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The European Court of Human Rights' Use of Non-Binding and Standard-Setting Council of Europe Documents

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ABSTRACT

In many judgments, the European Court of Human Rights lists relevant international materials and, in some of those judgments, it uses these documents when determining whether the European Convention on Human Rights has been violated. These materials are often non-binding and standard-setting documents that originate in the Council of Europe (CoE), the Court's organizational framework. This article analyses the Court's practice of using such documents, based on a sample of 795 judgments. The analysis serves to provide an answer to the questions of how and why the Court refers to and relies on these documents. More specifically, the article describes the number of judgments and the importance of the judgments in which the Court cites a CoE document, as well as the type of organs and the different documents cited. The analysis continues with a description of the part in which the Court's determination on the question of a violation the CoE documents appear and also addresses the purposes for which the Court seems to use the materials. Lastly, insight is provided into the relevance of the documents to the Court's reasoning and explanations are given for why the Court does, or does not, follow the standards formulated in a document.

KEYWORDS: judicial reasoning, Council of Europe, non-binding and standard-setting documents, European Court of Human Rights

1. INTRODUCTION

The Statute of the Council of Europe (CoE) gives the Committee of Ministers (CM) and the Parliamentary Assembly of the Council of Europe (PACE) the task of taking common action in 'the maintenance and further realisation of human rights and fundamental freedoms'.[1] Since its founding in 1949, many more bodies that also take such action have been established within the CoE. The European Committee of Social Rights (ECSR), the European Committee for the Prevention of Torture (CPT) and the Commissioner for Human Rights (CHR) are just a few examples. The most prominent body is the European Court of Human Rights ('Court') the,

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1 Articles 1(b) and 10 Statute of the Council of Europe 1949, ETS 1.

whose 'principal task is to secure the respect for human rights'.[2] The efforts of the different CoE stakeholders in the field of human rights sometimes converge in the Strasbourg case law when the Court discusses standard-setting documents adopted by these stakeholders. The Court, for example, uses these documents to establish whether or not consensus across the 47 CoE states exists or is emerging. To illustrate, a recommendation of the CM can function to demonstrate that there is a trend towards 'widening the range of openings to university by extending the admission criteria to channels other than the traditional one of a high-school leaving diploma, and in particular by accepting "high-level vocational qualifications . . . as appropriate preparation for higher education"'.[3]

The Court's practice of discussing these documents ties in with declarations adopted at the high-level conferences on the future of the Court, which have recalled the 'interdependence between the supervisory mechanism of the [European Convention on Human Rights] and the other activities of the [CoE] in the field of human rights'.[4] These conferences have called upon the CM to 'bring about a cooperative approach in all relevant parts of the [CoE] in order to present possible options to a State Party required to remedy a structural problem revealed by a judgment'.[5] Furthermore, the bodies of the CoE have been encouraged to 'increase and improve their activities of co-operation . . . with States Parties with regard to the implementation of the Convention'.[6] The States Parties themselves have expressed their determination to draw on the 'important work' of the CoE bodies in order to ensure the viability of the European Convention on Human Rights (ECHR or 'the Convention') mechanism.[7]

Although it is clear that the Convention should not be seen in a vacuum, the normative question can be posed as to whether the Court should shape the interdependence between the CoE activities in the field of human rights by incorporating CoE standards into its case law. This question arises considering that incorporation can have the result that a formally non-binding standard becomes binding indirectly.[8] A Strasbourg judge called this result 'illegitimate' for the right to strike as laid down in the European Social Charter (ESC), a right by which 10 CoE states were not bound.[9] He added that '[a]n

2 *Kharuk and Others v Ukraine* Application No 703/05, Merits and Just Satisfaction, 26 July 2012, at para 23.

3 *Altinay v Turkey* Application No 37222/04, Merits and Just Satisfaction, 9 July 2013, at para 43.

4 Interlaken Declaration, High Level Conference on the Future of the European Court of Human Rights, 19 February 2010, at 3.

5 Interlaken Declaration, ibid. at para D(7)(c)(ii). See also Brussels Declaration, High-level Conference on the 'Implementation of the European Convention on Human Rights, our shared responsibility', 27 March 2015, at para C(1)(c).

6 Brussels Declaration, ibid. at para 13; see also para C(3)(a).

7 Brighton Declaration, High Level Conference on the Future of the European Court of Human Rights, 20 April 2012, at para 4.

8 A judgment is binding on the respondent state and may become binding more generally if relied upon by the Court in subsequent judgments as a precedent. This means that the *res interpretata* has *de facto erga omnes effect*: see Article 46(1) European Convention on Human Rights 1950, ETS 5; Polakiewicz, 'Alternatives to Treaty-making and Law-making by Treaty and Expert Bodies in the Council of Europe' in Wolfrum and Röben (eds), *Developments of International Law in Treaty Making,* (2005) 245 at 289; Kicker and Möstl, *Standard-setting through Monitoring? The Role of Council of Europe Expert Bodies in the Development of Human Rights* (2013) at 147.

9 *R.M.T. v United Kingdom* Application No 31045/10, Merits and Just Satisfaction, 8 April 2014, at Concurring Opinion of Judge Wojtyczek, para 4. See also Turkey's observations in *Demir and Baykara v Turkey* Application No 34503/97, Merits and Just Satisfaction, 12 November 2008, at paras 61–62.

extensive interpretation of existing treaties pertaining to social rights may have a chilling effect on [States that have expressed their reluctance to undertake social rights' obligations] when they consider entering into new treaties in this field.'[10] In more general terms, the incorporation can impair the states' willingness to set new and progressive human rights standards.[11] Moreover, it can impair their willingness to cooperate with and facilitate the work of treaty and other monitoring bodies.[12]

This contribution will not ponder the critical and normative question just posed, but introduce that question nevertheless because it adds relevance to the actual research questions. This research formulates an answer to the more descriptive questions of how the Court refers to and relies on non-binding and standard-setting CoE documents and why it does so. Answering these questions may help place the normative question in perspective. The analysis that serves to answer the research questions is mostly descriptive in nature and at times explanatory as well, when a finding begs to and lends itself to an explanation. The explanations remain tentative and explorative, however, because they are not given by the Court, but by the author. This contribution cannot fully answer the research questions, considering that the full answers cannot be completely derived from the Court's case law and other sources; some considerations may only play a role in the minds of the judges without being made explicit. Nevertheless, the analysis will provide adequate answers to the research questions, as many insights and explanations can be derived from the case law and other sources. The answers that can be found in the case law must be usually derived from a judgment, because the Court does not spell them out; the answers, therefore, often rely on a plausible interpretation of a judgment by the author.

The analysis is primarily based on case law in which CoE documents appear and, where relevant and possible, on other sources as well. In the judgments upon which this research relies, the Court mentions a CoE document that can be non-binding on a CoE state, either because the document is inherently non-binding or, in the case of a CoE convention, because a state did not ratify it. Although the Court also employs (non-binding) instruments originating from outside the CoE, only CoE documents are scrutinized in this article because the CoE is the setting in which the Court operates and also because this is a relatively 'homogeneous regional setting'.[13] These two factors make it more likely that the Court indeed uses these documents. Moreover, the Court emphasizes 'that it has consistently held that it must take into account relevant international instruments and reports, *and in particular those of other [CoE] organs*, in order to interpret the guarantees of the Convention'.[14]

10 *R.M.T. v United Kingdom*, ibid. at Concurring Opinion of Judge Wojtyczek, para 8.

11 Government agents have also criticized the Court for its reliance on non-binding instruments because it may have a chilling effect on the states' willingness to adopt such instruments. The Court is aware of this criticism, see Glas, *The Theory, Potential and Practice of Procedural Dialogue in the European Convention of Human Rights System* (2016) at 328.

12 Regarding standards of the CPT specifically, when the Court increasingly relies on the CPT, this may have consequences for the cooperation between the CPT and the states, considering that the findings of the CPT are no longer the basis for recommendations to improve detention conditions, but can also lead to or contribute to a finding of a violation of the Convention by the Court, see Hagens, *Toezicht op menswaardige behandeling van gedetineerden in Europa* (2011) at 289.

13 Polakiewicz, supra n 8 at 287.

14 *Tănase v Moldova* Application No 7/08, Merits and Just Satisfaction, 27 April 2010, at para 176 (emphasis added).

Before delving into the how and why of the Court's practice, the methodology behind this research is outlined in Section 2. The analysis itself commences in Section 3 by taking a closer look at the number of judgments in which the Court cites a CoE document and the importance of the judgments in which it does so. Next, the type of organs and the different documents referred to by the Court are scrutinized (Section 4). Section 5 identifies the part of the Court's determination on the merits in which it relies on the CoE materials. This determination can be broken down into the following steps: scope, interference and justification.[15] Section 6 looks into the question for which purposes the Court uses the materials. Section 7 gives insight into the relevance of a document to the Court's reasoning and the last Section (Section 8) provides explanations as to why the Court does, or does not, rely on a CoE document. The questions that the analysis may raise and the conclusions that can be drawn are addressed in the respective Sections.

2. METHODOLOGY

The analysis presented in this article is, when it relies on the Court's case law, based on all Grand Chamber and chamber judgments of importance level 'case reports', 'high importance' (level 1) and 'medium importance' (level 2), issued in the three-year period from 1 September 2012 to 31 August 2015. A search with these filters on HUDOC has yielded 795 judgments,[16] a number that should provide a sound basis for the analysis. The data set excludes Committee judgments and judgments of importance level 3. This contribution is, therefore, not based on judgments in cases where 'the underlying question ... is already the subject of well-established case-law'[17] and judgments 'of little legal interest'.[18] Rather, only judgments going 'beyond merely applying existing case-law' or 'making a significant contribution' to the case law have been taken into account.[19] This choice was made because it is expected that the Court mostly uses CoE documents when developing its case law and not when applying well-established case law, considering that these documents seem to be particularly useful to keeping the Convention up to date.[20] Further, admissibility decisions fall outside the data set, because the number of 795 judgments is expected to already be sufficient for a sound analysis.[21]

The sample of 795 judgments has been divided into three categories. The first category is 'no-citation judgments', which are judgments in which the Court does not cite any CoE document in the part of the judgment titled 'relevant international documents'.[22] The second category is 'citation-only judgments', which concerns

15 These steps are not relevant to each Article and the three substeps are mostly relevant to Articles 8–11 ECHR.

16 Number of judgments per year: 101 (2012), 287 (2013), 252 (2014), 155 (2015). The search for 2013 and 2014 was undertaken on 19 December 2014 and for 2012 and 2015 on 8 September 2015. When the searches are repeated, slightly different numbers may result for reasons unknown to the author.

17 Article 28(2) ECHR.

18 This is the description of judgments of importance level 3 given on HUDOC.

19 This is part of the description of judgments of importance level 1 and level 2 given on HUDOC.

20 See Section 8(A).

21 Additionally, admissibility decisions often deal with admissibility matters or the striking-out of an application, two issues to which CoE instruments are probably of relatively little importance.

22 This part is called differently in different judgments. It is also called, for example, 'relevant international law', 'relevant international material' or 'relevant law and practice'.

judgments in which the Court only cites a CoE document in the said part of a judgment. The third category, coined 'reference judgments', concerns judgments in which the Court not only cites a document in the said part, but also refers to the document when applying the law in the section of the judgment that follows after the heading 'the law' or '*en droit*'.

To analyse the number of references, the documents and bodies referred to, and the importance of the three categories of judgments, the information presented in Appendix Tables A1 and A2 is used. Further, all three categories of judgments are relied upon (Sections 3–4). For this part of the analysis, all documents are taken into consideration which were mentioned by the Court in the 'relevant international documents' part. This means that documents, such as reports on country visits, which are mostly of a fact-finding character, also are also taken into consideration. This decision has been taken because the recommendations which are made in these documents show how standards are applied and because standards may be set in these documents as well.[23]

The analysis of the content of the judgments (Sections 5–8) is performed only on reference judgments. In this part of the analysis, references to CoE documents which only served to help establish the facts of the case before the Court have been left aside. As the Court referred often to the judgment in the case of *Demir and Baykara v Turkey*[24] in the sample of judgments, this judgment is also relied upon, although it was not one of the 795 judgments.

3. CATEGORIES OF JUDGMENTS

A. Numbers of Categories of Judgments

As can be seen in Appendix Table A2, in about three-quarters of the total 795 judgments, the Court does not mention any CoE document at all; these are the no-citation judgments. The remaining quarter is divided more or less equally between citation-only (108) and reference judgments (106). This means that in about half of all the judgments in which the Court cites a CoE document, it does not expressly return to this document when applying the law, although the documents may implicitly play a role in its considerations. This finding is in line with the finding that the Court cites 37 of the 83 different types of CoE documents only in the 'relevant international documents' part and that the Court cited a CoE document in that part 556 times, while it 'only' referred to such a document in its reasoning 233 times.

The question that arises in respect of these findings is why so many documents which are included because they are apparently relevant are only referred to as part of a list of relevant materials, but not used by the Court to reason its judgments. Indeed, as a concurring judge noted: 'When a judgment of an international court refers to "relevant international law", the reader may legitimately expect an

23 See, for example, *Kuroshvili v Greece* Application No 58165/10, Merits and Just Satisfaction, 12 December 2013, at para 82: 'les rapports généraux établis par le CPT n'indiquent pas explicitement le minimum d'espace personnel dont devrait disposer chaque détenu placé dans des cellules partagées. Il ressort toutefois des rapports nationaux du CPT et recommandations qui y sont faites aux Etats que le standard minimum souhaitable devrait être fixé à 4 m^2 par détenu'. See also Section 6.

24 Supra n 9.

explanation as to why and in which respect the documents referred to in it are relevant for the resolution of the instant case.'[25] One answer is, as a judge and three persons who work for the Registry acknowledged, that the Court mentions the materials to demonstrate its awareness of them and, thus, of the background to an issue.[26] Another possible answer may be that one of the (third) parties relied on the document in question and that the Court, for that reason, included the document in its list of relevant materials.

B. Importance of Categories of Judgments

The importance of a judgment can be derived from the level of importance that the Court assigns to a judgment, as introduced in Section 2. Additionally, a judgment can be considered as more important when it is issued by the Grand Chamber as opposed to a chamber; the Grand Chamber is the Court's largest formation[27] and only determines applications upon relinquishment by a chamber or after referral, when a case, for example, raises 'a serious question affecting the interpretation of the Convention'.[28]

Appendix Table A2 reveals that, in terms of percentage, the no-citation judgments are of the least importance; of the three types of judgments, they score the highest on medium importance and the lowest on the two highest levels of importance (high importance and Case Reports). The reference judgments show the opposite result: they score the lowest on medium importance and the highest on the two highest levels of importance. The citation-only judgments fall somewhere in between.[29] Further, when looking at the formation adopting the judgment, the no-citation judgments are, also in relative terms, most often issued by a chamber and least often by the Grand Chamber. Again, the result for the reference judgment is the opposite; they are most often adopted by the Grand Chamber and least often by a chamber.[30] The citation-only judgments also fall here somewhere in between.[31]

These results warrant the conclusion that reference judgments, when compared to the two other categories of judgments, are the most important judgments. In other words, the more important a judgment, the more often the Court not only sums up CoE documents in the 'relevant international documents' part, but also refers to them when applying the Convention. Consequently, the finding in the previous section that the Court does not mention CoE documents in about three quarters of all judgments should be placed into perspective: although the Court does not mention these documents often, it does mention them primarily in the most

25 *R.M.T. v United Kingdom*, supra n 9 at Concurring Opinion of Judge Wojtyczek, para 6.

26 Glas, supra n 11 at 327.

27 Article 26(1) ECHR.

28 Articles 30 and 43(2) ECHR.

29 Compared to them, relatively more no-citation judgments and relatively less reference judgments are of medium importance and relatively less no-citation judgment and relatively more reliance judgment are of the two highest levels of importance.

30 Research into references of the Court to the Venice Commission also showed that it was cited frequently in Grand Chamber judgments, see Hoffmann-Riem, 'The Venice Commission of the Council of Europe – Standards and Impact' (2014) 25 *The European Journal of International Law* at 585.

31 They are more often issued by the Grand Chamber than no-citation judgments and less often issued by the Grand Chamber than reference judgments and they are less often issued by a chamber than no-citation judgments and more often issued by a chamber than reference judgments.

important cases. The documents, therefore, potentially have considerable influence on the Court's case law. A likely explanation for this conclusion is that the most important judgments are most likely to set new or additional standards and that the CoE documents can be particularly useful for this purpose.[32]

4. ORGANS AND DOCUMENTS

A. Variety of Organs and Documents

The documents cited by the Court were adopted by a wide variety of CoE organs.[33] However, the organs do not appear equally frequently in the Strasbourg case law. The CM is cited the most in the 'relevant international documents' part (191), followed by the CPT (103), the PACE (101), the CHR (30), the Venice Commission (VC) (25), the ECSR (17) and the European Commission against Racism and Intolerance (ECRI) (11). Many more bodies have only less than 10 citations and often times only one, such as the European Committee for Social Cohesion (ECSC) and the Secretary General of the CoE. The number of references to CM documents is significantly less when the Court applies the law: 73, while this is 74 for the CPT.[34] Therefore, the ratio of citations in the 'relevant international documents' part to references in the 'the law' part is different *per* organ.

Appendix Table A2 gives insight into the types of CoE documents the Court mentions in the 795 judgments.[35] The sheer number of different documents found is striking: 83.[36] The Court in particular does not seem to be picky about the documents cited in the 'relevant international documents' part; the sample includes, for instance, information on the website and an annual report of the CM, a letter and a press release of the CHR, and the European Charter on the Statute for Judges, which is 'the quasi-official result of a multilateral meeting on the statute for judges in Europe, organised by the [CoE]'.[37] The Court is, however, comparably more selective in referring to particular documents when applying the law: only 37 of the 83 documents appear in the 'relevant international documents' part.

B. Irrelevance of Organ and Document

The type of organ in which a document originates seems to be irrelevant to the Court; it does not comment on the organ's character, tasks or composition, even though these aspects differ widely. As the Court noted itself, it has supported its 'reasoning by reference to norms emanating from other [CoE] organs, even though those organs have no function of representing States Parties to the Convention, whether supervisory mechanisms or expert bodies'.[38] To illustrate, the Court does

32 See also Section 8(A).

33 See Appendix Table A2.

34 See also Polakiewicz, supra n 8 at 271.

35 For an outline of the 'Diversity of international texts and instruments used for the interpretation of the Convention' by the Court itself (not limited to CoE materials), see *Demir and Baykara v Turkey*, supra n 9 at paras 69–73.

36 As categorized in Appendix Table A2.

37 Kuijer, *The Blindfold of Lady Justice; Judicial Independence and Impartiality in the Light of the Requirements of Article 6 ECHR* (2004) at 213.

38 *Demir and Baykara v Turkey*, supra n 9 at para 75.

not only cite more or less permanent CoE organs which may or may not be established by a treaty, but also principles adopted by an *ad hoc* Committee of Experts on Progress in the Biomedical Sciences and declarations of ministerial conferences. The organs are composed of ministers of foreign affairs,[39] domestic parliamentarians,[40] independent experts,[41] serving domestic judges[42] or just one individual.[43] The Court does, therefore, not seem to exclude beforehand the documents of any CoE body.

Nor does the Court comment on the character of a document which it mentions. The character may differ nevertheless regarding the decision-making process that preceded the document's adoption, their addressees and their legal nature.

As for the decision-making process, a recommendation of the CM to the governments of CoE members, for example, requires a two-thirds majority of the representatives casting a vote, and a majority of the representatives entitled to sit on the Committee.[44] The recommendations of the PACE also require a two-thirds majority of the representatives casting a vote.[45] To take another document, the opinions of the VC are adopted by a majority of its members.[46] In practice, however, 'they are almost always unanimous'.[47] Likewise, the decisions of the ECSR are taken by the majority of those present.[48] By contrast, documents of the CHR do not require any voting. Apart from the voting process, a notable constant factor of certain decision-making procedures is a country visit. This applies to, for instance, reports on country visits of the CHR and the CPT and opinions of the VC. During his/her visits, the CHR may act on any information relevant to the Office's functions, which includes notably information from *inter alia* governments, national parliaments, national ombudsmen, individuals and organizations.[49] The CPT visits places of detention, such as prisons, police stations and psychiatric hospitals,[50] and the VC makes country visits in preparation of an opinion in order to meet authorities, civil society and other stakeholders.[51] The fact that the assessment of a situation in one of the states is based on a country report is probably particularly helpful to the Court, considering that it otherwise depends on the information submitted to it by the parties and

39 CM and ministerial conferences.

40 Article 26 Statute of the CoE.

41 For example, the CPT, the ECSR and the VC (the individual members are experts; the VC also has member states), and the ECRI.

42 Consultative Council of European Judges.

43 CHR and the Secretary General of the CoE.

44 This is a consequence of the Gentlemen's Agreement adopted by the Ministers' Deputies at the 519bis meeting on 4 November 1994, where they agreed that 'no delegation should request the application of the rule of unanimity provided for under Article 20(a)(I) of the Statute to block the adoption of recommendations to the governments of member States, if the majority foreseen in Article 20(d) of the Statute has been attained': see Ministers' Deputies, *Working Methods of the Ministers' Deputies*, CM/Inf(2007)22, 14 May 2007.

45 Article 29 Statute of the CoE.

46 VC, *Revised Rules of Procedure*, CDL-AD(2004)050, 16 December 2004, at para 13(2).

47 Hoffmann-Riem, supra n 30 at 583.

48 ECSR, *Rules of the Committee*, 9 September 2014, at para 16(1).

49 Hammarberg, *Report by the Commissioner for Human Rights on his Visit to Ukraine*, CHR, CommDH(2007)15, 26 September 2007.

50 CPT, 'The CPT in Brief', available at: www.cpt.coe.int/en/about.htm [last accessed 11 November 2016].

51 Venice Commission, 'The Commission's Activities', available at: www.venice.coe.int [last accessed 11 November 2016].

considering that the Court 'has shown a more recent tendency not to carry out fact-finding missions'.[52]

The addressee(s) of the documents are also different. The recommendations of the CM, for example, are addressed to the States Parties,[53] and the recommendations of the PACE are proposals to the CM, 'the implementation of which is beyond the competence of the PACE, but within that of governments'.[54] Further, the annual general reports of the CPT are submitted to the CM and are transmitted to the PACE.[55] Some documents are addressed to only one state. This holds for *inter alia* CHR country visit reports, decisions about collective complaints of the ECSR and CPT reports to governments on a visit. As a last example, opinions of the VC are requested by *inter alia* the CM, the PACE, or by a state, or adopted on the VC's own initiative and are addressed to the state whose domestic situation is scrutinized.[56]

Lastly, some documents differ in character as regards their legal nature. The 17 CoE conventions, which were cited 47 times (out of 556 individual citations) and referred to 16 times (out of 233 individual references),[57] are the only documents that can bind a state, depending on whether they are signed and ratified.[58] The ESC is referred to the most, although this document is not binding in its entirety upon all contracting parties. The parties can choose, with some restrictions and minimum requirements, by which Articles they are bound.[59] Moreover, not all Convention States have ratified this Charter.[60] As can be derived from the foregoing and as the Court wrote itself, it has 'never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State'.[61] It, for example, noted that 'reference should be made to the European Convention on the Adoption of Children', which was not binding on the respondent state.[62] Similarly, the inherently non-binding character of a document does not stand in the way of the Court's reliance on it or even to the Court attaching considerable importance to it. The Court has emphasized this in relation to, for example, recommendations of the CM,[63] documents which others also consider to have a 'particular authority' due to their adoption procedure and which are 'regarded as an expression of the collective

52 Leach, Paraskeva and Uzelac, *International Human Rights & Fact-Finding: An Analysis of the Fact-finding Missions Conducted by the European Commission and Court of Human Rights* (2009) at 45.

53 Polakiewicz, supra n 8 at 248.

54 PACE, *Rules of Procedure of the Assembly*, 4 November 1999, at para 25(1)(a).

55 Article 12 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987, ETS 126.

56 Article 3(2) CM Resolution (2002)3, Revised Statute of the European Commission for Democracy through Law.

57 The reference to Protocol No. 7 ECHR is not taken into account here.

58 For more information about the use of CoE treaties in the case law of the Court, see Research Division of the Court, *The Use of Council of Europe Treaties in the Case-law of the European Court of Human Rights*, June 2011.

59 Article 20 ESC 1961, ETS 35; Article 1 Revised Social Charter 1996, ETS 163.

60 Forty-three states are parties to either the Social Charter of 1961 or the Revised Social Charter of 1996.

61 *Demir and Baykara v Turkey*, supra n 9 at para 78; and, for examples, see paras 79–83.

62 *A.K. and L. v Croatia* Application No 37956/11, Merits and Just Satisfaction, 8 January 2013, at para 68.

63 *Gülay Çetin v Turkey* Application No 44084/10, Merits and Just Satisfaction, 5 March 2013, at para 130; *Harakchiev and Tolumov v Bulgaria* Application Nos 15018/11, 61199/12, Merits and Just Satisfaction, 8 July 2014, at para 204.

will of the community of European States'.[64] Further and to illustrate, the Court has noted that the 'interpretative value of the ECSR appears to be generally accepted by States and by the [CM]'.[65] The Court 'certainly' accepts this value as it 'repeatedly had regard to the ECSR's interpretation of the [ESC] and its assessment of State compliance with its various provisions'.[66]

As the examples used in this section have shown, the Court does indeed not take into consideration the character of the CoE document which it uses; it is open to all sorts of CoE documents. Where it uses these documents when applying the law, is the subject of the next section.

5. PLACE OF THE REFERENCES TO THE DOCUMENTS IN THE JUDGMENTS

A. Scope

When deciding a case in 'the law' part of a judgment, the Court usually first determines whether the matter complained of falls within the scope of protection afforded by the Convention Article upon which the applicant relies. In making this determination, the Court may rely on a CoE document. To illustrate, when concluding that Article 3 of the ECHR was 'in principle' applicable in the context of the strapping of the applicant, the Court pointed out the 'practice of the CPT which considers the use of physical restraints an area of particular concern given the potential for abuse and ill-treatment'.[67] Further, when finding that Article 4(3)(b) of the ECHR does not cover work undertaken by career soldiers, the Court referred to the distinction made by the ECSR between career soldiers and conscripts when it comes to forced labour and a recommendation of the CM on human rights of members of the armed forces.[68] As a last example, to answer the question whether Article 8 of the ECHR applied, the Court mentioned the Data Protection Convention, which qualifies the data relating to the caution that the applicant received from the police, and which was stored in the police records, as 'personal data'.[69]

B. Interference

When the Convention indeed protects the matter complained of, the next question is whether an interference with the Convention took place in the applicant's case. Only one instance was found of the Court relying on a CoE document when

64 Polakiewicz, supra n 8 at 248. See also de Vel, *The Committee of Ministers of the Council of Europe* (1995) at 37.

65 *R.M.T. v United Kingdom*, supra n 9 at para 94.

66 Ibid.

67 *Bureš v The Czech Republic* Application No 37679/08, Merits and Just Satisfaction, 18 October 2012, at para 90.

68 *Chitos v Greece* Application No 51637/12, Merits and Just Satisfaction, 4 June 2015, at paras 85–87.

69 *M.M. v United Kingdom* Application No 24029/07, Merits and Just Satisfaction, 13 November 2012, at para 188. See also *Shindler v United Kingdom* Application No 19840/09, Merits and Just Satisfaction, 7 May 2013, at paras 111–114; *Nagla v Latvia* Application No 73469/10, Merits and Just Satisfaction, 16 July 2013, at para 81; *R.M.T. v United Kingdom*, supra n 9 at para 76; *Petropavlovskis v Latvia* Application No 4230/06, Merits and Just Satisfaction, 13 January 2015, at para 80; *Delfi AS v Estonia* Application No 64569/09, Merits and Just Satisfaction, 16 June 2015, at para 113.

answering this question. In that case, the parties agreed that there was an interference, but disagreed on its precise nature: the government disputed the applicants' position that the protection of journalistic sources was in issue.[70] The Court, when defining the term journalistic source, referred to a CM recommendation in which the term was similarly defined as by the Court.[71]

C. Justification

After an interference has been established, the Court determines in the context of some articles whether the interference is justifiable. This last step can be broken down into the questions whether an interference is provided for by law, has a legitimate aim, and is necessary and proportionate.

When answering the first question, the Court referred to a CoE document four times in the sample, of which three times were under Article 8 of the ECHR. To illustrate, prior to finding that the 'retention and disclosure of the applicant's caution data . . . cannot be regarded as being in accordance with the law', the Court drew attention to the Data Protection Convention and a CM recommendation that *inter alia* 'excludes the open-ended and indiscriminate collection of data except where specific legislation is enacted to authorise such collection'.[72] In another case, the Court considered it 'worth noting' that the impugned national legislation and case law were 'still valid and binding' after an adverse decision of the ECSR, because this committee does not have the power of annulment.[73]

In its discussion of the legitimate aim, the Court referred in three cases to a CoE document.[74] An example is a German case about legislation on anonymous adoption, aiming to protect the adopted child's private and family life.[75] The Court noted that, in pursuing this aim, the legislation was in conformity with the (revised) European Convention on the Adoption of Children (which Germany had neither signed nor ratified).[76]

By far the most references can be found in the third step about the necessity and proportionality of the interference, mostly in Article 8 ECHR cases. The Court, for example, mentioned CoE materials confirming that the domestic authorities enjoy a broad margin of appreciation.[77] On another occasion, the Court assessed an alleged violation of Article 8 ECHR on account of the applicants' eviction from land on which they had been settled for a long time. When dealing with the proportionality

70 *Telegraaf Media Nederland Landelijke Media B.V. and Others v The Netherlands* Application No 39315/06, Merits and Just Satisfaction, 22 November 2012, at para 85.

71 Ibid. at para 86.

72 *M.M. v United Kingdom*, supra n 69 at paras 196, 207. For the other Article 8 ECHR cases, see *Oleksandr Volkov v Ukraine* Application No 21722/11, Merits and Just Satisfaction, 9 January 2013, at paras 174, 183; *Vintman v Ukraine* Application No 28403/05, Merits and Just Satisfaction, 23 October 2014, at para 88.

73 *Berger-Krall and Others v Slovenia* Application No 14717/04, Merits and Just Satisfaction, 12 June 2014, at para 190.

74 See *Ekoglasnost v Bulgaria* Application No 30386/05, Merits and Just Satisfaction, 6 November 2012, at para 64; *Altinay v Turkey*, supra n 3 at para 43.

75 *I.S. v Germany* Application No 31021/08, Merits and Just Satisfaction, 5 June 2014, at para 76.

76 Ibid.

77 *Parrillo v Italy* Application No 46470/11, Merits and Just Satisfaction, 27 August 2015, at para 180.

of the eviction, the Court indicated 'that numerous international instruments, some of which have been adopted within the [CoE], emphasise the necessity, in the event of the forced eviction of Roma and travellers, of providing them with alternative housing, except in cases of *force majeure*'.[78] To take another example, in a case in which the applicant alleged that a fine for breaching the secrecy of criminal investigations violated Article 10 of the ECHR, the Court noted that it first had to establish whether the article written by the applicant concerned a matter of public interest. For this purpose, the Court cited a CM recommendation, which rightly points out that the media have the right to inform the public owing to the public's right to receive information, and stresses the importance of media reporting in informing the public on criminal proceedings, thus ensuring public scrutiny of the functioning of the criminal justice system.[79]

The question now is why the CoE documents are apparently most useful to the third step in Article 8 ECHR cases. An explanation for this finding may be that the matter of necessity and proportionality in Article 8 ECHR cases is comparably difficult to resolve in the sense that it is open to interpretation to a great extent, and that, therefore, the Court refers comparably often to CoE documents.

6. USE OF THE DOCUMENTS BY THE COURT

The analysis now moves from *where* the Court refers to the CoE materials to *how* it uses them. The author has noted first of all that the Court often seems to use CoE documents with generally applicable standards to show that other bodies have set comparable standards as its own. The Court thus seems to find support for its findings on the merits in the applicant's case by showing that it does not stand alone in the standards which it sets. For example, when stating that it 'has already acknowledged that same-sex couples are in need of legal recognition and protection of their relationship', it noted that the PACE expressed the 'same need, as well as the will to provide for it'.[80] In an Article 8 of the ECHR case in which the Court found a violation because of the authorities' refusal of the applicant's gender reassignment surgery

78 *Winterstein and Others v France* Application No 27013/07, Merits and Just Satisfaction, 17 October 2013, at para 159. For other examples under Article 8 ECHR, see *Michaud v France* Application No 12323/11, Merits and Just Satisfaction, 6 December 2012, at para 123; *A.K. and L. v Croatia,* supra n 62 at para 68; *Z.J. v Lithuania* Application No 60092/12, Merits and Just Satisfaction, 29 April 2014, at para 104; *Gablishvili v Russia* Application No 39428/12, Merits and Just Satisfaction, 26 June 2014, at para 57; *Y.Y. v Turkey* Application No 14793/08, Merits and Just Satisfaction, 10 March 2015, at para 110; *Khoroshenko v Russia* Application No 41418/04, Merits and Just Satisfaction, 30 June 2015, at para 134.

79 *A.B. v Switzerland* Application No 56925/08, Merits and Just Satisfaction, 1 July 2014, at para 47. For other references under Article 10 ECHR, see *Bucur and Toma v Romania* Application No 40238/02, Merits and Just Satisfaction, 8 January 2013, at paras 97, 107; *X. and Others v Austria* Application No 19010/07, Merits and Just Satisfaction, 19 February 2013, at paras 149–150; *Perinçek v Switzerland* Application No 27510/08, Merits and Just Satisfaction, 17 December 2013, at para 115. For references under other Articles, see *Ekoglasnost v Bulgaria,* supra n 74 at paras 69–70, 72; *Eğitim ve Bilim Emekçileri Sendikası v Turkey* Application No 20641/05, Merits and Just Satisfaction, 25 September 2012, at paras 57, 72; *Matelly v France* Application No 10609/10, Merits and Just Satisfaction, 2 October 2014, at para 74; *Danis and the Association of Ethnic Turks v Romania* Application No 16632/09, Merits and Just Satisfaction, 21 April 2015, at para 47.

80 *Oliari and Others v Italy* Application Nos 18766/11 and 36030/11, Merits and Just Satisfaction, 21 July 2015, at para 165.

because he was not permanently unable to procreate, the Court referred *inter alia* to a CM recommendation when assessing the necessity of the interference. The recommendation provided that 'prior requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements'.[81] In another case, the Court noted that 'confiscation in criminal proceedings is in line with the general interest of the community', to which it added that '[c]onfiscation in this context is therefore in keeping with the goals of the ... Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime'.[82] As a last example, to find that a complaint about *inter alia* the removal of the applicant's deceased husband's body tissue without her consent or knowledge fell within the scope of Article 3 of the ECHR, the Court referred to the Convention on Human Rights and Biomedicine, which aims 'to protect the dignity, identity and integrity of "everyone" who has been born, whether now living or dead'.[83] Also when applying Article 46 of the ECHR, on the execution of judgments, the Court refers to documents of, in particular, the CM to remind the states of the content of their Article 46 ECHR obligation.[84] Alternatively, it cites CM recommendations to give insight into which remedial measures can be taken.[85] Sometimes, the Court rather only mentions a CoE standard in brackets, without outlining its content, writing: 'see also',[86] thus seemingly also demonstrating that others have set comparable standards.

Next to referring to documents that set generally applicable standards, the Court refers to evaluations, concerns or recommendations of a CoE organ concerning a specific state, again apparently to back up its own findings. For example, when assessing whether the threshold of severity under Article 3 of the ECHR was met in the applicants' case, the Court relied on an ECSR decision. After describing the particularly serious living conditions of the applicant asylum-seeking family, the Court observed that the ECSR had decided that, in such circumstances, the rights of children and young persons to social, legal and economic protection are violated.[87] Further, in

81 *Y.Y. v Turkey,* supra n 78 at para 110.

82 *Veits v Estonia* Application No 12951/11, Merits and Just Satisfaction, 15 January 2015, at para 71.

83 *Elberte v Latvia* Application No 61243/08, Merits and Just Satisfaction, 13 January 2015, Ibid. at para 142. See also *M.M. v United Kingdom*, supra n 69 at para 196; *Horváth and Kiss v Hungary* Application No 11146/11, Merits and Just Satisfaction, 29 January 2013, at para 104; *Tali v Estonia* Application No 66393/10, Merits Just Satisfaction, 13 February 2014, at para 78; *Oran v Turkey* Application No 28881/07 and 37920/07, Merits and Just Satisfaction, 15 April 2014, at para 60; *I.S. v Germany,* supra n 75 at para 76.

84 *Torreggiani and Others v Italy* Application No 43517/09, Merits and Just Satisfaction, 18 January 2013, at para 95; *Savriddin Dzhurayev v Russia* Application No 71386/10, Merits and Just Satisfaction, 25 April 2013, at para 248; *İzci v Turkey* Application No 42606/05, Merits and Just Satisfaction, 23 July 2013, at para 98; *Zornić v Bosnia and Herzegovina*, Application No 3681/06, Merits and Just Satisfaction, 15 July 2014, at paras 41–42; *Rutkowski and Others v Poland* Application No 72287/10, Merits and Just Satisfaction, 7 July 2015, at paras 200, 208.

85 *Varga and Others v Hungary* Application No 14097/12 and others, Merits and Just Satisfaction, 10 March 2015, at para 105.

86 *Bureš v The Czech Republic*, supra n 67 at para 90; *Torreggiani and Others v Italy,* supra n 84 at para 69; *Savriddin Dzhurayev*, supra n 84 at para 259.

87 *V.M. and Others v Belgium* Application No 60125/11, Merits and Just Satisfaction, 7 July 2015, at para 159. For another instance of reliance on a decision of the ECSR, see: *Winterstein and Others v France,* supra n 78 at para 165.

another case and prior to finding that the civil proceedings in the applicant's case could not be considered to be arbitrary or to have upset the proportionality test, the Court referred to the findings of the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) and the Group of States against Corruption (GRECO) that the legislation governing the proceedings 'had been brought into line with the appropriate requirements of the international legislation'.[88] Regarding an Article 1 of Protocol No 1 ECHR complaint, brought in reaction to the loss of two-thirds of old-age pensions, the Court observed that the government gave 'no information as to the quality of life one could expect to have on the basis of the sums received in pension by the applicants'.[89] Consequently, it 'cannot but find guidance' in conclusions of the ESCR that the minimum pension level was inadequate.[90] 'Thus', the Court continued, 'the reductions have undoubtedly affected the applicants' way of life and hindered its enjoyment substantially'[91] and found a violation.[92] Other, shorter, examples are that the Court 'shares the CPT's concerns',[93] notes that its finding or view 'is line with' that of the CHR or the CPT,[94] and 'cannot disregard that the CPT has repeatedly expressed particular concern'.[95]

It can also be derived from the case law that the Court may cite generally applicable CoE standards to emphasize the importance of a certain general principle.[96] To illustrate, when emphasizing 'the utmost importance to be attached to the question of the States Parties' compliance with' interim measures, the Court referred to 'the firm position on that point expressed' by the States Parties in the Izmir Declaration and by the CM in an interim resolution.[97] To back up its proposition that '[p]rotection of journalistic sources is one of the basic conditions for press freedom', the Court referred to a CM recommendation.[98]

Somewhat differently, the Court can base itself on standards of another CoE body, without adding that its standards are comparable. This seems to imply that the

88 *Gogitidze and Others v Georgia* Application No 36862/05, Merits and Just Satisfaction, 12 May 2015, at para 106.

89 *Stefanetti and Others v Italy* Application No 21838/10 *et al.*, Merits and Just Satisfaction, 15 April 2014, at para 64.

90 Ibid. at paras 62–64.

91 Ibid. at para 64.

92 Ibid. at para 67.

93 *Savičs v Latvia* Application No 17892/03, Merits and Just Satisfaction, 27 November 2012, at para 139; *Enache v Romania* Application No 10662/06, Merits and Just Satisfaction, 1 April 2014, at paras 43, 61.

94 *Biao v Denmark* Application No 38590/10, Merits and Just Satisfaction, 25 March 2014, at para 102.

95 *D.F. v Latvia* Application No 11160/07, Merits and Just Satisfaction, 29 October 2013, at para 81. See for other examples: *Dembele v Switzerland* Application No 74010/11, Merits and Just Satisfaction, 29 September 2013, at para 48; *Vlad and Others v Romania* Application No 0756/06 and others, Merits and Just Satisfaction, 26 November 2013, at para 156; *Magyar Keresztény Mennonita Egyház v Hungary* Application No 70945/11, Merits and Just Satisfaction, 8 April 2014, at para 85; *Dvořáček v The Czech Republic* Application No 12927/13, Merits and Just Satisfaction, 6 November 2014, at paras 78, 104.

96 See, for example, *R.R. and Others v Hungary* Application No 19400/11, Merits and Just Satisfaction, 4 December 2012, at para 32; Savriddin Dzhurayev, supra n 86 at para 200.

97 *Kasymakhunov v Russia* Application No 29604/12, Merits and Just Satisfaction, 14 November 2013, at para 181; See also Savriddin Dzhurayev, ibid. at para 213; *Ermakov v Russia* Application No 43165/10, Merits and Just Satisfaction, 7 November 2013, at para 280.

98 *Telegraaf Media Nederland Landelijke Media B.V. and Others v The Netherlands*, supra n 70 at para 127.

Court incorporates the standards of the other body as its own. This conclusion can be derived from for example the remark of the Court that '[g]uidance to which measures the respondent Government could and should take in order to protect the applicant's property rights can be derived from relevant international standards, in particular from' a PACE resolution.[99] The Court also attached great importance to a recommendation of the VC that the fundamental elements of electoral law should not be open to amendment less than one year before an election. In the applicant's case, this recommendation was not respected because amendments were introduced one month before the deadline for registering candidates,[100] leading to a violation of Article 3 of Protocol No 1 to the ECHR.[101] Additionally, the Court has noted that an impugned rule 'forms part of a series of international instruments', among which CoE instruments,[102] or is 'in line with' a CoE document.[103]

As was already noted in the introduction, the Court may also rely on CoE standards to establish whether consensus about a (usually sensitive) matter exists or is emerging, considering that, even though an instrument does perhaps not bind the states, it can give an indication of their intent and practice.[104] In a case on whole life imprisonment, for example, the Court outlined various CoE legal instruments, which demonstrate 'first, that commitment to rehabilitation is equally applicable to life sentence prisoners; and second, that, in the event of their rehabilitation, life sentence prisoners should also enjoy the prospect of conditional release'.[105] Based on *inter alia* these instruments, the Court considered that 'in the context of a life sentence, Article 3 ECHR must be interpreted as requiring reducibility of the sentence' in certain circumstances and under certain conditions.[106] In another case, a review of the activities of CoE bodies demonstrated 'that there is a growing awareness at European level of the problems posed by migration in terms of political participation in the countries of origin and residence'.[107] Nevertheless, 'none of the material formed a basis for concluding that, as the law currently stands, States are under an obligation to grant non-residents unrestricted access to the franchise'.[108] CoE documents can, therefore, also help establish that *no* consensus exists (yet), as was also the case when an applicant alleged that he had been wrongfully convicted for having denied the Armenian genocide. The chamber relied on a declaration of some PACE members to demonstrate that no consensus existed on the legal characterization of the events in question. The chamber noted that '[i]n some countries . . . recognition

99 *Sargsyan v Azerbaijan* Application No 40167/06, Merits and Just Satisfaction, 16 June 2015, at para 238.

100 *Ekoglasnost v Bulgaria,* supra n 74 at para 70. For reliance on the same document, see *Danis and the Association of Ethnic Turks v Romania,* supra n 79 at para 47.

101 See also *Gülay Çetin v Turkey,* supra n 63 at para 130; *D.F. v Latvia,* supra n 95 at para 87; *Öcalan v Turkey (No 2)*, supra n 18 at para 106; *R.M.T. v United Kingdom*, supra n 9 at para 76.

102 *Michaud v France,* supra n 78 at para 123.

103 *Vintman v Ukraine,* supra n 72 at para 88. See, for another example, *Y. v Slovenia* Application No 41107/10, Merits and Just Satisfaction, 28 May 2015, at para 104.

104 Glas, supra n 11 at 328.

105 *Vinter and Others v United Kingdom* Application No 66069/09, Merits and Just Satisfaction, 9 July 2013, at para 116.

106 Ibid. at para 119. See also *Harakchiev and Tolumov v Bulgaria* Application Nos 15018/11, 61199/12, Merits and Just Satisfaction, 8 July 2014, at para 245.

107 *Shindler v United Kingdom,* supra n 69 at para 114.

108 Ibid.

has not come from the Government but only from Parliament or one of its chambers'.[109] In a case about the difference in treatment between unmarried different-sex couples and same-sex couples in respect of second-parent adoption, the Court concluded that, based on the Convention on the Adoption for Children, no conclusions could be drawn as to the existence of a possible consensus, considering the low number of ratifications so far.[110]

This section identified different ways in which the Court uses the CoE documents when applying the law, as the author deduced from the Court's case law. One apparent way of using the documents is to show that others have set comparable standards or have made comparable findings regarding a specific state. This can be interpreted as the Court showing that it is not the only one to impose certain standards on the States Parties. The Court also cites standards set by other CoE actors to probably stress the significance of a Convention principle. In a comparably far-reaching manner, the Court sometimes seems to incorporate standards of another body as its own. Further, the CoE standards can be relied upon to help establish whether consensus exists or not. Irrespective of how exactly the Court uses a CoE document, it is clear that the documents can be of use to it for different purposes.

7. RELEVANCE OF THE DOCUMENTS TO THE COURT

The previous section illustrated that the Court sometimes seemingly incorporates standards of others as its own. A document is then probably of great relevance to it. This section continues on this theme; it analyses the relevance that the Court attaches to the CoE documents, in the sense that it relies on them in more detail and discusses questions that arise as a consequence of the analysis.

The Court usually does not explain how relevant a document of another CoE body is to it. It normally just mentions a document without further ado. Exceptionally, however, it does address this matter. To a recommendation and resolution of the CM, the Court attached 'un grand poids'[111] and to the factual findings of the PACE and the CHR 'beaucoup d'importance'.[112] The Court also observed that the Data Protection Convention and a CM recommendation were 'of some importance'.[113] The Court may also attach considerable relevance to a document without stating this explicitly, as can be demonstrated by this citation and in particular the 'therefore':

> The Court notes that the physical conditions of the applicant's detention are in conformity with the [CM] European Prison Rules . . . . Furthermore, the CPT has also described them as 'broadly acceptable'. *Therefore*, no infringement of Article 3 can be found on this account.[114]

109 *Perinçek v Switzerland,* supra n 79 at para 115.

110 *X. and Others v Austria,* supra n 79 at paras 149–150; See also *Vallianatos and Others v Greece* Application Nos 29381/09, 32684/09, Merits and Just Satisfaction, 7 November 2013, at para 91.

111 *Gülay Çetin v Turkey,* supra n 63 at para 130. See also *Harakchiev and Tolumov v Bulgaria* Application Nos 15018/11, 61199/12, Merits and Just Satisfaction, 8 July 2014, at paras 204, 264.

112 *Martzaklis and Others v Greece* Application No 20378/13, Merits and Just Satisfaction, 9 July 2015, at para 72.

113 *M.M. v United Kingdom*, supra n 69 at para 196.

114 *Öcalan v Turkey (No 2)* supra n 101 at para 115 (emphasis added).

Thus, in these cases the Court seems to completely rely on other CoE organs. Further and as was noted above, when the Court incorporates standards of others as its own, a document is clearly of great relevance. Comparably more neutral, the Court can comment that it 'will take into account the criteria laid down in the relevant international instruments', as it said of the Convention on Preventing and Combating Violence against Women and Domestic Violence, in addressing the question whether the authorities succeeded in striking a fair balance between the interests of the defence and the rights of the victim.[115]

In other cases, the limited relevance of a document can be deduced from the Court's decision to mention it and to nevertheless not follow it, something which happens only in a few cases since the documents usually support its findings. Indeed, the Court once noted that while it is 'aware of the recommendations of the [CM] to the effect that educational facilities should be made available to all prisoners . . . it recalls that Article 2 of Protocol No 1 ECHR does not place an obligation on Contracting States to organise educational facilities for prisoners where such facilities are not already in place'.[116] The Court has also repeated that, even though the CPT prescribes 4 metres^2 of living space per prisoner as the desirable standard, only when the applicant has less than 3 metres^2 must overcrowding be considered to be so severe as to justify of itself a finding of a violation of Article 3 of the ECHR.[117] On another occasion, the Court observed that the PACE had stressed that reservations to the Convention should not be of a permanent nature. The Court did not follow the PACE on this point, because a reservation 'made in conformity with Article 57 [ECHR] . . . remains valid as long as it has not been withdrawn by the respondent State'.[118] In a case regarding the matter of summary trials under Article 6 ECHR, the Court observed that 'as early as in 1987 the [CM] called upon the member States to take measures aimed at the simplification of ordinary judicial procedures by resorting, for instance, to abridged, summary trials'.[119] 'However', the Court continued, 'it is also a cornerstone principle that any waiver of procedural rights must always, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance'.[120] The Court did not, therefore, fail to follow the CM's approach, but tempered its enthusiasm. Comparably, the Court may follow a CoE organ only partially by supplementing the standards of the other body with its own standards. This happened with three categories of fundamental electoral rules established by the VC (the voting system, the composition of electoral commissions and the fixing of constituency

115 *Y. v Slovenia,* supra n 103 at para 104.

116 *Velyo Velev v Bulgaria* Application No 16032/07, Merits and Just Satisfaction, 27 May 2014, at para 34.

117 *Chkhartishvili v Greece* Application No 22910/10, Merits and Just Satisfaction, 2 May 2013, at para 55; *A.F. v Greece* Application No 53709/11, Merits and Just Satisfaction, 13 June 2013, at para 45; *Horshill v Greece* Application No 70427/11, Merits and Just Satisfaction, 1 August 2013, at para 45; *Khuroshvili v Greece* Application No 58165/10, Merits and Just Satisfaction, 12 December 2013, at para 82; *Muršić v Croatia* Application No 7334/13, Merits and Just Satisfaction, 12 March 2015, at para 62.

118 *Khuroshvili v Greece,* ibid. at para 70.

119 *Natsvlishvili and Togonidze v Georgia* Application No 9043/05, Merits and Just Satisfaction, 29 April 2014, at para 91.

120 Ibid.

boundaries); the Court added to this the rule of conditions of participation in elections imposed on political parties.[121]

The findings in this section demonstrate that the documents can be clearly of great relevance to the Court's reasoning, but that this is not necessarily the case.[122] The Court, therefore, stays in control and takes the elements which are useful to it. Further, it does not simply follow what others prescribe; it 'maintains the last word on the interpretation of the Convention'.[123] As the Court has confirmed, it remains 'for the Court to decide which international instruments and reports it considers relevant and how much weight to attribute to them'.[124] The question may be raised why the Court sometimes bothers mentioning a document when applying the law even though it does not follow it. Again, a reason may be that the Court wants to show that it is aware of relevant documents, considering that it sometimes literally states that it 'is aware' of a certain document.[125]

8. EXPLANATIONS FOR (NOT) RELYING ON THE DOCUMENTS

A. Explanations for Relying

Section 7 described that the CoE documents are usually of some relevance to the Court's consideration of the merits of a case. This section aims to find explanations for why the Court relies on these documents. The first two of the three explanations relate to the means of interpretation of the Court.

To interpret the Convention, the Court is 'guided mainly by the rules of interpretation provided for in Articles 31 to 33 of the Vienna Convention [on the Law of Treaties]'.[126] It must, therefore, 'ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn'.[127] Article 31(3)(c) of the Vienna Convention[128] provides that account should be taken of '[a]ny relevant rules of international law applicable in the relations between the parties.' This implies, according to the Court, that it must take account of 'in particular the rules concerning the international protection of human rights'.[129] In this light, it is the Court's conviction that the provisions of the Convention cannot function as the 'sole framework of reference for the interpretation of the rights and freedoms enshrined therein'.[130] The Convention, therefore, 'cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law'.[131] This means of interpretation solely seems to be an explanation for the Court's reliance on CoE conventions. However, the

121 *Ekoglasnost v Bulgaria,* supra n 74 at para 69.
122 See also Glas, supra n 11 at 329. See for references to the CPT specifically Hagens, supra n 12 at 270.
123 Glas, supra n 11 at 329–30.
124 *Tănase v Moldova,* supra n 14 at para 176.
125 See, for example, *Velyo Velev v Bulgaria*, supra n 116 at para 34.
126 *Demir and Baykara v Turkey*, supra n 9 at para 65.
127 Ibid.
128 1969, 1155 UNTS 331.
129 *R.M.T. v United Kingdom*, supra n 9 at para 76.
130 *Demir and Baykara v Turkey*, supra n 9 at para 67.
131 *R.M.T. v United Kingdom*, supra n 9 at para 76.

following citation clarifies that the Court also can make reference to non-binding materials so as to prevent that the Convention is interpreted in a vacuum:

> The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account . . . the interpretation of . . . elements [of international law] by competent organs, and the practice of European States reflecting their common values.[132]

This means of interpretation surfaces, for example, when the Court emphasizes that not only the Convention should be interpreted in harmony with international law, but that also the CoE documents upon which it relies are related to other international law documents. The Court once noted that a PACE resolution in which it found guidance as to 'which measures the respondent Government could and should take in order to protect the applicant's property rights', relied on 'relevant international standards'.[133] In another case, when assessing whether 'the decision on naturalization had any punitive character for the purpose of the exercise of the applicant's freedom of expression and assembly', the Court referred to the European Convention on Nationality. It remarked that while this instrument had 'not been widely ratified by the [CoE] member States, . . . its definition [of nationality] relies on the traditional understanding of a bond of nationality as expressed by the ICJ in the *Nottebohm Case*'.[134] In sum, one plausible explanation for the Court's reliance on CoE materials is that the Convention should interpreted as part of a broad network of rules and interpretations of international human rights law.

Another possible explanation that can be found in the Court's means of interpretation is the living instrument doctrine. The Court itself mentioned this means when discussing its practice of interpreting the Convention provisions in the light of other international texts and materials.[135] The living instrument doctrine provides that the Convention must be interpreted in the light of present-day conditions and that the Court takes account of evolving norms of national and international law.[136] The consensus emerging from a CoE document can, according to the Court, be of relevance to establishing the present-day conditions,[137] irrespective of whether the respondent state has ratified 'the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned'.[138] It suffices, the Court explained, that the documents denote 'a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the [CoE] and show, in a precise area, that there is common ground in modern societies'.[139] The CoE documents are particularly useful to interpreting the

132 *Demir and Baykara v Turkey*, supra n 9 at para 85. See also *Matelly v France*, supra n 79 at para 74.
133 *Sargsyan v Azerbaijan*, supra n 99 at paras 237–238. See also *Chiragov and Others v Armenia* Application No 13216/05, Merits and Just Satisfaction, 16 June 2015, at paras 198–199.
134 *Petropavlovskis v Latvia,* supra n 69 at para 80.
135 See also Polakiewicz, supra n 8 at 289.
136 *Demir and Baykara v Turkey*, supra n 9 at para 68.
137 Ibid. at para 85. See also *R.M.T. v United Kingdom*, supra n 9 at para 98. See also Section 1.
138 *Demir and Baykara v Turkey*, supra n 9 at para 86.
139 Ibid.

Convention in line with the living instrument doctrine, because they are more easily drawn up than conventions and because they are usually rather dynamic.[140] To illustrate, it has been proposed by others that the Court could rely on 'significant non-binding recommendations' of CoE institutions regarding the difficult and developing issues of conscientious objection and the rights of the mentally ill.[141] Additionally, comparatively recent CoE conventions on, for example, human rights and biomedicine can be relevant in this respect.[142]

One further explanation of the author for the Court's reliance on the CoE documents is not directly related to the Court's means of interpretation, but to how the Court uses the documents as outlined in Section 6. This explanation is that the Court wants to show that other stakeholders have set comparable standards.[143] Showing this may provide additional support to new and possibly controversial findings, because the Court can show that it is not standing alone when setting a new step.[144] Therefore, another explanation for the Court's reliance on the CoE document can be to increase the legitimacy of, in particular, progressive judgments in the eyes of the States Parties.

B. Explanations for Not Relying

A question that arises in the light of the discussion of the relevance of the CoE documents in Section 7, is why the Court does exceptionally not follow the standards set in a CoE document, even though the standards can be an authoritative statement of a respected CoE organ and even though the Court mentions the standards when applying the law.

One straightforward explanation may be that the Court does simply not (completely) agree with the other body and therefore does not follow it. This was probably at issue in a case about the French ban on wearing clothing designed to conceal one's face in public. The Court and the other CoE bodies disagreed on the point whether the blanket ban was proportionate and, therefore, not only a breach, but also a violation of human rights. The PACE in a resolution and a recommendation on 'Islam, Islamism and Islamophobia in Europe' and the CHR in a 'View Point' found a blanket ban to be disproportionate.[145] The Court, however, found that, in particular due to the breath of the margin of appreciation, the ban was 'proportionate to the aim pursued', and therefore not in violation of Articles 8 and 9 of the ECHR.[146] The Court can impose different standards on a state, even if that state has

140 Polakiewicz, supra n 8 at 259, 287.

141 Shelton, 'Human Rights' in Shelton (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (2007) 346 at 346.

142 The ECHR, adopted in 1950, was the third CoE convention. After the ECHR, a further 215 conventions, protocols, etc. have been adopted; see the 'full list' list available at: www.conventions.coe.int [last accessed 11 November 2016].

143 See Section 6.

144 Hoffmann-Riem, supra n 30 at 587 (about the VC specifically); Glas, supra n 11 at 328.

145 *S.A.S. v France* Application No 43835/11, Merits and Just Satisfaction, 1 July 2014, at paras 35–37, 147.

146 Ibid. at para 157.

ratified another (binding) CoE instrument, because the 'States retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention'.[147]

Other possible explanations are less straightforward and relate to the different legal and institutional climate in which the Court and the other bodies function. The first such explanation proposed by the author is that the legal standards upon which the Court relies are different from those of the other CoE bodies. On the one hand, the Convention only sets minimum human rights standards, setting out what is required.[148] Under the Convention, the states are obliged to implement just these minimum standards, although they remain free to go beyond that (as recommended by other CoE bodies).[149] The Court, therefore, 'remains the guardian of a limited catalogue of rights as protected under the minimum standards set forth in the Convention'.[150] The CoE documents, on the other hand, can formulate standards going beyond the minimum Convention standards and beyond where the Court can interpret the Convention.[151] The bodies which base themselves upon these documents can, moreover, set additional standards that describe what is desirable and not merely what is required. Considering these different legal standards, the Court may consider a document to be relevant, but still cannot follow it because it is restrained by the legal context of the Convention. More specifically, the legal standards can differ in the sense that, while some other CoE bodies supervise the compliance of comparably 'specific and exacting norms' (for example, regarding industrial action), the Court's jurisdiction is limited to the Convention, a document that promulgates relatively general norms which may, therefore, not cover the situation complained of.[152] Moreover, precisely because the others supervise the compliance of comparably specific and exacting norms, the additional standards which they set, will be even more far-going and even less likely to be acceptable to the Court. The 'differences in nature and scope' between the predominantly and at least originally civil and political Convention rights and the economic and social rights in the ESC also illustrate how the legal standards may differ more specifically.[153] These differences hamper the Court's ability to rely to a great extent on the ESC and on the conclusions and decisions of the ECSR.[154] As the Court has stressed in a case on trade-union freedom:

147 *X. and Others v Austria,* supra n 79 at para 150. See also ibid. at Joint partly Dissenting Opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, De Gaetano and Sicilianos, para 22, in which the Judges indicate that the Court also has another approach to dealing with apparently contradictory instruments which are simultaneously applicable, namely construing 'them in such a way as to coordinate their effects and avoid any opposition between them'.

148 See also *R.M.T. v United Kingdom*, supra n 9 at Concurring Opinion of Judge Wojtyczek, para 3; Loof and Lawson (eds), 'Interview met Egbert Myjer', *Special nummer NTM/NJCM-bulletin: 60 jaar EVRM – een lichtend voorbeeld?* (2010) at 689.

149 Article 53 ECHR.

150 *R.M.T. v United Kingdom*, supra n 9 at Concurring Opinion of Judge Wojtyczek, para 3.

151 *Velyo Velev v Bulgaria*, supra n 116 at para 34.

152 *R.M.T. v United Kingdom*, supra n 9 at para 106.

153 Polakiewicz, supra n 8 at 276.

154 Ibid. See also *R.M.T. v United Kingdom*, supra n 9 at Concurring Opinion of Judge Wojtyczek, para 8.

> [I]n view of the sensitive character of the social and political issues involved in achieving a proper balance between the respective interests of labour and management, and given the high degree of divergence between the domestic systems in this field, the Contracting States enjoy a wide margin of appreciation as to how trade-union freedom and protection of the occupational interests of union members may be secured.[155]

As the Court affords a wide margin of appreciation, a factor that the ECSR may not take into consideration, it cannot simply copy the ECSR's findings.

The second explanation relating to the different climate in which the Court and the other CoE bodies function concerns the institutional climate. Specialized monitoring bodies, such as the ECSR, analyse matters in comparably broad and abstract terms and irrespective of how a domestic law influences the rights of a specific individual. The Court's task is different as it noted itself: it was not established to 'review the relevant domestic law in the abstract, but to determine whether the *Savičs v Latvia* manner in which it actually affected the applicant infringed the latter's rights'.[156] It is, therefore, possible that a law is generally not acceptable, as assessed by the ECSR, but that it does not cause a violation in the case of the applicant, as established by the Court. To illustrate, even when the CPT has repeatedly criticized the Latvian regime applicable to life-sentenced prisoners, whether the applicant suffered treatment proscribed by Article 3 of the ECHR 'depends on the extent to which he was personally affected by that regime'.[157] What also may play a role in terms of institutional climate is that the Court, as an institution that issues legally binding judgments, simply can ask less of the states and has to be more careful exactly because the states are legally bound. The other bodies can, in line with this explanation, be more progressive because the states do not need to follow their recommendations precisely. Especially when a CoE body has set particularly progressive standards, this could explain why the Court does not follow such standards.

The reader may be prompted to wonder why the Court relies on a CoE document in some cases, possibly for one of the explanations given in Section 8(A); while, in another case, it does not rely on such a document, possibly for one of the explanations of this section. The question is, therefore, why some explanations play a role in some cases, while others play a role in other cases. It was not possible for the author to derive an answer from the Court's case law. However, it may be the case that, when the Court follows a CoE document even though that document was adopted by a body that functions in a different legal and institutional climate, the body apparently set a standard that happened to fall within the scope of protection afforded by the Convention as interpreted by the Court.

155 *Sindicatul "Păstorul cel Bun" v Romania* Application No 2330/09, Merits and Just Satisfaction, 9 July 2013, at para 133.

156 *R.M.T. v United Kingdom*, supra n 9 at para 98.

157 Supra n 93 at para 134.

9. CONCLUSION

This contribution has analysed how the Court refers to and relies on non-binding and standard-setting CoE documents and why it does so, based on a sample of 795 judgments issued between 1 September 2012 and 31 August 2015. It can be concluded from this analysis that the Court mentions a CoE document only in the minority of judgments, in one-fourth of them. Mentioning such a document is therefore rather an exception than the rule. In about half the judgments in which the Court cites a document, it does not return to it when applying the law. However, although the documents do not appear in the majority of cases, when they do appear, they appear in relatively important cases, in which new standards are formulated.

It seems to be irrelevant to the Court which body adopted a document and nor does it comment on the character of the documents it cites, even though the documents differ due to the decision-making process that led to their adoption, their addressees and their legal nature. In a sense, this finding is surprising, because the fact that a document is well-informed (because it was adopted by experts or preceded by a country visit), broadly supported (because a qualified majority adopted it) or addressed to all states or exactly the state that is also the respondent state, might seem to be good reasons to rely on such a document. It may be the case that these factors play a role in the minds of the judges, but this is not apparent from the judgments in any way.

Given the variety of documents and bodies on which the Court relies, it seems to be very open to outside influence. This finding should, however, be qualified in the light of other findings. For one thing, the Court mentions lesser types of documents in the 'the law' part than in the part of the judgment in which it sums up relevant materials. Moreover, even when it does refer to a document when applying the law, it does not necessarily follow it (completely). More generally, it was found that the Court keeps the last word on how it interprets the Convention, even when explanations for relying on such a document are related to the means of interpretation which it employs and in spite of the authoritative nature of a document.

When considering the place of the references in the Court's determination of the merits of a case, the conclusion is that the Court most often cites a CoE document when addressing the question of justification and, more specifically, when addressing the necessity and proportionality of an interference, often times in an Article 8 ECHR case. A tentative reason given for this finding is that addressing this matter in Article 8 ECHR cases is comparably difficult because it is very much open to interpretation. When answering the question of an interference, the documents are cited least.

The Court uses the CoE documents in different ways. It, for example, seems to use them to show that others have set comparable standards to support its findings on the merits or to emphasize the importance of a certain principle, thus demonstrating that it does not stand alone. Further, the Court sometimes bases itself on standards of another body without adding that the Convention standards are comparable. The Court then seems to incorporate the standards as its own. Lastly, the Court can use the standards to establish whether or not consensus exists.

Although the Court does not usually address the relevance of a certain document to its interpretation of the Convention, clearly the documents can be of quite some

relevance to it. The opposite, however, also holds: some documents are only of limited relevance in that sense. The Court, therefore, remains in charge as it determines how relevant a document is to its interpretative exercise.

Possible explanations for the Court's reliance on one of the CoE documents are related to the means of interpretation upon which it relies. The first means is that the Convention must be interpreted, not in a vacuum, but in harmony with the general principles of international law. Therefore, documents of other CoE organs must also be taken into consideration. The other means is the living instrument doctrine, which requires the Court to interpret the Convention in the light of present-day conditions and the CoE documents can help it to achieve that. Another explanation may be that, by showing that others have come to comparable standards, the Court hopes to increase the legitimacy of its findings in the opinion of the States Parties.

A reason for the Court to *not* rely on another CoE body may be that it disagrees with the findings or standards set by the other. Other possible reasons are related to the legal and institutional climate in which the Court must function and which is different from that in which the other bodies function. These climates are not comparable *inter alia*, because the Court sets binding minimum standards while the others may also outline desirable standards, in moreover a non-binding manner, and, therefore, standards which go beyond the scope of protection afforded by the Convention rights.

As was noted in the introduction, the Court's use of the CoE documents as analysed in this contribution can lead to the normative question whether the Court should use these documents, considering that it may impair the willingness of the CoE states to set new and progressive human rights standards and their willingness to facilitate the work of the other CoE bodies. Establishing whether this is indeed the case, was not part of this research. What this research can, however, do is reassure the states, because the Court relies on these documents in not many cases nor follows them blindly. It may even be the case that the Court would arrive at a certain (rather far-reaching) conclusion anyhow and that it only uses the document as one of the many reasons for arriving at that conclusion. Furthermore, a document may be a reason for the Court to not accept that a certain standard is indeed a Convention standard, for example, because they demonstrate that there is no consensus.

APPENDIX

Table A1. Level of importance and formation

		Importance			Formation	
		Case Reports	1 (High Importance)	2 (Medium Importance)	Grand Chamber	Chamber
No citation	581/795 = 73%	41/581 = 7%	34/581 = 6%	506/581 = 87%	28/581 = 5%	553/581 = 95%
Citation only	108/795 = 14%	12/108 = 11%	10/108 = 9%	86/108 = 80%	10/108 = 9%	98/108 = 91%
Reference	106/795 = 13%	18/106 = 17%	12/106 = 11%	76/106 = 72%	14/106 = 13%	92/106 = 87%

Table A2. Documents

Organ	Document	Citation only	Reference
CM	Recommendation	103	32
	European Prison Rules (is a recommendation)	19	12
	Resolution[158]	16	6
	Decision	12	11
	Interim Resolution	12	8
	Guidelines	8	2
	Final Resolution	6	1
	Reply to Assembly Recommendation	5	1
	Declaration	4	–
	Information Document	2	–
	Draft Recommendation	1	–
	Annual Report	1	–
	Information on the website	1	–
	Rules for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements	1	–
	Total	191	73
CPT	Report to Government	77	64
	General Report	20	8

(*continued*)

158 'Until 1979, the term "resolution" was used for what is now called a recommendation. Nowadays, the legal form of a resolution is only used for administrative decisions relating to the exercise of supervisory functions by the [CM]' in Polakiewicz, supra n 8 at 247.

Table A2. Continued

Organ	Document	Citation only	Reference
	Public Statement	5	1
	Memorandum	1	1
	Total	103	74
PACE	Resolution	46	14
	Recommendation	40	9
	Report	9	3
	Parliamentary Assembly Opinion	4	–
	Declaration	1	1
	Opinion of a Parliamentary Assembly Committee	1	–
	Total	101	27
CoE	ESC (CETS No. 35)	11	3
Conventions	Convention on Human Rights and Biomedicine (CETS No. 164; Oviedo Convention)	7	2
	Convention on the Adoption of Children (CETS No. 202; Revised)	6	3
	Convention on Preventing and Combating Violence against Women and Domestic Violence C(ETS No. 210; Istanbul Convention)	4	1
	Convention on Action against Trafficking in Human Beings (ETS No. 197)	3	1
	Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (CETS No. 141)	3	1
	Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198)	2	1
	Data Protection Convention (CETS No. 108)	2	1
	Convention on Contact Concerning Children (ETS No. 192)	1	1
	Convention on Nationality (CETS No. 166)	1	1
	Convention on Extradition (CETS No. 24)	1	1
	Criminal Law Convention on Corruption (CETS No. 173)	1	–
		1	–

(*continued*)

Table A2. Continued

Organ	Document	Citation only	Reference
	Convention on Cybercrime (CETS No. 185)		
	Convention on the Exercise of Children's Rights (CETS 160)	1	–
	Convention on the International Validity of Criminal Judgments (CETS No. 70)	1	–
	Convention on the Prevention of Terrorism (CETS No. 196)	1	–
	European Code of Social Security (CETS No. 48)	1	–
	Protocol No. 7 ECHR[159] (CETS No. 117)	1	–
	Total	48	16
CHR	Country visit report	18	7
	Viewpoint	2	1
	Recommendation	2	–
	Report	2	–
	Position Paper	1	1
	Comment	1	–
	Declaration	1	–
	Letter to state	1	–
	Issue paper	1	–
	Press release	1	–
	Total	30	9
VC	Opinion	12	4
	Code of Good Practice in Electoral Matters	6	3
	Report	5	3
	Guidelines	2	–
	Total	25	10
ECSR	Conclusion	10	7
	Decision	6	3
	Digest of the case-law	1	–
	Total	17	10
Other	MONEYVAL state evaluation report	3	3
	European Charter on the Statute for Judges	3	1
	Principles Adopted by the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences	2	–

(*continued*)

159 Included because not ratified by the respondent state, see *Allen v United Kingsom* Application No 25424/09, Merits and Just Satisfaction, 12 July 2013.

Table A2. Continued

Organ	Document	Citation only	Reference
	White Paper of the Committee of Experts on Family Law	1	1
	Framework Programme of the European Commission for the Efficiency of Justice	1	–
	Guide of the Committee on Bioethics of the CoE	1	–
	Policy Guidelines of the ECSC	1	–
	Recommendation of the Congress of Local and Regional Authorities	1	–
	Report of the European Commission for the Efficiency of Justice	1	–
	Report of the Working Party on the Protection of the Human Embryo and Fetus of the Steering Committee on Bioethics	1	–
	Report of the Secretary General under Article 52 ECHR	1	–
	Total	16	5
ECRI	Country report	10	3
	General Policy Recommendation	1	1
	Total	11	4
Consultative Council of European Judges	Magna Carta of Judges	3	–
	Opinion	3	–
	Total	6	0
Ministerial Conferences	Izmir Declaration (Izmir, 26–27 April 2011)	1	1
	Resolution on Journalistic Freedoms and Human Rights (Prague, 7–8 December 1994)	1	1
	Final Declaration on Economic Migration, Social Cohesion and Development (Kiev, 4-5 September 2008)	1	–
	Interlaken Declaration (Interlaken, 18–19 February 2010)	1	–
	Total	4	2
Advisory Committee on the Framework Convention	Commentary	1	1
	Opinion	1	1
	Total	2	2

(*continued*)

Table A2. Continued

Organ	Document	Citation only	Reference
for the Protection of National Minorities			
GRECO	State Evaluation Report	1	1
	General Activity Report	1	–
	Total	2	1
	Grand Total	556	233