
Res Interpretata, Erga Omnes *Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights*

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Abstract

This article argues that Articles 1, 19 and 32 of the European Convention on Human Rights (ECHR) provide for a principle of res interpretata, which has also been confirmed in the case law of the European Court of Human Rights (ECtHR). This engenders a legal obligation under international law for the contracting states to take the full body of the Court's case law into account when performing their obligations under the Convention. It further argues that the principle of res interpretata is confirmed and operationalized in the ECtHR's more recent case law on the margin of appreciation, where the Court seeks to facilitate a more direct and timely involvement of its jurisprudence in the legal systems of the contracting states. Therefore, while the erga omnes effect for the judgments of the ECtHR is not expressly provided by the ECHR, the principle of res interpretata and the margin of appreciation doctrine de facto translate to introduce such an effect. After analysing the relevant case law and explaining the nuances of the Court's different approaches to incentivizing domestic courts, on the one hand, and domestic policymakers, on the other, the article will elaborate on the extent to which the obligations imposed on states through the principle of res interpretata can reach. While pointing out some dangers inherent in the trends analysed, and cautioning the Court to be careful not to compromise its role under

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Article 32 of the ECHR of upholding the interpretation and application of Convention rights, the article concludes with a relatively positive assessment of the developments discussed.

1 Introduction

In its recent case law, the European Court of Human Rights (ECtHR) seems increasingly preoccupied with the quality of national judicial and democratic decision-making processes. Although the precise outlines of this trend remain more than a little fuzzy around the edges, the literature is beginning to refer to a phenomenon of proceduralization in the Court's approach.¹ This article will take a closer look at how certain elements of proceduralization under the margin of appreciation doctrine engender *erga omnes partes* effect for the Court's judgments. It will argue that contrary to the *prima facie* appearance of a more lenient and deferential Court, the emerging approach in fact signals the Court's ambition for more direct influence and a deeper penetration of its jurisprudence into the legal systems of the contracting states.

This article will begin by explaining the contested nature of an *erga omnes* effect in relation to the judgments of the ECtHR and discuss the findings of the final report of the Council of Europe's Steering Committee for Human Rights (CDDH) on the longer-term future of the ECtHR, which instead emphasizes the principle of *res interpretata*. After elaborating the European Convention on Human Rights (ECHR) basis for the principle of *res interpretata*, this section will also explain how it de facto introduces a limited *erga omnes partes* effect for the judgments of the Court. The article then moves on to identify how the Court's more recent case law developing the margin

¹ See Van de Heyning, 'No Place like Home: Discretionary Space for the Domestic Protection of Fundamental Rights', in P. Popelier, C. Van de Heyning and P. Van Nuffel (eds), *Human Rights Protection in the European Legal Order: The Interaction between the European and the National Courts* (2011) 65; Popelier, 'The Court as Regulatory Watchdog: The Procedural Approach in the Case Law of the European Court of Human Rights', in P. Popelier, A. Mazmanyan and W. Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (2012) 249; Popelier and Van de Heyning, 'Procedural Rationality: Giving Teeth to the Proportionality Analysis', 9 *European Constitutional Law Review (ECLR)* (2013) 230; Brems and Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights', 35 *Human Rights Quarterly* (2013) 176; Brems, 'Procedural Protection: An Examination of Procedural Safeguards Read into Substantive Convention Rights', in J. Gerards and E. Brems (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (2013) 137; Rui, 'The Interlaken, Izmir and Brighton Declarations: Towards a Paradigm Shift in the Strasbourg Court's Interpretation of the European Convention on Human Rights', 31 *Nordic Journal of Human Rights* (2013) 28; Gerards, 'The European Court of Human Rights and the National Courts: Giving Shape to the Notion of "Shared Responsibility"', in J. Gerards and J. Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law* (2014) 13; Kavanagh, 'Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory', 34 *Oxford Journal of Legal Studies (OJLS)* (2014) 443; Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments', 15 *Human Rights Law Review (HRLR)* (2015) 745; Gerards, 'Procedural Review by the ECtHR: A Typology', in J.H. Gerards and E. Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017) 127.

of appreciation doctrine confirms and operationalizes the principle of *res interpretata*. Based on the CDDH's final report and the preceding case law analysis, the next section of the article will elaborate the *res* of *res interpretata*. Here, it will be argued that there are certain limits on the extent to which the obligations imposed on states through the principle of *res interpretata* can reach, and this will be followed by a clarification of those elements of the case law that primarily seem to lend themselves to creating such obligations. Finally, the article will conclude with a brief assessment of the trends analysed.

2 Erga Omnes Effect through the Principle of Res Interpretata

A Erga Omnes Obligations: A Complex and Layered Concept

Article 46 of the ECHR stipulates that the contracting parties 'undertake to abide by the final judgment of the Court in any case to which they are parties'. According to this classic doctrine, therefore, the judgments of the Court are only formally binding *inter partes* and do not have a binding *erga omnes* effect across the states that are not parties to the relevant case.² The Latin phrase *erga omnes* means 'towards all', and the concept has been referred to in many different meanings and contexts, causing considerable confusion about its contours.³ Most famously, in the *Barcelona Traction* judgment, the International Court of Justice (ICJ) stated that *erga omnes* obligations were 'obligations of a State towards the international community as a whole' and that 'all States can be held to have a legal interest in their protection'.⁴ The judgment focuses on law enforcement and establishes that on the basis of general international law, *erga omnes* obligations can be protected by each and every state.⁵ The ICJ, however, also reasoned that in light of 'the importance of the rights involved', such obligations 'derive, for example, in contemporary international law, from the outlawing of acts of

² Ress, 'The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order', 40 *Texas International Law Journal* (2005) 359, at 374. See also generally Besson, 'The Erga Omnes Effect of Judgments of the European Court of Human Rights: What's in a Name?', in S. Besson (ed.), *The European Court of Human Rights after Protocol 14: Preliminary Assessment and Perspectives* (2011) 125 (who notes the scarcity of academic literature on the issues); Bodnar, 'Res Interpretata: The Legal Effect of the European Court of Human Rights' Judgments for Other States Than Those Which Were Party to the Proceedings', in Y. Haeck and E. Brems (eds), *Human Rights and Civil Liberties in the 21st Century* (2014) 223; Gerards, 'The European Court of Human Rights', in Haeck and Brems, *ibid.*, 21; Klein, 'Should the Binding Effect of the Judgments of the European Court of Human Rights Be Extended?', in P. Mahoney (ed.), *Protecting Human Rights: the European Perspective* (2000) 705; Lambert Abdelgawad, *Les effets des arrêts de la Court européenne des droits de l'homme* (1999).

³ Tams and Tzanakopoulos, 'Barcelona Traction at 40: The ICJ as an Agent of Legal Development' 23 *Leiden Journal of International Law* (2010) 781, at 794; C.J. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005), at 115.

⁴ *Barcelona Traction, Light and Power Company Limited, Second Phase*, Judgment, 5 February 1970, ICJ Reports (1970) 3, para. 33.

⁵ Tams and Tzanakopoulos, *supra* note 3, at 792.

aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination'.⁶ Thus, the judgment also deals with the question of what kind of norms can have an *erga omnes* effect, and it establishes that *jus cogens* norms have such effect.⁷ Further, as stipulated in Article 53 of the Vienna Convention on the Law of Treaties (VCLT), the peremptory norms of general international law (*jus cogens*) cannot be derogated from by any treaty.⁸ References to *erga omnes* obligations, therefore, can be taken, broadly speaking, to relate to obligations that are considered normatively binding on all states by virtue of general international law, irrespective of their treaty-based undertakings and/or obligations that are on the same basis enforceable by and against all states.⁹ Not all *erga omnes* obligations, however, constitute peremptory norms of general international law (*jus cogens*). Accordingly, while not claiming that all human rights have the status of *jus cogens*, one construction of the concept of *erga omnes* holds that all rights stipulated in human rights treaties constitute obligations *erga omnes partes* in the sense that every state party to a human rights treaty has an enforcement interest in the performance of that same treaty by all other states parties.¹⁰

The term *erga omnes* is also sometimes used to connote the idea that the interpretative authority of international judgments reaches beyond the parties to the case. In the *South West Africa* judgment of the ICJ, the Court, for example, stated that an international judgment might bring with it 'an effect *erga omnes* as a general judicial settlement binding on all concerned'.¹¹ The case law of the ECtHR has in fact been considered to provide some of the bolder examples of this understanding, whereas express references to the term '*erga omnes*' in this context nevertheless seem confined to dissenting or concurring opinions of individual judges.¹² The specific *erga omnes*

⁶ *Barcelona Traction*, *supra* note 4, paras 33–34.

⁷ De Wet, 'The International Constitutional Order', 55 *International and Comparative Law Quarterly* (2006) 51, at 61. For a detailed discussion of the kinds of norms that can have an *erga omnes* effect, see M. Ragazzi, *The Concept of International Obligations Erga Omnes* (2000).

⁸ Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

⁹ Tams and Tzanakopoulos, *supra* note 3, at 105–106.

¹⁰ De Wet, *supra* note 7, at 55; Human Rights Committee, General Comment no. 31[80], Doc. CCPR/C/21/Rev. 1/Add. 13 (2004), para. 2. For the construction that human rights obligations are obligations owed to the international community as a whole and that all states' interest in the protection of human rights is not limited to the parties to specific treaties, see also International Law Institute, 'The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States', 63 *Yearbook of the Institute of International Law* (1989) 341, Art. 1. This latter understanding of human rights obligations also seems endorsed in ECtHR, *Perinçek v. Switzerland*, Appl. no. 27510/08, Judgment of 15 October 2015. Joint Dissenting Opinion of Judges Spielmann, Casadewall, Berro, De Gaetano, Sicilianos, Silvis and Kūris. All ECtHR decisions are available online at <http://hudoc.echr.coe.int/>.

¹¹ *South West Africa Cases (Second Phase)*, Judgment, 18 July 1966, ICJ Reports (1966) 6, para. 70. Similarly, see *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, 19 December 1978, ICJ Reports (1978) 3, para. 39, the International Court of Justice (ICJ) stated that its findings in a case between Greece and Turkey might have 'implications' in relations between other states.

¹² Laurence R. Helfer and Erik Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe', 68 *International Organization* (2014) 77, at 78. See, e.g., ECtHR, *Chassagnou and Others v. France*, Appl. nos 25088/94, 28331/95 and 28443/95, Judgment of 29 April 1999, Partly

effect at stake in this construction of the term, which will be the focus of this article, can be conceptualized simply as the idea that when an international court authoritatively settles interpretative questions, it is not only legally binding on the parties to the case, but it also has an *erga omnes partes* effect across all of the contracting states.

As already mentioned, the majority of the ECtHR has never adopted any express doctrine of *erga omnes* effect for its judgments in the above sense. However, the issue was up for debate in the context of the reform of the ECtHR, a process initiated at the Interlaken High Level Conference on the Future of the European Court of Human Rights in 2010.¹³ In this context, the CDDH was charged with an in-depth consideration of the longer-term future of the Court and considered various ideas for restructuring the ECHR system.¹⁴ The idea of giving the judgments of the Court (notably the Grand Chamber) a Convention-based and legally binding *erga omnes* effect *vis-à-vis* all contracting parties was tabled in this context.¹⁵ However, like all other innovative ideas that would have required more changes to the Convention, it was rejected in the CDDH's final report.¹⁶ Instead, the CDDH reasoned that the contracting states should take the 'principle of *res interpretata*' more seriously and 'integrate the Strasbourg Court's case-law into national law'.¹⁷

B A Legal Obligation through the Principle of Res Interpretata

The principle of *res interpretata* rests on the simple truth that despite the fact that ECHR law contains no doctrine of binding precedent, once the ECtHR has pronounced on an issue, it is to be expected that the Convention will be interpreted and applied in

Dissenting and Partly Concurring Opinion of Jude Zupančič; ECtHR, *Hutten-Czapska v. Poland*, Appl. no. 35014/97, Judgment of 19 June 2006, Partly Dissenting Opinion of Judge Zagrebelsky; ECtHR, *Lucky Dev v. Sweden*, Appl. no. 7356/10, Judgment of 27 November 2014, Joint Concurring Opinion of Judges Villeger, Nussberger and De Gaetano.

¹³ Reference documents from the reform process can be found at www.coe.int/t/dghl/standardsetting/cddh/reformechr/default_EN.asp. The key outcomes of this process are Protocol no. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms 2013, CETS 213; Protocol no. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms 2013, CETS 214.

¹⁴ See Steering Committee for Human Rights, Thematic Overview of the Results of the 'Open Call for Contributions (GT-GDR-F(2014)003), 12 March 2014, available at [www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/GT-GDR-F\(2014\)003_EN.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/GT-GDR-F(2014)003_EN.pdf).

¹⁵ See Dzehtsiarou and Greene, *Contribution*, available at www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Dzehtsiarou.pdf; Saura i Estapa, *Contribution*, available at www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Saura.pdf. See also generally Wildhaber and Greer, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights', 12 *HRLR* (2013) 655, at 682; Helfer, 'The Effectiveness of International Adjudicators', in Cesare Pr. Romano, Karen J. Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (2014) 464, at 472.

¹⁶ Steering Committee for Human Rights, CDDH Report on the Longer-Term Future of the System of the European Convention On Human Rights (CDDH Report), Doc CDDH(2015)R84 Addendum I, 11 December 2015, para. 64, available at [www.coe.int/t/DGHL/STANDARDSETTING/CDDH/REFORMECHR/CDDH\(2015\)R84_Addendum%20I_EN-Final.pdf](http://www.coe.int/t/DGHL/STANDARDSETTING/CDDH/REFORMECHR/CDDH(2015)R84_Addendum%20I_EN-Final.pdf).

¹⁷ *Ibid.*, para. 37.

the same manner if the Court is confronted with the same issue again in a different state.¹⁸ Classic cases in point include the 1979 judgment of *Marckx v. Belgium*, where the Court established the principle of equal treatment of children born out of wedlock in terms of inheritance rights, which naturally led to a finding of violation in *Inze v. Austria* in 1987 and in *Mazurek v. France* in 2000.¹⁹ It does not make much sense that it may take decades for a clear position of principle to penetrate the legal systems of all of the contracting states, even though they were not party to the case where the principle was established. This not only has obvious consequences for the authority of the Court's judgments and the effectiveness of the Convention system, but it also potentially begets a number of unnecessary applications to the Court. Accordingly, the Interlaken Declaration called upon the states to commit themselves to:

taking into account the Court's developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal systems.²⁰

This approach was, then, confirmed and reiterated with reference to the 'principle of *res interpretata*' in the CDDH final report on the longer-term future of the Court.²¹

The principle of *res interpretata* transpires from Articles 19 and 32 of the ECHR, which establish the Court to ensure the observance of Convention obligations and stipulate that it has the final authority on the interpretation and application of Convention rights – taken together with Article 1, which provides that the contracting states shall secure those very same rights to everyone within their jurisdictions.²² Read together, these provisions indicate that since the ECHR is a living instrument

¹⁸ The ECtHR has stated that '[w]hile the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases'. See ECtHR, *Christine Goodwin v. United Kingdom*, Appl. no. 28957/95, Judgment of 11 July 2002, para. 74. See also Besson, *supra* note 2, at 135–136.

¹⁹ ECtHR, *Marckx v. Belgium*, Appl. no. 6833/74, Judgment of 13 June 1979; ECtHR, *Inze v. Austria*, Appl. no. 8695/79, Judgment of 28 October 1987; ECtHR, *Mazurek v. France*, Appl. no. 34406/97, Judgment of 1 February 2000. The Committee of Ministers declared *Mazurek* satisfactorily implemented in 2005, but, in 2013, the Court found the transitional provisions of the relevant Act still to be in violation of the Convention. See ECtHR, *Fabris v. France*, Appl. no. 16575/08, Judgment of 7 February 2013. For other examples, see ECtHR, *Hirst v. United Kingdom (No. 2)*, Appl. no. 74025/01, Judgment of 6 October 2005; ECtHR, *Anchugov and Gladkov v. Russia*, Appl. nos 11157/04 and 15162/05, Judgment of 4 July 2013.

²⁰ High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010, item B.4.c, available at www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf. Bodnar, *supra* note 2, at 232, identifies the Interlaken Declaration as a significant milestone in the development of the *res interpretata* effect.

²¹ CDDH Report, *supra* note 16, para. 37. Various soft law instruments also recommend the general monitoring of the full body of the Court's case law by all contracting states. For an overview, see Bodnar, *supra* note 2, at 229–233.

²² Besson, *supra* note 2, at 134, 140, refers to Arts 1, 19, 32 of the ECHR as a basis to the *erga omnes* effect of the Court's judgments but does not elaborate on how they engender this effect. Bodnar, *supra* note 2, at 226–227, seems under-inclusive when he refers to Arts 1 and 19 as 'the sole source' of the *res interpretata* effect, while the CDDH Report, *supra* note 16, para. 37, seems over-inclusive in referring to Arts 1, 19, 32, 46 to establish the same.

authoritatively interpreted by the Court under Articles 19 and 32, in light of its object and purpose and in light of present-day conditions, the contracting states would not fulfil their obligation under Article 1 if they did not take the evolving case law of the Court into account when performing their treaty obligations.²³ This interpretation of the Convention is likewise implied when the Court reasons that its judgments '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'.²⁴

Accordingly, the principle of *res interpretata* informs the Court's stance that:

[a]lthough the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States.²⁵

Disregard for clear positions of principle in the case law, therefore, can be said to be in violation of the contracting parties' obligations under Article 1 of the ECHR, irrespective of which state the relevant judgment was directed against. Such disregard would, in turn, also fly in the face of the contracting states' obligation under Article 26 of the VCLT to perform treaty obligations in good faith.²⁶ This understanding of state obligations is exhibited, for example, in the *Opuz v. Turkey* judgment. Here, the ECtHR reasoned that when assessing whether the national authorities had met their obligation to protect the applicant against domestic violence:

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.²⁷

When contemplating the terminology appropriate for conceptualizing the general interpretational authority of the ECtHR's judgments, and the state obligations that come with it, Samantha Besson asks: '[W]hat's in a name?' She argues that the term *erga omnes* effect should be employed to connote the *res interpretata* or general 'interpretational' or 'jurisprudential' authority of the judgments of the ECtHR, in contrast with the *res judicata* or enforceable 'decisional' authority of its judgments *inter partes*

²³ On evolutive interpretation, see, e.g., ECtHR, *Bayatyan v. Armenia*, Appl. no. 23459/03, Judgment of 7 July 2011, para. 102.

²⁴ ECtHR, *Ireland v. United Kingdom*, Appl. no. 5310/71, Judgment of 18 January 1978, para. 154 (but with reference only to Art. 19 of the ECHR). See also ECtHR, *Karner v. Austria*, Appl. no. 40016/98, Judgment of 24 July 2003, para. 26.

²⁵ ECtHR, *Rantsev v. Cyprus and Russia*, Appl. no. 25965/04, Judgment of 7 January 2010, para. 197 (but without reference to specific Convention articles).

²⁶ Bodnar, *supra* note 2, at 227.

²⁷ ECtHR, *Opuz v. Turkey*, Appl. no. 33401/02, Judgment of 9 June 2009, para. 163. The finding of the Court, of course, is that the state was in breach of the Convention and not of some specific previous judgment. There is, therefore, no formal obligation to comply with the judgments of the Court in cases against other states as such, but, rather, an obligation to 'take into account' the principles flowing therefrom.

under Article 46.²⁸ This interpretation, she argues, would best reflect the international law origins of the Convention and the Court.²⁹ At the same time, however, she acknowledges that the notion of *erga omnes* is somewhat problematic in this context, notably since, in international law, it is generally understood to imply obligations that reach beyond the parties to a treaty and since the term does not differentiate between the two different elements of a judgment: its interpretational authority (which is subject to the *erga omnes* effect) and its operative part (the findings on violations and remedies, which are only binding *inter partes*).³⁰ The unqualified use of the term *erga omnes* effect in the Convention context, further, clearly does not sit well with the textual interpretation of Article 46 of the ECHR, which reserves the formally legally binding effect of judgments, and the Committee of Ministers' process for the execution of judgments, for the states parties to the case. It may be somewhat confusing, therefore, to refer to the notion of an *erga omnes* effect for the judgments of the Court in an unqualified manner as it can imply obligations beyond what is intended. For this reason, and given that the legal systems of the contracting states have different approaches to the effect of the Court's judgments in the national legal order,³¹ it is not surprising that many states may be opposed to the idea of an *erga omnes* effect for the judgments of the Court.³²

At the same time, however, as has been argued above, the principle of *res interpretata* does engender a legal obligation under international law, albeit of a more clearly delineated kind that reaches only the obligation to 'take into account' the interpretative authority of judgments against other states and that does not extend beyond the contracting states. The judgment of *Opuz v. Turkey* is an example of how this works in practice.³³ Similarly, in *Ahmet Yildirim v. Turkey*, where domestic legislation placed no obligation on the domestic courts to 'weigh up the various interests at stake' when blocking all access to Google sites, the ECtHR reasoned that '[s]uch an obligation ... flows directly from the Convention and from the case-law of the Convention institutions', and it found that the domestic courts 'should have taken into consideration' the significant collateral effect the measure would have.³⁴ Save for the lack of a Convention-based enforcement mechanism, which is reserved *inter partes* for

²⁸ Besson, *supra* note 2, at 132.

²⁹ *Ibid.*, at 128.

³⁰ *Ibid.*, at 131.

³¹ National positions range from a clear obligation to take the full body of the Court's evolving case law into account – as per s. 2(1)(a) of the United Kingdom's Human Rights Act 1998, 1998, c. 42 – to declarations that the judgments of the Court are not binding under domestic law – as per Art. 2 of the Icelandic Act on the European Convention on Human Rights, No. 62/1994. For an overview of some national law, see Committee on Legal Affairs and Human Rights, Contribution to the Conference on the Principle of Subsidiarity, Doc AS/Jur/Inf (2010) 04, 25 November 2010, available at www.assembly.coe.int/CommitteeDocs/2010/20101125_skopje.pdf.

³² CDDH Report, *supra* note 16, at para. 64.

³³ *Opuz*, *supra* note 27

³⁴ ECtHR, *Ahmet Yildirim v. Turkey*, Appl. no. 3111/10, Judgment of 18 December 2012, para. 66. The legislative provision in question and its application was found to produce arbitrary effects that did not meet the Convention standard of the 'foreseeability' of legislation prescribing limitations on rights.

judgments with a *res judicata* effect under Article 46, the end result is really the same under the principle of *res interpretata* as in the case of the *erga omnes* obligations mentioned earlier. The contracting states have a legal obligation under international law to take the Court's case law into account when performing their treaty obligations under the Convention, irrespective of whether they were parties to the relevant cases. Therefore, while it may not be appropriate to refer to this obligation in terms of an unqualified *erga omnes* effect and Article 46 of the ECHR, the Convention principle of *res interpretata*, which is based on Articles 1, 19 and 32 of the Convention and the Court's case law, can best be described as leading de facto to an *erga omnes partes* effect for the judgments of the Court.

C Concretizing the Legal Obligation

Proceeding from the above premises, the question arises of how the abstract obligation under the principle of *res interpretata* can be concretized in practice.³⁵ The final report of the CDDH on the longer-term future of the ECtHR gives some answers to this question. Importantly, as already mentioned, the CDDH encourages the ECtHR (Grand Chamber) – ‘without prejudice to the margin of appreciation afforded to Member States’ – to take an active role in this respect and to provide clearer interpretative guidance to the contracting states in its judgments.³⁶ Additionally, it encourages the national authorities (legislative and judicial) to study the full body of the Court's case law for principles to be applied in the domestic legal order, ‘in preventive anticipation of possible violations’³⁷ and to integrate Convention standards into the legislative process.³⁸ The Court's existing powers may, however, also be utilized to the effect of operationalizing or facilitating the principle of *res interpretata*. To begin with, it goes without saying that in cases like *Inze v. Austria* and *Mazurek v. France* the Court indeed enforces the *erga omnes* effect of the principles established in its earlier judgments by finding those states that have not implemented them in violation of the ECHR. There exist, in addition, clear examples like *Opuz v. Turkey* and *Ahmet Yildirim v. Turkey* where the Court elaborates how it assesses the performance of the national authorities against

³⁵ One question, which will not be investigated further in this article, is the temporal effect of new judgments of principle *vis-à-vis* states that are not party to the case. Besson, *supra* note 2, at 160, argues that the ‘ECtHR's jurisprudential authority is never retroactive’. Bjorge, ‘National Supreme Courts and the Development of ECHR Rights’, 9 *International Journal of Constitutional Law* (2011) 5, at 9–13, however, analyses the Court's somewhat conflicting case law on the question and concludes that the Court does not see evolutive interpretation as its sole prerogative and that ‘national supreme courts must take due notice of developments which will or are likely to move the jurisprudence of the Court’ (at 30). The issue recently came up in *Lucky Dev v. Sweden*, *supra* note 12, where the majority held a state accountable even though the contested domestic judgment was pronounced before the relevant *revirement de jurisprudence* in Strasbourg. In their joint concurring opinion, Judges Vilerger, Nussberger and De Gaetano, however, reasoned that ‘[n]ational courts are required to implement the Court's judgments, but not to anticipate changes in the case-law’.

³⁶ CDDH Report, *supra* note 16, paras 113–114.

³⁷ *Ibid.*, para. 41; see also para. 38.

³⁸ *Ibid.*, para. 54.

the standards developed in its case law.³⁹ However, as the following section will exhibit, the Court has recently embarked upon a project of consistently employing the margin of appreciation to confirm and operationalize *res interpretata* in a way that more actively engages the national authorities and produces a more timely (preventive) *erga omnes* effect for its judgments.

3 Operationalizing an *Erga Omnes* Effect through the Margin of Appreciation

A *The Two Sides of Subsidiarity and the Margin of Appreciation*

An emphasis on subsidiarity and the margin of appreciation as a check against the ECtHR intervening too decisively in the national legal systems is a recurrent theme in the CDDH's final report. Therefore, when framing *res interpretata* – the principle concerned with 'extending human rights jurisprudence throughout the community of the Convention States'⁴⁰ – reference to the margin of appreciation is expressly used as a reminder that states have a margin of appreciation when taking account of the Court's case law⁴¹ and that the Court should not go too far when giving general interpretative guidance in its judgments.⁴² At the same time, however, as we shall see, the margin of appreciation has become a distinct vehicle for operationalizing the *erga omnes* effect of the Court's judgments. At first sight, of course, this seems to be a paradox.⁴³ Upon a closer examination, however, it is not necessarily paradoxical but, rather, reflects the two sides of the subsidiarity/margin of appreciation coin.

In the context of the ECHR, the principle of subsidiarity 'means that the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than the Court'.⁴⁴ One side of

³⁹ *Inze*, *supra* note 19; *Mazurek*, *supra* note 19; *Opuz*, *supra* note 27; *Ahmet Yildirim*, *supra* note 34. In *Hutten-Czapska*, *supra* note 12, Partly Concurring, Partly Dissenting Opinion of Judge Zupančič, the judge reasoned that 'a *de facto erga omnes* effect exists anyway, whether the Court is forced to repeat it 60,000 times or not'.

⁴⁰ *Rantsev*, *supra* note 25, para. 197.

⁴¹ CDDH Report, *supra* note 16, para. 37.

⁴² *Ibid.*, para. 114.

⁴³ Besson, *supra* note 2, at 157, also notes that the principle of subsidiarity 'paradoxically' can justify the *erga omnes* effect of the ECtHR's judgments.

⁴⁴ Jurisconsult, *Interlaken Follow-Up Principle of Subsidiarity*, 8 July 2010, at 2, available at www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf. On the principle of subsidiarity in international law, see Besson, 'Subsidiarity in International Human Rights Law: What Is Subsidiary about Human Rights?', 61 *American Journal of Jurisdiction* (2016) 69; Mowbray, 'Subsidiarity and the European Convention on Human Rights', 15 *HRLR* (2015) 313; Follesdal, 'The Principle of Subsidiarity as a Constitutional Principle in International Law', 2 *Global Constitutionalism* (2013) 37; Carter, 'Rethinking Subsidiarity in International Human Rights Adjudication', 30 *Journal of Public Law and Policy* (2008) 319; Shelton, 'Subsidiarity and Human Rights Law', 27 *HRLJ* (2006) 4; Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law', 97 *American Journal of International Law* (2003) 38; Petzold, 'The Convention and the Principle of Subsidiarity', in R. St. J. Macdonald, F. Matscher and H. Petzold (eds), *The European System for the Protection of Human Rights* (1993) 39.

subsidiarity, therefore, limits intervention by the ECtHR. At the same time, however, subsidiarity also means that '[t]he Court can and should intervene only where the domestic authorities fail in that task'.⁴⁵ The other side of the same principle, therefore, also supports intervention under certain circumstances.⁴⁶ The margin of appreciation, which provides the doctrinal expression of the principle of subsidiarity in the Court's case law, is likewise employed equally to restrict the Court to a lenient review (a wide margin) and to empower the Court to undertake strict review (a narrow margin).⁴⁷ The width of the margin may also vary between individual cases of the same kind to reflect whether the national authorities have performed their tasks well enough. For example, under the 'fourth instance doctrine', where the margin is usually widest – that is, where the Court traditionally defers completely to the national courts with respect to the determination of questions of fact and the interpretation of national law⁴⁸ – the Court will nevertheless intervene if it finds that there are manifest problems with how the national courts have dealt with the relevant issues.⁴⁹

The twofold role of the margin of appreciation – as both a limitation on the Strasbourg Court's intervention and a justification for it – has recently been emphasized in the extrajudicial writings of former president Dean Spielmann, who when commenting on the ECtHR's more recent case law argued that the margin of appreciation is 'neither a gift nor a concession, but more an incentive to the domestic judge to conduct the necessary Convention review, realizing in this way the principle of subsidiarity'.⁵⁰ Indeed, while the Court, to a certain extent, has expressly relied on subsidiarity to introduce obligations under the principle of *res interpretata*, the following sub-sections will exhibit how the Court has relied primarily on the margin of appreciation doctrine to operationalize the principle and facilitate the *erga omnes* effect of its judgments.⁵¹

⁴⁵ Jurisconsult, *supra* note 44.

⁴⁶ See also Carozza, *supra* note 44, at 44 (referring to subsidiarity in this respect as 'a somewhat paradoxical principle'): ECtHR, Subsidiarity: A Two Sided Coin?, ECtHR background paper, 30 January 2015, para. 44, available at www.echr.coe.int/Documents/Seminar_background_paper_2015_ENG.pdf.

⁴⁷ On the margin of appreciation, see, e.g., Arnardóttir, 'Rethinking the Two Margins of Appreciation', 12 *ECLR* (2016) 27; Arai-Takahashi, 'The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry', in A. Føllesdal, B. Peters and G. Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (2013) 62; A. Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (2012); Kratochvíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights', 29 *Netherlands Quarterly of Human Rights* (2011) 324; Letsas, 'Two Concepts of the Margin of Appreciation' 26 *OJLS* (2006) 705.

⁴⁸ On the 'fourth instance doctrine', as part of the margin of appreciation doctrine, see J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primacy in the European Convention on Human Rights* (2009), at 238. See also generally Dahlberg, '... It Is Not Its Task to Act as a Court of Fourth Instance': The Case of the European Court of Human Rights', 7 *EJLS* (2014) 77.

⁴⁹ See, e.g., ECtHR, *Shtukaturov v. Russia*, Appl. no. 44009/05, Judgment of 27 March 2008, paras 90–96; ECtHR, *Fatullayev v. Azerbaijan*, Appl. no. 40984/07, Judgment of 22 April 2010, paras 121–129.

⁵⁰ Spielmann, 'Whither the Margin of Appreciation', 67 *Current Legal Problems* (2014) 49, at 49.

⁵¹ Mowbray, *supra* note 44, at 332, argues that Fabris, *supra* note 19, para. 72, indicates that the principle of subsidiarity imposes the obligation on states to 'pay attention to the Court's established jurisprudence'. Similarly, in ECtHR, *Erla Hlynisdóttir v. Iceland* (No. 2), Appl. no. 54125/10, Judgment of 21 October 2014, para. 54, the Court reasoned that '[i]n assessing the relevance and sufficiency of the national courts'

B Erga Omnes Effect for ECtHR Judgments vis-à-vis Domestic Courts

1 Res Interpretata and Judicial Dialogue

In practice, and as the ECHR has been incorporated into the national law of the contracting states, national courts regularly have recourse to the ECtHR's jurisprudence in their judgments.⁵² The conscientiousness with which they rely on it, however, varies greatly. Sometimes, national courts may even take the express position that the ECtHR has misunderstood some element of the local situation or that its judgments are not clear enough for them to follow.⁵³ It has been argued in the literature that such resistance is, in fact, the 'price of success' for the extent to which the law of the Convention has penetrated the contracting states' legal systems.⁵⁴ However, even if they have exhibited a certain element of resistance, judgments of this kind also acknowledge the supreme authority of the ECtHR over the interpretation of human rights by recognizing the 'procedural duty' to take the full body of the Court's evolving case law into account when interpreting and applying national law, while, at the same time, they carve out a space for the national courts in a process of interpretative dialogue with Strasbourg.⁵⁵

The same understanding of the respective roles of the ECtHR and the national courts is also reflected in the CDDH's final report on the longer-term future of the Court as it places great emphasis on the principle of *res interpretata*, while, at the same time, endorsing 'increased interaction and dialogue' in which the ECtHR should be 'more responsive to the considered interpretation of the Convention by national

findings, the Court, in accordance with the principle of subsidiarity, thus takes into account the extent to which the former balanced the conflicting rights implicated in the case, in the light of the Court's established case-law in this area'. However, here the Court immediately went on to employ the margin of appreciation to operationalize the obligation thus implied. See also generally Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity', 14 *HRLR* (2014) 487, at 498.

⁵² For a review of the situation in various contracting states, see Martinico, 'National Courts and Judicial Disobedience to the ECHR: A Comparative Overview', in O.M. Arnardóttir and A. Buyse (eds), *Shifting Centres of Gravity of Human Rights Protection Rethinking Relations between the ECHR, EU and National Legal Orders* (2016) 59, at 63–68.

⁵³ In *R v. Horncastle and Others*, [2009] UKSC 14, para. 11, the UK Supreme Court, e.g., reasoned that '[t]he requirement to "take into account" the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court'. See also *Manchester City Council v. Pinnock*, [2010] UKSC 45, para. 48.

⁵⁴ Martinico, *supra* note 52, at 68–71, with references to more examples from Germany, Austria and Italy. In contrast, Bjorge, *supra* note 35, gives a number of examples from the United Kingdom, Germany and France that exhibit a more positive attitude towards the ECtHR's jurisprudence.

⁵⁵ Martinico, *supra* note 52, at 69–70, citing also Murphy, *Human Rights Law and the Challenges of Explicit Judicial Dialogue* (2012), available at <http://jeanmonnetprogram.org/wp-content/uploads/2014/12/JMWP10Murphy.pdf>, at 25. Van de Heyning, *supra* note 1, at 94, also argues that 'a cooperative approach towards the highest domestic courts which take an active account of the ECHR' does not weaken the ECtHR but, instead, triggers a greater influence for the Convention.

courts'.⁵⁶ This is not as contradictory as it might seem at first glance, since the principle of *res interpretata* calls upon the national courts to interpret and apply ECtHR jurisprudence to new fact situations in the specific national context.⁵⁷ If they get it wrong, the Court will enter into a dialogue with them to correct the course,⁵⁸ but if they get it right, the human rights violation has been prevented or remedied 'at home' before (or without) reaching the ECtHR.

2 Enlarged Margins for Diligent Domestic Courts

In its recent case law, the ECtHR has carved out a distinct role for the margin of appreciation that recognizes this twofold task of the national courts: (i) to heed the obligation under the principle of *res interpretata* to take the ECtHR case law into account when adjudicating and (ii) to concretize the principles stemming therefrom in the national context. This was recently referred to by Başak Çalı as 'a nascent responsible courts doctrine', under which 'the ECtHR allows domestic courts a larger discretionary interpretative space with regard to making rights violation determinations, provided that domestic courts take ECtHR case-law seriously'.⁵⁹

The case law on the margin of appreciation in the context of balancing freedom of expression against the protection of private life has driven this innovation. Thus, when speaking about the margin of appreciation in *Von Hannover (No. 2) v. Germany*, the Grand Chamber unanimously established that, '[w]here the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts'.⁶⁰ It is interesting to note also that before operationalizing the principle of *res interpretata* in this way, the Grand Chamber provided clear interpretative guidance by consolidating decades of its case law into clear criteria that frame the balancing of competing private interests under Articles 8 and 10 of the ECHR.⁶¹ When adjudicating the case with reference to

⁵⁶ CDDH Report, *supra* note 16, para. 115. See also Besson, *supra* note 2, at 153–155, who in light of the unique characteristics of the Convention system emphasizes judicial dialogue as part of any doctrine of *erga omnes* effect for the judgments of the Court.

⁵⁷ Besson, *supra* note 2, at 161–162, 165–166, 174.

⁵⁸ See, e.g., ECtHR, *Lindheim and Others v. Norway*, Appl. nos 13221/08 and 2139/10, Judgment of 12 June 2012, para. 135.

⁵⁹ Çalı, 'From Flexible to Variable Standards of Judicial Review: The Responsible Domestic Courts Doctrine at the European Court of Human Rights', in O.M. Arnardóttir and A. Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations between the ECHR, EU, and National Legal Orders* (2016) 144, at 145.

⁶⁰ ECtHR, *Von Hannover (No. 2) v. Germany*, Appl. nos 40660/08 and 60641/08, Judgment of 7 February 2012, para. 107. See also ECtHR, *Aksu v. Turkey*, Appl. nos 4149/04 and 41029/04, Judgment of 15 March 2012, paras 67–68, where the Grand Chamber elaborated further on the new approach.

⁶¹ *Von Hannover (No. 2)*, *supra* note 60, paras 108–113; see also ECtHR, *Axel Springer AG v. Germany*, Appl. no. 39954/08, Judgment of 7 February 2012, paras 89–95. Applying the *Von Hannover (No. 2)* approach, in *Perinçek*, *supra* note 10, para. 228, the Grand Chamber also gave rather detailed interpretative guidance on the assessment of public statements in relation to highly contested and politically charged historical debates.

this new analytical approach, the Court focused exclusively on review *in abstracto* of whether the national courts had properly included and addressed the identified criteria in their proportionality analysis. After finding that they had heeded the (*erga omnes*) obligation to do so, the Court did not substitute its own *in concreto* proportionality review for that of the domestic courts.

This analytical move was controversial when first introduced in the ECtHR's jurisprudence.⁶² By establishing what can best be described as a rebuttable presumption of Convention compliance for diligent national courts, the ECtHR has indeed taken a rather drastic step that has the potential of reducing its own role in providing *in concreto* proportionality assessments to zero (complete deference).⁶³ The new approach is, thus, a development in the direction of taking even further the well-established approach in which national authorities enjoy a wide margin of appreciation in situations where competing rights have to be balanced against each other under the principle of proportionality.⁶⁴ It has subsequently developed into a relatively stable practice in cases concerning the balancing of private life and freedom of expression⁶⁵ and also seems to be taking hold in other situations where competing private interests have to be balanced against each other under the Convention.⁶⁶

When it comes to the balancing of public and private interests, a similar approach may also be emerging. Thus, in *Mouvement Raëlien Suisse v. Switzerland*, where freedom of expression was restricted not only with reference to the rights of others but

⁶² *Von Hannover (No. 2)*, *supra* note 60, was preceded by a divided Chamber and a divided Grand Chamber. See ECtHR, *MGN v. United Kingdom*, Appl. no. 39401/04, Judgment of 18 January 2011, para. 150; para. 5, Dissenting Opinion of Judge Davíd Thór Björgvinsson; ECtHR, *Palomo Sánchez v. Spain*, Appl. nos 28955/06, 28957/06, 28959/06 and 28964/06, Judgment of 12 September 2011, para. 57; para. 10, Joint Dissenting Opinion of Judges Tulkens, Davíd Thór Björgvinsson, Jočienė, Popović and Vučinić.

⁶³ On the difference between complete and partial deference in the Convention context, see Arnardóttir, *supra* note 47, at 45–51.

⁶⁴ See, e.g., *Chassagnou and Others*, *supra* note 12, para. 113.

⁶⁵ According to a HUDOC search for the terms 'strong reasons to substitute' and '*des raisons sérieuses pour que celle-ci substitue*', as of 1 May 2016, the Court has taken the *Von Hannover (No. 2)* approach in a total of 40 judgments concerning the balancing of Art. 8 and Art. 10 of the ECHR. In a further six judgments on the same issues, the older traditional approach has been applied by the majority of the Court, but concurring or dissenting judges have called for the application of the new approach. To these examples, we can add cases where the Court relies on similar approaches. Thus, in ECtHR, *Medžilis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*, Appl. no. 17224/11, Judgment 13 October 2015 (not final), para. 35; ECtHR, *Rusu v. Romania*, Appl. no. 25721/04, Judgment of 8 March 2016, para. 35, the Court did 'not see any serious reason to substitute its own assessment' for that of the domestic courts, which had carefully balanced freedom of expression and protection of private life 'in line with the principles laid down by the Court's case-law'. Similarly, see ECtHR, *Mouvement Raëlien Suisse v. Switzerland*, Appl. no. 16354/06, Judgment of 13 July 2012, para. 66.

⁶⁶ The *Von Hannover (No. 2)* approach was applied verbatim in ECtHR, *Fáber v. Hungary*, Appl. no. 40721/08, Judgment of 24 October 2012 (balancing under Arts 10 and 11); ECtHR, *Szima v. Hungary*, Appl. no. 29723/11, Judgment of 9 October 2012 (balancing the applicant's own rights and duties under Art. 10); ECtHR, *Bédat v. Switzerland*, Appl. no. 56925/08, Judgment of 29 March 2016 (balancing under Arts 10 and 6(1)). For a similar approach, see also ECtHR, *Karaahmed v. Bulgaria*, Appl. no. 30587/13, Judgment of 24 February 2015, para. 95 (balancing freedom of religion against the rights of demonstrators).

also to prevent crime and to protect health or morals, the Grand Chamber stated that in light of the wide margin of appreciation that otherwise applied in the case, 'only serious reasons could lead it to substitute its own assessment for that of the national authorities'.⁶⁷ Performing a light touch review and concluding that no such reasons existed, the Court emphasized the fact that the highest domestic court referred to Convention jurisprudence and performed a Convention-type proportionality review.⁶⁸ Similarly, in *McDonald v. United Kingdom*, the ECtHR noted the wide margin of appreciation that applies in matters of socio-economic policy and found that the national courts had exhibited due diligence to the Convention under Article 8(2). It added that:

[i]n such cases, it is not for this Court to substitute its own assessment of the merits of the contested measure (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities (notably the courts) unless there are shown to be compelling reasons for doing so.⁶⁹

The ECtHR, however, does not always rely on presumptions of Convention compliance by requiring 'serious', 'strong', or 'compelling' reasons to engage on the merits of the case. Thus, in the *Animal Defenders v. United Kingdom* judgment, which concerned the balancing of public and private interests in the context of an assessment of a blanket ban on political advertising, the Court simply reasoned that, for its proportionality review, 'the quality of the parliamentary and judicial review of the necessity of the measure is of particular importance ... including to the operation of the relevant margin of appreciation'.⁷⁰ Further, when assessing this quality, it emphasized the fact that the national courts had analysed the Strasbourg case law in detail 'and carefully applied that jurisprudence to the prohibition'.⁷¹ Similarly, in *Ivanova and Cherkezov v. Bulgaria*, the Court restated the principles developed in its case law and reasoned that when:

the national courts have regard to all relevant factors and weigh the competing interests in line with the above principles – in other words, where there is no reason to doubt the procedure followed in a given case – the margin of appreciation allowed to those courts will be a wide one ... and the Court will be reluctant to gainsay their assessment.⁷²

⁶⁷ *Mouvement Raëlien Suisse*, *supra* note 65, para. 66. In ECtHR, *Jeunesse v. the Netherlands*, Appl. no. 12738/10, Judgment of 3 October 2012, Joint Dissenting Opinion of Judges Villiger, Mahoney and Silvis, the *Von Hannover (No. 2)* approach was also referred to in the context of the balancing of public and private interests with respect to positive obligations under Art. 8.

⁶⁸ *Mouvement Raëlien Suisse*, *supra* note 65, para. 70.

⁶⁹ ECtHR, *McDonald v. United Kingdom*, Appl. no. 4241/15, Judgment of 20 May 2014, para. 57. The judgment may be seen as a development of the wide margin of appreciation, and a focus on the quality of national processes, which applies in the field of health and social services. See, e.g., ECtHR, *Maurice v. France*, Appl. no. 11810/03, Judgment of 6 October 2005, para. 124.

⁷⁰ ECtHR, *Animal Defenders v. United Kingdom*, Appl. no. 48876/08, Judgment of 22 April 2013, para. 108. This same approach was applied to the balancing of private life and freedom of expression in *Erla Hlynsdóttir (No. 2)*, *supra* note 51, para. 54; ECtHR, *Erla Hlynsdóttir v. Iceland (No. 3)*, Appl. no. 54145/10, Judgment of 2 June 2015, para. 59.

⁷¹ *Animal Defenders*, *supra* note 70, para. 115.

⁷² ECtHR, *Ivanova and Cherkezov v. Bulgaria*, Appl. no. 465771/15, Judgment of 21 April 2016, para. 53.

Enlarging the margin of appreciation, however, is but one side of the equation, and the ECtHR also draws negative inferences from the lack of due Convention diligence in this respect. This is exemplified by the *Matúz v. Hungary* judgment, where the Court found a violation and stated that ‘[i]f the reasoning of the national court demonstrates a lack of sufficient engagement with the general principles of the Court under Article 10 of the Convention, the degree of margin of appreciation afforded to the authorities will necessarily be narrower’.⁷³

C Erga Omnes Effect for ECtHR Judgments vis-à-vis Policymakers

1 The Different Roles of Courts and Policymakers

As identified in the CDDH’s final report, national democratic processes also have a distinct role to play in the process of embedding Convention principles in the national legal order.⁷⁴ The ECtHR, however, is differently situated *vis-à-vis* the national courts, on the one hand, and the national legislative or executive authorities responsible for policymaking, on the other. Due to the nature of their interpretative and adjudicative task, which is in essence the same as that of the Strasbourg Court, the principle of *res interpretata* seems most logically directed towards domestic courts.⁷⁵ The legislature’s policymaking role, by contrast, is political and focused on the formulation of abstract rules as opposed to the individualized adjudicative function of courts. It is to be expected, therefore, that the Court is more cautious when pronouncing on democratic processes.⁷⁶ Indeed, this is reflected in the well-established stance that when assessing whether a contested measure is taken in pursuit of a legitimate aim (such as those listed in paragraph 2 of Articles 8–11 of the ECHR), the Court ‘will respect the legislature’s judgment as to what is “in the public interest” unless that judgment is manifestly without reasonable foundation’.⁷⁷

⁷³ ECtHR, *Matúz v. Hungary*, Appl. no. 7657/10, Judgment of 21 October 2014, para. 35. See also the identical reasoning of the Court in *Erla Hlynsdóttir (No. 2)*, *supra* note 51, para. 54. For additional examples, see *Ivanova and Cherkezov*, *supra* note 72, paras 54–56; *Axel Springer AG*, *supra* note 61; ECtHR, *Ion Cârstea v. Romania*, Appl. no. 20531/06, Judgment of 28 October 2014, para. 38; ECtHR, *Niskasaari and Otavamedia Oyj v. Finland*, Appl. no. 32297/10, Judgment of 23 June 2015, para. 59; ECtHR, *Couderc and Hachette Filipacchi Associés v. France*, Appl. no. 40454/07, Judgment of 10 November 2015, para. 153. In the following I will use the term ‘due Convention diligence’ to refer to the requirement that national authorities exhibit due diligence by applying the principles and analytic approaches developed by the ECtHR domestically.

⁷⁴ CDDH Report, *supra* note 16, paras 38, 41, 54. On embedding international norms at the national level, see Koh, ‘Transnational Legal Process’, 75 *Nebraska Law Review* (1996) 181, at 205; Helfer, ‘Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime’, 19 *European Journal of International Law* (2008) 125, at 131–133.

⁷⁵ Besson, *supra* note 2, at 159. ECtHR, *supra* note 46, para. 33, also refers to national courts as ‘the natural partners of the Strasbourg machinery’.

⁷⁶ Saul, *supra* note 1, at 748.

⁷⁷ *MGN*, *supra* note 62, para. 199. ECtHR, *S.A.S. v. France*, Appl. no. 43835/11, Judgment of 1 July 2014, paras 113–122, exhibits the lengths to which the Court will go to respect the policymaker’s judgment on legitimate aims.

It is for the national authorities, thus, to decide on which policies to pursue, and the ECtHR's judicial role is limited instead to a Convention-based assessment of their consequences under the principle of proportionality. When making such proportionality assessments, it is also well established that the Court will grant a wide margin of appreciation 'in matters of general policy, on which opinions within a democratic society may reasonably differ widely' and that, in this context, 'the role of the domestic policy-maker should be given special weight'.⁷⁸ Against this background of the ECtHR's proper judicial role in relation to the policymaking function of the national authorities through democratic processes – and even though the principle of *res interpretata* speaks more directly to the domestic courts – the ECtHR can also support, to a certain extent, and incentivize parliaments and executives by giving a wider margin of appreciation when assessing the proportionality of measures stemming from processes that have duly taken cognizance of the principles developed in the Court's case law.

2 Enlarged Margins for Diligent Policymakers

Famously, when speaking to the margin of appreciation and finding a violation in *Hirst v. United Kingdom (No. 2)*, the ECtHR placed great emphasis on the fact that there was 'no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of convicted prisoners to vote' and that there had been no substantive debate in light of 'current human rights standards'.⁷⁹ Dissenting and concurring judges, however, expressed discontentment with this approach, 'as it is not for the Court to prescribe the way in which national legislatures carry out their legislative functions'.⁸⁰ The case law on 'general measures' – that is, legislative solutions that establish blanket rules and/or do not call for individual case-by-case proportionality assessments before a measure is applied in the domestic legal order – has nevertheless since provided the breeding ground for a move by the Court towards incentivizing parliaments to perform a Convention-type proportionality assessment.⁸¹ The *Animal Defenders* judgment is the key authority exhibiting this development and explaining the role of the margin of appreciation in this context.⁸² Here, and building on a line of earlier judgments, the Grand Chamber reasoned as follows:

⁷⁸ ECtHR, *Hatton and Others v. United Kingdom*, Appl. no. 36022/97, Judgment of 8 July 2003, para. 97.

⁷⁹ *Hirst (No. 2)*, *supra* note 19, para. 79.

⁸⁰ *Ibid.*, para. 7, Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens; see also Joint Concurring Opinion of Judges Tulkens and Zagrebelsky.

⁸¹ On 'general measures', see *Hatton and Others*, *supra* note 78, para. 123; *Animal Defenders*, *supra* note 70, para. 106.

⁸² According to a HUDC search as of 1 May 2016, a total of 39 judgments have cited the *Animal Defenders* case, *supra* note 70, for various reasons, some of which do not relate to the issues discussed in the present article. A number of judgments also concerned individualized proportionality assessments by courts and are discussed earlier in this article. The remaining judgments of note are discussed in the following, along with judgments otherwise identified in the relevant literature.

It emerges from that case law that, in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it ... The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation ... The application of the general measure to the facts of the case remains, however, illustrative of its impact in practice and is thus material to its proportionality.⁸³

This new formulation of the ECtHR's approach clearly emphasizes the quality of the parliamentary treatment of an issue as a factor influencing strictness of review, while retaining a role for the Court with respect to proportionality review *in concreto*. However, it should be noted that the Court also reasoned that 'the more convincing the general justifications for the general measure are, the less importance the Court will attach to its impact in the particular case', which seems to emphasize the abstract evaluation of the justification for a general measure over the assessments of its impact *in concreto* in the individual case, which, indeed, is what transpires from the Court's overall analysis in the judgment.⁸⁴ *Animal Defenders* was, however, decided by a slim majority of nine judges to eight, with the dissenting judges calling on the Court to perform more of its own *in concreto* proportionality analysis.⁸⁵ Subsequently, it seems that the Court is settling on an approach in which the quality of parliamentary review influences the width of the margin, while nevertheless performing a twofold analysis: the *in abstracto* review of the justification for the general measure described in *Animal Defenders*, coupled with its own proportionality review of its effects *in concreto*.⁸⁶

When addressing the quality of the parliamentary process, the ECtHR has mentioned different elements as being of value and potentially capable of influencing the strictness of review (for example, the evidence base, consultations, the level of

⁸³ *Animal Defenders*, *supra* note 70, para. 108. The case law cited in support contains various examples of general measures where the Court has, with more or less clear reference to the margin of appreciation, drawn positive or negative inferences from different elements related to the quality of domestic decision-making processes. For positive inferences, see *Hatton and Others*, *supra* note 78, para. 128 (quality of research into subject of executive regulation); ECtHR, *Murphy v. Ireland*, Appl. no. 44179/98, Judgment of 10 July 2003, para. 73 (substantive debates in parliament and comments by courts); ECtHR, *Evans v. United Kingdom*, Appl. no. 6339/05, Judgment of 10 April 2007, para. 86 (detailed examination issues before legislating). For negative inferences, see *Hirst (No. 2)*, *supra* note 19, paras 78–80 (no weighing of competing interests before legislating); ECtHR, *Dickson v. United Kingdom*, Appl. no. 44362/04, Judgment of 4 December 2007 (no weighing of competing interests in relation to the formulation of executive policy). The origins of the *Animal Defenders* approach can also be traced back to the earlier Chamber judgment in *MGN*, *supra* note 62, paras. 203–218 (the Court drew on a negative domestic review of legislation); ECtHR, *Alajos Kiss v. Hungary*, Appl. no. 38832/06, Judgment of 20 May 2010, para. 41 (legislature had not 'sought to weigh the competing interests or to assess the proportionality' of a measure).

⁸⁴ *Animal Defenders*, *supra* note 70, para. 109.

⁸⁵ *Ibid.*, para. 10, Joint Dissenting Opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano; para. 6, Dissenting Opinion of Judge Tulkens, joined by judges Spielmann and Laffranque.

⁸⁶ See, e.g., ECtHR, *Garib v. the Netherlands*, Appl. no. 43494/09, Judgment of 23 February 2016; ECtHR, *National Union of Rail, Maritime and Transport Workers v. United Kingdom*, Appl. no. 31045/10, Judgment of 8 April 2014. For judgments on 'general measures' where the Court does not cite the *Animal Defenders* judgment but, nevertheless, takes this approach, see ECtHR, *Parrillo v. Italy*, Appl. no. 46470/11, Judgment of 27 August 2015; ECtHR, *Shindler v. United Kingdom*, Appl. no. 19840/09, Judgment of 7 May 2013.

consensus reached and the comprehensiveness and level of detail of parliamentary review).⁸⁷ From the perspective of tracing the Court's approach towards the principle of *res interpretata*, however, it is noteworthy that in *Animal Defenders* it attached much weight to the fact that the domestic parliamentary and judicial bodies involved had carefully reviewed the question of whether the blanket ban, which in principle dated back to the 1950s, was still to be considered 'a proportionate general measure' in light of the Court's judgment against another state.⁸⁸ The due diligence exhibited by the national authorities by following up on the Court's more recent case law proved to be a key factor in the Court's review. Indeed, it stands out more generally that some kind of a Convention-type proportionality assessment is the most consistent key element that the Court – with carrot and stick – requires parliaments to embed in the legislative process,⁸⁹ and this seems also to apply logically to executive authorities when relevant.⁹⁰

This is not surprising as the requirement of proportionality is a deeply rooted and stable element that cuts across the whole body of the Court's case law. Indeed, the performance of a Convention-type balancing of interests has recently been referred to as the 'true mission under the Convention' for national parliaments.⁹¹ Accordingly, for example, in *Parrillo v. Italy*, the Grand Chamber noted that the legislature 'had already taken account of the different interests at stake';⁹² in *Garib v. the Netherlands*, the Court placed emphasis on the fact that parliament 'was concerned to limit any detrimental effects' of the measure in question⁹³ and in *Shindler v. United Kingdom*, it emphasized that parliament had 'sought to weigh the competing interests and to assess the proportionality' of the contested measure.⁹⁴ In all of these judgments, the Court drew positive inferences from the proportionality assessment performed before adopting 'general measures' and opened up the margin of appreciation.⁹⁵ In comparison, *Lindheim and Others v. Norway*; *Anchugov and Gladkov v. Russia* and *Ivanova and Cherkeзов v. Bulgaria* exemplify how the lack thereof narrows the margin.⁹⁶ The second observation is that the *Animal Defenders* judgment may indicate that the Court gives special approval to those national authorities that study and build their work on specific ECtHR judgments and that this may possibly result in granting them an even

⁸⁷ Popelier and Van De Heyning, *supra* note 1, at 254; Kavanagh, *supra* note 1, at 473–475; Saul, *supra* note 1, at 794–796; Gerards, 'Procedural Review', *supra* note 1, s. 3.2, all with references to case law.

⁸⁸ *Animal Defenders*, *supra* note 70, para. 114; see also paras. 115–116; ECtHR, *VgT Verein gegen Tierfabriken v. Switzerland*, Appl. no. 24699/94, Judgment of 28 June 2001.

⁸⁹ See also Saul, *supra* note 1, at 759.

⁹⁰ See *Hatton and Others*, *supra* note 78; *Dickson*, *supra* note 83.

⁹¹ ECtHR, *supra* note 46, para. 27.

⁹² *Parrillo*, *supra* note 86, para. 188.

⁹³ *Garib*, *supra* note 86, para. 126.

⁹⁴ *Shindler*, *supra* note 86, para. 117.

⁹⁵ The Court may, however, also choose to take a different route. See *S.A.S. v. France*, *supra* note 77, para. 129, where the Court relied on subsidiarity and a wide margin of appreciation without drawing clear inferences from the (good or poor) quality of the parliamentary decision-making process.

⁹⁶ *Lindheim and Others*, *supra* note 58, para. 128; *Anchugov and Gladkov*, *supra* note 19, para. 109; *Ivanova and Cherkeзов*, *supra* note 72, para. 54. For examples from older case law, see note 83 above.

wider margin in reward for their ‘exacting and pertinent’ consideration of Convention standards.⁹⁷

D Assessment of the New Approaches

The ECtHR has referred to the stance that it should not substitute its own assessment for that of the national authorities in different contexts where it intends to make clear that it will not assert itself, notably under the ‘fourth instance doctrine’ and when leaving choices between different regulatory approaches to the national authorities (while still retaining the Strasbourg proportionality review of their consequences *in concreto*).⁹⁸ Further, as identified in the literature on the ‘proceduralization’ of the ECtHR’s case law, the Court, on many occasions, has drawn positive or negative inferences from the quality of national decision-making processes when it reviews state performance.⁹⁹ What is new in the case law analysed above, however, is the emergence of a more systematic development that is characterized by (i) the Court’s increased interest in incentivizing/deferring to diligent national authorities; (ii) the unequivocal requirement that domestic authorities take the principle of *res interpretata* seriously, which emerges as a key yardstick against which domestic performance is measured and (iii) the development of the margin of appreciation doctrine as the tool with which to operationalize the above action.

In *Von Hannover (No. 2)* and a few other judgments, upon finding that the national courts had exhibited due Convention diligence, the presumption of Convention compliance had the effect that the ECtHR deferred completely to the domestic courts’ proportionality assessment without performing its own.¹⁰⁰ As pointed out by the dissenting judges, the *Animal Defenders* judgment on ‘general measures’ also comes close

⁹⁷ *Animal Defenders*, *supra* note 70, para. 116.

⁹⁸ A HUDOC search, from 1 February 2012 to 1 May 2016, of reported cases and judgments at importance levels 1 and 2, with the search terms ‘substitute its view’, ‘substitute its own assessment’, and ‘substitute itself’, reveals a number of judgments applying the *Von Hannover (No. 2)* approach, while most judgments nevertheless concern these two issues. See, respectively, ECtHR, *Rohlena v. Czech Republic*, Appl. no. 59552/08, Judgment of 27 January 2015, para. 51; ECtHR, *R.B. v. Hungary*, Appl. no. 64602/12, Judgment of 12 April 2016, para. 82.

⁹⁹ For positive inferences, see, e.g., ECtHR, *Remuszko v. Poland*, Appl. no. 1562/10, Judgment of 16 July 2013, para. 85; ECtHR, *A.L. v. Poland*, Appl. no. 28609/08, Judgment of 18 February 2014, para. 78. For negative inferences, see, e.g., ECtHR, *Waldemar Nowakowski v. Poland*, Appl. no. 55167/11, Judgment of 24 July 2012, para. 56; ECtHR, *Novikova and Others v. Russia*, Appl. nos 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13, Judgment of 26 April 2016, para. 205. This has occasionally been expressly linked to the margin of appreciation doctrine (see *Shtukaturov*, *supra* note 49, para. 89); and it has also sometimes included comments to the effect that domestic courts should apply ECtHR jurisprudence at home (see ECtHR, *Peta Deutschland v. Germany*, Appl. no. 4341/09, Judgment of 8 November 2012, paras. 47 and 51). For an overview of judgments where the quality of national decision-making processes has in various different ways had an effect on the Court’s review, see Gerards, ‘European Court of Human Rights’, *supra* note 1, at 52–56; Gerards, ‘Procedural Review’, *supra* note 1, ss 3.2, 4.2, 4.3; Brems and Lavrysen, *supra* note 1, at 191–198; Kavanagh, *supra* note 1, at 472–478; Saul, *supra* note 1, at 16–27.

¹⁰⁰ *MGN*, *supra* note 62 (in regard to the balancing of Arts 8 and 10); *Von Hannover (No. 2)*, *supra* note 60; *Aksu*, *supra* note 60; *McDonald*, *supra* note 69.

to exhibiting full deference to the domestic policymaker.¹⁰¹ This ‘strong’ form of complete deference, however, is the exception. A ‘milder’ approach of partial deference is much more common and is also evident in those cases where the Court proceeds from presumptions of Convention compliance. In this the ‘milder’ approach, the Court still focuses on the domestic authorities’ performance, but while due Convention diligence opens up the margin of appreciation, the Court nevertheless also engages to some extent with proportionality *in concreto*. Here, then, instead of complete deference, the Court uses a lenient review to operationalize the *erga omnes* effect of its judgments.¹⁰² The difference between complete and partial deference in the above sense, however, is a difference of degree, and the precise dividing line is not always entirely clear.¹⁰³

Generally speaking, it seems that deference has been taken the furthest in cases involving the balancing of competing, but equally protected, Convention rights of two (or more) private parties. In situations of this kind, the domestic court will have subjugated the interests of one or more parties to those of another. No matter how carefully it performs a Convention-inspired proportionality review, there will always be an alleged ‘victim’ of a violation when the opposing Convention right is upheld, and the element tipping the balance in favour of one or the other party may in the final analysis be minuscule or, to a greater or lesser extent, the result of a judge’s subjective appreciation. If both parties’ rights are carefully taken into consideration in accordance with the principles established in the Court’s case law, such cases seem particularly well suited for decisive deference to the domestic courts by the ECtHR, which would otherwise be duplicating much work that does not really raise serious questions under the Convention. In other areas of the case law, however, and while the extent to which domestic courts or policymakers have taken cognizance of the Court’s case law has influenced the width of the margin of appreciation, the Court seems more inclined to performing its own, somewhat more careful, *in concreto* proportionality assessment.¹⁰⁴

There are certain dangers inherent in the new approaches. Commentators have, for example, voiced the concern that even though national authorities use (or pay

¹⁰¹ See note 85 above.

¹⁰² For examples relating to diligent courts, see *Fäber*, *supra* note 66; *Szima*, *supra* note 66; ECtHR, *Küchl v. Austria*, Appl. no. 51151/06, Judgment of 4 December 2012; ECtHR, *Lillo-Stenberg and Sæther v. Norway*, Appl. no. 13258/09, Judgment of 16 January 2014. For examples relating to diligent policymakers, see note 86 above.

¹⁰³ Similarly, see Gerards, ‘Procedural Review’, *supra*, note 1, s. 4.2ff. Consider, e.g., ECtHR, *Verlagsgruppe News GMBH and Bobi v. Austria*, Appl. no. 59631/09, Judgment of 4 December 2012; ECtHR, *Pauliukienė and Pauliukas v. Lithuania*, Appl. no 18310/096, Judgment of 5 November 2013; ECtHR, *Print Zeitungsverlag GmbH v. Austria*, Appl. no. 26547/07, Judgment of 10 October 2013; *Küchl*, *supra* note 102; *Lillo-Stenberg and Sæther*, *supra* note 102, where the Court mostly expressed its agreement with the assessment of the domestic courts, while nevertheless adding some limited comment on some of the positions taken or pronouncing on isolated questions not addressed by the domestic courts.

¹⁰⁴ While *McDonald*, *supra* note 69, is the only example of complete deference when public and private interests are balanced against each other, and while *Animal Defenders*, *supra* note 70, is the only example of almost complete deference in the case of ‘general measures’, the case law on balancing competing private interests analysed earlier in this article is full of examples of complete or almost complete deference. See, e.g., the examples mentioned in notes 100 and 103 above.

lip service to) established Convention methodology for balancing competing interests, this does not necessarily ensure acceptable outcomes.¹⁰⁵ Indeed, a similar concern has been expressed by dissenting judges.¹⁰⁶ It has further been pointed out that the focus on established case law may freeze the development of the ECtHR's jurisprudence and that, while the Court's new approaches may allow it to develop a 'more tactful' relationship with national authorities, it may also create the appearance of double standards, which might trigger a 'new backlash' against it.¹⁰⁷ On the other hand, it must also be kept in mind that the Court retains the right and duty to assert itself if it finds that the national process or its outcome is problematic. Much depends, therefore, on how the Court applies the new approach in practice.¹⁰⁸ At the same time, it cannot be denied that by potentially giving diligent national authorities an exceptionally large scope to manoeuvre in their application of Convention norms, the new approaches seem to provide a particularly effective tool for incentivizing them to take the principle of *res interpretata* seriously.¹⁰⁹ It seems, however, that to guard against the dangers associated with them, the Court should be careful to always retain its own (albeit potentially lenient) *in concreto* review of the contested measures, as it would otherwise compromise its role under Article 32 of the ECHR of interpreting and applying the Convention in the cases brought before it. Too much emphasis on the mere assessment of the abstract justifications provided by the national policymaker, further, seems particularly ill-advised if it means that an individualized proportionality assessment is denied to applicants altogether. This would go even further in relaxing the Strasbourg supervision of Convention compliance than the *Von Hannover (No. 2)* approach, where the Court verified that each applicant had at least received an acceptable *in concreto* assessment at home.

4 The Res of Res Interpretata

The preceding case law analysis allows us to paint a clearer picture of the principle of *res interpretata* under the ECHR. As a starting point to that endeavour, it must be borne in mind that the judgments of the ECtHR are not all equally clear in terms of the interpretative guidance they provide. The Court has, in fact, acknowledged this when stating that its 'judgments in individual cases establish precedents albeit to a

¹⁰⁵ Çalı, *supra* note 59, at 160, commenting on the *Von Hannover (No. 2)* approach. For the same concern expressed generally for the wider phenomenon of 'proceduralization' of the Court's case law, see Kavanagh, *supra* note 1, at 479; Brems, *supra* note 1, at 159.

¹⁰⁶ In ECtHR, *Delfi v. Estonia*, Appl. no. 64569/09, Judgment of 16 June 2016, Joint Dissenting Opinion of Judges Sajó and Tsotsoria, the dissenting judges opined that the domestic courts had '*only selectively* considered the criteria laid down in the Court's case-law' (in n. 23) (emphasis in original).

¹⁰⁷ See Çalı, *supra* note 59, at 160 (on deference to courts).

¹⁰⁸ For the same observation in relation to 'proceduralization' more generally, see also Gerards, 'Procedural Review', *supra* note 1, s. 4.2.

¹⁰⁹ Gerards, 'The European Court of Human Rights', *supra* note 1, at 56, argues that there are 'great advantages of procedural review from the perspective of enhancing shared responsibility for compliance with the Convention'. See also Spielmann, *supra* note 50, at 63–64.

greater or lesser extent'.¹¹⁰ Accordingly, there will always be certain practical limits on the extent to which the obligations imposed on states through the principle of *res interpretata* can reach. With reference to Article 43 of the ECHR, the CDDH's report and the literature are in agreement that the judgments of the Grand Chamber carry the greatest interpretational authority.¹¹¹ Adam Bodnar has also identified some additional elements relevant to the 'compliance pull' of the Court's judgments, including, notably, the clarity and consistency of the Court's reasoning on the relevant issue; the level to which the Court may be divided on certain interpretations and who the dissenting judges are and the level to which individual judgments rely on local particularities and the margin of appreciation.¹¹² Besson seems to require even more for the establishment of interpretational authority, arguing that the generalizable elements of the Court's judgments must subsequently be confirmed at least once by the Court itself and, preferably, also by 'reciprocal legitimation' in judicial dialogue with national courts.¹¹³

This may, however, be setting the bar too high, as it is unreasonable and ineffective to impose a waiting time until the ECtHR has an occasion to confirm those positions of principle that are sufficiently clear from the start. For example, the *Hirst (No. 2)* judgment was the first to establish that 'a general, automatic and indiscriminate restriction' on prisoner voting is incompatible with Article 3 of Protocol 1, 'however wide' the margin of appreciation might be in such cases.¹¹⁴ The sheer clarity of such statements should be enough to establish *res interpretata* and an *erga omnes* effect. Apart from instances of such clear either/or positions of principle, however, the theme that one should take from the literature is a general requirement of stability before obligations under the principle of *res interpretata* should kick in to any decisive extent. Such a requirement is indeed also reflected in the CDDH's final report, but from the different perspective of looking back towards the earlier judgments of the Court. The CDDH thus suggests that the role of giving more general interpretative guidance would 'primarily be played by the Grand Chamber and especially where such guidance naturally flows from previous findings in various other similar cases'.¹¹⁵ Therefore, on a general note, it can be concluded that an *erga omnes* effect through the principle of *res interpretata* must be reserved for those judgments – or lines of judgments, as the case may be – that provide clear interpretative guidance and establish unambiguous and/or stable positions of principle.

Against this standard, the *res interpretata* of a judgment would primarily seem to reach the meaning of autonomous Convention concepts that define the protective scope of Convention rights and other clear positions of principle that relate either

¹¹⁰ ECtHR, *Pretty v. United Kingdom*, Appl. no. 2346/02, Judgment of 29 April 2002, para. 163.

¹¹¹ Bodnar, *supra* note 2, at 237; Besson *supra* note 2, at 169; CDDH Report, *supra* note 16, para. 114.

¹¹² Bodnar, *supra* note 2, at 237ff. On clarity and consistency, see also Besson, *supra* note 2, at 162.

¹¹³ Besson, *supra* note 2, at 161, referring also to Lambert Abdelgawad, *supra* note 2, at 327–328.

¹¹⁴ *Hirst (No. 2)*, *supra* note 19, para. 82. This position of principle, however, still leaves scope for the domestic authorities to decide how to draw the line for disenfranchisement. See ECtHR, *Scoppola v. Italy (No. 3)*, Appl. no. 126/05, Judgment of 22 May 2010, paras 93–102.

¹¹⁵ CDDH Report, *supra* note 16, para. 114.

to the substance of Convention rights or the ECtHR's analytic methods and judicial tests.¹¹⁶ For autonomous concepts and clear substantive positions of principles, the Court's interpretation indeed often takes the form of clear either/or positions that leave little discretion to the contracting states and can, thus, easily be considered part of the *res interpretata*. A good example of an autonomous Convention concept is to be found in *Stec v. United Kingdom*, where the Grand Chamber clarified its case law on the concept of 'possessions' under Article 1 of Protocol 1,¹¹⁷ while the *Hirst (No. 2)* judgment is a good example of a substantive position of principle.¹¹⁸ The methodology itself of balancing interests under the principle of proportionality, which is of course an unambiguous and stable element that permeates most of the Court's jurisprudence, is also particularly well suited for an *erga omnes* effect if the principle of *res interpretata* is to be taken seriously by the contracting states. Indeed, this is exhibited in the case law analysis performed earlier in this article, as the Court generally seems to place an obligation to perform a Convention-inspired proportionality assessment on national authorities. In this context, however, it should be noted that the Court seems to place quite exacting demands on the proportionality assessments performed by domestic courts, while only requiring a more loosely constructed Convention-type proportionality assessment of parliaments and executives.¹¹⁹

The details of a Convention-inspired proportionality assessment in individual cases is a complex and nuanced matter. Thus, it might at first sight seem difficult to establish stability since the outcome of the balancing act is likely to be influenced by a number of factors that may not be the same, or be given the same weight, as between countries or cases. However, in certain pockets of the case law, there may be lines of judgments that establish which kinds of considerations have what kind of effect in the balancing act, which allows the Court to give more detailed interpretative guidance.¹²⁰ On the back of the level of stability and clarity thus reached, the Court can require national courts to take an approach that is relatively narrowly tailored to its own case law, while, at the same time, also recognizing the domestic court's legitimate role of interpreting and applying that same case law in the particular context of the case at hand.¹²¹

5 Conclusions

As argued earlier in this article, the principle of *res interpretata* transpires from Articles 1, 19 and 32 of the ECHR and from the Court's case law. It places an obligation on the

¹¹⁶ Besson, *supra* note 2, at 132, 161.

¹¹⁷ ECtHR, *Stec and Others v. United Kingdom*, Appl. nos 65731/01 and 65900/01, Admissibility Decision of 6 July 2005, paras 47–53. Protocol no. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms 1952, ETS 9.

¹¹⁸ *Hirst (No. 2)*, *supra* note 19.

¹¹⁹ Compare, e.g., *Von Hannover (No. 2)*, *supra* note 60 (courts); *Shindler*, *supra* note 86 (parliament).

¹²⁰ See, e.g., the following Grand Chamber judgments: *Von Hannover (No. 2)*, *supra* note 60, para. 108ff; *Perinçek*, *supra* note 10, para. 228ff; *Ivanova and Cherkezov*, *supra* note 72, para. 53; ECtHR, *Üner v. the Netherlands*, Appl. no. 46410/99, Judgment of 18 October 2006, paras 57–60.

¹²¹ *Von Hannover (No. 2)*, *supra* note 60; *Perinçek*, *supra* note 10; *Ivanova and Cherkezov*, *supra* note 72.

contracting states to take account of ECtHR judgments – regardless of whether they are directed at them or at a different state – which de facto creates an *erga omnes partes* effect for the Court’s case law. As suggested by the CDDH’s final report on the longer-term future of the Court, it is important for the development of the principle of *res interpretata* that the Court, when possible, consolidates its case law and provides clear generalizable interpretative guidance.¹²² This would enable the competent national authorities in all of the contracting states to take preventive cognizance of the Court’s jurisprudence when heeding their obligation under Article 1 of the ECHR, and under Article 26 of the VCLT, of faithfully securing Convention rights to everyone within their jurisdictions. As further explained in the third section of the article, the Court has also in its more recent case law embarked on a project towards a deeper conception of subsidiarity. With respect to the new approaches devised, the ‘willingness of the national courts to make use of the Convention jurisprudential tools’ clearly influences the width of this margin of appreciation.¹²³

Thus, those states that faithfully apply the principles stemming from the Court’s case law at home can earn significantly increased margins, while those who do not will face a stricter Strasbourg Court. The Court, therefore, has effectively used the margin of appreciation doctrine to operationalize an *erga omnes* effect for its judgments through the principle of *res interpretata*. If certain conditions related to the clarity and consistency of the relevant case law – discussed in the preceding section – are met, the contracting states are not justified in waiting until the Court has repeated its stance on the basis of the precedential value of its previous judgments in a case against them. Instead, they must perform their role in the Convention system of interpreting and applying the evolving Strasbourg case law to new fact situations in the national context. *Res interpretata*, as operationalized through the margin of appreciation, therefore, allows for a deeper and more timely penetration of the Court’s case law into the national legal systems than the precedential value of the Court’s judgments in the traditional sense does.

In the final analysis, it is concluded that the ECtHR should continue along the path it has embarked upon of employing the margin of appreciation as a tool to facilitate *erga omnes* effect and the embedding of its jurisprudence in national processes. At the same time, however, and due to the different roles played by courts (legal/individual assessments) and policymakers (political/formulation of general standards), the Court should continue to distinguish between its approaches *vis-à-vis* the different national authorities. Since the Court cannot require the same level of detail of the policymaker under the principle of proportionality, it will necessarily have to retain a more active role for itself when the policymakers’ due diligence in taking account of Convention principles is rewarded with a wider margin of appreciation. Also, even with respect to incentivizing the domestic courts, it seems imperative in each case that the Court does not throw the baby out with the bathwater in the process and abdicate its own responsibility under Article 32 of the ECHR of having the final say on the interpretation *in abstracto* and application *in concreto* of the Convention.

¹²² CDDH Report, *supra* note 16, para. 114.

¹²³ ECtHR, *supra* note 46, para. 34.