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The *Erga Omnes* Effect of Judgments of the European Court of Human Rights –

What's in a Name?

What's in a name? That which we call a rose
By any other name would smell as sweet.
(Shakespeare, *Romeo and Juliet*, II, ii, 1-2)

Introduction

The *erga omnes* effect (EOE, hereafter) of the judgments issued by the European Court of Human Rights (ECtHR, hereafter) is one of the many proposals made in the 19 February 2010 Interlaken Action Plan to reform the ECtHR.¹ It is part of the new mechanisms designed to enhance subsidiarity in the ECHR system and the latter's effectiveness in the long run.² In a nutshell, granting the ECtHR's judgments EOE implies recognizing the legal (and not only the moral or persuasive) authority of the interpretive and hence

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¹ This is how EOE is defined in the Interlaken Action Plan under Section 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; [...]*" (emphasis added).

² See e.g. Contribution of the Secretary General of the Council of Europe to the Preparation of the Interlaken Ministerial Conference, 14 January 2010, para. 17: "17. Subsidiarity thus requires that the authority of the Court's case law should also be reinforced."

generalizable part of those judgments in all 47 States Parties to the European Convention on Human Rights (ECHR, hereafter).³

Of course, this is not a new proposal and it has been made repeatedly since the 1990s. Over the years, it has taken various guises, however. Different actors have had different takes on the issue. Some even argue that the ECtHR's judgments already benefit from a kind of EOE.⁴ Others distinguish between the proposed *de jure* EOE and a form of *de facto* EOE that already applies.⁵ Beneath the flurry of references, however, the general impression is that the concept of EOE, its legal status, its justifications, its consequences and its implementation are in need of clarification.⁶ Existing proposals

³ According to the ECtHR, in *Ireland v. United Kingdom*, No. 5310/71, 18 January 1978, para. 154: "[...] 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)."

⁴ See e.g. Michael O'BOYLE, Deputy Registrar of the European Court of Human Rights, "The Convention as a Subsidiary Source of Law", Conference "Strengthening Subsidiarity – Integrating the Court's Case-Law into National Law and Judicial Practice" (Skopje, 1–2 October 2010), available on http://assembly.coe.int/CommitteeDocs/2010/20101125_skopje.pdf.

⁵ See e.g. Interlaken follow-up, Principle of subsidiarity, Note by the Jurisconsult, European Court of Human Rights, 8 July 2010. As I will argue, this distinction presumably opposes the legal authority of the Court's case-law to its moral or persuasive authority (see also Elisabeth LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour européenne des droits de l'homme*, Bruxelles, Bruylant, 1999, pp. 303–4). For an empirical study on the ECtHR's judgments' persuasive authority in practice, see Laurence L. HELFER, Erik VOETEN, "Do European Court of Human Rights Judgments Promote Legal and Policy Change?", (2011), available on SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1850526.

⁶ Surprisingly, the academic literature is also quite scarce on the topic. Besides a seminal study published more than 10 years ago (LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, op. cit., note 5), one may mention the following articles: e.g. Frank CZERNER, "Inter partes - versus erga omnes- Wirkung der EGMR-Judikate in den Konventionsstaaten gemäß Art. 46 EMRK", *Archiv des Völkerrechts*, no. 3, vol. 46, 2008, pp. 345–367; Eckart KLEIN, "Should the Binding Effect of the Judgment of the European Court of Human Rights be Extended", in Paul MAHONEY et al., eds, *Protection des droits de l'homme : la perspective européenne, mélanges à la mémoire de Rolf Ryssdal*, Cologne, Carl Heymanns Verlag, 2000, pp. 705–713, esp. p. 711; Gérard COHEN-JONATHAN, "Quelques considérations sur l'autorité des arrêts de la Cour européenne des droits de l'homme", in *Libri amicorum Marc-André Eissen*, Bruxelles, Bruylant, 1995, pp. 39–64; Jacques VÉLU, "A propos de l'autorité jurisprudentielle des arrêts de la Cour européenne des droits de l'homme : vues de droit comparé sur les évolutions en cours", in *Nouveaux itinéraires en droit, Hommage à François Rigaux*, Bruxelles, Bruylant, 1993, pp. 527–562. The main commentaries and textbooks in French, English and German on

usually restrict themselves to stating the idea of EOE and do not expand on its criteria and mechanisms of implementation. Regrettably given this state of affairs, not much guidance was provided by the Interlaken Action Plan and its Follow-Up Plan adopted in Izmir on 27 April 2011.⁷ The aim of this article therefore is to address the concept of EOE anew and provide some much needed clarification.

Two caveats are in order, however. The first one is terminological, as one should stress how fluctuating the terminology is. The term *erga omnes* effect is indeed used interchangeably with terms such as jurisprudential or interpretive authority. Different linguistic versions of the same concept are not to be underestimated either, especially given the different judicial traditions represented within the Council of Europe. Terminological fluctuation signals an important conceptual indetermination, however, and one that terminological clarification alone cannot solve. The second caveat is

the ECHR are mostly silent on the question or extremely brief (except for Frédéric SUDRE, *Droit européen et international des droits de l'homme*, 10th edn, Paris, PUF 2011, pp. 820–823). The same may be said of the major study on the reception of the ECHR published by Helen KELLER, Alec STONE SWEET, eds, *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford, Oxford University Press, 2008, in which some chapters touch upon the question albeit not systematically (e.g. 8, 84, 87, 479, 619). For a very useful resource on the EOE published in the Interlaken aftermath, see Committee on Legal Affairs and Human Rights, Contribution to the Conference "Strengthening Subsidiarity – Integrating the Court's Case-Law into National Law and Judicial Practice" (Skopje, 1–2 October 2010), http://assembly.coe.int/CommitteeDocs/2010/20101125_skopje.pdf, and in particular the contributions by Christos POURGOURIDES, "Address" and "Compilation of Background Material on the interpretative authority of the Strasbourg Court's Judgments". See for further official elucidations of the concept of EOE: "L'autorité de la jurisprudence de la Cour", Discours de M. Jean-Paul COSTA, Président Cour EDH, 20 Septembre 2007, Conférence régionale, Le rôle des cours suprêmes dans la mise en oeuvre de la Convention européenne des droits de l'homme au niveau interne, Belgrade, 20 Septembre 2007; Elisabeth FURA-SANDSTRÖM, "Amplifying the effect of the Court's case law in the States Parties", in Conseil de l'Europe, *La réforme de la Convention européenne des droits de l'homme: un travail continu*, Strasbourg, Council of Europe Publishing, 2009, disponible à <http://www.echr.coe.int/library/DIGDOC/DG2/ISBN/COE-2009-EN-9789287166043.pdf>, p. 511; Memorandum of the President of the Strasbourg Court to States with a view of preparing the Interlaken Conference, 3 July 2009; 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, Mrs Herta DAUBLER-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; Preliminary Contribution by the President of the Court to the Izmir Conference, 26–27 April 2011.

institutional and pertains to the hybrid nature of the ECtHR and the ECtHR. *Qua* international human rights convention, the ECHR is formally an international treaty, but its content is materially of a constitutional kind. This transpires from its judicial system as the ECtHR is both an interstate and individual-state dispute settlement mechanism akin to other international adjudication mechanisms and a court with constitutional functions akin to those of domestic constitutional justice. The difficulties triggered by the concept of EOE are one of the symptoms of that institutional ambiguity within the ECHR system. The latter has to be addressed therefore in order for some of those conceptual difficulties to dissolve.

The gist of my argument is that, contrary to the rose in Romeo and Juliet, there is much in the name '*erga omnes* effect'. The term refers to the international law origins of the Convention and the Court, but is either carefully avoided or re-named almost every time it is used in an official context and a legal proposal is made in its respect.⁸ It is important, however, to face the international law term for what it is and implies for the ECHR system, and that the underlying concept be clarified in that light and the broader institutional implications assessed.

My argument is five-pronged. After a first section devoted to delineating the concept of EOE and clarifying the terminology (I.), its current legal status in European and domestic law as well as various recent proposals are discussed in a second section (II.). In section three, I discuss potential justifications for the EOE (III.). Sections four and five are devoted to proposing a normative regime of EOE (IV.) and articulating some domestic and European mechanisms to implement it in the future (V.).

I. The concept of *erga omnes* effect of judgments

In order to clarify the concept of *erga omnes* effect, one should start by explaining the notion and its relationship to jurisprudential authority (A.), then draw two distinctions that help narrow down the various understandings of the notion (B.) and, finally, delineate it from other related notions (C.).

⁸ The term '*erga omnes* effect' does not actually appear in the Interlaken Action Plan or the Izmir Follow-Up Plan. Nor is it ever mentioned as such in the ECtHR's case-law. There are a few exceptions, of course, but they mostly appear in non-official documents such as personal speeches or experts' reports. See e.g. Philippe BOILLAT, in this volume, pp. 17 ff.

A. The concept and its conceptions

Understanding the concept of *erga omnes* effect *qua* jurisprudential authority (2.) implies first explaining how jurisprudential authority differs from decisional authority (1.).

1. Jurisprudential authority and decisional authority

Jurisprudential or interpretive authority is the authority of the interpretation of a Convention right in a Court's judgment. Once released by the Court, that interpretation becomes an integral part of the authority of the ECHR right itself. As such, it binds all 47 States Parties to the Convention. Jurisprudential authority is not foreseen by the Convention itself, however, and its legal status and justification are the topic of the present contribution.

By contrast, decisional authority is the authority of the operative part of a Court's judgment and comes on top of the authority of the ECHR right at stake. As such, it only binds the State Party concerned by the judgment. The decisional authority of the Court's judgments is recognized by Article 46 paragraph 1 ECHR.⁹

⁹ On the decisional authority of the ECtHR's judgments and their execution, see e.g. Andreas VON STADEN, *Between Norms and Rationality: Compliance with the Judgments of the European Court of Human Rights*, 2012 forthcoming; Samantha BESSON, "Les effets et l'exécution des arrêts de la Cour européenne des droits de l'homme – Le cas de la Suisse", in Bernhard EHRENZELLER, Stephan BREITENMOSER, eds, *EMRK und die Schweiz*, St Gallen, Institut für Rechtswissenschaft und Rechtspraxis, 2010, pp. 125-199; Xavier-Baptiste RUEDIN, *L'exécution des arrêts de la Cour européenne des droits de l'homme*, Basel, Helbing Lichtenhahn, 2009; Jean-François FLAUS, "L'effectivité des arrêts de la Cour européenne des droits de l'homme: du politique au juridique ou vice-versa", *Revue trimestrielle des droits de l'homme*, vol. 77, 2009, pp. 27-72; Philippe BOILLAT, "Vers une mise en œuvre renforcée de la Convention européenne des droits de l'homme au niveau national", *Revue trimestrielle des droits de l'homme*, vol. 77, 2009, pp. 17-26; Elisabeth LAMBERT ABDELGAWAD, *L'exécution des arrêts de la Cour européenne des droits de l'homme*, 2nd edn, Strasbourg, Council of Europe Publishing, 2008; Frédéric SUDRE, "L'effectivité des arrêts de la Cour européenne des droits de l'homme", *Revue trimestrielle des droits de l'homme*, vol. 76, 2008, pp. 917-947; Jochen A. FROWEN, "The Binding Force of ECtHR Judgments and its Limits", in Stephan BREITENMOSER et al., eds, *Human rights, democracy and the rule of law, liber amicorum Luzius Wildhaber*, Zurich, Dike, 2007, pp. 261-269; Françoise TULKENS, "L'exécution et les effets des arrêts de la Cour européenne des droits de l'homme. Le rôle du judiciaire", in Cour européenne des droits de l'homme, ed., *Dialogue entre juges 2006*, Strasbourg, Council of Europe Publishing, 2006, pp. 9-18, p. 12; Georg RESS, "The Effect of Decisions and Judgments of

Jurisprudential authority does not correspond to an obligation to execute the judgment, but only to conform to its interpretation of the Convention right when respecting that right. By contrast, decisional authority according to Article 46 paragraph 1 ECHR gives rise to an obligation to execute. In case a judgment's jurisprudential authority is not respected, this amounts to a primary violation of the Convention. The content, scope and degree of that authority remain to be assessed, however, and this is the topic of the present contribution. By contrast, the violation of a judgment's decisional authority amounts to a non-execution of a Court's judgment and triggers one or all the procedures described in Article 46 paragraphs 2 to 4 ECHR. The details of the monitoring of the execution of the Court's judgments are well-known and I will not rehearse them in this article.¹⁰

2. *Erga omnes* effect and jurisprudential authority

In the realm of international courts and tribunals, the jurisprudential or interpretive authority of a judgment is usually referred to as its *erga omnes* effect.

The choice of *erga omnes* effect as legal term to refer to the ECtHR's judgments' jurisprudential authority lies in the Convention's international legal nature. *Qua* international treaty interpreted by an international tribunal,

the European Court of Human Rights in the Domestic Legal Order", *Texas International Law Journal*, vol. 40, 2005, pp. 359-382; Theodora CHRISTOU, Juan Pablo RAYMOND, eds, *European Court of Human Rights - Remedies and Execution of Judgments*, London, British Institute of International and Comparative Law, 2005; David LEEB, *Die innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im entschiedenen Fall*, Linz, Trauner, 2001; LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, *op. cit.*, note 5, pp. 65-98 and pp. 99-142; Jörg POLAKIEWICZ, *Die Verpflichtung der Staaten aus den Urteilen des Europäischen Gerichtshofes für Menschenrechte*, Berlin, Springer, 1993; Dieter KILLIAN, *Die Bindungswirkung der Entscheidungen des Europäischen Gerichtshofs für Menschenrechte auf die nationale Gerichte der Mitgliedstaaten der Konvention zum Schutze der Menschenrechte und Grundfreiheiten vom 4. November 1950*, Frankfurt, P. Lang, 1994; Frédéric SUDRE, "L'influence de la Convention européenne des droits de l'homme sur l'ordre juridique interne", *Revue universelle des droits de l'homme*, vol. 3, 1991, pp. 259-274; Henri ROLIN, "L'autorité des arrêts et des décisions des organes de la CEDH", in *L'efficacité des mécanismes juridiques de protection des personnes privées dans le cadre européen*, Grenoble, Cour de Justice de la CEE, 1973, pp. 729-746.

¹⁰ For a full discussion of the decisional authority and the execution of the ECtHR's judgments, see BESSON, "Les effets et l'exécution des arrêts de la Cour", *op. cit.*, note 9. On the mutual reinforcing relationship between decisional and jurisprudential authority, see LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, *op. cit.*, note 5, pp. 337-338.

its decisions should in principle only bind the parties to a dispute (*inter partes* effect, signalled by Article 46 paragraph 1 ECHR). Granting those decisions jurisprudential or interpretive authority in all States Parties to the Convention amounts therefore to recognizing their *erga omnes* effect.

There are two difficulties with the term *erga omnes* in the ECHR context, however. The first one is that most disputes and judicial procedures before the Court are not interstate (Article 33 ECHR): on the contrary, most of them arise between an individual and a State (Article 34 ECHR). In those circumstances, the *inter partes* effect can only refer to an effect *in partem* as it were. As a result, the contrast between *in partem* and *erga omnes* is not that clear in practice. Moreover, strictly speaking the notion of *erga omnes* effect seems to indicate that a judgment's effects are general and go beyond the Convention's 47 States Parties. This is indeed how the *erga omnes* effect of general international law is usually understood. That is not, however, how the ECtHR's judgments' *erga omnes* effect works: it is limited to the 47 States Parties to the Convention. Finally, the notion of *erga omnes* effect does not immediately reflect the difference between the decisional authority and the jurisprudential authority of the judgment and may be wrongly interpreted to mean that the scope of the judgment's full decisional authority becomes *erga omnes*.

It is important therefore to keep both of those qualifications in sight when discussing EOE and to understand it as jurisprudential authority within the scope of the 47 States Parties to the Convention. With those nuances in mind, both terms can be used interchangeably in the ECHR context and will also be in the remainder of this article. However, even though the terms' meaning is identical, it is important to remember the international law origins of the term EOE when assessing its legal status and justifications in the ECHR system, and when considering the institutional implications of EOE from an international law perspective.

B. Distinctions

A complete understanding of the notion of the EOE or jurisprudential authority of the ECtHR's judgments requires two further distinctions: one between *res judicata* and *res interpretata* (1.), and the other between relative and general authority (2.). Jurisprudential authority is the outcome of the combination of those sets of elements: it is the general authority of the *res interpretata*.

1. *Res judicata* and *res interpretata*

The distinction between jurisprudential and decisional authority discussed previously relies on the distinction between two kinds of elements in a judgment.

The *res judicata* corresponds to the content of the individual decision recognizing the violation of the ECHR. It may be found in the decisional or operative part, but also in the grounds of the judgment. By contrast, the *res interpretata* corresponds to the interpretive content of the judgment, i.e. a content that can be generalized beyond the individual case. It usually corresponds to a principle or an autonomous notion. It may only be found, as a result, in the grounds of the judgment and not in its operative provisions.

2. Relative and general authority

The distinction between *inter partes* and *erga omnes* effect of judgments, and accordingly between their decisional and jurisprudential authority discussed previously relies on the broader distinction between relative and general authority one finds in the domestic judicial context.

The general authority of judgments is usually limited to its *res interpretata* elements and this is what one refers to as jurisprudential or interpretive authority. The ECtHR's case-law relative authority in turn is usually restricted to the judgments' *res judicata* and this is what one refers to as decisional authority.¹¹

There are exceptional cases, however, where further combinations of the relative and general authority of a judgment, on the one hand, and of the *res interpretata* and *res judicata* in that judgment, on the other, can be identified.

One may mention, first of all, the relative authority of the *res interpretata* in a judgment. This may be understood either as a consequence of its jurisprudential authority in all States Parties including for the State Party at

stake in the judgment,¹² or as a kind of reinforced decisional authority.¹³ Understanding the *res interpretata* as part of the decisional authority of a Court's judgment is in line with the obligations stemming from Article 46 paragraph 1 ECHR. Those obligations include indeed an obligation to adopt not only individual measures to remedy the consequences of the violation in the particular case, but also general measures to bring an end to the violation and to prevent it from occurring again in the future.

Secondly, the general authority of the *res judicata* in a judgment. One may argue that the operative parts of judgments pertaining to absolute or core ECHR rights may be regarded as binding other States Parties with general decisional authority.¹⁴ This may be explained by reference to the general (*erga omnes*) duties that correspond to imperative human rights (e.g. Article 3 ECHR and the rights enumerated in Article 15 ECHR). There is no difference with respect to those general and imperative duties between the grounds and the operative part of the judgment, and therefore between the jurisprudential authority of those duties for all 47 States Parties and their decisional authority for the State Party directly concerned by the judgment. By extension, albeit for reasons of content and not of nature, it is clear that the ECtHR's interpretations of autonomous concepts (e.g. the notion of private life or family in the Convention) also benefit from a kind of general decisional authority.¹⁵

¹² See e.g. ECtHR, *Vermeire v. Belgium*, No. 12849/87, 29 November 1991, para. 25 by reference to ECtHR, *Marckx v. Belgium*, No. 6833/74, 13 June 1979.

¹³ See e.g. LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, op. cit., note 5, p. 81.

¹⁴ See e.g. LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, op. cit., note 5, p. 76.

¹⁵ See also LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, op. cit., note 5, pp. 324-327.

¹¹ See LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, op. cit., note 5, pp. 77-82 for this distinction and rejecting the alternative distinction between absolute and relative judicial authority (*autorité de chose jugée relative et absolue*) one finds in the domestic context.

The various combinations between relative and general authority, on the one hand, and *res judicata* and *res interpretata*, on the other, are reflected in the table below. In the remainder of the article, I will concentrate on jurisprudential authority *stricto sensu*, i.e. the content of the bottom right-hand corner of the table.

	Relative authority (<i>inter partes</i>)	General authority (<i>erga omnes</i>)
<i>res judicata</i>	Decisional authority (Art. 46 para. 1 ECHR ; <i>autorité relative de chose jugée</i>)	Exceptional: with respect to absolute ECHR rights (reinforced jurisprudential authority)
<i>res interpretata</i>	Consequence of the jurisprudential authority of the judgment for the State Party concerned (reinforced decisional authority)	Jurisprudential or interpretive authority (Art. 1+19+32 ECHR <i>a fortiori</i> ; <i>autorité générale de chose interprétée</i>)

C. Delineations

The notion of EOE or jurisprudential authority needs to be delineated from two related albeit distinct notions: that of precedent (1.) and that of pilot judgments (2.).

1. Jurisprudential authority and precedent

The EOE or jurisprudential authority of a ECtHR’s judgment for all States Parties to the Convention corresponds to the notion of precedent for the Court itself.¹⁶ They are two distinct sides of the same coin: the future

authority of a Court’s judgment for the Court itself, on the one hand, or for all States Parties, on the other.¹⁷

One does not go without the other, as a result. If the Court considers itself bound by its interpretation of the Convention in a previous judgment, that judgment must also bind other States Parties or else this would mean that they could be (indirectly) sanctioned by another judgment of the Court in an individual case without having had a duty to abide by that previous judgment. The reverse is also true, however: it would be incoherent to have the Court’s judgments vested with jurisprudential authority for all States Parties, and not require the Court itself to respect them.¹⁸

Interestingly, the Court has equivocated about the existence of its ‘jurisprudence’, and, more particularly, about the value of its own precedents and their binding nature.¹⁹ Interestingly, that equivocation corresponds to a large extent to the indetermination in matters of EOE and to whether there ought to be such an effect of the Court’s judgments and what the content and scope of their jurisprudential authority should be.

In short, although the Court does not consider itself formally bound by its own decisions, it usually tries to cohere with them and has even regarded them as ‘precedents’ in some cases.²⁰ The Court only distances itself from

¹⁷ See SUDRE, *Droit européen et international, op. cit.*, note 6, p. 821.
¹⁸ See e.g. ECtHR, *Prety v. United Kingdom*, No. 2346/02, 29 April 2002, para. 75.
¹⁹ See on precedents at the ECtHR, e.g. Lucius CAFLISCH, “Precedent in the Practice of the European Court of Human Rights”, (2011) forthcoming; Dragoljub POPOVIĆ, “The Role of Precedent in the Jurisprudence of the European Court of Human Rights”, in Dean SPIELMANN et al., eds, *La Convention européenne des droits de l’homme, un instrument vivant / The European Convention on Human Rights, a Living Instrument*, Brussels, Bruylant, 2011, forthcoming; Katia LUCAS, *Le revirement de la jurisprudence de la Cour européenne des droits de l’homme*, Brussels, Bruylant, 2008; Alastair MOWBRAY, “An Examination of the European Court of Human Rights’ Approach to Overruling its Previous Case law”, *Human Rights Law Review*, no. 2, vol. 9, 2009, pp. 179-201; Georg RESS, “Aspekte der Stabilität der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte”, in Astrid EPINEX, M. HAAG, A. HEINEMANN, eds, *Die Herausforderung von Grenzen, Festschrift Roland Bieber*, Baden, Nomos, 2007, pp. 231-240; Luzius WILDHABER, “Precedent in the European Court of Human Rights”, in Paul MAHONEY et al., eds, *Protection des droits de l’homme: la perspective européenne, mélanges à la mémoire de Rolv Ryssdal*, Cologne, C. Heymanns Verlag, 2000, pp. 1529-1545.
²⁰ See e.g. ECtHR, *Cossey v. United Kingdom*, No. 10843/84, 27 Septembre 1990, para. 35: “It is true that, as she submitted, the Court is not bound by its previous judgments; indeed, this is borne out by Rule 51 para. 1 of the Rules of Court. However, it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the

¹⁶ See on a theory of precedents in international adjudication, e.g. Marc JACOB, “Precedents: Lawmaking Through International Adjudication”, *German Law Journal*, no. 5, vol. 12, 2011, pp. 1005-1032. See on precedent in legal theory more generally, e.g. Grant LAMOND, ‘Precedent’, *Philosophy Compass*, vol. 2, 2007, pp. 699-711; Stephen PERRY, “Judicial Obligation, Precedent and the Common Law”, *Oxford Journal of Legal Studies*, vol. 7, 1987, pp. 215-225.

them for good reasons, such as reflecting societal changes, and it provides justifications when overruling them.²¹ Independently from the Court's position, there is widespread evidence in the Convention itself of the importance of precedent or, at least, of the notion of 'well-established case-law' binding the Court. It suffices to mention, for instance, the references made in Articles 28, 30 and 43 ECHR.

2. Jurisprudential authority and pilot judgments

The EOE and jurisprudential authority of a judgment for all States Parties to the Convention can in principle apply to any judgment of the Court. Of course, some judgments will entail more generalizable elements than others depending on the questions raised and whether they concern general principles or autonomous notions in the Convention.

No doubt, moreover, that some judgments can be drafted so as to maximize their interpretive and generalizable content and hence their jurisprudential authority. Such judgments, however, ought to be distinguished from judgments that are not only drafted so as to entail a large generalizable content in their grounds, but also so as to grant that content decisional authority on a given State Party through the indication of general measures in the operative part of the judgment. It is the case, for instance, of pilot judgments, but also of quasi-pilot judgments.²² Unlike ordinary judgments (so-called 'Article 46 judgments'), pilot judgments entail general measures among their operative provisions. Quasi-pilot judgments are ordinary

orderly development of the Convention case-law. Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day." See also ECtHR, *Chapman v. United Kingdom*, No. 27238/95, 18 January 2001, para. 70.

²¹ See e.g. ECtHR, *Vilho Eskelinen et al. v. Finland*, No. 63235/00, 19 April 2007 by reference to ECtHR, *Pellegrin v. France*, No. 28541/95, 8 December 1999.

²² On pilot judgments, see e.g. Philip LEACH, in this volume, pp. 215 ff; Philip LEACH, Helen HARDMAN, Svetlana STEPHENSON, Brad K. BLITZ, *Responding to Systemic Human Rights Violations – An analysis of pilot judgments of the European Court of Human Rights and their impact at national level*, Antwerpen, Intersentia, 2010; Lech GARLICKI, "Broniowski and After: on the Dual Nature of Pilot Judgments", in Lucius CAFLISCH et al., eds, *Liber amicorum Luzius Wildhaber: Human rights, Strasbourg views*, Kehl-Strasbourg-Arlington, N.P. Engel, 2007, pp. 177-192.

judgments which exceptionally also entail that kind of compulsory general measures within their operative part.²³

While it is true that general measures pertain to a structural problem in a given State Party and can therefore be regarded as constitutive of reinforced decisional authority for that State Party (the relative authority of *res interpretata* discussed previously), the way pilot judgments are drafted is also likely to grant them enhanced jurisprudential authority outside that State Party. It is difficult to think of any of the pilot judgments issued so far as anything else but judgments of principle. Pilot judgments and quasi-pilot judgments contribute, in other words, to the faster consolidation of the *res interpretata* on certain ECHR rights and hence to the extension of its authority to all States Parties. In the remainder of this article, I will concentrate on ordinary judgments, however, and their jurisprudential authority.

II. The legal status of the *erga omnes* effect of judgments

The ECtHR's case-law is sometimes described as already having jurisprudential authority on all 47 States Parties to the Convention.²⁴ At the same time, however, if one refers to the Interlaken Action Plan and to the various reforms proposals before then, it seems that the EOE still needs to be endorsed by most ECHR States Parties and that if there is a jurisprudential authority of the Court's case-law as things stand, it is at the most persuasive or moral.

To help understand this apparent incoherence regarding the EOE's legal status, I will distinguish between the EOE's current legal status in ECHR law and domestic law (A.) and its proposed legal status in various reform proposals, and in the Interlaken Action Plan in particular (B.).

²³ See e.g. ECtHR, *Lukenda v. Slovenia*, No. 23032/02, 6 October 2005; *Xenides-Arestis v. Turkey*, No. 46347/99, 22 December 2005. For a critique of those judgments, see BESSON, "Les effets et l'exécution des arrêts de la Cour", *op. cit.*, note 9.

²⁴ See e.g. the 'description' of the current Court's practice made by O'BOYLE, "The Convention as a Subsidiary Source of Law", *op. cit.*, note 4.

A. The current legal status

Due to its international law origins and its domestic reception, there are two dimensions to the current legal regime of jurisprudential authority of the ECtHR's case-law: its ECHR law dimension (1.) and its domestic law dimension (2.). As a matter of fact, one may venture that it is precisely because of those two dimensions in the EOE legal regime that it is sometimes regarded as already required legally. Some States Parties have long recognized the ECtHR case-law's jurisprudential authority, while other have not done so or, at least, very differently in terms of its degree, rank and scope.

1. According to ECHR law

ECHR law entails *à la fois* the Convention itself (a.) and its interpretation by the ECtHR (b.). As it stands, the text of the Convention does not grant EOE, but the ECtHR's case-law and its interpretation of the Convention do.

a. According to the ECHR

There is no evidence in the text of the ECHR to the ECtHR's case-law's jurisprudential authority. Article 46 paragraph 1 ECHR refers to its decisional authority only and restricts it to the parties to the case at hand.²⁵ One may even argue that the exclusion of other States Parties from the scope of Article 46 paragraph 1 ECHR may be interpreted as a tacit exclusion of the ECtHR's jurisprudential authority, at least *qua* legal authority.

As indicated above, however, there is evidence to the importance of precedents or, at least, of 'well-established case-law' binding the Court in the Convention itself. It suffices to mention, for instance, Articles 28, 30 and 43 ECHR. Given the mutual relationship between precedents and jurisprudential authority, one may argue that the latter also finds some grounding in those provisions. Moreover, since the 1990s, the Court has repeatedly regarded its case-law as part of the sources of ECHR law. According to the Court, the *res interpretata* in each of its judgments becomes an integral part of the ECHR right interpreted. The principle behind that combination of the Convention and the Court's case-law is sometimes

referred to as the principle of solidarity and its outcome as the *corpus juris conventionis*.²⁶

b. According to the ECtHR's case-law

The EOE is by and large a jurisprudential creation.²⁷ This is because ECHR rights are legal principles and, as such, their meaning and corresponding

²⁶ See e.g. VELU, "A propos de l'autorité jurisprudentielle", *op. cit.*, note 6, pp. 560 ff.; SUDRE, "L'influence", *op. cit.*, note 9, p. 271.

²⁷ ECtHR, *Ireland v. United Kingdom*, No. 5310/71, 18 January 1978, para. 154: "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)." See also ECtHR, *Prety v. United Kingdom*, No. 2346/02, 29 April 2002, para. 75: "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." ECtHR, *Karner v. Austria*, No. 40016/98, 24 July 2003, para. 26: "26. The Court has repeatedly stated that its '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' (see *Ireland v. the United Kingdom*, cited above, p. 62, § 154, and *Guzzardi v. Italy*, judgment of 6 November 1980, Series A no. 39, p. 31, § 86). 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 Convention States." ECtHR, *Opuz v. Turkey*, No. 33401/02, 9 June 2009, para. 163: "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." ECtHR, *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010, para. 197: "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

²⁵ See RESS, "The Effect of Decisions and Judgments", *op. cit.*, note 9, p. 376.

requirements are not self-explanatory but result from judicial interpretations.²⁸

The Court grounds its reasoning pertaining to jurisprudential authority either on an interpretation of Article 1 ECHR²⁹ (by extension of the authority of the Convention) or on a combination of Articles 19 and 32 ECHR³⁰ (by extension of the authority of the Court itself).³¹ The ECtHR usually structures its decisions so that one can easily distinguish the interpretive part or grounds of the judgment from the decisive or operative part, and hence between the elements that are vested with jurisprudential authority from those that are to be respected on the basis of Article 46 paragraph 1 ECHR.³² Not only does the ECtHR grant its judgments jurisprudential authority by binding itself to its own precedents and by binding all States Parties to those

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)).

²⁸ See also O'BOYLE, "The Convention as a Subsidiary Source of Law", *op. cit.*, note 4: "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. [...] 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."

²⁹ E.g. ECtHR, *Belilos v. Switzerland*, No. 10328/83, 29 April 1988, para. 50.

³⁰ E.g. ECtHR, *Ireland v. United Kingdom*, No. 5310/71, 18 January 1978, para. 154.

³¹ On those two (conventional or jurisdictional) groundings, see also LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, *op. cit.*, note 5, pp. 315-320.

³² See LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, *op. cit.*, note 5, p. 298.

judgments, but it also (indirectly)³³ sanctions the latter for not abiding with its case-law pertaining to other States.³⁴

Interestingly, and although the EOE has been endorsed and perpetuated by the Court since the 1970s, it is not regarded by all States Parties as a legal requirement stemming from the Convention. Hence the discrepancy one observes in official documents between descriptive statements of EOE and more normative ones. Of course, some States Parties recognize the EOE of the ECtHR's judgments, but it is on domestic legal grounds.

2. According to domestic law

Among the States Parties to the ECHR that have recognized the jurisprudential authority of the ECtHR's case-law, one may mention, among others, Switzerland,³⁵ the United Kingdom,³⁶ Ireland,³⁷ Belgium, Spain, The

³³ See LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, *op. cit.*, note 5, pp. 307-309.

³⁴ One may mention the ECtHR's judgment in *Modinos* referring to its precedent in *Dudgeon* or to its judgment in *Mazurek* referring to its case-law in *Marckx*. See e.g. ECtHR, *Modinos v. Cyprus*, No. 15070/89, 22 April 1993, para. 20: "20. The Court first observes that the prohibition of male homosexual conduct in private between adults still remains on the statute book (see paragraph 8 above). Moreover, the Supreme Court of Cyprus in the case of *Costa v. The Republic* considered that the relevant provisions of the Criminal Code violated neither the Convention nor the Constitution notwithstanding the European Court's *Dudgeon v. the United Kingdom* judgment of 22 October 1981 (Series A no. 45) (see paragraph 11 above)."

³⁵ See e.g. Swiss Federal Court decision, ATF 112 (1986) 290, p. 297 by reference to ECtHR, *De Cubber*: "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." See also Swiss Federal Court decisions, ATF 130 II 377, para. 3.1; 129 I 139; 126 I 33; 123 I 56; 123 II 193; 122 I 360.

³⁶ See UK Human Rights Act 1998: "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 given in a report 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

Netherlands, Croatia and Ukraine.³⁸ Interestingly, the European Union (EU) also recognizes the EOE of the ECtHR's judgments and regards that case-law as an integral part of the Convention.³⁹

opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen."

³⁷ See Ireland ECHR Act 2003: "Interpretation of Convention provisions 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 established under the Convention on any question in respect of which that Court has jurisdiction, (b) any decision or opinion of the European Commission of Human Rights so established on any question in respect of which it had jurisdiction, (c) any decision of the Committee of Ministers established under the Statute of the Council of Europe on any question in respect of which it has jurisdiction, 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."

³⁸ For a very useful resource published in the aftermath of the Interlaken Action Plan, see Committee on Legal Affairs and Human Rights, Contribution to the Conference "Strengthening Subsidiarity – Integrating the Court's Case-Law into National Law and Judicial Practice" (Skopje, 1–2 October 2010), http://assembly.coe.int/CommitteeDocs/2010/201010125_skopje.pdf, and in particular the "Compilation of Background Material on the interpretative authority of the Strasbourg Court's Judgments". See also VELU, "A propos de l'autorité jurisprudentielle", *op. cit.*, note 6; COHEN-JONATHAN, "Quelques considérations sur l'autorité", *op. cit.*, note 6, p. 54; RESS, "The Effect of Decisions and Judgments", *op. cit.*, note 9. For an empirical assessment of the jurisprudential authority of the ECtHR's case-law in domestic practice, see HELFER, VOETEN, *op. cit.*, note 5.

³⁹ Explanations relating to the Charter of Fundamental Rights of the European Union of 12 December 2000: "20. Note from the Praesidium: 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 [emphasis added] 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. [...]"

States have different reasons to recognize the jurisprudential authority of the ECtHR's judgments pertaining to other States Parties. Some have a friendly attitude to international law in general. This is the case in small countries like Switzerland and Swiss authorities' attitude to the ECtHR's case-law's jurisprudential authority is no exception.⁴⁰ Other States Parties see in the ECHR system, and more specifically in recognizing the ECtHR's case-law's jurisprudential authority a way to counter domestic politics. This is the case, for instance, of the judiciary in some Central and Eastern European States Parties.⁴¹ In the case of the EU, it is the role of supranational adjudication in the EU that explains the open attitude to the jurisprudential authority of the ECtHR's case-law. The case-law of the Court of Justice of the EU (CJEU, hereafter) is indeed an integral part of the meaning of EU law and benefits from the primacy of EU law in all EU Member States.⁴²

There are important variations between the ways in which EOE is recognized in those different domestic legal orders, however. Importantly, whether a given State Party endorses monism in the incorporation of the ECHR or not does not affect its likelihood of recognizing EOE.⁴³ Moreover, the ECtHR's judgments' jurisprudential authority may not have the same

⁴⁰ See e.g. BESSON, "Les effets et l'exécution des arrêts de la Cour", *op. cit.*, note 9; Helen KELLER, "Reception of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in Poland and Switzerland", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, no. 2, vol. 65, 2005, pp. 283–350, p. 306; Daniela THURNHER, "The Reception Process in Austria and Switzerland", in KELLER, STONE SWEET, eds., *A Europe of Rights*, *op. cit.*, note 6, pp. 311–391, pp. 329 ss; HEINZ AEMISEGGER, "Zur Umsetzung der EMRK in der Schweiz", *Jusletter 20 July 2009*, <http://www.weblaw.ch/jusletter>, pp. 2–4. See e.g. ATF 130 II 113, 123 cons. 6.4; ATF 109 Ia 273 by reference to ECtHR, *Klass and others v. Allemagne*, No. 5029/71, 6 September 1978.

⁴¹ See e.g. LEONARD HAMMER, Frank EMMERT, *The European Convention on the Human Rights and Fundamental Freedoms in Central and Eastern Europe*, The Hague, Eleven, 2011; Wojciech SADURSKI, "Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments", *Human Rights Law Review*, no. 3, vol. 9, 2009, pp. 397–453.

⁴² See Samantha BESSON, "European Human Rights, Supranational Judicial Review and Democracy – Thinking outside the judicial box", in Patricia POPELIER, Catherine VAN DE HEYNING, Piet VAN NUFFEL, eds., *Human Rights Protection in the European Legal Order: Interaction between European Courts and National Courts*, Cambridge, Intersentia 2011, pp. 97–146.

⁴³ See Samantha BESSON, "The reception of the ECHR in the United Kingdom and Ireland", in KELLER, STONE SWEET, *op. cit.*, note 6, pp. 31–106 on the differences between the United Kingdom and Ireland in this respect.

rank (constitutional or not) and effect (direct effect or not) in all domestic legal orders. Actually, the rank and effect of that jurisprudential authority may not necessarily be the same as that of the ECHR itself within any given legal order.⁴⁴ Thus, one may imagine that the ECHR and the Court's case-law pertaining to the State Party itself are granted constitutional rank and priority over domestic legislation, but not the case-law pertaining to other States Parties.⁴⁵

B. The proposed legal status

Recognizing the EOE to the ECtHR's case-law is not a new proposal in the ECHR system. Before looking more closely at the Interlaken Action Plan (2.), it is useful therefore to present some of the previous reform proposals (1.).

1. Previous reform proposals

There have been two important reform proposals of the ECHR system that gestured in the direction of generally granting jurisprudential authority to the ECtHR's judgments. Some of them expressly mentioned the EOE, while others did not.

The first important reform proposal in that context may be found in the Recommendations 1226 and 1477 of the Council of Europe's Parliamentary Assembly on the execution of judgments (28 September 2000).

In the first of those two recommendations, the Parliamentary Assembly stressed the importance of the principle of solidarity according to which the Court's case-law is an integral part to the Convention.⁴⁶ The second recommendation encouraged States Parties to use their right to intervene

⁴⁴ See RESS, "The Effect of Decisions and Judgments", *op. cit.*, note 9, p. 376.

⁴⁵ This may have to do with the nature of precedent and jurisprudential authority and their more direct connection to the judiciary. I will get back to this important question of the jurisprudential authority's duty-bearer in the domestic context later in the article.

⁴⁶ Parliamentary Assembly, Recommendation 1226 (2000), Execution of judgments of the European Court of Human Rights: "3. The principle of solidarity implies that the case-law of the Court forms part of the Convention, thus extending the legally binding force of the Convention *erga omnes* (to all the other parties). This means that the States Parties not only have to execute the judgments of the Court pronounced in cases to which they are party, but also have to take into consideration the possible implications which judgments pronounced in other cases may have for their own legal system and legal practice."

before the Court in cases that pertain to other States Parties.⁴⁷ Third State Party interventions of that kind would indeed ensure the inclusion of all perspectives in the deliberation of the Court and could enhance the justification of its judgments' jurisprudential authority, i.e. their legitimacy.

The second reform proposal one should mention is the Group of Wise Persons Report (16 November 2006). That report was ordered by the Committee of Ministers of the Council of Europe to devise different reform strategies and proposals for the future of the ECHR.

Among those reform proposals, one finds the mention of the possibility to identify in the Court's case-law those judgments that one may consider judgments of principle.⁴⁸ Isolating those judgments may help narrowing down the scope of EOE and hence making it easier not only to disseminate

⁴⁷ Parliamentary Assembly, Recommendation 1477 (2000), Execution of judgments of the European Court of Human Rights: "The Assembly, referring to its Resolution 1226 (2000) on the execution of judgments of the European Court of Human Rights, recommends that the Committee of Ministers: amend the Convention so as to give the Committee of Ministers the power to ask the Court for a clarifying interpretation of its judgments in cases where the execution gives rise to reasonable doubts and serious problems regarding the correct mode of implementation; amend the Convention to introduce a system of *astreintes* (daily fines for a delay in the performance of a legal obligation) to be imposed on States that persistently fail to execute a Court judgment; ask the governments of High Contracting Parties to make more use of their right to intervene in cases before the Court, so as to promote the *erga omnes* significance of the decisions of the Court."

⁴⁸ Report of the Wise Persons to the Committee of Ministers of 15 November 2006: "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."

those judgments to domestic authorities, but also for States Parties to respect them. The report rightly concludes, however, that a distinction between judgments of principle and others is too difficult: the distinction is indeterminate and cannot be drawn. It is better to leave it to domestic authorities, and in particular to judicial authorities, to identify the Court's judgments which may be relevant to deciding the case before them.

A connected line of argument in the report pertains to advisory opinions.⁴⁹ The report recommends indeed that States Parties be entitled to request

⁴⁹ Report of the Wise Persons to the Committee of Ministers of 15 November 2006: "4. Forms of co-operation between the Court and the national courts – Advisory opinions 76 The Group paid close attention to the relations between the Court and the national courts. The latter have responsibility for protecting human rights by upholding the Convention within their sphere of competence. 77 It should be noted in this connection that the national courts are called upon in particular to guarantee the effectiveness of domestic remedies and, where appropriate, the award of just satisfaction and proper execution of the Court's judgments. The Group therefore recommends that the Council of Europe continue and expand as far as possible its activities relating to human rights training for national judges. 78 The role of the member States' highest courts in applying the Convention is of paramount importance. The Group notes with satisfaction that the Court is maintaining and expanding its contacts with these courts. It emphasises the usefulness of those contacts and the importance of maintaining and even strengthening them. 79 The Group studied the possibility of institutionalising the links between the Court and the highest courts in the member States. 80 In this connection, the introduction of a preliminary ruling mechanism on the model of that existing in the European Union was discussed. However, the Group reached the conclusion that the EU system is unsuitable for transposition to the Council of Europe. The preliminary ruling mechanism represents an alternative model to the judicial control established by the Convention, which requires domestic remedies to be exhausted. The combination of the two systems would create significant legal and practical problems and would considerably increase the Court's workload. 81 On the other hand, the Group considers that it would be useful to introduce a system under which the national courts could apply to the Court for advisory opinions on legal questions relating to interpretation of the Convention and the protocols thereto. This is an innovation which would foster dialogue between courts and enhance the Court's "constitutional" role. 82 Requests for an opinion would always be optional for the national courts and the opinions given by the Court would not be binding. 83 The rules governing this category of advisory opinions should differ from those governing opinions given at the request of the Committee of Ministers, which are provided for under Article 47 of the Convention. Opinions given at the request of a national court should not be subject to the restrictions laid down in paragraph 2 of that provision. 84 The Group also believes that, to enhance the judicial authority of this type of advisory opinion, all the States Parties to the Convention should have the opportunity to submit observations to the Court on the legal issues on which an opinion is requested. 85 The Group is aware of the repercussions which the proliferation of requests for opinions might have on the Court's workload and resources, since the requests for opinions and the member States' observations would also need to be translated. In addition, providing such opinions would

not be the Court's principal judicial function. Accordingly, the Court's new advisory jurisdiction should be subject to strict conditions. 86 It is proposed in this connection that: a) only constitutional courts or courts of last instance should be able to submit a request for an opinion; b) the opinions requested should only concern questions of principle or of general interest relating to the interpretation of the Convention or the protocols thereto. c) the Court should have discretion to refuse to answer a request for an opinion. For example, the Court might consider that it should not give an answer in view of the state of its case-law or because the subject-matter of the request overlaps with that of a pending case. It would not have to give reasons for its refusal."

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advisory opinions from the Court in the future the way the Committee of Ministers is already entitled to (Article 47 ECHR). This would enable States Parties to submit questions of interpretation and of principle to the Court. Again, the report chooses a nuanced approach to advisory opinions.

The report rejects the EU model of preliminary rulings (Article 267 Treaty on the Functioning of the European Union [TFEU, hereafter]), claiming the latter is not adapted to the ECHR system. The grounds pertain not only to the Court's work-load, but also to the incompatibility between the preliminary ruling procedure and the jurisdictional subsidiarity of the Court whose jurisdiction requires the exhaustion of domestic remedies. By contrast, the report suggests the optional nature of applications for advisory opinions and applications stemming from supreme domestic courts only. It also considers that all other States Parties should be entitled to file observations in the context of the procedure pertaining to an advisory opinion, as this would enhance those opinions' authority. Finally, the report sets strict conditions to the admissibility of an advisory opinion: those include a kind of *acte clair* exception that enables the Court to dismiss any application for an advisory opinion pertaining to a question on which there is already an established case-law.⁵⁰

2. The Interlaken Declaration

The EOE is a central part of the 19 February 2010 Interlaken Action Plan and in particular of the set of measures that are meant to enhance subsidiarity and the better reception and protection of ECHR rights in domestic procedures, and hence eventually to alleviate the Court's work-load.⁵¹ The

not be the Court's principal judicial function. Accordingly, the Court's new advisory jurisdiction should be subject to strict conditions. 86 It is proposed in this connection that: a) only constitutional courts or courts of last instance should be able to submit a request for an opinion; b) the opinions requested should only concern questions of principle or of general interest relating to the interpretation of the Convention or the protocols thereto. c) the Court should have discretion to refuse to answer a request for an opinion. For example, the Court might consider that it should not give an answer in view of the state of its case-law or because the subject-matter of the request overlaps with that of a pending case. It would not have to give reasons for its refusal."

On the *acte clair* principle in the CJEU's case-law, see CJEU, *Srl CILFIT and others and Lanificio di Gavardo SpA v. Ministero della sanità*, Case 77/83, [1984] ECR 1257.

Interlaken Declaration, 19th February, 2010 - Action Plan: "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: [...]"

proposal was confirmed in the 27 April 2011 Izmir Follow-Up Plan albeit in looser terms.⁵²

By comparison to the proposals made by the 2006 Group of Wise Persons Report, the Interlaken Action Plan's proposal is modest and merely states the idea of EOE in its section B.4.c), without further mention of implementation mechanisms such as advisory opinions or State interventions. The Izmir Follow-Up Plan re-introduces the 2006 Group of Wise Persons Report's idea of advisory opinions, however, by inviting the Committee of Ministers to consider that possibility and by asking the Court to assist the Committee in those considerations.⁵³

Importantly, the legal value of the Action Plan remains to be established as it is a political programme and not (yet) an amendment to the Convention. The Interlaken Conference of States Parties has 'called upon' States Parties to 'commit' to recognizing the jurisprudential authority of the ECtHR's judgments and hence to taking into account the relevant judgments.⁵⁴ When

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."

⁵² Izmir Declaration, 27 April 2011, Follow-up Plan: "B. Implementation of the Convention at national level The Conference: 1. Reiterates calls made in this respect in the Interlaken Declaration and more particularly invites the States Parties to: a. Ensure that effective domestic remedies exist, be they of a specific nature or a general domestic remedy, providing for a decision on an alleged violation of the Convention and, where necessary, its redress; b. Co-operate fully with the Committee of Ministers in the framework of the new methods of supervision of execution of judgments of the Court; c. Ensure that the programmes for professional training of judges, prosecutors and other law-enforcement officials as well as members of security forces contain adequate information regarding the well-established case-law of the Court concerning their respective professional fields."

⁵³ Izmir Declaration, 27 April 2011, Follow-up Plan: "D. Advisory opinions The Conference: 1. Bearing in mind the need for adequate national measures to contribute actively to diminishing the number of applications, invites the Committee of Ministers to reflect on the advisability of introducing a procedure allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention that would help clarify the provisions of the Convention and the Court's case-law, thus providing further guidance in order to assist States Parties in avoiding future violations; 2. Invites the Court to assist the Committee of Ministers in its consideration of the issue of advisory opinions." See also Preliminary Contribution by the President of the Court to the Izmir Conference, 26-27 April 2011, p. 6.

⁵⁴ Note by the Jurisconsult, European Court of Human Rights, 8 July 2010, Interlaken follow-up, Principle of subsidiarity: "Impact of the Court's judgments. It is in the first

and how that commitment will ensue remains to be seen. No further commitments were made in that respect at Izmir, however, and they are unlikely to occur in the near future.⁵⁵

III. The justifications for the *erga omnes* effect of judgments

Various justifications of the jurisprudential authority of the ECtHR's judgments may be put forward. It is the case whether one looks at the ECHR system through an international law lens (A.) or from a more constitutional law perspective (B.).

A. The international law perspective

From an international law perspective, the jurisprudential authority of the ECtHR's judgment may be justified in many ways. I will address two of them here: the argument from international law interpretation and the argument from international law adjudication.

The first argument may be drawn from the interpretation of treaty law and the specificities of the *interpretation of international human rights law* in

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)."

⁵⁵ See the contributions by Philippe BOILLAT and Erik FRIBERGH, in this volume, pp. 17 ff and pp. 115 ff. For a general assessment of the impact of the Interlaken Action Plan on the reform of the ECHR system, see e.g. Alastair MOWBRAY, "The Interlaken Declaration – the Beginning of a New Era for the European Court of Human Rights?", *Human Rights Law Review*, vol. 10, 2010, pp. 519-528; Patrick WACHSMAN, "Entre deux lacs – Quelques réflexions sur la Conférence d'Interlaken sur l'avenir de la Cour européenne des droits de l'homme", *Revue trimestrielle des droits de l'homme*, vol. 83, 2010, pp. 511-535; Helen KELLER, Andreas FISCHER, Daniela KÜHNE, "Debating the Future of the European Court of Human Rights after Interlaken: Two Innovative Proposals", *European Journal of International Law*, no. 4, vol. 21, 2010, pp. 1025-1048.

particular.⁵⁶ Unlike ordinary international treaties, international human rights treaties, such as the ECHR, generate general, non-reciprocal and objective obligations among States Parties.⁵⁷ Moreover, international human rights are usually guaranteed as principles and not as rules. Finally, international human rights are usually drafted in a very abstract way so as to enable States Parties to specify them in context. Those distinctive features make it the case that interpretation is not only an integral, but also a necessary part of the application of international human rights law.⁵⁸

In view of those specificities, however, the interpretation of international human rights has also given rise to special methods in practice that build upon those of the 23 May 1969 Vienna Convention on the Law of Treaties (VCLT, hereafter), but are more specific. One may mention, for instance, the emphasis on dynamic or contextual interpretation. This can be justified because human rights are too indeterminate to be interpreted *in abstracto* and can only be interpreted in context.⁵⁹ That context being a political one, it can only be domestic and this is why international human rights' interpretations by international bodies ought to evolve with domestic interpretations of those rights. Another related feature is the subsidiarity of international human rights' interpretations to States Parties' interpretations and the respect of domestic authorities' margin of appreciation when interpreting international human rights.⁶⁰

⁵⁶ On the specificities of the interpretation of international human rights law, see e.g. George LETSAS, "Strasbourg's Interpretative Ethic: Lessons for the International Lawyer", *European Journal of International Law*, no. 3, vol. 21, 2010, pp. 509-541; Jonas CHRISTOFFERSEN, "Impact on General Principles of Treaty Interpretation", in Menno KAMMINGA, Martin SCHEININ, eds, *The Impact of Human Rights Law on General International Law*, Oxford, Oxford University Press, 2009, pp. 37-61; Birgit SCHLÜTTER, "Aspects of Human Rights Interpretation by the UN Treaty Bodies", in Helen KELLER, Geir ULFSTEIN, eds, *Human Rights Treaty Bodies: Law and Legitimacy*, Cambridge, Cambridge University Press, 2012 forthcoming.

⁵⁷ See COHEN-JONATHAN, "Quelques considérations sur l'autorité", *op. cit.*, note 6, p. 55.

⁵⁸ See LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, *op. cit.*, note 5, pp. 293-294.

⁵⁹ See e.g. Samantha BESSON, "Human Rights and Democracy in a Global Context – Decoupling and Recoupling", *Ethics and Global Politics*, no. 1, vol. 4, 2011, pp. 19-50; Eva BREMS, "Human Rights: Minimum and Maximum Perspectives", *Human Rights Law Review*, vol. 9, 2009, pp. 343-372, p. 353.

⁶⁰ See on the subsidiarity of international and European human rights law, e.g. Dinah Shelton, "Subsidiarity and Human Rights Law", *Human Rights Law Journal*, vol. 27, 2006, pp. 4-11; Laurence R. HELFER, "Redesigning the European Court of Human Rights:

Those specific features of international human rights interpretation are shared by the ECHR system.⁶¹ They set limits, as a result, on the kind of interpretive or jurisprudential authority the Court's judgments may have.

The second international law argument for the EOE of the ECtHR's judgments stems from the realm of international adjudication, and *international human rights adjudication* in particular. Even though international adjudication still suffers from many ambiguities, one being whether its judicial settlement function also implies a judicial law-making one, it is clear from recent theories of international adjudication⁶² that judicial interpretation cannot but contribute to the understanding of international law and hence to international (judicial) law-making.⁶³ In those circumstances, judicial interpretations of international law are part of international law the same way judicial interpretations of domestic law are part of domestic law.

Again, however, one should distinguish within the realm of international adjudication between different types of courts. While some are vested with exclusive, compulsory and final jurisdiction on the interpretation of a given

Embeddedness as a Deep Structural Principle of the European Human Rights Regime", *European Journal of International Law*, vol. 19, 2008, pp. 125-159.

⁶¹ See on the dynamic nature of the Court's interpretation, e.g. ECtHR, *Tyler v. United Kingdom*, No. 5856/72, 25 April 1978. See on the subsidiary nature of its interpretations, e.g. ECtHR, *Burden v. United Kingdom*, No. 13378/05, 29 April 2008, para. 42; ECtHR, *Hutton v. United Kingdom*, No. 36022/97, 8 July 2003, para. 97.

⁶² See e.g. Donald REGAN, "International Adjudication: A Response to Paulus – Courts, Custom, Treaties, Regimes and the WTO", in Samantha BESSON, John TASIIOULAS, eds, *The Philosophy of International Law*, Oxford, Oxford University Press, 2010, pp. 225-241; Benedict KINGSBURY, "International Courts: Uneven Judicialization in Global Order", in James CRAWFORD, Martti KOSKENNIEMI, eds, *Cambridge Companion to International Law*, Cambridge, Cambridge University Press, 2011 forthcoming; Hervé ASCENSIO, "La notion de juridiction internationale en question", in *La juridictionnalisation du droit international*, Colloque de Lille SFDI, Paris, Pedone, 2003, pp. 163-202; Emmanuelle JOUANNET, "La jurisprudence internationale en question", in *La juridictionnalisation du droit international*, Colloque de Lille SFDI, Paris, Pedone, 2003, pp. 343-391; Julie ALLARD, Antoine GARAPON, *Les juges dans la mondialisation*, Paris, Seuil, 2005.

⁶³ See e.g. JACOB, "Precedents", *op. cit.*, note 16; Samantha BESSON, "International Judges' Function(s) between Dispute-Settlement and Law-Enforcement – From International Law without Courts to International Courts without Law", *Loyola Law Review*, 2012 forthcoming; Armin VON BOGDANDY, Ingo VENZKE, "Beyond Dispute: International Judicial Institutions as Lawmakers", *German Law Journal*, no. 5, vol. 12, 2011, pp. 979-1004, pp. 988-989.

set of international law norms, others do not have that kind of exclusive, compulsory or final jurisdiction. This difference makes it difficult to justify the interpretive or jurisprudential authority of the latter on all States Parties to a given international treaty. It suffices here to mention the debates surrounding the International Court of Justice and the contested jurisprudential authority of its decisions beyond the States that are parties to a given procedure.

Of course, a counter-example to point is the CJEU. The CJEU has exclusive, compulsory and final interpretive powers over EU law (Article 344 TFEU). True, this may be because it is the judicial body of a complex post-national political and legal order, the EU. Whether the CJEU invalidates EU law through the annulment procedure (Article 263 TFEU) or a preliminary ruling (Article 267 TFEU) or interprets EU law through a preliminary ruling (Article 267 TFEU), its judgments have both decisional authority for the parties at hand and jurisprudential authority pertaining to the validity and interpretation of EU law for all 27 EU Member States.⁶⁴ In certain cases, they are even vested with *ex tunc* jurisprudential authority.⁶⁵

The question is therefore in which of those boxes to place the ECtHR. According to the Court itself, it is vested with the power to provide 'final authoritative interpretation of the rights and freedoms' of the Convention (Article 19 ECHR).⁶⁶ Further, its jurisdiction is compulsory for all States Parties to the Convention. However, the Court does not have exclusive jurisdiction on the interpretation of the ECHR. Its jurisdiction is grounded in the principle of jurisdictional subsidiarity. In that sense, the ECtHR is very different from the CJEU.⁶⁷ This also has to do with the nature of human rights and their close ties to a political community and the domestic legal order. The ECtHR cannot interpret ECHR rights in an exclusive fashion and without reference to domestic interpretations. It seems therefore to lie between the two existing models: it is neither one of many international

courts interpreting the ECHR, nor a supranational human rights court in Europe with exclusive interpretation rights on the ECHR. It is part of a judicial network of interpretation and requires judicial dialogue to be able to interpret ECHR rights in context and in a way that pays due account to their nature. The importance of judicial dialogue⁶⁸ in the interpretation of ECHR rights and in the identification of what Court's judgment or part of a Court's judgment ought to be vested with jurisprudential authority was actually confirmed by the Group of Wise Persons.⁶⁹

In sum, the principles of both interpretive and jurisdictional subsidiarity support an argument for the EOE of the ECtHR's judgments, but only if it takes into account domestic interpretations of the ECHR and is part of a judicial dialogue with domestic courts. I will discuss ways of accommodating that requirement in the section devoted to the regime and content of the jurisprudential authority of the ECtHR's judgments.

B. The constitutional law perspective

The ECHR system is often also approached from a constitutional law perspective. The ECtHR's constitutional function is considered as an additional argument in favor of the ECtHR's judgments' jurisprudential authority.⁷⁰

In this context, 'constitutional' is understood in a loose material sense to refer to a specifically constitutional content (e.g. human rights) or a specifically constitutional review function. What matters for authors sharing the constitutionalist approach to the ECHR is that the latter endorses

⁶⁸ On judicial dialogue between the ECtHR and domestic courts, see e.g. Nico KRISCH, "The Open Architecture of European Human Rights Law", in *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford, Oxford University Press, 2010, pp. 109-152, 126 ff. (focusing on decisional authority only, however); Luzius WILDHABER, "Ein Überdenken des Zustands und der Zukunft des Europäischen Gerichtshofs für Menschenrechte", *Europäische Grundrechtszeitschrift*, vol. 36, 2009, pp. 547-553; LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, op. cit., note 5, pp. 331-334.

⁶⁹ Report of the Wise Persons to the Committee of Ministers of 15 November 2006: "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."

⁷⁰ See e.g. LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, op. cit., note 5, pp. 76 and 313-314; SUDRE, *Droit européen et international*, op. cit., note 6, p. 821.

⁶⁴ See e.g. CJEU, *Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren*, Case C-453/00, [2004] ECR I-837.

⁶⁵ See e.g. CJEU, *Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren*, Case C-453/00, [2004] ECR I-837; CJEU, *Willy Kempter KG v. Hauptzollamt Hamburg-Jonas*, Case C-2/06, [2008] ECR I-411.

⁶⁶ See ECtHR, *Opuz v. Turkey*, No. 33401/02, 9 June 2009, para. 163.

⁶⁷ For a comparison between the two European courts, see e.g. BESSON, "European Human Rights, Supranational Judicial Review", op. cit., note 42. See also BESSON, "Human Rights and Democracy", op. cit., note 59; SUDRE, *Droit européen et international*, op. cit., note 6, p. 822; VELU, "A propos de l'autorité jurisprudentielle", op. cit., note 6, p. 559.

constitutional functions in the domestic context by adding onto the constitutional catalogue of fundamental rights, on the one hand, and by contributing to the constitutional review of domestic legislation, on the other.⁷¹

The constitutional reading of the jurisprudential authority of the Court's judgments is actually present in the Court's case-law,⁷² but also in the positions of different other bodies of the Council of Europe.⁷³ The Court ties its case-law's jurisprudential authority to the Convention's role as a "constitutional instrument of the European public order"⁷⁴ and in developing European values and principles.⁷⁵ If the Court is vested with a constitutional role rather than that of a fourth instance,⁷⁶ then clearly it considers itself justified in expecting all States Parties to conform to its interpretations of ECHR rights.⁷⁷

⁷¹ See e.g. ALEC STONE SWEET, "Sur la constitutionnalisation de la Convention européenne des droits de l'homme: La Cour européenne des droits de l'homme conçue comme une Cour constitutionnelle", *Revue trimestrielle des droits de l'homme*, vol. 80, 2009, pp. 923-944; STEVEN GREER, *The European Convention on Human Rights: Achievements, Problems and Prospects*, Cambridge, Cambridge University Press, 2006, p. 173; LUZIOUS WILDHABER, "A Constitutional Future for the European Court of Human Rights?", *Human Rights Law Journal*, vol. 23, 2002, pp. 161-165; SADURSKI, "Partnering with Strasbourg", *op. cit.*, note 41.

⁷² See e.g. ECtHR, *Karner v. Austria*, No. 40016/98, 24 July 2003, para. 26; ECtHR, *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010, para. 197.

⁷³ See e.g. O'BOYLE, "The Convention as a Subsidiary Source of Law", *op. cit.*, note 4; FURA-SANDSTRÖM, "Amplifying the effect of the Court's case law", *op. cit.*, note 7, pp. 513-514.

⁷⁴ ECtHR, *Loizidou v. Turkey*, No. 15318/89, 23 March 1995, para. 75.

⁷⁵ See ECtHR, *Karner v. Austria*, No. 40016/98, 24 July 2003, para. 26: "26. The Court has repeatedly stated that its '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' (see *Ireland v. the United Kingdom*, cited above, p. 62, § 154, and *Guzzardi v. Italy*, judgment of 6 November 1980, Series A no. 39, p. 31, § 86). 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 Convention States."

⁷⁶ See ECtHR, *Azinas v. Cyprus*, No. 56679/00, 28 April 2004, para. 38.

⁷⁷ See e.g. ECtHR, *Sunday Times*, No. 6538/74, 26 April 1979. See also ECtHR, *Opuz v. Turkey*, No. 33401/02, 9 June 2009, para. 163.

There are difficulties with this constitutional reading of the EOE, however. Equating the role of international human rights law with that of constitutional human rights law ignores the former's distinct role in a domestic legal order. While it is true that international human rights do not differ from domestic human rights in terms of either content or scope, their role is fundamentally different and complementary to them.⁷⁸ International human rights guarantee the right to have human rights domestically in a given political community where persons can be politically equal to one another and full beneficiaries of human rights. Their function as an external guarantee and pressure on domestic law is lost if they are too readily identified with domestic human rights law.⁷⁹ There is even a danger they might turn into a maximal threshold of human rights protection if they are treated as constitutional human rights and interpretations thereof.⁸⁰ It is important therefore that the monitoring and interpretation of international human rights by international institutions reflect those rights' specific role. International human rights institutions should not aim at replacing domestic judicial authorities, but should on the contrary situate themselves in a relationship of cooperation with them. This is actually how international human rights can be vested with legitimacy, i.e. through the reciprocal legitimization of domestic and international guarantees and interpretations.⁸¹

ECHR rights are international human rights in nature. As a result, the ECtHR's interpretations should not aim at replacing domestic ones the way a constitutional court's interpretations would. On the contrary, they should function as external minimal guarantees that should evolve with the

⁷⁸ See RONALD DWORKIN, *Justice for Hedgehogs*, Harvard, Belknap, 2011; BESSON, "Human Rights and Democracy", *op. cit.*, note 59. See on the relationship between constitutional and international human rights more generally STEPHEN GARBAUM, "Human Rights as International Constitutional Rights", *European Journal of International Law*, no. 4, vol. 19, 2008, pp. 749-768; GERALD L. NEUMAN, "Human Rights and Constitutional Rights: Harmony and Dissonance", *Stanford Law Review*, vol. 55, 2003, pp. 1863-1900.

⁷⁹ See BESSON, "Human Rights and Democracy", *op. cit.*, note 59. For a different albeit complementary critique of the constitutional approach to the ECHR, see KRISCH, *Beyond Constitutionalism*, *op. cit.*, note 68.

⁸⁰ See e.g. BESSON, "The reception of the ECHR", *op. cit.*, note 43, on the reception of the ECHR in the United Kingdom; BREMS, "Human Rights: Minimum and Maximum", *op. cit.*, note 59, p. 353; KLEIN, "Should the Binding Effect?", *op. cit.*, note 6, p. 713.

⁸¹ See BESSON, "Human Rights and Democracy", *op. cit.*, note 59; ALLEN BUCHANAN, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, Oxford, Oxford University Press, 2004, pp. 187-189; ALLEN BUCHANAN, "Reciprocal Legitimation: Reframing the Problem of International Legitimacy", *Politics, Philosophy & Economics*, no. 1, vol. 10, 2011, pp. 5-19.

developments of States Parties' interpretations of those rights in the domestic context.

It is even more important that this subsidiarity-oriented and mutuality-based understanding of the jurisprudential or interpretive authority of the ECtHR's judgments be used when discussing the future of EOE and not a constitutional understanding, as it runs counter to other recent constitutional and vertical features in the ECtHR's case-law.⁸² It suffices to mention the Court's pilot and quasi-pilot judgments discussed before in which the Court identifies general measures in the operative part of its decisions, but also the indication of individual measures in the operative part of some of its recent judgments and hence the Court's intervention in the execution of those judgments.⁸³ Another piece of evidence of the Court's constitutional tendency is its case-law pertaining to the reopening of domestic procedures after an adverse judgment of the Court and the Court's granting of a revision judgment on the basis of the non-reopening of the domestic procedure after a first adverse judgment on its part.⁸⁴ Those developments are just some of the

⁸² See e.g. SUDRE, "L'effectivité des arrêts de la Cour européenne des droits de l'homme", *op. cit.*, note 9; BESSON, "Les effets et l'exécution des arrêts de la Cour", *op. cit.*, note 9. For the most famous domestic reaction to the constitutional developments in the ECtHR system, see e.g. BVerfGE, 2 BvR 1481/04, *Görgülü* (responding to ECtHR, *Görgülü v. Allemagne*, No. 74969/01, 26 February 2004): "1. Zur Bindung an Gesetz und Recht (Art. 20 Abs. 3 GG) gehört die Berücksichtigung der Gewährleistungen der Konvention zum Schutz der Menschenrechte und Grundfreiheiten und der Entscheidungen des Europäischen Gerichtshofs für Menschenrechte im Rahmen methodisch vertretbarer Gesetzesauslegung. Sowohl die fehlende Auseinandersetzung mit einer Entscheidung des Gerichtshofs als auch deren gegen vorrangiges Recht verstoßende schematische „Vollstreckung“ können gegen Grundrechte in Verbindung mit dem Rechtsstaatsprinzip verstoßen. 2. Bei der Berücksichtigung von Entscheidungen des Gerichtshofs haben die staatlichen Organe die Auswirkungen auf die nationale Rechtsordnung in ihre Rechtsanwendung einzubeziehen. Dies gilt insbesondere dann, wenn es sich bei dem einschlägigen nationalen Recht um ein ausbalanciertes Teilsystem des innerstaatlichen Rechts handelt, das verschiedene Grundrechtspositionen miteinander zum Ausgleich bringen will." See e.g. Hans-Joachim CREMER, "Zur Bindungswirkung von EGMR-Urteilen: Anmerkung zum Görgülü-Beschluss des BVerfG vom 14.10.2004", *Europäische Grundrechtszeitschrift*, vol. 31, 2004, pp. 683–699.

⁸³ See e.g. ECtHR, *Assanidze v. Georgia*, No. 71503/01, 8 April 2004, paras. 202–203. See also BESSON, "Les effets et l'exécution des arrêts de la Cour", *op. cit.*, note 9; Giorgio MALINVERNI, "La compétence de la Cour pour surveiller l'exécution de ses propres arrêts", in Dean SPIELMANN et al., *op. cit.*, note 19.

⁸⁴ See ECtHR, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (n°2)*, No. 32772/02, 30 June 2009. For a discussion, see e.g. BESSON, "Les effets et l'exécution des arrêts de la Cour", *op. cit.*, note 9; Maya HERTIG RANDALL, Xavier-Baptiste RUEDIN, "Judicial Activism" et exécution des arrêts de la Cour européenne des droits de l'homme (Cour eur.

many constitutionalizing trends in the ECHR system that make States Parties fear for the interpretive and jurisdictional subsidiarity at the core of the system.⁸⁵

Paradoxically, however, the EOE of the ECtHR's judgments is frequently justified by reference to the principle of subsidiarity. It is true that alleviating the Court's case-load through securing its case-law's jurisprudential authority may enhance the role of States Parties and domestic courts in the implementation of the Convention. In that sense, the EOE enhances the part played by domestic authorities in implementing the ECHR. But does it really enhance subsidiarity? If it were enough to require States Parties to enforce a supranational interpretation of international law top-down and prevent them from bringing new interpretations of the ECHR to the Court to protect subsidiarity, much international law and much supranational adjudication would be respecting the principle of subsidiarity.⁸⁶ Subsidiarity requires not only the 'embeddedness' of ECHR rights in domestic law, but also the mutual responsiveness between domestic and European interpretations of the Convention.⁸⁷ As a result, one should be conscious of the dual meaning of

dr. h., Gde Ch., Verein gegen Tierfabriken Schweiz (VgT) c. Suisse (n° 2), 30 juin 2009", *Revue trimestrielle des droits de l'homme*, vol. 82, 2010, pp. 421–444.

⁸⁵ For this critique, see e.g. BESSON, "Les effets et l'exécution des arrêts de la Cour", *op. cit.*, note 9; BESSON, "European Human Rights, Supranational Judicial Review", *op. cit.*, note 42; KRISCH, *Beyond Constitutionalism*, *op. cit.*, note 68.

⁸⁶ It is enough to contrast those two conceptions of subsidiarity to understand this point: compare the account presented in the Contribution of the Secretary General of the Council of Europe to the Preparation of the Interlaken Ministerial Conference, 14th January, 2010: "17. Subsidiarity thus requires that the authority of the Court's case law should also be reinforced. [...] There is one Convention and one European Court ultimately responsible for its interpretation; by giving the greatest possible effect in domestic law and practice to the authority of the Court's case law, States can – and should – anticipate problems and solve them even before the Court is required to act", with the account spelled out by the ECtHR in *Scordino v. Italy*, No. 36813/97, 29 March 2006, para. 140: "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."

⁸⁷ For a similar warning, see SUDRE, *Droit européen et international*, *op. cit.*, note 6, p. 823. For a proposal along those lines, see also Jonas CHRISTOFFERSEN, "Individual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed?", in Jonas CHRISTOFFERSEN, Mikael RASK MADSEN, eds, *The European Court of Human Rights between Law and Politics*, Oxford, Oxford University Press, 2011, pp. 181–203. On mere 'embeddedness', see e.g. HELFER, "Redesigning the European Court of Human Rights: Embeddedness", *op. cit.*, note 60; KELLER, FISCHER, KÜHNE, "Debating the Future of the European Court of Human Rights", *op. cit.*, note 55.

subsidiarity used with respect to the EOE and of the danger of instrumentalizing the principle of subsidiarity in the context of the ECtHR's reform.

IV. The regime of the *erga omnes* effect of judgments

Existing ECtHR case-law and reform proposals regarding EOE provide very little information about its normative consequences and what its regime ought to be. In this section, I will discuss some of them, by reference, first, to the nature of jurisprudential authority (A.), its scope (B.), its content (C.) and its degree (D.).

A. The nature of jurisprudential authority

The ECtHR's case-law's jurisprudential authority is a kind of legal authority. It ought therefore to be distinguished from mere moral or persuasive authority.⁸⁸

The persuasive authority of the Court's case-law already applies to a large extent and is an important explanation of the Court's case-law's effectivity. As a result, the legal and moral dimensions of jurisprudential authority co-exist in practice. Note that the latter is sometimes erroneously referred to as *de facto* jurisprudential authority precisely because it is opposed to the legal or *de jure* jurisprudential authority of the case-law.⁸⁹

Jurisprudential authority is the authority of an interpretation of ECHR rights (the *res interpretata*). As a result, it is part of the authority of ECHR rights at large.⁹⁰ This in turn influences its scope, content and degree. Interestingly, however, at least on the basis of a comparative survey of domestic practices, the scope, content and degree of the jurisprudential authority of the ECtHR's

⁸⁸ On the difference between the moral or persuasive authority and the legal interpretive authority of ECtHR's judgments, see LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, *op. cit.*, note 5, pp. 303-304.

⁸⁹ See e.g. Interlaken follow-up, Principle of subsidiarity, Note by the Jurisconsult, European Court of Human Rights, 8 July 2010. For an empirical study on that persuasive authority in practice, see HELFER, VOETEN, *op. cit.*, note 5.

⁹⁰ See also LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, *op. cit.*, note 5, pp. 319-320.

judgments on a given ECHR right does not always correspond to the scope, content and degree of that right in the domestic context.

B. The scope of jurisprudential authority

The jurisprudential authority of the ECtHR's case-law may be characterized by reference to its scope and in particular its personal (1.), temporal (2.) or material scope (3.).

1. *Ratione personae*

The personal scope of the ECtHR's judgments' jurisprudential authority corresponds to that of the interpreted Convention rights themselves. This applies to the scope of the duty-bearers of those ECHR rights, but also of that of their right-holders.

First of all, regarding the duty-bearers, the jurisprudential authority of the ECtHR's judgments applies to all 47 States Parties to the ECHR (Article 1 ECHR) and, in each of them, to all domestic authorities.⁹¹

Domestic authorities called to respect the jurisprudential authority of the ECtHR's case-law may be central or regional, on the one hand, and legislative, executive or judicial, on the other. In practice, judicial authorities are mostly in charge of taking into account the Court's case-law pertaining to similar issues of principle in other States Parties. This has to do with the nature of human rights interpretation and therefore with the moral reasoning advantage of judges⁹² and their particular ability to identify within the ECtHR's case-law what could count as a minimal common interpretation.⁹³ Another more general ground for the particular relevance of judicial bodies in this context lies in the nature of precedents and jurisprudential authority

⁹¹ See also LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, *op. cit.*, note 5, pp. 310-311.

⁹² See the discussion in JEREMY WALDRON, "Judges as Moral Reasoners", *International Journal of Constitutional Law*, no. 1, vol. 7, 2009, pp. 2-24.

⁹³ See e.g. Report of the Wise Persons to the Committee of Ministers of 15 November 2006: "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."

and the way they impact immediately on other judges' reasoning.⁹⁴ It is important, however, especially by reference to the Committee of Ministers' 2004 Recommendation, that legislative authorities also pay attention preventively to those cases in the legislative drafting process.⁹⁵

In terms of right-holders, secondly, the jurisprudential authority of the ECtHR's case-law may be invoked by all persons and groups of persons under the jurisdiction of a State Party (Article 1 ECHR). A violation of jurisprudential authority equates with that of an ECHR right and may be invoked *qua* right violation following the same procedures (Articles 34 and 35 ECHR).

2. *Ratione temporis*

The temporal scope of the jurisprudential authority of the ECtHR's judgments is limited on both ends. It starts with a final (Article 44 ECHR) and non-overruled precedent and only ends once that precedent has been qualified or overruled.

Unlike some judgments of the CJEU invalidating EU law,⁹⁶ ECtHR's judgments' jurisprudential authority is never retroactive.⁹⁷ This is because human rights are indeterminate and their specification by interpretation has to remain dynamic as a result. It is that very nature of human rights that also explains why the qualification or overruling of the precedent is always possible and why the jurisprudential authority is only temporary.

⁹⁴ See e.g. LAMOND, "Precedent", *op. cit.*, note 16. This is actually confirmed in practice, as the European Court takes a different approach to respecting domestic interpretations of the Convention depending on whether those interpretations stem from legislative, executive or judicial authorities (see e.g. ECtHR, *Zdanoka v. Latvia*, No. 58278/00, 16 March 2006, para. 134). See also CHRISTOFFERSEN, "Individual and Constitutional Justice", *op. cit.*, note 87, 200-202.

⁹⁵ See e.g. Recommendation (2004) of the Committee of Ministers to Member States on the verification of the compatibility of draft laws, existing laws and administrative practice with standards laid down in the European Convention on Human Rights (adopted by the Committee of Ministers on 12 May 2004 at its 114th Session). See also WALDRON, "Judges as Moral Reasoners", *op. cit.*, note 92.

⁹⁶ See e.g. CJEU, *Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren*, Case C-453/00, [2004] ECR I-837; CJEU, *Willy Kemper KG v. Hauptzollamt Hamburg-Jonas*, Case C-2/06, [2008] ECR I-411.

⁹⁷ See by extension LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, *op. cit.*, note 5, pp. 83-88 and 311-312.

All it takes therefore for a precedent to arise with EOE is a judgment that entails some generalizable grounds: that judgment creates 'jurisprudence' (literally, in French, *le jugement fait jurisprudence*). More specifically, the conditions for the existence of a precedent are: (i) a clear and non-contradictory reasoned decision whose grounds may therefore be generalized; and (ii) the absence of overruling of those grounds in the next case(s).⁹⁸ One confirmation after the first decision is enough for there to be a precedent. Unlike what would be the case domestically, time matters as the reciprocal legitimization of the precedent requires judicial exchanges between domestic courts and the ECtHR.⁹⁹ Hence the idea of 'well-established' case-law. This does not, however, necessarily mean the expiration of a lengthy period of time following the precedent. Nor does it require numerous confirmations of the decision.¹⁰⁰

3. *Ratione materiae*

Jurisprudential authority is the authority of an interpretation of ECHR rights (the *res interpretata*). It refers to what can be generalized in the grounds of the judgment. The *res interpretata* in a judgment does not include facts or assessments of facts, however.¹⁰¹ Nor does it cover anything from the operative or decisional part of the judgment.

For the rest, the *res interpretata* of a judgment may include interpretation principles (so-called *principes d'interprétation*) and judicial tests (e.g. the proportionality test), but also interpretations of autonomous concepts (e.g. the concept of degrading treatment) developed by the Court. As discussed previously, the Group of Wise Persons has rightly stressed that the notion of 'judgment of principle' is indeterminate and that it should be for each

⁹⁸ See the conditions set by the ECtHR in *Vermeire v. Belgium*, No. 12849/87, 29 November 1991, para. 25: "[o]n ne discerne pas ce qui pouvait empêcher la cour d'appel de Bruxelles, puis la Cour de cassation de se conformer aux conclusions de l'arrêt Marckx à l'instar du tribunal de première instance: n'était ni *imprécise ni incomplète* la règle qui interdisait d'opérer au détriment d'Astrid Vermeire, par rapport à ses cousins Francine et Michel, une discrimination fondée sur le caractère "naturel" du lien de parenté l'unissant au de cujus." (emphasis added). See also LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, *op. cit.*, note 5, pp. 327-328.

⁹⁹ See LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, *op. cit.*, note 5, p. 328.

¹⁰⁰ See also LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, *op. cit.*, note 5, p. 327.

¹⁰¹ See also LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, *op. cit.*, note 5, pp. 309-310.

domestic authority to specify in context.¹⁰² As a result, it is not possible to distinguish between judgments of principle (so-called *arrêts de principe* or *grands arrêts*) and other judgments. The clearer and more coherent the Court is in its reasoning, however, the more it enhances the possibility for domestic authorities to identify a *res interpretata*.¹⁰³

There is no further limitation, however, as to the ECHR rights whose interpretations may be generalized. Jurisprudential authority does not only pertain to the absolute ECHR rights listed in Article 15 ECHR, for instance. Those rights benefit from the general decisional authority discussed previously. Nor is jurisprudential authority limited to Grand Chamber judgments. As we will see, however, those features may affect the degree of those judgments' jurisprudential authority.

It is important to emphasize that the Court may only embark into an interpretation exercise whose outcome could benefit from jurisprudential authority if certain conditions are fulfilled. Those conditions are dictated by the principle of subsidiarity. Or else the Court's judgment ought not be vested with jurisprudential authority.

¹⁰² Report of the Wise Persons to the Committee of Ministers of 15 November 2006: "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."

¹⁰³ On the requirement of enhanced clarity in the ECtHR's case-law as condition of its jurisprudential authority, see e.g. COHEN-JONATHAN, "Quelques considérations sur l'autorité", *op. cit.*, note 6, pp. 56 ff.; SUDRE, *Droit européen et international*, *op. cit.*, note 6, p. 822.

As alluded to before, the principle of subsidiarity is one of the leading principles in the ECHR system. It protects the priority of domestic human rights practices as much as the latter's underlying interpretations of human rights. Substantive subsidiarity is complemented, on the one hand, by jurisdictional subsidiarity as the ECtHR's jurisdiction only arises after the exhaustion of local remedies and, on the other, by remedial subsidiarity as States Parties remain free to choose what constitutes the best remedy and way to abide by an adverse judgment of the Court. Given the intricate ties between human rights interpretation and application, jurisdictional subsidiarity applies as much to the Court's remedial or decisional jurisdiction as to its interpretive jurisdiction.¹⁰⁴

On the basis of substantive subsidiarity, States Parties are recognized a certain margin of appreciation on issues pertaining to which there is no European "consensus".¹⁰⁵ It is the case of sensitive moral issues in particular.¹⁰⁶ Consensus is an important criterion,¹⁰⁷ as once the Court decides there is a consensus among domestic interpretations, it can be extremely creative and dynamic in the interpretation of the Convention.¹⁰⁸ In

¹⁰⁴ See on the subsidiary nature of the ECtHR's interpretations: ECtHR, *Burden v. United Kingdom*, No. 13378/05, 29 April 2008, para. 42; ECtHR, *Hatton v. United Kingdom*, No. 36022/97, 8 July 2003, para. 97.

¹⁰⁵ See Catherine VAN DE HEYNING, "No place like home: Discretionary space for the domestic protection of fundamental rights", in POPELIER, VAN DE HEYNING, VAN NUFFEL, eds, *Human Rights Protection*, *op. cit.*, note 42, pp. 65-96, pp. 87-91; Jan KRATOCHVIL, "The Inflation of the Margin of Appreciation by the European Court of Human Rights", *Netherlands Quarterly of Human Rights*, no. 3, vol. 29, 2011, pp. 324-357; KRISCH, *Beyond Constitutionalism*, *op. cit.*, note 68, pp. 140-3; Yutaka ARAI-TAKAHASHI, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECtHR*, Antwerp, Intersentia, 2002; Eva BREMS, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 56, 1996, pp. 240-314; Ronald St. JOHN MACDONALD, "The Margin of Appreciation", in Ronald St. JOHN MACDONALD et al., eds, *The European System for the Protection of Human Rights*, Dordrecht, Martinus Nijhoff, 1993, pp. 83-124.

¹⁰⁶ See ECtHR, *Prety v. United Kingdom*, No. 2346/02, 29 April 2002; ECtHR, *Leyla Sahin v. Turkey*, No. 44774/98, 10 November 2005.

¹⁰⁷ See e.g. Laurence HELFER, "Consensus, Coherence and the European Convention on Human Rights", *Cornell International Law Journal*, vol. 26, 1993, pp. 133-165; Kanstantsin DZEHTSIAROU, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the ECtHR", *Public Law*, 2011, pp. 534-553.

¹⁰⁸ See ECtHR, *Tyler v. United Kingdom*, No. 5856/72, 25 April 1978. See Alistair MOWBRAY, "The Creativity of the European Court of Human Rights", *Human Rights Law Review*, vol. 5, 2005, pp. 57-79.

such circumstances, the Court refers to the Convention as a “living instrument” and makes it fit “present-day conditions”¹⁰⁹, just the way a domestic court would.

The Court has never been very clear about the notion of ‘consensus’ and about the exact circumstances in which the margin of appreciation applies. Moreover, the Court is increasingly creative even in cases where there is no consensus among States Parties,¹¹⁰ or, on the contrary, cautious even where there is a consensus among States Parties.¹¹¹ Given the indeterminacy of human rights and hence of their interpretations, however, it should not come as a surprise that the notion of consensus cannot be specified in more detail. In any case, the Court has repeatedly stated that the margin of appreciation is not unlimited. It decreases with the importance of the right violated or even with the importance of certain central dimensions of the right being violated.¹¹² The existence of inherent limitations to the margin of appreciation in the case of imperative ECHR rights is perfectly compatible with the principle of interpretive subsidiarity, at least if one refers to their general (*erga omnes*) nature and therefore to the general decisional authority of the judgments pertaining to those rights I mentioned previously.

C. The content of jurisprudential authority

The ECtHR’s judgments’ jurisprudential authority does not correspond to an obligation to execute the judgment (Article 46 paragraph 2 ECHR), but only to conform to its interpretation of the Convention rights.¹¹³ In case a judgment’s jurisprudential authority is not respected, this amounts to a primary violation of the Convention that constitutes the ground for an application to the Court.

¹⁰⁹ See ECtHR, *Fretté v. France*, No. 36515/97, 26 February 2002; ECtHR, *Christine Goodwin v. The United Kingdom*, No. 28957/95, 11 July 2002.

¹¹⁰ See ECtHR, *Hirst v. The United Kingdom* (No. 2), No. 74025/01, 6 October 2005, paras. 81–2; ECtHR, *B and L v. The United Kingdom*, No. 36536/02, 13 September 2005.

¹¹¹ See e.g. ECtHR, *A, B and C v. Ireland*, No. 25579/05, 16 December 2010, and in particular the partly dissenting opinion of Judges ROZAKIS, TULKENS, FURA, HIRVELÄ, MALINVERNI and POALELUNGI.

¹¹² See ECtHR, *Jäggi v. Switzerland*, No. 58757/00, 13 July 2006; ECtHR, *Dudgeon v. United Kingdom*, No. 7525/76, 22 October 1981, para. 52.

¹¹³ This is why the argument according to which the EOE would increase the Committee of Ministers’ monitoring case-load is unwarranted. Contra: e.g. CZERNER, “Inter partes versus erga omnes”, *op. cit.*, note 6, p. 365.

It is important therefore to know exactly what the obligation 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’ (Interlaken Action Plan, Section B.4.c)) amounts to. I will take those three elements in turn.

First of all, it follows from the Interlaken Action Plan that the judgment whose jurisprudential authority is at stake needs to be a judgment *in violation*. It is unclear why this would have to be the case, however. Interpretations of the Convention can also be given in cases where no violation is found. The second element from the definition is that it ought to be a matter of *principle*. Given that all ECHR rights are drafted as principles, this could refer to any interpretation of those rights whether it pertains to an ECHR principle (e.g. principle of proportionality) or not. The third element refers to the *sameness* of the problem at hand. It would seem, however, that the applicability of a right and hence of its interpretation in a previous case would be enough to trigger the application of that interpretation of the right. The fact that the problem in both cases is a different one does not seem relevant.¹¹⁴

If those conditions are fulfilled, domestic authorities have to ‘take into account’ the relevant case-law and ‘draw their conclusions’. Of course, it may well be that once specified in the circumstances of the case, the ECHR right at stake ought not to be interpreted the way it was by the ECtHR. The domestic court will accordingly distinguish, qualify or even overrule the Court’s precedent. Hence the use of the term ‘taking into account’ as opposed to merely ‘abiding by’. So-doing, the domestic court will enter into a judicial dialogue with the ECtHR that may or may not lead to the distinction, qualification or overruling of the precedent by the Court itself. After all, the reasons that the Court invokes to distance itself from its own precedents do cover societal changes.¹¹⁵ And who could best warn the Court about those changes but domestic courts?

¹¹⁴ Contra LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, *op. cit.*, note 5, pp. 79–80 who seems to require the identity of legal situations.

¹¹⁵ See e.g. ECtHR, *Cossey v. United Kingdom*, No. 10843/84, 27 September 1990, para. 35: “It is true that, as she submitted, the Court is not bound by its previous judgments; indeed, this is borne out by Rule 51 para. 1 of the Rules of Court. However, it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the

Referring to the minimal interpretation of Convention rights crystallized in the Court's case-law is also important for domestic courts' reasoning as it reminds them of the common standards European States have set for themselves and which they have a responsibility to realize with other European States. There are numerous examples of that kind of interpretive dialogue between the ECtHR and domestic courts, leading, when the mutual exchange has been fruitful, to important changes in the Court's interpretation of the Convention.¹¹⁶ That kind of exchange between domestic courts and the ECtHR and their judicial dialogue actually explains why it is up to domestic courts to identify the jurisprudential authority of a given Court's judgment and not something to be identified *in abstracto* by the Court itself for future domestic and European cases.¹¹⁷

orderly development of the Convention case-law. Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day." See also ECtHR, *Chapman v. United Kingdom*, No. 27238/95, 18 January 2001, para. 70.

¹¹⁶ See e.g. in the United Kingdom, the House of Lords' decision in *R. v. Lyons*, [2002] WLR 1562, 1580, 1584, 1595 that was confirmed later on by the European Court in *Lyons and others v. United Kingdom*, No. 15227/03, 8 July 2003. See also *Z and others v. United Kingdom*, No. 29392/95, 10 May 2001, confirming the British courts' decision (*Barrett v. Enfield LBC*, [2001] 2 AC 550) that had been intentionally decided against the European Court's decision in *Osman v. United Kingdom*, No. 23452/94, 28 October 1998. Most recently, see also ECtHR, *A v. United Kingdom*, No. 3455/05, 19 February 2009. See also BESSON, "The reception of the ECHR", *op. cit.*, note 43 (on the empowerment of UK courts and their participation in a judicial dialogue with the ECtHR); BESSON, "European Human Rights, Supranational Judicial Review", *op. cit.*, note 42, p. 129; SADURSKI, "Partnering with Strasbourg", *op. cit.*, note 41; KRISCH, *Beyond Constitutionalism*, *op. cit.*, note 68, pp. 134 ff. (focusing on the Court's judgments' decisional authority only, however); VAN DE HEYNING, "No place like home", *op. cit.*, note 105, pp. 91-94; CHRISTOFFERSEN, "Individual and Constitutional Justice", *op. cit.*, note 87, pp. 198-200.

¹¹⁷ See e.g. Report of the Wise Persons to the Committee of Ministers of 15 November 2006: "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

When distinguishing, qualifying or overruling a precedent of the ECtHR, domestic courts may invoke various arguments that follow from the interpretive and jurisdictional subsidiarity of the ECtHR.

First of all, domestic courts may invoke a change in the interpretive *consensus* among States Parties. Since that consensus was one of the conditions for the ECtHR's interpretation in the first place and for derogating from the States Parties' margin of appreciation, the existence of an interpretive consensus on new grounds or the end of the previous interpretive consensus may be invoked against the precedent and its jurisprudential authority. This way, jurisprudential authority ought to evolve hand in hand with States Parties' margin of appreciation as a two-way street and not against it, as some may fear.¹¹⁸ The mutual constitution of ECHR rights' interpretations is what enables in turn the development of minimal precedents in the ECtHR's case-law.

Secondly, Article 53 ECHR (the Convention's so-called 'maximization clause') provides another ground on which to justify a derogation to a precedent. Domestic authorities may argue that their proposed interpretation of the Convention provides better protection to the rights at hand. Given the indeterminacy of the concept of higher or lower protection of a given human right taken in isolation from the others and also *per se*, this would be a difficult argument to rebut on the part of the Court.¹¹⁹ As a matter of fact, the

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."

¹¹⁸ See WILDHABER, "Ein Überdenken des Zustands und der Zukunft", *op. cit.*, note 68; and LUTZ WILDHABER, "Rethinking the European Court of Human Rights", in JONAS CHRISTOFFERSEN, Mikael RASK MADSEN, eds, *The European Court of Human Rights between Law and Politics*, Oxford, Oxford University Press, 2011, pp. 204-229, 215-217 on interpretation at the ECtHR not being a 'one-way street'. See also VAN DE HEYNING, "No place like home", *op. cit.*, note 105, pp. 90-91; KRISCH, *Beyond Constitutionalism*, *op. cit.*, note 68, p. 143; LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, *op. cit.*, note 5, pp. 331-334.

¹¹⁹ See on the indeterminacy of human rights and of their maximal realization as a result, e.g. BESSON, "Human Rights and Democracy", *op. cit.*, note 59; BUCHANAN, *Justice, Legitimacy, and Self-Determination*, *op. cit.*, note 81, pp. 180-186. Contra: BREMS, "Human Rights: Minimum and Maximum", *op. cit.*, note 59.

Court's case-law on Article 53 ECHR is inconclusive.¹²⁰ The lack or change of consensus argument has more potential if the EOE of the ECtHR's judgments becomes a generalized requirement of the Convention.¹²¹

D. The degree of jurisprudential authority

The jurisprudential authority of the ECtHR's judgment, just like the legal authority of ECHR rights and duties, comes in degrees. The corresponding obligations may be more or less stringent as a result.¹²²

The degree of jurisprudential authority plays a role in the context of the qualification or overruling of a European precedent by domestic courts and eventually by the Court itself. It is important to understand in any case that the jurisprudential authority of the ECtHR's case-law cannot be absolute at the risk otherwise of preventing judicial dialogue and the reciprocal development of the interpretation of ECHR rights.

Variations in the jurisprudential authority may not only reflect variations in the stringency of the obligations relative to the corresponding ECHR right, but may also result from the nature and content of the judgment itself.¹²³

An example may help illustrate the first case and the jurisprudential authority of core or absolute ECHR rights. The jurisprudential authority of a judgment interpreting the concept of degrading treatment under Article 3 ECHR will correspond in stringency to the degree of authority of that provision, i.e. a very high degree of stringency. And the same may be said of the rights enumerated in Article 15 ECHR. By extension, it is clear that the ECtHR's interpretations of autonomous concepts in the ECHR system also benefit from a high degree of jurisprudential authority.¹²⁴

¹²⁰ See e.g. ECtHR, *Handyside v. United Kingdom*, No. 5493/72, 7 December 1976, para. 54; ECtHR, *Emin and others v. Greece*, No. 34144/05, 27 March 2008, para. 17. See, however, ECtHR, *EB v. France*, No. 43546/02, 22 January 2008, para. 49.

¹²¹ See VAN DE HEYNING, "No place like home", *op. cit.*, note 105, pp. 71-81 for a discussion of Article 53 ECHR.

¹²² See also LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, *op. cit.*, note 5, pp. 305-306.

¹²³ See also LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, *op. cit.*, note 5, pp. 321 ff.

¹²⁴ See also LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, *op. cit.*, note 5, pp. 324-327.

It is more difficult to provide an exhaustive account of the second type of variation in the ECtHR's judgments' jurisprudential authority. An example may be the authority of the formation of the Court deciding the case. Grand Chamber judgments, especially when they are issued after a Chamber judgment, may be regarded as bearing greater authority than Chamber judgments.¹²⁵ This is because the formation is more inclusive and because its reasoning has benefited from enhanced deliberation. Another case may be the degree of entrenchment of a precedent. If a principle was interpreted a certain way and repeatedly interpreted that way, its jurisprudential authority is likely to be greater than if it is a new precedent.

V. The implementation of the *erga omnes* effect of judgments

The implementation of the jurisprudential authority of the ECtHR's judgments in practice depends on the adoption of mechanisms at domestic level (A.), but also at European level (B.).

A. Domestic implementation mechanisms

The jurisprudential authority of the ECtHR's judgments depends on the knowledge of those judgments on the part of domestic authorities. Domestic authorities have to be able to identify important or well-established case-law within the wealth of cases that do not pertain to their own State (e.g. among the 1'499 judgments issued by the Court in 2010 only).

As a result, translation, dissemination and training efforts by the competent centralized governmental agency are to be undertaken domestically.¹²⁶ This is a recommendation that has been pressed on domestic authorities by the

¹²⁵ See e.g. WILDHABER, "Rethinking the European Court of Human Rights", *op. cit.*, note 118, p. 207.

¹²⁶ On the domestic execution focal point, see e.g. Recommendation CM/Rec(2008)2/6 February 2008 of the Committee of Ministers to Member States on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights.

Parliamentary Assembly's Recommendations on the execution of judgments since 2000 and reiterated in Section B of the Interlaken Action Plan.¹²⁷

States Parties are encouraged to place a special emphasis on legislative and judicial authorities. With respect to the former, the mainstreaming of legislative proposals to check their conformity to the ECHR and the ECtHR's case law is already in place in certain States Parties (e.g. in the Joint Human Rights Committee in the United Kingdom¹²⁸) and is at the core of the Council of Europe's recommendations. Judicial training, but also judicial cooperation and dialogue are also recommended to enhance respect for the jurisprudential authority of the ECtHR's case-law.¹²⁹

When States Parties recognize the EOE of the ECtHR's judgments in their legal order, they face the same questions of validity, rank and effect as the ones they face regarding the ECHR itself. As discussed before, the current practice of States Parties is varied and does not necessarily correspond to the regime of incorporation of the Convention itself. Based on various experiences with the latter, however, democratic but also transparency

¹²⁷ For more recommendations of the Committee of Ministers concerning the application of the European Convention on Human Rights and the supervision of judgments of the European Court, see http://www.coe.int/t/dghl/monitoring/execution/documents/CM_Rec_en.asp. See also FURA-SANDSTRÖM, "Amplifying the effect of the Court's case law", *op. cit.*, note 7. See, more generally, on ways of improving the reception of the ECHR and the ECtHR's case-law in the domestic context, MAYA HERTIG RANDALL, in this volume, pp. 177 ff.

¹²⁸ See e.g. BESSON, "The reception of the ECHR", *op. cit.*, note 43; FRANCESCA KLUG, Helen WILDBORE, "Breaking New Ground: The Joint Committee on Human Rights and the Role of Parliament in Human Rights Compliance", *European Human Rights Law Review*, no. 3, 2007, pp. 231-250; Andrew DRZEMCZEWSKI, James GAUGHAN, "Implementing Strasbourg Court Judgments: the Parliamentary Dimension", in Wolfgang BENEDEK et al., eds, *European Yearbook on Human Rights*, Vienna, Neuer Wissenschaftlicher Verlag, 2010, pp. 233-244.

¹²⁹ See e.g. Izmir Declaration, 27 April 2011, Follow-up Plan: "B. Implementation of the Convention at national level The Conference: 1. Reiterates calls made in this respect in the Interlaken Declaration and more particularly invites the States Parties to: a. Ensure that effective domestic remedies exist, be they of a specific nature or a general domestic remedy, providing for a decision on an alleged violation of the Convention and, where necessary, its redress; b. Co-operate fully with the Committee of Ministers in the framework of the new methods of supervision of execution of judgments of the Court; c. Ensure that the programmes for professional training of judges, prosecutors and other law-enforcement officials as well as members of security forces contain adequate information regarding the well-established case-law of the Court concerning their respective professional fields." (emphasis added).

reasons commend legislative forms of incorporation, including a legislative reference to EOE on the model of Article 2 of the 1998 UK Human Rights Act and Article 4 of the 2003 Irish ECHR Act.¹³⁰

B. European implementation mechanisms

In order to enhance the identification of well-established case-law and hence the jurisprudential authority of the ECtHR's judgments, accompanying measures need to be adopted at the European level as well. This concern was addressed ever since the first reform proposals mentioned before. I will discuss three of them: Court rulings on questions of interpretation, Court advisory opinions and third party interventions before the Court.

The first implementation mechanism that has been in place since the entry into force of Protocol No. 14 is the possibility for the ECtHR to issue *rulings on questions of interpretation* (Article 46 paragraph 3 ECHR).¹³¹ These can be requested by the Committee of Ministers in the context of the monitoring of the execution of the Court's judgments by the States Parties concerned. When the reason for non-execution is uncertainty about the interpretation of the Convention in the judgment, a ruling on interpretation may help furthering the execution of the judgment in that State Party.

Even though the procedure is limited to the interpretation of issued judgments and not of Convention rights in general, it may help enhance the clarity of the Court's judgments and, once interpreted this way, their jurisprudential authority in all States Parties. The procedure has not yet been used, however. Requesting those rulings is a political decision that requires an important majority in the Committee of ministers.¹³²

The second mechanism one ought to discuss in the context of EOE is the creation of an *advisory jurisdiction* of the ECtHR, besides its existing contentious jurisdiction. The proposal was made by the Group of Wise Persons in 2006 and alluded to previously in this contribution.¹³³

¹³⁰ See e.g. BESSON, "The reception of the ECHR", *op. cit.*, note 43.

¹³¹ See Elisabeth LAMBERT ABDELGAWAD, in this volume, pp. 93 ff.

¹³² For the reasons, see Elisabeth LAMBERT ABDELGAWAD, in this volume, pp. 93 ff.

¹³³ Report of the Wise Persons to the Committee of Ministers of 15 November 2006, pp. 81 ff.

On the model of what applies in the EU with the preliminary rulings issued by the CJEU on matters of interpretation of EU law, one may expect that the ECtHR's advisory opinions could help clarify the interpretation of the ECHR and lead to more uniformity in its interpretation. The procedure would also enable other States Parties to file observations and hence could enhance the inclusion of all parties in the procedure leading to the interpretation of Convention rights by the Court.

According to the proposal made by the report, there would be three conditions to the submission of questions of interpretation to the Court: a) only constitutional courts or courts of last instance should be able to submit a request for an opinion; b) the opinions requested should only concern questions of principle or of general interest relating to the interpretation of the Convention or the protocols thereto; and c) the Court should have discretion to refuse to answer a request for an opinion. For example, the Court might consider that it should not give an answer in view of the state of its case-law or because the subject-matter of the request overlaps with that of a pending case. It would not have to give reasons for its refusal.

By making advisory opinions optional, the Group of Wise Persons has paid attention to the specificities of the ECHR system and to its case-load. Besides feasibility concerns, however, there are important difficulties with the proposed mechanism. The first one pertains to the difference between the CJEU and the ECtHR, and hence to that between the preliminary ruling procedure and what one could do within the ECHR system. The ECtHR is not the judicial body of a complete political and legal system like the EU. Its jurisdiction is subsidiary, as a result, and requires the exhaustion of local remedies precisely to give domestic authorities the possibility to develop their own interpretations of the Convention. Making advisory opinions non-binding would not only not alleviate this difficulty, but it would actually undermine the whole purpose of the ECtHR's judgments. Secondly, human rights, unlike EU law, are legal norms that need to be specified in a political context. Interpreting them *in abstracto* outside a given case and in a binding fashion would contradict their nature, as a result.¹³⁴ As a matter of fact, that limitation inherent to the nature of human rights also makes it unlikely that the CJEU could use a preliminary ruling to impose an interpretation of the

¹³⁴ See also LAMBERT ABDELGAWAD, *Les effets des arrêts de la Cour*, *op. cit.*, note 5, pp. 301-302.

EU Fundamental Rights Charter on EU Member States' judges in the future.¹³⁵

The third implementation mechanism one may mention is *third parties' interventions* in a pending case before the ECtHR. This mechanism is already in place (Article 36 ECHR), but could be used more systematically to influence the interpretation of the Convention by the Court. This would make sure the Court's judgments that are likely to generate an interpretive precedent are deliberated over following the expression of as many domestic perspectives as possible.¹³⁶ This way, the existence of an interpretive consensus among States Parties could be assessed more precisely and the various potential interpretations discussed. By improving the inclusion of the process and hence the representativity of the outcome, those interventions may contribute to the justification of the jurisprudential authority of the Court's case-law and hence to its overall legitimacy. Importantly, however, governmental interventions of that kind cannot replace legislative and judicial interpretations in the domestic context and judicial dialogue between domestic courts and the ECtHR.

Conclusions

Depending on the perspective and the name one gives to it, the *erga omnes* effect of the ECtHR's judgments is either something that already applies and binds States Parties, or something that States Parties should commit to in the future. The Court seems to lie in the former camp and so are different institutions at the Council of Europe, but most States Parties are situated in the latter. It is in this highly indeterminate legal context that the proposal that States Parties commit to taking into account the case-law of the Court even in cases that concern other States Parties re-surfaced in the 2010 Interlaken Action Plan.

¹³⁵ On the EU and the human rights competence, see BESSON, "Human Rights and Democracy", *op. cit.*, note 59; Samantha BESSON, "The Human Rights Competence in the EU – The State of the Question after Lisbon", in Pasquale PISTONE, Miguel MADURO, Georg KOFLER, eds, *Taxation and Human Rights in Europe and in the World*, 5th GREIT Conference, Amsterdam, IBFD, 2011, forthcoming.

¹³⁶ See e.g. the numerous third parties' interventions during the *MSS v. Belgium and Greece* case (ECtHR, *MSS v. Belgium and Greece*, No. 30696/09, 21 January 2011).

This article had as an aim to provide a clarification of the notion of EOE and of its European and domestic legal status, and, on that basis, to make proposals as to its potential justifications, legal regime and domestic and European implementation mechanisms.

The gist of the argument was that providing an answer to the question of EOE requires debating the nature of the ECHR system and adjudication by the ECtHR. The equivocations between the latter's constitutional and international nature are mirrored in the EOE debate. In short, the latter is either named and approved in constitutional terms *qua* jurisprudential authority, or named and rejected in international terms *qua erga omnes* effect. Not only are those re-naming processes and manichean oppositions not fruitful, but defending the EOE on constitutional grounds betrays the specific nature of international human rights law in general, and of the ECHR system in particular. International human rights need to be contextualized and specified before they can be applied and interpreted. As a result, their interpretation cannot but be domestic in priority. That is not to say, however, that international guarantees and institutions do not have a role to play in securing those interpretations. International monitoring helps consolidating minimal requirements on the basis of domestic practices and the interpretive consensus among States Parties. Importantly, however, that consolidation process is necessarily dynamic and requires an interpretive dialogue.

As a result, the jurisprudential authority of the ECtHR's judgments ought to be recognized by all States Parties, but in a way that saves the reciprocal interpretation and mutual legitimization process between the ECtHR and domestic courts. Different proposals along those lines were made in the article with respect to the content, scope and degree of the jurisprudential authority of the ECtHR's case-law and the ways to implement it domestically and at the European level.

More broadly, this contribution's discussion has shown that the concept of subsidiarity that has been at the core of the ECHR system from its inception needs to be thoroughly re-examined. Recent developments in the Court's case-law have indeed led to an understanding of subsidiarity that is at odds with the States Parties' conception and is instrumentalizing their reception of the Convention and its case-law to alleviate the Court's burden. We will not be able to reform the Court without knowing more about how it ought to cooperate with domestic courts. Although there is no question that the

Court's overload needs to be fixed, on the one hand, and that domestic authorities should do their share in the interpretation and reception of the Convention and that improvements are needed in that respect, on the other, merely shifting the burden to them will not help; interpreting European human rights is a shared and mutual responsibility.