International Conference on "Enhancing National Mechanisms for Effective Implementation of the European Convention on Human Rights"

Conférence internationale « Renforcer les mécanismes nationaux pour une mise en œuvre effective de la Convention européenne des droits de l'homme »

Saint-Petersburg, Russian Federation
Saint-Pétersbourg, Fédération de Russie

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EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

International Conference

on "Enhancing national mechanisms for effective implementation of the European Convention on Human Rights"

Conférence internationale

« Renforcer les mécanismes nationaux pour une mise en œuvre effective de la Convention européenne des droits de l'homme »

The Constitutional Court of the Russian Federation

1, Senate Square, Saint-Petersburg, the Russian Federation

22 – 23 October 2015

La Cour constitutionnelle de la Fédération de Russie

1, Place du Sénat, Saint-Pétersbourg, Fédération de Russie

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The Constitutional Court of the Russian Federation
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Council of Europe
Conseil de l'Europe

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Preface

The long-term effectiveness of the European Convention on Human Rights is contingent on effective communication and interaction between its judicial mechanism and the authorities of the member States, not least their highest courts. The European Court of Human Rights emphasised in 2014 that the implementation of its judgments is a *shared judicial responsibility*[1]. Indeed, courts play a key role in the domestic implementation of both the national constitutions and the Convention. Their achievements over the past decade are impressive as the Convention and the Court's judgments have become an integral part of the domestic law of the Council of Europe member States.

However, the courts' action needs to be accompanied and complemented by concerted efforts of other State authorities, including the executive and national parliaments. The Council of Europe seeks by all means to reinforce the national authorities' capacity for effective implementation of the Convention and the Court's judgments. Attempts have been made to include all domestic decision-makers in the implementation process. The Committee of Ministers' texts have been increasingly addressed to *all* domestic authorities[2], while the Parliamentary Assembly enhanced its efforts to involve national parliaments[3]. Moreover, the Council of Europe cooperation activities have been instrumental in assisting States to comply with the Convention in certain specific areas and, more generally, to ensure the adequate professional training of legal professionals on the Court's case-law[4].

Notwithstanding those efforts, the lack of domestic coordination between various State authorities in the implementation process often becomes a major obstacle to the swift adoption of effective measures required by both the national constitutions and the Convention. Experience shows that the recurrence of such issues requires the implementation process to be better organised in the member States and coordinated between all State actors involved. The Committee of Ministers' Recommendation Rec(2008)2 on efficient domestic capacity for rapid execution of the Court's judgments was a welcome attempt to shape the domestic implementation procedures but it did not radically improve the situation. The existence of appropriate domestic procedures are, more than ever, needed today to make the domestic authorities' interaction practical and effective and thus to ensure better implementation of the authorities' obligations under their national constitutions and the Convention.

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1. *The Dialogue between judges. Proceedings of the Seminar of 31 January 2014, Strasbourg, 2014*. Speaking at the seminar and the subsequent solemn hearing of the European Court of Human Rights on the occasion of the opening of the judicial year 2014, the President Dean Spielmann mentioned the role of the Court's pilot judgments for the proper enforcement of the Convention rights in the member States and referred to "a longstanding dialogue between our courts that is manifested not only on the occasion of annual event[s], but also through the visits paid to Strasbourg by delegations from supreme courts or [the President's] own official visits to member States. It is a dialogue which is also, and most importantly, maintained through the interaction between our respective case-law" (see at pp. 5 and 32).
2. See numerous decisions and resolutions adopted by the Committee of Ministers under Article 46 of the Convention since the late 1990s (http://www.coe.int/t/dghl/monitoring/execution/default_en.asp).
3. PACE's contribution to the speedy and effective implementation of judgments of the European Court of Human Rights is manifested by the reports and resolutions prepared at regular intervals by the Legal Affairs and Human Rights Committee since October 2006. Most recently, see AS/Jur Report (Doc. 12455 + Addendum), Resolution 1787 (2011), Recommendation 1955 (2011), AS/Jur (2013)13, AS/Jur (2013)14 and AS/Jur (2013)14 Add. (http://website-pace.net/en_GB/web/as-jur/presentation).
4. See in particular Human Rights Education for Legal Professionals (HELP Programme) covering 47 member States of the Council of Europe (http://helpcoe.org/) and numerous bilateral cooperation programmes conducted by the Council of Europe (http://www.coe.int/t/dghl/cooperation/capacitybuilding/echr_en.asp).

The need for such domestic mechanisms is all the greater when it comes to the adoption of general measures to prevent straight-forward violations of the fundamental rights arising from persistent structural problems at the domestic level. Member States' agents before the Court frequently play a central role in the transmission of the Convention organs' findings to the various authorities concerned but they are often not well equipped to initiate and implement integrated strategies required for the resolution of complex structural problems and, therefore, the prevention of new repetitive violations. While the persistence of problems in the implementation of the Convention is commonly attributed to the lack of political will, most of them arise from ineffective administration and the lack of appropriate procedures within the respondent States.

As the main bulk of the Court's case-load arises from unresolved structural problems in the member States, the time has come to reconsider the need for special coordination mechanisms that would boost the domestic capacity to address such issues in an effective manner. The Conference on Enhancing National Mechanisms for Effective Implementation of the European Convention on Human Rights provided a unique and timely opportunity to address this topic in a comparative perspective. It was also consistent with the current call for the Convention system to better tackle systemic issues in the member States rather than to provide individual justice in particular cases.

The Conference's specific purpose was both to assess the lacuna in the domestic implementation mechanisms, which may be country-specific or common to several States, and to identify the best national practices that could be supported, developed and spread over Europe to ensure timely adoption of the general measures required by the Convention. The Conference thus intended to build upon the internal expert knowledge of the member States and to result in some practical recommendations that would complement those already made by the Council of Europe with a view to the proper implementation of the Convention at the domestic level. The Conference discussions were based on the preparatory studies of the domestic experience conducted by national experts including judges, practitioners and academics from Austria, France, Germany, Italy, the Netherlands, the Russian Federation, Switzerland, Turkey and the United Kingdom who had been selected on account of their in-depth experience in the area.

Avant-propos

L'efficacité à long terme de la Convention européenne des droits de l'homme dépend de la communication et de l'interaction effectives entre son mécanisme judiciaire et les autorités des Etats membres, et en particulier leur cours suprêmes. La Cour européenne des droits de l'homme a souligné en 2014 que la mise en œuvre de ses arrêts constitue une *responsabilité judiciaire partagée*[5]. En effet, les cours jouent un rôle-clé dans la mise en œuvre au niveau national, à la fois des constitutions et de la Convention. Leurs réussites ces dix dernières années sont impressionnantes, car la Convention et les arrêts de la Cour sont devenus partie intégrante des lois internes des Etats membres du Conseil de l'Europe.

Cependant, l'action de la Cour doit être accompagnée et complémentée par des efforts concertés d'autres autorités de l'Etat, tant au niveau exécutif que législatif. Le Conseil de l'Europe cherche par tous les moyens à renforcer la capacité des autorités nationales à mettre en œuvre la Convention et les arrêts de la Cour. L'Organisation a tenté d'inclure tous les décideurs nationaux dans le processus de mise en œuvre. Les textes du Comité des Ministres ont de plus en plus été adressés à *toutes* les autorités nationales[6], tandis que l'Assemblée parlementaire a redoublé d'efforts pour impliquer les parlements nationaux[7]. Par ailleurs, les activités de coopération du Conseil de l'Europe ont été déterminantes dans l'assistance aux Etats en ce qui concerne le respect de la Convention dans certains domaines spécifiques, et plus généralement, dans le développement de la formation des professionnels du droit en matière de jurisprudence de la Cour[8].

Malgré ces efforts, le manque de coordination au niveau interne entre différentes autorités de l'Etat dans le processus de mise en œuvre devient souvent un obstacle majeur, empêchant une adoption rapide de mesures effectives, requises à la fois par les constitutions nationales et par la Convention. L'expérience montre que la récurrence de ces questions nécessite que le processus de mise en œuvre soit mieux organisé dans les Etats membres et coordonné entre tous les acteurs d'Etat qui sont impliqués. La Recommandation du Comité des Ministres Rec(2008)2 sur les moyens efficaces à mettre en œuvre au niveau interne pour l'exécution rapide des arrêts de la Cour a eu le mérite de tenter de développer les procédures internes de mise en œuvre, mais elle n'a pas amélioré la situation de manière radicale. Aujourd'hui, la nécessité de procédures internes appropriées est ressentie plus que jamais, afin de rendre pratique et effective l'interaction entre les autorités internes, en assurant ainsi une meilleure mise en œuvre de leurs obligations, en accord avec les constitutions nationales et la Convention.

5. *Dialogue entre juges. Actes du séminaire du 31 janvier 2014, Strasbourg, 2014.* En parlant au séminaire et à l'audition solennelle de la Cour européenne des droits de l'homme qui a suivi, à l'occasion de l'ouverture de l'année judiciaire 2014, le Président Dean Schpielmann a mentionné le rôle des arrêts-pilote de la Cour pour le renforcement adéquat des droits de la Convention dans les Etats membres et s'est référé à « un dialogue de longue date entre nos cours qui se manifeste non seulement à l'occasion d'événements annuels, mais aussi à travers des visites à Strasbourg de délégations de cours suprêmes ou des visites officielles du Président lui-même dans des Etats membres. C'est un dialogue qui est aussi, ce qui est très important, maintenu à travers l'interaction entre nos jurisprudences respectives » (voir pp. 5 et 32).
6. Voir les nombreuses décisions et résolution adoptées par le Comité des Ministres en conformité avec l'article 46 de la Convention à partir de la fin des années 1990 (http://www.coe.int/t/dghl/monitoring/execution/default_fr.asp).
7. La contribution de l'APCE à la mise en œuvre rapide et effective des arrêts de la Cour européenne des droits de l'homme se manifeste par des rapports et des résolutions préparés à des intervalles réguliers par la Commission des affaires juridiques et des droits de l'homme à partir d'octobre 2006. Plus récemment, voir AS/Jur Rapport (Doc. 12455 + Addendum), Résolution 1787 (2011), Recommandation 1955 (2011), AS/Jur (2013)13, AS/Jur (2013)14 et AS/Jur (2013)14 Add. (http://website-pace.net/fr_FR/web/as-jur/presentation).
8. Voir en particulier le Programme d'éducation aux droits de l'homme pour des professionnels du droit (le Programme HELP) qui couvre les 47 Etats membres du Conseil de l'Europe (http://helpcoe.org/), ainsi que de nombreux programmes de coopération bilatérale développés par le Conseil de l'Europe (http://www.coe.int/t/dghl/cooperation/capacitybuilding/echr_fr.asp).

Le besoin de tels mécanismes internes est encore plus important lorsqu'il s'agit de l'adoption de mesures générales pour empêcher des violations directes des droits fondamentaux, découlant de problèmes structurels constants au niveau interne. Des agents des Etats membres auprès de la Cour jouent fréquemment un rôle central dans la transmission des conclusions des organes de la Convention à différentes autorités concernées, mais ils sont souvent mal équipés pour lancer et mettre en œuvre des stratégies intégrées, nécessaires pour résoudre des problèmes structurels difficiles, et par conséquent, de prévenir de nouvelles violations à répétition. Si la persistance de problèmes dans la mise en œuvre de la Convention est habituellement attribuée au manque de volonté politique, la plupart de ces problèmes proviennent d'une administration ineffective et du manque de procédures appropriées dans les Etats défendeurs.

Etant donné que la plus grande partie des cas traités par la Cour provient des problèmes structurels non-résolus dans les Etats membres, le temps est venu de reconsidérer les besoins de mécanismes spéciaux de coordination, qui pourraient faire accroître la capacité interne de résoudre de tels problèmes de manière effective. La conférence « Renforcer les mécanismes nationaux pour une mise en œuvre effective de la Convention européenne des droits de l'homme » a offert une opportunité unique d'aborder cette question dans une perspective comparative. Elle était cohérente par rapport à l'appel lancé au système de la Convention, afin de mieux s'attaquer aux problèmes systémiques dans les Etats membres, plutôt que d'accorder une justice individuelle dans des cas particuliers.

Le but particulier de la conférence était à la foi d'examiner les lacunes dans les mécanismes internes de mise en œuvre, qui pouvaient être individuels ou communs à plusieurs Etats, et d'identifier les meilleures pratiques nationales qui pourraient être soutenues, développées et diffusées à travers l'Europe, afin d'assurer une adoption opportune de mesures générales exigées par la Convention. Voilà pourquoi la conférence s'est appuyée sur l'expertise nationale des Etats membres et a essayé de formuler des recommandations pratiques qui compléteraient celles qui avaient déjà été faites par le Conseil de l'Europe, en vue d'une mise en œuvre adéquate de la Convention au niveau interne. Les discussions lors de la conférence se sont appuyées sur des études préparatoires sur l'expérience interne présentées par des experts nationaux, y compris des juges, praticiens et universitaires d'Allemagne, Autriche, France, Italie, Pays-Bas, Fédération de Russie, Suisse, Turquie et Royaume-Uni, qui avaient été sélectionnés en fonction de leur riche expérience dans le domaine.


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Challenges of implementation of the Convention on Human Rights

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The European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR) was ratified by the Russian Federation and nowadays as the international treaty of the country, it is a part of its legal system. In this report I would like to discuss certain key challenges of implementation of the Convention and the decisions of the European Court of Human Rights, interpreting it.

1. The principal issue

The Constitutional Court of the Russian Federation has done a lot for consistent implementation of the provisions of the European Convention and the ECtHR decisions in respect of Russia into national legal system. It is thanks to the decisions of the Constitutional Court that reconsideration of court decisions on the outcome of the ECtHR decisions is safely ensured[9]. More than that, the Constitutional Court has elaborated the position that in the Russian legal system it is necessary to take into account decisions adopted upon complaints against other states. Thus, broadening effect of the ECtHR judgments has found an official affirmance in the practice of Russian constitutional justice. I could have long adduced examples of how, thanks to the Constitutional Court efforts, Russian legislation and law-enforcement was improving and developing by way of implementation of the Conventional provisions and the ECtHR precedents. But because of the time shortage I shall confine myself to the analysis of problems in this field.

The main problem, which the Constitutional Court of Russia has faced within its work, is the need of simultaneous fulfilment of two not always well-combined tasks: harmonising Russia's legal system with the all-European legal expanse, on the one hand, and protection of its own constitutional identity, on the other. This problem has several content and procedure aspects, which deserve attention within the framework of our conference. Let me begin with the aspect of content, so far as this is necessary for explanation of our position on procedural issues.

As the specialists point out, difficulties in implementation of the Convention are often connected with the lack of political will, which, in turn, leads to defects in organisational and legal mechanism of implementation of conventional provisions. The PACE Resolution No. 2075 (2015) of 30th September, 2015 also speaks about the absence of political will to implement judgments of the ECtHR in some States parties.

The phenomenon called the "lack of political will" in these documents is a very complicated and poly-semantic notion which needs to be conceived. Not denying the problem, I would like to point out that its reduction to

9. See, e.g., Judgment of the Constitutional Court of the Russian Federation 26 October, 2010 "On the case concerning the review of constitutionality of Section 2 of Article 392 of the Civil Procedure Code of the Russian Federation in connection with complaints of A.A.Doroshok, A.Ye.Kot and Ye.Yu.Fedotova".

lack of interest and moreover to the presence of "ill will" of national authorities in the course of implementation of the Convention would mean one-sided look at the situation, which can hardly be considered constructive. The problem must be also considered from other points of view.

What deserves attention first of all is that the ECtHR activity more and more orientates itself towards revelation of structural defects of national legal systems, which require amendments to the legislation, and the question arises whether such activity, law-making in essence, is legitimate. I have already, more than once, said that law-making function of the ECtHR as a supra-national judicial body, not being included in the democratic system of checks and balances within the framework of separation of powers, characteristic of the national states, suffers from the lack of democratic legitimacy[10].

2. The concept of the European Consensus

This problem is aggravated by more and more pronounced judicial activism of the ECtHR, realised with the help of a number of doctrinal and legal-technic mechanisms[11]. I do not doubt that the law-making function of the ECtHR is objectively preconditioned by the processes of European legal integration as well as necessity of the ECtHR judicial activism, without which effective protection of rights and freedoms (which as it is well-known is the unconditional priority for the Strasbourg Court) cannot be ensured. But once more I would like to draw attention to dangers which are connected with ECtHR intrusion into the field of operation of national and state sovereignty, in the basis of which lies the principle of people's sovereignty (in democratic states).

Lately a number of scholars and practitioners (and sometimes even individual states) in a reserved, but, nevertheless, quite pronounced manner criticized exactly these aspects of the ECtHR activity. From this perspective discussions held in Interlaken (2010), Izmir (2011) and Brighton (2012) are emblematic. As a result of these discussions, the high-level Conference of states-parties of the Council of Europe in Brighton suggested a new formulation of principles and aims of the Convention in its Preamble, including reference to the principle of subsidiarity and the margin of appreciation doctrine. Later, the Committee of Ministers of the Council of Europe submitted amendments within the Draft Protocol No. 15 to the Convention, which is open for signing, for consideration of the States. The suggestion to include in the Preamble of the European Convention the margin of appreciation doctrine in connection with the principle of subsidiarity is intended to make for more balanced and cautious approach to establishment of such margin on the part of the ECtHR.

In this connection the methodology of discovering of the "European consensus", which the Court uses in order to determine freedom of discretion of states in ensuring conventional rights, deserves particular attention. As the ECtHR emphasizes in a number of its judgments, margin of appreciation, which states use when ensuring conventional rights, depends on the achieved uniformity of regulation of corresponding relations in the internal law of States parties. And if a state does not follow common standard, which has been formed on the basis of the European consensus, substantiation of its position by it must be especially convincing[12]. I would like to dwell in more detail on this key notion of the European legal consensus.

First of all I need to emphasise that I do not consider the construction of the European consensus, as some critics write, as a dangerous lever of judicial activism. In any event, such realisation of this methodology in practice does not correspond to its destiny, when considering the problem from the theoretical point of view. I believe that orientation towards the European consensus is the most effective means of democratic legitimation of the ECtHR decisions, allowing the Court to lean on such objective grounds as legislative and executive practice of democratic states.

10. See, e.g., Valery D. Zorkin, Civilization of Law and Development of Russia, M., 2015, P. 159.
11. Among them: 1) evolutionary interpretation; 2) the concept of autonomous meaning of the conventional terms, which contemplates that the same terms can have different contents as applied to national law and ECtHR law; 3) the concept of implied rights; 4) creation of positive obligations; 5)extension of the Convention jurisdiction outside the territories of the states parties; 6) substantial deviations from approaches announced before (including by way of reinterpretation of decisions passed earlier) and reconsideration of legal positions; 7) preference of extended decisions, when instead of decisions on issues directly stated by a petitioner, the ECtHR discusses other problems as well (especially when the ECtHR indicates a very broad list of measures of restoration of violated rights, including prescriptions on alteration of national legislation); 8) intensive adoption of so called pilot judgements, making states-parties of the Convention to adopt general measures.
12. See, e.g., Eur. Court H.R. Dickson v. the United Kingdom, Judgment of 4 December 2007. Para 81; S.L. v. Austria, Judgment of 9 January 2003. Para 31; Tănase v. Moldova, Judgment of 27 April 2010. Para. 176; Demir and Baykara v. Turkey, Judgment of 12 November 2008. Para. 85; Weller v. Hungary, Judgment of 31 March 2009. Para. 28; Stec and Others v. the United Kingdom, Judgment of 12 April 2006. Paras. 63 – 64; Ünal Tekeli v. Turkey, Judgment of 16 November 2004. Para. 54; Stafford v. the United Kingdom, Judgment of 28 May 2002. Para. 68; Kiyutin v. Russia, Judgment of 10 March 2011. Para. 65; Konstantin Markin v. Russia, Judgment of 22 March 2012. Para. 126.

Practice of European constitutional courts is of particular importance in this context, so far as constitutional justice in the majority of cases reflects intra-state consensus, to be more precise - a public compromise (a kind of public agreement), which is in the foundation of the national constitution. By way of interpretation of this "public agreement" constitutional courts, as a rule, take into account the dynamics of social processes, public expectations and demands in their work, understanding that decisions cut off from social reality are often doomed not to be executed. The ECtHR reference to the consensus reached among the European constitutional justice bodies gives to it, as a supra-national (intra-state) body cut off from national socio-cultural roots, a possibility to understand in a more detail a wide social context of operation of human and civil rights and freedoms.

This is why I would say that the "European consensus" is a means to determine margin of appreciation not only of the states-parties, but of the ECtHR itself. It is a methodology of working out a judicial decision which, if properly used, leads judicial activism into predictable and constructive channel.

However, use of this methodology requires taking into account a number of restrictions. What are these restrictions?

I shall not dwell on the defects of application of this methodology, connected with the fact that in a number of cases such "consensus" does not reflect positions of states parties represented by their legislative and judicial bodies, but is formulated by the ECtHR itself on the basis of reports of non-governmental human rights organisations. There are more crucial issues to be discussed.

Can one always, even in the presence of obviously manifested consensus in the field of legislation or constitutional justice, be sure in correctness (more precisely – lawfulness) of a decision, which forces those who remained in the minority to follow the position of the majority of states?

It is appropriate to recall the Constitutional Court case regarding abolition of the death penalty, when in our decisions we deviated from the intra-state consensus, confirmed by a number of opinion polls and expert researches. In 1999 the Constitutional Court of the Russian Federation passed the Judgment, in which it recognised as unconstitutional sentencing to the death penalty in the absence of jury trials in all regions of the country, and in 2009 the Constitutional Court adopted a decision, according to which no courts in Russia may pass death sentences. In both cases we have taken this step not only because of our obligations before the Council of Europe, but also because we were guided by views higher than simple position of a majority.

Turning back to the issue of the European consensus, it is necessary to note that a current state of consensus can be created due to all sorts of situational, conjuncture and other reasons. Moreover, a decision based on the position of the majority of the European countries on a certain matter can ignore (or at least underestimated) some important notions reflecting such a list of socio-cultural features of a country, which needs to be taken into account for comprehensive and effective protection of human rights. Mostly it concerns the issues related to the core values and standards which in their entirety form a moral and cultural code of the nation, which undoubtedly affect a constitutional identity of the state even in a way which is not easy for us to understand.

One has to acknowledge that in the ECtHR practice several approaches to resolution of this problem are designed. In a number of cases the Court analysed particular historical and social context of operation of the Convention in one or another state as a possible ground for deviation from the European consensus while determining of concrete forms and ways of realisation of a right. However, as the practice shows, the ECtHR is not yet inclined to recognise the specificity of a socio-historical (socio-cultural) context as a sufficient ground for admissibility of deviation from the European consensus. The Court has considered reference to intra-state consensus, which blockades the consensus existing on the European level as another ground for deviation from the European consensus[13]. But this ground did not receive serious recognition in the ECtHR practice: only in one case the ECtHR has recognised this approach. I suppose that further development of these approaches could make for the perfection of the doctrine of discretion of states-parties in the channel of Brighton declaration.

3. Socio-cultural context of the implementation of the Convention

The significance of more full consideration of a particular socio-historical (socio-cultural) context of the Convention's realization by the European Court can be demonstrated by the widely known case "Konstantin Markin v Russia", which became an impulse for Russia for elaboration of the role of the Constitutional Court of the Russian Federation in the mechanism of implementation of the Convention. I have more than once turned to this case in my presentations, but, nevertheless, I would like to express some arguments necessary

13. Researches define the intra-state consensus as prevailing (but not unanimous) attitude by the majority of the population of a state-defendant to a concrete legal issue.

for subsequent clarification of the Constitutional Court's decisions, concerning its place and role in the system of measures for implementation of the Convention.

Let me remind that the essence of the legal dispute in the "*Markin case*" was whether there is any gender discrimination in case when military servicemen are deprived of a three-year nursing leave which is granted to military servicewomen.

Underestimation of socio-cultural specificity of Russia revealed itself, in my view, in two ways.

First, when the Court was defining possibilities and methods of overcoming what in the judgment of the Grand Camber was called "traditions, gender prejudices and opinions widespread among inhabitants of a respective country". Indeed, such gender prejudices in Russia are far from becoming obsolete. But the thing is that they operate not in the legal system of the country, but in the reality of family relations, which to a large extent are still based on patriarchal traditions of distribution of roles between men and women. That is why the Russian legislator tries, where it is possible, to grant women legislative preferences, which in their essence are not privileges, but legal compensations of additional efforts in childrearing, which in Russian families is a burden of women.

In our reality such legislative preferences to women are not discriminatory to men, but they are the means to overcome discrimination of women existing in society, aimed at creation of conditions, allowing for pulling women up to the level of realisation of rights available to men (i.e. aimed at ensuring larger measure of freedom for women in very different fields of public life). The crucial point here is the fact that the position of Russia regarding this issue does not diverge from the all-European values of gender equality (including equality in distribution of responsibility for upbringing of children between men and women). Divergences arise only when choosing means to ensure such equality, bearing in mind concrete historical "peculiarities of place and time" of realisation of this value.

There is a second point which should be borne in mind. When the Constitutional Court of the Russian Federation passed its inadmissibility decision in the "*Markin case*", it proceeded from comprehension of the idea that if Russian legislator equalises legal statuses of military servicemen and servicewomen in the notion parental leave, this will be "negative equality", i.e. equality in the absence of a corresponding right (i.e. such an equality which deprives this group of women and, what is more important, their children of extra protection). The ECtHR, on the contrary, proceeded in its decision from the European consensus on the question of the possibility to grant the right to take care about children to all military servicepersons. It is said in the judgment of the Grand Chamber of the ECtHR that "in a significant number of the member States both servicemen and servicewomen are also entitled to parental leave" and is emphasised that "the Convention does not stop at the gates of army barracks". The last thesis already in half a year's time after the "Markin case" was developed in the ECtHR judgement on the case "Bayatyan v Armenia", where the Court recognised that deprivation of liberty for conscientious objection to military service is not in conformity with the conventional guarantees of the right to freedom of thought, conscience and religion. Herewith, the Court directly referred to the European consensus and emphasised that within the framework of European expanse "there was an obvious trend among European countries, both existing Council of Europe member States and those which joined the organisation later, to recognise the right to conscientious objection"[14].

Do we have a sincere answer whether the Russian authorities will be able to show the political will expected from them to implement this kind of decisions of the ECtHR? I think that such a vector of development of corresponding legislation will hardly be accepted in a visible prospect, although individual steps in this direction are quite possible. After the "*Markin case*" the Russian Government submitted a draft law to the State Duma, granting military servicemen who are in the contractual military service and who are bringing up children without a mother a three-year nursing leave. Generally, the movement in this direction will be very reserved and careful.

It is important to understand deep-rooted socio-cultural grounds for such quite a predictable position of national authorities, and not confine oneself to superficial criticisms, because in the hidden meaning of the Russian authorities' position in this kind of questions lie sufficiently deep and weighty, to a significant extent, objective grounds. I am not going to analyse these grounds, intruding in the field of professional competence of historians, political scientists, sociologists, social psychologists, cultural scientists, anthropologists, etc. But I deem it necessary to point out before this audience what I consider as particularly important.

Russia is a country possessing of an enormous territory, which encloses vast expanses of two continents – Europe and Asia. In the course of the whole history of its own Russia was waging wars almost continuously,

14. *Bayatyan vs. Armenia* App. No. 23459/03 (ECtHR: 7 July 2011), para. 103.

defending its borders and standing up for its geopolitical interests. These factors undoubtedly influenced and continue to influence Russian society's attitude towards the issues of fighting efficiency of the Armed Forces of the country. It is quite clear that the increase of uncertainty in these matters will be perceived fairly painful not only by commanding elites, but also by wide parts of the population. States of the Western Europe can afford to move far in the course of the thesis that "the Convention does not stop at the gates of army barracks", and they can reach a stable European consensus in this regard on the legislative and judicial levels, since their security is ensured by the NATO and to a significant extent is guaranteed by military and economic power of the USA. And for Russia even small uncertainty in the issues influencing fighting efficiency of the country's Armed Forces may have considerable importance.

4. Conflicts of interpretation of the ECHR and of the Constitutional Court

After the judgment of the European Court was adopted in his favour, Mr Markin turned to a Russian court with a request to reconsider decisions rendered earlier due to new circumstances. Court of general jurisdiction, which found itself in a complicated situation of conflict of interpretations between the Constitutional Court of the Russian Federation and the ECtHR, sent a corresponding request to the Constitutional Court.

When considering this request, the Constitutional Court judged from the idea that the Convention and legal positions of the ECtHR based on it do not abrogate the priority of the Constitution for national constitutional courts and legal system in general in cases when the Constitution is able to protect human and civil rights and freedoms more exhaustively as compared to the corresponding provisions of an international treaty. If this condition is not taken into account, there arises a threat of "dissolution" of constitutional control of a country to a supra-national control over conformity of Russian legislation to the law of the Council of Europe.

In its decision on this request in the Judgement of 6 December, 2013 the Constitutional Court of the Russian Federation pointed out that if a court of general jurisdiction comes to the conclusion about impossibility of execution of a judgment of the ECtHR without adjudication of unconstitutionality of the provisions, the constitutionality of which has earlier been confirmed by the Constitutional Court, the court of general jurisdiction is entitled to suspend the proceeding and file a petition with the Constitutional Court[15].

Such a decision has allowed to find a procedural mechanism of implementation of the ECtHR decisions into Russia's judicial practice in the situation of conflict of interpretations between the ECtHR and the Constitutional Court of the Russian Federation, which is in conformity with the Constitution of the Russian Federation. The decision of the Constitutional Court of the Russian Federation cannot be called unexpected. The Constitutional Court has always disputed the principle, according to which participation of the Russian Federation in an international treaty does not mean renunciation of the state sovereignty, which is legally expressed in supremacy of the Constitution of the Russian Federation[16]. Developing its previous legal positions, the Constitutional Court proceeded from the idea that passing by a lower court of a decision on the basis of an ECtHR decision that certain internal rules contradict the Convention without a petition to the Constitutional Court would mean appraisal of constitutionality of national legislation by an inappropriate body.

The difficulty and crucial importance of the abovementioned problem is illustrated by the decision of the ECtHR on the case of "Anchugov and Gladkov v Russia" of 4th July, 2013 which became one of the reasons of a recent petition to the Constitutional Court from 93 deputies, representing all parliamentary fractions of the State Duma of the Russian Federation. In their request they contested the constitutionality of certain provisions of the piece of legislation, which establish the obligation of the authorities to execute ECtHR judgments even when they contradict the Constitution of the Russian Federation.

I would like to stress that the petition was forwarded by the lower Chamber of the parliament which is responsible for the implementation of the European Convention at the national level (including adoption of law executing the conventional provisions as well as execution of the pilot judgements against Russia). The fact that only 93 deputies applied to the Constitutional Court could be explained by the condition that this number is enough for petition to the Constitutional Court (unofficial information says that the real support of this petition was much higher). It is important that among the petitioners there were representatives of all the parliamentary fractions.

15. Judgment of 6 December 2013 No. 27-П "On the case concerning the review of the provisions of Article 11 and Items 3 and 4 of Section 4 of Article 392 of the Civil Procedure Code of the Russian Federation in connection with the request of the Presidium of Leningrad Circuit Military Court" (Item 1 of the Resolution part).
16. The Constitutional Court has more than once analyzed the provisions of Article 15 (Section 4) of the Constitution of the Russian Federation (Judgments of 29 June, 2004 No. 13-П; of 27 March, 2012 No. 8-П; of 9 July, 2012 No. 17-П and others).

In this situation the Constitutional court in its Judgement of 14 July, 2015 found the challenged provisions constitutional.

The Constitutional Court was guided by the idea that the Convention and the ECtHR legal positions interpreting the Convention, do not argue with the priority of the Constitution for national constitutional courts and legal systems *per se*, when the Constitution gives broader guarantees of human and civil rights and freedoms comparing to corresponding provisions of an international treaty. Without consideration of this condition there is a danger of "dissolution" of national constitutional control in supranational control of conventionality of the Russian legislation (including the Constitution!).

In the Court's opinion, these legislative provisions do not exclude that the state bodies entrusted with the obligation to ensure implementation of international treaties by the country, having come to the conclusion on impossibility to execute the ECtHR judgment because it is based on the interpretation of the Convention, inconsistent with the Constitution of the Russian Federation, may file a petition with the Constitutional Court in order to resolve the question of possibility of execution of this judgment; and the President of the Russian Federation and the Government of the Russian Federation are entitled to appeal to the Constitutional Court with a request to interpret the corresponding provisions of the Constitution of the Russian Federation. This Judgement of the Constitutional Court (as the previous judgement of 6 December, 2013 on the request of the Leningrad military court) is not sensational, because it only reproduces and develops the legal position on the supremacy of the Constitution of the Russian Federation when executing the ECtHR decisions. The Judgment envisages institutional guarantees for such supremacy. It is indicated that it is ensured exclusively by the Constitutional Court within the framework of one of the two procedures: 1) constitutional review of legislative provisions, where the ECtHR has found a defect (corresponding request must be sent by court, reconsidering a case on the basis of the ECtHR decision; 2) interpretation of the Constitution upon a request of the President of the Russian Federation or the Government of the Russian Federation (if the governmental bodies consider execution of a specific judgment of the ECtHR in respect of Russia impossible without violation of the Basic Law). The point here is not of validity or invalidity for Russia of an international treaty as a whole, but simply *of* the impossibility to implement its provision in the interpretation attributed to it by an authorised intergovernmental body within the framework of consideration of a specific case, to the extent to which this interpretation has rendered this provision concrete in such a way that it has come into conflict with the provisions of the Constitution of the Russian Federation.

This Judgement of the Constitutional Court caused criticism both from the side of those who suppose that signing of the European Convention by Russia means full and unreserved subordination of the Russian legal system to the integration law of the Council of Europe in the matters of human rights protection and from the side of those who want to leave the Council of Europe, supposing that this too liberal interpretation of the Conventional provisions by the European Court is fraught with flouting of the country's sovereignty. Both sides consider the decision of the Constitutional Court one-legged.

We, the constitutional justices, are used to reproaches of this sort. In my view, what is criticised by our opponents as a compromise and a lack of consistency has objective grounds, determined by the nature of constitutional justice. Unlike courts of general jurisdiction, which consider cases where there are "rights and wrongs", the Constitutional Court settles disputes about the law, where both sides have their legal reasons. Even in situations when the Court is petitioned by a person with a lawful complaint against unconstitutionality of a law, i.e. when there is a dispute between a person and the state represented by its legislative body, we, as a rule, deal with the opposition of different but equivalent values, being the foundation of the Constitution as a formalised public agreement. Our task is not to suppress one constitutional value by another, but to coordinate them, to find their appropriate balance, a legal compromise. This complicated task is aggravated by the fact that the Russian Constitution was adopted in the conditions of very deep social, economic and political transformations of the country and very sharp split of the Russian society connected with these transformations. Unfortunately, subsequent course of events has not lead to overcoming of this deep, in essence socio-cultural split, traditional for Russia.

Taking into account the abovementioned, I would like to stress that this decision (as well as the decision on request of the Presidium of Leningrad Circuit Military Court) (as well as the decision upon the request of the Presidium of the Leningrad District Military Court) is not in the contradiction to the European Court of Human Rights, but, on the contrary, it is based on the aspiration to safeguard ourselves from situations, fraught with serious complication of the relations of Russia with the ECtHR and with the Council of Europe as a whole. The question regards the situations when the ECtHR decisions, intruding into the sphere of the national sovereignty of Russia, are fraught with more substantial violations of rights of Russian citizens than those, which the Strasbourg Court is objecting to. As a matter of fact, the Constitutional Court, which possesses of a large

experience of constructive interaction and mutually respectful dialogue with the ECtHR, has taken upon itself the burden of settlement of conflicts of this sort. In the Judgment upon the request of deputies of the State Duma the Constitutional Court has once again emphasised acknowledgement of the fundamental importance of the European system of the protection of human and civil rights and freedoms, which judgments of the ECtHR form a part of, and readiness to search for a lawful compromise for the sake of supporting this system. And the fact that it reserves the degree of this readiness, since it is the Constitution of the Russian Federation which outlines the boundaries of compromise in this matter, fits in well in the already existing practice of interaction between the ECtHR and a number of States parties to the Convention. This practice is based on the understanding that interaction of the European and national legal orders is impossible in conditions of subordination and that only the dialogue between different legal systems is the pledge of the all-European legal development.

And in the conclusion I would like to highlight that I believe that the Convention and its subsequent development in the Protocols thereto is a great achievement in human rights protection in Europe and a great value. I am sure that development of relations of Russia with the Council of Europe institutions in the field of implementation of the Convention, regardless of the listed problems, is successful, effective and encouraging process.

However, at the same time I urge my foreign and Russian colleagues to do everything possible for saving the necessary level of mutual trust between Russia and Europe and, thereby, minimise political and legal risks which I indicated.

Discours d'ouverture

Philippe Boillat

Directeur général, Direction générale
Droits de l'Homme et Etat de Droit, Conseil de l'Europe

Saint-Pétersbourg, 22 octobre 2015

Monsieur le Président de la Cour constitutionnelle,

Madame la Vice-Présidente de la Cour Suprême,

Monsieur le Ministre,

Excellences,

Mesdames et Messieurs, Chers collègues,

C'est pour moi un réel privilège et un vrai plaisir de vous souhaiter la bienvenue à St-Pétersbourg au nom du Conseil de l'Europe, qui a co-organisé cette Conférence avec la Cour constitutionnelle de la Fédération de Russie. Je tiens d'emblée à remercier chaleureusement la Cour constitutionnelle russe de son excellente coopération dans l'organisation de cette Conférence.

Ma Direction générale – la Direction générale Droits de l'homme et Etat de droit – travaille sur ce projet depuis plusieurs mois, dans un contexte marqué par de nombreuses vicissitudes politiques et juridiques.

Je suis donc particulièrement heureux d'ouvrir cette importante Conférence aujourd'hui avec nos partenaires russes. Je saisis cette occasion pour remercier vivement tous nos interlocuteurs, russes et internationaux, qui ont permis la réalisation de ce projet.

Excellences, Mesdames et Messieurs,

Nous allons débattre aujourd'hui et demain des mesures tendant à l'amélioration de la mise en oeuvre sur le plan national de la Convention européenne des droits de l'homme.

Permettez-moi d'insister, dès à présent, sur la double dimension de cette Conférence.

Cette Conférence donne tout d'abord une première suite concrète aux décisions politiques prises par les Ministres de nos 47 Etats en mars et en mai de cette année. Notre réunion, ici, à St-Pétersbourg, est en effet un prolongement direct de ces deux réunions tenues à Bruxelles. Je rappelle que la Déclaration de Bruxelles a insisté sur « l'importance d'une exécution pleine, effective et rapide des arrêts [de la Cour européenne des droits de l'homme] et d'un engagement politique fort des Etats parties à ce sujet».

Les Ministres ont appelé, entre autres, « à faire un bilan de la mise en oeuvre, et un inventaire de bonnes pratiques relatives à la Recommandation CM/Rec(2008)2 sur des moyens efficaces à mettre en oeuvre au niveau interne pour l'exécution rapide des arrêts de la Cour européenne des droits de l'homme et, le cas échéant, procéder à sa mise à jour… ».

Aussi, notre Conférence est-elle censée fournir les premiers éléments de réflexion à cet appel de nos Ministres. Je suis particulièrement ravi que les autorités russes, dont certaines sont ici représentées à leur plus haut niveau – Cour Constitutionnelle, Cour suprême, Ministère de la justice, Ministère des affaires étrangères – non seulement prennent à leur compte le processus de réforme du système de la Convention, mais y contribuent désormais de manière très active.

Le second aspect essentiel de notre Conférence est qu'elle s'inscrit dans le cadre de notre coopération renforcée avec les autorités de la Fédération de Russie dans les domaines les plus variés. Nous avons renforcé notre coopération avec toutes les instances russes représentées dans cette salle. En effet, la mise en oeuvre de la Convention nous concerne tous. La Cour constitutionnelle russe l'a souligné à juste titre récemment, la Convention européenne des droits de l'homme et la Constitution russe contiennent essentiellement les mêmes valeurs et les mêmes garanties. Nos activités visant la pleine mise en oeuvre de la Convention servent donc, tout autant, la cause de la Constitution de la Fédération de Russie.

Il en va de même pour tous les Etats du Conseil de l'Europe. En effet, comme le Comité des Ministres nous y a incités il y a quelques mois, il nous appartient à présent d'intensifier notre coopération ainsi que notre dialogue bilatéral et multilatéral avec tous nos Etats, afin de trouver les moyens les plus efficaces pour mettre en oeuvre la Convention sur le plan national. Un élément central de ces activités consiste dans le partage de bonnes pratiques. C'est l'un des objectifs majeurs d'aujourd'hui et de demain.

Excellences, Mesdames et Messieurs,

Vous l'aurez noté à la lecture du programme, nous avons invité à cette Conférence d'éminents experts nationaux représentant différents systèmes juridiques de nos Etats membres. Sans prétendre à l'exhaustivité, la Conférence devrait nous livrer une large perspective comparative et une riche panoplie de différentes pratiques. Chaque rapporteur devrait nous présenter un aperçu des problèmes rencontrés et des solutions trouvées dans son pays.

Cette Conférence préparera également le terrain pour les travaux du Conseil de l'Europe qui vont débuter dans quelques mois afin d'améliorer les mécanismes nationaux de la mise en oeuvre de la Convention dans nos 47 Etats membres. Une tâche certes ambitieuse, mais indispensable.

Depuis la Conférence ministérielle de Rome, organisée en novembre 2000 pour célébrer le 50ème anniversaire de la Convention européenne des droits de l'homme, nous nous sommes essentiellement focalisés sur la réforme de la Cour et sur les procédures des Organes de Strasbourg. Aussi est-il grand temps de concentrer à présent nos efforts sur la mise en oeuvre de la Convention sur le plan national. Cette mise en oeuvre est bien évidemment tributaire de la volonté politique. Mais n'oublions pas qu'elle repose aussi, parfois tout autant, sur l'existence de procédures efficaces, des algorithmes d'action qui guident les autorités dans leurs décisions quotidiennes.

Excellences, Mesdames et Messieurs,

Je suis convaincu que notre Conférence contribuera à identifier les meilleures expériences et les meilleures pratiques au sein de nos Etats afin que tous puissent en profiter. J'ai hâte d'entendre vos présentations et vos débats sur des sujets cruciaux pour renforcer à long terme l'efficacité du système de la Convention.

Je souhaite à toutes et à tous des échanges constructifs et fructueux et un très agréable séjour dans cette fascinante ville de St-Pétersbourg.

Opening speech

Khanlar Hajiyev
Judge at the European Court of Human Rights, Doctor of Law

President of the Constitutional Court of the Russian Federation,

Judges of the Constitutional Court,

Ladies and Gentlemen,

It gives me great pleasure to be here today and to pass on to you the welcoming address on behalf of the European Court of Human Rights and, personally, of Guido Raimondi, the President elect of the European Court, who was unfortunately unable to attend, owing to commitments with a sitting of the Court's Grand Chamber. He has asked me to convey his warmest greetings to the conference organisers and participants and his thanks for the invitation to this historic building, which he has already had occasion to visit in 2012 for a conference comparing the experience of Italy and Russia in implementing the Convention. If I may quote your words on that occasion, Valeriy Dmitriyevich: "the future of the European system of rights and freedoms is a shared challenge for all the players in the European legal field, requiring constant dialogue in both judicial and extrajudicial spheres. National judicial bodies, including the higher courts undoubtedly have a special role to play in that dialogue". Dialogue between judges has been and continues to be a priority for the European Court and its leadership - and the Outgoing president, Dean Spielmann, and the President elect, Guido Raimondi, have done much to strengthen and pursue it. I am sure that today's meeting will be yet another step in that direction.

What is it that determines relations between the European Court and the Russian judicial system today? I will mention just a few of what I see as the key traits. For many years Russia topped the table for the highest number of applications to the Court but, thanks to the entry into force of Protocol no. 14 and coordinated work with inadmissible cases, the total number of complaints against Russia pending examination in the Court fell from more than 40,000 at the end of 2011 (almost one third of the total number of cases in the Court) to 9,500 at present (less than 15% of all pending cases). For the second successive year since 2014 there has been an increase in the number of cases settled by agreement with the Russian Federation Government, meaning not only a reduction in the European Court's workload but also, and above all, swift justice for individual applicants whose complaints were in the "manifestly founded" category. In May 2015 the Court recognised cassation in civil proceedings as a legal remedy to be exhausted in accordance with Article 35 of the Convention (decision in the case of Abramyan and others), emphasising that this would enable Russia's higher judicial bodies to consider applicants' complaints before they lodged applications in Strasbourg and "strengthen the dialogue between the Russian judicial system and the Convention institutions, thus giving full effect to the subsidiarity principle". The Constitutional Court strongly focuses on questions of interaction with the European Court of Human Rights: Valeriy Dmitriyevich has repeatedly and quite rightly identified the Constitutional Court as the "conduit for the Convention and the European Court's judgments within the Russian legal system". Separate mention must also be made of the active efforts of the Supreme Court of the Russian Federation and above all through judgments of its Plenum, as well as through the publication of thematic summaries and regular reviews, to make the professional and above all judicial community aware of the European Court's judgments. I am sure that those efforts will be pursued, including within the framework of implementing the plan sketched out by the high-level Brussels conference in March 2015 to create a network of experts for exchanging information between the European Court and the highest national courts.

But while listing successes, it is important not to forget the existing problems, in particular linked to the resolution of issues requiring a systematic, coordinated approach to taking general measures. Russian courts will be familiar with these issues in their own practice and they affect a great many citizens. These issues also relate to the inadequate execution of judicial decisions in cases related to in kind obligations (which are not covered by Federal Law no. 68 FZ of May 2010), conditions of detention, problems of investigating ill-treatment of detainees, guarantees of a person's rights in criminal proceedings, the safeguarding of fundamental rights of foreign citizens and so on. Without dwelling on each of these problems individually, I will merely observe that, having passed through every instance right up to the European Court, these kinds of complaints are more often than not returned into the domestic legal system and once again demand a response from it, at this stage for the fulfilment of Russia's international obligations. It goes without saying that, for well-known problems of a similar kind, this is a needless journey that is not in the interests of the applicants or the States and even less so of international institutions.

Mr President, in the natural cycle there is neither victory nor defeat, but simply a forward movement and, accordingly, steps that must be taken. Likewise, there are steps in the implementation of the convention which mankind takes in the quest for more solid safeguards of rights and freedoms. That movement calls for dialogue of courts and judges, both national and international, at the different stages of resolving a legal dispute. It is this cycle that makes it possible to guarantee rights and freedoms, ensure the rule of law and find answers to the questions of our time. This evolutionary process takes place thanks to the supreme gift bestowed upon people, and of course judges, which is that of decision-making. Allow me to express the hope that our meeting today will result in a new step along this path and contribute to the devising of more effective mechanisms for protecting the rights of citizens throughout Europe.

The role of the Supreme Court of the Russian Federation in implementing the Convention for the protection of Human Rights and fundamental freedoms

Tatyana Petrova

Vice-president of the Supreme Court of the Russian Federation – president of the Administrative law bench of the Supreme Court of the Russian Federation

Conference participants!

The powers, procedure for establishment and activities of the Supreme Court of the Russian Federation are laid down by Federal Constitutional Law no. 3-FKZ of 5 February 2014 "On the Supreme Court of the Russian Federation" and Federal Constitutional Law no. 1-FKZ of 31 December 1996 "On the judicial system of the Russian Federation". The unity of the judicial system is guaranteed by the application by all courts of the Russian Federation Constitution, federal constitutional laws, federal laws and universally recognised principles and norms of international law and international treaties which, in accordance with Article 15 paragraph 4 of the Russian Federation Constitution constitute an integral part of Russia's legal system.

These legislative provisions form the legal basis for the implementation of the Convention for the protection of human rights and fundamental freedoms of 4 November 1950 and the Protocols thereto (hereinafter – the Convention, the Convention and its Protocols) by Russia's courts, including the Supreme Court of the Russian Federation.

The impact of the Convention on the country's legal system as a whole is undoubtedly shaped first and foremost by the judgments of the European Court of Human Rights (hereinafter – the European Court), whose jurisdiction extends to questions of interpretation and application of the Convention and its Protocols in cases of alleged violations by the Russian Federation of its obligations under that instrument.

From Russia's official recognition of the European Court's jurisdiction on such matters, it follows that Russian courts, and above all the Supreme Court of the Russian Federation as the country's highest judicial authority, must take account of the legal positions set out in European Court judgments in their work.

Consideration of the European Court's legal positions as a means of anchoring and reflecting them in the practice of the Supreme Court of the Russian Federation differs according to the powers being exercised by the Supreme Court and the nature of the measures taken, which may be general or individual.

When exercising its constitutional prerogative to elucidate questions of judicial practice for courts, the Supreme Court of the Russian Federation stated, as far back as 2003, in judgment no. 5 of the Plenum of the Supreme

Court of the Russian Federation "On the application by general courts of universally recognised principles and norms of international law and international treaties in the Russian Federation", that courts had to apply the Convention, taking account of the European Court's practice to avoid any violations of this instrument.

Developing this approach, the Plenum of the Supreme Court of the Russian Federation formulated a further clarification in judgment no. 21 of 27 June 2013 "On the application by general courts of the Convention for the protection of human rights and fundamental freedoms of 4 November 1950 and the Protocols thereto" on the basis of judicial practice, pointing out that the European Court's legal positions were also to be taken into account in the application of Russian Federation legislation.

In that judgment the Plenum of the Supreme Court of the Russian Federation also pointed out that, for the purpose of effective protection of human rights and freedoms by courts, the legal positions of the European Court set out in judgments that had become final in respect of other States Parties to the Convention were also to be taken into account where the circumstances of the case examined by them were similar to those analysed and concluded upon by the European Court.

Accordingly, the Supreme Court of the Russian Federation steers courts towards consideration not only of judgments handed down in respect of Russia but also judgments pronounced in respect of other countries.

In that process, the Supreme Court of the Russian Federation has drawn courts' attention to the fact that Russian Federation legislation may provide for a higher level of protection of human rights and freedoms in comparison to the standards guaranteed under the Convention and its Protocols within the interpretation of the European Court. In such cases, courts must be guided by Article 53 of the Convention and apply the provisions set forth in Russian Federation legislation.

Pursuant to these clarifications and to familiarise judges with texts of European Court judgments an "international law" database has been created within the Supreme Court of the Russian Federation, with the systematic inclusion of significant international documents, including European Court judgments and decisions of other intergovernmental bodies engaged in the protection of human rights and freedoms.

Furthermore, the Supreme Court of the Russian Federation has not ignored issues linked to the implementation of injunctive measures adopted by the European Court.

The question has arisen in practice as to whether or not it is possible to stay execution of punishment in the form of administrative deportation from the Russian Federation in the event of the European Court adopting temporary injunction measures.

It must be pointed out that the significance of Rule 39 for the Convention system is constantly emphasised by the European Court itself and the Committee of Ministers of the Council of Europe. Failure to comply with the prescriptions of the European Court is regarded by the convention bodies as undermining the foundations of the system, constituting a violation of the Convention in its own right and specifically of the right of individual petition guaranteed in its Article 34.

With this in mind, it was explained to lower courts in the Review of judicial practice of the Supreme Court of the Russian Federation, no. 1 (2014), ratified by the Presidium of the Supreme Court of the Russian Federation on 24 December 2014, in essence, that on the basis of Article 11 paragraph 2 of the Russian Federation Code of Administrative Infringements and in the light of the Russian Federation's international law obligations in the event of the European Court adopting injunctive measures under Rule 39, ordering the Russian Federation to refrain from any actions involving expulsion, extradition or other forced removal of an applicant to another State, the judge must stay the execution of the judgment prescribing administrative punishment in the form of administrative deportation.

To further underpin this legal position, the Supreme Court of the Russian Federation referred, by way of an additional argument, to the European Court's judgment in a specific case ("Savriddin Dzhurayev v. Russia").

Alongside presentations of the legal positions set out in European Court judgments in respect of the Russian Federation, periodical reviews of case-law also feature the practices of other international/intergovernmental bodies, notably the UN Committees (on human rights, against torture, for the elimination of discrimination against women, on the rights of persons with disabilities).

The Supreme Court of the Russian Federation takes account of the State's obligations stipulated not only in the Convention as interpreted by the European Court but also in other conventions adopted by other bodies operating within the Council of Europe framework, such as the Convention on the rights of the child.

As long ago as 2008, in the Review of legislation and case-law of the Supreme Court of the Russian Federation, ratified by decision of the Presidium of the Supreme Court of the Russian Federation of 17 September 2008,

on the basis of the provisions of the aforementioned Conventions and European Court judgments including against other States, it was noted that administrative deportation of a foreign citizen or stateless person from the Russian Federation entailing interference with the right to private and family life was permissible only in cases where it was necessary in a democratic society and proportionate to the aims pursued by public policy.

In this connection, I am of the opinion that the set of general measures adopted by the Supreme Court of the Russian Federation makes it easier for the European Court's legal positions to be taken into account in our own courts' practice. The accessibility of the judicial acts of the Supreme Court of the Russian Federation and their inclusion in legal information systems enable citizens and legal persons to directly refer to the Convention and the case-law of the European Court.

Responses of the Supreme Court of the Russian Federation to violations of fundamental human rights and freedoms enshrined in the Convention, along the lines of review of a judicial act having entered into legal force with a view to restoring an applicant's violated rights in connection with a European Court judgment, are worthy of separate consideration here.

It must be pointed out that the basis for setting up such a mechanism to implement the Convention was the Russian Federation Constitutional Court judgment of 2 February 1996 (adopted even before our country ratified the Convention), in which the Court noted that, under Article 46 paragraph 3 of the Russian Federation Constitution, decisions of intergovernmental bodies could result in the review of specific cases by higher courts in the Russian Federation, opening up an entitlement for those courts to re-examine a case in order to revise decisions previously made in it. In subsequent judgments the Constitutional Court of the Russian Federation set Russian legislators the task of devising and establishing a procedure that would make it possible to review a case in different types of proceedings.

At present, the Russian Federation's civil, administrative, commercial and criminal procedural law establishes the possibility of reviewing a judicial act having entered into force in connection with European Court judgments.

The provisions of the Code of Criminal Procedure of the Russian Federation provide for the review of a court sentence, ruling or judgment in a case regarding circumstances in relation to which violations of the Convention were found. These reviews are carried out by the Presidium of the Supreme Court of the Russian Federation on a motion from the President of the Supreme Court.

The effectiveness of this norm is confirmed by statistical data.

For the period from 1 January 2002 to 1 October 2015, in connection with violations of the Convention and its Protocols established by the European Court, 256 motions of the President of the Supreme Court of the Russian Federation in respect of 315 individuals were examined by the Presidium of the Supreme Court of the Russian Federation.

As a result of criminal proceedings being reopened by the Presidium of the Supreme Court of the Russian Federation, 81 judicial decisions pronounced on the merits have been set aside, with the cases being sent for retrial.

It must be noted that these figures already require updating, as only yesterday, at a sitting of the Presidium of the Supreme Court of the Russian Federation, two judicial acts were set aside after criminal proceedings had been reopened in connection with the European Court finding violations of paragraphs 1, 3 and 4 of Article 5 of the Convention (for unlawful duration of custody), implementing the judgments in the cases of "Biryuchenko and others v. Russia" of 11 December 2014 and "Kalinin v. Russia" of 19 February 2015.

In civil cases over the period from 1 January 2002 to 1 September 2015 courts received 70 applications for the review of court judgments in connection with the European Court finding violations of the Convention and its Protocols, with 35 of those applications being satisfied and previous judgments overturned.

There is also a practice of reviewing judgments adopted by the Supreme Court of the Russian Federation when operating as a court of first instance.

I suggest that further evidence of the effectiveness of measures taken by the Supreme Court of the Russian Federation to implement the Convention's provisions is to be found in the statistical data for 2014 presented in the European Court's report, which notes that the downward trend in the number of complaints against the Russian Federation submitted to the European Court continued in 2014. Compared to the 12,330 complaints submitted in 2013, there were 8,952 complaints in 2014, representing a reduction of 27.4%, and of 37.5% in comparison to 2010.

The number of judgments finding a violation of Article 5 paragraph 3 of the Convention (right of a person in custody to trial within a reasonable time or release pending trial) fell by 20%, judgments finding a violation of

Article 5 paragraph 4 concerning the right to prompt examination of a complaint or continued detention by 77% and judgments finding a violation by the Russian Federation of Article 6 paragraph 3 (right to a fair trial) by 50%.

In 2014 the European Court of Human Rights handed down only three judgments finding violations of the right to a hearing within a reasonable time, which is ten times fewer than in 2009.

I believe that these results clearly demonstrate the qualitative changes that have taken place in the application of the law and procedural legislation under the influence of international standards of administration of justice and human rights protection.

At the same time, pursuant to the subsidiarity principle governing the activity of the European Court, the task of guaranteeing the functioning of the system of protection of human rights and freedoms provided for in the Convention and its Protocols falls above all to state authorities, including the courts, which have a duty to prevent human rights violations by performing their core rights protection function.

Mechanisms for effective implementation of the European Convention on Human Rights in the Netherlands

Martin Kuijer
Professor Human Rights Law, VU University Amsterdam

Ladies and gentlemen,

It is a true honour to address you today in the beautiful surroundings of the Constitutional Court of the Russian Federation and I would like to thank our hosts most sincerely for their hospitality.

Being from the Netherlands it is a special pleasure being in Saint-Petersburg since the very existence of this magnificent city symbolises the historical relationship between our two countries. However, I am not here to talk about Peter the Great's vision in 1703 to have a city rise from the Neva delta inspired by his journeys to Amsterdam.

Today, we are discussing another aspect of our shared heritage, the European Court of Human Rights. The organisation of this conference is very timely indeed. You are undoubtedly aware of the fact that a High Level Conference on the Implementation of the Convention was organised in March of this year by the Belgian Chairmanship of the Council of Europe. The current conference offers a perfect opportunity to give further impetus to the issues mentioned in the Brussels Declaration. One could say that the current initiative is the beginning of the implementation of that Declaration. The enhancement of national mechanisms for an effective implementation of the Convention is equally an important aspect of the work that was carried out over the last two years by the Council of Europe Group on the longer-term future of the Convention mechanism of which I was the chairperson. My presentation today is not on the work carried out by that Group, the GDR-F, but I will share with you some aspects of the work that struck me. National implementation goes hand in hand with good co-ordination by all domestic stakeholders. This is almost a more practical issue, but there seems to be room for improvement in this area. In addition, those stakeholders in the execution process must have sufficient authority to be able to deal with the sometimes complex issues relating to execution of judgments. Also, what is sometimes lacking is a clear procedure how to deal with the execution of Court judgments. All of these aspects, as well as issues discussed at the Conference today and tomorrow, will be considered within the framework of the work on Recommendation CM/Rec (2008)2 on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights that will be carried out in 2016 and 2017 by the CDDH and its subordinate Committee of Experts on the system of the European Convention on Human Rights.

Ladies and gentlemen, let me then focus on some of the issues I addressed in my national report.

Let me start with an obvious observation: the role of domestic courts with respect to the implementation of the European Convention on Human Rights is obviously strongly linked with the status of international norms as such in the domestic legal order.

In that regard, the Netherlands has a quite unique system. On the one hand, Article 120 of the Constitution of the Netherlands prohibits a judge checking the constitutionality of Acts of Parliament (in line with the doctrine of the supremacy of Parliament). However, at the same time, Articles 93 and 94 of the Constitution provide for direct applicability of international legal norms.

Rules of international law are part of the law of the land as soon as they become binding on the Kingdom of the Netherlands. Self-executing provisions of treaties have priority – in the event of conflict – over national legislation, including Acts of Parliament and even our Constitution. Provisions of the Convention are considered to be such 'self-executing' provisions. As a result, Convention standards may be invoked by a party before any domestic court and every Dutch court is empowered to disapply a legal provision or declare such a provision nonbinding if it is in conflict with higher law, such as the Convention.

In doing so, the Dutch judge applies the so-called 'incorporation doctrine', meaning that the norm (i.e. a provision of the Convention) is interpreted as it has been interpreted by the Strasbourg Court. It is therefore not decisive whether the Court judgment was against the Netherlands or against a third country (*de facto erga omnes* effect).

As a result of the above, a human rights-related debate in the Netherlands will likely focus on international human rights treaties. And of those international treaties, the European Convention on Human Rights is by far the most relevant for practical purposes, if only because of the detailed case law of the European Court of Human Rights.

As a result of the above, Dutch judges (whether they work as a judge in a first instance court, a justice in a court of appeal or the Supreme Court) follow the Court's case-law closely. In this respect, it is worth mentioning the practice within Dutch courts to appoint 'focal points' to keep their colleagues informed of relevant developments in European case-law. It is an easy to implement practical measure that proves to be very effective.

Let me then say a few words about the general mechanisms in the Netherlands to ensure timely and effective execution of judgments of the Court.

After the Court renders a judgment in which it finds a violation of the Convention the Dutch Government Agent to the ECHR officially informs the relevant state actors at the various ministries of that judgment and its content: that is to say the policy and legislation departments of the responsible ministries as well as more executive services such as the Immigration Service or the Prison Service. While the primary responsibility regarding the implementation of the Court judgment lies with the relevant ministry, the Government Agent has a coordinating function.

Individual measures have, until now, not posed many problems in the Netherlands. In cases concerning aliens, they usually entail the provision of a residence permit. Likewise, in criminal cases it is worth mentioning that the possibility of requesting reopening of criminal proceedings is provided by law. If the Court has granted the applicant just satisfaction the Government Agent assures the timely payment of the just satisfaction by paying the ordered amount to the applicant from the budget of the ministry of Foreign Affairs. After that, the expenses are recovered from the relevant ministry(ies). This construction serves to minimalise the risk of delay in the payment of just satisfaction.

As regards general measures, there are roughly speaking three options:

- The judgment concerned does not call for any general measures given the fact that the violation was due to the specific circumstances of the case whereas the legislative framework offers sufficient guarantees that similar incidents may be avoided in future. If that is the case, the judgment will merely be brought to the attention of relevant departments and services (including the judiciary) and the redress is primarily of an individual character.
- The judgment concerned calls for a legislative response. If possible, due to the lengthiness of the legislative process, a modification of decrees or policy guidelines will be preferred. New policy guidelines may be adopted by the Public Prosecutor's Office in criminal cases or by the Immigration and Naturalisation Service in asylum- and immigration cases. If need be, a formal legislative proposal is suggested.
- The judgment concerned calls for general measures of a judicial nature rather than a legislative response. In that case, the issue is taken up with the judiciary via the Council for the Judiciary (*Raad voor de rechtspraak*).

That brings me to the more specific issue of the role of domestic courts *vis-à-vis* the implementation of judgments of the European Court of Human Rights.

In case a domestic court of first instance is faced with a problem of compliance with a Court judgment which requires the adoption of general measures, the court has various possibilities.

One would be to disapply the conflicting domestic rule. In this regard, a distinction should be made between acts of parliament and subordinate legislation. It happens quite frequently that a court will disapply subordinate legislation due to a conflict with the Convention or its Protocols. Cases in which a court actually disapplies an act of parliament in order to avoid a violation of the Convention are relatively rare. In practice, whether or not the courts are prepared to rectify any discrepancies between the law embodied in an act of parliament, on the one hand, and a self-executing treaty provision on the other, depends on whether there is a possible solution that fits in with the history and system of the law in question and whether the consequences of the solution are foreseeable. When several solutions are possible and none of them meets this test, the courts tend to refrain from choosing between them. But should the legislature continue to do nothing about the problem, then there may be a point in time when the courts themselves will provide a solution. Consequently, the courts are empowered to remove any inconsistencies between Dutch law and self-executing provisions of the Convention and its Protocols, but may sometimes consider it *prudent* to leave a solution to the legislature, at least *pro tempore*.

Another possibility for the domestic court would be to apply a Treaty-consistent interpretation of national law. This is a frequently used technique in Dutch courts, especially when an act of parliament is at issue.

Courts (including the Supreme Court) do not consider themselves competent to order the State to adopt an act of parliament, regardless of whether the claim is based on a self-executing provision of treaty law. Hence, in that sense there is no formal competence to determine or initiate general measures needed following an adverse judgment of the Court. In practice, however, the following nuances need to be taken into account:

- Some adverse judgments of the Court can only be remedied by a judicial response rather than a legislative response because over time judicial practice developed in a manner inconsistent with the intention of the national legislator and inconsistent with the requirements of the Convention.
- Sometimes, a particular Court judgment is understood as containing an obligation to change national policy in the Netherlands. Primary responsibility for initiating such a change in general policy and/or legislation lies with the responsible Government minister (subject to parliamentary supervision). However, the process of amending the law can be rather lengthy, depending *inter alia* on whether a formal act of parliament needs to be amended, financial implications as a result of the policy change and political support. By way of example, changing formal legislation will in the Netherlands (taking into account all consultations that need to be conducted) take on average 1.5 to 2 years. It is obvious that domestic courts will in daily legal practice be confronted with the alleged non-conformity of the legal rule in question long before the legislator has been able to solve the issue via the proper means (i.e. amendment of the legal provision after parliamentary approval). In the meantime, domestic courts need to take up their own responsibility. Let me give one example. In its *Salduz* judgment, the Court held that Article 6 ECHR required that a suspect be assisted by a lawyer during police interrogation. Since such assistance during the police interrogation is not common practice in the Netherlands, the Minister of Justice announced that Dutch law would be amended accordingly. While draft legislation was being prepared, the Supreme Court already had to rule on the subject matter. Following the judgments of the ECtHR and the Dutch Supreme Court, the Public Prosecutor's Office issued new policy guidelines in April 2010 in anticipation of the new legislation to be adopted by parliament. The involvement of the judicial authorities is substantial in such a scenario.
- Thirdly, adoption of new legislation following an adverse judgment of the Court is rendered unnecessary as a result of Convention-consistent interpretation of national law. On occasion, it is not the legal rule as such that causes doubts concerning the compatibility with Convention standards. Instead, it is the interpretation of that legal rule. In these circumstances, adoption of new legislation is not always necessary (and given the time consuming nature of the legislative process not always desirable). For example, following the Court's judgment in the case of *Al-Khawaja and Tahery versus the United Kingdom* concerning a criminal conviction based on statements by absent witnesses, the Dutch Supreme Court aligned its jurisprudence with the Court's standards.

In conclusion, national implementation of Convention standards will only function effectively if all stakeholders on domestic level co-ordinate and co-operate. Domestic courts play a crucial role in this regard. Some Convention related problems can only be solved by the domestic judiciary. Sometimes a judicial response to an adverse judgment is needed rather than a legislative response. Sometimes a Convention-consistent interpretation of domestic law is all that is needed to resolve the conflict between domestic law and the Convention.

In order to fulfil this role a proper understanding of the relevant European case-law is presupposed. This is a challenge in itself given the ever growing body of jurisprudence. The appointment of focal points within domestic courts may be an easy to implement tool which could prove to be very effective. More generally speaking, what is needed is 'judicial dialogue'. Some of you will be aware of my affection regarding Protocol 16, but there are various modalities to have an 'open channel of communication'. This conference is one of them and therefore I thank you for offering that possibility. *Spasibo bolshoye vsem vam!*

Implementation of the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the legal system of the Russian Federation

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Ladies and gentlemen,

Thank you for giving me this opportunity to speak at today's conference, which is an important step in deciding how best to implement the European Convention on Human Rights and the ECtHR's case law in national legal systems.

I wish to underline my country's commitment to fulfilling its obligations under the Convention, including those relating to execution of the judgments handed down by the European Court.

Mechanisms for implementing the Convention have been set up in Russia and are operating reasonably well. A presidential decree has been issued which allows the Russian Ministry of Justice to organise and co-ordinate the activities of the competent state bodies in this area.

In particular, practical arrangements have been made for translations of ECtHR judgments to be sent to all the relevant state bodies so that they can peruse them and apply them in practice. The said bodies, furthermore, have appointed responsible persons or created special units to work with the Representative at the ECtHR and deal more effectively with the problems identified by the Court.

Widespread use is now being made of interministerial working groups consisting of representatives of the relevant bodies in highly complex cases which require fundamental changes to established practice in applying the law, or the drafting of new primary or secondary legislation. Within the framework of the co-ordination function and in accordance with the powers assigned, arrangements have been made for formally requesting and obtaining from the authorised state bodies relevant information about any measures taken by them within their competence.

An important element of this work is monitoring the way in which courts in Russia administer the law, and then introducing legislative reforms based on an analysis of the judgments of the Constitutional Court of the Russian Federation and the ECtHR.

In the light of the case law of the European Court of Human Rights, a high priority has been accorded to the task of addressing those problems which are recognised as being of a recurrent or systemic nature in the case of Russia and to creating effective domestic remedies.

In order to tackle the problem of excessive delays in the execution of decisions handed down by the national courts, for example, a number of co-ordinated measures have been introduced. These involved improving the procedure for making claims against the state and for preparing and submitting for execution writs of execution to this effect, strengthening budget guarantees and improving the law enforcement activities of state bodies and their officials. Another very important development has been the introduction of a new effective domestic remedy, namely the Federal Law "On compensation for violation of the right to trial within a reasonable time or of the right to execution of judgments within a reasonable time".

As a result, there has been a significant decrease in the number of complaints of this kind that come before the ECtHR and a real shift in the burden of responsibility for protecting citizens' rights to national level.

Russia's Ministry of Justice, furthermore, is in the final stages of drafting federal legislation which will see the scope of the Law on Compensation extended to include cases where there have been lengthy delays in executing court decisions relating to pecuniary and non-pecuniary obligations. It is expected that the enactment of this law, along with other measures, will help to permanently remove the issue of excessive delays in the execution of domestic court rulings of this type from the ECtHR's and the Committee of Ministers' scope of review.

Material is currently being prepared for the Committee of Ministers with a view to ending supervision of a group of cases involving other systemic problems, namely excessive length of proceedings in civil and criminal cases. This has been made possible by the fact that the Law on Compensation also applies to litigation of this kind. At the same time, a package of measures has recently been adopted with a view to developing and providing financial and logistical support for Russia's judiciary, improving the way courts operate and disciplining participants in proceedings. As a result, the number of civil and criminal cases in which courts have failed to observe the statutory time-limits has been gradually falling over the years.

Also, under the Blueprint for the development of Russia's penal enforcement system for the period up to 2020, and pursuant to the pilot judgment in *Ananyev and Others v. Russia*, a comprehensive action plan has been prepared and is now being putting into effect to tackle the problem of inadequate conditions of detention in pre-trial detention centres.

The action plan is based on a broad-based, long-term strategy. Not only does it require conditions of detention in pre-trial detention centres to be brought into line with international standards, it also calls for a more measured approach to imposing and extending preventive measures in the form of remand in custody, wider use of non-custodial measures, and improved domestic legal remedies.

The authorities have also introduced a number of measures to reform existing legislation and practice.

One particularly notable example was the adoption and entry into force in September 2015 of the Code of Administrative Proceedings and associated changes to the legislation. Thanks to these changes, the preventive remedy against violations arising from failure to ensure adequate conditions of detention in pre-trial detention centres and prisons has been significantly improved. The changes are fully consistent with the ECtHR's findings in its pilot judgment in *Ananyvev and Others v. Russia*.

In order to create an effective compensatory remedy for the persons in question, Russia's Ministry of Justice, in the light of the European Court's recommendations and with the active participation of the relevant state bodies, has drafted another piece of legislation which establishes the right to seek compensation from the RF Treasury through the courts for damage or loss caused by inadequate conditions of detention, irrespective of whether state bodies or their officials were at fault. At the same time, additional regulations are to be introduced concerning the specifics of filing and examining administrative claims for compensation for violations of conditions of detention. The drafting of this legislation is now in the final stages.

A similar approach is being adopted by Russia when it comes to addressing other systemic problems identified by the European Court of Human Rights. Alongside this, individual measures are being adopted in a timely fashion to restore, as far as practicable, applicants' rights where these have been violated.

Of major importance in addressing the problems identified by the ECtHR are the explanations provided by the Constitutional and Supreme Courts of the Russian Federation, in which direct references are made to the

Convention and the case law of the European Court of Human Rights. Quite recently, moreover, the Plenum of the Supreme Court adopted a special resolution concerning courts' application of the provisions of the Convention. An important step towards improving the Russian legal system, this move has met with a positive reception both in Russia, among those responsible for administering the law, and at international level.

The measures introduced by the Russian authorities have not only had a positive impact in Russia but have also gone a long way towards improving the statistics of the European Court of Human Rights. These statistics show a steady decline in the number of complaints against Russia pending before the Court. Over the past four years, for instance, the figure has decreased more than fourfold, from 40,300 to 9,200 complaints. And in terms of the number of complaints lodged with the ECtHR relative to population size, Russia has consistently been in the top 30 countries, out of a total of 47.

The oft-heard comments to the effect that the Russian authorities are not taking measures to execute the ECtHR's decisions and are failing to tackle the country's systemic problems are quite unjustified, therefore.

The fact that certain problems call for a major overhaul of legislation and practice and require significant additional budgetary resources as well as more time in order to resolve them is another matter. Our intention is to continue the work that needs to be done.

Another obstacle to the successful execution of a number of ECtHR judgments is the fact that, when rendering these judgments, the Court not infrequently oversteps the bounds of its own subsidiary role and jurisdiction.

I have already mentioned the close attention paid by the Russian authorities to the Court's recommendations, including those set out in the pilot judgments. The greater the tendency of the ECtHR to issue, often extremely detailed, recommendations about how its judgments are to be executed, however, the more acute the problem of the Court exceeding its jurisdiction becomes.

The implication of Article 46 of the Convention is that the methods and procedure for executing judgments are first and foremost a matter for the States Parties to the Convention. The ECtHR should not act as a substitute for states and be allowed unlimited freedom to perform non-judicial functions. Particularly as there is always a risk that the recommendations it makes will fail to take account of the specific features of the national legal system.

As the other speakers have already observed, the ECtHR has recently given a number of decisions where constitutional rights and freedoms, some of which are set out in detail in specific legislation, have been construed in a way that is different from an earlier interpretation provided by the Constitutional Court. Also worth mentioning in this context is the ruling in *Anchugov and Gladkov v. Russia*, in which the ECtHR found that there was a conflict between the Convention and the RF Constitution.

Given the primacy of the Constitution in the Russian legal system, such an approach on the part of the European Court creates practical difficulties when it comes to executing the relevant judgments. Of major relevance in this respect is the fact that the Constitutional Court, acting within its powers, has issued orders which pave the way for the creation of an effective mechanism for overcoming such conflicts. It is our belief that enshrining this mechanism in law and implementing it in practice will help provide sensible solutions to the current problems.

Serious questions about the feasibility of executing decisions have also been raised by the ECtHR's decision in the case of *Catan and Others v. Moldova and Russia*. In this decision, the ECtHR chose to interpret the "effective control" doctrine in an arbitrary manner despite the draft articles on responsibility of states approved by the UN General Assembly in 2001, and despite the established case law of international courts. As a result, Russia was held responsible for violations of the Convention that occurred on the territory of another state, with which the Russian authorities were in no way connected.

Unfortunately, the Committee of Ministers, in its attempts to facilitate the execution of such an important judgment, has likewise overstepped the bounds of the Convention and its control mechanism. In particular, a number of resolutions have been adopted in which the Committee of Ministers calls on the Russian authorities to submit a plan that would include measures to ensure the proper functioning of schools which use the Latin script.

What is being proposed, then, is that the Russian authorities interfere in the internal affairs of another sovereign state, whose territorial integrity Russia has recognised and still recognises, and with whom it has a relationship based on international law.

Such an approach is at odds with the Russian Constitution and also with the mechanism for supervising the execution of ECtHR judgments, as clearly set out in the Convention. That mechanism does include compelling states to perform actions which do not arise from its obligations under the Convention and which contravene

the rules of international law. Nor does it include compelling states to meddle in the internal affairs of other states and to deal with matters that ought to be handled by other bodies or settled under treaty-based arrangements between states.

The problems thrown up by the Catan judgment and its execution were highlighted at the round table held in Moscow in 2015 with the participation of prominent Russian lawyers and, as you will recall, at a similar event held in June 2015 in Strasbourg, involving Council of Europe bodies.

One way out of this situation, it seems, would be for all the States Parties to the Convention to explore and discuss the issue of the effective control doctrine and its practical application by the ECtHR and the Committee of Ministers. The results of this discussion could make a valuable contribution to the process of reforming the ECtHR and regulating its procedural activities with the aim of ensuring that it remains within its jurisdiction and adheres to its subsidiary role.

To conclude, I hope that today's discussion will pave the way for more effective implementation of the Convention in national legal systems without infringing the sovereign rights of the States Parties to the ECHR.

Thank you for your attention.

Renforcement des mécanismes nationaux de mise en œuvre de la Convention européenne des droits de l'homme : évaluation de l'expérience nationale suisse

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Considérations préliminaires

Le droit international est appliqué en Suisse selon le système moniste. Cela signifie que les garanties de la Convention européenne des droits de l'homme (CEDH)[17] sont applicables dans l'ordre juridique suisse au même titre que le droit national et qu'elles engagent l'ensemble des organes de l'Etat, c'est-à-dire le parlement, le gouvernement, l'administration et le pouvoir judiciaire, à tous les échelons de la Confédération et des cantons[18]. Contrairement à ce qui se passe dans un système dualiste, il n'est donc pas nécessaire de transposer une norme internationale dans le droit suisse par un acte supplémentaire, par exemple une loi spéciale. Une norme internationale qui lie la Suisse est valable d'elle-même en droit interne[19]. En cas de conflit avec une norme du droit interne suisse, elle a en règle générale la primauté sur cette dernière[20]. En outre, les droits découlant de la CEDH sont aujourd'hui, sans exception, directement applicables (*self-executing*), c'est-à-dire justiciables en Suisse[21].

Le Tribunal fédéral, instance judiciaire suprême de la Confédération, a joué un rôle déterminant lors de la réception de la CEDH dans l'ordre juridique suisse. Peu après l'entrée en vigueur de la Convention, il a reconnu

17. Recueil systématique du droit fédéral suisse, ch. 0.101 (RS 0.101).
18. 40 ans d'adhésion de la Suisse à la CEDH: Bilan et perspectives, Rapport du Conseil fédéral du 19.11.2014, Feuille fédérale suisse n° 1 du 13.01.2015, p. 353 ss. (FF2015.01.00353). Voir également art. 5, al. 4 de la Constitution fédérale suisse (Cst.), art. 189, al.1, lit. b Cst. et art. 190 Cst., in RS 101. Cf. aussi La relation entre droit international et droit interne, Rapport du Conseil fédéral du 05.03.2010, FF2010.13.02105. Voir enfin in RS 101 l'art. 35 Cst., aux termes duquel « *les droits fondamentaux doivent être réalisés dans l'ensemble de l'ordre juridique* » (al. 1) et « *quiconque assume une tâche de l'Etat est tenu de respecter les droits fondamentaux et de contribuer à leur réalisation* » (al. 2).
19. La relation entre droit international et droit interne, op. cit., FF2010.13.02067.
20. Cela découle notamment de la jurisprudence du Tribunal fédéral, qui reconnaît néanmoins des exceptions. Cf. La relation entre droit international et droit interne, op. cit., FF2010.13.2106-7. Cf. également Chiffres 5 et 6 (d) infra.
21. 40 ans d'adhésion de la Suisse, op. cit., FF2015.1.00380.

dans son arrêt *Diskont- und Handelsbank*[22] que les garanties de la Convention ont un caractère constitutionnel et a donc placé celles-ci, d'un point de vue procédural, sur un pied d'égalité avec les droits constitutionnels[23]. Par ailleurs, le Tribunal fédéral n'admet pas que des lois fédérales puissent avoir la primauté sur des règles de droit international antérieur, lorsqu'il s'agit d'obligations internationales en matière de droits de l'homme (jurisprudence dite *PKK*)[24]. En d'autres termes, les garanties de la CEDH priment en règle générale sur les règles internes suisses[25].

1. Procédure d'adoption de mesures de caractère général en Suisse en exécution d'un arrêt de la Cour européenne des droits de l'homme (CrEDH)

Il n'existe pas en Suisse de procédure particulière, formalisée dans une loi ou dans un autre texte, pour l'adoption de mesures générales tendant à la mise en œuvre d'un arrêt de la CrEDH. L'approche suivie en Suisse est essentiellement pragmatique. Cela vaut aussi bien pour les mesures générales visant une modification législative que pour celles qui consistent en une modification de la pratique administrative ou de la jurisprudence sur la base d'une loi qui reste inchangée. Dans ce dernier cas, les tribunaux – notamment le Tribunal fédéral – jouent un rôle central.

Le processus est déclenché lorsque l'agent du gouvernement suisse auprès de la Cour envoie copie de l'arrêt aux autorités concernées, que ce soit au niveau de la Confédération et/ou d'un canton, en indiquant les raisons principales de la violation constatée par la Cour.

Il peut arriver qu'une réforme législative ait déjà été initiée lorsque la Cour rend son arrêt[26]. Il va sans dire que dans ce cas, l'arrêt de la CrEDH sera dûment pris en compte dans le processus de réforme[27].

2. Rôle des autorités exécutives et législatives

Aucune autorité particulière en Suisse n'est chargée d'initier ou de coordonner le processus d'adoption de mesures générales suite à un arrêt de la CrEDH. Sur le plan international, c'est évidemment le Conseil fédéral (gouvernement fédéral de la Confédération) qui est l'interlocuteur de la CrEDH dans la mesure où c'est lui, par l'intermédiaire de son agent, qui défend la position de la Suisse devant la Cour et qui reçoit notification de ses arrêts, même si la violation trouve sa source dans le droit cantonal et non dans le droit fédéral. Pour le surplus, conformément à la structure fédérale de la Suisse, ce sont les cantons qui sont responsables en premier lieu de l'application du droit fédéral et du droit international aussi bien que du droit cantonal. Dans cette mesure, les possibilités pour le Conseil fédéral d'influer sur une modification de la législation et de la pratique cantonales sont limitées. La Constitution fédérale donne certes à son article 49, alinéa 2 la compétence à la Confédération de surveiller la mise en oeuvre du droit fédéral par les cantons, ce qui au sens de cette disposition inclut le droit international[28]. Mais les possibilités d'intervention fondées sur cette compétence, restreintes en soi, n'ont encore jamais trouvé d'application dans ce contexte[29]. Le Conseil

22. Arrêt du 19 mars 1975, in Recueil officiel des arrêts du Tribunal fédéral suisse, n° 101 (1975), Vol. II p. 67 (ATF 101 Ia 67), consid. 2c. Cf. également Heinz AEMISEGGER, Zur Umsetzung der EMRK in der Schweiz, in Jusletter 20. Juli 2009, p. 3, www.jusletter.ch.
23. Pour les autorités cantonales, cela signifie que lorsqu'une violation d'un droit constitutionnel par un acte législatif ou par une décision est alléguée, une violation de la CEDH peut toujours également (ou exclusivement) être invoquée. Cf. 40 ans d'adhésion de la Suisse, op. cit., FF2015.1.00380.
24. ATF 125 II 417. Cf. également : 40 ans d'adhésion de la Suisse, op. cit., FF2015.1.00380. Voir en outre : La relation entre droit international et droit interne, op. cit., FF2010.13.2113 et AEMISEGGER, op. cit., p. 4.
25. Cf. également Michel HOTTELIER, La Convention européenne des droits de l'homme et la Suisse : quarante ans d'enrichissement au service de la dignité humaine, in Revue trimestrielle des droits de l'homme, N° 103, juillet 2015, p. 563 et 575-6 + n. 102.
26. Cf. arrêts *Wettstein* c. Suisse du 21.12.2000, *Gsell* c. Suisse du 08.10.2009 et *Howald Moor et autres* c. Suisse du 11.03.2014 (cf. n. 11 infra).
27. On citera comme exemple actuel la modification en cours des règles sur la prescription dans le Code suisse des obligations, réforme qui avait déjà été initiée lorsque l'arrêt *Howald Moor et autres* c. Suisse du 11.03.2014 (décès suite à une exposition à l'amiante ; droit d'accès à un tribunal) a été rendu, mais qui sera influencée par cet arrêt.
28. RS 101. Cf. Giovanni BIAGGINI, Kommentar zur Bundesverfassung, Zurich, Orell Füssli Verlag, 2007, N 23 ad art. 49 Cst. Cf. également Considérations préliminaires, supra, p. 1.
29. Cf. Frank SCHÜRMANN, Die Kantone und die Umsetzung der Urteile der EGMR : Die Sicht des Bundes, in Samantha Besson / Eva Maria Belser (éd.), La Convention européenne des droits de l'homme et les cantons, Journée BENEFRI de droit européen de l'Institut de droit européen, Fribourg, 2014, p. 161 ss.

fédéral se limite à transmettre l'arrêt au gouvernement cantonal concerné, le plus souvent sans l'assortir de directives ou de recommandations[30].

S'agissant en particulier de la compétence d'initiative, c'est au gouvernement (fédéral ou cantonal) concerné qu'il appartient généralement de lancer le processus d'amendement de la loi incriminée par l'arrêt[31]. Comme indiqué sous Chiffre 1 ci-dessus, il peut arriver que la modification requise soit combinée avec une réforme d'ores et déjà en cours de la loi en question[32], ce qui peut signifier que le processus de modification de la loi prendra davantage de temps jusqu'à son entrée en vigueur. L'initiative peut également venir du parlement (fédéral ou cantonal) sur la base d'une intervention parlementaire se référant expressément à l'arrêt de la Cour.

L'Unité de l'Agent du Gouvernement suisse auprès de la CrEDH est à la disposition de l'administration gouvernementale ou parlementaire qui prépare le projet d'amendement législatif. Cela est vrai tout particulièrement au niveau fédéral[33].

3. Identification des mesures requises par les arrêts de la CrEDH

Il incombe aux autorités fédérales ou cantonales compétentes d'identifier les mesures requises, notamment s'agissant de modifications législatives. Souvent, l'arrêt lui-même donne suffisamment d'indications sur les mesures à prendre pour assurer son exécution, par exemple si la violation réside dans l'absence d'une base légale suffisante en droit suisse (telle qu'elle est prévue par exemple à l'art. 8 CEDH). Dans un tel cas, il apparaît clairement que la loi doit être modifiée afin de créer la base légale requise[34]. Dans le cas de la Suisse, relativement peu d'affaires – une dizaine – ont donné lieu à l'adoption d'une modification de la législation interne, fédérale ou cantonale[35].

Du point de vue du processus d'exécution de l'arrêt, le fait que la décision de la Cour consiste en un arrêt ordinaire limité à un cas individuel, en un arrêt pilote ou encore en un arrêt semi-pilote ne fait aucune différence dans le système suisse. On notera toutefois qu'à ce jour, la Suisse n'a pas encore été confrontée à un arrêt pilote ou semi-pilote.

Le fait pour la Cour de donner dans son arrêt une indication spécifique de la mesure générale dont l'adoption est requise pourrait effectivement s'avérer utile en ce sens qu'elle permettrait le cas échéant d'éviter des discussions au Comité des Ministres sur la question de savoir si des mesures de caractère général sont nécessaires ou non – et, dans l'affirmative, lesquelles. Certes, une telle façon de procéder pourrait être perçue selon le cas comme un empiètement de la Cour sur la marge d'appréciation de l'Etat. La CrEDH parle d'ailleurs à ce sujet d'une « obligation de résultat, non pas de moyens »[36]. Mais la Cour a déjà donné un début d'application à cette proposition, puisqu'elle indique dans ses arrêts pilotes les mesures qui doivent être adoptées par l'Etat concerné. Cette pratique pourrait être étendue aux arrêts importants dont on peut supposer qu'ils donneront lieu à discussion, au Comité des Ministres, sur le point de savoir quelles mesures de caractère général doivent

30. Cette notification se faisait autrefois également aux autres gouvernements cantonaux. Depuis 2008, l'Office fédéral de la justice publie ces arrêts dans ses rapports trimestriels sur les « *Arrêts et décisions choisis de la Cour européenne des droits de l'homme* » (notamment https://www.bj.admin.ch/dam/data/bj/staat/menschenrechte/egmr/ber-egmr-2013q3-f.pdf). Il en va de même pour la publication des arrêts dans le recueil de la « *Jurisprudence des autorités administratives de la Confédération* » (JAAC, cf. http://www.vpb.admin.ch/homepage_fr.html). Ces rapports, qui contiennent également des références aux arrêts et décisions de la CrEDH concernant d'autres Etats, sont transmis aux Tribunaux fédéraux (Tribunal fédéral, Tribunal pénal fédéral, Tribunal administratif fédéral, etc.), à plusieurs Offices de l'administration fédérale, aux Directions cantonales de la justice ainsi qu'aux Tribunaux supérieurs des cantons.
31. Cf. notamment le droit d'initiative du Conseil fédéral défini à l'art. 181 Cst. : « *Le Conseil fédéral soumet à l'Assemblée fédérale des projets relatifs aux actes de celle-ci.* » (RS 101).
32. Cf. n. 10 et 11 supra. Voir également Chiffre 3 infra sur l'effet des résolutions intérimaires du Comité des Ministres.
33. Cf. notamment l'affaire *Glor* c. Suisse du 30.04.2009 (non-admission au service militaire et devoir de payer la taxe d'exemption de l'obligation de servir), où l'agent du gouvernement suisse a participé au groupe de travail qui a procédé à l'élaboration de l'amendement législatif.
34. Cf. l'arrêt *Kopp* c. Suisse du 25.03.1998 (respect de la vie privée ; écoutes téléphoniques ; absence de base légale).
35. Au niveau fédéral, on mentionnera les arrêts *F.* du 18.12.1987 (interdiction de remariage : modification du Code civil) ; *Burghartz* du 22.02.1994 (nom des époux : modification du Code civil) ; *P. et L.* (responsabilité pénale des héritiers pour soustraction d'impôts du défunt : modification de la loi sur l'impôt fédéral direct) ; *J.B.* du 03.05.2001 (obligation de collaborer dans une procédure pour soustraction d'impôt : modification de la loi sur l'impôt fédéral direct) et *Glor* du 30.04.2009 (taxe d'exemption du service militaire : modification de la loi en question). Au niveau cantonal, il faut citer les affaires *Plumey* du 09.09.1996 (examen de la détention par le procureur : modification de l'ancien Code de procédure pénale du canton de Bâle-Ville) ; *Belilos* du 29.04.1988 (procédure en matière de contravention, absence d'examen judiciaire : modification de la loi vaudoise sur les sentences municipales et, par ricochet, de plusieurs lois cantonales similaires) ; *Weber* du 22.05.1990 (publicité de la procédure : modification de l'ancien Code de procédure pénale du canton de Vaud) ; *Wettstein* du 21.12.2000 (incompatibilités de fonctions : modification de la loi cantonale zurichoise sur la justice administrative) et *Gsell* du 08.10.2009 (atteinte à la liberté d'expression ; absence de base juridique : modification de l'ordonnance cantonale grisonne sur la police, puis de la loi sur la police du canton des Grisons).
36. Cf. l'arrêt *Belilos c. Suisse* du 29.04.1988. Voir également SCHÜRMANN, op. cit., n. 14.

être prises. Cela dit, l'expérience faite en Suisse tend à montrer que les considérants de l'arrêt permettent en général de déterminer assez clairement si des mesures de caractère général s'imposent ou non[37]. La question n'a donc pas donné lieu en Suisse à une réflexion de principe. L'approche consiste à définir de cas en cas les mesures à prendre en fonction de la violation constatée par la Cour, des considérants y relatifs et de la réglementation ou de la pratique fédérale et/ou cantonale applicable.

S'agissant des résolutions intérimaires du Comité des Ministres, elles n'ont pas de statut particulier dans l'ordre juridique suisse. Quoi qu'il en soit, les autorités suisses ont pour pratique d'en assurer le respect, dans le sens de leur mise en œuvre selon une approche, ici encore, pragmatique. C'est ainsi que l'exécution de l'arrêt *F.* déjà cité ayant entraîné une modification du Code civil suisse qui a pris plusieurs années, la ministre suisse de la justice s'est adressée aux gouvernements et aux tribunaux de l'ensemble des cantons pour appeler leur attention sur le fait que si la disposition incriminée du Code civil devait être appliquée dans l'intervalle entre l'adoption de l'arrêt et l'adoption de la législation révisée, la Suisse risquait une nouvelle condamnation à Strasbourg. Les autorités cantonales semblent en avoir dûment tenu compte dans la mesure où le Tribunal fédéral n'a plus été saisi d'un recours à ce sujet.

A propos, plus généralement, de la surveillance par le Comité des Ministres de l'exécution des arrêts de la Cour, on relèvera qu'au-delà des affaires qui appelaient une modification de la législation ou de la pratique fédérale ou cantonale, le Comité des Ministres s'est borné à constater dans la majorité de ses résolutions clôturant la procédure de surveillance à l'égard de la Suisse a) que l'arrêt de la Cour avait été transmis aux autorités internes concernées, b) qu'il avait été publié et c) que les autorités suisses avaient déclaré que les arrêts de la CrEDH lient la Confédération et les cantons et sont en Suisse directement applicables.

4. Application de la procédure d'adoption de mesures de caractère général aux décisions d'autres instances judiciaires ou quasi-judiciaires internationales

La même procédure – c'est-à-dire une procédure définie de cas en cas selon une approche pragmatique telle qu'exposée ci-dessus – est appliquée en Suisse pour l'exécution des décisions d'autres instances judiciaires ou quasi-judiciaires internationales.

Pour ce qui est en particulier des instances qui peuvent être saisies de requêtes individuelles, il s'agit essentiellement en l'espèce des décisions prises par le Comité de l'ONU contre la torture (CAT) suite aux communications qui lui sont adressées à l'encontre de la Suisse, soit environ 150 communications à ce jour. Tous les cas ont trait au principe du non-refoulement. Les autorités fédérale (le Secrétariat d'Etat aux migrations) et cantonales (les différents offices cantonaux des étrangers) assurent le respect et la mise en œuvre des décisions des instances onusiennes compétentes (mesures intérimaires et décisions finales). A noter que dès la première décision du CAT concernant la Suisse, dans l'affaire Mutombo en 1993, le ministre suisse de la justice a pris la décision de principe que les décisions du CAT seraient respectées au même titre que les arrêts de la CrEDH, quand bien même leur portée juridique est différente.

5. Réaction des tribunaux de première instance

Comme on l'a vu, les arrêts de la CrEDH sont directement applicables en Suisse et les juridictions de tous les niveaux sont en principe dans l'obligation de les respecter (principe de l'effet utile). Elles sont également tenues d'appliquer le principe dit de l'interprétation conforme, selon lequel toute réglementation interne doit être élaborée et interprétée en conformité avec le droit international, en l'occurrence avec les arrêts de la CrEDH[38]. Cela ne pose pas de difficulté particulière lorsque la disposition en question laisse une marge d'interprétation au juge. En revanche, la situation est plus complexe lorsque la disposition incriminée par un arrêt de la Cour ne peut pas être interprétée selon ce principe, c'est-à-dire d'une manière conforme audit arrêt. C'est surtout au niveau du droit fédéral que le cas pourrait se présenter, tout particulièrement si l'arrêt de la Cour s'avère être en conflit avec la Constitution fédérale[39], un cas de figure qui ne s'est encore jamais présenté. S'agissant d'un conflit entre un arrêt de la Cour et une loi fédérale, on a observé dans les Considérations préliminaires que selon une jurisprudence aujourd'hui bien établie, le Tribunal fédéral n'admet pas que des lois fédérales

37. Cf. n. 19 supra.
38. Cf. Chiffre 1 supra et Chiffre 6 infra, y compris n. 28.
39. Compte tenu notamment de l'art. 192 Cst., qui fixe les règles applicables en cas de révision de la Constitution (RS 101).

puissent avoir la primauté sur des règles de droit international antérieur lorsqu'il s'agit d'obligations internationales en matière de droits de l'homme[40].

Les tribunaux de première instance n'ont pas la possibilité en droit suisse de référer au Tribunal fédéral la question de la compatibilité d'une norme interne suisse avec la CEDH. En revanche, si l'autorité compétente d'un canton refuse ou omet de prendre une mesure de caractère général (par exemple une modification de la législation cantonale) suite à un arrêt de la Cour, tout justiciable lésé peut, dans un cas d'espèce, recourir au Tribunal fédéral contre une telle omission pour violation du droit international et d'une norme constitutionnelle, dès lors que, comme on l'a vu dans les Considérations préliminaires, le Tribunal fédéral a reconnu un caractère constitutionnel aux garanties de la CEDH[41].

6. Rôle de la Cour suprême et de la Cour constitutionnelle

Le rôle du Tribunal fédéral est ici très important, à divers égards:

- Le Tribunal fédéral applique la jurisprudence de la CrEDH non seulement dans les affaires dirigées contre la Suisse, mais en général, c'est-à-dire aussi dans les affaires qui sont dirigées contre d'autres Etats et ont une incidence indirecte sur le droit suisse. Un exemple connu est celui de l'arrêt *De Cubber c. Belgique* du 26 octobre1984, à la lumière duquel le Tribunal fédéral a jugé qu'il est contraire à l'article 6 CEDH que, dans une procédure criminelle, une seule et même personne assume tout d'abord la fonction de juge d'instruction, puis celle de juge du fond[42]. En conséquence de cette décision du Tribunal fédéral, plusieurs cantons ont été amenés à amender leur Code de procédure pénale[43].
- Dès lors que le Tribunal fédéral, suivant la jurisprudence de la CrEDH (concernant également d'autres Etats), adopte l'interprétation établie par celle-ci, il va de soi que le traitement réservé par la plus haute juridiction à la jurisprudence de la CrEDH détermine également la façon dont les instances inférieures l'appliquent à leur tour.
- (c) Comme on l'a déjà relevé, le Tribunal fédéral a pour pratique constante de chercher avant tout à interpréter les dispositions du droit suisse de manière conforme à la CEDH et à la jurisprudence de la CrEDH, selon le principe dit de l'interprétation conforme[44]. Les exemples de cette pratique sont très nombreux[45].
- (d) Il arrive également, quoique rarement, que le Tribunal fédéral doive constater qu'il n'est pas possible d'interpréter une règle de droit fédéral d'une manière conforme à la CEDH, dans la mesure où cette règle ne laisse aucune marge d'interprétation. A moins que dans un tel cas, le Tribunal fédéral ne fasse prévaloir la norme CEDH, c'est-à-dire l'arrêt de la Cour[46], il arrive qu'il doive appliquer la règle interne en vertu des dispositions constitutionnelles[47], tout en constatant que dite règle interne pose problème par rapport à la CEDH. Un jugement de ce type, de la part du Tribunal fédéral, peut être compris comme un appel implicite au législateur, invitant ce dernier à se saisir de la question.
- (e) Comme on le sait, un arrêt de la CrEDH a un effet déclaratoire et non pas cassatoire. Lorsque la CrEDH constate qu'un arrêt du Tribunal fédéral n'est pas conforme à la CEDH, ce dernier arrêt ne s'en trouve donc pas invalidé pour autant. C'est pourquoi la loi fédérale sur le Tribunal fédéral prévoit à son article 122 que

40. Voir notamment l'arrêt *PKK* in ATF 125 II 417. Cf. Considérations préliminaires supra, n. 6. On observera qu'en vertu de l'art. 190 Cst., « *le Tribunal fédéral et les autres autorités sont tenus d'appliquer les lois fédérales et le droit international* » (RS 101). Sur le pouvoir du Tribunal fédéral d'examiner la conformité des lois fédérales avec la Constitution et avec le droit international (à ne pas confondre avec le pouvoir de juger ces questions), cf. Chiffre 6 (d) infra.
41. Art. 189, al. 1, lit. a et b Cst. (RS 101).
42. Cf. ATF Ia 294.
43. Berne, Valais, Fribourg et Grisons.
44. A noter que « *l'obligation d'interpréter le droit interne de manière conforme au droit international peut être déduite de l'art. 5, al. 3 et 4, de la Constitution (RS 101). Il s'agit du pendant, en droit interne, des obligations internationales consacrées aux art. 26 et 27 de la Convention de Vienne sur le droit des traités selon lesquelles tout traité doit être exécuté de bonne foi nonobstant le droit interne. Concrètement, cela veut dire que les autorités compétentes doivent, dès le processus législatif, veiller à dépister les incompatibilités potentielles du droit national avec le droit international et formuler les dispositions internes de mise en œuvre de manière à éviter, dans toute la mesure du possible, des complications supplémentaires au niveau international* » (cf. La relation entre droit international et droit interne, op. cit., FF 2010.13.2108). Le champ d'application personnel de l'obligation de faire une interprétation conforme au droit international s'étend non seulement au législateur fédéral, cantonal et communal, mais à toutes les autorités étatiques qui doivent, dans les limites de leurs compétences respectives, veiller à éviter que la Confédération n'engage sa responsabilité internationale en raison de la violation de ses engagements internationaux. Sous l'angle des conséquences pratiques, le respect des obligations internationales de la Suisse implique la mise en œuvre, sur le plan interne, des moyens propres à donner à ces engagements un effet optimal, tous les organes de l'Etat pouvant et devant concourir utilement à la réalisation des objectifs fixés dans ces traités (idem, FF 2010.13. 2108-9).
45. Voir en particulier l'arrêt *F.* du 18.12.1987, en lien avec l'art. 150 du Code civil (cf. supra n. 19).
46. Cf. Chiffre 5 supra.
47. Cf. art. 190 Cst. (n. 24 supra).

la révision d'un arrêt du Tribunal fédéral pour violation de la CEDH peut être demandée aux conditions suivantes: a) la CrEDH a constaté, dans un arrêt définitif, une violation de la CEDH ou de ses protocoles; b) une indemnité n'est pas de nature à remédier aux effets de la violation et c) la révision est nécessaire pour remédier aux effets de la violation. L'admission d'une demande de révision sortit un effet *ex tunc* et non *ex nunc*[48]. Dans l'esprit du législateur suisse, cette disposition est la suite logique de l'obligation faite aux Etats parties à la CEDH, à l'article 46, paragraphe 1 CEDH, de se conformer aux arrêts de la CrEDH. Cela signifie que malgré l'existence éventuelle d'une norme de droit fédéral contraire, la norme CEDH doit être appliquée. La primauté de principe des garanties de la CEDH en Suisse s'en trouve ainsi confirmée[49].

7. Amendements constitutionnels requis par un arrêt de la Cour EDH

A ce jour, aucun arrêt de la CrEDH n'a rendu nécessaire un amendement de la Constitution fédérale. Le principe de l'interprétation conforme a trouvé application jusqu'ici. On rappellera par ailleurs que selon la jurisprudence du Tribunal fédéral, les garanties de la CEDH ont un caractère constitutionnel et sont placées, d'un point de vue procédural, sur un pied d'égalité avec les droits constitutionnels[50].

D'un point de vue général, il est clair pour les autorités suisses que deux principes sont applicables dans un tel cas de conflit : (1) Sur le plan du droit international public : si la CrEDH constate qu'une disposition constitutionnelle d'un Etat partie à la CEDH n'est pas compatible avec cette dernière, la responsabilité internationale dudit Etat est engagée au titre de la CEDH en vertu du principe *pacta sunt servanda*. L'Etat en question doit donc amender son droit interne pour le mettre en accord avec la convention. Il ne saurait, en vue de se soustraire à une telle obligation internationale dans une procédure d'exécution relevant du droit international comme la procédure devant le Comité des Ministres, invoquer le fait que selon son droit interne, une norme constitutionnelle aurait par hypothèse un rang supérieur à celui d'une norme du droit international[51]. (2) Sur le plan du droit constitutionnel interne: dans le cas de la Suisse, la Constitution fédérale ne peut être amendée que dans le respect de la procédure constitutionnelle prévue à cet effet. C'est ainsi qu'une modification de la Constitution fédérale ne peut valablement entrer en vigueur que si elle est acceptée par la majorité du peuple et des cantons[52] ; en l'absence de cette double majorité, la question doit être réexaminée jusqu'à ce qu'une solution soit trouvée qui permette à la Suisse de se mettre en conformité avec la Convention.

Conclusion

On peut dire en conclusion que jusqu'ici, l'exécution des arrêts de la CrEDH n'a pas posé en Suisse de problèmes particuliers. Cela vaut sur le plan cantonal aussi bien que fédéral. Relativement peu d'affaires ont appelé des modifications législatives. Aucune affaire répétitive n'est à relever. Un examen de la pratique du Comité des Ministres vis-à-vis de la Suisse montre que dans une majorité de cas, les obligations de la Suisse au titre de l'article 46, paragraphe 1 CEDH ont été considérées par le Comité comme remplies, sans modification de loi ou de pratique, par le seul fait que les autorités concernées avaient été informées de l'arrêt de la Cour, que celui-ci avait été publié et que la Suisse avait déclaré que les arrêts de la CrEDH sont directement applicables en Suisse et qu'ils lient les autorités chargées d'appliquer le droit.

Pour ces raisons, la Suisse n'a pas ressenti le besoin de mettre sur pied une procédure formelle pour l'exécution des arrêts de la CrEDH. Elle s'en tient à cet égard à une approche pragmatique, laquelle s'est avérée être généralement dans l'intérêt de toutes les parties concernées.

48. Cf. HOTTELIER, op. cit., p. 571-2 : « *Le Tribunal fédéral et les parties sont par conséquent replacés dans la situation où ils se trouvaient au moment où l'arrêt annulé a été rendu. La cause est alors tranchée comme si cet arrêt n'avait pas existé.* »
49. Cf. AEMISEGGER, op.cit., p. 4 ss.
50. Cf. Considérations préliminaires supra, notamment l'arrêt *Diskont- und Handelsbank* du 19 mars 1975, ATF 101 Ia 67, consid. 2c.
51. Cf. La relation entre droit international et droit interne, op. cit., FF2010.13.02091.
52. Cf. art. 192 ss. Cst. (RS 101).

The legal stances of the Constitutional Court of the Russian Federation on the issue of implementing the European Convention on Human Rights

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The adoption by the Constitutional Court of the Russian Federation of Judgment no. 21-P[53] of 14 July 2015 reviewing the constitutionality of the provisions of Article 1 of the Federal Law "Ratifying the Convention for the protection of human rights and fundamental freedoms and the Protocols thereto" and a set of other legal provisions contained in various procedural codes of the Russian Federation caused quite a stir among certain national and international media, as well as individual officials and law specialists, a number of whom saw it as a public refusal proclaimed by the Constitutional Court to accept judgments of the European Court of Human Rights[54] as binding in respect of Russia and, as a result, opening up the possibility of their selective execution on the basis of corresponding Constitutional Court decisions.

Concerning that view, I would like to provide some explanations, based solely on legal arguments, of the substance of the legal stances taken up by the Constitutional Court of the Russian Federation on the implementation in Russia's legal system of both the actual provisions set out in the European Convention[55] for the protection of human rights and fundamental freedoms and the ECHR's judgments interpreting them in applications lodged against Russia.

I would like to begin with the broadly positive statement that Russia's Constitutional Court, perhaps like no other constitutional court in Europe, has made a multitude of efforts, through its constitutional supervision, to promote the norms set out in the European Convention and the ECHR judgments interpreting them in the area of practical application within the framework of the Russian Federation's legal system. This point in particular has repeatedly been made by the President of Russia's Constitutional Court, V.D. Zorkin, in his statements on this question.

53. In the case reviewing the constitutionality of the provisions of Article 1 of the Federal Law "Ratifying the Convention for the protection of human rights and fundamental freedoms and the Protocols thereto", paragraphs 1 and 2 of Article 32 of the Federal Law "On the international treaties of the Russian Federation", paragraphs 1 and 4 of Article 11 and sub-paragraph 4 of paragraph 4 of Article 392 of the Code of Civil Procedure of the Russian Federation, paragraphs 1 and 4 of Article 13 and sub-paragraph 4 of paragraph 3 of Article 311 of the Code of Commercial Procedure of the Russian Federation, paragraphs 1 and 4 of Article 15 and sub-paragraph 4 of paragraph 1 of Article 350 of the Code of Administrative Procedure and sub-paragraph 2 of paragraph 4 of Article 413 of the Code of Criminal Procedure of the Russian Federation in connection with the application lodged by a group of deputies of the State Duma.
54. Hereinafter – the ECHR.
55. Hereinafter – the European Convention.

For proof that our Constitutional Court is in principle well disposed to implementation of the European Convention's provisions and the ECHR judgments based on it, we only have to look at one of the Constitutional Court's decisions of fundamental importance for the Russian Federation's legal order formulating a general legal stance on this point. I am referring to Judgment no. 4-P of the Constitutional Court of the Russian Federation of 26 February 2010 in the case reviewing the constitutionality of paragraph 2 of Article 392 of the Code of Civil Procedure of the Russian Federation in connection with complaints lodged by a number of citizens[56], in which the Constitutional Court stated that the presence in Russia's legal system of procedures for reviewing court judgments having entered into legal force and found to have violated the European Convention on Human Rights serves the purpose of a compulsory measure. As the practical implementation of such a measure is geared to applying the provisions of that Convention and results from its Article 46 taken in conjunction with Articles 19, 46 and 118 of the Russian Federation Constitution, it requires legislative consolidation of machinery for executing final decisions of the European Court and adequately restoring the rights found by the European Court of Human Rights to have been violated.

It must be said that our federal legislator fully subscribes to this approach to executing ECHR decisions and applying the European Convention in practice, as demonstrated by its creation of special procedural machinery for remedying specific violations of the European Convention's provisions in practice, using the construct of new facts which enables Russian courts to review the cases of applicants to the European Court of Human Rights who are found to be the injured party, or victim, having suffered a violation of their rights. Corresponding legal provisions establishing such machinery can now be found in all the procedural codes applicable in Russia, each of them intended to guarantee the possibility of review of Russian court decisions previously pronounced against an applicant and having entered into legal force.

The introduction of the institution of review of court decisions on the basis of ECHR judgments into Russia's legal system demonstrates, in my eyes, a generally positive attitude on the part of the Russian Federation to the binding nature of the European Convention it ratified and the ECHR judgments based on that instrument's provisions.

As we know, in addition to establishing the actual violation of specific provisions of the European Convention in a resolutive section, such judgments also generally grant the payment of just satisfaction under Article 41 of the Convention, imposed as a kind of individual measure in respect of the respondent State's liability as the guilty party vis-à-vis the injured party having suffered the violation.

It must be pointed out in this connection that the Russian Federation always has and does unconditionally fulfil such European Court decisions, the sole exception being a decision pronounced by the ECHR in 2014 in the case of "*OAO Neftyanaya Kompaniya Yukos v. Russia*", which in fact disregarded the just judgment of the Russian court in this case and granted an unprecedented amount of compensation to be paid to an unidentified circle of individuals lumped together under the notion of "shareholders of the applicant company", despite them not even having been the subjects of the corresponding application to the ECHR.

I would additionally point out that execution of the European Court's judgments requires one further circumstance to be taken into account. In practice, when adopting such judgments finding violations of the European Convention and stipulating specific individual measures with regard to payment of so-called just satisfaction to the injured party, the European Court fairly often comes up with innovative and creative interpretations in its analysis of various provisions of the Convention, except that, not long afterwards in historical terms, these interpretations sometimes quite radically change in content. Naturally, the Russian Federation had no way of knowing about this at the time of ratifying the European Convention. Nevertheless, when interpreting specific provisions of the European Convention in this way, the European Court frequently concludes that, in addition to individual measures, the respondent State must also adopt certain general measures aimed at preventing similar violations of the Convention in future with respect to anyone else who might find themselves in the same situation as the applicant. Being of a general nature, those measures usually call for certain rectifications in the respondent State's legal system, which can usually be effected by making the necessary amendments to the country's routine laws but, in some cases, as with the judgment in the case of "*Anchugov and Gladkov v. Russia*" in 2013, executing such measures actually requires amendments to the Russian Federation Constitution itself.

In the light of this practice, 93 State Duma deputies applied to the Constitutional Court of the Russian Federation in particular with regard to the constitutionality of the provisions of Article 1 of the Federal Law "Ratifying the Convention for the protection of human rights and fundamental freedoms and the Protocols thereto",

56. In the case reviewing the constitutionality of paragraph 2 of Article 392 of the Code of Civil Procedure of the Russian Federation in connection with complaints lodged by A.A. Doroshok, A.Ye. Kot and Ye.Yu. Fedorova. – *Konstitutsionnyy Sud Rossiyskoy Federatsii. Postanovleniye. Opredeleniye/Конституционный Суд Российской Федерации. Постановления. Определения* (judgments and rulings of the Constitutional Court of the Russian Federation). 2010 , Comp. ed O.S. Khokhryakova. M., 2011. P.68-83.

recognising the jurisdiction of the European Court of Human Rights as binding in matters concerning the interpretation and application of the Convention and its protocols in the event of a violation of the provisions of those treaty instruments by the Russian Federation, if the alleged violation took place after their entry into force in respect of the Russian Federation.

When ruling on this case, and on a previous case (in 2013) at the request of the presidium of the military court of the Leningradskiy military district (Judgment no. 27-P of 6 December 2013[57]), the Constitutional Court of the Russian Federation based its position exclusively on a constitutional law rationale, leaving it relatively little latitude to formulate its views on the issue.

The scope for the Constitutional Court of the Russian Federation to rule on questions of the constitutionality of specific measures of an individual or general character proposed by the ECHR to remedy what it sees as violations of the European Convention's provisions arises above all from the stipulation that the Russian Federation Constitution wields supreme legal force throughout the territory of our country (Article 15 paragraph 1 of the Russian Federation Constitution). Naturally, that supreme legal force of the Russian Federation Constitution is exercised within the limits of Russia's legal system, which, alongside the laws and various other legal and regulatory acts of the Russian Federation and its constituent entities, incorporates, as component parts, the universally recognised principles and norms of international law and also the international treaties ratified by the Russian Federation which, of course, include the Convention for the protection of human rights and fundamental freedoms and ECHR judgments interpreting its provisions. But once the supreme legal force of the Russian Federation Constitution extends to the entire Russian legal system as a whole, it is also applicable in respect of each of its component parts, including those formed by the Russian Federation's international treaties included in it by virtue of instruments of ratification, not excluding, of course, the Convention for the protection of human rights and fundamental freedoms and the ECHR judgments based on it.

This, in my opinion, is the only possible logical conclusion to be drawn from analysis of Article 15 of the Russian Federation Constitution but it nevertheless has its detractors who claim that the Russian Federation's international treaties take precedence within the Russian legal system since, in Article 15 paragraph 4 of the Constitution, it is directly stipulated that: "if an international treaty of the Russian Federation establishes rules which differ from those stipulated by law, then the rules of the international treaty shall apply".

From this there logically follows, in their opinion, a further argument that the aforementioned rules of the international treaty enjoy priority over the Russian Federation Constitution too, which means that it is impossible for Russia to not execute both the provisions of those very international treaties and the decisions regarding compliance with them taken by inter-state bodies, including international judicial bodies, by having those decisions declared unconstitutional, including by the Constitutional Court of the Russian Federation. On the practical level, this inference naturally concerns first and foremost the provisions of the Convention for the protection of human rights and fundamental freedoms and the ECHR judgments based on it.

However, this line of reasoning does not find the backing it needs in our Constitution. Firstly, it would seem, because a straightforward logical analysis of Article 15 of the Constitution clearly reveals the fairly rigid hierarchy of its first paragraph and all the following paragraphs; being placed first, the first paragraph of Article 15 definitely gives it a general character in relation to all the subsequent paragraphs and the supreme legal force of the Russian Federation Constitution declared by it therefore also acquires the character of a general principle within the framework of the Russian legal system that allows no exceptions, which, incidentally, is borne out by the text of all the other articles in the Russian Federation Constitution, as these contain no clearly expressed stipulations on this point.

In my opinion, this must mean only one thing: the creators of the Russian Federation Constitution quite definitely gave the first paragraph of Article 15 peremptory value, making the principle of the supreme legal force of the Russian Federation Constitution applicable to any component part of Russia's legal system mentioned in all the other articles of the Constitution, including in the other paragraphs of Article 15 itself and, of course, its fourth paragraph. It follows that all of the Russian Federation's international treaties forming a component part of its legal system pursuant to Article 15 paragraph 4 of the Russian Federation Constitution may be applicable within that system only if they too are subordinate to the supreme legal force of the Russian Federation Constitution.

57. In the case reviewing the constitutionality of Article 11 and sub-paragraphs 3 and 4 of paragraph 4 of Article 392 of the Code of Civil Procedure of the Russian Federation in connection with the application of the presidium of the military court of the Leningradskiy military district. – *Konstitutsionnyy Sud Rossiyskoy Federatsii. Postanovleniye. Opredeleniye/Конституционный Суд Российской Федерации. Постановления. Определения* (judgments and rulings of the Constitutional Court of the Russian Federation). 2010 , Comp ed. O.S. Khokhryakova. M., 2013. pp. 493-502.

However, since the Russian Federation's international treaties have priority over the country's laws pursuant to that self-same paragraph 4 of Article 15 of the Constitution, those treaties, just like the decisions of the competent inter-state bodies interpreting their provisions, must be situated within Russia's legal system in terms of the scope of their legal force below the level of the Russian Federation Constitution and the decisions and legal stances of the Constitutional Court of the Russian Federation based on the Constitution and, accordingly, take up an intermediate position between the Constitution and Constitutional Court decisions interpreting it on the one hand and Russia's federal laws on the other hand, as it is over federal laws that they enjoy priority within our legal system in accordance with Article 15 paragraph 4 of the Russian Federation Constitution. As it happens, this casts our legal system in a more favourable light in terms of implementing the European Convention's provisions than, say, the German system, where, according to the legal stance of the German Federal Constitutional Court stated in the *Görgülü* case, the Convention's provisions do not have priority over laws but are merely equivalent to them as, *de facto*, they acquire no more than the status of a federal law within the German legal system. In the Russian system on the other hand, this source of legal regulation is given priority over federal laws, including, it must be assumed, federal constitutional laws too.

However, that level of priority is in no way assigned within the framework of Russia's legal system to the European Convention's provisions and the ECHR's judgments interpreting them where the Russian Federation Constitution and the Constitutional Court's interpretative judgments are concerned, if only because, in a strictly legal sense, neither the Russian Federation Constitution nor the Constitutional Court's decisions equate to federal constitutional laws and even less so to routine federal laws.

This assertion is based firstly on the fact that, in the text itself, the Constitution is categorically not referred to by any form of wording including the word "law", which is a departure from previous times, by the way, when it was referred in our country as the basic law. But even if it was termed as such today, in the hierarchy of legal and regulatory acts making up Russia's legal system it would still find itself at the apex of that system in reality, in the position exclusively reserved for it. Accordingly, even in such a case, in terms of legal force, absolutely all the legal system's other parts or components would, once again, only be ranked below the Constitution, as is currently the case in our system.

This means that, at present, there is no basis in constitutional law for arguing that, within Russia's legal system, the Russian Federation Constitution and the Constitutional Court's interpretative judgments have lesser legal force in comparison to the European Convention and the ECHR judgments based on it.

However, it cannot go unmentioned that this line of reasoning and the resulting conclusions have their opponents too, who put forward a counter-argument founded, as they see it, on the provisions of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations[58]. They point to Article 46 paragraph 1 of that Convention, which stipulates that a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent. However, it must be pointed out that paragraph 1 does not stop there, but goes on to say, I quote: "unless that violation was manifest and concerned a rule of its internal law of fundamental importance".

No one can really doubt that in the Russian Federation Constitution and, indeed, in other States' constitutions, there are precisely such norms of fundamental importance, and for that reason the international treaties themselves and the decisions of the competent intergovernmental bodies interpreting them cannot and must not encroach upon the constitutional norms of any sovereign State whatsoever, including, of course, Russia.

It should further be pointed out that the third paragraph of Article 46 of the Vienna Convention provides that a violation is manifest if it would be objectively evident to any State or any international organisation conducting itself in the matter in accordance with the normal practice of States and, where applicable, of international organisations and in good faith. On top of this, paragraph 1 of Article 31 of the Vienna Convention lays down a general rule on the necessity of interpreting a treaty in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

On the basis of these international law provisions, the Constitutional Court of the Russian Federation logically concluded in part 3 of the analytical section of its Judgment no. 21-P of 14 June 2015 that, as follows from Article 46 paragraph 1 of the Vienna Convention, a State is entitled to block the effects exerted on it by individual provisions of an international treaty, by invoking the circumstances that its consent to be bound by that treaty was expressed in violation of a given provision of its domestic law relating to competence to

58. Concluded in Vienna on 21.3.1986 – See the international public law collection: *Mezhdunarodnoye publichnoye pravo. Sbornik documentov (Международное публичное право. Сборник документов)*. Vol.1. 1996. pp 87-113.

conclude treaties, if that violation was manifest and affected a particularly significant norm of domestic law, which includes provisions of the Russian Federation Constitution whose violation is undoubtedly manifest by virtue of being evident to any international law entity conducting itself in the matter in good faith and in accordance with the normal practice of States.

The Constitutional Court of the Russian Federation further pointed out that an international treaty is binding for its participants only within the meaning that may be clarified with the aid of rules introduced for its interpretation. From that point of view, if the European Court of Human Rights, when interpreting any given provision of the Convention for the protection of human rights and fundamental freedoms while examining a case, assigns a meaning to a notion in the Convention other than its ordinary meaning or produces an interpretation that is contrary to the Convention's object and purpose, then the State against which the ruling is made is entitled to derogate from its execution, which goes beyond the scope of the obligations voluntarily entered into by that State when ratifying the Convention. Accordingly, a European Court of Human Rights judgment cannot be considered binding for execution if, as a result of the interpretation of a specific provision of the Convention for the protection of human rights and fundamental freedoms on which the given judgment is based in violation of the general rule governing the interpretation of treaties, the meaning of that provision departs from the imperative norms of general international law (*jus cogens*), which include without question the principle of sovereign equality and respect for the rights inherent to sovereignty, as well as the principle of non-interference in the internal affairs of States.

Accordingly, the provisions of the Convention for the protection of human rights and fundamental freedoms as interpreted by the judgments of the European Court of Human Rights can and must be incorporated in Russia's legal system but may have effect within it only on condition of them being subordinate to the supreme legal force of the Russian Federation Constitution, which rules out any possibility of execution, on our country's territory, of judgments which contain provisions contrary to the Russian Federation Constitution and to Constitutional Court judgments interpreting that instrument and which, thereby, disregard their supreme legal force as a universally binding constitutional principle with mandatory application within Russia's legal system.

The Joint Committee on Human Rights as a model Parliamentary monitoring mechanism

Michael O'Boyle
Deputy Registrar, European Court of Human Rights (2006-2015)

Good morning ladies and gentlemen,

I should say from the outset that I have been asked at the eleventh hour by the organisers of this Conference to take the place of the UK human rights expert, Mr. Murray Hunt, who is the legal adviser to the UK's Joint Committee On Human Rights (JCHR) and who, unfortunately, has had to withdraw from this meeting at the last moment. This, of course, is a tall order and, while I will not be able to come close to Mr. Hunt's recognised knowledge and competence about the Joint Committee, I propose to limit myself to some general remarks about the implementation of Court judgments, the parliamentary dimension of the concept of joint responsibility for the protection of Convention rights and the role of the Joint Committee in the implementation of ECHR judgments against the UK – a matter that Mr. Hunt addresses in his written contribution with greater sharpness and precision. For those that seek a crisp account of UK practice concerning the implementation of judgments it is to Murray Hunt's written contribution that you must look above all else.

We can all agree that implementation of the Court's judgments is critical to the integrity and credibility of the ECHR system as a whole. Yet when general measures are required by a Court judgment as in a certain number of cases - implementation may be a difficult and complex exercise requiring the consultation and agreement of a large number of state actors as well as much diplomatic skill and patience deployed in a process of dialogue. As the former PACE Rapporteur, Erik Jurgens, has pointed out: "The ECHR mechanism does not operate in a legal vacuum: the Court's judgments are implemented and translated into real life through a complex legal and political process which involves a number of domestic and international institutions".

When he speaks of international bodies he is referring to the Committee of Ministers but also the Parliamentary Assembly of the Council of Europe (through its Committee on Legal Affairs and Human Rights (CLAHR)). But he also refers to the role of national bodies and he does not limit himself to the executive but also includes the national parliaments which have an important supervisory role to play.

My second general point relates to the growing concern about the "implementation gap" that afflicts international human rights law: a sense that the priority is no longer standard-setting or devising adequate mechanisms for monitoring states' performance against those standards, but finding ways to ensure that states give effect to those norms at the national level. This is the essence of the concept of subsidiarity. As Murray Hunt has observed the real challenge lies in finding the most effective levers in the national system for securing the necessary changes in law, policy or practice which will give practical effect to human rights commitments.

We must face up to the reality that, even in the highly developed ECHR system, implementation of the Court's judgments has become problematic, when judgments concern sensitive national interests and the national authorities manifest a reticence to implement them, notwithstanding their clear international legal obligation to do so.

My third general remark relates to the concept of joint responsibility. As has been recognised by both the Court in Strasbourg, and by the States in the Brighton and Brussels Declarations, the protection of human rights involves a joint responsibility between both national and international actors. This concept encompasses not only the notions of subsidiarity and margin of appreciation but also involves an almost constant dialogue between the Strasbourg Court and national institutions, in particular the national superior courts but also the executive and legislative branches of government. But the notion of joint responsibility for the protection of Convention rights also applies at the national level where all three branches of government have a shared responsibility for ensuring the protection of human rights including the observance of adverse Court judgments. This is perhaps a dimension that international actors have paid scant attention to and one that calls for full attention at this conference on the exploration of innovative and effective national mechanisms of implementation. It involves the same requirement of constant dialogue as at the international level and, as we can see from recent notorious examples of failure to execute Court judgments, is also intimately bound up with the essential requirement of putting the legitimacy of an international system for human rights protection on a sound footing and countering the critique that democracy is being subverted by courts and that the democratic will of Parliament is being thwarted by the decisions of unelected and and unaccountable judges applying human rights laws. It is noteworthy, and perhaps a little comforting to international actors, that this critique is also directed at national superior courts.

However it is clear that for a national system of implementation to function well all three branches of Government - executive, legislative and judicial - must work towards a common goal when exercising their different but complementary functions. When the executive branch lacks political will to implement a judgment it is unlikely that this can be brought about by the other two acting in concert although they will certainly have their role to play in seeking to persuade and cajole the executive to do what is required of a rule of law state.

This brings me conveniently to the Parliamentary oversight mechanism that exists in the UK – the JCHR - that was brought into being by Parliament in 2001.

The JCHR has over the years developed into a Parliamentary human rights oversight body. It screens all Government Bills and picks out those with significant human rights implications for further examination. The Committee also looks at Government action to deal with judgments of the UK courts and the European Court of Human Rights where breaches of human rights have been found.

The work of the JCHR has become a familiar and settled part of the UK human rights landscape and has earned an excellent reputation for the quality of its reports within the legal community and beyond.

The Committee has twelve members, six from the Lords and six from the Commons. It has a permanent legal adviser. The party-political composition of the Committee mirrors broadly the party-political composition of each House, but the Chair of the Committee does not have to be a member of the governing party.

It enjoys the reputation of acting in a bipartisan fashion notwithstanding its composition. This is not the place to seek to give a full account of all its activities. Murray Hunt's report provides an excellent account of how it interacts with Government Departments. But let me highlight some of its most important features.

The JCHR has three overarching and interrelated aims:

- to enhance the protection of human rights within the parliamentary process and in the UK generally;
- to increase the accountability of the Executive to Parliament for human rights issues; and
- to improve the quality of deliberation about human rights issues during the legislative process.

The achievement of these aims involve a pre-legislative scrutiny of all Bills going through Parliament with a view to selecting and commenting on those which raise significant human rights issues. Needless to say for this work to be effective it is important that the Committee expresses its views at an early stage of the legislative process since the opportunities to affect the outcome once the Bill is introduced on the floor of the house are limited.

Alongside its ongoing scrutiny of bills which come before Parliament, the JCHR carries out broader thematic inquiries on topics with important human rights implications. It has carried out such inquiries in areas such as deaths in custody, human trafficking and counter-terrorism policy and human rights.

The Committee also monitors the Government's response to Court judgments pressing the Government to reveal how it plans to respond to ECHR judgments.

It has drawn up "Guidance for Departments on Responding to Court Judgments on Human Rights (that can be consulted on the Committee's web site) that reflects the good practices that have developed between Government Departments and the JCHR.

Government Departments - when they draw up an Action Plan in response to an adverse judgment - are advised by government to include brief references and links to any relevant reports on general measures such as reports by the JCHR or other independent scrutiny bodies such as the Independent Reviewer of Terrorism Legislation. The inclusion of this guidance is the result of criticism by the JCHR in its reports on the Government's response to the Court's judgment in *Gillan v UK*[59], in which it criticised the Government for failing to draw to the attention of the Committee of Ministers the fact that both the JCHR and the Independent Reviewer of Terrorism Legislation had expressed reservations about the adequacy of the Government's general measures in response to the Court's judgment.

The trigger for the process of adoption of general measures is largely internal to Government: it depends on the lead department identifying the measures which are necessary to comply with the judgment. The Ministry of Justice plays a light co-ordination role. The JCHR has developed the role of scrutinising the adequacy and timeliness of the department's response. Initially this was done largely by correspondence between the Committee and the relevant Government department, with occasional reports by the JCHR on the scrutiny it had been conducting. The practice has now evolved to the point where the Government provides an annual report to the JCHR on its response to court judgments, including judgments of the European Court of Human Rights[60].

The JCHR's scrutiny of the Government's responses takes a variety of forms. It may ask the Minister responsible for human rights oral questions about the Government's report during its (roughly) annual evidence session with that Minister, or correspond with the relevant lead department about the response to particular judgments if necessary.

It also actively invites representations from interested parties (NGO'S with expertise in human rights/academics/ relevant charities/ or persons who may be affected by a bill).

The JCHR sometimes recommends amendments to Government Bills in order to comply with judgments of the European Court of Human Rights. It also reports on the Government's responses to court judgments, but less frequently than it formerly did: in the 2010-15 Parliament it published one report on human rights judgments, towards the very end of the Parliament[61].

Some legal commentators have noted that the Committee is in fact seeking to develop in Parliament a "culture of rights" (sometimes referred to as "human rights mainstreaming") and a culture of justification. A culture of rights in the sense that Parliament must take into consideration the human rights dimension when formulating policy and enacting legislation and a culture of justification in that ministers and government should give reasons for their policies and legislative proposals and, in particular, be willing to justify them in terms of human rights. This is the requirement that the Government should demonstrate its 'human rights reasoning' against the background not just of the ECHR and its jurisprudence but international human rights law in general. Both of these aims are instrumental to the ultimate aim of enhancing the protection of human rights within the UK parliamentary process.

I conclude with an observation that I mentioned earlier about the necessity of political will in all branches of government for such oversight mechanisms to function effectively. It is clear from research that has been carried out in the UK that there has been a dramatic increase in reference to the reports of the JHCR by parliamentarians and that its reports are playing an increasingly important role in parliamentary debates. This is a healthy sign that the level of human rights awareness in Parliament is on the increase.

As a Parliamentary human rights monitoring body the JCHR is worthy of study and perhaps emulation by other states and PACE has consistently recommended that some form of supervisory body should be set up in all member states in accordance with their legal and constitutional traditions.

On the issue of prisoner voting the JCHR has consistently pressed the Government to introduce legislation giving effect to the Court's judgment in the *Hirst* case[62]. However neither the executive nor Parliament have been prepared to give weight to its arguments. But, as we can all appreciate, this is not a failing of the JCHR but of Government policy generally - proving the old adage that "you can bring a horse to water but you cannot make it drink".

Thank you for your attention.

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59. Gillan and Quinton v UK, ECtHR, judgment of 12 January 2010.
60. *Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2013-14* (December 2014) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389272/responding-to-human-rights-judgments-2013-2014.pdf.
61. Seventh Report of 2014-15, *Human Rights Judgments* (March 2015) http://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/130/130.pdf.
62. Hirst v UK (no.2), ECtHR, 6 Sepember 2005.

Legal axiology in the machinery for implementing the requirements of the European Convention

Nikolay Bondar
Judge of the Constitutional Court of the Russian Federation

With all the diversity of both theoretical legal methods and the concrete case-law of individual States that exists for integrating international legal standards into national legal systems, including the European *Convention on Human Rights (hereinafter - the European Convention), the key point is that the implementing institution ultimately has an axiological, value-conscious basis. That* much is quite clear: without taking account of national historical and socio-cultural values in their correlation with the universally recognised principles and norms of international law and the general democratic values reflected in them, in principle it is impossible to implement international legal standards in a national legal system.

Moreover, it is already a value judgment in itself when a State opts for international legal cooperation, embracing recognition of the jurisdiction of supranational judicial bodies and common limits for the acceptance of universally recognised principles and norms of international law by the national legal order, as indeed is the choice of concrete means for taking on board and implementing a given principle, international law standard or rule of the European Convention, including as interpreted by the European Court of Human Rights (hereinafter – the ECHR), in the application of domestic law.

1. Given the very *role of judicial bodies in the implementation machinery*, and also the specific characteristics of that form of state authority activity geared to adapting international law standards to the domestic legal order, *the question of legal axiology as an instrument for implementing the norms of international law in the domestic legal system* seems very pertinent.

Legal axiology approaches as a tool for legal implementation function across the board: the legal positions developed by supreme judicial bodies are binding for both executive and, importantly here, legislative authorities. This means that a judgment of a judicial body responsible for constitutional supervision may be the first step towards taking a general measure and, accordingly, the implementation of a given norm of the European Convention in national legislation. One example is Constitutional Court of the Russian Federation judgment no. 4-P of 27 February 2009, which was noteworthy in that, even before the case had been examined in the Constitutional Court, the ECHR examined the complaint by the same applicant (P.V. Shtukaturov) and, having ruled in their favour, indicated the necessity, in a list of general measures, of improving national legislation in this respect and bringing it into line with the Convention's requirements. In turn, the Constitutional Court of the Russian Federation declared that the norms challenged, linked to the possibilities of legal protection for the rights of incapable individuals, were unconstitutional, agreeing with the line taken by the ECHR, and this was duly implemented in legislation. Through that decision the

Constitutional Court became a driving force and key component of the state machinery for implementing the corresponding international law standards developed by the ECHR[63].

At the same time, while there has been a significant increase in the extent and quality of the judiciary's involvement in legal implementation, there is every reason for a certain *demarcation of the functional role of the different courts in the machinery for implementing the European Convention's requirements*.

Accordingly, general courts and commercial courts are geared, first and foremost, to implementing specific ECHR judgments within the framework of the established mechanism for reviewing judicial acts in the light of new circumstances. The corresponding legal provisions are to be found in procedural legislation - Article 311 paragraph 2 sub-paragraph 4 of the Code of Commercial Procedure of the Russian Federation, Article 392 paragraph 4 sub-paragraph 4 of the Code of Civil Procedure of the Russian Federation, Article 413 paragraph 4 sub-paragraph 2 of the Code of Criminal Procedure of the Russian Federation and Article 350 paragraph 1 sub-paragraph 4 of the Code of Administrative Procedure of the Russian Federation. However, this does not rule out heavier involvement on their part: if court examination uncovers circumstances that are conducive to violations of civil rights and freedoms guaranteed by the Convention, then, as pointed out in paragraph 11 of the Russian Federation Supreme Court Plenum judgment of 10 October 2003, the court may pronounce a special ruling (or judgment), drawing the attention of the relevant organisations and officials to the violation of conventional rights and freedoms and the circumstances, calling for the necessary steps to be taken[64].

There is no doubt however that it is constitutional justice that plays a special role in the judicial machinery for the legal implementation of requirements under the European Convention, chiefly as a result of its specific legal nature. In objective terms, by the very nature of its activity and the characteristics of the legal force of its judgments, the Constitutional Court, having been institutionally designed as a jurisdictional authority enforcing the law, is becoming increasingly closer in its overall legal characteristics to normative/declaratory practice – and this is ever more manifest where contemporary case-law is concerned. In this respect, the Constitutional Court has the characteristics of a quasi-law-making body, which nevertheless takes nothing away from its statutory capacities as a full judicial body.

In declaring a given norm unconstitutional, the Constitutional Court deprives it of its legal force (Art. 79 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation"), in other words it has the effect of repealing it. From this it follows that the corresponding judgment of the Constitutional Court has the attributes of a normative act aimed, as we know, at establishing or amending or repealing legal norms or altering the scope of their effects. Moreover, the Constitutional Court acts as a kind of generator of constitutional law energy, ensuring in particular the "alignment" in constitutional justice of norms of sectoral legislation (and the practice in applying it that has developed), in other words the impact of judicial supervision on sectoral legislation through constitutional interpretation in order to bring it into line with the requirements of constitutional principles and values without impinging on the letter of the law.

So it is a role of constitutional guide, integrating international law standards in national legal systems, that is frequently fulfilled by judicial bodies, including courts of jurisdictional supervision, tasked with guaranteeing compliance with and implementation of norms and principles of international law, including by calling national states to account for breaches of international/treaty obligations. When we look at the level of integration attained by the European legal area, it has to be recognised that it is those court and jurisdictional processes that play an all-but decisive role where the prospects of forging European constitutionalism are concerned.

2. *What lies at the basis of the axiological approaches of the Constitutional Court of the Russian Federation* particularly with regard to the European Convention? When answering this question, we must take account of the fact that constitutional law practice, whether when rejecting acts and norms or in its law-making, normative role, is exercised on the basis of the systematic realisation of the normative potential of the Russian Federation Constitution, including the provisions of Article 15 paragraph 4. The practice of Russian constitutional justice shows that the Constitutional Court of the Russian Federation consistently values the European Court's judgments and interpretative case-law as an asset in terms of doctrine and of the country's own law, both for law enforcement and for standard-setting and implementation.

At the heart of its axiological approaches there is a *recognition of the fundamental equivalence of the legal nature of convention-based and supranational constitutional rights*. This is precisely the methodologically significant

63. See Constitutional Court of the Russian Federation judgment no. 4-P of 27.02.2009 // Compendium of legislation of the Russian Federation 2009. no. 11. Art. 1367.
64. Russian Federation Supreme Court Plenum judgment no. 5 of 10.10.2003 (as per version of 5.03.2013) "On the application by general courts of universally recognised principles and standards of international law and international treaties of the Russian Federation "// Rossiiskaya Gazeta. 2003. 2 December. No. 244.

conclusion arrived at by the Constitutional Court, implying not only the importance of the Convention for administering national constitutional supervision (which is also important in itself) but also *de facto recognition of the constitutional nature of convention-based rights and freedoms in their relationship with national human rights institutions*. It was perhaps the first time that a national constitutional justice authority in Europe (in the form of the Constitutional Court of the Russian Federation) had made such a decisive conclusion on the legal nature of the rights and freedoms set out in the Convention when it was stated: "… The human and civil rights and freedoms recognised by the Convention for the protection of human rights and fundamental freedoms are, in essence, the same as the rights and freedoms enshrined in the Russian Federation Constitution"[65].

The Constitutional Court then goes on to draw another, no less fundamental, conclusion: "Confirmation of the violation of those rights, by the European Court of Human Rights and the Constitutional Court of the Russian Federation respectively – by virtue of the general nature of these bodies' legal status and purpose – makes it possible to deploy a single institutional mechanism for executing the decisions taken by them in order to fully restore the rights that have been violated".

This confirms the fact that what is taking place here is not only the direct influence of international/European human rights protection institutions on national constitutional systems but also a kind of *constitutionalisation of universally recognised principles and norms of international law*, and on that basis, the permeation of domestic legal/constitutional elements into the sphere of international relations determining, in particular, the European constitutional area.

As interaction broadens between the national legal system and sources of supranational law, and European Convention case-law permeates more strongly into it, this is bound to bring with it conflicts over values, clashes and contradictions that may take on the most acute and fundamental proportions in the event of a difference of opinions between the ECHR and the Constitutional Court on the circumstances of the same case (or similar cases).

Bearing out this extremely active integration process is the trend towards using ECHR judgments in the judgments of the Constitutional Court of the Russian Federation: measured over five-year periods, 15.9% of Constitutional Court judgments contained references to ECHR judgments in the period 2000-2004, and that figure was already up to 39.1% for the period 2005-2009 and 41.2 % in the period 2010-2014.

3. When analysing the key features of legal axiology with regard to action between a national constitutional court's activities on the one hand and the European Court's convention-related activities on the other hand, we must take account of not only general but also specific features. The very nature and limits of these bodies' axiological influence differ, at times very substantially. At the same time, those differences objectively exist and, accordingly, must be assessed not from a confrontational viewpoint but in terms of the point where a compromise and balance of interests and values can be struck – by recognising that there are indeed differences between axiological elements of convention-related and national constitutional justice as well as a diversity of national constitutional courts.

Where can those differences be seen in terms of legal axiology? The main point is perhaps that *the Constitutional Court of the Russian Federation, as the country's constitutional supervision authority, is assigned the task of safeguarding the fundamental unity and inviolability of the axiological fundaments of the constitutional order*, including through ensuring unified interpretation and application of the Constitution as well as unified constitutional law interpretation of legislation and unified judicial law enforcement practice across the board. The guarantee of and condition for successfully resolving the respective issues are the unity and inviolability of the axiological bases of the system of national constitutionalism.

Indicative of this was the Constitutional Court's recent examination of a case resulting in the adoption of Ruling no. 1787-O of 16 July 2015. The basis of the case was that differing court decisions were pronounced on the same religious text (published by the Jehovah's Witnesses religious organisation) in different regions of the Russian Federation in respect of whether it could be qualified as extremist. That religious organisation disputed individual provisions of the Federal Law "On combating extremist activity" in this connection, claiming that they were ambiguous. In its ruling, the Constitutional Court of the Russian Federation pointed out that, in judicial practice, such a constitutional interpretation of the corresponding provisions was necessary in order to guarantee the unity of judicial practice with the help of the respective procedural and instance mechanisms. In other words, the Constitutional Court proceeds on the basis that the same text cannot be assessed in differing ways from the standpoint of combating terrorism, as the values that are protected by this legislation are the

65. See Constitutional Court of the Russian Federation judgment no. 4-P of 26 February 2010, second indent of sub-para 3.3 of the analytical section // Compendium of legislation of the Russian Federation. 2010. No. 11. art. 1255.

same on the scale of the country as a whole. Accordingly, in the eyes of the Constitutional Court, guaranteeing the fundamental unity of values underlying the constitutional order and the universal nature of constitutional values makes it necessary to assess the limits of the influence of religious and ethnic factors on legislation and its application. This kind of approach is to be found in other decisions of the Constitutional Court, such as the judgment regarding the possibility of setting up political parties with religious[66] or regional/ethnic[67] traits.

Where the European Convention's jurisdiction is concerned, *pursuant to the subsidiary character of the ECHR, there is already assumed to be a high degree of restraint in terms of the requirements of uniformity of axiological approaches to different national legal orders.*

This is borne out, fundamentally, in the ECHR's practice too (although, if truth be told, it has to be said that these approaches are not always consistent). One example – of a positive kind - was the case of "Lautsi and others v. Italy" (application no. 30814/06) on the question of the presence of depictions of the crucifixion in state schools. Leaving aside the rather complex, contradictory process of arriving at and adopting a final decision (ultimately by the Grand Chamber of the ECHR), let us simply note that the European Court took the view that "the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State" (para. 68). Accordingly, it is also the case that "the decision whether crucifixes should be present in state-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State"; this is further borne out by "the fact that there is no European consensus on the question of the presence of religious symbols in state schools" (para.70).

We can see here a kind of *polyphony of modern European constitutionalism* or, as Ye. Tanchev puts it, "multi-tier constitutionalism"[68] on the European continent. This is quite understandable: in the context of the level of legal integration achieved today, in particular between Council of Europe member States (which include the Russian Federation), there are no grounds whatsoever for talking about a unified constitutional law area.

In today's context, in the absence of a single normative block of "European constitutional law", *the regulatory basis forming European constitutionalism* is provided by a complex and rather diverse normative system embodying the unity of European international law components and national constitutional institutions. Where the Council of Europe member States are concerned, this takes the form of a set of norms in the process of formation: firstly, on the basis of convention-based regulation, in the light of the European Convention on Human Rights and the precedent-forming practice of its interpretation by the European Court, as well as other legal regulation under international/European treaties; secondly, on the basis of national constitutional regulation, including the case-law of national constitutional bodies, which are actively involved in the system of protection of European democratic values acquiring constitutional importance, both for individual States and for the European legal area as a whole[69].

However, it is important to note that European constitutionalism is not some kind of regional "law-globalism" in its European dimension. Qualitatively speaking, it is a new philosophical/worldview category intended to reflect not so much supranational legal universalisation as the *national constitutional integration* of the state legal systems of Europe on the basis of their mutual enrichment while preserving the juridical sovereignty of legal systems. This is not negated, either, by the fact that European constitutionalism naturally - not only as a result of global consequences for the European legal area but, by its very nature, by taking account of the acquisition of new capacities - goes beyond the limits of a simple (cumulative) addition of national constitutional law systems; one important problem is ensuring that the corresponding regulatory components can interact without contradictions.

In these conditions it is crucially important that, for its part, the ECHR recognises a kind of *pluralism of constitutional values*, bearing in mind both the regulatory area and the law enforcement sphere.

There is no denying, however, that it is in the judgments of the ECHR that the polyphony of European constitutionalism is quite evidently lacking. One flagrant example is the ECHR judgment of 4 July 2013 in the case of "*Anchugov and Gladkov v. Russia*" (application nos. 11157/04 and 15162/05), which went so far as to call into question a norm of the Russian Federation Constitution (Article 32). Alongside other related issues, the

66. Constitutional Court of the Russian Federation judgment no. 18-P of 15.12.2004 // Compendium of legislation of the Russian Federation, 2004. no. 51. art. 5260.
67. Constitutional Court of the Russian Federation judgment no. 1-P of 1.02.2005 // Compendium of legislation of the Russian Federation, 07.02.2005, no. 6, art. 491.
68. See: *Танчев Е. Возникающий наднациональный конституционализм и современные системы конституционного контроля* [Tanchev Ye., Emerging supranational constitutionalism and contemporary systems of constitutional supervision] // *Сравнительное конституционное обозрение* [Comparative constitutional review]. 2007. No. 4. p. 61.
69. See: *Бондарь Н.С. Судебный конституционализм: доктрина и практика* [Bondar N.S., Judicial constitutionalism: doctrine and practice. *М.: Норма*, 2015. pp.217-223.

question arises as to whether there is some kind of hierarchy between national constitutional values and the values of the Convention.

It seems a reasonable assertion that *the links between the values of the Convention and those of the Constitution are to do not with hierarchy or subordination but, above all, with coordination*. Furthermore, the level of coordination links may vary, as confirmed *inter alia* by the Constitutional Court's case-law. Ultimately, this is an issue of the correlation of European consensus and national constitutional identity, bearing in mind that the Convention based on "*European consensus*" is sometimes deployed to the detriment of constitutional pluralism and "*constitutional polyphony*" within the European constitutional area.

One important and extremely positive strategy for integrating convention-based norms and principles in a national legal system is to *use the legal positions of the ECHR to overcome clashes of national constitutional values* and, ultimately, implement European standards in the national legal system. There are quite a few judgments of the Constitutional Court of the Russian Federation along these lines – dating from both the early period of the Russian Federation's Council of Europe membership and more recent times. In one such judgment, to resolve a clash and strike a balance between the right to free speech and the right to election canvassing, the Constitutional Court brought into play the ECHR judgment of 19 February 1999 in the case of "*Bowman v. the United Kingdom*"[70]. And in a recently adopted judgment, no. 4-P of 12 March 2015, the Constitutional Court drew on the ECHR judgment of 26 June 2014 in the case of "*Gablishvili v. Russia*" (application no. 39428/12), to devise a mechanism for protecting the rights of HIV-positive foreign nationals with families on the territory of the Russian Federation, geared to striking a balance between individual and public interests and protecting family values on the one hand and public health in their country of residence on the other hand. This was the *de facto* exercise by the Constitutional Court of the Russian Federation of judicial implementation of the corresponding legal position of the European Court in Russia's domestic legislation.

4. At the same time, broadening interaction between national and supranational courts and ever more actively incorporating European Convention case-law components into national legal systems justifiably and quite naturally heightens the risk of a different type of conflict, clash or contradiction between values that may become most critical in the event of diverging approaches to the same case examined by the ECHR and the Constitutional Court of the Russian Federation (as happened, notably, in the well-known case of K. Markin[71]).

When making choices as to how they are to be resolved, the key point to be borne in mind is that *axiological clashes of the kind arising from the correlation and interpretation of national and supranational law have constitutional significance*. And all disputes which, owing to their legal nature, characteristics and consequences, qualify as constitutional are to be resolved, as we know, in constitutional proceedings. To that end, we must turn our attention to Constitutional Court of the Russian Federation judgment no. 21-P of 14 July 2015, which proposes a mechanism for resolving such clashes.

To be fair, it has to be said that axiological clashes arising from the relationship between the court serving the Convention and national constitutional courts are, fundamentally, exceptional. One flagrant example is the stance taken by different legal orders to the institution of gay marriage and advocacy of homosexual relationships as compared with the approach of the European convention. The ECHR's philosophy on this point is well known, as is the stance of a number of western European States.

However, it is clear that sexual freedom is very much the aspect of personal self-expression that cannot be interpreted in isolation from the generally established system of social regulation within a specific culture, including moral and religious norms, national traditions and the like. In the Muslim world, for example, manifestations of sexual emancipation that are acceptable in Europe are obviously not considered as a core component of the right to freedom of expression and will not be protected at the level of constitutional law. It cannot be ignored that in Europe itself there is not unanimous agreement on this issue. Our approach to these issues is reflected in Constitutional Court of the Russian Federation judgment no. 24-P of 23 September 2014. In that judgment, on the one hand the Constitutional Court gave a constitutional interpretation of the challenged provisions, pointing to the inadmissibility of interference in the sphere of individual self-determination, including a person's sexual identity. On the other hand, the Court did not find grounds to follow the "standards" that are actually geared to revising conventional ideas of equality and freedom and essentially replacing the combat against discrimination and inequality with a demand for special rights for sexual minorities.

70. Constitutional Court of the Russian Federation judgment no. 15-P of 30.10.2003 // Compendium of legislation of the Russian Federation, 2003. no. 44. art. 4358.
71. See Constitutional Court of the Russian Federation Ruling no. 187-O-O of 15.1.2009; Constitutional Court of the Russian Federation judgment no. N 27-P of 06.12.2013 // Compendium of legislation of the Russian Federation. 2013, no. 50, art. 6670.

One axiological flashpoint stemming from the relationship between the jurisdiction of the European Convention and Russia's national constitutional system was the ECHR judgment of 4 July 2013 in the case of "*Anchugov and Gladkov v. Russia*", where the ECHR effectively called into question one of the norms of the Russian Federation Constitution (Art. 32 para. 3), holding that the alleged deprivation of convicted prisoners of their electoral rights violated the requirements of Article 3 of Protocol no. 1 to the Convention.

Nevertheless, it is evidently not the axiological differences that arise from time to time between the European Court and our Constitutional Court that characterise relations between them, a fact that is confirmed by the active role played by constitutional justice in implementing international law standards, including those of the European Convention.

Enhancing national mechanisms for effective implementation of the European Convention on Human Rights. National report - Italy

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1. The procedure for the adoption of general measures following the European Court of Human Rights judgments in Italy

In Italy, the procedure for the adoption of general measures[72] following the European Court of Human Rights (hereafter: 'ECtHR') judgments is provided for under the Law no. 12/2006, "Rules on the enforcement of ECtHR judgments". This law consists of only one article, which introduces a letter *a-bis*) into Article 5 of the Law no. 400/1988. This article specifies the duties of the President of Council of Ministers. According to this law, the President of the Council of Ministers:

- supports compliance action following the ECtHR judgments against Italy;
- transmits details of such action promptly to Parliament for examination by the parliamentary standing committees;
- presents a yearly report to Parliament on the state of enforcement of those judgments.

As it is evident from the wording of the provision, the Azzolini Law does not give specific consideration to the procedure applicable to the adoption of general measures.

In order to take all the necessary administrative steps in order to implement the Azzolini Law, the Decree of the President of the Council of Ministers of 1 February 2007 was issued. Article 1(2) of this Decree authorises the Department for Legal and Legislative Affairs to coordinate all issues relating to compliance with the ECtHR judgments. More specifically, the Office within the Department that is competent to deal with the relevant issues is the Office for Legal Advice and Relationships with the European Court in Strasbourg.

Article 1(3) of the Decree authorises the Department for Legal and Legislative Affairs, after reaching agreement with the Permanent representative Italian office at the Council of Europe, to give notice to the competent Administration and also to the Minister for the Economy of the ECtHR judgments issued against Italy in order to start procedures relating to its enforcement, according to Articles 41 and 46 European Convention on Human Rights.

72. See recently A. Bultrini, *La questione cruciale dell'attuazione delle sentenze della Corte nella prospettiva del futuro del sistema convenzionale*, in S. A. Sonelli (ed), *La convenzione europea dei diritti dell'uomo e l'ordinamento italiano*, Turin, 2015.

It is worth noting that Article 1(4) of the Decree provides that the Department for Legal and Legislative affairs has the competence to 'invite' the State Administration directly involved in a specific judgment to comply with ECHR principles, to suggest, if appropriate, the adoption of the individual and general measures considered necessary and to coordinate the appropriate measures to prevent further violations of the ECHR.

As is evident from the wording of the provision, the Department in question essentially plays a role of 'moral suasion', which does not appear to be consistent with the binding obligation to comply with the ECtHR judgments stemming from Article 46 ECHR.

Article 2 of the Decree deals, *inter alia*, with the implementation of the provision of the Azzolini Law concerning the annual report which must be submitted to Parliament. More precisely, it states that each year the Department for Legal and Legislative Affairs must draw up a report addressed to the Parliament on the state of domestic compliance with and enforcement of ECtHR judgments, along with indications of the action required in order to comply with ECtHR case law[73].

It is pointed out in the 2014 report that, thanks to the systemic reforms which have been adopted in relation to prison overcrowding and the excessive length of judicial proceedings, there has been a fall of 30% pending cases involving Italy before the Strasbourg Court (around 4,000 thousand petitions less than 2013).

2. The roles of the executive and the legislator in the adoption of general measures

On the basis of the relevant legislation, the interaction between the executive and the legislator in the process is clearly biased in favour of the former.

The whole process relating to the identification and adoption of general measures and, more generally, to compliance with the ECtHR judgments rests 'in the hands' of the executive and, more specifically, the Office of the President of the Council of Ministers. The Department for Legal and Legislative Affairs, which acts as the driving force for the process, is incorporated into the Office of the President of the Council of Ministers and is directly answerable to the President.

Shifting from law in books to law in action, the role of the executive, represented by the President of the Council of Ministers, seems to be even more significant (and the role of the legislature is accordingly reduced). In fact, the role of the executive is not limited to carrying out the acts that are necessary in relation to the adoption of general measures, but extends to the specific adoption of such measures, which are more frequently adopted by a legislative act of the executive, known as the decree-law ('decreto legge') rather than by ordinary parliamentary legislation.

The decree-law is an instrument adopted by the executive in certain special cases involving extraordinary necessity and urgency (see Article 77[74] of the Italian Constitution), which have equal force to a legislative act. It must be converted into law by Parliament within 60 days of publication, failing which it loses its effects *ab initio*.

It is possible to identify three main areas in which the Italian executive has adopted decree-laws concerning the implementation of general measures following ECtHR judgments.

The first concerns the controversial issue of overcrowding in the Italian prisons and follows the statements contained in the pilot judgment *Torreggiani*[75] in which Strasbourg Court held that Italy had violated Article 3 ECHR.

A second category of general measures adopted by decree-law relates to the problem of the excessive length of judicial proceedings in Italy. In response to the perennial problem of excessively long proceedings before the Italian courts, the Pinto Law sought to provide redress by enabling the courts to make awards of just satisfaction. The Pinto Law was introduced in the wake of the 1999 *Bottazzi v Italy* judgment[76] in which the Grand Chamber first focused on a systemic violation of the right to trial within a reasonable time under Italian law. As is known, the ECHR has ruled against Italy on several occasions, and did so in this respect due to the violation

73. See http://www.governo.it/Presidenza/CONTENZIOSO/contenzioso_europeo/relazione_annuale.html.
74. 'The Government may not, without an enabling act from the Houses, issue a decree having force of law. When the Government, in case of necessity and urgency, adopts under its own responsibility a temporary measure, it shall introduce such a measure to Parliament for transposition into law. During dissolution, Parliament shall be convened within five days of the introduction of such a measure. Such a measure shall have no effect from the outset if it is not transposed into law by Parliament within sixty days of publication. Parliament may regulate the legal relations arisen from the rejected measure.
75. *Torreggiani and Others v Italy,* App 43517/09, judgment of 08-01-2013.
76. *Bottazzi v Italy,* App 34884/97, judgment of 28-07-1999.

of Article 6 ECHR, i.e. the right to a fair trial. The Pinto Law, enacted in 2001[77], was amended by the Decree-Law no. 83/2012, converted into the Law no. 134 of 7 August 2012, after the ECtHR had found problems relating to enforcement of that legislation in the *Scordino*[78] and *Gaglione*[79] judgments.

The amendments introduced by the Decree-Law no. 83/2012 relate to the following points: definition of the threshold up to which the length of proceedings is assumed to be 'reasonable'; definition of the amount of redress for each year exceeding that period; definition of cases in which the right to redress is excluded due to an abuse of trial by the applicant; the provision of a procedure to obtain redress in the form of a payment order.

The amendments introduced by the Decree-Law no. 83/2012 were challenged before the Italian Constitutional Court (hereafter: 'ICC') in 2014. Specifically, in this case[80] the ICC heard a referral questioning a provision which stipulated that fair compensation for excessively long trials was only available after the trial in question had been concluded, and not whilst proceedings were still ongoing, even if the trial was already unreasonably long. The Court rejected the question as unfounded, referring to the fact that previous legislation allowing for this possibility had been amended, whilst also interpreting the existing legislation with reference to legislative intention and the consistency of this solution with other applicable legislation. It also noted, referring also the case law of the ECtHR, that, whilst the state was under an obligation to provide a remedy, there was no specific mandatory form of redress and the choice between the available options was in the hands of the legislator, acting within the margin of appreciation allowed to it. Nevertheless, the constitutional judges added "that whilst – for the reasons set out above – the breach ascertained and the need for the legal system to offer an effective remedy in view of the violation of the principle that trials must have a reasonable length have no bearing on the inadmissibility of the question and do not call into question the 'priority status of Parliament's assessment as to whether the means used to achieve a goal necessary under constitutional law are appropriate', they nonetheless require this Court to assert that any excessive prolongation of legislative inertia in relation to the problem identified in this ruling would not be tolerable".

On December 2014, the so called 'Pinto Action Plan' ('Piano d'azione Pinto'), agreed upon between the Italian Government and the Committee of Ministers of the Council of Europe, was finalised in order to tackle the problem of the high number of applications brought against Italy due to the inappropriate nature of the remedy offered by the Law no. 89/2001. Particularly, the grounds for challenging that Law focused on the lack of an appropriate redress as a way of ensuring actual and swift protection of the right to a fair trial. The Pinto Action Plan, which involves a number of actors (Office of the President of the Council of Ministers, Minster of Foreign Affairs, Office of the Agency of the Government, Ministry of Justice and Ministry of Economy and Finance), has resulted in the settlement of 7,046 pending applications, most of which were based on a delay in the enforcement of the payment order issued by the Court of Appeal competent to assess the amount due by way of redress.

However, the Italian Permanent Representatives to the Council has noted that many other applications have been filed with the ECtHR with respect to the same problem (delayed payment of redress). Thus, the violation of the right to a fair trial by the Italian State still raises concerns also at supranational level. Italy is one of the states against which most applications have been filed. The commitment by the Italian Government which led to the settlement of a number of pending cases has however been welcomed by the Council of Europe.

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77. The Pinto Law was adopted as an initial response to a number of judgments in which, whilst not being pilot judgments, the ECtHR pointed out that the frequency with which violations were found to have occurred showed that there had been '*an accumulation of identical breaches*' which were '*sufficiently numerous to amount not merely to isolated incidents*' In *Bottazzi and Others v Italy*, par. 22.
78. In *Scordino v Italy*, App 36813/97, judgment of 29-03-2006, the Grand Chamber of the ECtHR found a double systemic problem concerning the effectiveness of Law no. 89 of 24-03-2001, known as the Pinto Law, which established a procedure for lodging complaints with the Italian courts in respect of excessively long proceedings, along with the right to receive compensation for expropriation. In order to satisfy its obligations under Article 46 the ECtHR held that Italy should, above all, remove all obstacles on the award of compensation reasonably related to the value of the expropriated property. This should be guaranteed by appropriate statutory, administrative and budgetary measures in order that the right in question is guaranteed effectively and rapidly in respect of other claimants affected by expropriated property. The ECtHR noted in relation to the Pinto Law that, although the existence of a remedy is necessary, it is not of itself sufficient and invited the respondent state to take all measures necessary to ensure that the domestic decisions are not only in conformity with the case-law of the ECtHR but that they are also executed within six months of being deposited with the registry. It is worth mentioning that these indications did not appear in the operative part of the judgment and similar pending cases were not adjourned.
79. *Gaglione and others v Italy,* App 45867/07, judgment of 20-06-2011. In this case the Court found that general measures were required to remedy the improper processing of '*Pinto*' applications in Italy (at 07-12-2010, more than 3,900 applications concerning, among other things, delays in paying compensation under the Pinto Law were pending before the Court). It disagreed with the assertion that the applicants had not suffered a significant disadvantage and dismissed for the first time a request seeking the application of the new admissibility criterion introduced by Protocol No. 14 (no significant disadvantage).
80. Constitutional Court, judgment no. 30/2013.

An important initiative taken in order to tackle the problem of the delay in the enforcement of the so called 'Pinto Decrees' (which is the cause of most applications filed with the Strasbourg Court) has been implemented by the Ministry of Justice by arranging a 'recovery plan' made possible by financial resources allocated to this purpose.

The Plan tasks the Court of Appeal with extinguishing the debts accrued over the time, on the basis of a detailed timetable which each Court of Appeal must promptly communicate to the Ministry along with a report of the payment orders pending enforcement and the respective deadline foreseen.

On the basis of this plan, the Ministry of Justice will remit payment of the amount due from the Court of Appeals to the applicants. Payments will be processed by the central administration, supported by the Bank of Italy.

As final remark, it should be added that the use of decree-laws seems to be quite inappropriate, since it risks definitively marginalising the role of Parliament in relation to the implementation of general measures.

3. The identification of the measures required by the ECtHR in the Italian legal order

It could be interesting exercise to identify, first, a case in which, on account of the failure to act by the executive and the legislature, the judiciary (in particular the Italian Constitutional Court) has played a crucial role in the adoption of general measures, acting *de facto* as a negative legislator and, secondly, a further case in which the Italian political authorities have displayed a less passive attitude as regards the adoption of general measures.

The post-Scoppola domestic scenario

Considering the way in which the judiciary has tried to remedy the inertia on the part of the executive and the legislature with regard to the necessary reforms to be implemented in order to comply with ECtHR judgments, it is worth considering some cases concerning individual measures which subsequently resulted, on account of the involvement of the ICC, in the adoption of general measures. The main source of inspiration is the 'second chapter' of the Scoppola saga[81].

In 2009 the ECtHR held that Italy had violated Article 7(1) ECHR due to the application of Article 7 of the Decree-Law no. 341/2000[82]. Therefore, Italy was required to ensure that the penalty of life imprisonment imposed on the applicant was replaced by a penalty not exceeding a term of imprisonment of thirty years.

The domestic implications of the Scoppola *judgments* are very interesting, especially with regard to the case law of Italian Constitutional Court. More specifically, in judgment no. 210/2013, the ICC held that, whilst the Scoppola judgment of the ECtHR was not a pilot judgment and did not specify the general measures required under Italian law to remedy the violation, this did not mean that general measures in a certain form were not necessary.

In connection with this last point, different positions concerning the precise nature of Scoppola judgment have been adopted on the one hand by the ICC and on the other hand by the Joint Divisions of the Court of Cassation which, in the case under examination, referred a question concerning the constitutionality of the Decree-Law no. 341/2000 to the ICC.

According to the Court of Cassation, the ECtHR judgment of 17 September 2009 in *Scoppola v Italy* features the substantive characteristics of a 'pilot judgment'. More specifically, according to the Court of Cassation, "whilst Scoppola does not provide specific indications regarding the general measures to be adopted, it nonetheless stresses the existence within Italian law of a structural problem due to the non-compliance with the ECHR of Article 7 of the Decree-Law no. 341 of 2000, as interpreted under national case law".

By contrast, according to the ICC, there is no specific reference to the 'pilot judgments' in the Scoppola case, since the wording itself of the judgment departs from that model when providing that, "in the present case, the Court does not consider it necessary to indicate general measures required at national level for the execution of its judgment". The ICC crucially continues its reasoning by noting that "in view of the above, it must be concluded that the manner in which the member state adopts structural measures to comply with the judgments of the Strasbourg Court is not always specified in substantive form in those judgments, and may in fact be established with a reasonable margin of appreciation. Therefore, it is not necessary for the judgments of the ECtHR to specify which 'general measures' are to be adopted in order to conclude that, notwithstanding their discretionary configuration, they nonetheless represent a necessary consequence of the structural violation of the ECHR by national law. When this happens, the branches of state are obliged to take action in order to

81. See *Scoppola v Italy*, App 50550/06, judgment of 10-06-2008; *Scoppola v Italy (no. 2)* [GC], App 10249/03, judgment of 17-09-2009; *Scoppola v Italy (no. 3)* [GC], App 126/05, judgment of 22-05-2012.
82. *Scoppola v Italy (no. 2)* [GC], App 10249/03, judgment of 17-09-2009.

ensure that the legislative effects that breach the ECHR cease, each acting strictly in accordance with its own powers. It must therefore be concluded that the core content of the Scoppola judgment – that is the part of it to which the obligation laid down under Article 46(1) ECHR applies, and more generally with reference to which the aspects which the state responsible for the violation must take into account when establishing the measures to be adopted in order to comply with it are determined – is broader in scope than that stated in the operative part, with specific reference to the violation ascertained, in which the ECtHR limits itself to declaring that the respondent State is responsible for ensuring that the sentence of life imprisonment imposed on the applicant is replaced by a penalty consistent with the principles set out in the present judgment, that is the penalty of thirty years' imprisonmen'".

In its reasoning, the ICC also focused on the reaction of the political authorities to the *Scoppola* judgment, noting - as regards the general measures - that Italy had announced that in the light of the 'direct effect' granted by the Italian courts to the judgments of the ECtHR, and in view of the possibilities offered by the enforcement review procedure to individuals whose circumstances are similar to those of the claimant in this case, the authorities considered the publication and circulation of the judgment of the ECtHR among the competent courts to be sufficient to prevent similar violations.

That said, despite the formal difference of opinion concerning the nature of the *Scoppola* decision, the ICC agrees with the conclusions of the Court of Cassation that this judgment does not enable Italy to restrict itself to replacing the penalty of life imprisonment imposed in the case in question, but obliges it to resolve the violation on a legislative level and to remove its effects in respect of all individuals convicted whose circumstances are the same as those at issue in the *Scoppola* case.

Since, according to the ICC, the Parliament had not acted to remedy the breach, it was necessary to establish "how to eliminate effects that have already definitively arisen in cases identical to those in which the Convention was found to have been breached, but which were not appealed before the ECtHR, and have thus become definitive". Finally, in the view of the ICC, whilst the *Scoppola* case could be resolved on the basis of the Italian law regarding the force of the ECtHR rulings, this was not possible in this case, in which the ECtHR had not been involved. Therefore, since the action taken by Italy had not been sufficient, it was necessary to declare the provision of criminal law unconstitutional.

The *post Torreggiani* domestic landscape

It is now necessary to take into account another case regarding the adoption of general measures in which - in contrast to the post-Scoppola scenario - the ICC decided not to wear its legislative hat, but on the contrary took a step back, while sending a 'warm' invitation to act to the executive and the legislature which, as will be noted, has been taken quite seriously by the latter.

The issue was overcrowding in Italian prisons, and the relevant judgment *Torreggiani and others v Italy*[83] (in which the ECtHR held, unanimously, that Article 3 ECHR had been violated). The Court's judgment was without doubt a 'pilot judgment'. The ECtHR called on the authorities to put in place, within one year, a remedy or combination of remedies providing redress in respect of violations of the Convention resulting from overcrowding in prison. The Court decided to apply the pilot-judgment procedure in the light of the growing number of individuals potentially affected in Italy and along with the judgments that had found that a violation was liable to result from the applications in question.

In an initial response to the judgment, in an unprecedented message to Parliament on 8 October 2013, the President of Republic – at the time Giorgio Napolitano – defined overcrowding in Italian prisons as intolerable, referring expressly and broadly to *Torreggiani* judgment, to the need for Parliament to adopt the necessary general measures required by the pilot judgment and finally, to the case law of the ICC on the effects of ECHtR decisions on domestic law.

Given the failure to act by the legislature, the ICC was asked, precisely as occurred also in the post-*Scoppola* scenario, to act as negative legislator. This time, however, the ICC refused to do so, passing on the issue to Parliament.

More specifically, in judgment no. 279/2013, the ICC considered a referral order questioning a provision of the Criminal Code which only allowed for the deferred enforcement of judgments in a specific list of cases, whereas in the cases before the lower courts a deferral was claimed to be necessary on the grounds that enforcement would occur under conditions contrary to human dignity (due to prison overcrowding). The Court rejected the questions as inadmissible, finding that to allow deferred enforcement on the grounds of prison overcrowding

83. *Torreggiani and Others v Italy,* App 43517/09, judgment of 08-01-2013.

would be to differentiate between prisoners in an arbitrary manner. Whilst both preventive and compensatory remedies were necessary, it had not been demonstrated that the specific power (deferral of enforcement of the judgment) sought by the referring courts was essential and was the only instrument available for rectifying the potential breach of constitutional law. However, the Court finally noted that "an excessive prolongation of legislative inertia would not be tolerable, having regard to the serious problem identified in this ruling".

On this occasion, the warning of the ICC was taken seriously by politicians.

In fact, on 19 December 2013 an action plan was presented by the Government, comprised of four lines of action:

- Legislative actions aimed at reducing prison entry flows and enabling prisoners to progressively leave the prison system through the adoption of alternative measures accompanying their reintegration in the external community;
- Managing and organisation actions through the implementation of more open prison regimes for prisoners who are classified as requiring 'medium or low security measures', focused on limiting the use of cells as a place of prisoners' rest and not a place where spending almost their entire day;
- Building actions, planned according to the present needs of our prison estate;

4. Provision of modalities and procedures both for the 'preventive remedy', which puts an end to the perpetuation of situations of violation found by the Court, and the compensative remedy for those who suffered a treatment in violation of their fundamental right not to be subjected to degrading treatment, according to Court's jurisprudence. It is worth pointing out that the subsequent Decree-Law no. 146/2013, converted into the Law no. 10/2014, has introduced the following additional measures: the increase of early release from 45 to 75 days per semester; the transformation of the minor illicit conducts [sic.] connected to the traffic of narcotic substances into an autonomous offence punished by a shorter penalty; the extension of the use of remote control devices such as the 'electronic bracelet'; the stabilisation of the institution of house detention with the purpose of reducing the phenomenon of overcrowding; the early identification of foreign prisoners reached by an order for expulsion.

However, at meeting no. 1193 of the Committee of Ministers of the Council of Europe (4-6 March 2014), it emerged that in order to comply with the *Torreggiani* judgment, the remedy or the set of remedies to be arranged by Italy must have preventive as well as compensatory nature and must not be restricted to individuals who filed applications with the ECtHR.

Conversely, the information contained in the Action Plan of 19 December 2013 only referred to a remedy "which appears to be available in limited circumstances (i.e. to sentenced prisoners currently imprisoned, and who have lodged an application at the European Court)". Therefore, at the end of the meeting, the Committee of Ministers expressed 'concern' and mentioned the commitment to provide remedies to guarantee 'adequate and sufficient redress' by the deadline of 27 May 2014.

In reply to the judgment of 8 January 2012, the Government headed by Prime Minister Renzi has provided a remedy by adopting the Decree-Law no. 92 of 26 June 2014. According to this Decree-Law, a judge may order that the penalty imposed on a person who has suffered a violation of Article 3 ECHR be reduced by one day for each ten days of residual period of the sentence still to be served; otherwise, he/she shall be eligible for redress in the amount of a lump-sum payment of 8 Euros.

The provisions considered overall have been considered satisfactory by the ECtHR: in two judgements issued after a few weeks, on 16 September 2014 - *Stella and others v Italy* and *Rexhepi and others v Italy* - the Court found that these remedies to fulfilled the requirements applicable to Italy for compliance with the *Torreggiani* decision; however, the Court called for a further analysis of the remedies at a later stage during enforcement of the provisions by the domestic courts.

Additionally, in a very recent judgment handed down on March 2015, the Strasbourg Court took the Italian case as an example, noting that: "[t]he recent example of Italy shows that such measures, implemented in the context of a pilot procedure, can contribute to solving the problem of overcrowding".

The scope of application of the Law no. 12/2006

As noted above, the Law no. 12/2006 lays down 'Rules on the enforcement of ECtHR judgments'. All of the provisions contained in it (concerning the activities of the President of the Council of Ministers in relation to action required following ECHtR judgments against Italy, along with the prompt transmission of such judgments to Parliament for examination by the parliamentary standing committees, and the presentation to Parliament of an annual report on the state of enforcement of those judgments) relate exclusively to ECtHR judgments.

The Department for the Legal and Legislative Affairs is also tasked with monitoring the enforcement of ECtHR judgments.

The remedies for domestic courts facing problems of compliance with ECtHR judgments requiring the adoption of general measures

The well established case law of the ICC, in particular in the wake of the 'twin' judgments no. 348 and no. 349 of 2007 describes the most common techniques normally used by judges when resolving conflicts between norms from different legal orders that are relevant in cases brought before the courts.

Among others, the canon of interpretation 'in line with the ECHR' has a crucial impact and requires the courts to apply the solution that best fits with the principles enshrined in the ECHR, as interpreted by the Court of Strasbourg, when facing with a number of possible constructions of the same provision.

In case of conflict between a domestic norm and a provision of the ECHR, national courts must therefore interpret the former in a manner consistent with the latter, provided that such a construction is permitted by the wording of the relevant provision. It is only if the contrast cannot be resolved by an interpretative way that the courts may refer a question of constitutionality to the Constitutional Court, as the domestic courts are prevented from enforcing the provisions of the ECHR directly or from setting aside domestic provisions alleged to be in contrast with it (and, accordingly, with the Constitution). Such a question of constitutionality would be based either on Article 117(1) of the Constitution or Article 10(1) (if it involves an international law norm incorporating generally recognized principles of international law).

The reference of a question to the Constitutional Court thus appears to constitute an *extrema ratio*.

The role played by the Court of Cassation in determining and initiating general measures

Some remarks may be made with regard to the Court of Cassation. The literature has correctly drawn attention to the loss of this Court's supremacy as a consequence of the increasing role of the ECtHR and the CJEU. The dialogue with these Courts seems to be the crucial aspect of the activity of the Court of Cassation, namely how best to resolve conflicts within a multilevel system. Furthermore, this Court is responsible for preventing possible conflicts between domestic law and supranational law by interpreting the relevant laws and statutes in accordance with the Charter and the ECHR. It is worth noting that, while performing its role as the guarantor of the uniform application and interpretation of the law, this Court extends its scrutiny to the provisions of the Charter as a relevant parameter. According to the Article 360(3) of the Code of Civil Procedure, the violation of international law (except treaties pending ratification) may constitute grounds for appealing to the Court of Cassation.

The impact of ECtHR judgments on constitutional provisions and their interpretation

In Italy, there has not been any amendment of constitutional provisions which could be considered a direct consequence of a ECHR judgment so far. However, the constitutional revision of Article 111 and the consequent express constitutional reference, inter alia, to the right to fair trial (para. 1) and to the reasonable length of trial (para. 2), have reacted to the Italian systematic violation of Article 6 of the ECHR.

It could be worth mentioning a case which, even if formally deals with statute law, does substantially have a para-constitutional relevance because it is connected with the principle of *res iudicata* and to the review of the proceeding as a consequence of ECtHR judgments

More precisely, Article 630 of the Italian Code of Criminal Procedure allowed the '*review*' of final judgments only in four circumstances, excluding the case of a judgment delivered by the European Court of Human Rights.

The post-Dorigo judgment[84] domestic consequences have changed this *status quo*.

Mr. Dorigo was sentenced by the Court of Udine to thirteen years imprisonment for having participated in the Aviano base attack. His conviction was based on the accusations made by three co-defendants, whose statements where used as evidence without any chances for him to carry out a cross-examination, as required by Article 6 ECHR.

After the judgment became final and res iudicata, Mr. Dorigo applied before the European Commission of Human Rights for violation of the right to a fair trial. In 1998 the European Commission stated that the Italian authorities had violated Article 6 of the ECHR.

Following this judgment, the General Prosecutor at the Court of Udine requested the suspension of the execution of the sentence until the assessment of its legitimacy, in light of the judgment of the European court. In

84. *Dorigo v Italy,* App 46520/99, judgment of 16-02-2001.

2007, the Court of Cassation, by the decision no. 2800, declared the order of imprisonment invalid and thus ordered to release Mr. Dorigo from prison, carving out the following principle: "the judge of the execution must declare the unenforceability of the sentence if the ECtHR established that the conviction had been issued in violation of the right to fair trial established by art. 6 ECHR and that the convicted shall have the right to the reopening of the proceedings, even if the Legislator has not yet provided for the introduction of a proper possibility of re-examination".

In the meantime, Mr. Dorigo filed a request of re-examination and, in that proceeding, asked the judge to refer a question of constitutionality because of the lack of provisions allowing the reopening of a trial after a judgment of the ECtHR.

The Constitutional Court, in the decision no. 129/2008, rejected the question, although it urged the legislative power to take all necessary steps in order to give execution to ECtHR decisions.

Before the Court of Appeal, another issue of constitutionality was raised, for violation of Article 117 of the Constitution and Article 46 of the ECHR, this latter as an 'interposed' parameter referred to by the former (on the 'quasi-constitutional' status of the ECHR in the Italian constitutional jurisprudence, see the next paragraph).

Here, the Constitutional Court went farther, and instead of making an exhortation, issued an 'additive' decision, declaring Article 630 of the Code of Civil Procedure unconstitutional for not providing a chance of reopening of the criminal proceeding "when it is necessary, under art. 46 cl. 1 ECHR, in order to enforce a final decision issued by the ECtHR".

Lawmaking as a key stage in the implementation of Constitutional and treaty-based standards

Andrei Klishas

Chairman of the Council of the Federation Committee on Constitutional Legislation and State-building, the Federal Assembly of the Russian Federation

I would like to begin by welcoming everyone on behalf of the Russian Senate, as the Federation Council of Russia's Federal Assembly is sometimes now referred to, and on behalf of our committee – the Committee on Constitutional Legislation and State Building.

Needless to say, I endorse what both the judges and the Minister of Justice said earlier today about how Russia must fully comply with the Convention and abide by the decisions of the European Court of Human Rights, having regard to the provisions of the Russian Constitution. And, of course, Russia is also willing to participate in all the Council of Europe bodies.

In the case of the Council of Europe's Parliamentary Assembly, however, I must emphasise that Russia is willing to participate only on condition that the rights of the Russian delegation are restored in full. This matter was discussed in some detail by the Chair of the Federation Council Valentina Matiyenko and the President of the Parliamentary Assembly of the Council of Europe Anne Brasseur in Geneva, at a gathering of the Inter-Parliamentary Union, which is probably the oldest organisation of its kind in the world. At all these meetings, we likewise emphasised our commitment to the values enshrined in the European Convention and our readiness to be actively involved in all these international institutions.

As many of the speakers have pointed out, there is no question that Russia's accession to the European Convention on Human Rights has greatly influenced Russian legislation. Thanks notably to the Convention, we have been able to further secure such rights as the right to privacy, the right to free movement, to respect for private and family life, to protection of honour and dignity, to name just a few. Amendments have also been made to the law on the legal status of foreign nationals. Numerous political rights have been developed in greater detail in Russian legislation, in line with the provisions of the Convention. They include the right to hold meetings, rallies and demonstrations, freedom of conscience and religion and many, many more. Amendments have been made to the Criminal Code and the Code on the Execution of Sentences, the Code of Administrative Offences and the law on operational and investigative activities. The purpose of these amendments was to ensure more comprehensive protection for the rights of individuals, in particular persons subject to measures of a medical nature, and to address issues to do with allowing defence lawyers to participate in proceedings, the monitoring and recording of suspects' telephone and other communications and other matters.

Article 6 of the European Convention is extensively reflected in federal legislation, in particular procedural legislation. The right to a fair and public hearing within a reasonable time by an independent and impartial tribunal, for example, is enshrined in the Code of Arbitration Procedure, many other pieces of legislation and, lastly, in the Code of Administrative Court Proceedings which was adopted in March 2015.

As mentioned by Valeriy Zorkin in his speech, certain rights enjoy a higher level of protection in Russian legislation than in the European Convention. In particular, where an individual cannot afford to pay for defence counsel, the possibility exists for one to be appointed free of charge. 2011 saw the enactment of a federal law on free legal aid, which reinforces the mechanism whereby citizens can exercise their right to receive free, qualified legal assistance and which paves the way for the creation of state and other systems for providing legal aid.

Also worth noting is the considerable emphasis given to monitoring Russian legislation to ensure it is consistent with the European Convention. Such monitoring is carried out on an ongoing basis by the Ministry of Justice, fairly successfully in our opinion.

The Russian parliament gives prompt consideration to the necessary legislative amendments, the condition being that they must be compatible with the Constitution. And, of course, the main requirement for the implementation of international law is fulfilment of international obligations. Alongside this mandatory condition for the implementation of international legal rules, including their interpretation by international judicial authorities, there is the principle of sovereign equality of states.

One further point I feel I must make in this regard is that, very often when we talk about the need to observe states' sovereignty, many choose to take a rather abstract view of the term "sovereignty". It follows from the Constitution, however, according to which the bearer of sovereignty is the people, that, ultimately, any violation of a state's sovereignty always results in a violation of the rights of its citizens. Sovereignty is not some abstract construct, or some privilege enjoyed by governments or other authorities, therefore.

Something else that has been mentioned by many of the speakers is the importance of reinforcing the principle of subsidiarity. Issuing prescriptions to states, demanding that they take steps to amend their legislation is not behaviour compatible with subsidiarity. I am referring to those cases where, when rules were drawn up concerning this or that set of rights, the national legislator was left with no margin of discretion, so to conclude that the limits of that discretion have been exceeded is hardly reasonable. An obvious example of this can be seen in the decision to grant voting rights to convicted prisoners, something that is restricted in Russia under the Constitution.

The extent of the powers available in the lawmaking sphere predetermines the choice of means by which international obligations are fulfilled. National legislators' lawmaking activities are based on state sovereignty. And this in turn means they have considerable discretion in choosing effective means of fulfilling international obligations.

Russia has consistently lobbied for a more robust legal framework in international relations. And when it comes to the primacy of international treaty law over domestic law, it is important to bear in mind that before a provision contained in an international treaty can take precedence, in terms of its application, over a domestic statute, it must first find its place in the system of sources of Russian law, i.e. acquire the appropriate legal force within that system.

The issue of the supremacy of international treaties over federal constitutional laws is a contentious one. Whenever we ratify a convention, we apply the rules as we would when adopting federal laws, but not federal constitutional laws, so whether these conventions take precedence over federal constitutional laws remains open to debate.

International treaties and their implementation by international organisations contributes to the formation of an international system of law. This system is then linked into the national legal system through the activities of the courts in administering the law. In Russia, a leading role in this area is played by the Constitutional Court, whose decisions are not only binding on the parties to the proceedings, but also determine the enforceability of the contested provisions in general.

In one recent ruling, the Constitutional Court directed the national authorities to have regard, first and foremost, to the provisions of the Constitution. Where there is a conflict of meaning between constitutional and treaty-based rules, the Russian Federation may derogate from its obligations in exceptional circumstances. In particular, precedence may be given to constitutional provisions if the Russian Constitution provides a higher level of protection for the exercise of rights. That does not preclude the possibility of federal lawmakers developing a special legal mechanism for resolving matters of this kind.

Also high on the agenda is the issue of improving domestic remedies. Above all, that means ensuring full and effective protection at national level. At the same time, it is important to ensure uniform interpretation of treaty-based provisions, and in particular to align the different approaches to the question of which level of jurisdiction should be regarded as final. When examining cases, the European Court of Human Rights makes an assessment of the national legislation to see whether it meets the requirements of the Convention. At the

admissibility stage, the decision in cassation proceedings is recognised as being a sufficient domestic remedy. Russian lawmakers, however, in providing for the possibility of supervisory review, take the view that supervisory proceedings are an important remedy. The supervisory courts set aside a substantial number of court rulings, thereby ensuring that any judicial errors which may have been committed are corrected. To exclude the existing supervisory procedures, therefore, without any system to ensure the timely prevention and correction of judicial errors, runs counter to the basic function of the justice system, namely to protect human rights and ensure effective redress for any violations of those rights. In this regard, the decision in supervisory proceedings can be seen as a necessary condition for a finding that all available domestic remedies have been exhausted.

I would like to conclude by saying that there is no question the Russian parliament today is giving the utmost attention to the protection of human rights and freedoms. While observing all the provisions of international conventions and inter-state agreements, we do nevertheless believe that the main burden of protecting citizens' rights and freedoms falls to national authorities.

The implementation of judgments of the European Court of Human Rights in Austria[85]

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1. Procedural Aspects of the implementation of judgments of the ECtHR

In Austria, there is no specific procedure for the implementation of judgments delivered by the European Court of Human Rights (ECtHR) which establish a violation of rights of the Convention of Human Rights by Austrian authorities. Such a procedure does not exist in any case, neither if the judgment required an individual measure or the paying of compensation nor if the judgment required general measures. If a judgment found a violation of the Convention by Austrian authorities it undergoes a legal analysis by the Government Agent in the Federal Ministry for Europe, Integration and Foreign Affairs and by the Deputy Government Agent in the Federal Chancellery (Prime Minister's Office). The Government Agent and the Deputy Government Agent assess *prima vista* what kind of measures have to be taken in order to implement the respective judgment. Subsequently, the judgment is sent to the Federal Ministry or the *Land* (i.e. the federal state) accountable for the violation for consideration. It is the task of the accountable authority – where necessary supported by the agents – to identify and to take the measures required by the judgments of the ECtHR. The Federal Ministry for Europe, Integration and Foreign Affairs has to be informed about the measures taken or planned to implement a judgment. On the basis of this information the Government Agent's office submits, in close co-ordination with the Deputy Government Agent, action plans and actions to the Council of Europe's Execution Department. This approach does not follow a written procedure but it forms a long standing government practice.

Since there have not been any pilot or semi-pilot judgments with respect to Austria no specific procedure has so far been developed. The same is true for interim resolutions. As the implementation in general does not follow a written procedure this approach seems to be flexible enough to ensure an effective implementation even in the case of a pilot judgment.

The competence of the government agent in the Federal Ministry for Europe, Integration and Foreign Affairs is based on the Federal Ministries Act 1986. This Act i.a. organised the competences of the federal ministries being the top of the federal administration.

According to this Act, "foreign affair matters" means in particular "to represent the Republic of Austria vis-à-vis government of foreign countries and other entities of international law, comprising international organisations and to communicate with these". This includes the representation of the Republic of Austria vis-à-vis the

85. This contribution was prepared with the considerable support by Ms Brigitte Ohms, Deputy Agent in the Austrian Federal Chancellery.

Council of Europe and its bodies. Within the Foreign Ministry there is a division specialised in international law including human rights and humanitarian law (*Völkerrechtsbüro*) where the Agent is selected from.

Pursuant to the above-mentioned Act, the Federal Chancellery is responsible for "matters concerning the Constitution". The Legal and Constitutional Service of the Federal Chancellery ("*Bundeskanzleramt-Verfassungsdienst*") where the Deputy Agent is selected from, acts as a legal expert and advisor in various fields. In particular, it reviews all draft laws and ordinances from other ministries and the *Länder* (federal states) with regard to their compatibility with constitutional law (which includes the European Convention on Human Rights, see question 3). Furthermore, it represents the Federal Government before the Austrian Constitutional Court and the Republic of Austria in proceedings before the European Commission and the European Court of Justice as well as before the European Court of Human Rights (together with the Foreign Ministry).

These two branches of the Federal Ministry for Europe, Integration and Foreign Affairs and the Federal Chancellery have been cooperating in various fields, including the representation before the ECtHR and the execution of its judgments, on a regular basis and as a well-established practise.

2. The role of the executive and the legislator in the implementation of judgments of the ECtHR

After the European Court of Human Rights delivered a judgment establishing a human rights violation by Austrian authorities it has to be clarified whether the judgment required general measures and what kind of general measures. This clarification is based on the respective assessment by the Government Agent and the Deputy Government Agent, both parts of the governmental departments (see para. 1). If general measures are envisaged or have to be taken in order to implement a judgment, this fact is pointed out in the action plan or action procedure to the Committee of Ministers.

In some cases the implementation of a judgment requires the adoption or the amendment of a law. The competence to initiate laws lies with the Government and with the Parliament. In most cases, the Federal Ministry being assigned with the relevant subject (according to the Federal Ministry Act) has to develop a draft proposal for the law. Legislative proposals are widely circulated in a review process in which it can be discussed whether the draft fully implements the judgment of the European Court of Human Rights. At this stage, the Constitutional Service of the Federal Chancellery is providing its expert opinion with respect to the Austrian Constitution including the European Convention on Human Rights. After the final draft of a law has been adopted by the Federal Government it is sent to Parliament together with an explanatory memorandum for debate, revision and enactment. Moreover, Parliament can initiate laws on its own. In this case, it is not dependent on any act by the executive.

In other cases, the implementation of a judgment requires the adoption or the amendment of ordinances. Ordinances are drafted and adopted by the competent federal minister.

If general measures have to be taken by way of laws or by way of ordinances, is a question of national constitutional law.

There is no specific, centralised and specialised body entrusted with initiating and coordinating the process of adoption of general measures following a judgment by the ECtHR. The development and adoption of the necessary general measures falls within the competence of the respective authority (e.g. it falls within the competence of the Ministry of Justice if a judgments required the amendment of the Code of Criminal Procedure). By way of cooperation between all bodies of administration the Government Agent and his deputy provide support, if necessary, in respect of the interpretation of the Convention and the case-law of the Court and they comment on drafts.

Due to the Federal Constitution of Austria, occasionally general measures have to be taken by the *Länder* (federal states). The division of competences between *Bund* and *Länder* according to the Austrian Constitution has to be observed when implementing judgment of the ECtHR. In this case, the general measures required have to be taken by the competent authorities of all *Länder* or of the *Länder* concerned. There is no specific procedure to ensure the fulfilment of the obligations of the *Länder* stemming from the respective judgments of the ECtHR. There is no specific body having the competence to give a formal instruction in order to legally force the *Länder* to implement a judgment (for the Constitutional Court see para. 4 and 5). In this respect, the importance of the "Human Rights Coordinators" (*Menschenrechtskoordinatoren*) should be mentioned. They were being established in 1998 on the basis of a decision of the Federal Government, the governments in the *Länder* did likewise. The Human Rights Coordinators meet at least twice a year to exchange relevant information on human right issues. The Deputy Government Agent in the Federal Chancellery being one of the Human

Rights Coordinators coordinates these meetings. During these meetings i.a. implementation measures following judgments of the ECtHR are discussed, if necessary. By this, an effective and useful exchange of experts of all administrative departments specialised in human rights is guaranteed, which improves the effectiveness of the implementation of judgments.

A specific indication by the European Court of Human Rights about general measures could be helpful to identify such measures for the implementation process at domestic level. Particularly, if a large number of applications referring to a specific problem are pending and a large number of persons are affected by this problem it may be effective to identify specific necessary measures. The previous efforts of the state concerned may also be a reason for the Court to give or not to give more concrete references to the necessary measures. Certainly, in most cases the necessary measures may be identifiable as a consequence of the human rights violation established by the Court. Furthermore, it falls into the discretion of the state concerned to decide how to execute a judgment. This margin of appreciation should be respected by the Court as well as the underlying principle of subsidiarity. The implementation of judgments under the review of the Committee of Ministers ensures the effective execution of the judgments and provides for the appropriate flexibility.

In Austria, the European Convention on Human Rights has been given the status of a constitutional law (see also para. 3). Since more than fifty years it forms an integral part of the constitution. The fact, that the Convention and the Strasbourg case-law are most relevant criteria in the jurisprudence of the Austrian Constitutional Court (*Verfassungsgerichtshof*), strengthened its relevance and importance for the Austrian legal order. There is a strong political consensus to comply with the Convention and to fully implement the judgments of the ECtHR. However, there are judgments by the Court relating to Austria which lead to criticism and political discussion, e.g. the right to vote of prisoners, the scope of LGBT-rights or family issues.

3. The status of the European Convention on Human Rights in Austrian law and its consideration by the courts

Since the European Convention on Human Rights has been given the status of a constitutional law in Austria, all legislation and all acts of the administration (including ordinances) as well as the judiciary have to comply with the Convention. That includes the case-law of the Court of Human Rights. The Constitutional Court has the competence to review laws and ordinances in order to establish any violation of constitutional law including the Convention and to rescind the law or ordinance violating constitutional law including the Convention.

All domestic courts (including the courts of first instance) have to observe the Convention. If a court has concerns regarding the compatibility of a law or an ordinance with the Convention as interpreted by the ECtHR, it shall file an application with the Constitutional Court for rescission of this law or ordinance. Only the Constitutional Court is empowered to rescind a law or an ordinance but every court can apply with the Constitutional Court to exercise this power. Furthermore, all courts have to interpret legislation and ordinances in conformity with the constitution, which includes – as said before – the Convention and the jurisprudence of the Court. Therefore, if a judgment of the ECtHR can be complied with by way of applying a specific interpretation of legislation or ordinances, all courts are obliged to apply this interpretation in their judgments.

In order to provide the necessary information for the courts (and other bodies) summaries of the judgments with respect to Austria and of other relevant judgments are submitted by way of circular by the Federal Chancellery at least twice a year.

4. The role of the Constitutional Court in the implementation of the European Convention on Human Rights

Neither the Constitutional Court nor the Supreme Court have a specific role or specific powers in determining or initiating general measures following a judgment by the Court. Particularly, the Constitutional Court and the Supreme Court do not have the competence to initiate the adoption or amendment of a law or an ordinance.

As mentioned before (see question 3) the Constitutional Court has the power to rescind laws and ordinances if it finds them to violate the Convention. The Supreme Court is not empowered to rescind laws, neither is any other court. The specific competence of the Constitutional Court to rescind laws requires an application duly brought before the Constitutional Court. According to Article 140 of the *Bundes-Verfassungsgesetz* (Federal Constitutional Law), courts as well as one third of the members of the *Nationalrat* (National Council) or the *Bundesrat* (Federal Council) are entitled to lodge an application. In specific cases, the *Länder* (federal states) have the right to apply with the Constitutional Court to assess the conformity of laws with the Constitution. Moreover, the Constitutional Court itself can decide on the conformity of a law or an ordinance with the

constitution including the Convention if the law or ordinance is decisive in an individual case pending at the Constitutional Court. The competence of the Constitutional Court to assess the conformity of laws and ordinances with the constitution including the Convention and to rescind the law or the ordinance in case of the incompatibility (*Normenkontrollverfahren* – procedures to assess the compatibility of laws with the constitution) plays a crucial role for the implementation of the Convention and the jurisprudence of the European Court of Human Rights. The control of legislation by the Constitutional Court is not limited to the implementation of judgments delivered with respect to Austria. But it is a tool to implement the full range of the Strasbourg case-law in the domestic legal order irrespective of the states concerned in the judgments.

5. The European Convention on Human Rights and the Austrian Constitution

Since the Convention has been given the status of a constitutional law in Austria, the interpretation of the Convention by the Constitutional Court is adapted to the Strasbourg case-law. In some cases, the Constitutional Court had to change its interpretation of the constitution (which includes the Convention) after a judgment of the European Court of Human Rights. This change of interpretation can lead to the rescission of a law.

One example for implementing a judgment of the ECtHR in this way is the judgment of the Court with respect to Austria, relating to Jehovah's Witnesses (ECtHR 31.7.2008, Appl. No. 40825/98). In its judgment of 25 September 2010 (VfSlg 19.166/2010) the Constitutional Court established that it has to change its own interpretation of Article 14 together with Article 9 of the Convention with regard to the time period required by the respective domestic law as a precondition before being recognised as a religious community. The Constitutional Court rescinded the relevant law. This example highlights the fact that the Constitutional Court explicitly shows its willingness to follow the case-law of the European Court of Human Rights even if it has to change its own interpretation of the Convention as part of the domestic constitutional law.

Former decisions of the Constitutional Court could lead to another assessment but should not be misinterpreted under the present day condition. In its judgment of 14 October 1987 (VfSlg 11.500/1987) the Constitutional Court found that it is bound by basic constitutional provisions establishing the organisation of the state even if they are not in line with the Convention in the interpretation of the Strasbourg Court. It emphasised that it was the competence of the legislative authority to amend the Constitution if there was an incompatibility with the Convention. The very last sentence of the quoted paragraph shows that the Constitutional Court found itself not to be empowered to amend constitutional provisions establishing the organisation of administration and courts being a part of the organisation of the state. This approach of the year 1987 cannot be regarded as the current status of the consideration of the Constitutional Court. Today, this judgment could not be regarded as a general reservation of the Constitutional Court *vis-à-vis* Strasbourg judgments challenging the Austrian constitutional order. The Constitutional Court has proven that it accepts the judgments by the Court and that it is willing to implement them without any exemption or reservation.

An amendment of the Constitution had been necessary with regard to the system of remedies in administrative law. This question had been touched by the Constitutional Court's decision of 1987 mentioned above. As a consequence of the jurisprudence of the ECtHR relating to Article 6 and Article 5 of the Convention it became clear that the system of remedies in administrative law consisting of administrative remedies and a review by the Administrative Court did not meet the requirements of the Convention. Therefore, Austria had to introduce a two-stage system of administrative court review in order to fully comply with the Convention. For this reform, which took a long time, several amendments of provisions of the Constitution had been necessary. After some "interim solutions", the Administrative Jurisdiction Amendment Act 2012 (Federal Law Gazette I No. 51/2012) entered into force in 2014 amending i.a. the *Bundes-Verfassungsgesetz* (Federal Constitutional Law). It fundamentally reorganised the mechanisms of legal protection against individual decisions of administrative authorities with view to the requirements of the Convention and the case-law of the ECtHR and of the European Charter of Fundamental Rights.

The subsidiary role of the European Court of Human Rights: margin of appreciation and national sovereignty, the "manifestly ill-founded" criterion

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Valeriy Dmitriyevich, judges of the Constitutional Court, Ladies and Gentlemen, colleagues! It is a great honour for me to be able to share my thoughts on the conference topic with such an authoritative international community of experts.

The stance of the Russian Federation regarding the role of the Convention and the binding nature of the European Court's judgments has been discussed more than once today. I think it unnecessary to dwell on this in detail again. Listening to the representatives of all branches of state authority and also the Russian experts making statements, there has been one consistent message: the Convention is without doubt binding for Russia, as are the European Court judgments based on it. This approach remains unchanged even after the European Court's adoption of judgments in the previously mentioned cases of "*Anchugov and Gladkov v. Russia*" and "*YUKOS v. Russia*" which were, to say the least, "inconvenient" for Russia. The constancy of that position is confirmed in the judgment handed down by the Constitutional Court in June. *Pacta sunt servanda* - agreements, including international treaties, must be honoured.

I think that the key question here lies elsewhere! That question is: what was agreed on? In other words, how is the famous provision of Article 46 of the Convention to be interpreted? Does that provision establish an absolute, unconditional obligation for a State party to be bound by an international treaty? Or does it contain exceptions albeit not directly mentioned but which may be inferred by parties to the Convention? Is the provision of Article 46 to be understood within the system of other norms of international law, in a context of interpretation of similar binding norms to which not only the European Court but also other international courts have recourse?

I believe that the Convention contains an implicit right for a State to derogate, from, or in all events stay, the execution of European Court judgments in exceptional circumstances, on grounds that the Court has exceeded the powers assigned to it (the margin of appreciation), where such a judgment violates the State's public policy and encroaches on its sovereignty, and also where it is not in line with international public policy (for example by manifestly violating the requirements of legal certainty in court practice, or of a fair trial etc).

It goes without saying that such a decision taken by national authorities may not be arbitrary and has limits; otherwise, abuses could not be ruled out. The criterion whereby a State may react in this manner to a European Court judgment is founded on the methodological acceptance repeatedly demonstrated by the Court (although, for the time being, not consistently) of its subsidiary function. Where the approaches of national courts and the European Court have to be reconciled on fundamentally similar human rights problems, the disagreement of one court with the opinion of the other is permissible *only on an exceptional basis* in circumstances where universally recognised standards have been flagrantly, "manifestly" and substantially violated. A manifest violation would result, for example, from a blatant error of logic, the absence of any reasonable grounds and so on, in the understanding of anyone (a so-called "outside observer").

I will explain these points regarding entitlement that may be inferred and the "manifest" criteria in a little more detail, as far as is reasonable in the context of a brief address, and then go on to propose an additional procedural solution which, in my view, will help to reinforce cooperation between national authorities and the European Court in the common cause of human rights protection.

So, according to sub-paragraph (a) of paragraph 1 of Article 2 and paragraph 3 of Article 31 of the Vienna Convention on the law of treaties, in particular, an international obligation/treaty derives from an aggregate of inter-related international law instruments, *whatever its particular designation; in the interpretation* of a treaty, account should be taken, together with the context, of *subsequent practice* in the application of the treaty and *any relevant* rules of international law applicable in the relations between the parties.

The general normative provisions that form the "Treaty", together with the Convention, with regard to both the Convention as a whole (fundamental human rights and freedoms) and its individual provisions (including the provision regarding the binding nature of judgments of the European Court of Human Rights as an international court), are contained in (a) the fundamental act of international law – the UN Charter, (b) regional conventions and other agreements, (c) special multilateral and bilateral agreements on the question of execution of decisions/judgments of foreign courts, the protection of state immunity and other international law documents.

In this venerable company of experts there is no need to quote the numerous international agreements that recognise sovereignty and state autonomy as one of the fundamental principles of international law (*jus cogens*). All of them call, to varying degrees, for account to be taken of national public policy and state sovereignty in the application of international law standards. That requirement is laid down as a principle. The elevation of that requirement to the level of a principle means that interpretations of the Convention (of Article 46) must conserve its effects.

In addition, modern international case-law contains a whole host of examples of parties in international relations derogating from execution of decisions or judgments of international organisations, including European international courts, while invoking, directly or indirectly, national and/or international public policy or national interests. We know of several cases concerning judgments of the UN's International Court of Justice and Security Council resolutions, whose supposedly absolutely binding nature has nevertheless been relaxed as a result of interpretation in context including by the European Court itself, and also the European Court of Justice with reference to international law principles.

Alongside state autonomy and the necessity of respecting state sovereignty and public policy, we must also bear in mind, in the universally binding category, the principle of respect for and protection of human rights. The effects of that principle extend not only to the activities of States but also to international organisations, including the European Court.

Let me elaborate on this by naming a number of conditions applicable by inference when interpreting and employing the provisions of Article 46 of the Convention.

Firstly: The principle of legal certainty is one of the key conditions for the functioning of a State governed by the rule of law and of respect for and protection of human rights. Accordingly, the European Court's practice must also comply with the requirements it established itself of reasonable clarity, coherence and consistency. There is no need in this auditorium to present examples of when the European Court has departed from this approach.

Secondly: The requirement to observe what are termed as procedural principles of natural law constitutes an implicit exception to the rules established by Article 46 of the Convention and a universally binding condition on the European Court's activities. There are two principles currently applicable *a minima* to any jurisdictional process: the first is that no one may be judge in their own cause (*nemo judex in causa sua*), the second is that both sides must be heard (*audi alteram partem*).

We have already heard mention today of the Court's judgment on just satisfaction in the YUKOS case, and the question quite rightly arose of how that judgment, benefiting over 50,000 shareholders, not one of whom

expressed any wish to end up having their conventional rights protected in this case, was arrived at. I would add that not even the viewpoint of the beneficiary (a foreign fund) nominated by the applicant company for compensation was clarified. If we look at the text of the judgment with regard to the substitution of the recipient of the payment contrary to the company's instructions, the company itself (or its representative) was not even asked for an opinion by the Court.

Thirdly, the exception that is implicit in Article 46 of the Convention is the necessity of considering the Convention's hierarchical position within the system of national legal norms, and particularly the inter-relation between the Convention and a country's Constitution/constitutional provisions. It has already been observed today that there are substantial variations in a number of States Parties to the Convention regarding this point (Austria, Italy, Germany, Russia, Ukraine, the United Kingdom and others).

In Russia, in the view of the Constitutional Court, the Constitution is designated as the summit of the hierarchy and has priority over the provisions of the Convention. One can be easily convinced of this argument with a literal reading of Article 15 of the Constitution. "International agreements of the Russian Federation shall be an integral part of its legal system" and have priority over laws (paragraph 4), but within that system the Constitution "shall have supreme legal force" (paragraph 1). This argument is further borne out in the contextual interpretation of Article 15.

In particular, it is established in Article 79 of the Constitution that "the Russian Federation may participate in interstate associations and transfer some of these powers to those associations in accordance with international agreements, provided that this does not entail restrictions on human rights and freedoms and does not conflict with the basic principles of the constitutional order of the Russian Federation". But according to the requirements of the Law "On the international treaties of the Russian Federation", "if an international treaty contains rules requiring amendments to individual provisions of the Russian Federation Constitution, the decision expressing consent to its binding nature for the Russian Federation is possible in the form of a federal law only after the corresponding rectifications have been made to the Russian Federation Constitution or its provisions have been reviewed under the established procedure (Article 22 - Special procedure for expressing consent to the binding nature of international treaties for the Russian Federation"). It is precisely in the Constitution that the fundamentals of national public policy, whose significance and meaning are subsequently elucidated by national constitutional justice bodies, are customarily established.

The rules laid down in the Constitution, including those relating to the hierarchy of legal norms, are "of fundamental importance" as a result of the Constitution's normative status and, being accessible to a participant in an international agreement acting in good faith, they are furthermore evident. For that reason, a special reservation on the priority of the Constitution and national public policy will be superfluous when concluding an international treaty.

Accordingly, contrary to the opinion of the partisans of a literal reading of the requirements laid down in Article 46 of the Convention regarding its binding nature, when signing up to the Convention the parties have not agreed to grant the European Court unlimited authority (appreciation) in interpreting the abstract norms of the Convention. The margin of appreciation is laid down in other applicable norms of international law, which recognise, in particular (but not only), the obligation to respect national public policy and sovereignty as well as international public policy.

Regarding the "manifestly ill-founded" criterion, while it is opinion-based, it does lay down certain pointers for the Courts in the exercise of their appreciation when appraising each other's legal approach. The requirement that deviation from the agreed standards must be manifest to an "outside observer" gives the proposed criterion greater objectivity.

In conclusion, as an additional procedural step towards reinforcing the European Court's subsidiary role and further enhancing its authority, I would like to propose taking on board the consultation mechanism laid down at the level of the European Union in the Protocol on the application of the principles of subsidiarity and proportionality appended to the final act of the Lisbon Conference in December 2007. Roughly paraphrased, this would mean that, in the event of a conflict between a judgment of a national constitutional court and a judgment of the European Court of Human Rights, the latter must, at its own initiative, approach the corresponding constitutional court or other authority fulfilling the function of constitutional supervision with a view to holding consultations on a possible conflict and such requests must be examined under an accelerated procedure.

Thank you for your attention.

Domestic structures and the implementation of general measures: a synthesis of 38 national systems

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During the last fifteen years academics have reflected on factors that account for differences in state compliance: the criteria linked to the incorporation of the ECHR and its rank in the domestic legal order is not relevant[86]; strong democracies tend to better implement judgments than other States[87], "successful state compliance with international and human rights law needs to rely both on political will and on management capacity and infrastructure"[88]. In an in-depth study using a database of nearly 1000 leading cases, some authors have come to the conclusion that "the importance of bureaucratic capacity decreases strongly and significantly the longer a case remains pending and the greater the political opposition. By contrast, domestic political constraints initially slow down the implementation of judgments. (…) In addition, while new democracies implement some cases more quickly, the problem cases that last longer are less likely to be resolved when they concern a new democracy or a non-democracy than when they involve a stable democracy"[89].

This report seeks to provide an overview of the national mechanisms and good practices not covered by the other national studies included in this publication. It is based mostly on the replies provided by the government agents to a questionnaire prepared by the Council of Europe[90]. This report is divided into three main issues: the synergies around the government agent office, the interaction between the executive and the legislative and the role played by national courts. It outlines ideas and options for discussion and concludes that further steps could be adopted on that preliminary basis.

86. D. Anagnostou, "Introduction, Untangling the domestic implementation of the European Court of Human Rights' judgments", in The European Court of human rights, Implementing Strasbourg's Judgments on Domestic Policy, ed. D. Anagnostou, 11-12.
87. A. von Staden, "Rational choice within normative constraints: compliance by liberal democracies with the judgments of the European Court of human rigths", online SSRN database, February 2012, 17ff.
88. D. Anagnostou & A. Mungiu-Pippidi, "Domestic implementation of human rights judgments in Europe: legal infrastructure and government effectiveness matter", EJIL 2014, 25(1), 205-227, 226.
89. S. Grewal & E. Voeten, "The politics of implementing European Court of human rights judgments", SSRN Electronic Journal, jan. 2012, 35.
90. The author of this report wishes to warmly thank the government agents and/or experts sitting at the CDDH who kindly contributed to the preparation of this report. 29 of the 38 States concerned sent replies; despite several reminders, it was not possible to get information for the others. It happened that additional information was asked after receiving the first reply, this is why I may refer to the 2nd reply sent by government agents.

I. The role of the government agent

States have set up government agents with a wide array of models having an impact on the procedure for the adoption of general measures (A). A more puzzled picture appears as to the synergy mechanisms surrounding the government office (B).

A. The Government Agent's Office

Following Recommendation 2008(2), the government agents have all been entrusted with the role of general coordination[91] and of defining and triggering the general measures to be adopted. Two major models exist as to the status of the government agent: either he/she works under the auspices of a particular Minister (Ministry of Justice, Ministry of Foreign Affairs and Ministry of Finance), either he/she has a separate office. Each model has drawbacks and advantages depending on the legal and political culture of the State. It is instructive to note that in Monaco, following the Order n° 4.025 on 9 November 2012, the Human Rights Body was removed from the Department of external relations to the Department of legal affairs to facilitate the adoption of general measures[92]. In the framework of the second model, the government agent may benefit from more respect and so be at a higher political level (like in Croatia since 2012 where the government agent office was transferred from the Ministry of Justice to a separate entity under the auspices of the Prime Minister). However, in Azerbaijan, the fact that the government agent is appointed by the President of Azerbaijan[93], which is quite unique in the European landscape, may lead to more dependence and to over-politicize the issue of the implementation of the judgments.

Thus the following factors seem relevant: the degree of cooperation between the government agent, the Permanent Representation in Strasbourg and the Ministries of Justice and Foreign Affairs; whether the government agent office is "able to link across the spectrum"[94]. In some countries, it could be helpful to enact a Memorandum of Understanding in order to clarify the relationship between the various stakeholders[95]. Government agents would greatly benefit from the attendance at the DH meetings of the Committee of Ministers in Strasbourg[96] in order to clarify what is expected and it would be an opportunity to exchange with other government agents and with the Department for the implementation of the judgments. Moreover the lack of (human) resources of such bodies needs to be addressed[97]: in Poland the government agent body has been reinforced during the last ten years, which explains, among other factors, why more and more Polish cases could be closed[98].

B. The networks surrounding the Government Agent's Office

It is fundamental that government agents "liaise regularly with all relevant domestic authorities, including the judiciary, to acquire information on the general measures taken/envisaged to execute the Court's judgments"[99]. States have opted for contact persons (Luxembourg[100]) or for provisional or permanent inter-institutional working groups[101]. In all these models it is the executive which has taken the lead and it appears difficult to imagine another setup[102]. The Polish case seems to be the most achieved one to this date with an inter-ministerial Committee set up in July 2007 under the auspices of the Prime Minister and "upon the initiative of the Government Agent" which involves the executive, the legislative, the judiciary, occasionaly the civil society and the Ombudsman[103]. In January 2015 the Prime Minister introduced a detailed schedule

91. P. Boillat, Concluding remarks, in The role of government agents in ensuring effective human rights protection, Proceedings, Council of Europe, 2008, 115.
92. E-mail dated 11th September 2015.
93. Execution of judgments of the European Court of human rights in Azerbaidjan, Status Quo upon Azerbaidjan's chairmanship of the Committee of ministers of the Council of Europe, Free Expression Observatory, MRI, May 2014, 13, 14.
94. E. Mottershaw & R. Murray, « « National Responses to Human Rights judgments: the need for government co-ordination and implementation », 2012 EHRLR 6, 639 & f., 652.
95. Idem, 652.
96. G. Meyer, Theme III, in The role of government agents in ensuring (…)", 92.
97. D. Anagnostou & A. Mungiu-Pippidi, "Domestic implementation (…), 222.
98. Reply to the questionnaire, 16th February 2015.
99. Round-table on Recommendation 2008(2) of the Committee of Ministers to Member States on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights, "Synthesis of the replies by member States to the questionnaire on the domestic mechanisms for rapid execution of the Court's judgments", prepared by the Secretariat, 15-16 December 2011, 5.
100. Reply to the questionnaire, 11th February 2015.
101. Guide for the drafting of actions plans and reports for the execution of the judgments of the European Court of human rights, Series Vade Mecum n°1, CoE, Directorate GI, August 2015, 13.
102. E. Mottershaw & R. Murray, « National Responses (…)", 644.
103. Reply to the Questionnaire, 16th February 2015.

for the submission of action plans and reports and for the translation of judgments and their dissemination among the relevant stakeholders. Since 2012 Croatia has offered another interesting illustration of such a permanent inter-institutional network involving the judiciary[104]. Information is shared with the Parliament. A similar body exists in the Former Yugoslav Republic of Macedonia with the executive and the judiciary[105] and other actors may be invited (NGOs, legal experts and professionals)[106]. In Moldova, the government agent may be assisted by an advisory council that shall comprise the representatives of state authorities, academia and civil society[107]. Thus it seems important to reflect on the added value of such bodies, of having deadlines and of involving other external stakeholders.

II. The interaction between the executive and the legislative in view of the adoption of general measures

Very few States have enacted a special regulation (Poland, Ukraine and Spain) and no expert mentioned a special practice concerning pilot judgments. More problematic seems to be the case when an expert mentions that "there is no entity vested with specific competence for triggering the procedure aimed at the adoption of general measures"[108]. In some limited States (Czech Rep., Spain, Finland, with more doubts Luxembourg), this procedure is applicable by analogy to other judicial and even sometimes non-judicial bodies.

The degree of interplay between the government agent, the executive and the legislative considerably varies. Yet two steps can clearly be identified, the first one involving the government agent and the executive (A), the second one being at the parliamentarian stage (B).

A. First step: the executive at the forefront

In a certain number of States the initiative to adopt general measures lies in the hand of the government agent (in Portugal, Luxembourg, Romania or Monaco), but most of the time in cooperation with the executive. States which opted for an independent Agent government's Office have usually given larger powers to the government agent (Cyprus[109]). Yet, in a majority of States the initiative to adopt general measures lies more openly in the hands of the executive. The procedure may be centralised or more often decentralised (like in Finland, in Ireland[110], in Estonia, in Liechtenstein and in Croatia) in that each Department (involved in the case) may be responsible for drafting measures.

From this synthesis several questions have emerged: whether the government agent should be allocated more powers when the question of drafting general measures comes; the benefits of a centralised and of a decentralised system; the advantages of involving other actors, such as the civil society, experts, National HR institutions and ombudsmen (like in Spain where he played a very positive role[111]); the degree of consultations with the Department for the implementation of the judgments. The expert for Belgium mentioned that regular phone calls, e-mails and also visits on the ground by this Department help much to pressure the various actors[112]. In Lithuania, in case of opposition by the Parliament, assistance by the Execution Department would have a greater impact than setting up working groups[113].

B. Second Step: The remaining role played by the legislative

The implementation of the judgments has increased the role played by governments but has sometimes reinforced Parliaments too. Thus in most cases the executive prepares and proposes the amendments that the legislative has then to adopt (like in Norway, Finland, Greece, Bosnia Herzegovina or Croatia). Through our research on the ground, we got the impression that some experts seemed to share the view that it would be beneficial to involve the Parliament at an earlier stage in order to avoid opposition when the vote is taken.

104. Reply to the questionnaire, 4th March 2015.
105. PPSD (2014)22, 13 October 2014, "The role of parliaments in implementing ECHR standards: overview of existing structures and mechanisms", Background memorandum prepared by the Secretariat, 9.
106. Reply to the questionnaire, 15th June 2015.
107. Art.9, chap.2, Appendix 3 of the new law (Law No. 151 of 30.07.2015 on the Governmental Agent).
108. Reply to the questionnaire, 2nd February 2015.
109. 1st Reply to the questionnaire, 5th February 2015.
110. E. Mottershaw & R. Murray, "National responses (…), 651.
111. M. Candela Soriano, « The Reception process in Spain and Italy », in A Europe of rights, 431-432.
112. 2nd Reply to the questionnaire, 6th March 2015.
113. 2nd Reply to the questionnaire, e-mail dated 6th March 2015.

Previous studies have revealed that the greater role the Parliamentary plays, the more effective the implementation of the judgments of the European Court of Human Rights is[114].

The involvement of the legislature may take several forms: a co-proposal procedure could be set up; or the Parliament could be consulted by the executive (and the government agent) and/or represented in inter-institutional bodies when such bodies do exist (a practice experienced by some very few European States). A synergy may be deepened within the new established structures among parliaments (sub-committees on human rights); thus a regular parliamentary scrutiny of action plans/reports[115] could be introduced. Yet the prerequisite for this should be "the need for parliaments to possess an efficient 'legal' service – with specific human rights competence"[116].

C. European tools to encourage the adoption of general measures

Not surprisingly, experts adopt very diverse opinions when we come to the question of the utility for the Court to indicate measures to be adopted under Article 46, some favoring it (Czech Republic, Belgium, Greece, Bosnia Herzegovina) under the condition they abide by the principle of subsidiarity, or even demanding it (Moldova, Andorra, Hungary, Former Yugoslav Republic of Macedonia, Slovak Republic, Romania), others opposing this practice (Finland, Spain, Portugal, Monaco, Croatia and Ukraine). It appears that the diversity of opinions depends more on the personal experience, not on the size of the country neither necessarily on the political and/or legal culture. Academics have noted that the judgments where the Court made indications as to Article 46 (including with deadlines) are better and more quickly implemented than others[117]. It would be useful, on a case by case basis, that government agents indicate to the Court when giving some clarifications under Articles 41 and 46 would facilitate the implementation of the judgments.

Concerning the authority of interim resolutions, many experts mentioned the fact that they are at least morally binding. Academics have shown that "as judgments are pending longer (and perhaps are more politically sensitive), executives with high constraints are less able to resist pressures to comply than those with fewer constraints. We find at best weak evidence that international pressures also contribute to faster implementation, thus corroborating the recent literature that domestic constraints are the key to compliance with international human rights treaties". So "if States choose to resist implementation, powerful states are more likely to endure that resistance". Thus, "in countries where legislatures exercise a strong constraint on power, legislatures could force unwilling executives to comply"[118]. Thus the combination of European and national pressures should be favoured.

III. The key role played by national Courts when faced with the need to adopt general measures

The whole picture emerging out of the replies seems once more heterogeneous, not only with regard to the practice developed by Courts of first instance, but also by Higher Tribunals.

With regard to domestic Courts of first instance, there seems to be, in most systems, no possibility nor an established procedure for referral to the Supreme Court and/or Constitutional Court when facing a problem of compliance with the ECHR judgments which require the adoption of general measures (for instance in Finland, Croatia, Moldova, Monaco, Former Yugoslav Republic of Macedonia and Norway). Some States offer a possibility of referral, like in Lithuania, Czech Republic, Luxembourg, Greece, Spain and Belgium. In some countries the Supreme Courts may issue recommendations to lower Courts (Ukraine, Azerbaijan and Moldova).

Thus Courts of first instance seem to be equipped when facing the issue of the implementation of a general rule incompatible with the ECHR. The question arises as to whether Supreme and/or Constitutional Courts can order the State to adopt general measures. This possibility does not exist in many countries due to the

114. D. Anagnostou & A. Mungiu-Pippidi, "Why do States implement differently the European Court of human rights judgments ? The case law on civil liberties and the rights of minorities, JURISTRAS Project (2009) 23. M. Chrzanowska, in Parliaments and the European Court of human rights, 12 May 2015, Senate, Warsaw, 9-10.
115. PPSD (2014)22, "The role of Parliaments (…)", para.21.
116. A. Drzemczewski & J. Lowis, "The work of the Parliamentary Assembly of the Council of Europe", in Hunt, Hooper & Yowell, Parliaments and Human Rights, 2015, 323.
117. P. Leach, "No Longer Offering Fine Mantras to a Parched Child ? The European Court's developing approach to remedies", in A. Follesdal, B. Peters and G. Ulfstein (eds), Constituting Europe: The European Court of human rights in a National, European and Global context, CUP, 2013, 160. E. Lambert Abdelgawad, « L'exécution des arrêts de la Cour européenne des droits de l'homme (2013), bilan et perspectives d'avenir », RTDH, 2014, 599-600.
118. S. Grewal & E. Voeten, "The Politics of Implementing (…)", 4, 22 & 8.

separation of powers. Yet several peculiarities exist: the Bosnian Herzegovinian Constitutional Court shall order amendments to the provisions which are found to be incompatible with the ECHR[119]. The Azerbaidan Supreme Court has the power of legislative initiative[120]. The Czech Constitutional Court may indicate general measures and it is also possible for it and for the Supreme Court to dialogue with the government agent to see whether a reversal of interpretation is possible[121]. Following the finding by the Belgium Constitutional Court that there exists a legislative gap contrary to the Constitution (indirectly the ECHR), there emerges a "legal obligation for the legislature to fill such a gap"[122].

Besides the diversity of solutions, this report could help to reveal the failures of domestic capacities in too many States in order to implement general measures. One of the conclusions we have come to, and this has already been noted[123], is that these domestic structures "reflect a largely top-down implementation process. The institutional arrangements predominantly rely on the executive and in most countries we find a strong degree of centralisation. The involvement of the legislative is limited whereas Tribunals seem to benefit from more possibilities to impact general rules. Surprisingly, the government agent does not always play a key role and external stakeholders are not sufficiently involved.

Therefore we wish to conclude this report that time has come not only for exchange of good practices but it has become important to go further Recommendation 2008(2) in order to draw up a more precise framework to give States the opportunity to enhance their domestic capacities.

119. Reply to the questionnaire, 8 January 2015.
120. Reply to the questionnaire, 4th March 2015.
121. "Interestingly, the Constitutional Court Act provides another option. If an international court finds that an obligation resulting for the Czech Republic from an international treaty has been infringed by the encroachment of a public authority (…), and if such infringement was based on a normative act in force, the Government shall submit to the Constitutional Court a motion for annulment of such normative act (…), if there is no other way to assure it will be repealed or amended. However, this option has never been used so far": Reply to the questionnaire 12th February 2015.
122. J. Gerards & J. Fleuren, chap.9 Comparative analysis, in Implementation of the European Convention on Human rights and of the judgments of the European Court of Human Rights in national case-law, a comparative analysis, J. Gerards, J. Fleuren (eds.), Intersentia, 2014, 333 et s., 344-345.
123. JURISTRAS, D. Anagnostou, http://www.eliamep.gr/old/eliamep/content/home/research/research_projects/juristras/en/index.html (11th September 2015).

Observations liminaires

Vít Alexander Schorm

Agent du gouvernement, Ministère de la Justice de la République Tchèque

Président du Comité directeur pour les droits de l'Homme (CDDH)

Monsieur le Président de la Cour constitutionnelle, Mesdames et Messieurs,

Hier soir, nous avons pu apprécier les musiciens et les danseurs dans l'une des pièces russes les plus classiques, le Lebedinoje ozero, le Lac des Cygnes, de Piotr Iljič Čajkovskij. Ce ballet avait sa première en 1877 à Moscou, avec la choréographie d'un Tchèque, Václav Reisinger. La Russie était dirigée à l'époque par le tsar Alexandre II dont le père, Nicolas Ier, a, sur son lit de mort, curieusement exhorté son successeur à surtout ne rien changer en Russie qui était en train de perdre une guerre.

Or le fils, qui, dans sa jeunesse, a failli épouser la reine Victoria lors de son passage à Londres, a tout changé: il a aboli le servage, opéré d'autres réformes majeures, et en est arrivé, en fin d'hiver de 1881, jusqu'au point d'édicter une Constitution pour la Russie, marquant ainsi la fin de samoděržavie, le despotisme ou l'absolutisme des empereurs russes. Hélas, avant d'octroyer la sanction finale à ce texte, l'empereur de toutes les Russies, pas très loin d'ici, a été assassiné par les anarchistes. Le nouveau tsar Alexandre III, dont le nom reste attaché au plus joli des ponts de Paris, choqué par l'horreur de l'attentat, n'a pas osé sceller l'œuvre de son père.

Quoique l'histoire n'admette pas de "si", on peut rêver que la Russie serait alors devenue une monarchie constitutionnelle et se serait vraisemblablement épargnée de bien des vicissitudes d'envergure mondiale. Et cette ville, qui sait, aurait pu rester de nos jours la capitale de l'empire dont on voit pas mal de traces ici ou là, y compris dans cette salle magnifique.

Pourquoi cette introduction historique ce matin? Bien d'entre vous connaissent probablement l'histoire russe mieux que moi. Eh bien, d'abord pour remercier le président Zorkine d'avoir bien voulu nous inviter à regarder ce ballet magnifique, d'ailleurs terminé de manière optimiste, à la différence du scénario classique où le Cygne meurt. Et puis, pour rappeler que la Russie, même dans sa configuration "empire", a toujours été, inexorablement et à juste titre, attirée par l'Europe. La constitution écrite est une invention occidentale et la Convention européenne des droits de l'homme, aussi.

Voilà. Je crois que le temps est venu d'introduire la première oratrice. Elle est juge de la Cour de Strasbourg et compatriote de pratiquement toutes les tsarines depuis le XVIIIe siècle, y compris de Catherine la Grande. Elle a fait des études slaves et je me demande si elle s'exprimera aujourd'hui devant nous en russe ou dans une des deux langues officielles de la Cour. Quel que soit votre choix linguistique, Madame Nussberger, vous avez la parole pour nous présenter l'expérience allemande de la mise en œuvre des arrêts de la Cour européenne.

Enhancing national mechanisms for effective implementation of the European Convention on Human Rights report on Germany[124]

Angelika Nußberger

Judge of European Court of Human Rights on behalf of Germany, elected Section President of the European Court of Human Rights

What counts are results. A well-balanced and convincingly argued judgment does not change the reality and improve the human rights situation in the member States of the Council of Europe unless it is taken seriously by those whom it concerns. Therefore it is very important that the organisers of this conference have put this question on the agenda.

What are the preconditions for an effective implementation of the European Convention on Human Rights? In my view there are two preconditions that are equally important: First political will, and second effective mechanisms. The best mechanisms will be of no help if there is no political will. And the best political will cannot suffice to implement judgments if there are no effective mechanisms.

I was invited as an expert on the implementation system in Germany. So let me explain the situation in my own country[125].

1. Political will as a precondition for effective implementation

First: political will.

a) Ratification and its consequences

The political will is manifest; the ratification of the Convention documents the political will. As Germany has ratified the Convention, it is legally bound by it. What that means is clearly spelled out by the Vienna Convention on the Laws of the Treaties. The most important article in this context is one that constitutional courts tend to forget or at least not to cite: "A party may not invoke the provisions of its internal law as justification for its

124. The text only reflects the personal opinion of the author and does not bind the Court in any way.
125. Cf. Angelika Nußberger, The European Court of Human Rights and the German Federal Constitutional Court, http://www.cak.cz/assets/pro-advokaty/mezinarodni-vztahy/the-echr-and-the-german-constitutional-court_angelika-nussberger.pdf.

failure to perform a treaty"[126]. This applies to constitutional law as well as to ordinary laws, from the perspective of international law no distinction is made.

b) Practice

Up to now in practice there was no real problem of non-implementation of a judgment of the Court in the German legal system. There is no controversial open question like the painful question of prisoners' voting rights in Britain. It is true that there were tensions, but nevertheless all the judgments, even if they were ferociously criticized, were implemented. That is true especially in the case of the two most important conflicts between the German Federal Constitutional Court and the Strasbourg Court.

The first case concerned the balancing of freedom of the press and privacy and thus the von-Hannover-jurisprudence of the Court[127]. The main question was in how far famous people would have to tolerate intrusions into their private life by photographers and journalists. On the basis of the first judgment of the ECHR of 2004[128] in which it found that Germany had violated the Convention as it had not sufficiently protected the rights of the famous persons the Constitutional Court changed its jurisprudence in this field and introduced, as required by the Strasbourg Court, the element "contribution to a public debate" into its analysis of such cases[129]. This change in the jurisprudence was in a later judgment accepted by the Strasbourg Court as compatible with the Convention[130]. In this way the conflict was solved.

The second case concerned security detention. Its retroactive prolongation was considered to be a violation of the Convention by the Strasbourg Court. In an earlier judgment the German FCC had considered the same regulation to be in line with the German Constitution[131]. Nevertheless, after the Strasbourg Court had found a violation, the FCC accepted to reopen the case and reconsider it on the basis of the ECHR's argumentation. And, what was quite sensational, it accepted the position of the Strasbourg Court and declared the whole regulation to be unconstitutional. While it allowed the regulations to be still applied in a modified form for a transitory period, it charged the legislator with the elaboration of new legislation. Even if the FCC upheld the systematic and conceptual approach of the German law and integrated the Strasbourg judgment in this system, it is fair to say that the implementation of the Strasbourg Court's judgment was a success story.

So far, in practice, there were thus no problems.

In theory, however, the FCC elaborated a differentiated approach that has often been misunderstood.

c) Theory

It is true that in German national law the ECHR has the status of a Federal statute and is therefore subordinate to the Basic Law. This is different from most of the other member States of the Council of Europe which, as a rule, grant the Convention a status above laws, but under the Constitution. However, this difference is not so relevant, as the FCC has explained that the Convention must be relied on as an interpretation aid in the interpretation of the fundamental rights and the rule-of-law principles of the Basic Law, provided that this does not lead to a restriction or reduction of protection of fundamental rights under the Basic Law – this is the basic message of the Constitutional Court in the famous Görgülü judgment[132]. The most important factor is the openness of the Basic Law to international law and its substantive orientation towards human rights. All this aims at preventing violations of public international law.

Nevertheless, it is also true that the FCC has set limits to the openness of the Basic Law. According to the FCC a precondition for the implementation of is that the ECHR's judgments are "part of a methodologically justifiable interpretation of the law". Furthermore, the implementation must not be a "schematic enforcement", but has to take the effects on the national legal system into account. In addition to that the FCC also indicates what may be called an "emergency exit":

126. Article 27 of the Vienna Convention on the Law of the Treaties. This rule is without prejudice to article 46 which concerns the competence to conclude a treaty.
127. The most important case in this context is the FCC's judgment of 15 December 1999 (BVerfG " 101, 361) which forms the basis for the ECHR's judgment in the case von Hannover v. Germany.
128. ECHR judgment von Hannover v. Germany, No. 59320/00, 24 June 2004.
129. Judgment of the FCC, BVerfGE 120, 180.
130. ECHR judgment von Hannover No. 2, No. 19359/04, 17 December 2009.
131. Judgment of the FCC, BVerfGE 128, 326.
132. Judgment of the FCC, BVerfGE 111, 307; https://www.bundesverfassungsgericht.de/entscheidungen/rs20041014_2bvr148104en.html.

"The Basic Law aims to integrate Germany into the legal community of peaceful and free states, but does not waive the sovereignty contained in the last instance in the German constitution. There is therefore no contradiction with the aim of commitment to international law if the legislature, exceptionally, does not comply with the law of international agreements, provided this is the only way in which a violation of fundamental principles of the constitution can be averted"[133].

Here the FCC indicates that a conflict might be possible. This has been only theory up to now. It remains to be seen how such a conflict might be solved. It is a real dilemma as constitutional law and international law come to different conclusions.

2. Mechanisms for implementation

Concerning now more concretely the mechanisms for implementation which I have explained in my paper I might summarise the results as follows: There does not exist a specific procedure of follow-up to ECHR judgments finding a violation of the Convention. The problems are rather dealt with on the basis of the general mechanisms provided for in the German legal system for legal change.

Once a judgment becomes final, the Agent's Office within the Federal Ministry of Justice will analyse the judgment and determine whether general measures are deemed to be necessary. If so, the Ministry of Justice will initiate the necessary steps – depending on the nature of the measures, which may necessitate federal legislation, *Länder* (state) legislation, practice directions or the mere dissemination of information to the judiciary, including the translation of ECtHR judgments.

The lack of a written procedure may stem from the fact that the judgments establishing a violation by Germany have – compared to many other Contracting States - never been very numerous (178 since 1959) which might be explained by the powerful position of the German Federal Constitutional Court. After a moderate peak in the 2000's numbers have even dropped to ten violations found in 2012 and three in 2013 and 2014 respectively. Moreover, some judgments do not require special general measures as they are resolved solely on an individual level.

Another reason why no unitary procedure of implementation is laid down might be that the judgments which do require implementation of general measures have been of great diversity, thus involving a wide spectrum of legislative and other issues.

In spite of the diversity of the cases most general measures require a piece of federal legislation. In these instances the executive will be obliged to come up with a draft for the necessary legislative measures which will then be examined by the legislative bodies. The legislature will usually leave the first draft to the executive, but it also has the right of initiative. The Ministry of Justice will be the first to identify any need for legislation, but the official coordination of such measures will fall to whichever ministry is responsible for the respective field of legislation. Thus, the procedure does not differ from the general law-making procedure.

There are many examples where the jurisprudence of the ECHR has triggered new legislation. This is true for length of proceedings cases where the German legal system did not afford litigants an effective means of complaining of the length of pending proceedings. A new law was enacted within the one-year time-frame granted by the Court in a pilot judgment.

There is, however, a problem for the courts of first, second and third instance when they have to apply the current law even if there might be contradicting jurisprudence of the ECtHR. They may try to interpret a legal provision in the light of the ECtHR's decision, but this is not always possible. The courts could refer such a case to the Constitutional Court on the basis of a specific procedure based on Article 100 of the Basic Law if they are convinced that the relevant provision is not only incompatible with the Convention, but also with the Constitution. It is then up to the FCC to decide on the conflict.

One illustrative example for such a – yet unresolved – conflict concerns civil servants' right to strikes. While the Basic Law prohibits strikes of civil servants generally, the jurisprudence of the ECHR – developed in a series of Turkish cases – demands a differentiated functional approach. In a concrete case the Supreme Administrative Court saw no other solution than to regard the teacher's participation in the strike as illegal on the basis of the Constitution, but stressed this dilemma as a serious legal problem and called for a change in legislation[134]. It did, however, not call upon the FCC to decide the conflict on the basis of Article 100 of the Basic Law.

133. Idem.
134. Judgment of the Supreme Administrative Court, 27.2.2014 (BVerwG 2 C.1.13).

These are intricate questions which all the member States to the Convention have to face. But such very specific – and still open questions do not call into question the efficiency of the mechanism of implementation as such.

There is a famous proverb: Where there is a will, there's a way. In my view this is the most important aspect in implementing the judgments of the ECHR in the member States to the Convention.

La France face à l'exécution des arrêts de la Cour européenne des droits de l'homme

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La question de l'exécution des arrêts de la Cour européenne des droits de l'homme[135] par la France ne peut pas être qualifiée de long fleuve tranquille. En effet, les relations entre la Cour de Strasbourg et l'Etat français révèlent des tensions et des crises passagères, qui ont pu être surmontées notamment par la communication et le dialogue entre les différents acteurs chargés de l'exécution des arrêts. Au fondement même de cet échange entre Strasbourg et Paris réside un consensus politique selon lequel les décisions de la CourEDH doivent être exécutées car la protection des droits et libertés l'emporte sur toute autre considération.

Ainsi convient-il d'envisager les mécanismes d'exécution des arrêts de la CourEDH – dans leur fragilité (I), avant d'évoquer l'existence en France d'un fort consensus politique – garant de la résolution des crises potentielles (II).

I. Les faiblesses et les limites des mécanismes français

Si la France a pu être historiquement considérée comme la patrie des droits de l'homme, en raison de l'adoption de la Déclaration des droits de l'homme et du citoyen dès 1789, son inscription dans la dynamique européenne de protection des droits de l'homme ne s'est pas faite sans résistance (A). Et ce n'est que progressivement qu'ont été mis en œuvre des mécanismes concrets d'exécution des arrêts de la CourEDH (B).

A. Les résistances initiales à l'encontre de la Convention EDH

Il faut, tout d'abord, rappeler que si la France a activement participé à la rédaction de la Convention de sauvegarde des Droits de l'Homme et des Libertés Fondamentales[136] et a compté parmi ses premiers signataires, en revanche, sa ratification n'est intervenue que bien tardivement, en 1974, soit 23 ans et 5 mois plus tard. Et ce n'est qu'en 1981 que la France a reconnu le droit de recours individuel et la juridiction de la Cour Européenne des droits de l'homme.

Une telle lenteur à ratifier la CEDH s'est expliquée par des raisons politiques diverses[137] telles que la question scolaire, la situation en Algérie et la peur d'être condamnée pour les exactions commises dans ce contexte

135. Ci-après CourEDH.
136. Ci-après CEDH.
137. Sur les circonstances et l'histoire de la ratification par la France, cf Alain Pellet, « La ratification par la France de la Convention Européenne des droits de l'homme », *Revue du Droit Public et de la Science Politique en France et à l'étranger*, septembre-Octobre 1974, p. 1319-1379.

sous la IVème République, puis une certaine hostilité de principe de la Vème République, déguisée sous des arguments techniques (tels que l'incompatibilité entre certaines règles de procédure pénale française et les dispositions de la Convention). C'est, en bref, une crainte de perdre sa souveraineté qui a conduit la France et ses gouvernants à cette posture réticente vis-à-vis de la ratification. Et il y a bien là un certain paradoxe lorsque l'on sait que des juristes français ont joué un rôle fondamental dans l'élaboration du texte, à l'instar de René Cassin – auteur principal de la Déclaration Universelle des Droits de l'homme – ou encore Pierre-Henri Teitgen – un des rédacteurs de la CEDH.

En outre, une fois ratifiée, la Convention a été considérée du point de vue interne comme un traité doté d'une valeur supra-législative, mais infra-constitutionnelle, en vertu de l'article 55 de la Constitution de 1958. C'est ainsi qu'en janvier 1975, le Conseil constitutionnel a rendu une décision très célèbre sur l'Interruption Volontaire de Grossesse[138] et a considéré, à cette occasion, qu'il n'était pas juge de la conventionnalité des lois, mais exclusivement juge de la constitutionnalité des lois. Il s'est ainsi mis en retrait tout en invitant cependant les juridictions ordinaires (administratives et judiciaires) à opérer ce contrôle de la conventionnalité. Si la Cour de cassation a accepté d'opérer ce contrôle et a fait prévaloir dès 1975[139] les traités sur les lois adoptées postérieurement, il a fallu attendre 1989 et le célèbre arrêt Nicolo[140] pour que le Conseil d'Etat en fasse de même. A la suite de ces célèbres arrêts, les juges ordinaires confrontés à un cas d'incompatibilité entre une loi ordinaire et un traité ont ainsi écarté la loi et appliqué le traité. Mais il n'en demeure pas moins qu'historiquement, les juges ordinaires ont été réticents à s'appuyer sur la CEDH et les décisions de la CourEDH. La ratification et les premières applications de la CEDH reflètent ainsi un processus d'échange complexe – du moins dans ses débuts – entre la Convention Européenne et l'ordre juridique français.

B. La fragilité des mécanismes d'adoption des mesures générales

Si l'on évoque maintenant la procédure d'adoption des mesures générales, il faut souligner qu'en France, celle-ci n'est pas établie par une loi. Ainsi, la Direction des Affaires Juridiques du Ministère des Affaires Etrangères et du Développement International (MAEDI) comprend une sous-direction des droits de l'Homme qui est investie d'une mission contentieuse (elle représente la France devant la CourEDH) et consultative (elle répond aux questions portant sur l'interprétation de la CEDH). C'est cette dernière qui assure la coopération interministérielle et informe l'autorité concernée par le constat de la violation de la CEDH de la nécessité de mettre le droit interne en conformité avec la Convention.

Du point de vue du contentieux administratif, le MAEDI a comme interlocuteurs principaux le Conseil d'Etat et le ministère de l'Intérieur, lesquels sont en relation avec les juridictions du fond. S'agissant du contentieux judiciaire, le MAEDI a comme interlocuteurs principaux la Cour de Cassation et le ministère de la Justice. La décision d'adopter des mesures générales découle donc de la concertation entre les différents organes concernés, notamment les autorités administratives et les juges. Les juridictions judiciaires et administratives suprêmes ont notamment beaucoup contribué à définir les modalités pratiques d'exécution des arrêts de la CourEDH.

Les techniques utilisées pour adapter le droit interne à la suite de l'adoption d'un arrêt de la CourEDH sont donc nées de la pratique. Elles se présentent sous différentes modalités :

- tout d'abord, il s'agit de la *communication pour information* de l'arrêt de la CourEDH auprès des organes concernés ; en France, une proposition de loi a par ailleurs été déposée le 13 avril 2011, tendant à présenter au Parlement un rapport annuel sur l'exécution des arrêts de la Cour européenne des droits de l'homme par la France, mais elle n'a pas été adoptée. L'objectif aurait été de renforcer le suivi de l'exécution des arrêts de la CEDH par le Parlement français sur le fondement d'un rapport adressé par le Gouvernement.
- il s'agit, ensuite, de la *publication et diffusion de l'arrêt dans des revues juridiques et sur les sites internet*[141] ;
- il peut également y avoir émission par le gouvernement de *circulaires administratives* afin de donner des instructions aux autorités concernées pour mettre en œuvre la jurisprudence de Strasbourg et afin d'éviter que la violation ne se répète du fait d'une application erronée du droit interne. Ces circulaires sont des circulaires interprétatives et non réglementaires. En effet, une circulaire adressée aux juges ne saurait être impérative en raison même du principe de la séparation des pouvoirs. Il ne s'agit donc que d'une simple

138. Décision n° 74-54 DC du 15 janvier 1975, *Journal officiel du 16 janvier 1975*, page 671, *Recueil*, p. 19.
139. Cour de Cassation, 24 mai 1975, *Société des Cafés Jacques Vabre*, 73-13.556.
140. CE, 20 octobre 1989, Nicolo, *Recueil Lebon* p. 190.
141. Evoquons, à titre d'illustration, le site internet grand public *Legifrance* (www.legifrance.gouv.fr) et par exemple pour l'affaire Mennesson c. France du 26 septembre 2014 (à propos du refus de retranscription d'actes d'état civil pour des enfants nés par gestation pour autrui) la publication dans l'intranet de la Cour de cassation par le service de documentation, des études et du rapport de la Cour de cassation (Veille de droit européen, mai-juin 2014, n° 65).

recommandation. C'est d'ailleurs ce qu'a souligné le Conseil d'Etat, dans un arrêt du 7 décembre 1992, *M. Terrin*, lequel demandait l'annulation de deux circulaires du Garde des sceaux adressées aux juridictions suite aux arrêts de la CourEDH *Kruslin et Huvig* de 1990 sur les écoutes téléphoniques[142].

Naturellement, les modifications jurisprudentielles peuvent également être le seul fait du pouvoir judiciaire qui procède de lui-même à un revirement de jurisprudence. C'est le principe de la « loyauté conventionnelle »[143] qui s'applique.

- Parfois, enfin, afin que la répétition de l'illicite cesse, il faut recourir au *législateur et à des modifications normatives*. La décision de modifier la législation est par conséquent fortement tributaire de la volonté politique du gouvernement. Ainsi, au lendemain des arrêts *Kruslin et Huvig*, M. Toubon évoque « l'obligation juridique… de faire une loi précise qui remplisse les conditions fixées par la Cour de Strasbourg dans les deux arrêts par lesquels la France a été condamnée »[144]en matières d'écoutes téléphoniques. Et c'est en s'appuyant sur les indications précises de la CourEDH que la loi du 10 juillet 1991 a établi la nature des infractions pouvant donner lieu à des écoutes téléphoniques ou encore les limites de temps acceptables.

De même, c'est volontairement que le législateur français a fait évoluer la législation sur la garde à vue en adoptant la loi du 14 avril 2011 qui prévoit que l'avocat pourra assister à toutes les auditions de la personne dès le début de la mesure de garde à vue et que l'intéressé sera informé du droit de garder le silence. Cette loi est intervenue à la suite de deux arrêts *Salduz c. Turquie*[145] et *Dayanan c. Turquie*[146] dans lesquels la Cour Européenne avait rappelé les exigences du procès équitable en consacrant le droit d'être assisté d'un avocat dès le début de la mesure et le droit de garder le silence, arrêts qui ont précédé l'arrêt *Brusco c. France* du 14 octobre 2010 par lequel la France était directement visée et condamnée par la CourEDH.

Le système juridique français a donc donné naissance à une série de « pratiques » qui permettent d'exécuter les arrêts de la Cour Européenne des droits de l'homme. Celles-ci restent cependant fragiles dans la mesure où aucun cadre législatif ou réglementaire ne vient les consacrer, ni les protéger. De même, l'exécution des arrêts repose sur une simple concertation entre les organes du pouvoir impulsée par l'Agent du Gouvernement français. Cependant, malgré cette absence de cadre formel, les conflits potentiels entre Strasbourg et Paris ont pu être surmontés en raison d'un consensus politique fort autour de la nécessaire protection maximale des droits de l'homme.

II. Les crises juridiques surmontées grâce à un consensus politique fort

Les relations entre la Cour de Strasbourg et la France ont été émaillées de différentes crises « célèbres » liées à l'exécution de tel ou tel arrêt. Cependant ces crises ont démontré que lorsqu'une des autorités est défaillante pour adopter la mesure générale nécessaire à l'exécution de l'arrêt, une autre autorité prend le relai. C'est ainsi que l'ensemble des pouvoirs – exécutif, législatif et judiciaire – jouent un rôle complémentaire (A) dans l'exécution des arrêts de la CourEDH qui est encore renforcé par l'intervention des juridictions suprêmes françaises (B).

A. L'action complémentaire des pouvoirs exécutif, législatif et judiciaire

La CourEDH a rappelé, à plusieurs reprises, qu'un arrêt de condamnation d'un Etat lui laisse le choix des moyens à utiliser dans son ordre juridique interne pour s'acquitter de l'obligation découlant de l'article 53 (nouvel article 46 de la CEDH)[147]. L'Etat reste donc libre de choisir les moyens de s'acquitter de ses obligations au titre de l'article 46 de la Convention, dans la mesure où ils sont compatibles avec les conclusions contenues dans l'arrêt de la Cour[148].

Les mesures générales sous forme de modification législative résultent de l'obligation de garanties contre la répétition de l'illicite[149]. Deux cas de figure sont à distinguer : lorsque la disposition législative est directement

142. « Si ces notes invitent les autorités à qui elles sont adressées à veiller à ce que les écoutes téléphoniques soient ordonnées dans le respect des conditions énoncées par ces décisions, elles ne comportent en elles-mêmes aucune disposition impérative ». Malgré ce rappel, il n'en demeure pas moins que la Cour de cassation a opéré un revirement de jurisprudence à la suite de la note du Ministère de la Justice du 27 avril 1990.
143. Selon l'expression du Professeur Sudre, voir *Droit européen et international des droits de l'homme*, PUF, 2012, n°451.
144. *Journal Officiel de l'Assemblée Nationale*, 2ème séance du 13 juin 1991, p. 3146, cité par Frédéric Lazaud, *L'exécution par la France des arrêts de la Cour Européenne des Droits de l'Homme*, PUAM, 2006, tome 1, p. 236.
145. CourEDH, Grande Chambre, 27 novembre 2008.
146. CourEDH, 13 octobre 2009.
147. CourEDH, *Marckx c. Belgique*, 13 juin 1979 ; CourEDH, 29 avril 1988, *Belilos c. Suisse* ; CourEDH, 24 juillet 2007, *Baumet c. France*.
148 CourEDH, Grande Chambre, 30 septembre 2009, *Verein gegen Tierfabriken Schweiz (VGT) c. Suisse*, req. n°32772/00, §88.
149. Pour plus de précisions, voir Elisabeth Lambert, *Les effets des arrêts de la Cour Européenne des droits de l'homme – Contribution à une approche pluraliste du droit européen des droits de l'homme*, Bruylant, 1999, p. 123-128.

mise en cause par la Cour Européenne (soit que l'absence de disposition emporte violation de la Convention, soit que l'inapplication de la loi ne suffise pas à faire cesser à l'avenir l'illicite) et lorsqu'elle l'est seulement indirectement (la violation de la Convention résulte d'une mesure prise en application d'une loi). C'est dans ce second cas que l'adoption des mesures générales peut s'avérer plus complexe et délicate, dans la mesure où l'acte réglementaire fait « écran ». Notamment si la loi n'est pas directement mise en cause par l'arrêt de la Cour, peut se poser la question du fondement de l'obligation pour l'Etat de modifier la loi. En outre, la doctrine française reste divisée sur l'obligation qui incomberait à l'Etat d'adopter des mesures générales afin d'exécuter un arrêt de la CourEDH. L'argument qui est alors invoqué est celui de l'autorité relative des arrêts de la CourEDH[150].

La décision de modifier la législation est par conséquent fortement tributaire de la volonté politique du gouvernement et des autorités compétentes. Il est ainsi des cas où dans des domaines sensibles sociétalement, le législateur n'est pas parvenu à apporter une solution normative du fait de l'absence de consensus au sein du Parlement. On peut évoquer, à titre d'exemple, la simplification de la procédure de changement de la mention du sexe dans l'état civil pour les transsexuels. Dans un arrêt du 25 mars 1992, *Botella c. France,* la France a en effet été condamnée par la Cour de Strasbourg pour violation du droit à la vie privée garanti par l'article 8 de la Convention européenne des droits de l'homme pour avoir refusé à un transsexuel la modification de son état civil. Dans un contexte de défaillance du législateur, c'est le juge judiciaire qui a décidé d'accélérer les choses en opérant un revirement jurisprudentiel de nature à mettre un terme à la violation de la Convention. Ainsi, l'Assemblée plénière de la Cour de cassation a décidé d'abandonner sa jurisprudence antérieure[151].

Une autre décision de la CourEDH qui a fait couler beaucoup d'encre en France et qui a suscité beaucoup de contestation est l'arrêt du 7 juin 2001, *Kress c/ France* relative à l'existence de l'institution du Commissaire du Gouvernement. Ce dernier n'est ni un représentant du gouvernement, ni un ministère public. Pourtant, en se fondant sur la théorie des apparences, la CourEDH a considéré que la présence au délibéré du Commissaire du Gouvernement méconnaissait les exigences du « procès équitable ». Après avoir manifesté son mécontentement et avoir invoqué sa spécificité historique – le commissaire du gouvernement ayant été créé par une ordonnance royale de 1831 –, la France a finalement fait évoluer la procédure devant ses juridictions administratives. Un décret n° 2005-1586 du 19 décembre 2005 est alors venu prévoir que le Commissaire du Gouvernement « assiste au délibéré. Il n'y prend pas part ». Puis, face à la pression exercée par la Cour, un autre décret n° 2006-964 du 1er août 2006, a prévu qu'à compter du 1er septembre 2006, le Commissaire du Gouvernement n'assisterait plus au délibéré devant les juridictions inférieures tandis que devant le Conseil, à la demande d'une partie, le Commissaire du Gouvernement peut se voir interdire d'assister au délibéré. Enfin, un dernier décret est intervenu le 7 janvier 2009 pour substituer à l'appellation de « Commissaire du Gouvernement » celle de « rapporteur public ». Et très récemment, dans une décision du 4 juin 2013, *Marc-Antoine c. France*, la CourEDH a considéré que le fait que le rapporteur public, et non les parties à l'instance, était le seul à obtenir communication du projet de décision du conseiller rapporteur ne violait pas l'article 6.1 de la CEDH. Il a donc presque fallu dix ans pour que soit mis un terme à la joute ou au « dialogue de sourds » qui a opposé la Cour de Strasbourg et la France.

Ainsi, l'adoption de mesures générales implique qu'un pouvoir prenne le relai lorsqu'un autre tarde à faire cesser la répétition de l'illicite. La réaction des autorités françaises serait certainement différente dans le cas d'un arrêt-pilote qui mettrait en avant une violation systémique et structurelle de la Convention et dans lequel la Cour ne se limiterait pas à trancher l'affaire en question, mais donnerait des indications sur la manière de remédier à ces dysfonctionnements. On peut s'attendre à ce que les autorités publiques françaises – gouvernementales ou juridictionnelles – soient attentives aux indications données par la CourEDH et mettent un terme à la répétition de l'illicite. La menace d'une saisine potentielle de la CourEDH les invitera en effet à anticiper et à éviter une possible condamnation.

Le Conseil d'Etat a, par exemple, redéfini, dans trois arrêts de 2007 (*M. Boussouar*, *M. Planchenault* et *M. Payet*) les critères de la notion de mesures d'ordre intérieur dans les prisons afin d'élargir les catégories d'actes qui peuvent être contestés devant le juge de l'excès de pouvoir. Le juge administratif français a ainsi préféré faire évoluer sa jurisprudence dans le sens de la CourEDH[152] plutôt que d'être très probablement sanctionné à l'avenir.

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150. Selon M.L. Rassat, l'Etat « peut … parfaitement, en droit, prendre le parti de ne rien changer à son droit interne », in *Institutions judiciaires*, PUF, 1993, p.27.
151. Dans un arrêt du 11 décembre 1992, elle a jugé que « lorsque à la suite d'un traitement médico-chirurgical, subi dans un but thérapeutique, une personne présentant le syndrome du transsexualisme, ne possède plus tous les caractères de son sexe et a pris une apparence physique la rapprochant de l'autre sexe, auquel correspond son comportement social, le respect dû à la vie privée justifie que son état civil indique désormais le sexe dont elle a l'apparence » (Cour Cass., Ass. plén., 11 déc. 1992).
152. CourEDH, 27 janvier 2005, *Ramirez Sanchez c. France* et CourEDH, 12 juin 2007, *Frérot c. France*.

La lisibilité des arrêts de la CourEDH est également un autre élément à considérer pour parvenir à une bonne exécution des arrêts. Il peut arriver que l'Etat fasse une interprétation de l'arrêt qui ne corresponde pas aux exigences européennes. Une indication plus précise des mesures générales par la CourEDH pourrait ainsi aider l'Etat à adopter la législation répondant aux exigences européennes. Cependant, le sujet reste sensible car au-delà du fait que la CourEDH s'est jusqu'en 2000 refusée à mettre en œuvre un pouvoir d'injonction, la mise en œuvre systématique d'un tel pouvoir pourrait se heurter à la souveraineté du législateur national.

La réticence du législateur pourrait ainsi s'en trouver renforcée, et ce d'autant plus s'il s'agit d'un sujet sensible sociétalement ou politiquement. On peut évoquer en France les affaires récentes sur le refus de retranscription d'actes d'état civil pour des enfants nés par gestation pour autrui[153]. Si l'Etat français s'est engagé à exécuter la décision par l'adoption de mesures individuelles et a reconnu, à la suite de la CourEDH, que l'intérêt des enfants doit prévaloir sur le choix fait par leurs parents, il semble néanmoins qu'il ne lèvera pas pour autant – en tout cas dans l'immédiat – l'interdiction du recours à la GPA. Plus de précisions dans la rédaction de la décision de la CourEDH n'aurait donc pas changé la donne.

B. La contribution spécifique des Cours suprêmes françaises à l'exécution des arrêts de la CourEDH

Le rôle des juridictions suprêmes françaises reflète également le consensus politique autour de la nécessité d'exécuter les arrêts de la Cour de Strasbourg.

Certes, le Conseil constitutionnel français ne joue pas un rôle direct dans la détermination des mesures générales, dans la mesure où depuis sa jurisprudence *IVG* de 1975, il s'est déclaré incompétent pour statuer sur la conventionnalité des lois, considérant que cela relevait de la compétence des juges judiciaire et administratif. Le Conseil constitutionnel n'est donc pas en contact « direct » ni avec la Convention ni avec les décisions de la CourEDH qui ne sont ni des normes de référence dans son contrôle, ni des principes interprétatifs à l'aune desquels il donne un sens à la Constitution française. De plus, le Conseil constitutionnel ne peut pas être saisi par les tribunaux inférieurs pour trancher un cas de conflit entre la Convention et une loi. Et pour l'instant, la question du conflit entre une décision de la Cour de Strasbourg et une norme constitutionnelle ne s'est pas posée en France. Dès lors aucun amendement constitutionnel n'a été adopté du fait de l'adoption d'une décision de la Cour Européenne des droits de l'homme.

En outre, avec l'introduction de la question « prioritaire » de constitutionnalité par la révision de la Constitution adoptée en 2008[154], le choix a été fait de donner la priorité au contrôle de la constitutionnalité des normes sur le contrôle de leur conventionnalité. Comme a pu l'écrire Pierre Bon, il s'agissait de « redonner à la Constitution toute sa place »[155].

Néanmoins, le Conseil constitutionnel peut jouer un rôle indirect, dans la mesure où il tient compte – même s'il ne le dit pas expressément – de la jurisprudence de la Cour de Strasbourg. On peut évoquer l'évolution de sa jurisprudence sur les validations législatives sous l'influence de la CourEDH[156]. C'est également en s'inspirant de la jurisprudence de la CourEDH relative à la liberté d'expression[157] que le Conseil constitutionnel français a érigé en objectif de valeur constitutionnelle le principe du pluralisme comme condition de la démocratie[158].

De même, la Cour de cassation et le Conseil d'Etat s'inspirent de plus en plus de la jurisprudence de la CourEDH pour rendre leurs décisions et jouent donc un rôle important dans la prévention des violations de la CEDH. Même si le Conseil d'Etat juge, par une jurisprudence constante, que les arrêts de la CourEDH n'ont qu'une autorité relative de chose jugée, *de facto*, il s'efforce de se conformer à la jurisprudence de la Cour à laquelle il reconnaît en fait un effet *erga omnes*. Et la Cour de cassation a, pour sa part, admis de manière plus formelle l'autorité interprétative des arrêts de la Cour de Strasbourg. C'est ainsi que dans une décision du 15 avril 2011 rendue en assemblée plénière (à propos de la garde à vue), elle a pu considérer que « les États adhérents à cette Convention sont tenus de respecter les décisions de la Cour européenne des droits de l'homme, sans attendre d'être attaqués devant elle ni d'avoir modifié leur législation. »

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153. CourEDH, 5e sec., 26 juin 2014, *Labassee c. France*, affaire numéro 65941/11 et *Menesson c. France*, affaire numéro 65192/11.
154. Les modalités de mise en œuvre de la QPC ont été précisées par la loi organique n° 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution (*JORF* n°0287 du 11 décembre 2009 page 21379).
155. Pierre Bon, « La question prioritaire de constitutionnalité après la loi organique du 19 décembre 2009 », *RFDA*, n° 6, 2009, p. 1109.
156. Dans l'arrêt du 28 octobre 1999, *Zielinski et Pradal c. France*, la Cour Européenne des droits de l'homme a considéré qu'il fallait une « raison impérieuse » pour pouvoir accepter une loi de validation législative, alors que, pour le Conseil constitutionnel français, la seule invocation de l'intérêt général « simple » suffisait. Dans sa décision du 21 décembre 1999, le Conseil constitutionnel a fait évoluer sa position et a resserré son emprise sur le contrôle des lois de validation en évoquant désormais un « intérêt général suffisant ».
157. CourEDH, arrêt *Handyside* du 7 déc. 1976 ; arrêt *Lingens* du 8 juill. 1986.
158. Cons. const., n° 86-217 DC du 18 déc. 1986.

Il faut également souligner l'évolution de la position du Conseil d'Etat français dans un arrêt *Baumet* du 4 octobre 2012[159], par lequel le juge administratif a apporté une réponse de principe à la question de l'obligation d'exécution des arrêts de la CourEDH. Le Conseil d'Etat a ainsi donné une définition extensive de l'obligation d'exécution pesant sur l'Etat, s'appuyant sur une lecture combinée de l'article 1 et des articles 41 et 46 de la Convention, s'inscrivant ainsi dans le cadre défini par la jurisprudence de la Cour de Strasbourg. Dans le même temps, le Conseil d'Etat estime que l'arrêt de condamnation de la CourEDH est sans incidence sur la chose définitivement jugée qui ne peut être remise en question et n'est pas susceptible de produire un effet suspensif d'exécution du jugement national[160]. Ainsi le Conseil d'Etat français a préféré éviter de formuler des hypothèses exceptionnelles d'inexécution du jugement qui l'aurait conduit sur une pente glissante.

Pour conclure, il importe de souligner l'idée fondamentale du "dialogue" évoquée par le Président Zorkine lors de son allocution d'ouverture et si justement mentionnée par la Cour constitutionnelle de Russie dans sa décision du 14 juillet 2015. Le dialogue est nécessaire aussi bien entre les organes exécutif, législatif et judiciaire d'un Etat qu'entre les Etats et la Cour de Strasbourg. Certes, la Constitution constitue la norme fondamentale dans l'ordre juridique interne et incarne l'identité de l'Etat, mais il est peut-être une technique qui permettrait de garantir tout à la fois la suprématie de la Constitution et la nécessaire exécution des arrêts de la CourEDH, c'est la technique de la conciliation. De fait, cette technique est utilisée par le Conseil constitutionnel français lorsque deux droits de même valeur constitutionnelle entrent en conflit. La conciliation a le mérite de permettre de trancher un conflit de droits sans pour autant procéder à une hiérarchisation des droits. Dans le cas des rapports entre systèmes juridiques, elle permettrait de garantir la protection des droits sans établir de subordination d'un système par rapport à l'autre. Car ce qui importe le plus dans la maison commune européenne c'est la meilleure protection possible des droits et libertés.

159. CE, Section, 4 octobre 2012, *Baumet*, n°328502.
160. Voir Frédéric Sudre, « A propos de l'obligation d'exécution d'un arrêt de condamnation de la Cour Européenne des droits de l'homme », *RFDA*, 2013, p.13 et suiv.

The role of Russian Courts in implementing general measures recommended by the European Court of Human Rights

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It should first and foremost be pointed out that the binding nature of European Court of Human Rights judgments in cases involving the Russian Federation is enshrined at legislative level in the Russian Federation. Judicial acts of Russian courts in criminal, civil or administrative proceedings that have entered into force are subject to review in the light of new circumstances, which include, in particular, the finding by the European Court of Human Rights that a Russian court violated the provisions of the Convention for the protection of human rights and fundamental freedoms when examining a specific case, the judgment on which was complained of by an applicant to the European Court of Human Rights (see Article 413 paragraph 4 sub-paragraph 2 of the Code of Criminal Procedure of the Russian Federation, Article 392 paragraph 4 sub-paragraph 4 of the Code of Civil Procedure of the Russian Federation, Article 311 paragraph 3 sub-paragraph 4 of the Code of Commercial Procedure of the Russian Federation and Article 350 paragraph 1 sub-paragraph 4 of the Code of Administrative Procedure of the Russian Federation).

And this approach is adhered to by Russian courts, including the highest instances.

The Plenum of the Supreme Court of the Russian Federation has referred to the binding nature of the European Court's judgments for our country and its judicial organs three times in its rulings.

Noteworthy in this connection is Judgment no. 5 of 10 October 2003 "On the application by general courts of universally recognised principles and norms of international law and international treaties of the Russian Federation", in which it is specially stipulated that, in cases involving the Russian Federation, the final judgment of the European Court is binding upon it (see indent 1 of paragraph 11).

In Judgment no. 22 "On court decisions" adopted a few months later, on 19 December 2003 by the Plenum of the Supreme Court of the Russian Federation, it is recommended that courts take account of European Court judgments even in cases where Russia is not directly involved, in order to rule out the possibility of committing the judicial errors identified by the European Court in judgments in respect of other States.

Finally, in its Judgment no. 21 of 27 June 2013 "On the application by general courts of the Convention for the protection of human rights and fundamental freedoms of 4 November 1950 and the Protocols thereto", the Plenum of the Supreme Court of the Russian Federation states, with regard to judgments, even in cases against other States but relating to circumstances similar to those to be considered by our own courts, that those judgments are to be taken into account; indeed, our courts must also take the European Court's judgments into account when interpreting Russian legislation on human rights and freedoms.

It cannot escape our attention that, already in the first of these three plenum judgments, the judgment of 10 October 2003, special mention is made of the fact that "execution of judgments concerning the Russian Federation implies, where necessary, an obligation on the part of the State to take individual measures to remedy violations of human rights provided for in the Convention and the consequences of such violations for the applicant, as well as *general measures in order to prevent the recurrence of such violations*" (paragraph 11 indent 2, *my bold text – V.M.*). This means that pilot judgments are directly recognised as binding for our country.

The question then arises as to what legal means are available to the Russian Federation's judicial bodies, and in particular the Supreme Court, for ensuring that it is possible to facilitate implementation of the aforementioned European Court directives in our legislation. Such means do exist.

The Supreme Court has the right of legislative initiative, which it actively deploys. One only has to recall that, when preparing draft legislation on major improvements to judicial supervision, both the Supreme Court and, up until recently, the Superior Commercial Court, which also had that right, drew on the corresponding recommendations of the European Court of Human Rights.

In addition, at the initiative of the Supreme Court, a special law was adopted in the Russian Federation, ensuring that cases were examined within a reasonable time, once again taking account of the European Court's recommendations.

These are just a few specific examples, and there are many more of them.

An important role in developing Russian legislation, including with regard to the stances of the European Court of Human Rights, is held by the Constitutional Court of the Russian Federation.

The Constitutional Court is entitled to make recommendations to the legislators as to how and in which direction given legislative norms should be tweaked and it makes active use of that prerogative.

Suffice it to recall that when the supervisory review procedure was changed at the initiative of the Superior Commercial Court for it to be deemed acceptable by the European Court, the Constitutional Court recommended that the rules governing supervisory proceedings in general courts also be amended along similar lines. These measures have now been synchronised to a great extent and, obviously, will be subject to further improvement in the draft unified Code of Civil Procedure, which is now being drawn up.

In this manner, Russia's judicial authorities, including those of the highest level, have underlined our country's commitment to the European Convention on Human Rights and European Court judgments considering the practical application of the corresponding norms of the Convention.

However, a peculiar situation has arisen in recent times, with States Parties to the Convention swiftly and unquestioningly executing certain measures prescribed by the European Court, both individual and general, while categorically rejecting others. What has caused this conflicting situation?

We clearly need to answer two questions here. Firstly, what is the root cause of this conflicting situation? And, secondly, can it be remedied (and if so how)?

Where the cause is concerned, it would appear to stem from the fact that in certain cases a State will perceive a general or individual recommendation handed down by the European Court as a violation of its own public policy. Let us ask ourselves a question: would any State consent to enforced execution of a judicial decision pronounced by a court outside its borders that is not compatible with its public policy? It seems to me that it is enough to merely pose the question to be able to say with one hundred per cent certainty that no State anywhere would execute such a decision. This conclusion is based on norms of international law, set out in particular in the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano, 16 September 1988) – see Article 27 paragraph 1. See also Article 34 paragraph 1 in the version of 2007. As is well known, there is a similar provision applicable as of 10 November 2015 in European Union countries in Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 (see Article 45 paragraph 1 sub-paragraph "a")[161].

This provision is self-evident and explains a lot.

We need only to cast our minds back to the determined reaction of Great Britain (both its government and parliament) to the European Court's judgment in the case of "Hirst v. the United Kingdom" which, in the view

161. These norms of international law relate to decisions of courts of foreign States. At the same time, this approach is supposed to also permeate through to decisions of international courts since the submission of a State to the jurisdiction of an international court does not signify the State's consent to a restriction of its sovereignty as a result of an international court decision violating that State's public policy.

of the British authorities, was incompatible with the foundations of the constitutional order of their State. When the European Court took the same approach when examining the complaint brought by Anchugov and Gladkov against Russia, it cannot go unmentioned that our country's negative reaction was completely foreseeable, as the European Court's position was at odds with the norms of the Russian Federation Constitution.

So these situations of conflict arise because a State on the receiving end of a European Court recommendation or requirement finds it incompatible with its public policy.

Is it possible to do away with this, let's be honest, aberrant factor? Undoubtedly yes. For this to happen, the European Court, when making recommendations to States, must proceed in such a way as not to impinge upon and violate the public policy of the State to which the recommendations are addressed. It must be borne in mind in this connection that public policy is not uniform in different States. Polygamy is permitted in some countries, for example, but this would contravene Russian public policy. A similar situation applies to the case of so-called same-sex marriages. It must be pointed out that our State shows tolerance towards gay people but we do not go so far as to allow marriages of this kind. Under our legislation and in our mentality marriage is the union of a man and a woman for the purpose of founding a family. For us this is a component of our public policy and this situation should be taken into account by international organisations, including the European Court of Human Rights.

For that reason it is very important that the European Court takes account of the public policy of the country in question when drawing up recommendations. The European Court has every opportunity to do this. In a whole host of cases the European Court has demonstrated an exceedingly fine, in-depth and rigorous analysis of national legislation and its practical application by the judicial and administrative authorities of different States. When public policies are properly taken into account, there is no longer an issue. The way to resolve this problem is through dialogue and consensus. There are grounds to believe that things have already started moving in this direction.

One extremely telling indication was the high-profile case of "Konstantin Markin v. Russia". It came before the Grand Chamber of the European Court and was twice addressed by our own Constitutional Court. And whereas the First Section examining the case at first instance entered into a public debate with Russia's Constitutional Court, the Grand Chamber, while supporting the First Section on the merits, deemed it necessary to refrain from criticism of our Constitutional Court. For its part, the Constitutional Court of the Russian Federation, through statements by its President, pointed out that it is possible, in principle, to grant lengthy periods of parental leave to male service personnel on condition that they work in support roles[162]. Furthermore, a corresponding bill is currently at drafting stage. Ultimately, a mutually acceptable compromise has been reached.

Further movement in this direction will make it possible to establish a demarcation line which, if observed, will obviate the issue of enforceability of the European Court's directives, on both individual and general points.

162. See V.D. Zorkin. *Россия и Европейский Суд по правам человека: взаимодействие внутригосударственного и международного правосудия* [Russia and the European Court of Human Rights: interaction between domestic and international justice]. "Sudya", 2013, no. 10, p.13.

L'avenir a plus long terme du système : les travaux du GDR et la déclaration de Bruxelles

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Bonjour à tous et toutes,

C'est un véritable honneur pour moi d'avoir l'occasion de vous adresser quelques mots en tant que Vice-Présidente du GDR, groupe de travail qui traite assidûment depuis plus de deux ans de la réforme à plus long terme de la Cour.

Les outils mis en avant par le groupe d'experts sur la réforme de la Cour ont trouvé un écho politique dans la récente Déclaration de Bruxelles – que j'ai co-organisée avec l'équipe du bureau de l'Agent du Gouvernement belge devant la Cour – ainsi que dans les décisions ministérielles ultérieures.

Or, cela a déjà été dit, la présente conférence a une double dimension : nationale et internationale. Elle peut en cela être vue comme l'heureux prolongement de la Conférence de Bruxelles de mars dernier dans le domaine qui donne à la Cour de Strasbourg tout son sens et toute son autorité : celui de ses arrêts.

L'autorité des arrêts de la Cour est examinée sous *deux angles* : celui du processus d'exécution des arrêts par les Etats et celui de sa surveillance par le Comité des Ministres.

- En ce qui concerne l'exécution des arrêts :

Le rapport du GDR rappellera que la grande majorité des arrêts de la Cour de Strasbourg sont exécutés sans difficulté particulière.

Certaines affaires se heurtent parfois à des difficultés de nature politique ou technique, certaines mesures d'exécution s'avérant complexes ou coûteuses mais la mise en œuvre des arrêts soulevant des problèmes structurels est essentielle pour éviter les violations similaires futures.

Les comités d'experts du Conseil de l'Europe renvoient à leurs travaux antérieurs et à la feuille de route détaillée de la Déclaration de Bruxelles concernant l'exécution rapide des arrêts de la Cour.

La question du besoin d'une autorité renforcée de tous les acteurs chargés de l'exécution au niveau national sera centrale dans le cadre des travaux menés lors du prochain biennium.

Le comité d'experts GDR considère que la Cour pourrait indiquer plus clairement dans ses arrêts quels sont les éléments réellement problématiques qui ont constitué les sources directes du constat de violation.

En ce qui concerne la question de la satisfaction équitable accordée par la Cour, le GDR estime qu'il y a un besoin de plus de transparence des critères appliqués et tenant compte des circonstances économiques nationales.

Concernant la question de la réouverture des procédures suite à un arrêt de la Cour, les travaux du GDR encouragent la possibilité pour les Etats parties de s'inspirer, le cas échéant, de leurs expériences respectives et des solutions trouvées.

- En ce qui concerne la surveillance de l'exécution :

Les travaux mettent en lumière que ce qui importe actuellement est d'envisager des moyens et outils qui apporteraient un soutien technique avec un levier politique adéquat pour le Comité des Ministres chargé de la surveillance collégiale de l'exécution.

La nécessité de renforcer les outils et procédures politiques du Conseil de l'Europe dans le cas de violations graves et à grande échelle est soulignée.

Dans le même temps, il est nécessaire que le Service de l'exécution des arrêts soit en mesure de remplir son rôle premier d'évaluation en temps utile de tous les plans et bilans d'action présentés par les Etats et d'aider ces derniers par le biais de consultations bilatérales dans les affaires révélant des problèmes structurels ou complexes.

Les travaux menés à Strasbourg saluent, enfin, l'appel de la Déclaration de Bruxelles à améliorer les synergies entre tous les acteurs du Conseil de l'Europe en matière d'exécution.

Nous le voyons, il reste du chemin à parcourir mais, ensemble, nous savons où aller.

Je vous remercie pour votre attention. *Spaciba*.

National and international legal instruments: the dynamics of relations

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Securing democratic development and human rights is a strategic objective for all governments and for the international community. It is important, therefore, to find the right balance between national and international legal rules.

Of key significance here is the notion of legal sovereignty. Globalisation has provided the backdrop for a burgeoning legal framework that reflects the diverse relations which exist between the state, non-governmental institutions and private individuals, and not only in strictly "territorial administrative" terms but also in connection with "supranational" and inter-territorial information flows. The notion of sovereignty in these circumstances is intended to contribute to a proper understanding of this tendency, with reference to the fundamental interests of the nation state.

The concept of legal sovereignty as referred to here is intended to reflect one of the major facets of sovereignty both at national level and in the international community. By that I mean the combination of constitutional and international principles of law, the recognition that a state's sovereign rights have some kind of pre-eminence in lawmaking and the administration of justice, the quest for balance between "delegated" powers and the acquisition of new powers by states as members of international organisations, and the harmonisation of procedures for resolving conflicts including "conflicts of jurisdiction".

The basic tenets of the concept of legal sovereignty proposed here are reflected in Russian law. Specifically, in Article 15, paragraph 4, and Article 79 of the RF Constitution, in the provisions of the RF Civil Code on the public policy exception when concluding international agreements and treaties, in Article 15, paragraph 1, of the RF Constitution proclaiming the supreme legal force of the Constitution throughout the Russian Federation, and in the constitutional provisions on the rights of the RF Constitutional Court. The Constitutional Court accordingly has the right to provide interpretation of the provisions of the RF Constitution and to settle disputes in accordance with the RF Constitution, laws and other legal instruments (Article 125, paragraph 5).

From an analysis of international legal acts, it will be observed that there is some kind of recognition of legal sovereignty as a way of balancing national and international legal instruments. In the Convention for the Protection of Human Rights and Fundamental Freedoms, for example, there are 11 references to national legislation and domestic law in cases where it is necessary to protect public order and national interests. In the Final Act of the Conference on Security and Co-operation in Europe (Helsinki, 30 July – 1 August 1975), there is a declaration on principles such as sovereign equality, respect for the rights inherent in sovereignty, and the principle of non-intervention in internal affairs. All this within the framework of international law, moreover.

There are two points to be drawn from such a reading of the rules. Firstly, according to international and constitutional principles, national sovereignty serves as a source of primacy for member states' rights in international organisations. Secondly, the principle of subsidiarity/complementarity recognised by the Council of Europe means that the powers of higher levels of government more remote from citizens should merely

complement the powers of lower levels, on account of their proximity to the population. In our view, this could be a useful starting point when dealing with issues relating to the implementation of the Convention in national legal systems.

In the light of the above, let us turn our attention to a few aspects of the mechanism for implementing the Convention. As a law-governed state under Article 1 of its Constitution, Russia attaches great importance to this issue. Human and civil rights and freedoms are recognised in the Constitution as being the highest guiding principles. On comparing the articles of the Convention and the articles on citizens' constitutional rights, moreover, it will be observed that they are basically identical.

The mechanism for implementing the Convention in Russia consists of several stages and includes a comprehensive set of tools. First comes ratification of international treaties with the help of federal laws. Each step here leads logically to the next, enabling the Convention to be implemented in a swift and flexible manner. Thanks to the use of reservations, it is possible to take account of the specific architecture of Russia's legislative institutions and branches of law, and the amount of time needed to change them.

Second, over the past two decades, Russia has introduced a raft of federal and sub-federal laws aimed at recognising and widening protection for citizens' rights, in the political, economic and social spheres, in legislation on the judiciary and in procedural laws.

Third, active use is being made of the Federal Law "On international treaties of the Russian Federation", which contains provisions concerning the requirement for state structures to fulfil international obligations. In the laws and regulations on ministries, government departments and other structures, greater emphasis has been given to protecting the rights and freedoms of ordinary citizens.

Fourth, in recent years, civil society organisations have been actively involved in the machinery for implementing the Convention. Civic chambers at federal and sub-federal level, ombudsmen for human rights, children's rights and entrepreneurs' rights are working to uphold the rights and lawful interests of particular sections of the population. Members of the business community can turn to the regulatory and supervisory bodies, the prosecutor's office and the courts if they believe their rights have been infringed.

At the same time, self-regulation is growing now that a system of public scrutiny is in place.

Fifth, a key channel for implementing the Convention is national judicial activity. There is a keen awareness in Russia of the need to give effect to the ECHR and the decisions of the European Court in the work of the courts. Two points are worth noting here. The first concerns the decisions of the RF Supreme Court which guide case law in accordance with international standards and decisions. Where necessary, the courts draw on the provisions of the Convention in order to assess evidence in specific cases, and Russia is equally attentive when it comes to executing the decisions of the ECtHR.

That brings me to my second point regarding the implementation of the Convention via Russia's Constitutional Court. The positions taken by the Court are consistent and well established, and on the particular subject of its jurisdiction, reference can be made to the well-known ruling handed down by the Constitutional Court on 14 July 2015. In this ruling, the Court found that the construction placed on certain provisions of the Convention brought them into conflict with the RF Constitution. In which case, the Constitutional Court, in accordance with its status, is entitled to resolve the issue of whether or not it is possible to enforce a judgment of the ECtHR and adopt measures to ensure implementation of the Convention. According to international and constitutional principles and, in particular, the principle of subsidiarity, it is open to the RF Constitutional Court to provide a higher level of protection for citizens' rights. We are talking here, of course, about exceptional circumstances, when there is a need to ensure compliance with the fundamental principles of the constitutional system and protect national interests.

The unique architectures of national and international legal instruments, their various "driving" interests and interpretations make it particularly important to develop rigorous solutions in this area so as to avert conflicts or, failing that, resolve them in the appropriate manner.

The above is not to say, of course, that the way the implementation mechanism operates at present is wholly satisfactory. Its effectiveness is being increased, however, by amending, where necessary, a number of existing federal laws and adopting new instruments, while at the same time improving certain aspects of the ratification process, in particular the use of reservations. The courts and other state bodies must be even more consistent in implementing those provisions of the Convention which have been recognised in Russia. A major role here falls to the country's Constitutional Court, which actively influences the process of lawmaking and administration of the law, in the wider context of international legal regulation.

In general, the purpose of regulatory policy is to accommodate the entire "battery" of legal rules and to anticipate the associated risks.

The national experience of implementing European Court of Human Rights judgments in the Russian Federation

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Mr Chairman, conference participants, Ladies and Gentlemen,

I was involved in preparing the document which you all have in your possession and has been translated into English too, entitled "Expert conclusion on the national experience of executing European court decisions in the Russian Federation". This conclusion was prepared with the direct participation of the director of our institute, Taliya Yarullovna Khabriyeva, who sends her apologies for being unable to attend this conference since she is currently working as rapporteur at the session of the Venice Commission. But I think that the fact that you have this document dispenses me, with the permission of the chairman, from reading you its contents, and all the more so since the presentation by the Russian Federation Permanent Representative before the European Court of Human Rights, Georgy Olegovich Matyushkin, highlighted in substance how the Russian Federation executes European Court decisions in implementation of the European Convention on Human Rights. Indeed, there have been a whole host of other presentations I could mention which obviate the need for me to repeat what is said in that document. So I will just sum up the main conclusions on specific points.

1. It may be said that a legal mechanism for executing ECHR judgments has been developed and operates in Russia, including where the taking of general measures is concerned. At the same time, there is room for improvements to this mechanism

2. The activation of measures to execute ECHR judgments and implement the Convention's standards on the whole in Russia's legal system is fully covered by the legislative and regulatory norms governing the prerogatives of entities which have law-making initiative. Heavily involved in that process are the Government, the Ministry of Justice and the Russian Federation representative before the ECHR, whose office fulfils functions of coordination for the interaction of the legislative, executive and judicial authorities.

3. Irrespective of the category of the issue and the nature of the judgment handed down by the ECHR, that judgment is regarded as being subject to compulsory examination and consideration by the relevant national authority within the scope of its competence. Practice shows that the Convention itself and its interpretation

by the ECHR are recognised as an integral component of Russia's legal system having a binding and directly applicable nature. Even the significance of the pilot judgments pronounced by the ECHR in respect of other States is recognised in doctrine. This is an avenue offering strong potential for improving implementation machinery.

4. Russia's obligation to implement the decisions of international judicial bodies is determined by two factors: 1) whether Russia is party to a treaty on which the judicial body in question is founded; 2) there being no reservations. Decisions of quasi-judicial bodies have the character of recommendations. The only problem is providing timely information on those decisions.

5. The legislation of the Russian Federation together with the explanations of legislation given by its supreme judicial bodies form a good basis for productive work by courts at first instance in guaranteeing human and civil rights along the lines of judgments adopted by the ECHR.

The problems lie elsewhere: the level of information (translation of relevant acts), judges' training, the development of legal awareness. Courts can always apply to the Constitutional Court if complications arise in resolving given questions prompted by doubts over the interpretation of the provisions of the European Convention or the Russian Federation Constitution.

6. The adoption of general measures to implement ECHR judgments lies above all within the competence of the legislative authority. But the role of the Constitutional Court and the Supreme Court cannot be overestimated here. This is borne out by specific examples in the expert conclusion I am talking about. It must not be forgotten that the legislator is placed under obligation by law to take measures to execute judgments of the Constitutional Court establishing a need to take legislative measures. The Constitutional Court's proposals are often founded on norms of the European Convention and decisions of the European Court.

7. As of yet there has been only one known "conflict" or disagreement in the interpretation of the Convention by the ECHR and Russia's Constitutional Court – this is the well-known case of "Markin v. Russia". As of yet there has been only one known ECHR judgment requiring an amendment of the Russian Constitution (in the case of "Anchugov and Gladkov v. Russia". The decisions subsequently adopted by the Constitutional Court and the amendments to the Constitutional Law "On the Constitutional Court" were significant as regards the substance of the issues that arose. Amending a constitutional provision stipulating that citizens held in places of detention under a court sentence may not vote or stand for election is virtually impossible, as the Constitution does not permit the revision of provisions included in its second chapter.

Now, in my capacity of professor and theoretician, I will venture to put forward my own polemical views largely inspired by the fruitful and remarkable discussions of the last two days. But with one proviso. There is a very good aphorism that talks about illuminating the sun with a lamp. I would not presume to illuminate the sun with a lamp, in the sense that, yesterday, many speakers, notably Valeriy Dmitriyevich Zorkin, pointed out fundamental methodological principles that form a kind of baseline and, so far, I have not heard anyone who would contradict those fundamental postulates. They can be definitely taken on board. That was yesterday. Today we have heard similar points made by the judges Aranovskiy and Morshchakova whose intention, I believe, is not just to express them but to really have them adopted. I have to say that I fully agree with their well and cleverly made points and I would fully embrace the statement made by Mr Aranovskiy, which greatly impressed me in terms of methodology and content.

The interesting experience of Germany has left a considerable impression on me. At the time, I was writing an article when the German Constitutional Court handed down its judgment in the well-known case of Görgülü v. Germany. And the German Constitutional Court judgment met not only with our comprehension but also with our approval. My arguments are set out in that article. But today, Ms Angelika Nussberger, Judge Nussberger, says that in any case where possible conflicts may arise no mechanism has been thought up for resolving them. Yes, indeed, and a great deal remains to be done here. But I believe, from a theoretical viewpoint, that one possible marker, or avenue for identifying it, is to be found in the German reference literature classifying the legal acts passed by courts and, alongside acts of interpretation, distinguishing acts specifying the law and decisions aspiring to fill in legal loopholes. There is no doubt that European Court decisions regarding the interpretation of the Convention are one hundred per cent binding on everyone in the Russian Federation. I repeat, decisions regarding interpretation! But it is a different story where other decisions are concerned. When decisions relating to the specification of points of law are involved, I understand those who talk about and emphasise the coordination of positions. Here, the European Court must very carefully and, perhaps, even before pronouncing judgment, actually coordinate positions. Dagestan was mentioned in this respect and, when I was young, I travelled through the Caucasus mountains and crossed other mountain ranges and experienced the lives of those people first-hand. Their way of life cannot be simply suppressed just like that.

Accordingly, when the relevant norms are applied, there must be coordination with actual conditions. And if it is a matter of pronouncing decisions in a context of legal deficit, I understand Valeriy Dmitriyevich when he says that the question arises as to whether the European Court of Human Rights is exceeding its authority. Well, isn't it? Here (with regard to general provisions and with regard to pilot judgments) questions already arise over the limits of the judgments concerned. In all events, dear colleagues, the principle of subsidiarity, as we have heard in this arena, is a means of resolving even the most acute conflicts on the basis of partnership and mutual amenability of international and national bodies.

I would further like to draw attention to the sovereignty of judicial authority. All the hallmarks of sovereignty inherent in the State and state authority in general are in fact inherent in such institutions as the courts and the judiciary. Of course, with certain reservations, but distinct from any other state bodies and any other authority, independence is organically, implicitly, intrinsic to a court, otherwise it could not even be considered as a court. In the European system judges are not accountable as regards the merits of the cases they deal with to anyone whomsoever beyond the boundaries of the judicial system. They have a duty to act independently in all circumstances and without any kind of external influence. The Committee of Ministers of the Council of Europe has reinforced that view in its recommendations, which emphasise that no body, other than courts themselves, can determine their competence as defined by law; the government or administration cannot take decisions retrospectively invalidating court judgments; branches of executive or legislative power must guarantee the independence of judges and ensure that no steps potentially endangering judges' independence are taken[163].

In the continental system the court depends on the law and the law alone. Article 120 of the Russian Federation Constitution states that judges shall be independent and subordinate only to the Constitution and federal law. That means that they must be inwardly, outwardly and altogether independent, although we are all familiar with Article 15 of the Russian Federation Constitution, which requires judges to adhere to the universally recognised principles and norms of international law and the international treaties of the Russian Federation. I cannot go into detail here regarding the interpretation of these rules, but what is important is the general point that courts are independent of any other authority (or body) and dependent on legislation and the law. Except that here the court loses its sovereignty within the continental system of law. The ECHR as a court, as a European judicial instance, does not stand above a national court. A national court is subordinate only to the national constitution and national laws and to any other legal acts only insofar as this is directly permitted by national legislation.

I believe that science must play a role here not only with regard to problems of implementation of the Convention's standards by law-making bodies but, first and foremost, in providing a rationale for the corresponding provisions set out in court decisions. As the conference participants will be aware, I head up a department with a very peculiar title – the Department of Implementation of Court Decisions in Russian Legislation, which represents a completely new department and a new direction within the Institute of Legislation and Comparative Law. In practical terms, it deals with one of the mechanisms for implementing *inter alia* the provisions of the European Convention and judgments of the European Court in the Russian Federation's legal system, including, both directly and indirectly via the execution of Constitutional Court and Supreme Court judgments and key judgments of general courts. Regardless of whether or not we recognise precedent as a source of law, everyone will agree that individual positions elaborated in courts must be enshrined in legislation. And from that point of view, as we see it, doctrinal study is required with regard to which judgments must remain simply judgments in specific cases as precedents, which judgments must be elevated to the level of guidance from supreme judicial instances and which legal positions of courts must be enshrined in legislation. And that, indeed, is what our institute does. As all legislative initiatives pass through our institute, this creates an additional specific doctrinal filter within the mechanism of implementation of all that is related, in particular, to the application of the European Convention's standards.

I have to say that our experience of integrating the Convention's norms into our legal system is generally no different from the European one. I found it interesting to hear Mr Martin Kuijer shed light on the experience of the Netherlands, for example. Our procedure is roughly the same, albeit with a somewhat different name. Needless to say, they can be developed and reinforced. Where Russia is concerned, for example, it may be proposed that annual reports on the examination of cases in the European Court of Human Rights be heard in the parliamentary committees of the State Duma and the Federation Council dealing with constitutional legislation. In this way Parliament could get to grips with the problems and experience of resolving them, and implementation of the positions devised by the ECHR in our legal system could be given impetus. A system

163. Recommendation Rec(94)12 of the Committee of Ministers on the independence, efficiency and role of judges (http://docs.cntd.ru/document/901927870).

has developed in Russia for the execution of Constitutional Court judgments. Acts of the ECHR and judgments of the Constitutional Court of the Russian Federation undoubtedly differ in various respects, but procedurally speaking there is perhaps a need to improve the mechanism for implementing ECHR decisions, drawing on the procedure covering Constitutional Court decisions.

In conclusion, I would like to draw attention to a theoretical viewpoint which, unfortunately, is more often than not dismissed in discussion. People often fail to see the difference between the notions of "system of law", "system of legislation" and "legal system" and insist that given provisions of international instruments and even given decisions of the European Court must necessarily and without fail be integrated into Russian legislation. But the Russian Constitution talks about a legal system, and a legal system incorporates all manner of different structures and items (since the time when Professor René David produced his fundamental writings on what constitutes a legal system, we no longer equate it with a system of law). And, here, Professor Musin quite rightly emphasised the corresponding legal order. The legal order occupies a special place within the legal system. So should that be where we integrate provisions and decisions? Not in legislation but in the legal system. We have to comprehend these things and sometimes set some limits for implementing provisions that are counterproductive for national legislation.

But, dear conference participants, the most important human right is, as we know, the right to life. And the prime means of guaranteeing that right is eating lunch, so I suppose I have to stop here in order not to violate your fundamental rights. Thank you.

General measures: the Turkish experience with a focus on the judiciary

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Dear President of the Constitutional Court,

Distinguished Judges,

Ladies and Gentlemen,

It is my utomost honour to address the Russian Constitutional Court today. I have long been an admirer of Russian literature. It is my great pleasure to visit St. Petersburg in person, the city I have met through the works of Pushkin and Dostoyevski. I thank you for your invitation.

In my contribution to the debates on the effective implementation of the European Court of Human Rights judgments, I wish to draw lessons from the Turkish experience. As you know, Turkey accepted the right to individual petition in 1987 and the compulsory jurisdiction of the European Court of Human Rights in 1990. Since then, there have been a considerable amount of litigation against Turkey before the European Court of Human Rights, attesting both to strong interest in the European Court of Human Rights amongst lawyers and individuals in Turkey[164] and the diverse range of human rights violations that have taken place in Turkey over the years[165].

A central feature of the Turkish experience is the large number of repetitive cases from Turkey both pending before the Court's case docket[166] and the Committee of Ministers awaiting execution[167]. Turkey has a significant number of cases under enhanced supervision, attesting to the fact that there are significant delays in giving effect to the general measures flowing from Strasbourg case-law.

How do we approach the effective implementation of the general measures flowing from the judgments of the European Court of Human Rights in the Turkish context?

In this presentation, I will focus on the role of the Turkish judiciary. In my written report (in English) you may also find a discussion of the role of the executive and the legislature.

With respect to the latter, I outline in my report that Turkey does not have a dedicated domestic follow up mechanism either on the executive or the legislative side for the effective implementation of general measures. There have been some recent innovations, i.e. establishing a unit within the Ministry of Justice that has a

164. Currently 13.5 percent of pending cases (8950 cases) before the European Court of Human Rights are from Turkey. See at: http://www.echr.coe.int/Documents/Stats_pending_month_2015_BIL.pdf.
165. Un until 2014, there have been 3095 cases against Turkey. In 2733 cases the Court has found at least one violation. Statistics avaible at: http://www.echr.coe.int/Documents/Stats_violation_1959_2014_ENG.pdf.
166. The majority of the pending cases are repetitive cases.
167. Turkey currently has 606 judgment under enhanced supervision and 916 judgments under standard supervision. See, http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=&StateCode=TUR&SectionCode=STANDARD+SUPERVISION accessed on 15.09.2015.

monitoring of general measures mandate, but this unit is understaffed and does not carry out systematic work dedicated to general measures. Turkey has recently established an Action Plan concerning the implementation of general measures in all judgments awaiting execution. It has not, however, been put into motion. The Parliament has been considering to set up a dedicated procedure for the follow up of general measures, but this has not yet materialised. There is a National Human Rights Institution, but this institution also does not carry out dedicated work on the execution of human rights judgments, with a focus on general measures.

The lack of a systemic approach towards general measures on the side of the executive and the legislature means a lot of responsbility, in the Turkish context, falls under the judiciary. What is then the legal framework for the judicary to develop an effective approach to general measures? Considering the lack of support from other branches of state, how far can the Turkish judiciary succeed as the guardian of general measures? I hope the discussion below is of relevance to the Russian context.

The starting point for Turkey, like any other country within the Council of Europe jurisdiction, goes back to treaty obligations under Article 46 and Article 1 of the European Convention on Human Rights. Article 46 makes it very clear that states have the primary obligation to execute the judgments of the European Court of Human Rights, under the supervision of Committee of Ministers. Article 1 is equally clear in stating that states undertake to provide everyone within their jurisdiction rights protected in the Convention.

Under Article 90 of the Turkish Constitution international treaties duly entered into force have the force of domestic legislation. In addition, in case of a conflict between human rights treaties and domestic legislation, the former must prevail.

When Articles 46 and 1 of the European Convention on Human Rights are read in conjunction with Article 90 of the Turkish Constitution, we can comfortably argue that the general legal framework is in place for the effective implementation of the judgments of the European Court of Human Rights in the Turkish context. The Turkish state has explicit treaty obligations, the Turkish Constitution gives way to human rights treaties when there is a conflict with domestic legislation. This general framework must be followed by Turkish judiciary, from lower courts to higher courts, in the context of the judgments of the European Court of Human Rights.

We do, however, also know that what may seem simple and clear at once is not always straight forward.

First, what is at stake is the effective implementation of general measures flowing from human rights judgments and not the implementation of European Convention on HUman Rights obligations in abstract.

Could we interpret the Turkish general framework implicitly requiring all organs of the state to comply not only with respect to the European Convention on Human Rights, but also the judgments of the European Court of Human Rights?

My own view on this is that we must do so, as the alternative view, e.g. accepting European Convention on Human Rights obligations without accepting the duty to abide by the judgments of the European Court of Human Rights, does not have any compelling arguments on its side.

Given that all states have recognised the European Court of Human Rights as the ultimate interpreter of the Convention, the interpretations of the European Convention of Human Rights must have binding qualities when giving effect to the European Convention on Human Rights. The alternative would suggest having fourty seven conventions rather than a single Convention binding all states of the Council of Europe. In addition, the European human rights system, with Protocol 11, has given states the right to challenge the decisions of the Chambers by asking the Grand Chamber to review Chamber decisions. There is, therefore, a mechanism available to states within the system, if they believe that the Chambers got a case wrong. Even in cases where a state is not a direct party but may potentially be effected by the outcome of a case, states are able to make third party interventions to the Court. We have seen this, for example in the *Lautsi* case.

The law on the right to individual petition, which came into force in 2012 agrees with this, empowering the Constitutional Court to adjudicate cases at the intersection of the European Court of Human Rights and the Constitution, with a view to decrease the number of cases, including repetitive cases, going to Strasbourg. I will return to this later.

There are those within the Turkish legal circles, as in the Russian circles, that hold the view that not *all* judgments of the European Court of Human Rights can be taken into account in the domestic legal systems to have general interpretive effects.

This is also manifested in the non-Strasbourg compliant decisions given by the Turkish judiciary leading to repetitive cases before the European Court of Human Rights. As you may see from the web site of the European Court of Human Rights and the Committee of Ministers, Turkish judiciary has particular shortcomings in upholding

the freedom of expression and freedom of peaceful assembly in the recent years, either applying the Turkish law ways that are not compliant with the European Convention on Human Rights or applying Turkish law that is in open contraction with the case law of the European Court of Human Rights[168].

We need to unpack what this objection to respect the European Court of Human Rights case law means carefully.

Given that general measures in the context of the judiciary require domestic judges to take into the case-law of the European Court of Human Rights when they decide on their future cases, what may come in the way of taking into account the case-law of the European Court of Human Rights?

First of all, some of the judgments of the European Court of Human Rights only deliver individual measures and they may, very clearly, not demand any obvious general measures, from the legislature, courts, or even the judiciary. Consider cases concerning the custody of a child in the context of Article 8 rights. The case can be intensely fact specific and may only concern the parties to that case. In such instances, where there is no demand to take the case-law as a whole into account for future cases, obviously, it is uncontroversial not to take that specific case into account in future judicial deliberations.

In cases, where the Turkish judiciary follows this line of reasoning (e.g. unique circumstances of the case attracting individual measures, but not necessarily general measures) I do not find a significant problem. But in each case, the domestic court, of course, needs to indicate, why the Strasbourg case (or cases) cannot be followed in this case and why facts are highly specific. Indeed, I think this is responsbile judicial action. One should not misconsruct what a Strasbourg judgment case says and use it the domestic context in ways that is not meant to be used. I must, however, say, one off intensly fact specific cases, these days are extremely rare.

Secondly, there are a stream of cases of the European Court of Human Rights, where they may not be well-established case law on a particular issue. The domestic judge, therefore may say that there is no general measure in the form of well-established case law to be followed on a particular point. In these instances, domestic courts can engage in a judicial dialogue with the European Court of Human Rights and through well reasoned judgments, they may seek to influence the emerging case-law of the European Court of Human Rights. In Turkey, we do not have widespread examples of this type of reasoning, but the advent of the right to individual petition before the Constitutional Court is likely to generate such cases in the years to come.

Thirdly, the domestic courts may take the view that in a case against Turkey, the European Court of Human Rights has got either the facts wrong or the interpretation of domestic law wrong. In such cases, the Turkish state will continue to have obligations with respect the individual measures in this case, but in future cases, the domestic courts may seek to clarify the issues that have been misunderstood by the European Court of Human Rights and within the spirit of judicial dialogue may invite the European Court of Human Rights to consider such clarifications. It is important to note, however, that the European Court of Human Rights may disagree and if it does so, given its final interpretive role of the Convention system, domestic courts would be in a position to follow the case-law in its future decisions. Whilst, the United Kingdom Supreme Court (former House of Lords) have engaged in this type of dialogue in the Z v. UK case, we do not yet have high profile cases to report from the Turkish Constitutional Court.

Fourthly, there are cases, where the European Court of Human Rights not only decides on the individual case, but also establishes a test as to how similar cases would need to be handled by domestic courts. Van Hannover v. Germany, for example, developed a test with respect to balancing Article 8 rights and Article 10 rights. In such instances, taking this test into account in domestic court cases, I would argue, flows from the general duty to give effect to general measures by domestic courts. In Von Hannover (2), the European Court of Human Rights has openly indicated that if domestic courts employ the tests developed in protecting competing rights, Strasbourg would also be respectful of the outcome that a domestic court reaches. In Turkey, we find positive examples of Courts employing the tests developed by the European Court of Human Rights when interpreting domestic legislation. The repetitive cases on the Court's docket however shows that this is not the general practice accross the board. This is where training of judges, and future judges is extremely important. In the recent years, we have also seen some judges, in particular with respect to freedom of expression cases, to abandon the tests developed by the European Court of Human Rights. This is a worrying trend.

Finally, there are cases where the European Court of Human Rights finds a domestic legislation incompatible with the European Convention. In such cases if the legislature does not duly amend the legislation, the domestic judge is faced with a dilemma: should she apply the legislation that is in force or should she apply the Convention principle and disregard the legislation. This is an important problem. In such cases, domestic judges are asked to compensate the lack of effective implementation of general measures by legislatures.

168. See notably, the lead case on freedom of assembly, Ataman v. Turkey.

In this respect, many courts in the Council of Europe space have first attempted to interpret the legislation in harmony with the judgments of the European Court of Human Rights. This flows from the general legal obligations all state organs have towards the treaty. But what if this is not possible? What if something has to give in? In such cases, establishing domestic legal procedures to avoid such conflicts is of utomost importance.

In the Turkish case, we have two such proceedings, one old, concrete norm review before the Constitutional Court and one recent, since 2012, the right to individual petition before the Constitutional Court.

In the case of concrete norms review, a domestic court can refer the case it has before it to the Turkish Constitutional Court for the constitutionality review of the domestic legislation. Given that Turkey is a state party of the Convention, there is nothing that stops the Turkish Constitutional Court from reviewing the constitutionality of such legislation also in the light of the Conventionality of such legislation. Even though this procedure has been available for sometime, domestic judges have not used it very effectively and when it has been used, the Constitutional Court has not carried out a Convention compatibility review.

This brings me to the 2012 law on the right to individual petition before the Turkish Constitutional Court[169]. Under this law, the Turkish Constitutional Court has the power to receive individual complaints with respect to rights that exist both in the Constitution and in the Convention. During the drafing process, a key concern for introducing the law was the large number of cases before the European Court of Human Rights from Turkey. The Turkish legislator, therefore, aimed to bring the Conventionality review more explicitly to the purview of the Constitutional Court. We only have three years of judicial practice of the Turkish Constitutional Court, but the due regard given to the case-law of the European Court of Human Rights has increased significantly during this time[170]. The Constitutional Court, therefore, is able to act as a harmoniser of the Turkish Constitution and the European Convention on Human Rights and has adopted the view that harmonious interpertation is for the greater benefit of individuals residing in Turkey.

There is, however, one shortcoming. When the Turkish Constitutional Court was empowered to entertain individual cases, it was not given explicit powers to issue general measures. So, when an individual case concerning a well-established case law of the European Court of Human Rights comes before the Turkish Constitutional Court, if the Turkish Constitutional Court finds a violation, it either awards compensation or sends the case for retrial to the lower Courts. It cannot tell the lower courts to set aside domestic legislation. It also cannot strike out a law that is in violation of the Constitution and the Convention through its powers under the right to individual petition.

Whilst, the 2012 reforms gave us a Constitutional Court that promotes harmonious interpretation of domestic and Convention rights, it has not adequately dealt with the problem of legislative and executive failures to implement general measures.

It is true that when the other branches of the state fail to address general measures efficiently, a sigificant responsbility falls on the shoulders of the judiciary. This has long been the Turkish experience. Despite the limitations of the system, and in particular after the introduction of the right to individual petition to the Constitutional Court, we are set to see important changes in how this question is tacked by the Turkish judiciary in the years to come.

169. The Law on Establishment and Rules of Procedures of the Constitutional Court (Law No: 6216), adopted in 30 March 2011, in force since 23 September 2012.

170. See, for example, TCC Judgment of 2/4/2014 (App No. 2014/3986) (finding the twitter ban unconstitutional); TCC Judgment of 6/1/2015 (App No 2013/3924) (finding the banning of trade unionists march and subsequent forceful intervention to marchers unconstitutional) ; TCC Judgment of 17/7/2014 (App No 2013/293) (finding violations of positive procedural obligations of prohibition of torture, inhuman and degrading treatment).

The European Convention and the integration of integrations: the role of courts in overcoming the fragmentation of international law

Tatiana Neshataeva
Judge of the Court of the Eurasian Economic Union

1. On subsidiarity

The Brussels Declaration adopted at the High-Level Conference on 27 March 2015[171] reaffirms the commitment of European states, including the Russian Federation, to the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter "the Convention"), as a cornerstone of the system for protecting these rights. The declaration further emphasises the subsidiary nature of the ECHR control mechanism.

Subsidiarity has its roots in Catholic law and is the principle that all matters should properly be resolved at local level and that only controversial issues should be referred to a higher body. Hence, according to the Convention, the key role of national authorities, i.e. courts and parliaments, with their capacity to understand subtle differences in securing and protecting human rights at national level, with the help of national human rights institutions and civil society, where necessary.

The subsidiarity mechanism came about as a result of a long and painful process involving constant clashes between national courts and the European Court of Human Rights (hereafter "the ECtHR"), in cases such as Görgülü v. Germany[172] or, more recently, Hirst v. the United Kingdom[173], or Markin v. Russia[174]. All these decisions gave rise to extensive public debate and a refusal by the domestic courts to implement the ECtHR's decisions. It is my belief, however, that a general solution to such conflicts has already been found: a domestic court may only deviate from a decision handed down by an international court if (a) the international court upheld a lower standard of human rights protection than the one adopted at national level and (b) the applicant has shown that the national standard of rights protection is higher.

171. High-level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility" Brussels Declaration // http://justice.belgium.be/fr/binaries/Declaration_EN_tcm421-265137.pdf. Date accessed: 20.10.2015.
172. Case of Görgülü v. Germany // http://hudoc.echr.coe.int/eng?i=001-61646#{"itemid":["001-61646"]}. Date accessed: 20.10.2015.
173. Case of Hirst v. the United Kingdom // http://hudoc.echr.coe.int/eng?i=001-70442#{"itemid":["001-70442"]}. Date accessed: 20.10.2015
174. Case of Konstantin Markin v. Russia // http://hudoc.echr.coe.int/eng?i=001-109868#{"itemid":["001-109868"]}. Date accessed: 20.10.2015.

Such an approach has also prompted international judges to take a closer look at human rights practice in domestic courts. Witness the detailed scrutiny given to the case law on compensation for non-pecuniary damage suffered by legal entities (United Communist Party of Turkey v. Turkey[175], Saffi v. Italy[176], Commingseroll v. Portugal[177]).

Certainly, the process of moving courts, national and international, closer together remains fraught with pitfalls. For example, confusion sometimes arises over the terms "human rights" and "state sovereignty". As any expert knows, sovereignty is limited in two spheres of contemporary international law: when waging a war of aggression and when defending human rights.

Then again, international bodies may behave in a manner that is insufficiently respectful. Consider the recent rejection, on the grounds that they were too radical, of the proposals for closer co-operation between the ECtHR and supreme courts, specifically a proposal to grant national courts the right to review repetitive cases proprio motu before the cases come before the international court, and another to invite domestic judges to participate in test cases before the ECtHR's Grand Chamber. I am confident that in time, these ideas too will catch on and be put into effect.

To repeat what I said before, however, broadly speaking, a mechanism for overcoming misunderstandings and disagreements between the ECtHR and domestic courts has already been found, as the standards laid down in the Interlaken[178], Izmir[179], Brighton[180] and Brussels declarations show.

II. Fragmentation of international law

What concerns us today is another issue, namely the fragmentation of international law arising from different readings of the same international norms by various international courts and, consequently, growing discrepancies in how these norms are understood in national courts.

1. The problem of fragmentation was first noted over fifty years ago by Wilfred Jenks (a British lawyer and director-general of the International Labour Organisation), who attributed it to two things: (1) the tendency for international treaties to develop in different historical, functional and regional contexts and (2) the fact that the law is constantly developing through case law[181]. I myself would add a third cause, namely insufficient knowledge of general international law on the part of practising lawyers.

2. In the Report of the Study Group of the UN's International Law Commission on "Fragmentation of international Law: difficulties arising from the diversification and expansion of international law" (2006), it was pointed out that an ever-growing role is played by so-called "functional differentiation", and that it is a paradox of globalisation that while it has led to increasing uniformisation of social life, it has also led to the increasing fragmentation of the various spheres of social life, including legal institutions and spheres of legal practice and, consequently, to the fragmentation of law. For each sphere of social relations there are now specific legal rules[182].

3. What once appeared to be governed by "general international law" has become the field of operation for such specialist systems as "trade law", "human rights law", "environmental law", "European law", "law of the sea", "investment law", etc. each possessing its own principles and institutions. Such specialisation tends to take place, moreover, with relative ignorance of the general principles of international law. The fact is that these general principles, developed over the centuries and universally acknowledged, are a very important part of international law. Yet often, specialised rules are made in defiance of these so-called peremptory norms or *jus cogens*.

175. Case of United Communist Party of Turkey and others v. Turkey // http://hudoc.echr.coe.int/eng?i=001-58128#{"itemid":["001-58128"]}. Date accessed: 20.10.2015.
176. Case of Immobiliare Saffi v. Italy // http://hudoc.echr.coe.int/eng?i=001-58292#{"itemid":["001-58292"]}. Date accessed: 20.10.2015.
177. Case of Commingersoll S.A. v. Portugal // http://hudoc.echr.coe.int/eng?i=001-58562#{"itemid":["001-58562"]}. Date accessed: 20.10.2015.
178. High Level Conference on the Future of the European Court of Human Rights Interlaken Declaration // http://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf. Date accessed: 20.10.2015.
179. High Level Conference on the Future of the European Court of Human Rights organised within the framework of the Turkish Chairmanship of the Committee of Ministers of the Council of Europe // http://www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf. Date accessed: 20.10.2015.
180. High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration // http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf. Date accessed: 20.10.2015.
181. C. Wilfred Jenks. The conflict of law-making treaties, BYBIL vol.30, (1953). P. 403.
182. Fragmentation of international law; difficulties arising from the diversification and expansion of international law. Report of the Study group of the International law commission // http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf. Date accessed: 20.10.2015.

The reason this is happening is because the number of international treaties is increasing. The situation is worse in cases where one and the same subject matter has been dealt with in several international treaties.

4. One consequence of the emergence of specialised spheres in general international law or of the same subject matter being governed by various international treaties has been the creation of specialised courts and tribunals, whose diverse practice has itself become a factor in the development and spread of fragmentation. The problem is compounded by the tendency of international courts and tribunals to operate in what may be called "*clinical isolation*" from one another, with the result that they end up encroaching on one other's jurisdiction.

One initial example of how the same subject matter may be governed by various international treaties, each of which has its own dispute settlement body, is the so-called MOX Plant case. A tribunal set up under a UN Convention found that there had been no breach by the United Kingdom. Ireland then applied to the ECJ, which held that jurisdiction over the dispute belonged to the ECJ[183].

The issue raised by Ireland concerned radioactive emissions from a UK power station and was governed by three international treaties:

- a universal one, the UN Convention on the Law of the Sea (UNCLOS);
- a regional one, the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR);
- European Community and EURATOM law regarding the environment, which is likewise regional in nature.

There were two interrelated issues to be considered:

- was the matter one of maritime law or of mutual relations within the framework of the EU?
- which court or tribunal had the authority to settle the dispute: the UNCLOS arbitral tribunal, the OSPAR arbitral tribunal or the ECJ?

In the end, by agreement between the parties, tribunals were set up under both Conventions, and an application was then made to the ECJ.

The UNCLOS arbitral tribunal declared itself competent yet when delivering its decision, relied solely on the Convention. The Tribunal found that the United Kingdom was not in breach of the Convention.

The tribunal set up under OSPAR pointed out that the (permanent) International Tribunal for the Law of the Sea, the International Court of Justice or ad hoc arbitral tribunals could be used to settle maritime disputes. At the same time as the OSPAR proceedings got under way, the European Commission, supported by the UK, started an infringement procedure before the ECJ against Ireland, claiming that in submitting the dispute to a tribunal outside the Community legal order, even though the matters at issue fell within the competence of the Community, Ireland had violated the exclusive jurisdiction of the ECJ. The proceedings before the arbitral tribunal had not yet been concluded.

The *ECJ* held that since the EU had ratified UNCLOS, the Convention was part of the Community legal order and that since the issues raised in the dispute were the subject of rules at Community level, the ECJ had jurisdiction. The court was quite explicit, taking the position that "an international agreement such as the Convention cannot affect the exclusive jurisdiction of the Court in regard to the resolution of disputes between Member States concerning the interpretation and application of Community law".

It is believed that the MOX Plant case was the first to highlight the potential problems associated with the exclusive ECJ jurisdiction and the multiplication of international courts and tribunals. The ECJ is clearly determined to defend its exclusive jurisdiction to the maximum. It has no mechanism, however, that would prevent EU member states from going to another court or tribunal.

Next I would like to draw your attention to the disputes that have arisen between economic regional courts (Mexico Soft Drinks (WTO DSB and a NAFTA tribunal), Brazilian Tyres (MERCOSUR and WTO DSB)[184].

The Mexico Soft Drinks case offers an example of how different international treaties may contain similar substantive rules, resulting in "jurisdictional competition" between two or more dispute settlement bodies.

The US complained to the WTO'S Dispute Settlement Body (DSB) about an additional tax imposed by Mexico on soft drinks. The US contended that Mexico's actions were inconsistent with Article III of GATT. Mexico objected

183. N. Lavranos. On the Need to Regulate Competing Jurisdictions between International Courts and Tribunals // http://cadmus.eui.eu/bitstream/handle/1814/11484/MWP_2009_14.pdf?sequence=3. Date accessed: 20.10.2015.
184. N. Lavranos. Opp. cit. Date accessed: 20.10.2015.

to the case being heard by the WTO, arguing that jurisdiction lay with a NAFTA arbitral tribunal and that the North American Free Trade Agreement contained provisions analogous to the GATT rules.

The WTO DSB rejected Mexico's arguments and ruled that it had jurisdiction to hear the case. The Appellate Body upheld the DSB's finding.

In the event, no "judicial" fragmentation occurred, as the hearing before the NAFTA panel did not take place, but the case itself was the first to highlight the possibility of competition between dispute settlement systems, one of which had been set up under a regional treaty (NAFTA) and the other under a universal treaty (WTO agreements).

An example of competition between MERCOSUR and WTO law can be seen in the Brazilian Tyres case.

In 2000, Brazil passed a law banning the import of retreaded tyres. Following the adoption of this legislation, Uruguay instituted proceedings before the MERCOSUR court, on the grounds that the import ban represented a new trade restriction, one that had not existed at the time when Brazil had contracted its obligations under MERCOSUR. The court found that Brazil had violated its obligations under MERCOSUR and the law was amended while maintaining the ban on the import on retreaded tyres from non-MERCOSUR countries (the so-called "MERCOSUR exemption").

The European Communities brought the dispute before the WTO, arguing that the "MERCOSUR exemption" was discriminatory. The EC submitted that, under the MERCOSUR arbitral tribunal decision, Brazil should have lifted the ban on imports of retreaded tyres not only for MERCOSUR countries but for all WTO members. Brazil countered that the MERCOSUR decision referred to bans in trade between countries that were members of MERCOSUR.

The WTO DSB ruled that the "MERCOSUR exemption" was unjustified, discriminatory and *a priori* unlawful.

That brings me to the Tadic case. An illustration of fragmentation in the decisions of the International Court of Justice[185] and the International Criminal Tribunal for the former Yugoslavia[186], the Tadic case was merely the tip of the iceberg.

In it, the International Criminal Tribunal for the former Yugoslavia, in line with the ICJ's position in the Nicaragua case, ruled that the state was responsible for genocide committed as a result of the actions of armed groups, on the basis of the "effective control" test if the actions were performed by individual persons and on the basis of the "overall control" test if the actions were performed by organised and hierarchically structured groups. The ICTY Appeals Chamber accordingly took the view that acts committed by Bosnian Serbs would come under the responsibility of the Federal Republic of Yugoslavia on the basis of the "overall control" test.

Bosnia-Herzegovina then instituted proceedings before the International Court of Justice, citing the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. Bosnia-Herzegovina submitted that Serbia armed and equipped the persons and groups that had carried out the genocide and should therefore be held responsible.

The ICJ held that the persons (Scorpions, Mladic) or entities (Republika Srpska and VRS) that committed the acts of genocide at Srebrenica did not have ties with the Federal Republic of Yugoslavia, with the result that they alone could be held wholly responsible for the genocide. The ICJ also found that neither the Republika Srpska nor the VRS were *de jure* organs of the FRY and that no *de jure* control had been exercised.

The ICJ further applied the "effective control" test but was unable to conclude, on that basis, that the acts of genocide at Srebrenica had been carried out under the direction of the organs of the respondent state.

The ICJ was equally categorical on the subject of the jurisdiction of the ICTY, stating that questions of state responsibility were outside the scope of the ICTY's jurisdiction and that the ICTY could only adjudicate crimes committed by individuals.

The Tadic case is considered to be an example of fragmentation of the most dangerous kind in that it highlights inconsistencies in the practice of two bodies operating under the same UN umbrella

Of particular interest to us is the issue of competition between courts in Europe. A good example of fragmentation in the decisions handed down by the European Court of Justice and the European Court of Human Rights is provided by the Bosphorus case.

185. Bosnia-Herzegovina v. Serbia and Montenegro (Genocide Convention), judgment of 26 February 2007 // http://www.icj-cij.org/docket/files/91/13685.pdf. Date accessed: 20.10.2015.
186. Tadic case (Case No.: IT-94-1-A. 15 July 1999) // http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf. Date accessed: 20.10.2015.

On the basis of UN sanctions imposed against former Yugoslavia, via an EC Regulation, the Irish authorities impounded an airplane leased by Bosphorus from the state-owned Yugoslavia airline JAT. **The measure was challenged before the ECJ, which ruled that it was justified[187]. Following that ruling, Bosphorus started proceedings against Ireland before the ECtHR, claiming that the measure violated its right to property.**

The ECtHR held that there had been no violation of the right to property[188].

The ECtHR further held that the level of legal protection provided by the ECtHR was not identical to that available within the EU. The **ECtHR went on to state that as long as the level of fundamental rights protection was "not manifestly deficient"** the ECtHR would not exercise its jurisdiction.

Critics of the ECtHR decision in the Bosphorus case have accused the Court of not being sufficiently specific in stating that it would decline to exercise its jurisdiction as long as the fundamental rights protection within the European Community was not "manifestly deficient".

In answer to these critics, it is worth pointing out that, on the contrary, the ECtHR's approach makes it possible to address sensitive issues involving collisions between Community and ECtHR law with subtlety and consideration for the specific circumstances of the case, something which cannot, alas, be said for the Opinion issued by the ECJ in 2014 concerning the draft agreement on the European Union's accession to the European Convention on Human Rights[189], and which shows that fragmentation is still an issue.

The time has come to create mechanisms for overcoming the fragmentation arising from decisions handed down by international courts.

The Achabal case[190] provides an example of fragmentation in the decisions of the ECtHR and the UN's Human Rights Committee. After being declared inadmissible in a decision given by the ECtHR, sitting in a single-judge formation, the application was declared admissible and accepted for processing by the UN Human Rights Committee. In its findings, moreover, the latter expressed criticism of the lack of reasoning behind the ECtHR's decision.

Without going into the details of these cases, which have been cited merely as examples, my intention is to show the danger of such discrepancies, and their capacity to undermine courts' authority and the unity of the world legal system which, as we know, has no mechanism for ensuring interaction between international courts. Within the European Union, for instance, there are two courts: the European Court of Justice (in Luxembourg) and the European Court of Human Rights (in Strasbourg), hence the notion of "integration of integrations".

III. Integration of integrations

Aside from the problem of the EU's accession to the ECHR (and the risk that, if it fails, there will be two human rights systems operating in Europe), growing regional integration has led to the emergence of a new court based on Eurasian integration, namely the Court of the Eurasian Economic Union (hereafter "the EAEU Court"). As well as heightening the risk of fragmentation of the European legal order in the human rights sphere, this could create a major challenge for the ECtHR given that the Russian Federation and Armenia are States Parties to the European Convention on Human Rights and Belarus may become a party. In addition, entrepreneurs from the Asiatic part of the Eurasian Economic Union, operating in Armenia and Russia, can now complain, and are already complaining, about breaches of the Convention in their applications to the EAEU Court (formerly the "EurAsEc Court"). The situation is complicated by the fact that judges from countries which are not parties to the Convention are not familiar with the Convention's provisions and its case law.

Ways of overcoming these problems need to be found as of now, therefore.

- Rule changes

1. First and foremost, the judges and staff working at the Court need to have a clear understanding of current international law. This is easier said than done. The Convention as it stands contains no stipulation to the effect that judges must possess a knowledge of international law. Article 21, paragraph 1, of the Convention

187. Case C-84/95 (Bosphorus) [1996] ECR I-3953 // http://curia.europa.eu/juris/showPdf.jsf?docid=100308&doclang=EN. Date accessed: 20.10.2015.
188. Case of Bosphorus v. Ireland // http://hudoc.echr.coe.int/eng?i=001-69564#{"itemid":["001-69564"]}. Date accessed: 20.10.2015.
189. Opinion 2/13 of the court 18 December 2014 // http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN. Date accessed: 20.10.2015.
190. María Cruz Achabal Puertas v. Spain (1945/2010), CCPR/C/107/D/1945/2010 (2013); 20 IHRR 1013 (2013). See also J. Gerards, "Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning", in: *Human Rights Law Review* 2014.

reads: "The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence".

The working group on reform of the ECtHR proposed amending the wording, to insist that judges be recognised specialists in the field of national and international law, and that staff employed in the ECtHR secretariat be required to possess a knowledge of international and national law.

The Statute of the EAEU Court, on the other hand, does require judges to have a knowledge of international law. Under Article 9 of the Statute, judges must be of high moral character, highly qualified in the field of international and domestic law, and, in general, meet the requirements applicable to judges of the highest judicial authorities of the member states.

The EAEU, however, has no mechanism for verifying member states' compliance with the eligibility requirements for judges. Such a mechanism needs to be developed in the form, say, of an independent qualifications board. In the case of the EAEU, such a board could operate under the auspices of the Supreme Eurasian Economic Council while in the case of the ECtHR, it could come under the Council of Europe Secretariat.

- Mutual respect

2. The hope is that if judges respect international law, they will also respect the decisions handed down by international courts. The EurAsEc Court, for example, has been guided by the jurisprudence of the European Court of Human Rights when dealing with complex procedural issues. Consider the case of the South Kuzbass Coal Company v. the Eurasian Economic Commission[191] and ONP v. the Eurasian Economic Commission[192].

South Kuzbass Coal Company v. the Eurasian Economic Commission

In the first case heard by the EurAsEc Court, the South Kuzbass Coal Company complained that the provisions of Article 25 of the Court's Statute and Article 4 of the Treaty establishing the Eurasian Economic Community (concerning the requirement to file a pre-trial application with the Eurasian Economic Commission) could not be implemented as the Customs Union Commission had ceased operating and the issue in question was not addressed in the texts of its successor, the Eurasian Economic Commission.

The panel of judges, having discussed the issue of pre-trial settlement of contentious matters under the administrative procedure, concluded that at the time when the application was filed with the Court, there were no regulations governing such procedure and that consequently, it could not be implemented in respect of the company in question.

A supranational body is under no obligation to answer for its actions in court as long as the possibility exists for those actions to be reviewed under its own system. Any application that might be filed with a court, therefore, must first be filed with the Commission in accordance with the formal conditions and time-limits laid down in the Commission's Rules of Procedure. The contents of those Rules must be available to the applicant.

Only preliminary measures which are accessible and clear to the applicant and sufficient to settle the dispute need be exhausted, however. The existence of such remedies must be satisfactorily confirmed by documentary evidence and practice: the respondent must show that the said conditions have been met, the relevant document exists, the rule is observed and that the mechanism works and was applied in respect of a specific applicant.

Accordingly, from its very first decision on 5 September 2012, the Court established the rule that the requirements set out in Article 25 of the Statute and Article 4 of the Treaty of 9 December 2010 concerning pre-trial procedures cannot be regarded as absolute and should not be applied automatically, in order to avoid infringing higher norms, namely the principle of equality of arms (Article 2 of the Statute) and the applicant's right to a fair trial (Article 6 ECHR). In adjudicating this case, the EurAsEc Court took account of the decisions of the ECtHR in Heinrich v. France (22 September 1994) and Cardat v. France (19 March 1991).

OPN v. Eurasian Economic Commission

In this case, the respondent, the Eurasian Economic Commission, insisted that a bankrupt firm had no standing before the Court. The firm had been declared bankrupt on the initiative of the customs authorities. The Court ruled that a legal entity which had ceased trading was an economic entity whose rights and lawful interests were eligible for protection in an international court. The decision rendered on 21 February 2013 contains a

191. Decision of the EurAsEc Court of 05.09.2012 in the case of the South Kuzbass Coal Company // http://www.rg.ru/2012/12/03/reshenie-site-dok.html. Date accessed: 20.10.2015.
192. Decision of the Appeals Chamber of the Court of the Eurasian Economic Community of 21.02.2013 // http://www.rg.ru/2013/02/27/evrazes-onp-dok.html. Date accessed: 20.10.2015.

reference to the ECtHR decision in Credit Industrial Bank v. Czech Republic[193], which indicates that the Court defended the interests of companies that were planning to return to the professional segment of the market and had no reason to suppose that such interests were not lawful.

For the Eurasian court, the ECtHR's decisions in matters concerning the independence and accessibility of the justice system have been indispensable, therefore.

It is worth noting that, when dealing with matters relating to the substantive economic law of a regional organisation, the EAEU Court (formerly the "EurAsEc Court") has also studied the decisions of the WTO DSB, the ECJ and the MERCOSUR Court, again to good effect.

- Co-operation

3. It is unlikely that the problem of fragmentation can be satisfactorily resolved purely through the goodwill of the judges working in international courts, however. Globally speaking, it needs to be addressed at an institutional level. Allow me to return to the Brussels Declaration, which recommends establishing "contact points" for human rights matters within national and international bodies. In my view, such "contact points" ought to be created and ongoing dialogue developed in the case of international courts as well. In the human rights sphere, the primary role in establishing these institutions belongs to the Council of Europe, and in the case of general principles of law, to the International Court of Justice. Where regional integration is concerned, the initiative could come from the EAEU and the ECJ in Luxembourg. Dialogue needs to start here and now. Given its pan-European character, the Council of Europe is perhaps a good place to begin. Particularly as in the landmark Bancovic decision, the ECtHR observed as follows: "The Court must also take into account any relevant rules of international law […]. The Convention should be interpreted as far as possible in harmony with other principles of international law". A very inspiring passage that could usefully guide courts in their day-to-day activities. It is my belief that courts can do a great deal to bring unity to the world's legal system using the resources available to them, gradually and without fanfare. One possible starting point would be co-operation between the courts' secretariats to prepare the ground for dialogue between judges.

4. To conclude, I would like to point out that all legal conflicts (whether between a domestic court and an international one or between international courts) are essential for the development of general international law. International law is the only instrument for legal compromise with the capacity to embrace humanity at large. I firmly believe that globalisation and a single legal and economic area is the direction in which the world is moving and a strategy for its development while regionalisation, meaning closer legal and economic ties within regions, is a tactic for creating an overarching world order. In that context, the quest for general approaches to specific issues across the European continent (geographically speaking, a single territory stretching from the Atlantic to the Pacific) will ultimately help us find solutions to many of the problems facing the world today.

193. Case of Credit Industrial Bank v. Czech Republic // https://www.google.by/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBsQFjAAahUKEwi9i-uop-fIAhVJVSwKHU7EA4w&url=http%3A%2F%2Fhudoc.echr.coe.int%2Fapp%2Fconversion%2Fpdf%2F%3Flibrary%3DECHR%26id%3D001-61381%26filename%3D001-61381.pdf%26TID%3Dthkbhnilzk&usg=AFQjCNG39X4pYjw4SDtqoF1HNXI6InRoJg. Date accessed: 20.10.2015.

Executing European Court of Human Rights judgments in the context of the law of state responsibility

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In its Judgment no. 21-P of 14 July 2015 the Constitutional Court of the Russian Federation clearly marked out the "red lines" which it was not prepared to cross when considering the question of European Court of Human Rights (ECHR) judgments setting out assessments of domestic legislation: such judgments are subject to implementation within the framework of Russia's legal system only on condition of the Russian Federation Constitution being recognised as having supreme legal force[194].

The assertion of the supreme legal force of the Russian Federation Constitution within the framework of Russia's legal system is a very sound one. I believe that the Constitutional Court's efforts to construct a dual model of relations and interaction between international and domestic law, between the Russian Federation Constitution and the European Convention for the protection of human rights and fundamental freedoms of 1950 (hereinafter the European Convention), the Constitutional Court and the ECHR must receive every possible support, including from representatives of international legal science. For any law specialist, one's own constitution must be sacrosanct, as it guarantees the unity, harmony and effectiveness of the national legal order. But – and this is also what a dual model is all about – that postulate does not cancel out another supreme principle, namely that international obligations must be scrupulously observed. In the dual scheme of things, domestic and international law are equally ranked systems, and neither of them has priority over the other one.

The Constitutional court is very punctilious in its statements, from which it very clearly follows that the Russian Federation Constitution stands above all else, not *universally* but within the framework of Russia's legal system, part of which, under Article 15 paragraph 4 of the Constitution, is made up by the European Convention. But, at the same time, we must not forget that, in the first place, the European Convention forms part of this system of international law, and Russia forms part of the international community in which relations are governed by the norms of international law. From the viewpoint of international law, the principle of *pacta sund servanda* is also sacrosanct, as it guarantees the efficiency and the very existence of that system, it is the cornerstone of the legally binding power of international law. We are all aware of the *jus cogens* provision in Article 27 of the Vienna Convention on international treaty law of 1969, under which a State may not invoke the provisions of

194. Constitutional Court of the Russian Federation Judgment no. 21-P of 14.7.2015 "in the case reviewing the constitutionality of the provisions of Article 1 of the Federal Law "Ratifying the Convention for the protection of human rights and fundamental freedoms and the Protocols thereto", paragraphs 1 and 2 of Article 32 of the Federal Law "On the international treaties of the Russian Federation", paragraphs 1 and 4 of Article 11 and sub-paragraph 4 of paragraph 4 of Article 392 of the Code of Civil Procedure of the Russian Federation, paragraphs 1 and 4 of Article 13 and sub-paragraph 4 of paragraph 3 of Article 311 of the Code of Commercial Procedure of the Russian Federation, paragraphs 1 and 4 of Article 15 and sub-paragraph 4 of paragraph 1 of Article 350 of the Code of Administrative Procedure and sub-paragraph 2 of paragraph 4 of Article 413 of the Code of Criminal Procedure of the Russian Federation in connection with the application lodged by a group of deputies of the State Duma", section 2.

its internal law as justification for its failure to implement an international treaty. And according to another very important document – the Draft Articles on responsibility of States for internationally wrongful acts of 2001 – "the characterisation of an act of a State as internationally wrongful is governed by international law. Such characterisation is not affected by the characterisation of the same act as lawful by internal law" (Art. 3)[195].

However, within the framework of the dual model, even the ECHR has to understand that it cannot place a State in such a complex situation where it faces a choice of which text would be "best" to violate – the European Convention or its own Constitution. This has to be a subject for dialogue and interaction between the courts, the importance of which was quite rightly pointed out in Constitutional Court Judgment no. 21-P. Otherwise, the ECHR may share the fate of its colleague – the Inter-American Court of Human Rights, which pronounces progressive decisions imbued with lofty humanitarian ideals, sometimes simply directly declaring laws of the greatest importance for a State invalid (amnesty laws that, in many Latin American countries, guarantee a peaceful transition from a dictatorship to a democracy, for example) or even constitutional provisions. However, this lack of flexibility is having chilling results: the statistics show that only 10% of its judgments are fully executed by the States[196]. Any international court must bear in mind that not only was it created by States and assigned its competence by them but the court's authority and effectiveness and enforceability of its decisions also entirely depend on those States. As it does not have the coercive means available to a national court, an international court cannot command States but must "achieve its ends" through the cogency, balance and, if need be, diplomacy of its judgments, striking the correct balance between the need to safeguard the pan-European legal area and its European values and the characteristic features of each member of the European family.

Be that as it may, it is clear that the failure to execute a final ECHR judgment, including on the grounds and along the lines established in Constitutional Court Judgment no. 21-P of 14 July 2015, will be perceived as an act at variance with the international obligations entered into through the ratification of the European Convention (Art. 46). To what extent can that variance be justified and will it not be seen as an internationally wrongful act within the meaning of the Draft Articles on responsibility of States? The dual approach makes it necessary to examine the question not only from a domestic law viewpoint but also from an international law angle. If the *only* argument for failure to execute an ECHR judgment is the supremacy of the Constitution, that in itself does not absolve Russia from state responsibility.

An attempt to find grounds in *international law* for stepping back, by way of exception, from international obligations seems to have been made in section 3 of Constitutional Court Judgment no. 21-P of 14 July 2015. One such ground invokes a possible violation by the European Court of the rules of interpretation laid down by the Vienna Convention on international treaty law, while another would be to invoke the manifest violation of a fundamentally important rule of a country's internal law regarding competence to conclude treaties (Art. 46 of the Vienna Convention). Both these arguments have their weaknesses. The first implies a need for verification (by what – the Constitutional Court?) that the European Court has complied with the rules of interpretation of the European Convention and that ECHR judgments conform to *jus cogens* rules, which would appear to go beyond the scope of competence of a national court and wreck the dual model painstakingly constructed by the Constitutional Court itself. The second argument is linked to the invalidation of a treaty and would be more applicable if, let's say, agreement with the binding nature of the European Convention was expressed in the name of Russia not by a federal law but, for example, by a decision of the Government. It appears that Article 46 of the Vienna Convention is not really intended for cases where an international body set up under an agreement goes beyond the framework of the consent initially given by a State in good faith.

Under the law of state responsibility, it is not every act of a State at variance with its international obligations that automatically qualifies as unlawful. There are circumstances that may be invoked by a State as precluding the wrongfulness of an act not in conformity with its international obligations. The list of these circumstances is exhaustive and set forth in the Draft Articles on responsibility of States of 2001 adopted by the UN International Law Commission and approved by the General Assembly. It would seem that one of them – the "state of necessity" established in Art. 25 - is worth a closer look in our context[197].

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195. Draft Articles on responsibility of States for internationally wrongful acts (appended to United Nations General Assembly Resolution A/RES/56/83 of 12.12.2001).
196. *Cavallaro J., Erin Brewer S.* Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court // American Journal of International Law. 2008. Vol. 102. pp. 785-786.
197. Article 25 states:"1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: *a*) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and *b*) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: *a*) the international obligation in question excludes the possibility of invoking necessity; or *b*) the State has contributed to the situation of necessity".

According to the case-law of the UN International Court of Justice for example (in the case of the Gabcikovo-Nagymaros Project, in which it recognised this circumstance as part of international law), the state of necessity can only be invoked under certain strictly defined conditions: 1) it must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; 2) that interest must have been threatened by a "grave and imminent peril"; 3) the act being challenged must have been the "only means" of safeguarding that interest; 4) that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed (balance of interests)[198].

Moreover, as both the International Court and the ILC point out, the state of necessity can be invoked only in exceptional cases, and the State invoking it "may not be the sole judge" of this question[199].

The state of necessity is an extremely complex concept that triggers lively debate in both doctrine and practice. Those arguing in favour of the state of necessity as a circumstance precluding wrongfulness have at various times included Oppenheim-Lauterpacht, Graefrath, Schwarzenberger and Sorensen. Those against invoking necessity on grounds that it would pave the way for abuses have included Arechega, Brownlie, Bowett, Guggenheim and Ushakov[200]. In the view of the American researcher Robert Sloane, when the Draft Articles were adopted in 2001 the state of necessity should have been seen as a "progressive development of international law" rather than "codifying existing general international law"[201]. It is a singular circumstance formulated "by contradiction" ("a State may not invoke…"). Its "elastic" formulations ("essential interest", "grave and imminent peril") do not add certainty in its application. Cases where the invoking of necessity has been deemed legitimate are extremely rare in international practice. Let us just say that the author is not aware of any cases where this circumstance has been invoked in the context of protecting the constitutional legal order.

It is more interesting to try to apply this test to a wholly possible scenario, with the resolving of the question of execution of European Court judgments in the case of "Anchugov and Gladkov v. Russia" of 4 July 2013, referred to by the Constitutional Court as the "most obvious" example of variance with the provisions of the Constitution. In that case, the European Court found that the restriction contained in Russian legislation of the electoral rights of persons serving punishment in the form of prison sentences violated Article 3 of Protocol no. 1 to the European Convention, which, in the view of the Constitutional Court directly contradicted Article 32 paragraph 3 of the Russian Federation Constitution. Let us just try to reason simply by asking questions and not imposing any specific answers.

1) Is there an *essential interest* of the Russian Federation here and what does it entail? On the one hand, this is about a rule of the Constitution (what could be more essential?) and, what is more, one that is contained in the "unalterable" chapter 2. On the other hand, do all the provisions of the Constitution refer to the fundaments of the constitutional system, fundamental principles and norms of the Constitution, whose necessary protection is the focus of Constitutional Court Judgment no. 21-P (section 2)?

2) If we answer yes to the first question, then the second one is whether this interest is threatened by a *"grave and imminent peril"*? So let us consider wherein lies the threat from the judgment in the case of "Anchugov and Gladkov" for Russia's legal order? How could its execution undermine that order? How can we substantiate that threat, what makes it imminent? On the one hand, it is the will of the people that is expressed in the Constitution, and on the other hand is the prohibition of voting for prisoners in itself vitally important for Russia? There are arguments both for and against.

3) The third question asks whether the non-execution of a European Court judgment is the *only way to safeguard* an essential interest? Are such courses of action making it possible to reconcile obligations under the European Convention and the Constitution, for example the interpretation of Article 32, not in line with the need for the legislator to devise specific mechanisms for implementing it that meet the ECHR's requirements: for, ultimately, the claims of the European Court were not prompted by the actual prohibition of voting for prisoners, but by its current automatic, unascertained nature that does not make it possible to take all the circumstances of the specific case into account?

It must once again be emphasised here that this is not about the non-fulfilment of the Convention, whose norms may not *a priori* be contrary to the Constitution: both documents profess and safeguard identical values. This

198. The Gabcikovo-Nagymaros Project (Hungary v. Slovakia), Judgment of 25 September 1997, ICJ Report, 1997, p. 7 (paras. 51-52).
199. Report of the International Law Commission on the work of its 53rd session // General Assembly Official records. 56th session. Supplement no. 10 (A/56/10). New York, 2001. p. 204.
200. A review of doctrine in this area appears in the supplement to the Eighth report by R. Ago on "State responsibility". Rep. UN A/CN.4/318/Add.5-7 // Yearbook of the International Law Commission. 1980. Vol. II. Part 1. pp. 46-51 (paras. 71-80).
201. Sloane, Robert D. On the Use and Abuse of Necessity in the Law of State Responsibility // The American Journal of International Law. Vol. 106. No. 3 (July 2012). P. 471.

is about the possibility in principle, stated in Judgment no. 21-P, of derogating, on an exceptional basis, from execution of the prescriptions of a specific ECHR judgment based on the European Convention and interpreted by the European Court in such a way as to be contrary to the Russian Federation Constitution, in other words a temporary derogation from the obligation to execute final decisions of the European Court of Human Rights.

In the author's view, the test of necessity relates precisely to the kind of "exceptional" cases mentioned by the Constitutional Court in Judgment no. 21-P in exercising its "right to expression". This is clearly a very complex test but, for one thing, it can be used as an argument for ruling out unlawfulness in the non-execution of specific European Court judgments, in dialogue with the Committee of Ministers or, if the case goes that far, within the European Court of Human Rights itself in new proceedings examining disputes over whether a State has properly executed a European Court judgment (Art. 46 as amended by Protocol 14). But most importantly, in the author's eyes, it can be used at the stage of assessment by the Constitutional Court itself of the expediency and well-foundedness, in terms of both Russian and international law, of the possible non-execution of a European Court judgment and the consequences of such a step.

I would like to say in conclusion that respect for the European Convention and other international obligations is a guarantee of the supremacy of the Constitution, and respect for Russia's Constitution is a guarantee of Russia's fulfilment of its international obligations in good faith.

State sovereignty and implementation of the European Convention and decisions of the European Court of Human Rights

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When examining the role played by the decisions and judgments of the European Court in Russia's legal system, it is important to look at their place in the practice of the European Court itself, as it is through case law that the list of rights protected by the Court expands and becomes more detailed. A classic example in this respect is the right of access to a court, which is not explicitly provided for in Article 6 of the Convention[202].

It will be observed that the Convention for the Protection of Human Rights and Fundamental Freedoms was signed back in 1950 and that, obviously, much has changed since then. The Convention, however, must continue to provide meaningful and effective protection for human rights, and many of its articles dedicated to specific human rights have remained *unchanged* owing to the laconic manner in which they are worded.

For the Convention, a text that had not been revised for half a century, to remain effective, however, a particular kind of approach was required, one that has been repeatedly expressed by the European Court in its judgments and decisions. As Vladimir Tumanov once observed, "The Convention is not a stagnant legal instrument, it is open to interpretation in the light of present-day conditions"; "the object and purpose of the Convention as a legal instrument providing protection for human rights demand that its provisions be construed and applied in such a way as to render the guarantees it affords effective and meaningful"[203].

Firstly, the practice of the European Court is very wide-ranging, with use being made of virtually all the traditional methods of interpretation recognised by the world's legal systems (textual, systematic, doctrinal and semantic interpretation, the latter being complicated because the Convention is a bilingual instrument).

Secondly, on acceding to the Convention and its protocols, states undertook to uphold and guarantee only those rights and freedoms which were directly provided for in the international treaties in question. The European Court, therefore, must not expand the list of rights and freedoms protected under the Convention and its protocols without reasonable cause. Otherwise there is a danger that it may infringe the universally accepted principles and rules of international law, and in particular the principle of the sovereign equality of states.

202. *L. B. Alekseyeva.* Practice of the European Court of Human Rights in the application of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to a fair trial and access to legal remedies. – M.: Rudomino, 2000, pp. 11-26.

203. *V. A. Tumanov.* The European Court of Human Rights. A review of its organisational structure and activities. – M.: Norma, 2001 pp. 90-91.

Following on from Veniamin Chirkin's contention that in today's world, the institutions of the European Union (a particular type of body) are effectively creating supranational law[204], it should be noted that alongside other factors, the development of the state and laws at both national and international level are being heavily influenced by three processes: modernisation, globalisation and integration. Each of these has both positive and negative sides. Modernisation can simply be a synonym for westernisation, while integration can lead to overdependence (evidence of this can be seen in Russia today) and globalisation sometimes destroys established ways and customs, or the socio-cultural environment[205] which Valery Zorkin has talked about.

With globalisation, the issue of state sovereignty as the hallmark of a state has intensified, and divided legal scholars. Some such as Lev Yavich talk about its disappearance and erosion in the context of a global world order, arguing that state sovereignty is a major obstacle to global integration[206]. Others, such as Mikhail Marchenko, believe it is immutable, nay absolute.

Upon critically evaluating the various viewpoints on this issue, we discover that the argument about the absolute nature of state sovereignty does not stand up to scrutiny. Clearly, in nature and in social relations, nothing can ever be absolute. And that includes state sovereignty, which has always been limited by the sovereignty of other nation states.

Nor, however, do we have much confidence in the assertion that in today's globalising world, state sovereignty is fated to disappear along with state borders, that it will wither away from obsolescence. Such diametrically opposed claims are indicative of a rather one-sided approach to the legal and political issue at hand. One way to avoid extremes when making judgments is to regard sovereignty as a single construct, composed of a legal and a factual aspect, as suggested by Mikhail Marchenko[207]: the *legal aspect* expresses the form of state sovereignty as a phenomenon, while the *factual* aspect of sovereignty is what constitutes its substance.

State sovereignty, moreover, is not to be confused with that other characteristic of state authority, *polnovlastiye* ("all power"). In today's globalised world, the range of powers enjoyed by our state authorities is changing, by virtue of the fact that the Russian Federation can participate in international organisations and may assign some of its powers to them (Art. 79 of the RF Constitution). Consequently, the degree to which sovereignty is exercised in practice (i.e. the factual aspect of sovereignty) is directly dependent on the comprehensiveness of state authority. A modern state, in continuing to be a full subject of international law, does not lose its sovereignty, therefore. Simply, there are fewer practical opportunities for the expression and exercise of that sovereignty in an environment where multiple supranational entities are operating.

It is important not to underestimate peoples' desire to live according to their own customs, laws, religious and other rules, to choose a form of government that is congenial to them and to establish the corresponding political system. Often, however, supranational organisations seek to restrict nation states' ability to manage their internal affairs themselves and often these organisations dictate policy in the international arena, thereby essentially limiting state sovereignty.

Suggesting that countries should renounce state sovereignty, however, is tantamount to rejecting the principle of states' territorial integrity. No global interests can negate the supremacy of a state's authority within its own territory. It is a different matter if the *state itself, out of a concern to protect universal, global interests, voluntarily agrees to itself impose curbs on its powers.* In those circumstances, the importance of state sovereignty in a globalised world not only does not diminish but is, if anything, magnified.

While it is certainly the case that, with globalisation, states' freedom of action decreases, that does not mean they have less sovereignty. On the contrary, states acquire additional opportunities and functions both abroad and at home. Supranational regulation creates wider opportunities for states to influence spontaneous processes and in this sense serves to strengthen state sovereignty[208].

One major consequence of globalisation, however, from a state sovereignty perspective, is the conflict between the growing economic and political interdependence of countries and peoples, and *the preservation of a state's right to deal with its own problems independently and at its own discretion*. The blurring of boundaries between

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204. In the Russian language, "natsia" and "natsionalniy" are understood in ethnic terms. In English and the Romance languages, the words "nation" and "national" do not have these connotations and are understood as meaning "state" (often the term "nation state" is used). The UN is an organisation not of nations but of states. This difference needs to be borne in mind when discussing supranational public authority and supranational law.
205. See V. Y. Chirkin. Supranational international governmental entities and supranational law // Yuridicheskaya mysl. 2015. No. 4. p. 111.
206. L. S. Yavich. On the philosophy of law for the 21st century. M., 2000. p. 12.
207. M. N. Marchenko. The state and law in a globalised world. M., 2009.
208. T.V. Milusheva. The limitations and boundaries of state power: theoretical and law study, DPhil thesis, Saratov, 2012.

different states' economic systems is becoming a political and legal issue on an international scale. Circumstances such as these call for the creation of political and legal mechanisms for settling any conflicts that may arise.

Whereas in the past, a nation or country on the world political stage could be treated as a single entity, visible only from the outside and whose internal affairs were of no material importance, nowadays, there is more and more talk about how in modern society, there is a plurality of interests, which cannot be reduced to a common denominator. Whereas before the state could be regarded as an integral entity, a piece on "the great chessboard" as it were, nowadays that description needs to be heavily qualified. The diminution of the role and importance of the state can also be seen in a weakening of civic loyalty, and a lessening of "allegiance to the flag" and all the attributes of a state.

Economic integration is a huge factor in maintaining the world order and establishing stable relations between states. It is very important therefore, that integration should be based on a number of specific principles: firstly, the principle of a state's sovereignty over its natural resources, meaning that each state has the right to dispose of its natural resources as it sees fit; secondly, freedom of choice over the type of integration to be pursued; thirdly, equality and mutually beneficial co-operation and non-discrimination[209]; and fourthly, the rule that precedence must be given to the national constitution as an instrument possessing supreme legal force.

"Supreme legal force" means that, legally speaking, the constitution prevails over any other normative acts (including federal and federal constitutional laws), which must themselves be compatible with the Constitution and not contradict it[210]. It follows from this that neither the European Convention nor any ECtHR decisions based on it can override the Constitution. They can be implemented in the Russian legal system only if the Russian Constitution is recognised as being preeminent.

As ruled by Russia's Constitutional Court, insofar as the Convention for the Protection of Human Rights and Fundamental Freedoms as an international treaty of the Russian Federation is an integral part of its legal system, the state is bound to execute any judgment handed down by the ECtHR on the basis of the Convention concerning a complaint against Russia in relation to the parties to the case and within the limits of the subject-matter of the dispute. The implementation of any individual or collective measures provided for in the ECtHR judgment must likewise be effected in accordance with Article 15 (paragraph 4) of the Russian Constitution, based on the recognition of such judgment as an integral part of the Russian legal system.

At the same time, it is clear from the RF Constitution, and specifically Articles 4 (paragraph 1), 15 (paragraph 1) and 79 establishing Russia's sovereignty, the supreme legal force of the Russian Constitution and the inadmissibility of implementing within the state legal system any international treaties, participation in which may involve the limitation of human and civil rights and freedoms or a breach of the principles of the constitutional system of the Russian Federation and in so doing violate the requirements of the Constitution, that *neither the Convention* on Human Rights as an international treaty of the Russian Federation, *nor any rulings of the European Court of Human Rights* containing assessments of national legislation or concerning the need to amend that legislation, *can override the supremacy of the RF Constitution within the Russian legal system and, consequently, are enforceable in that system only if it is acknowledged that the RF Constitution has supreme legal force*[211].

Another factor in the erosion of the foundations of state sovereignty is the growing issue of *territorial integrity*. Contrary to popular opinion, globalisation is not only about coming together, co-operation and opening borders. With increased internationalisation and interdependence have come new barriers, and simultaneous political and economic fragmentation within individual countries. It is increasingly apparent in today's world that there are two aspects to the issue of the territorial integrity of sovereign states: an *economic* one and an *ethno-political* one.

The *economic aspect* stems from the processes shaping the formation of a single economic area, the knock-on effect, or "flip side", of which is the destruction of domestic markets. The decline in the effectiveness of state regulation has reinforced the trend towards decentralisation, and states' sovereignty is being squeezed not only by the expansion in the powers of supranational, supra-state organisations but also by the gathering strength of individual regions.

The spread of market-based relations and the expansion of free trade zones have led to closer ties between countries and greater integration while at the same time encouraging isolationist and separatist forces and,

209. For further information, see: L.A. Morozova, Theory of the state and law: textbook. 2nd edition, revised and expanded. - M.: Eksmo Publishing, 2005. p. 115.
210. See: Comments on the Constitution of the Russian Federation. 2nd edition / edited by S.A. Komarov. – St. Petersburg: St. Petersburg Institute of Law Publishing, 2014. pp. 46-47.
211. See: http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=182936.

in so doing, contributing to the rise of nationalism and the escalation of local conflicts. The severity of the problem and its contemporary resonance are also determined, to a large extent, by ethno-political aspects. The sphere of inter-ethnic and intercultural interaction has enormous potential to undermine the foundations of state sovereignty.

The *ethnic aspect* of territorial integrity stems from the growth of ethnocratisation and various forms of ethnic separatism. Nationalism and its radical manifestations are a fundamental concern today. Contributing to ethno-cultural regionalism and worsening inter-ethnic conflicts are profound differences in moral philosophy, history and culture, the deepening and widening of interaction between peoples and, at the same time, heightened identity awareness among those same peoples.

The situation is not helped by the fact that globalisation often signifies "westernisation", i.e. the modernisation of non-western, traditional societies in the image of contemporary, western liberal democracies, with no regard to the centuries-old traditions of unique cultures, the specific features of the economic system, and patterns and models derived from past collective experience. Given that such transformations often not only do not lead to rapid economic growth but actually cause social and economic conditions to deteriorate, they are apt to provoke a backlash.

The principle of national self-determination proclaimed many years ago by the former US President Woodrow Wilson is today more relevant than ever. The biggest threat to this principle is policy built on the tenet "one ethnos - one state", whose destructive potential has been making itself felt for decades now and which has engendered numerous bloody "ethnic conflicts". Casualties of this process have included Pakistan, India, Afghanistan, Yugoslavia and parts of the former USSR. Over a period of ten years, we saw the rapid disintegration of the Soviet Union, Yugoslavia, Czechoslovakia, Ethiopia, Ulster, Kashmir, Kosovo, Transnistria and Abkhazia, and a worsening of the situation with regard to the Kurds, the Basques, the Catalans, the Scots, the Welsh, the Indian Tamils and the Quebecois. These and other examples are an indication of the significance of the ethno-political factor in the modern world. The further integration advances, moreover, the greater, it seems, is the separatists' success in achieving their aims.

The conclusion to be drawn from all this is that whereas in the 20th century, harmonious international relations relied on the peaceful co-existence of sovereign states, in the 21st century, they will hinge on the peaceful co-existence of ethnic groups within one and the same state.

That is not all, however. States are gradually losing their monopoly over the use of armed force. More and more often, when international instability occurs, it comes from "non-governmental" quarters, insofar as "non-legitimate centres" of power are increasingly springing up within this or that state. Political destabilisation is frequently related to armed separatism, which spills over into international extremism and terrorism. Confirmation of this can be seen in the recent history of countries such as Chechnya, Kosovo, Macedonia, Ukraine, Syria, etc. Certain states, furthermore, while supporting extremist organisations, seek to influence other states' domestic policy. A telling example of this can be found in the attempts by the USA and certain European countries to bring pressure to bear on Russia through the crisis in Ukraine (late 2014 – early 2015).

At present, the most serious threat to the cornerstone of state sovereignty – the principle of non-interference in the internal affairs of a sovereign state – comes from the spread and affirmation of the universal ideology of human rights. What we are seeing today are attempts to impose on the international community a shift away from "state law" towards "humanitarian law" or civil society law, in which the observance of human rights becomes one of the highest priorities, if not the highest.

A significant number of countries have signed up to conventions and protocols on civil rights and freedoms, and in so doing acknowledged that these instruments take precedence over their own domestic law. Whenever a state commits a flagrant breach of human rights and freedoms, it is assumed that the international community is entitled to intervene. A natural consequence of this approach to dealing with human rights violations is the practice of limiting state sovereignty. Already, too, theories justifying interference in the internal affairs of sovereign states have emerged in the shape of such concepts as "limited sovereignty" and "humanitarian intervention". Yet where there are legal rules in operation, governing inter-state relations, even if those rules are not perfect, it is difficult to see such attempts as anything other than a case of international players manufacturing versions of an "alternative" international law, according to their interests at any given time.

All this highlights the complex dilemma that lies at the core of "humanitarian intervention": on the one hand, the legitimacy of action undertaken by a particular country, coalition or international organisation in the absence of a UN mandate and, on the other hand, the universally recognised need to take effective measures to stop gross or systematic human rights violations which have serious humanitarian consequences.

It should be noted that the factors examined above from the perspective of the sovereign state's role in the system of international relations have been variously interpreted. Alongside the view that the state in today's world is increasingly losing control over the levers of social and economic management and that, consequently, we seeing a waning and a reassessment of the principle of state sovereignty, there is another school of thought which believes that the role of the state both as a major wielder of power and as a key player in international relations will, in the foreseeable future, not only not become weaker but actually strengthen in some respects.

Current developments in the global political and legal environment demonstrate the need to devise a single policy regarding foreign intervention in the affairs of countries where human rights abuses are taking place. In the case of countries which commit crimes against their own citizens, traditional concepts like "national sovereignty" or "state borders" cannot be regarded as an "absolute defence".

There is thus every reason to suppose that in the present effectively unipolar world, what we are seeing is not so much an assault on state sovereignty as such, as an attempt to use the objective processes of economic development and the issue of human rights violations in the interests of a stronger state. The protests both of the anti-globalisation movement and of those who oppose the USA's interference in sovereign countries' internal affairs under the pretext of protecting human rights and preventing a "humanitarian disaster", as happened in Yugoslavia and as is now happening in Ukraine, become understandable in this context.

In some European countries, there are forces at work which are trying to prevent state responsibilities from being delegated to international institutions, notably the trade union organisations which fear such moves will lead to higher unemployment. Supporters of protectionism are influential in the agricultural lobby, which opposes cuts in agricultural production in particular states, while others oppose the removal of restrictions on the use of natural resources by foreigners, offshoring, etc. All these forces are highly influential and invoke the idea of a nation state. To ignore them for any length of time will be impossible.

All the factors mentioned above are temporary ones, however. The main reasons for the continued existence of nation states in the era of globalisation lie elsewhere, it seems. In a period of transition to a society of "minorities", nation (but not ethnocratic) states are becoming a centre for the consolidation, preservation and development of the cultures of various, mainly small, ethnic groups. And it is the desire to preserve national identity and language that has, to a large extent, sparked "separatist" tendencies in developed industrial countries, including French-speaking Quebec, and a number of European countries such as the United Kingdom, Spain, France and Belgium. The countries of eastern Europe, while actively seeking integration into European structures, guard their sovereignty jealously, not because they wish to experiment with some special economic development models of their own but because they see the nation state as the most acceptable means of accomplishing the task of preserving national identity.

By all accounts, therefore, globalisation is unlikely to lead, even in the long term, to the demise of the nation state. Quite the contrary, an increase in the number of nation states looks set to become an integral feature of globalisation, its "flip side" as it were.

Two players who are very much involved in the globalisation process are China and India, both of whom aspire in the long term to become great powers, and both of whom are fiercely protective of their sovereignty and looking to build their own military and political might.

Responses to the challenges of globalisation vary and are ultimately determined by the level of development of the state concerned. The relatively developed countries of eastern Europe and the Baltic states, for example, are willing to sacrifice some of their national sovereignty in return for the benefits of integration into Europe.

The development of the nation state is taking place as a function of global integration processes. That being the case, Russia is introducing reforms, projects and social and political programmes to address the needs of globalisation, and transformative processes testify to the emergence of a coherent, strong state with a single, rigorous policy aimed at unifying the country's social and political sphere. This is based on the global trend towards an enhanced role for the state in society and greater opportunity to be a countervailing force against the most developed countries in an increasingly globalised world.

Quelques observations finales

Philippe Boillat

Directeur Général, Direction générale Droits de l'Homme et Etat de droit, Conseil de l'Europe

Monsieur le Président de la Cour constitutionnelle,

Madame la Vice-Présidente de la Cour Suprême,

Mesdames et Messieurs,

Chers collègues,

Après les réflexions profondes du Secrétaire général sur la raison d'être de la Convention européenne des droits de l'homme, je vais pour ma part en revenir à des réflexions plus prosaïques, mais néanmoins très importantes.

Nous arrivons au terme de notre Conférence. Notre rencontre, comme nous l'espérions, a permis – je crois que nous en conviendrons tous - un premier échange très fructueux d'idées, d'expériences concrètes et de bonnes pratiques, dans le droit fil des décisions prises par nos Ministres lors des Conférences de Bruxelles, au printemps de cette année.

A la lumière des interventions d'hier et d'aujourd'hui, permettez-moi de vous faire part de quelques réflexions concernant la mise en œuvre de la Convention au plan national : quels sont les acquis et quelles sont les perspectives ?

Acquis

- Premier acquis, les valeurs de la Convention - les droits et libertés garantis - sont bien ancrées dans les systèmes juridiques des Etats membres du Conseil de l'Europe, notamment dans leur droit constitutionnel. La Fédération de Russie en est un exemple convaincant.
- Deuxième acquis, le statut de la Convention en droit interne est reconnu, que le système national soit moniste ou dualiste. Dans la plupart des Etats, la Convention a un rang supra-législatif ; dans certains Etats, elle a même un rang constitutionnel. J'ajoute que l'expérience devant la Cour européenne des droits de l'homme démontre clairement que, même si ces caractéristiques ne découlent pas directement de la Convention européenne des droits de l'homme, l'applicabilité directe de la Convention en droit interne, sa justiciabilité devant les autorités internes, notamment les tribunaux, et sa primauté par rapport au droit national contraire, sont des éléments qui facilitent, qui favorisent sa pleine mise en œuvre dans le droit interne.
- Troisième acquis, les arrêts de la Cour sont juridiquement obligatoires et lient l'Etat défendeur en tant que tel. Personne ne l'a contesté au cours de cette Conférence. Aussi toutes les autorités nationales doivent-elles concourir pour permettre à l'Etat de respecter cette obligation. A cet égard, je relève que l'arrêt de la Cour Constitutionnelle russe du 14 juillet dernier ne signifie pas qu'un constat de conflit avec la Constitution soit le point final de l'exécution, mais que, le cas échéant, la responsabilité de l'exécution devrait revenir à un autre organe, notamment au parlement.

Dans ce contexte, je relève que les obstacles à l'exécution d'un arrêt de la Cour de Strasbourg devraient, dans la plupart des cas, être surmontés par le biais d'une interprétation du droit national, y compris constitutionnel, conforme aux exigences de la Convention. Comme cela a été dit ce matin, ce qui compte finalement c'est de donner la meilleure protection des droits fondamentaux à chaque citoyen.

- Quatrième acquis, la subsidiarité, principe qui sous-tend tout le système de contrôle de la Convention, est un élément clé du succès de ce système. Il implique qu'il incombe aux Etats de choisir les moyens nécessaires pour assurer, en pratique, le respect des droits et libertés protégés. Cette obligation de résultat est également celle qui régit l'exécution des arrêts, dans la mesure, bien évidemment, où les moyens choisis par l'Etat sont efficaces et permettent de remédier aux violations constatées.

J'en viens à présent aux perspectives de la mise en œuvre de la Convention au niveau national. Il est important pour ma Direction Générale de poursuivre l'exercice lancé hier et aujourd'hui dans une perspective opérationnelle au sein du Comité des Ministres, des comités d'experts, ou à l'occasion d'autres Conférences, séminaires ou tables rondes.

Perspectives

Quels sont alors les éléments qui permettraient de faciliter la mise en œuvre de la Convention, et notamment d'améliorer l'exécution des arrêts ?

Sans, il va sans dire, prétendre à l'exhaustivité, je mentionnerai, dans un style télégraphique que vous me pardonnerez :

- le soutien des instances politiques ; sans soutien politique, dans les cas complexes notamment, l'exécution se heurte à de réelles difficultés ;
- la diffusion rapide de la jurisprudence de la Cour, grâce notamment à une procédure de sélection efficace des arrêts les plus importants et des décisions pertinentes rendus contre son propre pays mais également contre d'autres Etats, traduits dans la ou les langues nationales ;
- des directives ou recommandations pertinentes à l'intention des tribunaux ou autres autorités concernées. Parmi les exemples donnés, je citerai les recommandations émanant des ministères de la justice – voire des agents du gouvernement – à l'intention des tribunaux ou autres autorités concernées, sans bien évidemment, interférer dans l'indépendance de la justice ;
- la formation des juges, initiale et continue ;
- la création de « focal points » au sein des tribunaux.
- Ces bonnes pratiques ne sont pas destinées aux seuls tribunaux. Elles s'appliquent également aux procureurs, aux huissiers de justice, au personnel pénitentiaire, voire aux autorités sociales.
- Je relèverai en particulier l'utilité de la création de « focal points » auprès des tribunaux pour assurer la diffusion de la jurisprudence pertinente de la Cour, ou encore la création de bureaux spécialisés en matière de droits de l'homme auprès de diverses autorités nationales. Comme vous le savez, la Cour de Strasbourg va créer son propre réseau de correspondants au sein des Cours constitutionnelles et suprêmes de nos 47 Etats membres.

Comment améliorer encore le processus d'exécution ?

- Je me réfère tout d'abord au rôle clé de l'agent du gouvernement, à son statut et à son action. En effet, dans la plupart des systèmes, il appartient à l'agent du gouvernement aussi bien de porter, en amont, les préoccupations nationales à l'attention de la Cour que d'assurer, en aval, la coordination nécessaire à une exécution efficace et rapide. Il s'agit donc de renforcer ses ressources et son autorité afin qu'il puisse mettre utilement en œuvre les procédures de coordination nécessaires.
- J'aimerais me référer aussi à l'expérience des Etats qui ont mis en place des structures de concertation plus élaborées, sous forme notamment de comités interministériels permanents.
- Je mentionnerai également l'expérience des Etats qui ont assuré une implication précoce dans le processus d'exécution de représentants des parlements, des ONGs, des institutions nationales pour la promotion et la protection des droits de l'homme ou encore des barreaux.
- Je relèverai par ailleurs le rôle important que peuvent jouer les cours constitutionnelles et suprêmes. En effet, dans certaines situations, leurs positions ont été déterminantes pour définir les procédures à suivre. Certaines de ces Cours ont même le droit de prendre des initiatives législatives.
- Enfin, je tiens à souligner l'importance de la mise en œuvre de la Recommandation CM/Rec(2008)2 du Comité des Ministres aux Etats membres sur des moyens efficaces à mettre en œuvre au niveau interne pour l'exécution rapide des arrêts de la Cour.

Monsieur le Président, Mesdames et Messieurs,

- La Conférence de Bruxelles a mis l'accent sur un élément-clé dans la mise en œuvre de la Convention : la responsabilité partagée entre la Cour, le Comité des Ministres du Conseil de l'Europe et les Etats parties, mais également la responsabilité partagée entre les différentes autorités nationales.
- Dans ce contexte, la nécessité a été soulignée d'améliorer les capacités de coordination entre les différents acteurs nationaux, afin de promouvoir davantage encore la mise en œuvre de la Convention en général, notamment pour permettre aux Etats de réagir de manière proactive face à des arrêts pertinents contre d'autres pays, et aussi pour assurer une exécution efficace et rapide des arrêts de la Cour qui les concernent directement.
- L'importance a également été souligné de la prévisibilité des obligations d'exécution, surtout en ce qui concerne l'étendue de l'obligation d'adopter des mesures générales. A cet égard, une question très controversée est celle de l'opportunité pour la Cour d'identifier les mesures générales requises pour exécuter l'arrêt. Les avis sur cette question restent très contrastés et la réflexion pourrait utilement être approfondie.
- Des voix, notamment de la part de nos hôtes, se sont aussi élevées contre ce que l'on a appelé « l'activisme judiciaire » de la Cour européenne des droits de l'homme. Je ne souhaite pas traiter ici de cette question épineuse. Je me bornerai à rappeler que ce type de craintes et de critiques ont été adressées à la Cour depuis sa création. Je vous renvoie, à cet égard, à l'arrêt Golder de 1975. Le principe de subsidiarité et la doctrine de la marge d'appréciation, introduits dans le Préambule de la Convention par le biais du Protocole n° 15 à la suite de la Conférence de Brighton, répondent, en partie du moins, à cette préoccupation.

Monsieur le Président, chers collègues,

- Si je devais retenir un seul mot de cette Conférence, ce serait celui de dialogue : dialogue entre la Cour de Strasbourg et les Cours nationales ; dialogue entre le Comité des Ministres et les autorités nationales, mais aussi dialogue entre autorités nationales elles-mêmes.
- En tout état de cause, les confrontations stériles doivent absolument être évitées. Il faut créer des plateformes capables de surmonter les problèmes d'interprétation et de compréhension, que ce soit dans les relations avec la Cour ou avec le Comité des Ministres. De telles plateformes devraient permettre de construire de nouveaux ponts et d'encourager les discussions nécessaires pour :
- d'une part, assurer une interprétation par la Cour européenne qui tienne adéquatement compte des traditions et des spécificités du système juridique de l'Etat défendeur ; il s'agit de bien circonscrire la notion du « consensus européen », tout en évitant l'écueil d'une régionalisation de la protection des droits de l'homme ; il y va du plein respect du principe de l'universalité des droits de l'homme ;
- et d'autre part, il s'agit d'assurer, au stade de l'exécution, des solutions efficaces pour la mise en œuvre des arrêts, que ce soit par une interprétation du droit national conforme à la Convention, par un revirement de jurisprudence ou par des changements législatifs, y compris, le cas échéant, de nature constitutionnelle.
- Le Protocole n° 16 recèle des potentialités à cet égard. D'autres idées ont été avancées, notamment un « Protocole n° 16 inversé » impliquant une obligation pour la Cour européenne de consulter les cours constitutionnelles ou suprêmes nationales dans certaines situations. De même, le rôle important du dialogue au sein du Comité des Ministres pour définir les mesures individuelles et générales requises pour faciliter le processus de l'exécution a été, à juste titre, relevé.
- Il est indispensable en tout état de cause que le juge national puisse faire entendre sa voix à Strasbourg.

Monsieur le Président, chers collègues,

- Le temps ne me permet pas de citer toutes les propositions et suggestions évoquées pendant nos deux journées de travail intense. Vous retrouverez les rapports des orateurs dans les actes de notre Conférence, publication qui verra le jour dans les meilleurs délais et qui sera envoyée à chaque participant à cette Conférence.

Avant de terminer, Monsieur le Président, permettez-moi de vous exprimer, ainsi qu'à tous vos collaborateurs et toutes vos collaboratrices, une fois encore ma vive gratitude pour la parfaite organisation de cette Conférence. J'associe à ces remerciements les collègues de ma Direction générale qui se sont engagés sans compter pour que cet événement soit un succès. Je remercie les interprètes qui sont indispensables à nos échanges.

Je voudrais enfin dire ma reconnaissance à tous les orateurs, russes et internationaux, et aux modérateurs pour leurs précieuses contributions.

Je remercie enfin tous les participants pour leur participation active aux débats.

Concluding address

Thorbjørn Jagland
Secretary General, Council of Europe

Mr President,

Ladies and Gentlemen,

I would like to thank all of you for being part of this International Conference on enhancing national mechanisms for the implementation of the European Convention on Human Rights.

This question is at the heart of the Convention reform process and, indeed, very close to my own heart.

The Brussels Declaration in March agreed that we have a shared responsibility for the long-term effectiveness of the Convention.

Responsibility is shared among States, the Strasbourg Court and the Committee of Ministers of the Council of Europe and it is, likewise, shared between various authorities in any State. This basic principle is extremely important: even though it is only the Government which engages in the proceedings before the Court and the Committee of Ministers, it is the State as a whole which is bound by the Convention.

The State as a whole could only meet its obligations if all State authorities effectively collaborate towards the same goal. It should not and cannot be an exclusive competence of any single authority.

I am therefore delighted to see all main actors of the Russian legal system represented here today, some of them at their highest level – the Constitutional Court, the Supreme Court, the Ministry of Justice. This fact alone is indicative of their commitment to the Convention, which forms the basis of our common legal space, stretching across the European continent.

I am most grateful to Mr Zorkin for his personal involvement.

Needless to say, Russia's role in Europe is crucial, and it is our duty to engage in a direct dialogue on matters of common concern.

The common legal space that we have built, based on the Council of Europe conventions is an unprecedented success. It sets a remarkable example to other regions of the world.

And we must be constantly vigilent over the need to protect this achievement – from which all of our nations benefit.

Indeed, ignoring or breaking the basic rules which preserve the integrity of the Convention system risks disastrous consequences in individual States and far beyond their borders too.

Effective implementation of the Convention is an ongoing challenge in all of our member states and it requires, in particular, effective internal coordination. This is the topic that is being addressed today and it will continue be addressed by the Council of Europe in the coming months, in accordance with the Brussels declaration. What is needed is better guidance for all of our States based on best practice.

Today's conference has generated a lot of material for updating the Committee of Ministers' Recommendation dating back to 2008 and we are grateful for all national contributions made.

Speaking more specifically about the Russian Federation, I am reminded of some of the challenges and success stories that we discussed here four years ago, at the First Saint-Petersburg Legal Forum.

One issue I raised at that time was the need to ensure that any individual complaint against the authorities is considered by the Russian supreme judicial authorities before being taken up by the Strasbourg Court. This was not standard practice at the time and so I called for a kind of "judicial vertical" to be established in the Russian judicial procedure for consideration of any Convention-related complaint.

I am extremely pleased that the problem has since been resolved through joint efforts of the legislature, executive and judiciary. As a result, the Strasbourg Court recently recognised the appeal to the Supreme Court as an effective remedy. This is most welcome and I hope that this new remedy will be effective both in theory and in practice.

We also follow very closely the work being done by our Russian partners to set up new, special domestic remedies against the most frequent and repetitive violations of the Convention.

I have had several occasions to congratulate Russia for the Compensation Act which was introduced in 2010 in response to the Court's first pilot judgment. This legislation has secured domestic relief for thousands of applicants who therefore do not need to bring their cases to Strasbourg.

We share this experience with many other States looking to achieve similar results. And we trust that the Russian authorities will build on such success establishing similar remedies to grant redress for other repetitive violations, not least those concerning conditions of detention.

I'd like to thank Minister Konovalov for his recent initiatives in this regard and offer any assistance from the Council of Europe that would be useful and appropriate.

Mr President,

Ladies and Gentlemen,

Let me say a few words on the relationship between the Convention and national legal orders, a topic which generated much discussion over the summer. There is nothing new in discussing the complex relations between international law and national constitutions.

It is certainly no surprise that our Conference has addressed these matters in light of the recent decision of the Russian Constitutional Court.

And, personally, I think that it is good that we talk about these matters openly, and together.

Indeed, you will remember the full and immediate support I gave to the Constitutional Court's idea of "dialogue and constructive interaction" in order to resolve such issues.

I think it is helpful if I further clarify my position today.

You are no doubt aware that when such delicate issues have arisen in our member states they have always been resolved either through amendment of the relevant constitutional provisions or, much more frequently, through Convention-compliant interpretation ("interprétation conforme").

Any radical or destructive move to break this constructive practice would disrupt the fragile balance between domestic and international law to the detriment of our common European legal order to which we are deeply committed.

Open conflicts between the Convention and the domestic constitutions must therefore be avoided at all costs. The member states' highest political and judicial authorities bear the paramount responsibility in that regard. "Pacta sunt servanda" means the treaty must be performed in good faith.

It is also well established among nations that a state party may not justify its failure to perform a treaty by invoking provisions of its internal law, including constitutional law.

Our major international conventions and the predominant legal doctrine leave no doubt in that regard, including the Vienna Convention. In practice, domestic courts should give effect to Strasbourg rulings and they do it as best as they can. But this should not eclipse, in any event, the overarching obligation on the State to abide by the Convention.

Extensive practice of the Council of Europe member states has also upheld these principles.

Our states have consistently demonstrated that perceived tensions between the Convention and core constitutional principles can be resolved without open conflict.

This is the only way to preserve our common, legal pan-European space.

The alternative is a blatant challenge to the binding effect of the European Court's judgments which would mark the beginning of the end for our unique human rights protection system.

I trust that this is not the intention of the Russian Federation, nor of any other State or any institution in Europe.

Let me conclude by reaffirming that the Council of Europe's raison d'être continues to be finding common solutions to common problems based on respect for human rights and thus promoting greater unity in greater Europe.

The authorities of all member states and, in particular, their courts have extensively used the Convention to the benefit of their citizens making these human rights a legal reality, not just a political declaration one may use or misuse whenever suitable.

The Convention rights live first and foremost in the decisions delivered by domestic courts every day in our 47 member states. Russian courts are no exception. It is the most impressive achievement in international law in recent history.

It's our duty – indeed our shared responsibility – to co-operate both domestically and internationally, to help our courts in this common endeavor.

I have stated it repeatedly ever since I became Secretary General, and I repeat it today: "There will be no enduring peace in Europe – and no unity – without the full respect of our common values based on the European Convention on Human Rights".

Concluding address

Valery Zorkin
President of the Constitutional Court of Russia

First and foremost, I would like to thank the conference participants. The discussions that have taken place here will provide strong impetus for the development of theory and practice of protection of human rights and fundamental freedoms guaranteed by the Convention.

We share a common understanding that the Convention for the protection of human rights and fundamental freedoms is a pan-European asset of the kind that needs to be cherished and handled with great care. This regulatory legal instrument may be considered from various viewpoints. Here I would like to emphasise that the European Convention is a treaty of major constitutional significance.

The idea of constitutionalising convention-based rights and freedoms has lost none of its relevance. Convention standards are reflected in the provisions of national constitutions, including the Russian Constitution. Therefore, there can be no justification or rational case for not properly implementing the European Convention itself. The judgment of the Constitutional Court of the Russian Federation (of July 2015) is not about non-implementation of the Convention. The issue is rather how can a judgment of the European Court of Human Rights based on interpretation of the Convention that is at variance with the Constitution be implemented. The unique feature of the Convention, setting it apart from a whole host of multilateral international treaties, is that it sets out very abstract norms and principles. The ECtHR judgments give concrete expression to temporal, territorial and personal scope of application of the Convention's provisions. This is how they become part of the legal fabric of the Council's member States and, ultimately, the pan-European legal area.

What form will that concrete expression take? The judgments of the European Court of Human Rights translate the Convention into real life. More specifically, the Convention lives, performs its regulatory function and develops through court judgments. Even so, the approaches taken by the European Court represent not the Convention itself or its literal meaning but its interpretation in a specific historical context.

Let us take the Internet as an example. Could we talk about the Internet in the 1950s? Surely some individual ideas had already been expressed but they were not reflected in the Convention nor were they to be found in any interpretation given by the European Court. And nowadays the Strasbourg Court is bound to resolve human rights issues connected with Internet as well. The technology breakthroughs driven in the "technetronic age" that directly affect specific content of human rights and fundamental freedoms are by no means limited to this example. There have been truly revolutionary changes in the field of biotechnology, genetics, medicine and so on.

For this very reason I focused on the principles of judicial activism and consensus in my report. The principles in question play a decisive role in interpretation, construction and clarification of legal rules. That is the only way that an abstract legal instrument can function, be it the Convention or the Constitution. These circumstances should necessarily by taken into account by both the European Court and national constitutional courts.

An interpretation must, of course, be legal, in other words it must be given within the limits of the legal meaning set out in the regulatory text. However, problems may arise here due to the changes in the specific content of abstract legal principles and norms occurring in time and space as a result of action by national legislators and interpretation by courts. Neither historically volatile specific rules of national legislation nor historically volatile judicial interpretations are to be found at the "core" of the Convention. As a result, there may exist divergence in rules elaborating on the same norms and principles in various regions of Europe.

Speakers at our conference have already drawn attention to the issue of banning abortion, which was put to a referendum in Ireland. The majority of countries have some common features characteristic to the entire European legal framework. At the same time, they have peculiarities related to these countries' socio-cultural "code", their differing levels of historical development and so on. In a multi-ethnic and federal state like Russia, these issues have a substantial impact on the country's legal system. These factors of socio-cultural diversity and specific historical features account for reluctance yet to recognise that the European Court, being a subsidiary judicial body, has overarching authority to set standards and regulate matters pertaining to specific historically determined content of norms of national legislation. Hence the need for dialogue, accord, goodwill and compromise in ensuring harmonisation and correlation of national legislation with ECtHR judgments. I stress in this respect that the sacrosanct nature of the normative "core" of the Convention itself is, of course, unquestionable.

So what message does the Constitutional Court convey in its judgment of July 2015? Its intention was not at all to clear the way for non-enforcement of ECtHR judgments when compliance with them is deemed inappropriate. After all the issue involves international legal obligations. However, in case the authorities responsible for executing ECtHR judgments in Russia conclude that a judgment contradicts the Constitution and therefore cannot be enforced, then the issue – in essence a legal controversy – is subject to resolution by the Constitutional Court on the basis of the Constitution as the legal act having superior legal status in the country's legal system.

In a state – be it a unitary state or a federation – legal disputes and conflicts between normative acts are resolved on the basis of the Constitution, which enjoys a position of supremacy as the most powerful legal instrument in the national legal order. The very question of possible conflict between a European Court judgment and a Constitutional Court judgment is not about a discrepancy between the Convention provisions and constitutional norms; indeed when signing and ratifying the Convention, the State assumes the corresponding obligations, acting on the premise that the provisions of the Constitution correspond to the Convention. Otherwise, the Constitution would have had to have been amended beforehand. Therefore no doubt can arise as to whether the Convention should be complied with. The Convention should be implemented! Where a conflict may emerge is between an interpretation of the Convention given in ECtHR judgment and the Constitution. And such a conflict must be resolved but not in an arbitrary fashion; the solution must be found through analysis of the provisions of the national Constitution, which has supreme legal status and represents the highest authority in the Russian legal system.

It goes without saying that human rights protection is our common primary goal. In this sense, we all speak the same language – the language of law. Final judgments of both the Strasbourg Court and the Constitutional Court cannot in principle be "wrong" from a legal viewpoint, as they are based on the Convention and the Constitution respectively.

Under Article 46 of the Russian Federation Constitution, the European Court of Human Rights is one of the inter-state human rights protection bodies which can be approached by individuals who have exhausted all other domestic remedies. Russia has recognised the jurisdiction of the ECtHR and, accordingly, the Court's judgments in respect of Russia are to be enforced. At the same time, the Constitutional Court holds the position that in case the Russian Constitution as interpreted by the Constitutional Court affords greater protection for human and civil rights and freedoms in the Russian Federation as opposed to the Convention as interpreted by the European Court, the Constitution Court's interpretation takes precedence in the given case. This stance is underpinned by the principle of priority of human rights, enshrined in Article 2 of the Russian Constitution. This is what we are talking about when we say that the boundaries for implementing an interpretation of the Convention norms given by the Court in a specific judgment in respect of Russia are determined by the Constitution. An international law interpretation cannot be upheld by the national legal system if it leads to restriction of fundamental rights envisaged by the Constitution. Such an interpretation is limited by the requirements of doctrinal interpretation of constitutional provisions enshrining human and civil rights.

And in conclusion I would like to recall once again the topic of our conference. We gathered here to discuss ways of improving implementation of the Convention on Human Rights. Essentially, law is a human right. In a certain sense the whole of humanity is a civilisation of law. Greater Europe, founded on the legal values of the Convention is an integral part of that civilisation. These values must be cherished, and it is our duty to safeguard them.

My best wishes to all of you, thank you very much.

Enhancing national mechanisms for effective implementation of the European Convention on Human Rights

Country Report on the United Kingdom
Murray Hunt
Legal Adviser
Joint Committee on Human Rights of the UK Parliament

Q1. There is no procedure established by law in the UK for the adoption of general measures following judgments of the European Court of Human Rights. The procedure which exists (described in more detail below) is primarily a matter of custom and practice, established mainly by the interaction between the Government and Parliament's human rights committee, the Joint Committee on Human Rights ("the JCHR").

Since it was established in 2000, the JCHR has developed a practice of scrutinising the Government's responses to judgments of the European Court of Human Rights. However, there is no law or other text which requires the JCHR to scrutinise the Government's response to judgments of the European Court of Human Rights. It is not set down in the remit of the JCHR, contained in Parliament's Standing Orders. That remit is defined very broadly as being to "consider human rights matters in the UK". Successive JCHRs in each Parliament, however, have interpreted that remit to include scrutinising the Government's response to Strasbourg Court judgments.

To the best of this expert's knowledge, there are no Government regulations, internal ministerial instructions or other internal guidance about the process that should be followed after an adverse judgment of the Court. There is an internal Government document designed to elicit the necessary information from the relevant Government department (in the form of a template for the action plan which is required to be drawn up following such a judgment, referred to further below), but this does not set out or prescribe any particular procedure to be followed. Such procedure as exists has been established, first, by the necessity of preparing for supervision by the Committee of Ministers and, more recently, by the development of the practice of parliamentary scrutiny of the Government's response by Parliament's human rights committee. In 2010, the JCHR drew up some Guidance for Departments on Responding to Judgments Concerning Human Rights, which sought to distill into writing the practices that had grown up between the Government and the JCHR[212]. At the beginning of the 2010-15 Parliament the new JCHR decided to continue its predecessor committee's work on human rights judgments and adopted its predecessor's Guidance as the basis for that work.

There is one specific part of the UK's legal framework concerning the adoption of general measures: a provision of the Human Rights Act 1998[213] which gives the Government the power to introduce general measures

212. Annex to JCHR Fifteenth Report of 2009-10, *Enhancing Parliament's role in relation to human rights judgments* (2010), p. 69 http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/85/85.pdf.
213. Human Rights Act 1998, s. 10.

by way of a fast-track procedure (a "remedial order") which enables an incompatibility with the Convention to be removed more quickly than would be the case if the remedying general measures were introduced by way of primary legislation. For example, following the judgment of the European Court of Human Rights in *Gillan and Quinton v UK*, that counter-terrorism powers to stop and search without reasonable suspicion were incompatible with Article 8 ECHR, the UK Government used the power to introduce the necessary general measures by way of remedial order. The JCHR's standing orders do require it to scrutinise such remedial orders, and to prioritise such work over all other work. However, the number of remedial orders introduced to remove an incompatibility with the ECHR found by the European Court of Human Rights (as opposed to incompatibilities found by the UK's own courts) is small: only about 3 out of 19 to date.

Q2. The UK process following an adverse judgment of the European Court of Human Rights is summarised in the Government's 2011-12 Report *responding to human rights judgments*[214]. Lead responsibility for the implementation of a particular judgment rests with the relevant Government Department (depending on the subject matter of the judgment – for example if the judgment concerns police powers the lead department will be the Home Office). However, the Ministry of Justice plays a "light touch co-ordinating role". On receiving notice of an adverse judgment against the UK, the lead department completes a draft Action Plan, using a template (copy Annexed to this Report) which contains some guidance to the lead department about the information that they are required to provide. If necessary, officials from the Ministry of Justice work with officials in the lead department to fill out the information that is requested by the form, and this forms the basis of the Action Plan that is eventually transmitted to the Committee of Ministers.

The content of the guidance to the lead department contained in the template Action Plan reflects the requirements of the Committee of Ministers and also the practice of scrutiny by the JCHR. For example, departments are advised to include in their Action Plan brief references and links to any relevant reports on the general measures such as reports by the JCHR or other independent scrutiny bodies such as the Independent Reviewer of Terrorism Legislation. The inclusion of this guidance is the result of criticism by the JCHR in its reports on the Government's response to the Court's judgment in *Gillan*, in which it criticised the Government for failing to draw to the attention of the Committee of Ministers the fact that both the JCHR and the Independent Reviewer of Terrorism Legislation had expressed reservations about the adequacy of the Government's general measures in response to the Court's judgment.

The trigger for the process of adoption of general measures is therefore largely internal to Government: it depends on the lead department identifying the measures which are necessary to comply with the judgment. The Ministry of Justice plays a co-ordinating role, but with a relatively light touch. The Joint Committee on Human Rights has developed a role for itself scrutinising the adequacy and timeliness of the department's response. Initially this was done largely by correspondence between the Committee and the relevant Government department, with occasional reports by the JCHR on the scrutiny it had been conducting. The practice has now evolved to the point where the Government provides an annual report to the JCHR on its response to court judgments, including judgments of the European Court of Human Rights[215].

The JCHR's scrutiny of the Government's responses takes a variety of forms. It may ask the minister responsible for human rights oral questions about the Government's report during its roughly annual evidence session with that minister, or correspond with the relevant lead department about the response to particular judgments if necessary. The JCHR sometimes recommends amendments to Government Bills in order to comply with judgments of the European Court of Human Rights. It also reports on the Government's responses to court judgments, but less frequently than it formerly did: in the 2010-15 Parliament it published one report on human rights judgments, towards the very end of the Parliament[216].

Q3. The lead department identifies the general measures that a judgment requires in the first instance. The process for doing this within Government depends on the nature of the judgment. A judgment which reveals an underlying systemic problem or which cuts across the responsibility of more than one department will require inter-departmental discussions and possibly negotiations, as different departments may have different views about what the judgment requires. Generally speaking, the more departments are involved in responding to a judgment, the longer it takes for the Government to bring forward a response. The JCHR

214. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217308/responding-human-rights-judgments.pdf p. 10.
215. *Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2013-14* (December 2014) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389272/responding-to-human-rights-judgments-2013-2014.pdf.
216. Seventh Report of 2014-15, *Human Rights Judgments* (March 2015) http://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/130/130.pdf.

chases the lead department in cases where there is unreasonable delay in informing Parliament about the Government's proposed response.

Where the judgment does not specify what general measures are required, the lead department will take the advice of its lawyers about what is required to comply with the judgment and will formulate a response in the light of that advice, to be considered by the relevant minister. Specific indications in the judgment of the measures that are required may be helpful, but in the UK both the Government and Parliament place a high value on the margin of appreciation, including in relation to the measures required to comply with a judgment, and judgments which are too prescriptive about the measures required therefore risk being counterproductive by appearing to leave too little scope for the Government and Parliament to decide how best to respond.

Interim resolutions of the Committee of Ministers calling for specific general measures have no legal status in the UK. The political embarrassment of being the subject of such an interim resolution may have some practical effect, but that effect is limited in relation to issues which are politically controversial and where the Government lacks the political will to introduce the necessary measures (as in the case of prisoner voting in the UK at present).

Q4. The UK's domestic procedure for the adoption of general measures is limited to the implementation of judgments of the European Court of Human Rights. Apart from judgments of EU courts which have direct effect, there are no other international courts whose judgments have the same normative status in the UK. The recommendations of the UN human rights system, including those of the Human Rights Council in the Universal Periodic Review, the treaty bodies and the special procedures, are treated differently both within the executive and by Parliament.

Q5. UK courts do not treat judgments of the European Court of Human Rights as having direct effect in the UK legal system until Parliament has made the necessary change in the law. A lower court, for example, will treat itself as legally bound by a statutory provision which has been found to be incompatible by the European Court, or by a higher court's interpretation of that provision in a way which the Court has found to be incompatible. There is no specific procedure for fast-tracking such as issue to the Supreme Court. The Supreme Court itself may also treat itself as so bound where Parliament has not yet changed the law.

Q6. The UK Supreme Court has no role in the initiation of general measures following a judgment of the European Court of Human Rights. It would be within its powers to indicate what general measures might remedy a particular incompatibility, but respect for the constitutional role of the other branches make it extremely unlikely to express any views on the subject, even in cases where there may have been a long delay in bringing forward general measures in response to a judgment.

Q7. As for whether any judgment of the European Court of Human Rights has ever required an amendment of a constitutional provision or a change in its interpretation in the UK, it is important to distinguish between the effect of accession to the Convention and judgments of the Court under that Convention. The UK's acceptance of the obligation in Article 46 ECHR to comply with judgments of the Court amounted to a voluntary modification by the UK of the constitutional doctrine of parliamentary sovereignty, at least for as long as the UK remains a signatory to the Convention. The well known failure of the UK to implement the judgments of the Court concerning prisoner voting do not therefore involve a conflict between the UK's current constitution and the requirements of the Convention. Rather they involve a conflict between the Convention and the UK's constitution as it existed prior to the UK's acceptance of Article 46 of the Convention. Those who do not wish the UK to comply with the judgment seek to revert to the constitutional position prior to the UK's accession to the Convention.

22 October 2015, Thursday

from 08.15	Departure from the hotel to the Constitutional Court of the Russian Federation
09.00 – 09.30	Registration of participants

09.30 – 10.00	**Opening of the Conference**
	Opening of the Conference by Mr Valery ZORKIN, President of the Constitutional Court of the Russian Federation **Welcome speeches** ▸ ***Mr Philippe BOILLAT,*** Director General, Directorate General of Human Rights and the Rule of Law (DGI), Council of Europe ▸ ***Mr Khanlar HAJIYEV,*** Judge of the European Court of Human Rights ▸ ***Mr Aleksandr KONOVALOV,*** Minister of Justice of the Russian Federation

10.00 – 11.00	**Working session I**
	Moderator: Mr Sergey KNYAZEV, Judge of the Constitutional Court of the Russian Federation ***Keynote speech by Mr Valery ZORKIN,*** President of the Constitutional Court of the Russian Federation (30 min) ***Keynote speech by Ms Tatyana PETROVA,*** Vice-president of the Supreme Court of the Russian Federation (30 min)
11.00 – 11.30	Coffee break

11.30 – 13.30	**Working session I** *(continued)*
	Rapporteurs *(up to 15 minutes each):* ***Mr Martin KUIJER,*** Chairman of the Council of Europe Drafting Group on the longer-term reform of the Court (GT-GDR-F), Senior Legal Adviser on Human Rights Law of the Ministry of Justice of the Netherlands ▸ presentation: National Mechanisms for Implementation of the European Convention on Human Rights: Report on The Netherlands ***Mr Georgy MATUSHKIN,*** Permanent Representative of the Russian Federation before the European Court of Human Rights, Deputy Minister of Justice of the Russian Federation ▸ presentation: Execution of Judgements of the ECtHR in cases concerning the Russian Federation ***Mr Charles-Edouard HELD,*** Former Ambassador, Permanent Representative of Switzerland to the Council of Europe, Former Chair of the Rapporteur Group on Legal Cooperation (GR-J) ▸ presentation: National Mechanisms for Implementation of the European Convention on Human Rights: Report on Switzerland ***Mr Sergey MAVRIN,*** Vice-President of the Constitutional Court of the Russian Federation ▸ presentation: Legal Positions of the Constitutional Court of the Russian Federation on the Implementation of the European Convention on Human Rights ***Mr Michael O'BOYLE,*** Former Deputy Registrar of the European Court of Human Rights, the United Kingdom ▸ presentation: National Mechanisms for Implementation of the European Convention on Human Rights: Report on the United Kingdom ***Mr Nikolay BONDAR,*** Judge of the Constitutional Court of the Russian Federation ▸ presentation: Legal Axiology: the balancing between National Constitutional and European Conventional Jurisdictions ***General debate*** *(30 minutes)*
13.30 – 15.00	Lunch at the Constitutional Court of the Russian Federation

15.00 – 17.00	**Working session II**
	Moderator: Mr Michael O'BOYLE, Former Deputy Registrar of the European Court of Human Rights, the United Kingdom ***Rapporteurs*** *(up to 15 minutes each):* ***Mr Oreste POLLICINO,*** Professor at the Bocconi University, Italy ▸ presentation: National Mechanisms for Implementation of the European Convention on Human Rights: Report on Italy ***Mr Andrey KLISHAS,*** Chairman of the Council of the Federation Committee on Constitutional Legislation and State-building, the Federal Assembly of the Russian Federation ▸ presentation: Legislation as an Essential Step towards Achieving Constitutional and Conventional Standards ***Ms Katharina PABEL,*** Professor of the Public Law at the University of Linz, Austria ▸ presentation: National Mechanisms for Implementation of the European Convention on Human Rights: Report on Austria ***Mr Andrey BUSHEV,*** Associate Professor of the Department of Business Law at St. Petersburg State University, the Russian Federation ▸ presentation: Subsidiary Role of the ECtHR: Margin of Appreciation and the National Sovereignty, the "Manifestly Ill-Founded" Criterion. ***Mr Evgeny SEMENYAKO,*** First Vice-President of the Federal Chamber of Advocates of the Russian Federation ▸ presentation: The Role of Bar Associations in the Implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms ***Ms Elisabeth LAMBERT-ABDELGAWAD,*** Professor at the University of Strasbourg, France ▸ presentation: National Mechanisms for Implementation of the Convention: a General Overview of the Member States' Practices ***General debate*** *(30 minutes)*
17.15	Departure to the Hotel Ambassador (optional, for those who would like to attend a buffet dinner)
17.30 – 19.00	Buffet Dinner at the Hotel Ambassador
from 18.50	Departure to the Mariinsky Theatre

19.30 – 22.40	**The New Stage of the Mariinsky Theatre, the Swan Lake Ballet**
23.00	Departure to the hotel

23 October 2015, Friday

from 08.15	Departure from the hotel to the Constitutional Court of the Russian Federation

09.00 – 10.30	**Working session III**
	Moderator: Mr Vít Alexander SCHORM, Government Agent, Ministry of Justice of the Czech Republic, Chairman of the Steering Committee for Human Rights (CDDH) of the Council of Europe ***Rapporteurs*** *(up to 15 minutes each):* ***Ms Angelika NUSSBERGER,*** Judge of European Court of Human Rights on behalf of Germany, elected Section President of the European Court of Human Rights ▸ presentation: National Mechanisms for Implementation of the European Convention on Human Rights: Report on Germany ***Mr Konstantin ARANOVSKIY,*** Judge of the Constitutional Court of the Russian Federation ▸ presentation: Implementation and Other Means of the Application of the European Convention on Human Rights ***Ms Marie-Elisabeth BAUDOIN,*** Professor of Public, Vice-Dean of the Law at the University of Auvergne, France ▸ presentation: National Mechanisms for Implementation of the European Convention on Human Rights: Report on France ***Mr Valery MUSIN,*** Professor, Head of the Department of Civil Procedure of St. Petersburg State University, the Russian Federation ▸ presentation: The Role of the Russian Courts in the Implementation of the General Measures Recommended by the ECtHR ***General debate*** *(30 minutes)*
10.30 – 11.00	*Coffee break*

11.00 – 12.30	**Working session III** *(continued)*
	Rapporteurs *(up to 15 minutes each):* ***Ms Isabelle NIEDLISPACHER,*** Belgium Co-Agent before the European Court of Human Rights, Human Rights Department at the Federal Ministry of Justice, Vice-Chair of the Council of Europe Committee on the Reform of the European Court of Human Rights (DH-GDR) ▸ presentation: "Shared responsibility": Brussels Declaration of 2015 and its follow-up ***Ms Tamara MORSCHAKOVA,*** Professor, Head of the Department of the Judiciary at the Higher School of Economics, Russian Federation; Former Judge of the Constitutional Court of the Russian Federation ▸ presentation: Judicial Implementation of the European Convention on Human Rights ***Mr Yury TIHOMIROV,*** Professor, First Deputy Head of the Centre for Public Law Research, the Russian Federation ▸ presentation: National and International legal Instruments: the Dynamics of Relations ***Mr Valery LAZAREV,*** Professor, Member of the Academy of Natural Sciences of the Russian Federation, Head of the Department of Implementation of Court Decisions in the Russian Legislation of the Institute of Legislation and Comparative Law under the Government of the Russian Federation ▸ presentation: Implementation of the ECtHR Decisions in the Legal System of Russia" ***General debate*** *(30 minutes)*
12.30 – 12.45	Group photo, the main staircase, the House of Countess Alexandra Laval
12.45 – 14.00	Lunch at the Constitutional Court of the Russian Federation

14.00 – 15.15	**Working session IV**
	Moderator: Mr Sergey MAVRIN, Vice-President of the Constitutional Court of the Russian Federation ***Rapporteurs*** *(up to 15 minutes each)* ***Ms Başak ÇALI,*** Associate Professor of International Law School – Koç University, Turkey ▸ presentation: National Mechanisms for Implementation of the European Convention on Human Rights: Report on Turkey ***Ms Tatiana NESHATAEVA,*** Judge of the Court of the Eurasian Economic Union ▸ presentation: ECtHR and the Integration of Integrations: the Role of courts in Overcoming of Fragmentation of International Law ***Mr Yaroslav KOZHEUROV,*** Associate Professor of the Department of International Law of the Moscow State Legal University, the Russian Federation ▸ presentation: Implementation of the Judgements of the ECtHR in the Context of the Application of the Law of International Responsibility ***Mr Sergey KOMAROV,*** Professor, Head of the Department of Theory of State and Law of the Law Faculty of the RANEPA, scientific director of the Law Institute (St. Petersburg), the Russian Federation ▸ presentation: State Sovereignty and implementation of the European Convention and the ECtHR decisions ***Mr Philippe BOILLAT,*** Director General, Directorate General of Human Rights and the Rule of Law (DGI), Council of Europe ▸ presentation: National Implementation: Achievements and Further Prospect

15.15 – 15.45	**Closing session**
	Closing speeches by ***Mr Vyacheslav LEBEDEV,*** President of the Supreme Court of the Russian Federation ***Mr Thorbjørn JAGLAND,*** Secretary General of the Council of Europe ***Mr Aleksandr KONOVALOV,*** Minister of Justice of the Russian Federation ***Mr Valery ZORKIN,*** President of the Constitutional Court of the Russian Federation
16.00 – 17.00	Guided tour around the complex of buildings of the Constitutional Court of the Russian Federation

17.00 – 19.00	**Reception hosted by the Constitutional Court of the Russian Federation, the Blue Lounge**
from 19.15	Departure to the hotel

List of participants / *liste des participants*

Constitutional Court of the Russian Federation **Cour constitutionnelle de la Fédération de Russie**	
ZORKIN Valery	President Président
KHOKHRYAKOVA Olga	Vice-President Vice-Présidente
MAVRIN Sergey	Vice-President Vice-Présidente
ARANOVSKIY Konstantin	Judge Juge
BOYTSOV Aleksandr	Judge Juge
BONDAR Nikolay	Judge Juge
GADZHIEV Gadis	Judge Juge
DANILOV Yuri	Judge Juge
ZHARKOVA Lyudmila	Judge Juge
ZHILIN Gennady	Judge Juge
KAZANTSEV Sergey	Judge Juge
KLEANDROV Mikhail	Judge Juge
KNYAZEV Sergey	Judge Juge
KOKOTOV Aleksandr	Judge Juge
KRASAVCHIKOVA Larisa	Judge Juge

MELNIKOV Nikolay	Judge Juge
RUDKIN Yuri	Judge Juge
YAROSLAVTSEV Vladimir	Judge Juge
SIVITSKY Vladimir	Secretary General Secrétaire général
SERGEVNIN Sergei	Head of the Department of International Relations and Research of Constitutional Review Practice Chef du Département des relations internationales et de la recherche sur les pratiques de révision constitutionnelle

Council of Europe Conseil de l'Europe	
JAGLAND Thorbjørn	Secretary General Secrétaire général
BOILLAT Philippe	Director General, Directorate General of Human Rights and the Rule of Law (DG1) Directeur général, Direction générale des Droits de l'Homme et Etat de Droit (DGI)
GUESSEL Alexander	Director of Political Affairs Directeur des Affaires politiques
LOBOV Mikhail	Head of the Human Rights Policy and Co-operation Department, Directorate General Human Rights and Rule of Law (DG1) Chef du Service des politiques et de la cooperation en matiere de droits de l'Homme, Direction générale des Droits de l'Homme et de l'Etat de Droit (DGI)
SUNDBERG Fredrik	Deputy to the Head of Department for the Execution of Judgments of the Court, Directorate General Human Rights and Rule of Law (DG1) Chef-adjoint au Service de l'exécution des arrêts de la Cour, Direction générale des Droits de l'Homme et de l'Eat de Droit (DGI)
DE SALAS Alfonso	Head of the Human Rights Intergovernmental Co-operation Division, Directorate General Human Rights and Rule of Law (DG1) Chef de la Division de la Coopération intergouvernementale en matière de Droits de l'Homme, Direction générale des Droits de l'Homme et Etat de Droit (DGI)
BECQUART Aygen	Head of the Evaluation Division, Directorate of Internal Oversight Chef de l'Equipe d'Evaluation, Direction de l'Audit interne et de l'Evaluation
KAYACIK Leyla	Senior Adviser, Private Office of the Secretary General and the Deputy Secretary General of the Council of Europe Conseiller principal, Cabinet du Secrétaire général et le Secrétaire général adjoint du Conseil de l'Europe

LONGANGUÉ Maxime	Political Advisor, Directorate of Political Affairs Conseiller politique, Direction des Affaires politiques
BYKOVA Larisa	Project Officer, Human Rights National Implementation Division, Directorate General of Human Rights and Rule of Law (DG I) Chargée de projet, Division de la mise en oeuvre nationale des droits de l'Homme, Direction générale des Droits de l'Homme et Etat de Droit (DGI)
SHADAROVA Anastasia	Project Officer, Human Rights National Implementation Division, Directorate General of Human Rights and Rule of Law (DG I) Chargée de projet, Division de la mise en oeuvre nationale des droits de l'Homme, Direction générale des droits de l'Homme et de l'Etat de Droit (DGI)
BAEVA Tatiana	Spokesperson / Press Officer Porte-parole / Chargée de presse

Supreme Court of the Russian Federation **Cour suprême de la Fédération de Russie**	
LEBEDEV Vyacheslav	President Président
PETROVA Tatyana	Vice-President Vice-Président

European Court of Human Rights **Cour européenne des Droits de l'Homme**	
NUSSBERGER Angelika	Judge, elected Section President Juge, élue Présidente de Section
DEDOV Dmitry	Judge Juge
HAJIYEV Khanlar	Judge Juge
CHERNISHOVA Olga	Head of Division, Registry of the European Court of Human Rights Chef de division, Greffe de la Cour européenne des droits de l'homme

Court of the Eurasian Economic Union **La Cour de l'Union économique eurasiatique**	
NESHATAYEVA Tatiana	Judge Juge

Supreme Court of Justice of the Republic of Moldova **La Cour Suprême de la Justice de la République de Moldavie**	
POALELUNGI Mihai	President Président

Representatives of Legislative a and Executive Authorities Représentants des autorités exécutives et législatives de la Fédération de Russie	
ALEKSANDROV Aleksey	Representative of the Council of the Federation of the Federal Assembly of the Russian Federation before the Constitutional Court of the Russian Federation Représentant du Conseil de la Fédération de l'Assemblée fédérale de la Fédération de Russie auprès de la Cour constitutionnelle de la Fédération de Russie
VASILYEVA Tatiana	Representative of the General Prosecutor's Office of the Russian Federation before the Constitutional Court of the Russian Federation Représentante du Bureau du Procureur général de la Fédération de Russie à la Cour constitutionnelle de la Fédération de Russie
BULAVIN Sergey	Assistant to the Prime-Minister of the Russian Federation, Candidate of Law Assistant du Premier Ministre de la Fédération de Russie, Doctorant en Droit
VYATKIN Dmitry	Representative of the State Duma of the Federal Assembly of the Russian Federation before the Constitutional Court of the Russian Federation Représentant de la Douma d'Etat de l'Assemblée Fédérale de la Fédération de Russie à la Cour constitutionnelle de la Fédération de Russie
KLISHAS Andrey	Chairman of the Council of the Federation Committee on Constitutional Legislation and State-Building of the Federal Assembly of the Russian Federation président du Comité de la législation constitutionnelle et de la construction étatique de Sénat de l'Assemblée fédérale de la Fédération de Russie
KOKORINA Zoya	Councilor of the Ministry of Foreign Affairs of the Russian Federation Conseiller du Ministère des Affaires étrangères de la Fédération de Russie
KONOVALOV Aleksandr	Minister of Justice of the Russian Federation Ministre de Justice de la Fédération de Russie
KROTOV Mikhail	Representative of the President of the Russian Federation before the Constitutional Court of the Russian Federation Représentant du Président de la Fédération de Russie devant la Cour constitutionnelle de la Fédération de Russie
KUZMENKOV Stepan	Head of the Division of the Ministry of Foreign Affairs Chef de la Division du Ministère des Affaires étrangères
MATUSHKIN Georgy	Permanent Representative of the Russian Federation before the European Court of Human Rights – Deputy Minister of Justice of the Russian Federation représentant permanent de la Fédération de Russie auprès de la Cour européenne des droits de l'homme – Vice-Ministre de la justice de la Fédération de Russie

SOLTANOVSKY Ivan	Appointed Permanent Representative of the Russian Federation before the Council of Europe, Former Director of the Department of all-European cooperation of the Ministry of Foreign Affairs Représentant permanent nommé de la Fédération de Russie devant le Conseil de l'Europe, ancien Directeur du Département de la Coopération européenne du Ministère des Affaires etrangères

Officials of Foreign Countries **Les fonctionnaires de pays étrangers**	
PEITSCH Heike	Consul General of the Federal Republic of Germany in St. Petersburg Consul général de la République fédérale d'Allemagne à Saint-Pétersbourg
MERLO Pietro	Consul General of the Federal Republic of Germany in St. Petersburg Consul de la République fédérale d'Allemagne à Saint-Pétersbourg
OLUFSEN Heidi	Consul General of the Kingdom of Norway in St. Petersburg Consul général du Royaume de Norvège à Saint-Pétersbourg

European Experts **Experts européens**	
BAUDOIN Marie-Elisabeth	Professor of public law, Vice-Dean of the Faculty of Law at the University of Auvergne, France Professeur de droit public, vice-doyen de la Faculté de droit de l'Université d'Auvergne, France
KUIJER Martin	Chairman of the Council of Europe Drafting Group "F" on the Reform of the Court (GT-GDR-F), Senior Legal Adviser on Human Rights Law of the Ministry of Justice of the Netherlands président du Groupe de rédaction "F" du CDDH sur la réforme de la Cour (GT-GDR-F) au Conseil de l'Europe, conseiller juridique supérieur dans le domaine des droits de l'homme du Ministère de la justice des Pays-Bas
CAMBREA Irina	Co-Agent of the Government of Romania at the ECtHR Co-Agent du Gouvernement de Roumanie à la Cour européenne des Droits de l'Homme
LAMBERT-ABDELGAWAD Elisabeth	Professor at the University of Strasbourg, France Professeur à l'Université de Strasbourg, France
NIEDLISPACHER Isabelle	Belgium Co-Agent before the European Court of Human Rights, Vice-Chair of the Council of Europe Committee on the Reform of the European Court of Human Rights (DH-GDR) co-agent belge devant la Cour européenne des droits de l'homme, vice-président du Comité des experts du Conseil de l'Europe sur la réforme de la Cour européenne des droits de l'homme (DH-GDR)

O'BOYLE Michael	Former Deputy Registrar at the European Court of Human Rights ancien Vice-Greffier de la Cour européenne des droits de l'homme
PABEL Katharina	Professor Dr. of Public Law, University of Linz, Austria professeur du droit public, l'Université de Linz, Autriche
POLLICINO Oreste	Professor at the Bocconi University, Milan, Italy professeur à l'Université de Bocconi, Italie
SISTONEN Satu	Legal Officer of the Unit for Human Rights Courts and *Conventions, Ministry for Foreign Affairs of Finland* Conseiller juridique de l'Unité pour les Cours et Conventions des Droits de l'Homme, Ministère des Affaires étrangères de Finlande
FABIAN Katarina	Desk officer, Department for International Law, Human Rights and Treaty Law, Ministry for Foreign Affairs, Government Offices of Sweden Administratrice, Département de Droit International, Droits de l'Homme et des Traités, Ministre des Affaires etrangères, Suède
ÇALI Başak	Associate Professor of International Law of the Law School of the Koç University, Turkey professeur associée du droit international à l'Ecole internationale de droit de l'Université de Koç, Turquie
SCHORM Vít Alexander	Government Agent, Ministry of Justice of the Czech Republic, Chairman of the Steering Committee for Human Rights (CDDH) of the Council of Europe agent du Gouvernement, Ministère de la justice de la République tchèque, président du Comité directeur des droits de l'homme (CDDH) du Conseil de l'Europe
HELD Charles-Edouard	Former Ambassador, Permanent Representative of Switzerland to the Council of Europe, Former Chair of the Rapporteur Group on Legal Cooperation (GR-J) of the Committee of Ministers of the Council of Europe ancien ambassadeur, Représentant permanent de la Suisse auprès du Conseil de l'Europe, ancien Président du Groupe de rapporteurs sur la coopération juridique (GR-J) du Comité des Ministres du Conseil de l'Europe

Russian Experts **Experts Russes**	
BOBROVA Vera	Deputy Administrator of the Office of the Commissioner for Human Rights in the Russian Federation Vice-administrateur au Bureau du Commissaire aux Droits de l'Homme de la Fédération de Russie
BORISENKO Elena	Candidate of Law doctorante en droit
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GRITSENKO Elena	Professor of the Department of State and Administrative Law of the St. Petersburg State University, Russia professeur du Département du droit d'État et administratif de l'Université d'Etat de Saint-Pétersbourg, Russie
DENISOVA Anna	Member of the Federal Chamber of Advocates Membre de la Chambre fédérale des Avocats
KOZHEUROV Yaroslav	Associate Professor of the Department of International Law of the Moscow State Legal University named after O.E.Kutafin, Russia professeur associé du département du droit international de l'Université juridique d'état de Moscou à nom de O. Kutafin, Russie
KOMAROV Sergey	Doctor of Law, Professor, Head of the Department of Theory of State and Law named after G.V.Maltsev of the Law Faculty named after M.M.Speransky of the Russian Academy of National Economy and Public Administration under the President of the Russian Federation docteur en droit, professeur, chef du département de la théorie de l'Etat et du droit à nom de G.Malzev de la faculté juridique à nom de M. Speransky d' Academie russe de l' économie nationale et de la fonction publique sous l'égide du Président de la Fédération de Russie
LAZAREV Valery	Doctor of Law, Professor, Academician of the Academy of Natural Sciences of the Russian Federation, Head of the Department of Implementation of Court Decisions in the Russian Legislation of the Institute of Legislation and Comparative Law under the Government of the Russian Federation docteur en droit, professeur, l'académicien de RAEN, chef du département de l'application des décisions judiciaires à la législation de la Fédération de Russie à l'Institut de la législation et du droit comparé sous l'égide du Gouvernement de la Fédération de Russie
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MORSCHAKOVA Tamara	Doctor of Law, Professor, Head of the Department of the Judiciary at the Higher School of Economics, Russia, Former Judge of the Constitutional Court of the Russian Federation docteur en droit, professeur, Chef du Département de la magistrature à l'École supérieure d'économie, la Russie, ancien juge de la Cour constitutionnelle de la Fédération de Russie
MUSIN Valery	Doctor of Law, Professor, Head of the Department of Civil Procedure of St. Petersburg State University docteur en droit, professeur, chef du département de la procédure civile de l'Université d'état de Saint-Pétersbourg, Russie

PILIPENKO Yury	President of the Federal Chamber of Advocates Président de la Chambre des avocats fédérale
SEMENYAKO Evgeny	First Vice-President of the Federal Chamber of Advocates premier vice-président de la Chambre fédérale d'avocats de la Fédération de Russie
SIDOROVICH Olga	Director of the Institute of Law and Public Policy, the editor-in-chief of the "Comparative Constitutional Review" Directeur de l'Institut de Droit et Politiques publiques, rédacteur en chef de la «Revue Constitutionnelle Comparative»
TIHOMIROV Yury	Doctor of Law, Professor, First Deputy Head of the Centre for Public Law Research, Russia docteur en droit, professeur, Premier Vice-Président du Centre de Recherche en Droit public
TOLSTOY Georgy	Professor, Doctor of Law, Academician, Russian Academy of Science Department of Civil Law, St. Petersburg State University professeur, académicien, Académie des Sciences de Russie, Department de Droit civil, Université d'Etat de St. Pétersbourg, Docteur en Droit
SHEVELEVA Natalia	Chair of the Department of State and Administrative Law of the St. Petersburg State University, Russia Président du Département du droit d'État et administratif de l'Université d'Etat de Saint-Pétersbourg, Russie

Interpreters **Interprètes**	
BELYAK Alla	Interpreter interprète
DEVICTOR Grégoire	Interpreter interprète
POGODIN Boris	Interpreter interprète
TANNER Julia	Interpreter interprète
SHUKLINA Zhanna	Interpreter interprète
SHERBINA Mikhail	Interpreter interprète

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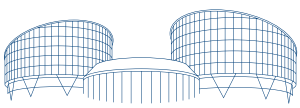
The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

Le Conseil de l'Europe est la principale organisation de défense des droits de l'homme du continent. Il comprend 47 États membres, dont les 28 membres de l'Union européenne. Tous les États membres du Conseil de l'Europe ont signé la Convention européenne des droits de l'homme, un traité visant à protéger les droits de l'homme, la démocratie et l'État de droit. La Cour européenne des droits de l'homme contrôle la mise en oeuvre de la Convention dans les États membres.



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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