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Application of the European Court of Human Rights' case-law in the judicial decision-making in Serbia: Analysis and Recommendations

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Draft report

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Table of contents

Executive summary

The present report is prepared in the context of the European Union (hereinafter: EU) project on the support to the Judicial Academy of Serbia in ensuring easier access to the case-law of the European Court for Human Rights (hereinafter: the Court) for judges and other judicial officials, aimed at the improvement and unification of the case-law among Serbian courts, as well as its harmonisation with the EU standards.

The authors first explain that the European Convention on Human Rights (hereinafter: the Convention),[1] as interpreted and applied by the Court, forms an integral part of Serbian legal order, and can be invoked even in a case of legal lacuna or non-conformity with domestic norms. Moreover, Article 145 para. 2 of Serbian Constitution[2] requires that the court decisions are based on the binding case-law of the Court whenever the case under examination gives rise to a Convention issue. The authors explain that according to Article 46 of the Convention, Serbia abide by the final judgment of the Court in any case to which it is party. However, the Court's task is not only to secure the resolution of a particular case. It also has a duty to construct the Convention rights by elucidating and interpreting the binding legal obligations established under the Convention. This means that Serbian courts and other authorities are also obliged to follow and apply the Court's case-law determining the scope and substance of the Convention obligations developed in respect of other states parties to the Convention.

Authors also analyse and present the current legislation and practice on the application of the Court's case-law in the judicial decision making. While the legislation provides a solid basis for the application of the Court's case-law in domestic judgments, the practice demonstrates that Serbian courts still rarely invoke principles that derive from the Court's jurisprudence, and when they do so, they only mention the relevant article of the Convention or certain judgment, without further elaboration of the manner in which that right is interpreted in the case-law of the Court and without an assessment of its applicability to the instant case.

Chapter five of this report is intended to address these deficiencies in the domestic application of the Convention law. It explains the methodology for the application of the Court's case-law in the judicial decision-making. In particular, it provides for the methodological solutions on the following matters: (1) identification of the relevant Convention issue in a particular case; (2) identification of the relevant Court's case-law for the resolution of a case; (3) how to use the Court's case-law in the context; (4) designation of a structure of the Court's case-law analysis, and (5) provision of the essential citation guidelines.

Finally, the last chapter contains a set of recommendations, on the basis of the identified deficiencies, for improvement of the methodology of decision-making and preparing judgments and decisions by Serbian courts, including scripts and forms that will facilitate application of the Court's case-law in the domestic judgments and decision.

[1] European Convention for the Protection of Human Rights and Fundamental Freedoms, No. 005, 4 November 1950.

[2] Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, no. 98/2006.

1 Introduction

With the position of a candidate for the EU membership, Serbia is faced with a task to ensure full implementation of key reforms, with a particular focus on judicial reforms and protection of fundamental rights and freedoms covered by the negotiating Chapter 23. In this connection, a comprehensive analysis of Serbian legislation is under way in order to assess its conformity with the relevant standards and to propose solutions for overcoming identified differences and possible deficiencies.

The present report is prepared in the context of the EU project on the support to the Judicial Academy of Serbia in ensuring easier access to the case-law of the Court for judges and other judicial officials, aimed at the improvement and unification of the case-law among Serbian courts as well as its harmonisation with the EU standards.

The report in particular aims at preparing a set of recommendations, based on the Court's case-law, for improving the methodology of decision making and preparing judgments and decisions by the Serbian courts. It assesses current legislation and practice dealing with the methodology of drafting of judgments and decisions implementing the Convention and the Court's case-law in the reasoning. On the basis of identified deficiencies, the report provides recommendations for improvement, including scripts and forms that will facilitate application of the Court's case-law in judgments and decision of Serbian courts.

The report has been prepared in three stages.

In the first stage, the current legislation and practice of Serbian courts has been analysed. For this purpose, in July and August 2017 a number of meetings and interviews were held with the relevant stakeholders involved in the judicial processes in Serbia. This included, in particular, representatives of the Constitutional Court of Serbia, the Supreme Court of Cassation, the Belgrade Court of Appeal, the Office of the Agent of the Republic of Serbia before the European Court of Human Rights, the Judicial Academy of Serbia, as well as representatives of the Council of Europe Office in Belgrade and those working in private practice.

In the second stage, in September 2017 the preliminary findings were discussed with the relevant stakeholders. In addition, the scripts and forms facilitating the application of the Court's case-law were tested on the concrete cases with a specially designated group of training judicial officials and those who have completed the training offered by the Judicial Academy.

In the third stage, completed in October 2017, the final report, incorporating the comments and suggestions, was prepared. The findings of this report are presented further below.

The experts find it important to express sincere gratitude to all those who have participated in this project. The opinions expressed, and possible errors made, are exclusively those of the experts.

2 The position of the Convention in Serbian legal order

Each State Party to the Convention has chosen its own way to incorporate the Convention in its domestic legal order. There are various solutions covering the status of the Convention, from those countries giving it the status of constitutional law or giving its absolute supremacy over national law, to majority of countries placing it below the constitution. Also, in majority of states, including Serbia, there is no explicit mention of the status of the Convention, and its position is determined based on the status of international treaties in general.[3]

The status of international sources in Serbian legal order, including the Convention, is defined in 2006 Serbian Constitution. Contemporary constitutions accept either monistic, or dualistic approach towards the international law.[4] While dualistic systems are based on a premise that international and domestic law are separate systems, monistic systems are based on the idea that domestic and international law are parts of a single system, and envisage direct application of norms of international law.[5] Serbian Constitution prescribes that customary international law[6] and ratified international treaties are an integral part of Serbian legal system and that these sources apply directly.[7] Therefore, it accepts the monistic approach, which means that the Convention, as interpreted and applied by the Court, forms an integral part of the domestic legal order, and can be invoked even in case of a legal lacuna or inconsistence with domestic norms. This position is additionally supported by another constitutional provision, which guarantees direct application of human and minority rights enshrined in "universally accepted rules of international law, the ratified international treaties and laws."[8]

As Serbia ratified the Convention in March 2004,[9] this international treaty is an integral part of Serbian legal system. Although the Constitution abandons the absolute primacy of international law, prescribing in Article 16 para. 2 that all ratified international treaties, including the Convention, must be in accordance with the Constitution, the Convention is hierarchically

[3] See further, European Commission for Democracy Through Law (Venice Commission), *Draft report on case-law regarding the supremacy of international human rights treaties* (CDL-DI(2004)005rev, 22 October 2004).

[4] See more about this division in A. Cassese, *International Law* (Oxford University Press, 2001), pp. 162-165. See also J. R. Paust, "Basic Forms of International Law and Monist, Dualist, and Realist Perspectives", in M. Novaković (ed.), *Basic Concepts of Public International Law* (PF, IUP, IMPP, Belgrade, 2013), pp. 244-265. As to the significance of the division to monistic and dualistic systems, see A. Abashidze, "The Relationship between International Law and Municipal Law: Significance of Monism and Dualism Concepts", in M. Novaković (ed.), pp. 23-33.

[5] Ibid., pp. 72-75.

[6] Serbian Constitution uses the term "generally accepted rules of international law." This source of law is recognised in Article 38 para. 2 of the Statute of the International Court of Justice as "evidence of a general practice accepted as law." This is an unwritten source of law, which develops through long term, uniform practice of states and which is followed by awareness of its mandatory nature.

[7] Article 16 para. 2 of the Constitution.

[8] Article 18 para. 2 of the Constitution.

[9] The Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms Act, Official Gazette of Serbia and Montenegro – International treaties, nos. 9/2003, 5/2005, 7/2005 – Corrigendum and Official Gazette of the Republic of Serbia – International treaties, no. 12/2010.

above laws and other general acts which must not be contrary to the Convention.[10] Therefore, the Constitution prescribes the following hierarchy of legal norms: the Constitution, international law (including also the Convention), laws, and by-laws.

The Constitution prescribes in Article 167 para. 1(1) that the Constitutional Court shall decide on the compliance of laws and other general acts with the Constitution, the universally accepted rules of international law and the ratified international treaties (the Convention), as well as on the compliance of the ratified international treaties (the Convention) with the Constitution (Article 167 para. 1(2)), thereby confirming the above noted hierarchy of norms in Serbian legal order. A law may regulate solely the manner of exercise of human rights if the Constitution contains an explicit authorisation for a legislator to act in that way and if, due to the nature of a certain right, it is necessary for the law to regulate the manner of its exercise.

In addition, Serbian Constitution contains provision on the interpretation of the catalogue of human and minority rights guaranteed in Articles 21-80. Therefore, Article 18 para. 3 prescribes that these norms "shall be interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation." Here, the framers of the Constitution thought of the judgments of the Court and decisions of the UN human rights committees.[11] Also, it is important to underline that human rights norms are not interpreted only in accordance with principles enshrined in decisions against Serbia, as this obligation directly derives from Articles 1 and 46 of the Convention, but also in accordance with principles and standards which arise from judgments adopted against other State Parties to the Convention. Such a provision constitutes yet another piece of evidence that the framers of the Constitution had the intention to point to the significance of the international monitoring bodies in the area of human rights protection, which usually have the right to carry out authentic interpretations of conventions on which basis they were set up. Speaking of the Convention, this international body provides an authentic interpretation of the Convention, by determining the content of the guaranteed rights and freedoms and the scope of the state obligations.

Finally, under the Constitution, Serbian courts perform their duties in accordance with the Constitution, law and other general acts, when stipulated by the Law, generally accepted rules of international law and ratified international treaties.[12] In addition, court decisions need to be based on the Constitution and law, as well as on the ratified international treaties (the Convention) and regulations passed pursuant to laws.[13] In other words, Serbian courts must rely on the binding case-law of the Court in their judgments and decisions whenever the case under examination gives rise to a Convention issue.

[10] Article 19 para. 45 stipulates that" Laws and other general acts enacted in the Republic of Serbia may not be in contrary to the ratified international treaties and generally accepted rules of the International Law."

[11] Article 11 of the Publication of Laws and Other Regulations Act, Official Gazette of the Republic of Serbia, no. 45/2013, prescribes that judgments of the Court and decisions of the UN human rights committees brought against Serbia are published in the Official Gazette.

[12] Article 142 par. 2 of the Constitution.

[13] Article 145 para. 2 of the Constitution.

3 The binding nature of the Court case-law

According to Article 46 of the Convention, the state parties to the Convention abide by the final judgment of the Court in any case to which they are parties. The compliance with the Court's judgment is secured through the execution process supervised by the Council of Europe Committee of Ministers. This means that when the Court finds a breach of the Convention, that judgment imposes on the respondent State a legal obligation to comply with the Court's findings.

In principle, this means paying a sum of money as the just satisfaction ordered under Article 41 of the Convention and choosing, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in the domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. As a rule, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46, provided that such means are compatible with the conclusions reached by the Court.[14]

Furthermore, it should be stressed that the Court's task is not only to render retrospective justice in individual case, namely to secure the resolution of a particular case. It also has a duty to construct Convention rights by elucidating and interpreting the binding legal obligations established under the Convention. By rendering justice in a particular case and elucidating, safeguarding and developing the Convention principles, the Court contributes to the observance by the states of the engagements undertaken by them as contracting parties.[15]

In theory, the Court's rulings have only *inter partes* effects and are not legally binding beyond the state party/parties to the dispute and beyond the particular facts of the case. It is also important to note that the doctrine of binding precedents does not apply to the Court's case-law, in the sense that the Court would be bound by its previous interpretation of the Convention, nor is there a formal common law distinction between the *ratio decidendi* (principles for a decision) and *obiter dicta* (findings made in passing) in the Court's practice.[16]

Nevertheless, the Court has held that "while it 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".[17] This accordingly means that only in exceptional circumstances, in the case of a good and cogent reason, will the Court depart from its previous interpretation of the binding legal obligations established under the Convention. The Court will do so in case of a legal certainty and the

[14] *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, 13 July 2000.
[15] *Nagmetov v. Russia* [GC], no. 35589/08, § 64, 30 March 2017.
[16] D. Harris, M. O'Boyle, E. Bates and C. Buckley, *Law of the European Convention on Human Rights* (Oxford, Oxford University Press 2014), p. 20; W.A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford, Oxford University Press 2015), pp. 46-47.
[17] See, for example, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, 11 September 2002; *Scoppola v. Italy* (no. 2) [GC], no. 10249/03, § 104, 17 September 2009, and *Sabri Güneş v. Turkey* [GC], no. 27396/06, § 50, 29 June 2012.

orderly development of its case-law.[18] It could be therefore held that the Court is bound by the principle of judicial consistency in its decision-making.

In addition, it should be noted that Article 1 of the Convention prescribes that States are required "to secure to everyone within their jurisdiction the rights and freedoms" contained in its catalogue. The Court's duty is to ensure that States meet this obligation, and Article 32 grants the Court exclusive jurisdiction over "all matters concerning the interpretation and application of the Convention."

The Court thereby creates a predictable scope and content of the Convention obligations that apply beyond the particular parties and circumstances of a case. In other words, in its practice the Court signals the direction of its future rulings and creates *de facto* binding legal obligations for the state parties to the Convention. It could be therefore held that the Court's practice shapes states' expectations of compliance with the Convention, and so constrains states' behaviour in accordance with the Convention law.[19]

In practical terms, this means that the courts and other authorities of a particular state party to the Convention are obliged to follow and apply the Court's case-law determining the scope and substance of the Convention obligations developed in respect of other states or previous cases against their state. This is because they may reasonably expect that the Court will rule in the same manner in another, relevantly similar, case emanating from the state party in question. The national courts and other authorities can thereby thwart an adverse ruling in a possible future case coming before the Court.

The national authorities should therefore draw the necessary conclusions from a judgment finding a violation of the Convention by another state, if the same legal problem exists or may arise in their own legal systems. The national courts, in particular, should take into account the relevant Convention principles as developed in the Court's case-law when conducting proceedings and formulating judgments in the cases they process.

The readiness of the states to approach the Court's practice in this way has been signalled through the political undertakings made at the high level conferences in Interlaken,[20] Izmir,[21] Brighton[22] and Brussels[23] on the future and reforms of the Convention system. The same also follows, in particular, from the work of the Council of Europe Parliamentary Assembly (hereinafter: PACE)[24] and the Committee of Ministers (hereinafter: CM).[25]

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[18] *Cossey v. the United Kingdom*, no. 10843/84, § 35, 27 September 1990.

[19] See further, A.T. Guzman and T.L. Meyer, "International Common Law: The Soft Law of International Tribunals", 9 *Chicago Journal of International Law* (2008), 515-535.

[20] See *Interlaken Declaration*, 19 February 2010, p. 3, available at http://echr.coe.int.

[21] See *Izmir Declaration*, 26-27 April 2011, pp. 3-4, available at http://echr.coe.int.

[22] See *Brighton Declaration*, 19-20 April 2012, p. 2, available at http://echr.coe.int.

[23] See *Brussels Declaration*, 27 March 2015, pp. 5-7, available at http://echr.coe.int.

[24] See Resolutions 1516 (2006) and 1787 (2011) and Recommendations 1764 (2006) and 1955 (2011) on the implementation of judgments of the European Court of Human Rights; Resolution 1856 (2012) and Recommendation 1991 (2012) on guaranteeing the authority and effectiveness of the European Convention on Human Rights; Resolution 1914 (2013) and Recommendation 2007 (2013) on ensuring the viability of the

It should be stressed, however, that the application of the Court's case-law in the decision making by the national authorities is not merely a matter of a legal requirement placed upon them in an attempt to prevent the finding of a violation of the Convention by the state at the international level. On a more fundamental level, the application of the Convention law at the national level is a requirement following from the principle of subsidiarity, which places the national authorities, notably the courts, at the forefront of securing an effective respect for the Convention rights and freedoms at the national level. In accordance with the principle of subsidiarity, which has gained a normative recognition in the recently adopted Protocol No. 15 to the Convention,[26] the observance of the Convention principles is a shared responsibility of the Court and the national authorities. On the part of the latter, this requires an adequate application of the Convention law in their decision making and, when necessarily, engaging in a dialogue with the Court on the contentious issues of principle emanating from their legal system.[27]

Moreover, it should be stressed that, in a shifting paradigm, the national courts and other authorities should perceive and use the Court's case-law as a valuable and authoritative "tool" at their disposal allowing them to resolve complex legal issues in the cases they process. It will often be the case that the contentious legal issues of a procedural or substantive nature arising in a particular case could be resolved by the reliance on or inspiration from the Court's case-law. Such a use of the Court's case-law could ensure a qualitative legal ruling for the benefit of the parties to a dispute and, where necessary, an argumentative position in the internal dialogue between the courts of different levels in the country over complex legal issues of principle arising in their legal system.

Strasbourg Court: structural deficiencies in States parties; and Resolution 2055 (2015) and Recommendation 2070 (2015) on the effectiveness of the European Convention on Human Rights: the Brighton Declaration and beyond, and Resolution 2075 (2015) and Recommendation 2079 (2015) on the implementation of judgments of the European Court of Human Rights.

[25] See, in particular, Recommendation (2000)2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights; Recommendation (2002)13 on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights; Recommendation (2004)4 on the European Convention on Human Rights in university education and professional training; Recommendation (2004)5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights; Recommendation (2004)6 on the improvement of domestic remedies; Recommendation (2008)2 on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights, and Recommendation (2010)3 on effective remedies for excessive length of proceedings.

[26] Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 213, 24 June 2013. The Protocol will come into force by the acceptance of its provisions by all state parties to the Convention. So far ten states have signed and thirty-five have ratified the Protocol. Serbia signed it on 13 December 2013 and ratified on 29 May 2015 (available at https://www.coe.int/en/web/conventions/full-list/, last visited 4 August 2017).

[27] On a dialogue between the Court and the Serbian Constitutional Court, see I. Krstić and T. Marinković, *Evropsko pravo ljudskih prava* (Belgrade, Council of Europe 2016), pp. 267-284.

4 Analysis of the current legislation and practice on the application of the Court's case-law in the judicial decision-making

As noted above, Serbian Constitution does not explicitly mention the status of the Convention, and its position is determined on the basis of the status of international treaties in general. However, Article 18 para. 3 and Article 145 para. 2 of the Constitution mandate for the application of the Court's case-law in the judicial decision making. This constitutional provision stipulates that court decisions are based also on ratified international treaties (including the Convention).[28] On the other hand, the duty to examine cases pursuant to the ratified international treaties is omitted without any clear reason.[29] Such inconsistency in regulating this area may also cause an ambivalent and inconsistent approach of the domestic authorities with regard to international law in practice. However, Article 145 para. 2 of the Constitution is further elaborated in the Court Rules, which in Article 122 para. 4 stipulate that in the reasoning of the court decisions it is allowed to invoke decisions of international human rights supervisory bodies, including the jurisprudence of the Court.[30]

In view of the effect of the Court's judgments against Serbia, there are several procedural laws mentioning explicitly the Convention and the Court's judgment delivered against Serbia as a source to be taken into account by the domestic courts.

In particular, the Civil Procedure Act[31] prescribes that a trial completed by a final court decision may be reopened upon the request of a party who receives an opportunity to use the decision of the Court in which the Court found violations of the Convention's rights and freedoms, and which could have led to the adoption of a more favourable decision.[32]

The Criminal Procedure Code[33] recognises two relevant cases when a request for the protection of legality may be submitted if by a final decision or a procedural decision in the case: (1) the relevant law was applied but the same law was by a decision of the Constitutional Court found not to comply with the ratified international treaties (including the Convention), and (2) the Convention rights and freedoms were violated or denied to a defendant or other participant in proceedings, as determined by the Constitutional Court's decision or judgment of the Court.[34] A request may be submitted within three months of the date when the person was delivered the decision of the Constitutional Court or the Court.[35] The Supreme Court of Cassation decides on

[28] Article 145 para. 2 of the Constitution.
[29] See Article 142 para. 2 of the Constitution.
[30] The Court Rules, Official Gazette of the Republic of Serbia, nos. 110/2009, 70/2011, 19/2012, 89/2013, 96/2015, 104/2015, 113/2015 – corr., 39/2016, 56/2016 i 77/2016.
[31] Civil Procedure Act, Official Gazette of the Republic of Serbia, nos. 72/11, 72/2011, 49/2013 – CC decision, 74/2013 – CC decision, 55/2014.
[32] Article 426 para. 11 of the Civil Procedure Act.
[33] Criminal Procedure Code, Official Gazette of the Republic of Serbia, nos. 72/2011, 101/2001, 121/2012, 32/2013, 45/2013, 55/2014.
[34] Article 485 para. 1 (2) and (3) of the Criminal Procedure Code.
[35] Article 485 para. 3 of the Criminal Procedure Code.

a request for the protection of legality,[36] and it can abolish or reverse, in full or in part, the first-instance decision and a decision issued in ordinary legal remedy proceedings.[37]

The Administrative Disputes Act[38] recognises the possibility that a trial completed by a court decision may be reopened if a subsequently delivered judgment of the Court in the same matter can be of influence on legality of the completed procedure.

Although the Constitution sets a duty to apply the Court's case-law in the judicial decision making, judges are not further motivated to apply it. The Judges Act prescribes that the work of judges is subject to regular evaluation that involves all aspects of their work. [39] The High Judicial Council sets criteria, standards and procedure for the performance evaluation. Rules on criteria, procedures and bodies for the evaluation of the work of judges[40] stipulate that the criterion for the evaluation of the work of a judge is the percentage of the quashed decisions and the time taken for the decision-making. At the same time, there are no other criteria, such as, among others, the application of the Court's principles and standards, although it is a duty stipulated in the Constitution. This can be one of the reasons why, although the Convention has been given, pursuant to the Constitution, a rather high position in hierarchy of legal norms, its application in practice can still be characterised as insufficient.

A "stimulation" in this respect can be achieved by applying Article 6 of the Judges Act.[41] This provision in para. 1 stipulates that the Republic of Serbia is liable for the damage caused by a judge through unlawful or improper work. If the damage was caused intentionally (the gross negligence was removed by the 2013 amendments), the Republic of Serbia may demand that a judge reimburse the paid compensation.[42] When the decision of the Constitutional Court, the Court or other international court concludes that human rights and fundamental freedoms were violated in the course of a court procedure and that the judgment has been based on such a violation, or that a judgment has not been adopted due to a violation of the right to a trial within a reasonable time, the Republic of Serbia may demand that a judge reimburse the paid compensation, if damage was caused intentionally or by gross negligence. The Public Attorney is under the duty to initiate civil procedure for compensation, under the request of the Ministry of Justice and the positive opinion of the High Judicial Council.[43] However, there are no indications that this provision was ever applied in practice.

[36] Article 486 para. 1 of the Criminal Procedure Code.
[37] Article 492 para. 1(1) and 2 of the Criminal Procedure Code.
[38] Administrative Disputes Act, Official Gazette of the Republic of Serbia, no. 111/2009.
[39] Article 32 of the Judges Act.
[40] Rules on criteria, procedures and bodies for the evaluation of the work of judges and court presidents, adopted on 22 July 2014.
[4141] Judges Act, Official Gazette of the Republic of Serbia, nos. 116/2008, 58/2009 – CC decision, 104/2009, 101/2010, 8/2012 - CC decision, 121/2012, 124/2012 – CC decision, 101/2013, 111/2014 - CC decision, 117/2014, 40/2015, 63/2015 - CC decision, 106/2015, 63/2016 - CC decision, 47/2017.
[42] Article 6 para. 2 of the Judges Act.
[43] Article 6 para. 4 of the Judges Act. Before the 2013 amendments, the High Judicial Council had a competence to decide on whether there were conditions for the reimbursement of compensation, at the request of the Ministry of Justice.

There is no comprehensive overview of the Serbian courts judgments in which the Court's case-law has been invoked and applied. This is due to several reasons, most notably because all judgments are not available on the Internet and they are not indexed as "Convention cases". However, in 2016, the Council of Europe conducted a qualitative study on the use of the Court's case-law in the practice of Serbian courts.[44] The conclusions of that study coincide largely with the assessment of the situation given by the relevant stakeholders when interviewed for the purposes of the present study.

In this connection, it should firstly be noted that there are almost no judgments where the domestic courts directly invoked an international norm due to the non-existence of a national norm regulating the matter in dispute. In other words, in the majority of cases, courts are not prepared to directly apply international norms in the event of a legal gap.[45]

Furthermore, decisions wherein courts emphasise that the Convention makes an integral part of the legal order of the Republic of Serbia are not as frequent in practice either.[46] Unlike other courts, the Constitutional Court frequently points out that the Convention, which is of relevance for the decision-making in a given case, makes an integral part of the internal order.[47]

It should be noted, however, that recently there is a tendency of reliance on the Convention law by the national courts. That being said, a more detailed analysis shows that this is usually done as a mere formality. Very often, only the relevant provision of the Convention is mentioned but without any further elaboration on the manner in which that provision is interpreted in the Court's case-law and without an assessment of its applicability in the instant case under examination. Such a reliance on the Convention provisions cannot be considered a proper use of the Convention law in the judicial decision-making.

It has also been observed that in some decisions the domestic courts only invoke the Convention without even referring to the relevant provision.[48] This is also an example leading to the conclusion that as much as it is praiseworthy that an increasing number of judgments invoke the Convention or the Court's case-law, which is indicative of an increasing awareness of judges as to the status of the Convention in the internal legal order, such a mere reference, without further relevant elaboration, is not sufficient and adequate.[49]

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[44] Lj. Milutinović, I. Krstić and B. Cucković, *Qualitative study on the European Court of Human Rights case-law on the Republic of Serbia jurisprudence* [*Kvalitativna studija o uticaju presuda Evropskog suda za ljudska prava na jurisprudenciju sudova u Republici Srbiji*] (Council of Europe, Belgrade 2016), available at http://www.coe.int/en/web/national-implementation/publications/other-publications.

[45] See, for instance, judgment of the Administrative Court No. 8 U 3815/11 of 11 July 2011. See also, by contrast, judgment of the Supreme Court of Serbia, Rev. 229/2004/1 of 21 April 2004.

[46] See procedural decision of the Valjevo Higher Court, Km. 32/2011 of 14 October 2011.

[47] I. Krstić, *Status and Application of the European Convention on Human Rights in the Republic of Serbia, in Comparative Study on the Implementation of the ECHR at the national level* (Council of Europe, Belgrade 2016), p. 94.

[48] See, for instance, procedural decision of the Kragujevac Appellate Court, Gž 2510/11 of 14 October 2011.

[49] See, for instance, judgment of the Novi Sad Appellate Court, Gž. 3438/14, 13 May 2015; judgment of the Novi Sad Appellate Court, Gž. 106/16, 22 June 2016.

Finally, the practice of Serbian courts shows that they are more keen to apply the Court's case-law in cases involving issues raised by several judgments against the Republic of Serbia and when a large number of trainings have been held (such as with the issue of the right to a trial within reasonable time).[50] However, even in those cases, there is an impression that the domestic courts are applying the principles flowing from the Court's case-law in a rather formal manner without proper understanding of their meaning.

[50] Krstić, *supra* n. 47, pp. 100-101.

5 Methodology for the application of the Court's case-law in the judicial decision making

The further discussion rests upon a premise that the substantive Convention law is known to the relevant decision-making authority and proposes methodology of application of that law in the drafting of judgments and decisions by the relevant national courts.[51] In particular, it provides for the **methodological solutions** on the following matters: (1) identification of the relevant Convention issue in a particular case; (2) identification of the relevant Court's case-law for the resolution of a case; (3) how to use the Court's case-law in the context; (4) designation of a structure of the Court's case-law analysis, and (5) provision of the essential citation guidelines.

The proposed methodology is to be understood as a **contribution to the existing general drafting methodology** applied in the judgments and decisions of Serbian courts.[52] It aims at providing solutions for a qualitative upgrading of that methodology by indicating mechanisms through which the identified deficiencies in the application of the Convention law in Serbia can be addressed and that law more effectively applied in the judgments and decisions of Serbian courts.

5.1 Identification of issues

Judges have a duty **to ensure the observance of the engagements undertaken by the Convention** and to adjudicate potential human rights violations in individual cases. **First step** in applying standards and principles enshrined in the Court's case-law is **to identify the relevant Convention issue** in a particular case. Therefore, it is necessary to recognise that the case concerns human rights, and to identify concrete potential violation(s) in a particular case. This intellectual process depends on the personal knowledge of judges on the Convention rights and freedoms, as well as on the ability of a judge to identify the possible Convention issue from the materials and arguments put forward by the parties. However, judges should always be aware that if in a particular case an issue of human rights protection under the Constitution arises, there is a high probability that an issue arises under the Convention as well. This essentially means that the Convention law must be consulted.

After the identification of a possible human rights violation, judges need to look at the possible values that can be attributed to the Convention rights. Therefore, **further step is to be aware of the "scope" of the Convention rights**, which means asking what exactly a particular Convention provision protects, or from what kind of injustice that provision shields the rights-holders. This is not, however, an instinctive assessment and very often the text of the relevant Convention provision does not provide for a conclusive solution. It will therefore be crucial to identify the relevant Court's case-law interpreting the Convention provision in issue. Moreover,

[51] Excluding the Constitutional Court, upon the understanding that it is not a "court" integrated in the standard domestic system of courts.

[52] See further, LJ. Milutinović and S. Andrejević, *Vodič za izradu prvostepenih sudskih odluka iz građanske materije s osvrtom na navođenje presuda Evropskog suda za ljudska prava* (Belgrade, Council of Europe 2016).

judges should be aware that although it may seem that the Convention deals with the civil and political rights, there are also some cases dealing with social matters.[53]

The judge must be able to identify if the case gives rise to an issue protected by one of the **substantive provisions of the Convention**. Majority of Convention provisions are substantive in their nature. This concerns, in particular, Article 2 (the right to life), Article 3 (the prohibition of torture), Article 4 (prohibition of slavery and forced labour), Article 5 § 1, 2, 3 and 5 (right to liberty and security of person), Article 7 (no punishment without law), Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression), Article 11 (freedom of assembly and association), Article 12 (the right to marry), Article 14 (prohibition of discrimination, non-autonomous provision), Article 1 of Protocol No. 1 (right to peaceful enjoyment of possessions), Article 2 of Protocol No. 1 (right to education), Article 3 of Protocol No. 1 (right to free elections), Article 1 of Protocol No. 4 (prohibition of imprisonment for debt), Article 2 of Protocol No. 4 (freedom of movement), Article 3 of Protocol No. 4 (prohibition of expulsion of nationals), Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens), Article 5 of Protocol No. 7 (equality between spouses), and Article 1 of Protocol No. 12 (prohibition of discrimination, autonomous provision). However, it is important to underline that some provisions have substantive and procedural obligations. This particularly relates to Article 2, where the procedural obligation means to properly investigate death upon the substantive obligation to protect life, and Article 3 where the procedural obligation means to properly investigate torture and other forms of ill-treatment upon the substantive obligation to protect physical and mental integrity.

For example, the case concerns discrimination. Discrimination is prohibited by Article 21 para. 3 of the Constitution and the judge should see, if not knowing it in advance, whether discrimination is also prohibited under the Convention. He or she will then identify that this is so under Article 14 of the Convention and/or Article 1 of Protocol No. 12. In order to assess the "scope" of these provisions, the judge will need to identify:

- Which substantive right was allegedly breached?
- Is there a difference in treatment (direct or indirect)?
- Is difference in treatment based on one of the grounds recognised under the cited Convention provisions?
- Is there objective and reasonable justification for the difference in treatment?

For cases involving Articles 8 to 11 of the Convention, the judge should assess:

- Whether the complaint falls within the scope of the right in question?
- Is there an interference with the right in question and what is the nature of such interference?
- If there is an interference: lawfulness, legitimate aim, and proportionality criteria apply.

[53] See, for instance, *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008.

The judge must also be able to identify whether the case gives rise to the Convention **issues of a procedural nature**. Among these are, in particular, unfairness in the course of a judicial procedure, or with respect to access to that procedure or the implementation of a judicial decision (Article 6 of the Convention) the lack of remedies when violations of other Convention rights occur (Article 13 of the Convention).[54] Additionally, explicit procedural guarantees are found in Article 5 § 4 of the Convention relating to arrest and detention, and in Protocol No. 7 relating to the expulsion of aliens (Article 1), the right of appeal in criminal cases (Article 2), compensation for wrongful conviction (Article 3) and the right not to be tried or punished twice (Article 4).

For example, the case involves deprivation of liberty. Detention is prescribed by Article 30 of the Constitution. Therefore, the judge should see, if not knowing it in advance, whether the Convention also includes provisions on the deprivation of liberty. After consulting the text of the Convention, the judge will identify that Article 5 paras. 1 and 4 regulate the deprivation of liberty. In order to assess the "scope" of this Article, the judge will need to identify:

- Is deprivation of liberty in conformity with the considerations of lawfulness?
- Is it affected for one of the grounds permitted under Article 5 para. 1?
- Has the procedure for the deprivation of liberty been duly followed?

In the majority of cases, the judge will determine more than one possible Convention provision to be taken into account and therefore, it is **necessary to consult the whole text of the Convention**, including its Protocols.

In determining the Convention issue, judges should take into account some of the **main Convention principles and standards**:

- Frequent reference is made to the **"margin of appreciation"** to be accorded to the states, mostly when there is a lack of consensus or common grounds between Contracting Parties to the Convention. It differs according to the context of the case. For instance, the Court has considered it to be wider in matters concerning national security, planning policies, issues concerning moral or ethical issues, or where the state has to strike a balance between competing private interests or Convention rights;[55]
- The Court has given **autonomous meaning** to different legal concepts. The Court is not bound by definitions and principles in domestic law, and it is free to assess their application to the particular situations in domestic systems. This particularly applies to the concepts, such as, "civil rights and obligations", "property" or "criminal charge."

[54] E. Brems, "Procedural Protection: An examination of procedural safeguards read into substantive convention rights", in E. Brems and J. Gerards (eds.), *Shaping Rights in the ECHR* (Cambridge University Press, 2013), p. 138.
[55] K. Reid, *A Practicioner's Guide to the European Convention on Human Rights* (Sweet and Maxwell, Thomson, Reuters, 2015), pp. 67-68.

- **Positive obligations** – the Convention provisions impose primarily negative obligations on states, meaning to refrain from violating human rights. However, some provisions are also interpreted as imposing positive duties on states to take measures to protect the enjoyment of rights from interference from other sources, which can also be private individuals.[56]

In addition, the judge must be aware that the Convention rights must be interpreted in **"harmony" with other sources of international law**. As the Court found:

> "The principle underlying the Convention cannot be interpreted and applied in a vacuum. The Court must … take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty… The Convention should be interpreted as far possible in harmony with other principles of international law of which it forms part."[57]

This duty also derives from **Article 18 para. 3 of the Constitution**, which prescribes that human and minority rights guaranteed by the Constitution, need to be interpreted in accordance with international human rights law. In other words, it means that judge should also consult other relevant human rights provisions, mainly those adopted under the UN auspices and supervised by different UN committees (for instance, Human Rights Committee, Committee on the Elimination of Racial Discrimination). Sometimes, in applying relevant international law, it is necessary to determine the precise **relationship between several rules** that are all applicable to a concrete situation. This relationship can be:

- The relationship of **interpretation** – when one norm assists in the interpretation of another and both norms applies in conjunction;
- The relationship of **conflict** – when two norms are both applicable but incompatible with each other and choice must be made between them. This approach requires a very solid knowledge on international human rights law, which can be obtained only by continuous training and the holistic approach to the presentation of the Convention issues. Positive tendency is that different supervisory mechanisms show differences in approach and reasoning, but also present a significant degree of consistency in terms of content and interpretation. This matter will become even more topical following Serbia's full access to the EU when norms of EU law will have to be read in accordance with the relevant Convention requirements.[58]

[56] Ibid., p. 77.
[57] *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, 21 November 2001.
[58] See further, *Avotiņš v. Latvia* [GC], no. 17502/07, 23 May 2016.

Although there are numerous trainings for judges and prosecutors, provided by the Judicial Academy and supported by different course materials, judges should strongly be encouraged to attend **trainings** on the Convention issues and to regularly follow developments in the Court's case-law. **Materials** distributed at seminars and on other occasions represent an important tool in raising awareness and knowledge about the Convention rights among judges. However, judges should also be sufficiently skilful in using the Court's official case-law **HUDOC database** and other available sources, both in English and Serbian.

5.2 Identification of the relevant case-law

Upon the identification of the Convention issue in a particular case, the competent court should first identify the "relevant" Court's case-law for the resolution of that case. An incorrect or misconceived use of the Court's case-law in the domestic judgments and decisions raises a serious issue of legitimacy of the domestic court's findings and may lead to the denial of justice.[59]

In general, the "relevant" case-law is such which is either **directly relevant** for the resolution of a case or provides for a persuasive authority for the resolution of the case (**indirect use of an authority**).

A **direct reliance** on the Court's case-law, bearing in mind its position in the above-discussed constitutional arrangement of Serbia, concerns a **direct citation** of an authority resolving the contentious issue in the case under examination. This is possible only if the issue in question is the **same or relevantly similar** to the one examined in the Court's judgment or decision. That will be the case if it was analysed and decided on the substance (admissibility or merits) in the cited Court's judgment or decision. If that is not the case, the Court's judgment or decision at issue may only be used as an indirect authority for the resolution of the case, bearing in mind the limits of such a use of case-law as discussed further below.

In this connection, the national court should also be mindful to consider whether the use of the Court's case-law serves to **complete the understanding** of the relevant domestic law or practice, or it **completes a conceptual or normative gap or contradiction** existing in the domestic legal order. The direct reliance on the Court's case-law will in particular be needed for the latter purpose, namely to address a conceptual or normative gap or contradiction in the domestic legal order, as it will represent an authoritative and straightforward guidance for the resolution of such a legal deficiency. For this purpose, an indirect reliance on an case-law authority may also be possible but will necessitate a highly structured and convincing justification for its use. Otherwise, in the absence of such a justification, it may become the source of further misunderstandings and misconceptions, which should be avoided.

It is particularly important to bear in mind the **autonomous meaning of the Convention terms** (such as "criminal charge"[60] and "civil rights and obligations"[61]) and, if the case emanates

[59] See, for instance, *Bochan v. Ukraine* (no. 2) [GC], no. 22251/08, §§ 63-64, 5 February 2015.
[60] See, for instance, *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, §§ 105-107, 15 November 2016.
[61] See, for instance, *Ferrazzini v. Italy* [GC], no. 44759/98, §§ 23-31, 12 July 2001.

from a legal system different from that in Serbia, the particularities of the legal system at issue. This will require the national court to compare and contrast the differences and similarities between the Court's findings and the particularities of Serbian legal order before drawing any firm conclusions from the relevant Court's judgment or decision. An analysis to this effect should clearly be set out in the judgment or decision of the national court. In particular, the reasoning should indicate the relevant Court's standard relied upon and the legal and factual context in which it developed, its relevance for the situation in the domestic legal order, and the manner in which it should be applied in the case at hand.

An **indirect use** of an authority concerns the **citation of the Court's case-law by a comparison or analogy**. This will be possible if the factual or legal issue under examination by a national court was not analysed and decided on the substance in the Court's judgment or decision but that judgment or decision summarises or discusses the relevant principles of the Convention law in a manner that could serve as a persuasive authority for the resolution of the domestic case.[62] It is necessary, however, that the Convention principle relied upon by the Court, served for the resolution of a case on the substance. A mere mention of a particular Convention principle in a judgment or decision, which was only in general and abstract relevant for the resolution of the case, will not make the judgment or decision in question relevant for an indirect use in the domestic decision-making.

In this connection, a confusion should be avoided between the **use of the Court's case-law by a comparison or analogy** and the **citation of the general Convention principles** in the domestic court's judgment or decision.[63] For the latter purpose, the mention of a Convention principle by the Court in a judgment or decision will make that judgment or decision relevant only in order to set out the applicable general principles of the Convention law in the domestic court's judgment or decision, and not necessarily for the resolution of a particular case.[64] As already discussed above, the indirect relevance of an authority for the resolution of the case will depend on the question whether the applicable principle of the Convention law was summarised and discussed by the Court's judgment or decision in a manner that could persuasively resolve the domestic case.

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[62] For instance, in the absence of a case-law on surveillance via GPS, the case-law related to the collection and storing of data by security services on particular individuals, with or without the use of covert surveillance methods, will be relevant for determining the nature of interference with the right to respect for private life under Article 8 of the Convention (see the approach in *Uzun v. Germany*, no. 35623/05, §§ 43-53, 2 September 2010). In such a case, that case-law will not directly resolve the case but will persuasively inform a decision on the question whether and in what manner does the surveillance via GPS interfere with the right to respect for private life under Article 8 of the Convention.

[63] See below V.4.

[64] It will very often be the case that the Grand Chamber judgments contain a detailed summary of the applicable general principles under a particular Convention provision. However, in its judgment the Grand Chamber will usually deal with a particular issue under that provision. Accordingly, if the domestic court is faced with a different issue arising under the same provision, the judgment will be relevant only for the setting out of the general principles but not necessarily for the resolution of the contentious issue itself. See, for instance, *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, 15 October 2015, which comprehensively outlines the applicable principles of a right to peaceful assembly under Article 11 of the Convention and then deals in particular with the obstructing the flow of traffic during demonstrations.

Any indirect use of a case-law authority should be subject to a **careful reasoning** in the domestic court's judgment or decision. The relevant legal and factual background of the cited Court's case should preferably be explained in the domestic court's judgment or decision. Moreover, a link between the cited Court's case-law and the case under examination by the domestic court should also be explained. A particular care should be devoted to the above mentioned autonomous meaning of the Convention terms and the particularities of the legal system under scrutiny in the Court's judgment or decision. In this context, in the case of an indirect use of a case-law authority, a higher degree of transparency in the domestic court's decision-making will be needed, bearing in mind that the foreseeability of an indirect reliance on that case-law will not necessarily be self-evident. Accordingly, the necessity of an indirect reliance on the particular case-law should convincingly be demonstrated.

The "relevant" case-law should be identified on the basis of the sources outlined in the above discussion. It is salutary to stress that, as much as possible, the **direct source**, namely the case-law available on the Court's official website (HUDOC)[65] and/or its Reports of Judgments and Decisions[66] should be consulted. In addition, with regard to the cases against Serbia, the relevant translations available on the official website and other publications of the Official Gazette of Serbia should be consulted.

The necessary degree of circumspection should always be applied with regard to any **intermediary or secondary source**. This may be different case-law analyses, other research material and/or translations available to the relevant court. It is necessary to bear in mind that such intermediary or secondary sources may be deliberately or inadvertently misleading or simply incorrect. Accordingly, as much as they are valuable, whenever possible, they should be double-checked against the direct source of the Court's case-law.

In the event of **multiple relevant authorities**, the preference should be given to the decided cases against Serbia. If there is no such a case, the case-law concerning countries with similar legal orders should be preferred over other case-law. In any event, the directly relevant case-law should always be preferred over the case-law which may only be indirectly relevant for the resolution of the case.

The preference should be given to the citation of the **case-law developed by the Grand Chamber** as the highest judicial formation of the Court. The further level in relevancy is the **case-law developed at the level of Chambers**. The case-law relied upon by Committees of three judges is of a limited relevance as it merely follows the principles developed in the Court's well-established case-law.[67] It should therefore be cited only exceptionally if the line of development of the Court's well-established case-law would be difficult or highly onerous to trace back to its original source at the Grand Chamber or Chamber level.

More **recent cases** should have precedence over the older cases. However, the level of importance of a judgment as indicated in HUDOC should also guide the choice of the authority

[65] Available at www.hudoc.echr.coe.int.
[66] Available at www.echr.coe.int.
[67] See Article 28 of the Convention.

to use for a particular matter.[68] Moreover, the cases reported in the Court's Reports of Judgments and Decisions should be given precedence over other cases. In some instances, decisions of the former European Commission of Human Rights would have to be cited. However, this should rarely be the case since normally the relevant principles enunciated in the Commission's practice have been already adopted in the Court's case-law.

Moreover, **only final cases** should be relied upon as an authority. The decisions are final upon the adoption as there is no possibility of a referral of the case to the Grand Chamber. In accordance with the provisions of Article 44 § 2 of the Convention, the judgments are final: (1) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (2) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (3) when the panel of the Grand Chamber rejects the request to refer the case to its jurisdiction. The finality of a judgment will always be indicated in HUDOC.

5.3 The use of the Court's case-law in the context

The use of **the Court's case-law in the context** presupposes the use of the "relevant" case-law authority: (1) at the appropriate stage of the domestic proceedings; (2) in a manner which is consistent with the nature of the legal issues addressed in the cited judgment or decision (internal consistency); (3) in a manner which is mindful of the necessity to secure the interpretation and application of the Convention in such a way as to promote internal consistency and harmony between its various provisions, and (4) in a manner which secures harmony between the Convention and other sources of international law.

Firstly, depending on the circumstances of a particular case, the domestic court should be mindful to consider whether a Convention issue arises with regard to a preliminary issue in the case or concerning the merits of the case. If the case raises a preliminary issue which necessitates a Convention analysis, a further decision on the merits may be deficient in the absence of such an analysis. Accordingly, as a rule, before proceeding with a further step in its analysis, the relevant decision-maker should satisfy him- or herself that all Convention issues have been addressed.[69]

[68] HUDOC differentiates three levels of importance. First level (high importance) are cases which make a significant contribution to the case-law. The second level (medium importance) are cases which, although not making a significant contribution to the case-law, go beyond merely applying the existing case-law. The third level (low importance) is given to cases which simply apply the existing case law. See further, section "Importance" on the HUDOC website.

[69] Although the Convention law does not provide for any rules on the admissibility of evidence in the domestic proceedings (see *Schenk v. Switzerland*, no. 10862/84, § 46, 12 July 1988), it will very often be the case that the admissibility of a particular piece of evidence will require a Convention analysis. For instance, an allegation that a confession has been obtained by torture or other form of compulsion will require an analysis from the Convention point of view of the circumstances in which that confession was made before any conclusions on its reliability and accuracy for the accused's conviction could be drawn (see, for instance, *Erkapić v. Croatia*, no. 51198/08, §§ 75-88, 25 April 2013).

In some instances, it will be impossible to drawn a clear distinction between a preliminary issue and a matter on the merits from the Convention point of view.[70] The same is true for instances in which the decision on the preliminary issue is so closely linked to the decision on the merits that it cannot be separated.[71] In such cases, the domestic court's judgment or decision should contain a clear indication of a postponement of the Convention analysis for a later stage in the reasoning. When such an analysis has been performed, an explicit cross-reference to the earlier indication of a deferment should be made.

In any event, whenever a Convention issue arises in a case, the domestic courts should be mindful of the Court's case-law according to which "[when] pleas deal with the 'rights and freedoms' guaranteed by the Convention and the Protocols thereto, the national courts are required to examine them with particular rigour and care."[72] Moreover, the reference to the Convention principles needs to be genuine. In this connection, a mere mention of a Convention Article in the domestic court's judgment or decision does not suffice unless the relevant case-law of the Court is analysed. In this context, the Court reasoned that "what matters is the reality of the situation rather than appearances, a mere reference to [a Convention] Article in the domestic decisions is not sufficient; the case must have in fact been examined consistently with the standards flowing from the Court's case-law."[73]

Secondly, in order to observe the **internal consistency of a citation**, the national court should be mindful that the legal authority does not lie in the exact wording used in a judgment or decision but the principles which were accepted and applied by the Court as necessary grounds for the decision.[74] In other words, it is not possible to read and use a particular wording of a judgment or decision out of its legal context and the overall understanding of the principle which the wording in question expresses.

A **common fallacy** arises in this respect when the exact wording is singled out from a Court's judgment or decision without the understanding of its context. This fallacy should not occur if the above discussed guidelines on the identification of the "relevant" case-law are observed as they will inevitably require the understanding of relevance of the principle relied upon.

In order to contextualise the principles, set out in the Court's case-law, it is also important to observe **the structure of the Court's judgments and decisions**. According to Rule 74 of the

[70] A telling example in this respect is the question of the existence of a protected proprietary interest and the compliance with the requirements of the right to peaceful enjoyment of possessions under Article 1 of Protocol No. 1 (see, for example, *Stojanovski and Others v. the former Yugoslav Republic of Macedonia*, no. 14174/09, § 50, 23 October 2014).

[71] A comparison could be made to the Court's joining of the assessment on the admissibility of an application to its assessment of the merits of the case. In such instances, an explicit decision is made to join the assessment of admissibility to the merits and to reject or uphold the admissibility objection (see the approach in *Petrović v. Serbia*, no. 40485/08, §§ 65 and 98, 15 July 2014).

[72] *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, § 96, 28 June 2007.

[73] *Neshkov and Others v. Bulgaria*, nos. 36925/10 and 5 others, § 187, 27 January 2015.

[74] See further, P.M. Tiersma, "The Textualization of Precedent", 82(3) *Notre Dame Law Review* (2013), p. 1202.

Rules of Court,[75] a judgment contains: (1) the names of the President and the other judges constituting the Chamber or the Committee concerned, and the name of the Registrar or the Deputy Registrar; (2) the dates on which it was adopted and delivered; (3) a description of the parties; (4) the names of the Agents, advocates or advisers of the parties; (5) an account of the procedure followed; (6) the facts of the case; (7) a summary of the submissions of the parties; (8) the reasons in point of law; (9) the operative provisions; (10) the decision, if any, in respect of costs; (11) the number of judges constituting the majority; (12) where appropriate, a statement as to which text is authentic, and (13) where applicable, separate opinions of judges who have taken part in the consideration of the case. A decision, addressing the admissibility issues of a case, essentially contains the same elements, with the notable exception that it does not provide information on the number of judges constituting the majority but merely an indication whether it was taken unanimously or by a majority (Rule 56 of the Rules of Court).

The **two central parts of a judgment or decision** are: (1) the facts of the case, and (2) the reasons in point of law. The judgments and decisions only contain the **facts of the case** which are relevant for the points in law addressed at a later stage of the analysis. The facts of the case are usually set out at length, and the particular points in the legal analysis are cross-referenced to the facts of the case. For an easier understanding of the case, particularly if it does not emanate from the same legal system, the facts of the case should be read together with a statement of the relevant domestic law, which was used for the determination of the case at the domestic level. The statement of facts should not be cited as a legal authority as it does not have the strength of a jurisprudential enactment.

The **reasons in point of law** in a judgment are divided in two parts. The first part is a discussion on the admissibility criteria under Articles 34 and 35 of the Convention[76] and/or other preliminary issues (such as, joinder of applications). The second part is a legal analysis on the merits of the case. The second part usually consists of a statement of general principles under the Convention and the application of those principles to the case at issue. Both parts represent jurisprudential enactments but their relevance in a particular case may differ, as discussed above.[77] The decisions have a similar structure with a difference that they only address the admissibility criteria under Articles 34 and 35 of the Convention.

The relevant paragraphs containing Convention principles in the judgments and decisions are **numbered**. A reference should always be made to the relevant paragraph(s) number(s) in the judgment or decision which contain(s) the principle relied upon in the decision-making. Only such references could be considered accurate and complete. A mere reference made to the name of a case is not a proper citation of a judgment or decision used for the resolution of a particular legal matter.

Thirdly, the domestic courts should be mindful that the same legal issue may be qualified under more provisions of the Convention alternatively or cumulatively. For instance, the

[75] As amended on 14 November 2016; available at www.echr.coe.int.
[76] See further, *Practical Guide on Admissibility Criteria* (Council of Europe/European Court of Human Rights 2014); a 2011 version available in Serbian language at www.echr.coe.int.
[77] See above 5.2.

procedural guarantees existing under the substantive Convention norms will either also give rise to a separate issue under Article 6 of the Convention (right to a fair trial)[78] or will be inspired and guided by the requirements of Article 6.[79] Accordingly, when confronted with a Convention issue, the domestic courts should take into account the fact that "**the Convention must be read as a whole**, and interpreted in such a way as to promote internal consistency and harmony between its various provisions."[80]

Fourthly, as already noted above, the Convention should always be interpreted and applied in a manner which secures **harmony with other sources of international law** of which it forms part.[81] Examples in this respect include the interpretation and application of the Convention in the light of international humanitarian law,[82] international law on the protection of persons with disabilities[83] and international law on the civil aspects of international abduction of children.[84]

The requirement to interpret and apply the Convention in harmony with other sources of international law requires the relevant court to be adequately informed and attentive to various sources of international law on the legal matter under examination. In some instances, such as those mentioned above, the compliance with the Convention requirements presupposes a compliance with other standards of international law.

The interaction between the Convention and other standards of international law requires **careful reasoning** in the domestic court's judgment or decision. That reasoning should clearly stipulate the following matters: (1) the applicable Convention standards; (2) other applicable standards of international law and sources of those standards; (3) the position of the domestic law with regard to the applicable standards under the Convention and other sources of international law; (4) the interaction between the relevant domestic and international legal standards; and (4) the relevance of the matter for the case at issue.

5.4 Structure of the case-law analysis

Before citing the particular Court's judgment, judge will have to analyse each case in order to assess if it is applicable to case that needs to be adjudicated. HUDOC database contains judgments, decisions, resolutions and reports of the case. While judgments and decisions are argumentative documents, resolutions and reports contain non-argumentative information.[85] HUDOC also provides legal summaries and press releases of the Court's judgments, that can

[78] See *Zdravković v. Serbia*, no. 28181/11, §§ 50-73, 20 September 2016.
[79] See *Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, 25 March 1999.
[80] See, for instance, *Catan and Others v. Moldova and Russia* [GC], nos. 43370/04 and others, § 136, 19 October 2012.
[81] *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, 21 November 2001.
[82] *Hassan v. the United Kingdom* [GC], no. 29750/09, §§ 102-105, 16 September 2014.
[83] *Guberina v. Croatia*, no. 23682/13, § 92, 22 March 2016.
[84] *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, 6 July 2010; *X v. Latvia* [GC], no. 27853/09, §§ 92-108, 26 November 2013.
[85] R. Mochales and M.-F. Moens, *Study on the Structure of Argumentation in Case-Law* (Katholieke Universiteit Leuven, 2008).

be used for case-analysis. Also, the Court's website contains official reports with selection of significant cases or their extracts, classified by Articles, keywords and key notions, preceded by a headnote and a summary. Furthermore, Case-Law Information Note, a publication available on the Court's website, contains summaries of important cases, namely concise presentation of facts and law with emphasis on the Court's legal reasoning. Finally, there are also case-law guides and research reports dedicated to certain Convention rights or certain issues, with brief description of cases.

However, although case summaries provide information on the facts of the case, the issue before the Court, and how the Court resolved the issue, they should not be used as a substitute to the Court judgments. It is recommended that judges consult the Court's judgments in their entirety. In particular, judges should prepare a brief of the case as a toll for their personal use. This approach will provide the judge with more confidence to rely on a particular case, and can be used again in later cases without wasting time for research and further analysis.

A case-law analysis should include the following elements.

Name of the case and parties involved – particular attention is given to cases against States with similar legal tradition and similar problems.

Relevant facts of the case – contains an indication of the factual background of the case ("The Facts" section of the Court's judgments). It comprises a summary of actions or omissions and events that have allegedly given rise to a violation of the Convention. It is important to underline that not all facts of the case are important for the decision in a case. It is always necessary to determine which facts are merely background information and which were decisive for the Court's decision.

Rationale on the observance of rights and freedoms in dispute before the Court – analysis of the legal issues considered by the Court. The core of the case-law analysis is to identify the exact issue(s) in dispute and their exact scope and content. This part is contained in "The Law" section (usually under the heading "Merits" and, in some instances, "Admissibility") of the Court's judgments. This part provides legal reasons that justify the specific conclusion reached by the Court.

Decision – conclusion of the analysis. It can be as follows:

- the Court declares the application/complaint admissible/inadmissible;
- the Court finds that there has been a violation/no violation of the Convention.

Other considerations to be taken into account – separate opinions (concurring[86] and dissenting[87]), or parties' arguments concerning disputable issues which are sometimes

[86] Concurring opinion is an opinion of the majority which agrees with the decision made by the majority, but states different (or additional) reasons as the basis for the decision.

[87] Dissenting opinion expresses disagreement with the majority opinion and presents different reasoning for the judgment.

important for the understanding of the case (summarised under the heading “The parties’ arguments”).

5.5 Citation guidelines

The **proper citation** of the Court’s case-law is a crucial element in the use of that source of law. In general, the proper citation presupposes the possibility for a reader to easily identify and ascertain the source of law relied upon by the relevant decision-maker. In particular, the proper citation is made of the following elements: (1) accuracy; (2) adequate indication of case titles; (3) adequate reproduction of the principle relied upon, and (4) accurate type of reference to the cited principle.

In this respect, the reader should not be left in a state of uncertainty with regard to the source referred to, or the legal rules or principles flowing from that source. A failure in the proper citation of legal sources raises issue of a lack of legitimacy or validity of the decision-making process. That, in turn, undermines the credibility and confidence in the decision-maker from the perspective of the parties to a dispute, the general public and the higher courts. In this connection, it is recalled that in the administration of justice “even appearances may be of a certain importance or, in other words, ‘justice must not only be done, it must also be seen to be done’. What is at stake is the confidence which the courts in a democratic society must inspire in the public”.[88]

The **following recommendations** are intended to address the issues of a proper citation of the Court’s case-law. It is important to note that they are made for the use across the vertical and hierarchical structure of courts in Serbia. Their observance across the judicial structure will secure consistency and uniformity in the citation of the Court’s case-law, and the highest courts in the country are expected to play a particularly important role in this respect.

5.5.1 Accuracy

It is crucial to secure that all elements of a reference made are accurately reproduced (**technical accuracy of a citation**). This concerns the case name, case number, date of adoption of the judgment or decision, and the relevant paragraph in which the principle used is stated. If multiple authorities are cited, the citation should follow the level of relevance of a case, as discussed above.[89] In particular, the Grand Chamber cases should be cited first, followed by the Chamber cases. Within these two groups, cases should be cited in a chronological order from the oldest to the most recent one.

It is also important to ascertain the **substantive correctness and accuracy** of a citation. This will primarily be secured through a faithful reproduction of the relevant principle used for

[88] *Micallef v. Malta* [GC], no. 17056/06, § 98, 15 October 2009.
[89] See above 5.2.

the resolution of the contentious matter. If an intermediary or secondary source is used, it is necessary, if possible, to verify the original source in the Court's case-law.

The principles enunciated in the Court's judgments and decisions are usually made with reference to an earlier authority from which they emanate, unless the authority in question is the one determining the principle for the first time. When searching the Court's case-law through the HUDOC database, it is possible to conduct a further research by following the references to earlier judgments or decisions. In some instances, if the principle stated is not sufficiently understandable when reproduced in a judgment or decision, in order to secure accuracy of the reliance on the judgment or decision in question, a further research will be needed so as to identify the full meaning of the principle at issue.

For instance, paragraph 84 of the case of *Moreira Ferreira v. Portugal* (no. 2) [GC], no. 19867/12, 11 July 2017, states the following:

> "The Court also reiterates that according to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999‑I). Without requiring a detailed answer to every argument advanced by the complainant, this obligation presupposes that parties to judicial proceedings can expect to receive a specific and explicit reply to the arguments which are decisive for the outcome of those proceedings (see, among other authorities, *Ruiz Torija v. Spain*, 9 December 1994, §§ 29-30, Series A no. 303‑A, and *Higgins and Others v. France*, 19 February 1998, §§ 42-43, Reports of Judgments and Decisions 1998‑I). Moreover, in cases relating to interference with rights secured under the Convention, the Court seeks to establish whether the reasons provided for decisions given by the domestic courts are automatic or stereotypical (see, *mutatis mutandis*, *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 210, ECHR 2017)."

This paragraph enunciates several principles already made in the earlier case-law. In particular, the following principles are stated:

- with reference to the case of *García Ruiz v. Spain* [GC], no. 30544/96, § 26, 21 January 1999, the principles that "judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case";
- with reference to the cases of *Ruiz Torija v. Spain*, no. 18390/91, §§ 29-30, 9 December 1994, and *Higgins and Others v. France*, no. 20124/92, §§ 42-43, 19 February 1998, the principles that "[w]ithout requiring a detailed answer to every argument advanced by the complainant, this obligation presupposes that parties to

judicial proceedings can expect to receive a specific and explicit reply to the arguments which are decisive for the outcome of those proceedings"; and

- by analogy, a reference is made to the case of *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 210, 24 January 2017, by stating that "in cases relating to interference with rights secured under the Convention, the Court seeks to establish whether the reasons provided for decisions given by the domestic courts are automatic or stereotypical".

If, in the above example, for some reason, the latter principle stated with reference to the *Paradiso and Campanelli* case would not be fully understandable from paragraph 84 of the *Moreira Ferreira v. Portugal* (no. 2) case, a further research should be conducted by consulting the cited paragraph 210 of the *Paradiso and Campanelli* case and, if appropriate, in the same manner tracking back the relevant principle to even earlier case-law. Without such a research, the domestic court would not be able to secure substantive correctness and accuracy of a citation by developing its arguments by merely citing paragraph 84 of the *Moreira Ferreira v. Portugal* (no. 2) case.

5.5.2 Case titles

The case titles should be used in a manner securing an **easy identification of the cited authority**. The manner of citation of cases by the Court should serve as the principal guidance. Uniformity and accuracy should be maintained when transcribing case titles into Serbian and the Cyrillic script. The highest courts should be particularly mindful of the uniformity and accuracy of citation.

The case titles should indicate: (1) name of the case; (2) when a reference is made to a decision, an indication to that effect; (3) when a reference is made to a Grand Chamber case, an indication to that effect; (4) application number; (5) reference to the paragraph in which the relevant principle is stated, and (6) date of the judgment or decision.

It is recommended to use the **following script**:

- *Case name in italics*: last name of the applicant, *v.* (*versus*), and the country against which the application was lodged; for instance, ***Petrović v. Serbia***, …
    - if there are two applicants, both last names should be mentioned, if differ; for instance, ***Paradiso and Campanelli*** *v. Italy*, …
    - if there are more applicants, use of the last name of the first applicant and the indication "and Others"; for instance, *Annenkov and* ***Others*** *v. Russia*, …

- if there are more countries against which the application was lodged, all countries should be named; for instance, *Ališić and Others v.* ***Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia***, …
- if the application was lodged against a high number of countries, only the first country should be mentioned and the others should be indicated as "and Others"; for instance, *Banković and Others v.* ***Belgium and Others***, …

- Where appropriate, indication that a *decision* has been referred to: (dec.); for instance, *Skenderi and Others v. Serbia* **(dec.)**, …
- Where appropriate, indication that a *Grand Chamber case* has been referred to: [GC]; for instance, *Paradiso and Campanelli v. Italy* **[GC]**, …
  - if the case concerns a Grand Chamber decision, a reference to be made in the following manner: *Stec and Others v. the United Kingdom* **(dec.) [GC]**, …
- *Application number*: use of the introductory abbreviation "no." and the Court's case (application) number; for instance, *Paradiso and Campanelli v. Italy* [GC], **no. 25358/12** …
  - when more application numbers, use of the abbreviation "nos." and case numbers; for instance, *Tarantino and Others v. Italy*, **nos. 25851/09, 29284/09 and 64090/09** …
  - if more than three cases, indication of the first number and "and others"; for instance, *Polyakova and Others v. Russia*, **nos. 35090/09 and 3 others**, …
- Reference to the paragraph in which the relevant principle is stated: use of the abbreviation "para.";[90] for instance, *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, **para. 210**, …
- *Date* of the judgment or decision: date indicated in HUDOC; for instance, *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, para. 210, **24 January 2017**.

When the same case has already been cited in the judgment or decision, there is no need to cite the full case title again. In such a case, it is sufficient to indicate the abbreviated case title (last name of the applicant) and the paragraph of the judgment or decision referred to. For

[90] When referring to a particular paragraph of a judgment or decision, the Court's standard referencing model is to use the symbol "§". However, as that symbol is not in the common usage in Serbian legal writing, a proposal is made to use the abbreviation "para." instead.

instance, ***Paradiso and Campanelli*****, para. 210**. The same can be followed if the same source is cited successively.

The above script should accordingly be followed if referring to a decision of the former European Commission of Human Rights. In such a case, however, an indication to that effect should be added in brackets after the name of the case. For instance, *X v. Germany* **(Commission Decision)**, no. 8227/78, 7 May 1979.

5.5.3 Reproduction of the text

The reliance on the principles emanating from the Court's judgments and decisions is possible by: (1) paraphrasing the principle; (2) citing the principle, and (3) quoting the principle.

The **principle is paraphrased** if the literal wording used by the Court is adapted and explained. This will be necessary, in particular, when the principle should be put in the context by giving the legal and factual background to its meaning. When paraphrasing a principle, the above discussed accuracy of a citation should rigorously be observed.

For instance, the following statement represents a paraphrasing of a principle in the context (see *Allen v. the United Kingdom* [GC], no. 25424/09, § 101, 12 July 2013):

> "In cases concerning the victim's right to compensation from the applicant, who had previously been found not guilty of the criminal charge, the Court held that where the decision on civil compensation contained a statement imputing criminal liability, this would create a link between the two proceedings such as to engage Article 6 § 2 in respect of the judgment on the compensation claim (see *Ringvold*, cited above, § 38; *Y v. Norway*, cited above, § 42; and *Orr*, cited above, § 49)."

The **citation of a principle** is the use of the literal wording used by the Court to express its meaning. This should normally be the most common way of reliance on the Convention principles. The inverted commas are not needed but the accurate reference to the judgment or decision from which the principle emanates should be made.

The following statement is a standard citation of a principle (see *Simeonovi v. Bulgaria* [GC], no. 21980/04, § 112, 12 May 2017):

> "The Court reiterates that the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, as guaranteed by Article 6 § 3 (c), is one of the fundamental features of a fair trial (see *Salduz*, cited above, § 51, and *Dvorski v. Croatia* [GC], no. 25703/11, § 76, ECHR 2015)."

The **quotation of a principle** is the use of the literal wording used by the Court by placing the text in the inverted commas. This can be used in order to stress a particular statement and to emphasise its literal meaning. Any intervention in the text, irrespective how insubstantial, is not allowed, unless it is made clear that the text is inserted by, for instance, placing it in the square brackets.

The following example of a quotation of a principle can be observed (see *Sejdovic v. Italy* [GC], no. 56581/00, § 84, 1 March 2016):

> "The Court has further held that the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial – ranks as one of the essential requirements of Article 6 (see *Stoichkov v. Bulgaria*, no. 9808/02, § 56, 24 March 2005). Accordingly, the refusal to reopen proceedings conducted in the accused's absence, without any indication that the accused has waived his or her right to be present during the trial, has been found to be a 'flagrant denial of justice' rendering the proceedings 'manifestly contrary to the provisions of Article 6 or the principles embodied therein' (ibid., §§ 54-58)."

5.5.4 Introductory signals

The **introductory signals** indicate the manner in which an authority has been relied upon. This is important as it represents an explicit indication to the reader of a level of relevance attributed to the cited principle by the decision-maker. In particular, as it has already been discussed above, there are two principal forms of reliance on an authority: direct and indirect.[91]

The following **script of introductory signals** can be adopted, depending on whether the authority has been directly or indirectly relied upon:

- Direct reliance supporting a finding: **see** …
    - in the event of a citation of one of multiple relevant authorities, an introductory signal should be made to that effect; for instance, **see, for example,** … or **see, amongst many others,** …
- Direct conclusion by inversion: **see, by contrast,** …
- Indirect reliance on an authority by analogy: **see, *mutatis mutandis*,** …
- Indirect reliance by comparison: **compare** …
- Indirect reliance by inversion: **compare and contrast** …

[91] See above 5.2.

6 Summary of recommendations

In view of the findings of the present expertise, the following **recommendations** are made:

i. **the Convention, as interpreted and applied by the Court, forms an integral part of the domestic legal order, and can be invoked even in a case of legal lacuna or inconsistence with domestic norm(s). The domestic courts are required to rely on the binding case-law of the Court in their judgments and decisions whenever the case under examination gives rise to a Convention issue (sections 2 and 3);**

ii. **it is advisable to annually assess the level and quality of application of the Convention principles in domestic courts decisions. It is important, however, to have all domestic courts judgments accessible within the judiciary and to the general public. In addition, it is important to establish a special register of cases in which domestic courts invoked the Court's jurisprudence (section 4)**

iii. **the relevant national authorities are encouraged to consider giving special recognition to the judges' work on cases involving complex and extensive Convention analysis. The modalities of such recognition should be regulated in a clear, foreseeable and certain manner so as to avoid any arbitrariness in the assessment of judges' performance in this respect (section 4);**

iv. **departments tasked with the control of jurisprudential consistency should additionally be strengthened with technical equipment and personnel. There should be a judge (judge assistant) who would regularly follow the Court's jurisprudence and would inform and/or advise other judges on the important case-law developments, which are of relevance for the processing of cases by national courts. In addition, cases against Serbia and leading cases against other states should be annually published in a case-law bulletin or other similar report, which should be available to all judges in Serbia (section 4);**

v. **to foster ability, by training, study visits and otherwise, of the advisers of the Supreme Court of Cassation and the appellate courts to recognise and analyse the domestic courts decisions from the perspective of their compliance with the Court's case-law (section 4);**

vi. **education and dissemination of knowledge on the Convention law should be made more structural, with a greater focus on legal writing and incorporation of principles established in the Court's jurisprudence in domestic decisions (sections 4 and 5.1);**

vii. **relevant resources on the Convention law should be ready and available for the peruse of judges in their work. Judges should be made aware of the necessity of use of those resources in their daily work and they should be trained how to use them in order to be able to identify the possible existence of a Convention issue in the cases they process. In accordance with the principle *iura novit curia*, as a matter of the case-processing routine, judges should be required to**

consider whether the case under examination raises an issue from the Convention point of view (sections 4 and 5.1);

viii. **for the processing of a particular case only Court's case-law "relevant" for that case should be used. In every case giving rise to a Convention issue, the judge's duty is to identify the directly and/or indirectly "relevant" Court's case-law for the case (section 5.2);**

ix. **the reliance on the Court's case-law should be sufficiently reasoned. The degree of care and detail in the reasoning depends on the complexity of the issue under examination (sections 5.2 and 5.3);**

x. **use of the direct source of case-law should be preferred. Any intermediary or secondary source should be verified (section 5.2);**

xi. **in the event of multiple relevant authorities, the use of case-law in the following order: (1) case-law concerning Serbia, (2) case-law concerning countries with similar legal orders, (3) other case-law. Preference to be given to the direct over indirectly relevant case-law (section 5.2);**

xii. **the use of case-law according to the following order of relevance: (1) Grand Chamber case-law; (2) Chamber case-law, and (3) exceptionally, the Committee case-law (section 5.2);**

xiii. **only final cases should be relied upon as an authority (section 5.2);**

xiv. **careful assessment of the question whether the Convention issue arises in the context of preliminary issues or the decision on the merits. Any deferment of a Convention analysis in the reasoning should be made clear and transparent (section 5.3);**

xv. **the internal consistency of a citation must be rigorously observed by: (1) understanding the case-law as a set of principles; (2) making references only to the reasons in point of law, and (3) making focused references to the relevant paragraph(s) in the cited authority (section 5.3);**

xvi. **interpretation and application of the Convention as a whole (section 5.3);**

xvii. **interpretation and application of the Convention in harmony with other standards of international law (section 5.3);**

xviii. **the reasoning of a judgment or decision should contain a reference to the general Convention principles applicable in the case and the application of those principles to the case under examination (section 5.4);**

xix. **citations should comply with the following requirements: (1) accuracy; (2) case titles should be properly indicated; (3) reproduction of the case-law principles should be accurate and precise, and (4) choice of the appropriate introductory signals is needed (section 5.5);**

xx. **consistency and uniformity in the citation of the Court's case-law should be observed by all courts. The highest courts in the country are expected to play a**

particularly important role in securing that consistency and uniformity of citation (section 5.5).

Annex I: Checklist for THE application of the Court'S case-law

In cases giving rise to a Convention issue, the following checklist could inform the decision-maker whether all aspects of an appropriate use of the Court's case-law have been covered. This checklist is intended to be used as a tool at the disposition of judges and other judicial officials dealing with the Convention law. Its use, however, is only instructive and should not be understood or used as a further mandatory step in the administration of cases.

I Identification of issues

- ☐ The case gives rise to an issue under the following substantive provisions of the Convention: …
- ☐ The case gives rise to the following Convention issues of a procedural nature: …
- ☐ Other possible Convention provisions to be taken into account: …
- ☐ Other relevant standards of international law: …
- ☐ HUDOC research completed
- ☐ All other relevant and available resources consulted

II Identification of the relevant case-law

- ☐ Directly relevant case-law for the case is the following: …
  - the following principle is associated to the case of [indication of the case]: …
- ☐ Indirect use of the following authorities is possible/needed: …
  - the following principle is associated to the case of [indication of the case]: …
- ☐ The precedence in use of the identified cases to be given in the following order: …
- ☐ All identified cases are final

III Use of the relevant case-law

- ☐ The Convention issue arises only with regard to the following aspect of the case:

  or
- ☐ The Convention issue arises with regard to the following preliminary issue(s) … and the following issue(s) on the merits …
  - the Convention analysis conducted and completed separately for the preliminary issues and the merits

    or
  - deferred Convention analysis indicated and cross-referenced in the reasoning

or

- analysis on the preliminary issues and the merits joined and addressed

- All principles referred to understood and verified
- All case titles properly indicated
- The manner of reproduction of the text from the case-law verified
- Introductory signals for citations verified

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