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# THE EFFICACY OF STRASBOURG LAW

*Mark W. Janis\**

This article explores what we seem to know and what it might be useful to know about the efficacy of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>1</sup> It concludes that, though we know quite a lot of detail about compliance with Strasbourg law, we should be a little more careful about claiming too much success for the system. For an international legal system, Strasbourg law is, from what we can tell, remarkably efficacious, but it is far from (anything but relatively) perfect.

Although one can define terms like “compliance,” “obedience,” and “efficacy” to make them distinguishable, it seems that virtually all studies about how Strasbourg law “works” do not do so. Talk about Strasbourg law “working” or not, of it being “efficacious,” “effective,” or “successful” or not, of there being “compliance” with its norms or judgments or not, of its rules being “respected” or “put into practice” or not, makes all these terms more or less interchangeable.<sup>2</sup> Though one could also analyze Strasbourg law using a break-down of levels of compliance,<sup>3</sup> it appears more fruitful to break up the Strasbourg efficacy

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1. European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 221, E.T.S. 5, U.K.T.S. 71. The Convention enumerates individual human rights that member states, now 41, agree to protect. It also establishes a European Court of Human Rights which, along with the Committee of Ministers of the Council of Europe, both based in Strasbourg, France, control and supervise enforcement of the rights against member states. For almost fifty years, there also existed a European Commission of Human Rights responsible, *inter alia*, for screening applications, reaching friendly settlements, and reporting on claims. Protocol No. 11 to the Convention, opened for signature on May 11, 1994, merged the Commission and the Court as of November 1, 1998. The relatively complicated mechanics of the Strasbourg human rights system are set forth, among other places, in MARK JANIS, RICHARD KAY & ANTHONY BRADLEY, EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS (2d ed. 1995) [hereinafter JANIS, KAY & BRADLEY]; DAVID HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1995); P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2d ed. 1990).

2. There is, I think, no harm in this. Much excellent discussion of compliance questions in international law proceeds similarly. *See, e.g.*, Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

3. Harold Koh helpfully distinguishes coincidence, conformity, compliance, and obedience between norms and practice. *See id.* at 2600-01. Looking at the motivation of those who appear to

studies into three categories depending upon the kind of "law" they explore: (1) judgments (and decisions), (2) legal rules, and (3) the legal system itself. This yields some interesting comparisons.<sup>4</sup>

Studies of the efficacy of Strasbourg judgments and decisions are the most numerous. There are a great many reports on and examinations of the effects of individual judgments of the European Court of Human Rights, and the decisions of the European Commission of Human Rights and the Committee of Ministers of the Council of Europe.<sup>5</sup> Almost all of these reports or commentaries are interesting and informative. However, by their very nature, they fail to provide a general picture. The individual case studies must be read together and compared in order to yield some overall conclusion about whether there has been compliance with Strasbourg judgments and decisions.

It is just this sort of general study that is most lacking. Some of the work asserts to be comprehensive, but is frankly disappointing, being largely uninformative.<sup>6</sup> Other work provides more evidence,<sup>7</sup> but is still

obey judgments, Richard Kay distinguishes behavioral explanations based on "prudential calculation" from those grounded on "law following." Richard S. Kay, *The European Human Rights System as a System of Law*, 6 COLUM. J. EUR. L. \_\_\_\_, at \_\_\_\_ (forthcoming 2000) [hereinafter Kay].

4. Benedict Kingsbury has provided a persuasive account of how definitions of compliance with international law vary depending on the theory of law that one adopts, and I gratefully acknowledge that his insight has helped me break up compliance into categories of "law," albeit my own. See generally Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345 (1998).

5. There are both official and unofficial reports and commentary. For example, the Council of Europe has a web-site reporting, usually in a sentence or two, responses of states to judgments of the Strasbourg Court. See European Court of Human Rights, (visited Nov. 29, 1999) <<http://www.dhcour.coe.fr/eng/effects.html>>. For an example of an official report, in an entry on *Jersild v. Denmark*, September 23, 1994, Series A, No 298, the Council of Europe's web-site reports: "On 24 January 1995 the Special Court of Review gave leave for the case against Mr. Jersild and Others to be reopened." European Court of Human Rights (visited Nov. 29, 1999) <<http://www.dhcour.coe.fr/eng/effects.html>>. As an example of unofficial commentary, an important case, like *Sunday Times*, Judgment of April 26, 1979, Series A, No. 30, 2 EUR. HUM. RTS. REP. 245, can evoke many articles about the compliance or not of a state, e.g. N.V. Lowe, *Contempt of Court Act 1981*, 1982 PUB. L. 20; S.H. Bailey, *The Contempt of Court Act 1981*, 45 MOD. L. REV. 301 (1982); Wong, *The Sunday Times Case: Freedom of Expression Versus English Contempt-of-Court Law in the European Court of Human Rights*, 1 J. INT'L L. & POL. 35 (1984).

6. For example, in 1993, Peter Leuprecht, then the Director of Human Rights of the Council of Europe, promised a book chapter the purpose of which was "to show that judgments of the European Court of Human Rights and decisions of the Committee of Ministers under Article 32 of the European Convention on Human Rights are not only legally binding, but actually executed." Peter Leuprecht, *The Execution of Judgments and Decisions*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 791 (Macdonald et al. eds., 1993). However, the chapter refers in substance only to the formal language of the Convention itself and in no way substantiates the conclusion that "[o]n the whole, the record of execution of judgments of the Court and decisions of the Committee of Ministers is remarkably good." *Id.* at 800. Probably, the real goal of the chapter is hortatory; Leuprecht concludes: "It is to be hoped that the States concerned will continue to take *bona fide* all the measures necessary to execute the Court's judgments and the Committee of Ministers' decisions, and that the Committee itself will confirm and develop its now well-established practice to use its powers fully and responsibly, without being impeded by considerations of political expediency." *Id.*

rather impressionistic.<sup>8</sup> The most impressive study of compliance with Strasbourg judgments and decisions covers only the compliance record of one country, the United Kingdom,<sup>9</sup> although the twenty-nine cases reviewed do constitute about 31 percent of all violations decided in the period.<sup>10</sup> This nuanced study of the United Kingdom's compliance record shows how difficult it can be to tell if Strasbourg judgments and decisions have been executed properly in practice.<sup>11</sup> Moreover, the study concludes that though in many cases it seems that the United Kingdom has complied with adverse judgments and decisions,<sup>12</sup> in other cases there had been doubtful compliance<sup>13</sup> or by some assessments even non-compliance.<sup>14</sup> It may well be that the record of executing Strasbourg judgments is no worse than the record of many domestic courts,<sup>15</sup> but one must be careful not to

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7. For example, in 1996, the then-President of the Strasbourg Court, Rolv Ryssdal, reviews the compliance record of the Court, giving about ten examples of cases either where he notes good compliance such as Germany changing its rules about the cost of translators in criminal proceedings as a result of *Luedicke, Belkacem & Koc*, Judgment of November 28, 1978, Series A, No. 29, or where compliance was long-delayed (i.e., Belgium taking eight years to implement the amendments to its family law called for by *Marckx*, Judgment of June 13, 1979, Series A, No. 31). See Rolv Ryssdal, *The Enforcement System Set Up Under the European Convention on Human Rights*, in COMPLIANCE WITH JUDGMENTS OF INTERNATIONAL COURTS 49, 54 (Bulterman & Kuijer eds., 1996).

8. Ryssdal concludes that "to date judgments of the European Court of Human Rights have, I would say, not only generally but always been complied with by the Contracting States concerned." *Id.* at 67. However, in the same volume, another Strasbourg Court judge, S.K. Martens, in a commentary on Judge Ryssdal's contribution, reaches a slightly more pessimistic conclusion: "For my part, I also have the impression that as a rule respondent States, after a judgment finding a violation, do modify their legislation sooner or later. There are, however, exceptions." S.K. Martens, *Commentary*, in COMPLIANCE WITH JUDGMENTS OF INTERNATIONAL COURTS 71, 73 (Bulterman & Kuijer eds., 1996). Martens cited three examples of probable non-compliance including the absence of adequate remedial legislation by Ireland in *Norris*, Judgment of October 26, 1988, Series A, No. 142, and by the Netherlands in *Bentham*, Judgment of October 23, 1985, Series A, No. 1985. See *id.*

9. See Robin R. Churchill & J.R. Young, *Compliance with Judgments of the European Court of Human Rights and Decisions of the Committee of Ministers: The Experience of the United Kingdom, 1975-1987*, 62 BRIT. Y.B. INT'L L. 283 (1991) [hereinafter Churchill & Young].

10. See *id.* at 284.

11. "This paper also demonstrates some of the problems involved in carrying out a study of compliance with judgments of the Court and decisions of the Committee of Ministers. . . . The relevant law is not always very accessible (e.g., in relation to prisoners), nor is it always easy to ascertain how the law applies in practice (e.g., in relation to the treatment of detainees in Northern Ireland)." *Id.* at 346.

12. These cases include *Campbell & Cosans* concerning corporal punishment, Judgment of February 25, 1982, Series A, No. 48; *Gillow* concerning housing laws in Guernsey, Judgment of November 24, 1986, Series A, No. 109; and *Young, James & Webster* concerning labor unions and the closed shop, Judgment of August 13, 1980, Series A, No. 44. See *id.*

13. Churchill & Young conclude that as a result of *Sunday Times*, Judgment of April 26, 1979, Series A, No. 30, "there was no sign of any attempt to review the reform of the law of contempt against the touchstone of the European Convention, with the result that the extent of compliance remains uncertain." *Id.*

14. There was no reform of the law authorizing corporal punishment in the Isle of Man after *Tyrer*, Judgment of April 25, 1978, Series A, No. 26, although the authors could find no example of corporal punishment being imposed in subsequent practice. See *id.* at 286-87.

go too far in asserting a nearly perfect record for compliance with Strasbourg judgments and decisions.<sup>16</sup>

The second category of efficacy, compliance with Strasbourg's legal rules, ought, in a way, to be even more important than the first. After all, given the large number of alleged violations of European human rights law and the small number of cases that ultimately reach the Strasbourg Court,<sup>17</sup> most meaningful enforcement of Strasbourg's substantive law must take place before national courts.<sup>18</sup> There are a number of studies that discuss the ways in which the substantive legal rules of the Strasbourg Convention figure or not as rules of decision in the domestic legal systems of the member states.<sup>19</sup> There is also work available that discusses the effect of Strasbourg institutional case law on municipal judicial proceedings.<sup>20</sup> What is missing are general studies about how Strasbourg legal rules, whether in the form of the Convention's substantive provisions

15. One need go no further than the difficulties of enforcing school desegregation following the U.S. Supreme Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), to see how much the practice of domestic law can vary from its judgments. That we tend to worry rather more about the efficacy of international law than about the efficacy of domestic law is probably due to the lingering doubt many share about international law being "law" at all, a doubt that goes back to the very origins of the discipline. See Mark Janis, *Jeremy Bentham and the Fashioning of "International Law"*, 78 AM. J. INT'L L. 405 (1984).

16. For example, "[t]he [European] Convention's reputation as a bulwark against arbitrary government interference stems at least in part from the fact that the decisions of its judicial enforcement organs, the European Court of Human Rights ("Court") and the European Commission of Human Rights ("Commission"), are almost universally respected and implemented by the twenty-four European nations ("Contracting States") that have ratified the Convention." Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT'L L.J. 133, 133-34 (1993).

17. The European Commission of Human Rights always had as one of its chief functions the filtering of cases so as to yield a reasonable number of cases for the system. As early as 1960, one commentator, noting that 710 of the first 713 individual applications to Strasbourg had been deemed inadmissible, remarked that cases "denying the individual further hearing before an international tribunal, form by far the most significant part of the jurisprudence of the Commission." Gordon Weil, *Decisions on Inadmissible Applications by the European Commission of Human Rights*, 54 AM. J. INT'L L. 874, 874 (1960). Though the number of cases heard by the Strasbourg Court has skyrocketed from only about one per year in the 1960s, to two or three each year in the 1970s, to almost twenty per year in the 1980s, to more than 100 annually in the 1990s, there are thousands of applications each year that never reach the Court. See JANIS, KAY & BRADLEY, *supra* note 1, at 36-37, 70-71.

18. See *id.* at 428-29.

19. One of the most comprehensive, though now somewhat dated, general surveys is A. DRZEMCZEWSKI, *THE EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW* (1983). Reviews of individual countries can more easily be kept up-to-date. See, e.g., Ulf Bernitz, *The Incorporation of the European Human Rights Convention into Swedish Law – A Half Measure*, 38 GERMAN Y.B. INT'L L. 178 (1995); Iain Cameron, *The Swedish Experience of the European Convention on Human Rights Since Incorporation*, 48 INT'L & COMP. L.Q. 20 (1999).

20. See Jörg Polakiewicz & Valérie Jacob-Foltzer, *The European Human Rights Convention in Domestic Law: The Impact of Strasbourg Case-Law in States Where Direct Effect is Given to the Convention*, 12 HUM. RTS. L.J. 65, 121 (1991).

or in the precedent-like norms created by the Strasbourg institutions, have or have not influenced the actual practice of states or governments.<sup>21</sup>

The third category of efficacy, the efficacy of the legal system of Strasbourg itself, is both the most difficult to gauge and, probably, the most important. International law is sometimes accused of being irrelevant, but increasingly it seems that even ordinary critics of the function of law in international relations have come to acknowledge that international law and international legal institutions are playing increasingly important roles in international society.<sup>22</sup> How, though, to determine the real impact of international law on international society? In particular, are the many assertions about the overall efficacy of the Strasbourg legal system at the end of the day merely impressionistic?<sup>23</sup>

Understanding how deeply a legal system permeates and regulates a society, especially an international society like Europe, may always be more a study in theory than of practice. This is not to say that the theoretical aspects of the question of the deep-rootedness or not of an international legal system will not be illuminating. For example, when explaining to others the nature and efficacy of the Strasbourg legal system, it may be useful to employ some of the ideas from the theoretical paradigm for legal systems in general devised by H.L.A. Hart.<sup>24</sup> Hart grounds much of his theory of a legal system upon a distinction between primary and secondary rules: primary rules being rules of obligation and secondary rules being rules that have to do with the functioning of the system, including rules about making and changing primary rules, as well as a rule of recognition that calls upon actors within the system to agree upon what is and what is not a legitimate legal rule.<sup>25</sup>

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21. There is some anecdotal evidence, though, available both in some of the records of the enforcement or not of individual Strasbourg judgments and in some of the reviews of the respect paid to Strasbourg legal rules. See, e.g., Churchill & Young, *supra* note 9.

22. See Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L.J. 487 (1997); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993).

23. I am as guilty as anyone in making grand claims about the efficacy of the Strasbourg legal system: "European human rights law provides, therefore, not only the most important body of case law about the substance of international human rights law, but one of the most refreshing and interesting examples of an effective international legal process." JANIS ET AL., *supra* note 1, at 6. And saying this alone: "What makes European human rights law special is not only its increasing case load, but also its effectiveness." MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 267 (3d ed. 1999) [hereinafter JANIS, AN INTRODUCTION].

24. See H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994) [hereinafter HART]. My views on Hart and Strasbourg law have developed thanks to the insights of Richard Kay. Along with Anthony Bradley, we have elaborated something of a common position. See JANIS, KAY & BRADLEY, *supra* note 1, at 4-8. The paragraph above is only a short form of all that can be done to describe and explain the Strasbourg legal system employing Hart's notions. See Kay, *supra* note 3, at \_\_\_\_.

25. Although Hart's theory can be illuminating for understanding the role of international law in international society, Hart's own treatment of international law is disappointing. See HART, *supra*

It is convenient to describe the Strasbourg system as follows: there are primary rules, especially the substantive human rights norms in the European Convention, and secondary rules, including those in the Convention establishing the international enforcement machinery of the Strasbourg Court, which are tasked with the application, interpretation, and adjudication of the primary rules vis-à-vis the member states. What makes the Strasbourg legal system a more thorough-going international legal system than, say United Nations human rights law, is that Strasbourg displays a much more settled and accepted system of secondary rules and institutions. Moreover, the actors within the system, both governments and individual litigants, as well as their lawyers, recognize the Strasbourg rules *and* the Strasbourg institutions as legitimate.

This last aspect, recognition of legitimacy,<sup>26</sup> may be the most crucial "practical" test for the third sort of efficacy analysis, i.e., the efficacy of the Strasbourg legal system. Yet, testing recognition of the legitimacy of the Strasbourg system is very difficult and largely untried. It is much more usual to simply make positive assertions about the efficacy of the Strasbourg legal system.<sup>27</sup> Are there more quantifiable ways of testing the system's efficacy?

Elsewhere, this author has suggested four possible tests: (1) case load in the European Court of Human Rights, (2) acceptance of what were the two optional clauses of the European Convention,<sup>28</sup> (3) growth in the number of states joining the Council of Europe and ratifying the Convention, and (4) an increasing recognition of the legitimacy of the

note 24, at 213-37. This is probably due to his uncharacteristic reliance on rather simplistic positivist notions of the nature of international law, notions that I have criticized elsewhere. See, e.g., Mark Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT'L L.J. 61 (1984).

26. Legitimacy in international law has been most persuasively explored by Thomas Franck. See THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

27. I do so myself, not only in the two places mentioned above in footnote 23, see JANIS, KAY & BRADLEY, *supra* note 1, at 6; JANIS, AN INTRODUCTION, *supra* note 23, at 271, but most recently in Mark Janis, *Russia and the 'Legality' of Strasbourg Law*, 8 EUR. J. INT'L L. 93 (1997) [hereinafter Janis, *Legality*]. Other such assertions are legion. As early as 1980, when the Strasbourg Court had rendered only about forty judgments, the then-President of the Court, Sir Humphrey Waldock, wrote that whether "the system set up by the European Convention on Human Rights is, in general, effective is not, I believe, today open to serious question." Humphrey Waldock, *The Effectiveness of the System Set Up by the European Convention on Human Rights*, 1 HUM. RTS. L.J. 1, 1 (1980). Hundreds of judgments later, Strasbourg Judge Juan Antonio Carrillo Salcedo remarked similarly: "The European Convention constitutes, therefore, the first effective regional enforcement mechanism for human rights." Carrillo Salcedo, *The Place of the European Convention in International Law, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 15, 17 (Macdonald et al. eds., 1993).

28. Article 25 provided the right of individuals to petition the Commission and Article 46 gave the Court jurisdiction to hear cases after they have been considered by the Commission. Both provisions are now compulsory after the amendments made to the Convention by Protocol No. 11, effective November 1, 1998. See European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 221.

system.<sup>29</sup> The first three tests are easily quantifiable and satisfied impressively.<sup>30</sup> To some extent, of course, the fourth test, recognition of the legitimacy of Strasbourg law, can be gleaned from the other three tests. The burgeoning case load of the Court, the now universal acceptance of the optional clauses, and the doubled membership of European states in the Strasbourg legal system all point to individuals, governments, and lawyers in Europe taking the system more seriously, and perhaps to the conclusion that the players increasingly recognize the system's legitimacy.

Yet, "increasing" recognition of Strasbourg's legitimacy is only relative: there is "increased" legitimacy at least compared to what went before. Does that make it "enough recognition" to say the system is properly "legitimate?" This second question is also relative: "enough recognition" calls for a comparison of the levels of recognition between the Strasbourg system and other legal systems, e.g., *vis-à-vis* both domestic legal systems where legitimacies will vary from country to country, say from an older Western democracy to a newer democratic entrant such as Russia,<sup>31</sup> and other international legal systems where legitimacies will vary too, say from international economic law to the international law regulating the use of force.<sup>32</sup> There are no such comparisons of legitimacy in the literature. This may be because tests of recognition of legitimacy do not easily form part of either legal or, even, political analysis. Gauging recognition of legitimacy of legal systems may be more a psychological, rather than a legal or political, exercise and in any case difficult to ascertain in any sort of definite way.<sup>33</sup> This may well be true for most any legal system, domestic or international.

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29. See Janis, *Legality*, *supra* note 27, at 95-96.

30. Not only has the case load in Strasbourg exploded, but the governments of all member states are now expected to accept both optional clauses (realistically they are now "optional" clauses) and membership in the system has almost doubled from the original twenty-two member states before the end of the Cold War in 1989. See *id.* These successes have led to the need to radically reform the control machinery of Strasbourg in Protocol No. 11 that will merge the Commission and the Court. See JANIS, KAY & BRADLEY, *supra* note 1, at 88-118.

31. See Janis, *Legality*, *supra* note 27, at 98-99.

32. I have argued elsewhere that there are different international legal systems that vary along a "structural spectrum," some forms of international law being more "law-like" than others. See Mark Janis, *Do 'Laws' Regulate Nuclear Weapons?* in *NUCLEAR WEAPONS AND INTERNATIONAL LAW* 53, 60-61 (Pogany ed. 1987).

33. It may be that anecdotal evidence from the media demonstrates psychological acceptance rather well. For example, it seems to me to be meaningful when cartoons are printed assuming something of a knowledge of the Strasbourg system, for example, the one showing a student preparing himself to be caned in class with the caption, "[y]our complete ignorance on every other subject is only matched by your detailed knowledge of each provision on corporal punishment by the European Court of Human Rights." *PUNCH*, March 10, 1982. Or when the main headline of a daily paper reads: "£40,000 Present for IRA Families: Britain Pays Terrorist Court Costs Early." See *DAILY MAIL*, Dec. 27, 1995, at 1.

In conclusion, we do know rather a lot about compliance with Strasbourg law, especially about the way in which specific Strasbourg judgments and decisions have been executed or not in practice and about the way in which national legal systems in Europe use or do not use Strasbourg legal rules. The sheer quantity of specific Strasbourg judgments and decisions and the considerable body of law about domestic employment of Strasbourg rules is encouraging. However, we seem to know rather less about Strasbourg's overall compliance track record. There could certainly be more work done about the efficacy of Strasbourg judgments and decisions in general and the actual effect of Strasbourg legal rules on government practices, though these are not easy subjects to test. Most important, more might be ventured to study and analyze the efficacy of the Strasbourg legal system itself, in particular about the way the Strasbourg system is or is not accepted as legitimate by the individuals and governments and their lawyers who do or do not employ it. Although it may be difficult to ultimately answer questions about the "legitimacy" of the Strasbourg system in any but impressionistic ways, it should be possible to do more at least in the way of comparisons of legitimacy between Strasbourg and both domestic legal systems and other international legal systems. A working hypothesis might be that Strasbourg law compares rather favorably with many national legal systems and very favorably indeed with most other international legal systems in terms of both Strasbourg's legitimacy and its efficacy. Compliance with Strasbourg law may not be perfect, but for an international legal system, its efficacy is apparently relatively impressive.