respond immediately to the questions concerning the issues of human rights and fundamental freedoms protection."

18. Turkey

a. Article 90 of the Turkish Constitution of 7 November 1982 as amended 17 October 2001

http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf

"Article 90 Ratification of International Treaties […]

(5) International agreements duly put into effect bear the force of law. [...] In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."

b. Constitutional Court of Turkey Judgement No. 2003/33 of 10 April 2003

http://www.anayasa.gov.tr/index.php?l=manage_karar&ref=show&action=karar&id=1840&content=

The Constitutional Court of Turkey, in its decision 2003/33 on expropriation in the public interest, referred to the Strasbourg Court's decisions which did not involve Turkey, namely: *Papamichalopoulos v. Greece* of 24 June 1993, *Carbonara and Venture v. Italy* of 11 December 2003) and *Belvedere Alberghiera S.R.L. v. Italy* of 30 October 2003.

19. Ukraine

a. Ukrainian Law No.3477–IV of 2006

Annexed to Parliamentary Assembly Report on the implementation of judgments of the European Court of Human Rights, by Mr. Erik Jurgens, 18 September 2006, Assembly Doc. 11020

http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc06/edoc11020.htm#P1169_169391

"Section 4. Application of the Convention and the case law of the European Court of Human Rights in Ukraine

Article 17. Application by courts

17.1. While adjudicating cases **courts shall apply** the Convention and **the case law of the Court as a source of law**.

Article 18. Order reference

[...]

18.2. In order to make a reference to judgments and decisions of the Court and decisions of the Commission courts shall use translations published in the outlet specified in Article 6 of this Law.

18.3. In case of the absence of the translation of Judgment or decision of the Court or decision of the Commission, courts shall use their original texts. [...]

18.5. If a linguistic discrepancy between the original texts is found and/or if need be to carry out a linguistic interpretation of the original text courts shall use the relevant case law of the Court.

Article 19. Application in the legislative sphere and administrative practice

19.1. The Office of the Government's Agent shall carry out a legal review of all draft laws, as well as by-laws subject to state registration, as to their compliance with the Convention and shall prepare an opinion thereon.

19.2. If the review specified in part 1 of this Article was not carried out or an opinion on the inconsistency of the by-law was issued, its state registration refused.

19.3. The Office of the Government's Agent shall provide **regular and reasonably periodic examination of current legislation on its consistency with** the Convention and **the Court's case law**, especially in the spheres relating to the activity of law-enforcement bodies, criminal proceedings, and restriction of liberty.

19.4. Following the examination set forth in Article 19.3. of this Law, the Office of the Government's Agent shall submit proposals to the Cabinet of Ministers of Ukraine on amendments to the current legislation in order to bring it in conformity with requirements of the Convention and the relevant Court's case law.

19.5. The ministries and departments shall provide within their competence a systematic control over the **adherence of administrative practice** to the Convention **and the Court's case law**."

b. Current Developments

Examples provided by Dmytro Kotliar, former Deputy Minister of Justice of Ukraine

Application no. 36813/97, judgment of 29 July 2004

Ukrainian courts have been referring in their decisions to the case law of the European Court of Human Rights, including judgments against other States. For example, the Supreme Court of Ukraine referred in its decisions regarding the right to freedom of expression to the judgment in case of *Lingens v. Austria* (Application no. 9815/82, judgment of 8 July 1986). Examples among others are the cases No. 6-8152кс05 of 4 July 2007 and No. 6-16433св08 of 28 January 2009

In the Resolution of the Plenary Assembly of the Supreme Court of Ukraine, which has a force of an interpretive recommendation to lowers courts, on the Judicial Practice in Cases concerning Protection of Dignity and Honour of Natural Persons and Business Reputation of Natural and Legal Persons (No. 1 of 27 February 2009), case law of the ECHR on Articles 8 and 10 of the Convention was used as a basis for legal positions concerning distinguishing value judgments from facts and public right to know that outweighs protection of personal data. Nevertheless, no specific judgments were mentioned as examples.

Moreover, in a number of its decisions the Constitutional Court of Ukraine referred to judgments of the European Court of Human Rights with respect to other countries as a part of its legal reasoning. For example:

- case concerning creditors of municipal enterprises (decision of 20 June 2007), refers to ECHR judgment *Osman v. the United Kingdom* (Application no. 87/1997/871/1083, judgment of 28 October 1998);
- case concerning creation of political parties (decision of 12 June 2007), judgments *Rekvenyi v. Hungary* (Application no. 25390/94, judgment of 10 May 1999), *Refah Partisi (the Welfare Party) and Others v. Turkey* (Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98, judgment of 13 February 2003);
- case concerning dissemination of information (decision of 10 April 2003), judgments *Nikula v. Finland*, (Application no. 31611/96, judgment of 21 March 2002) and *Janowski v. Poland* (Application no. 25716/94, judgment of 21 January 1999) ;
- case concerning savings of citizens (decision of 10 October 2001), judgment in *James and Others v. UK* (Application no. 8793/79, judgment of 21 February 1986).

Additionally, other courts have also been referring to the judgments of the ECHR against other States. For example, in its judgment of 15 October 2008 in the case No. 1-1/2008 the Kirovograd District Court referred to the ECHR judgment in *Teixeira de Castro v. Portugal* (Application no. 44/1997/828/1034,

judgment of 9 June 1998). In another example, the Sevastopol Administrative Court of Appeal referred to *Burdov v. Russia* (Application no. 33509/04, judgment of 15 January 2009) in its judgment of 16 June 2009 (Case No. 2-a-266/09/0105) on the payment of social benefits.

But not only the Ukrainian judiciary is reacting to the Strasbourg Court's judgments against other states, but also Ukraine's legislature. The interpretative authority of the ECHR judgments prompted the Government of Ukraine to initiate amendments in the legislation to prevent Court's judgments finding similar violations of the Convention by Ukraine. In January 2010 the Parliament of Ukraine adopted a law amending national legislation concerning the right to correspondence of persons in detention or imprisonment.[23] The explanatory note to the relevant draft law[24] directly states that it was prepared by the Government in view of the inconsistence of the national legislation with Article 8 of the ECHR as interpreted in judgments of the European Court in cases of *Campbell v. UK* (Application no. 13590/88, judgment of 25 March 1992), *Schönenberger and Durmaz v. Switzerland* (Application no. 11368/85, judgment of 20 June 1988), *A.B. v. the Netherlands* (judgment of 29 January 2002), *Klamecki v. Poland* (Application no. 25415/94, judgment of 03 April 2003). At the time of preparation of the draft law there were no judgments delivered by the Court against Ukraine finding similar violations.

To bring Ukrainian law in line with Article 5 of the Convention, as interpreted by the European Court of Human Rights, the Government of Ukraine prepared and the parliament adopted on 9 September 2010 a law on amendments to legislation concerning placing of children in juvenile reception centres.[25] No judgments against Ukraine on this matter had been delivered by the Strasbourg Court at the time when the draft law was prepared and submitted to Parliament. Explanatory note to the draft law[26] refers to *Kurt v. Turkey* (Application no. 15/1997/799/1002, judgment of 25 May 1998).

In another example judgments of the Court against other states were used in Ukraine to substantiate adoption of the law providing for an effective legal remedy in cases of violation of the right to a fair trial within a reasonable time. Relevant draft law has been prepared by the Government of Ukraine and refers to *Hornsby v. Greece* (Application no. 18357/91, judgment of 19 March 1997), and *Kudla v. Poland* (Application no. 30210/96, judgment of 26 October 2000), along with *Merit v. Ukraine* (Application no. 66561/01, judgment of 30 March 2004).[27] However, the law has yet to be adopted by the Parliament.

20. United Kingdom

a. Human Rights Act 1998

Human Rights Act 1998 (c. 42)

http://www.legislation.gov.uk/ukpga/1998/42/data.pdf

Section 2: Interpretation of Convention rights.

(1) "A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any —

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

(b) opinion of the Commission [...] adopted under Article 31 of the Convention,

(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

(d) decision of the Committee of Ministers taken under Article 46 of the Convention,

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen."

b. Statement of Home Secretary of State for the Home Department on Search Powers under Section 44 of the Terrorism Act 2000, 8 July 2010

House of Commons Debate, 8 July 2010, c540

[23] Law No. 1829-VI of 21 January 2010, On Amending Certain Legislative Acts of Ukraine to Ensure the Right to Correspondence of Persons in Detention and Convicted Persons.
[24] Available at http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=32443.
[25] Law No. 2507-VI of 9 September 2010, On Amending Certain Legislative Acts of Ukraine concerning Placing Children in Juvenile Reception Centres.
[26] Available at http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=35168.
[27] See Draft Law No. 3665 of 28 January 2009, On Amending Certain Legislative Acts of Ukraine concerning the Right of Person to Pre-Trial Proceedings, Trial or Enforcement Proceedings within a Reasonable Time. Available at http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=34272.

http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100708/debtext/100708-0001.htm#10070875001177

"Mr Speaker, I would like to make a statement on stop and search powers under section 44 of the Terrorism Act 2000.

On Wednesday last week, the European Court of Human Rights […] found that the stop and search powers granted under section 44 of the Terrorism Act 2000 amount to the violation of the right to a private life. […]

I can, therefore, tell the House that I will not allow the continued use of section 44 in contravention of the European Court's ruling and, more importantly, in contravention of our civil liberties. [...]

In order to comply with the judgment-but to avoid pre-empting the review of counter-terrorism legislation-I have decided to introduce interim guidelines for the police."

c. The Supreme Court – Annual Reports and Accounts 2009-2010

http://*www*.supremecourt.gov.uk/docs/ar_2009_10.pdf

Page 26-27: "On 9 December 2009, the Supreme Court dismissed an appeal relating to the admission of hearsay evidence in criminal trials. In so doing it **did not follow a recent decision of the European Court of Human Rights** (ECHR) in Strasbourg, which had held that convictions based solely or to a decisive extent on the evidence of witnesses that were not available for cross-examination in court breached the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights.

The **Supreme Court unanimously held that courts take into account any judgment of the Strasbourg court** in relation to the evidence of witnesses unavailable for cross-examination. However on rare occasions, such as *R v. Horncastle* and others this did not mean a breach of Article 6.

The Court expressed concerns that the decision of the Strasbourg court had not sufficiently appreciated or accommodated particular aspects of the UK trial process and the safeguards in the statutory scheme. The ECHR decision had not fully considered whether it was justified to impose the rule equally on common law and continental jurisdictions and it would create severe practical difficulties if applied to English criminal procedure."

d. R (GC & C) v. Commissioner of the Police of the Metropolis (2010)

*R (*GC & C*) v. Commissioner of the Police of the Metropolis [2010] EWHC 2225, Case No. CO/15170/2009 of* 16. July 2010

http://www.bailii.org/ew/cases/EWHC/Admin/2010/2225.html

Lord Moses:

"30. In my judgment, this court is bound by the decision of the House of Lords. The doctrine of precedent and the legal certainty which that doctrine protects demands that this court follows the decision in S. and Marper."

"31. In *K & Ors v. Lambeth Borough Council* [2006] 2 AC page 465, Lord Bingham identified that principle and its application in relation to conflicting decisions of the House of Lords with the Strasbourg court. He said:

> "44. There is a more fundamental reason for adhering to our domestic rule. The effective implementation of the Convention depends on constructive collaboration between the Strasbourg court and the national courts of member states. The **Strasbourg court authoritatively expounds the interpretation of the rights embodied in the Convention and its protocols**, as it must if the Convention is to be uniformly understood by all member states. But in its decisions on particular cases the Strasbourg court accords a margin of appreciation, often generous, to the decisions of national authorities and attaches much importance to the peculiar facts of the case. Thus it is for national authorities, including national courts particularly, to decide in the first instance how the principles expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions. It is by the decisions of national courts that the domestic standard must be initially set, and to those decisions the ordinary rules of precedent should apply.""

"33. […] The fact that the parties were the same, both in the House of Lords and in Strasbourg affords no ground for failing to follow the decision of the House of Lords."

"35. Accordingly, I conclude that this court is bound by the decision of the House of Lords. The appropriate course that I would take is that which is indicated in page 43 of the speech of Lord Bingham,

namely, that this court should give permission to appeal and order a leapfrog appeal to which I should record both the defendant and the Secretary of State have specifically accented. "

e. R (Ullah) v. Special Adjudicator (2004)

R (Ullah) v. Special Adjudicator [2004] 2 AC 323, *per Lord Bingham*

http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040617/ullah-2.htm

"20. In determining the present question, **the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court**: *R (Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, paragraph 26. This reflects the fact that the **Convention** is an international instrument, the **correct interpretation of which can be authoritatively expounded only by the Strasbourg** court. From this it follows that a **national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law**. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. **The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less**."

f. Al Skeini and others (2004)

Al Skeini [2004] EWHC 2911, Case No: CO/2242/2004

http://www.bailii.org/ew/cases/EWHC/Admin/2004/2911.html

This case is a very good example on how a British divisional Court ploughed its way through all the Strasbourg case law to determine the scope of the extraterritorial application of the UK's human rights obligations.

Paragraph 108: "There is a rich jurisprudence emanating from Strasbourg concerning the jurisdiction of the Convention, on which we have been addressed in detailed written and oral submissions on behalf of the claimants and the Secretary of State respectively. It is not possible to do justice to the parties' submissions without setting out the basic material of that jurisprudence, […]"

Paragraph 116: "In the light of these conflicting submissions, there is no alternative to reviewing in detail the Strasbourg authorities presented to us. To give focus and point to that review, while at the same time mindful of the different readings given by the parties to *Bankovic* itself, we think it is appropriate and necessary to start with some reference to the Court's reasoning in *Bankovic*, before we put it in its place as part of a chronological account of the Strasbourg jurisprudence."

g. Re McKerr (2004)

Re McKerr [2004] 1 WLR 807 at paragraph 65-66 per Lord Hoffmann

http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040311/mckerr-3.htm

"65. It should no longer be necessary to cite authority for the proposition that the Convention, as an international treaty, is not part of English domestic law. [...] That proposition has been in no way altered or amended by the 1998 Act. Although people sometimes speak of the Convention having been incorporated into domestic law, that is a misleading metaphor. What the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention. They are available against specific public authorities, not the United Kingdom as a state. And their meaning and application is a matter for domestic courts, not the court in Strasbourg."

"66. This last point is demonstrated by the provision in section 2(1) that a court determining a question which has arisen in connection with a Convention right must "take into account" any judgment of the Strasbourg court. Under the Convention, the United Kingdom is bound to accept a judgment of the Strasbourg court as binding: Article 46(1). But a court adjudicating in litigation in the United Kingdom about a domestic "Convention right" is not bound by a decision of the Strasbourg court. It must take it into account."

h. R (RJM) v. Secretary of State for Work and Pensions (2008)

R (RJM) v. Secretary of State for Work and Pensions [2008] 3 WLR 1023

http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd081022/rjm-3.htm

"64. Where the Court of Appeal considers that an earlier decision of this House, which would otherwise be binding on it, may be, or even is clearly, inconsistent with a subsequent decision of the ECHR, then (absent wholly exceptional circumstances) the court should faithfully follow the decision of the House, and leave it to your Lordships to decide whether to modify or reverse its earlier decision. To hold otherwise would be to go against what Lord Bingham decided. As a matter of principle, it should be for this House, not for the Court of Appeal, to determine whether one of its earlier decisions has been overtaken by a decision of the ECHR. As a matter of practice, as the recent decision of this House in Animal Defenders [2008] 2 WLR 781 shows, decisions of the ECHR are not always followed as literally as some might expect. As to what would constitute exceptional circumstances, I cannot do better than to refer back to the exceptional features which Lord Bingham identified as justifying the Court of Appeal's approach in East Berkshire [2004] QB 558: see Kay [2006] 2 AC 465, paragraph 45.

65. When it comes to its own previous decisions, I consider that different considerations apply. It is clear from what was said in Young [1944] KB 718 that the Court of Appeal is freer to depart from its earlier decisions than from those of this House: a decision of this House could not, I think, be held by the Court of Appeal to have been arrived at *per incuriam*. Further, more recent jurisprudence suggests that the concept of *per incuriam* in this context has been interpreted rather generously - see the discussion in the judgment of Lloyd LJ in *Desnousse v. Newham London Borough Council* [2006] EWCA Civ 547, [2006] QB 831, paragraphs 71 to 75.

66. The principle promulgated in Young [1944] KB 718 was, of course, laid down at a time when there were no international courts whose decisions had the domestic force which decisions of the ECHR now have, following the passing of the 1998 Act, and in particular section 2(1)(a). **In my judgment, the law in areas such as that of precedent should be free to develop**, albeit in a principled and cautious fashion, to take into account such changes. Accordingly, I would hold that, where it concludes that one of its previous decisions is inconsistent with a subsequent decision of the ECHR, the Court of Appeal should be free (but not obliged) to depart from that decision."

i. R v. Horncastle and others (2009)

R v. Horncastle and others [2009] UKSC 14

http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0073_Judgment.pdf

Paragraph 11: "The requirement to "take into account" the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case."

j. Cadder v. Her Majesty's Advocate (Scotland) (2010)

Cadder v. Her Majesty's Advocate (Scotland) [2010] UKSC 43

http://www.bailii.org/uk/cases/UKSC/2010/43.html

The court ruled that whilst the Scottish High Court's decision, to allow for the questioning of suspects by the police for up to 6 hours without legal assistance, was entirely in line with previous domestic authority, that authority cannot survive in the light of the Strasbourg Grand Chamber's judgment in *Saludz v. Turkey* (2008)

Lord Hope

"26. The situation in this appeal however, as it was in *HM Advocate v. McLean 2010 SLT 73*, is that no solicitor was present at any stage either before or during the interview. In McLean, having examined the decision of the Grand Chamber in Salduz, the appeal court took the view that it permitted "certain flexibility in the application of the requirement": paragraph 24, last sentence. It saw no reason to depart from the approach that had been laid down in *Paton v. Ritchie 2000 JC 271* and *Dickson v HM Advocate 2001 JC 203*. […]

[…]

29. **There is no doubt that the appeal court's decision** in McLean **was entirely in line with, and fully supported by, previous authority**. **The question, however, is whether it can survive scrutiny in the light of what the Grand Chamber said in *Salduz v. Turkey*** (2009) 49 EHRR 19."

[…]

33. The more one reads on through the [*Salduz v. Turkey*] judgment, however, the clearer it becomes that the Grand Chamber was determined to tighten up the approach that must be taken to protect a detainee against duress or pressure of any kind that might lead him to incriminate himself. […]

[…]

41. The statement in paragraph 55 [of *Salduz v. Turkey*] that article 6(1) requires that, "as a rule", access to a lawyer should be provided as from the first interrogation of a suspect must be understood as a statement of principle applicable everywhere in the Council of Europe area. The statement that the rights of the defence will "in principle" otherwise be irretrievably prejudiced must be understood in the same way. It is true that the use of such expressions indicates that there is room for certain flexibility in the application of the requirement, as the Lord Justice General said in *HM Advocate v. McLean*, paragraph 24. But they do not permit a systematic departure from it, which is what has occurred in this case under the regime provided for by the statute.

[…]

Should the court follow Salduz

45. The starting point is section 2(1) of the Human Rights Act 1998, which provides that a court which is determining a question which has arisen in connection with a Convention right must "take into account" any decision of the Strasbourg court. The United Kingdom was not a party to the decision in *Salduz* nor did it seek to intervene in the proceedings. The United Kingdom was not a party to the decision in *Salduz* nor did it seek to intervene in the proceedings. As the Lord Justice General observed in *McLean*, paragraph 29, the implications for the Scottish system cannot be said to have been carefully considered. But in *R (Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, paragraph 26, Lord Slynn of Hadley said that the court should follow any clear and constant jurisprudence of the Strasbourg court. And in *R (Anderson) v. Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837, paragraph 18, Lord Bingham of Cornhill said the court will not without good reason depart from the principles laid down in a carefully considered judgment of the court sitting as a Grand Chamber. In *R v. Spear* [2002] UKHL 31, [2003] 1 AC 734, on the other hand, the House refused to apply a decision of the Third Section because, as Lord Bingham explained in paragraph 12, they concluded that the Strasbourg court had materially misunderstood the domestic legal context in which courts martial were held under United Kingdom law. And in *R v. Horncastle* [2009] UKSC 14, [2010] 2 WLR 47 this court declined to follow a line of cases in the Strasbourg court culminating in a decision of the Fourth Section because, as Lord Phillips explained in paragraph 107, its case law appeared to have been developed largely in cases relating to the civil law without full consideration of the safeguards against an unfair trial that exist under the common law procedure.

46. In this case the **court is faced with a unanimous decision of the Grand Chamber. This, in itself, is a formidable reason for thinking that we should follow it**. […]

47. As for the question whether *Salduz* has given rise to a clear and constant jurisprudence, the case law shows that it has been followed repeatedly in subsequent cases. A full list was provided in its helpful written intervention by JUSTICE. There are far too many for them all to be mentioned in this judgment. The following selection is sufficient to show that the court has consistently applied the ruling in *Salduz. […]*

48. In my opinion the **Strasbourg court** has shown by its consistent line of case law since *Salduz* that the Grand Chamber's finding in paragraph 55 is now **firmly established in its jurisprudence**. […] **The conclusion that I would draw as to the effect of *Salduz* is that the contracting states are under a duty to organise** their systems in such a way as to ensure that, unless in the particular circumstances of the case there are compelling reasons for restricting the right, a person who is detained has access to advice from a lawyer before he is subjected to police questioning [, i.e. implement the Court's interpretation of Article 6].

49. As JUSTICE has shown by the materials referred to in its written intervention, **the majority of those member states which prior to *Salduz* did not afford a right to legal representation at interview (Belgium, France, the Netherlands and Ireland) are now recognising that their legal systems are, in this respect, inadequate**. In the Netherlands the Supreme Court has held that a suspect arrested by the police must be offered the opportunity to consult a lawyer before being interviewed and that an

arrested minor was entitled to have the assistance of a lawyer while being interviewed: LJN BH3079, 30 June 2009. In France the Conseil Constitutionnel has held that articles 62 and 63 of the Code of Criminal Procedure, which authorise the questioning of a person remanded in police custody (the process known as la garde à vue) but do not allow the person held against his will to have the benefit of legal assistance while undergoing questioning, are unconstitutional because they could not be reconciled with articles 9 and 16 of the Déclaration of 1789 des droits de l'homme et du citoyen: Décision No 2010-14/22 QPC, 30 July 2010. It postponed the effect of its decision until 1 July 2011 to allow the legislature to remedy the unconstitutionality. The Criminal Chamber of the Cour de Cassation has applied the law as declared by the Conseil Constitutionnel but postponing the effect of its decision, and has set aside two rulings of lower courts which pre-empted the postponement: arrêt no 5699 and arrêts nos 5700 and 5701, 19 October 2010. The Conseil d'Etat in its turn has drawn the government's attention to the fragility, in the light of article 6 of the Convention, of article 706-88 of the code de procédure pénale, which prevents access to legal assistance at this stage: Section de l'intérieur, Projet de loi relatif à la garde à vue, 7 October 2010 (No 384.505). There has, as yet, been no decision as to the effect of *Salduz* in Ireland. […]

50. I should add for completeness that I see **no room for any escape from the *Salduz* ruling** on the ground that the guarantees otherwise available under the Scottish system are sufficient to secure a fair trial. The appeal court made much of this point in *HM Advocate v. McLean*, paragraph 27, as did the Lord Advocate in her address to this court. As I have already said, **the ruling in paragraph 55 of *Salduz* must be read as applicable equally in all the contracting states.**

63. I agree with Lord Rodger's judgement. For the reasons he gives, and these reasons of my own, I would hold that the decisions of the **High Court of Justiciary in *Paton v. Ritchie*** 2000 JC 271, ***Dickson v. HM Advocate*** 2001 JC 203 and ***HM Advocate v. McLean*** 2010 SLT 73 **are no longer good law in the light of the Grand Chamber's ruling in *Salduz* and that they should be overruled**. I would allow the appeal on the ground that leading and relying on the evidence of the appellant's interview by the police was a violation of his rights under article 6(3)(c) read in conjunction with article 6(1) of the Convention.

[Unanimous judgment; 7 judges]

k. Additional Information

UK Joint Committee on Human Rights (2010): Enhancing Parliament's role in relations to human rights judgments, fifteenth report of session 2009-2010, HL Paper 85, HC 455, 26 March 2010, available at: http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/85/85.pdf (05.10.2010).

Effect of judgments against other States

189. As far as we are aware the Government does not have in place any arrangements for systematically monitoring judgments of the European Court of Human Rights against other States and considering, as soon as practicable following the judgment, whether they have any implications for UK law, policy or practice. In the Netherlands, by comparison, the Government's annual report to Parliament on human rights judgments has, since 2006, covered not only judgments of the European Court of Human Rights against the Netherlands, but any judgment which could have a direct or indirect effect on the Dutch legal system. In Switzerland too, since the beginning of 2009 regular reports by the Government to Parliament now cover all Strasbourg Court judgments which may have a bearing on the Swiss legal system, and not just those against Switzerland.

190. In our view, the Government should institute a mechanism for systematically considering the implications for the UK of Court judgments against other States and should provide to Parliament the relevant information indicating exactly what consideration it has given to such other judgments and their possible implications for the UK. We note with interest that this is already done by the Governments of the Netherlands and Switzerland, which include the information in the annual reports to their parliaments. We do not consider that this would be an unduly onerous task. We know that the Government already monitors the cases coming before the European Court of Human Rights with a view to intervening in those which may have implications for UK law, and indeed increasingly does so.

191. We recommend that the Human Rights Division of the Ministry of Justice, working with the Foreign Office, make the necessary arrangements to ensure that systematic consideration is given to whether judgments of the European Court of Human Rights finding a violation by another State have any implications for UK law, policy or practice and that this consideration take place as soon as reasonably practicable after the judgment.

192. We also recommend that the Minister for Human Rights provide a detailed description of the arrangements which are made for this purpose in his memorandum to be provided to the Committee before he next gives oral evidence in relation to human rights judgments. The Minister's memorandum

should also include a summary report of the outcome of this consideration of the implications for the UK of Court judgments finding violations by other States.

193. We suggest that our successor committee consider developing this line of monitoring work by regularly asking the Government what steps it is taking to give effect in UK law to a judgment of the European Court of Human Rights against another State but which clearly has implications for UK law, policy or practice.

F. Extracts from EU Charter of Fundamental Rights

1. Charter of Fundament Rights of the European Union of 12 December 2000

2000/C 364/01 of 19.12.2000

http://www.europarl.europa.eu/charter/pdf/text_en.pdf

Preamble: "This Charter reaffirms, with due regard for [...] the principle of subsidiarity, the rights as they result, in particular, from the [...] European Convention for the Protection of Human Rights and Fundamental Freedoms [...] and the case law of the Court of Justice of the European Communities and of the European Court of Human Rights."

Art. 52 (3): "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

Art. 53: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

2. Note from the Praesidium: Text of the explanations relating to the complete text of the Charter of Fundament Rights of the European Union of 12 December 2000

Brussels, 11 October 2000, Charter 4473/00

http://www.europarl.europa.eu/charter/pdf/04473_en.pdf

Article 52 explanations: "The purpose of Article 52 is to set the scope of the rights guaranteed. […] Paragraph 3 is intended to ensure the necessary consistency between the Charter and the ECHR by establishing the principle that, insofar as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR. This means in particular that the legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR without thereby adversely affecting the autonomy of Community law and of that of the Court of Justice of the European Communities.

The reference to the ECHR covers both the Convention and the Protocols to it. The meaning and **the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the European Court of Human Rights** and by the Court of Justice of the European Communities. The last sentence of the paragraph is designed to allow the Union to guarantee more extensive protection.

The list of rights which may at the present stage, without precluding developments in the law, legislation and the Treaties, be regarded as corresponding to rights in the ECHR within the meaning of the present paragraph is given hereafter. It does not include rights additional to those in the ECHR. […]"

Article 53 explanations: "This provision is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law. Owing to its importance, mention is made of the ECHR. The level of protection afforded by the Charter may not, in any instance, be lower than that guaranteed by the ECHR, with the result that the arrangements for limitations may not fall below the level provided for in the ECHR."

3. Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union of 19 October 2010, communication from the Commission

Brussels, 19 October.2010, COM(2010) 573 final

http://ec.europa.eu/justice/news/intro/doc/com_2010_573_en.pdf

Footnote 7 “The rights and principles enshrined in the Charter stem from the constitutional traditions and international conventions common to the Member States, the European Convention on Human Rights, the Social Charters adopted by the Community and the Council of Europe, and the **case law** of the Court of Justice of the Union and the **European Court of Human Rights”**.