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## European Convention on Human Rights and national constitutions

### Report<sup>1</sup>

Committee on Legal Affairs and Human Rights

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### Summary

This work has arisen in the context of increasing interconnectedness between the roles of the European Court of Human Rights, national constitutional courts and the Court of Justice of the European Union. Given the absence of a clear constitutional hierarchy between these jurisdictions, we are dealing with a sort of “multi-level constitutionalism”.

Although moments of conflict and tension between the different legal orders can arise, it is essential that any solutions to such conflicts respect States’ international legal obligations, and the credibility and legitimacy of the European Court of Human Rights as the international court responsible for the interpretation and application of the Convention.

Constructive ways should be found to best avoid conflicts between the jurisdictions of these different legal orders – and to ensure that thoughtful dialogue can be undertaken where any conflicts arise. This should include improved mechanisms for encouraging mutual understanding, mutual respect and judicial dialogue between national and European courts. Improvements are also needed to ensure that domestic courts appropriately engage with the case law of the European Court of Human Rights when applying human rights at the domestic level – including through making the Court’s knowledge-sharing guides available in all languages of the Council of Europe.

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1. Reference to committee: [Doc. 15336](#), Reference No. 4605 of 27 September 2021.



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## A. Draft resolution<sup>2</sup>

1. The Parliamentary Assembly recalls that one of the aims of the Council of Europe is the achievement of greater unity between its member States, based on common values, including the creation of a common European space for human rights. There can, however, at times be the perception of a conflict between national constitutional provisions and the requirements of the European Convention on Human Rights (ETS No. 5, “the Convention”). Further potential conflicts can also exist between the Convention, national constitutional systems, and European Union law.

2. Full respect of the Convention and the national constitutional order is not antithetical but fully complementary. The Assembly considers that the priority in the Council of Europe should be the reinforcement of the legal and moral authority of the Convention. As such it is incumbent on the instances of the Council of Europe to seek out innovative tools necessary to ensure the uniform application of the Convention, while taking into account the principles of subsidiarity, the margin of appreciation and mutual respect for national constitutional systems. Member States enjoy a margin of appreciation in applying the Convention standards at the national level, subject to the supervisory jurisdiction of the European Court of Human Rights (“the Court”), whose task is to interpret the Convention and ensure the observance of the engagements stemming from it by the Contracting States.

3. The Assembly considers that there is not any hierarchy between the European Court of Human Rights, the Court of Justice of the European Union (CJEU) and national supreme or constitutional courts, or between the Convention, the European Union law and national constitutions, in the sense of a traditional approach to the hierarchy of norms within a constitutional framework. Indeed, any attempt to impose such a hierarchy would be problematic and unhelpful. However, the Assembly considers that there does need to be a constructive dialogue between the judicial instances and that the different jurisdictions do need to respect and acknowledge each other’s respective roles, competences, and spheres of expertise.

4. The Assembly also considers that it is not necessary to seek to entirely avoid potential conflicts or conflicting interpretations between different jurisdictions; in general such conflicts, while appearing difficult at the time, can add to the development of judicial thinking and reasoning. Moreover, when solutions are sought following constructive dialogue, the focus is usually on resolving the legal issue at hand rather than on anything resembling an attack on one system.

5. The Assembly recalls that such a system of mutual respect and deference functions well if there is an overlapping consensus at the three levels – Council of Europe, European Union and national level. However, this does not function when serious tensions arise. Tensions have for example arisen in what is sometimes referred to as the rule of law crisis in certain States. Some may also arise where significant political tensions exist in seeking to determine what is the best outcome to help citizens of a country overcome important economic, societal or environmental challenges, or challenges to existing power structures. These are often inherently political issues. Due to the lack of a constitutional hierarchy between the different sets of legal norms (national, Convention, European Union), there is a subsequent lack of formal avenues for handling and deciding disagreements, which in turn becomes a legal problem.

6. Indeed, conflicts have been well publicised in the past as between national constitutional provisions and the requirements of European Union law and the case law of the CJEU. The reasoning and approach applied in seeking to resolve conflicts between the CJEU’s interpretation of European Union law, and European Union member States, can thus be instructive as inspiration for potential tools in resolving conflicts at the Convention level. Moreover, potential conflicts could arise as a result of the accession of the European Union to the Convention, not least given some of the specific requirements of the European Union institutions following Opinion 2/13 of the CJEU, and these matters will need to be grappled with as part of the ongoing work toward accession of the European Union to the Convention.

7. The Assembly considers that a new kind of synergetic legal order has emerged in Europe, through the European integration project, both at the level of the European Union and the Council of Europe. This is sometimes called multilevel constitutionalism or co-ordinate constitutionalism. It essentially implies that there is not a strict hierarchy among the different constitutive elements of this order – the European Union, the Convention and national constitutions, as well as their respective (apex) courts – the CJEU, the European Court of Human Rights and national supreme or constitutional courts. Whilst each of these courts can be supreme in its own legal order, their decisions just as their legal orders can intersect and interact. As part of

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2. Draft resolution adopted unanimously by the committee on 22 March 2023.

multilevel constitutionalism, each defers to the other's decisions in its sphere of competence, provided those decisions respect mutually agreed fundamental essentials. The Assembly favours such an approach based on complementarity and mutual respect.

8. The Assembly notes that there are many different constitutional models, and even more ways that human rights are given effect, in practice, within member States. This is not a problem. Different models (both monist and dualist) can be successful in giving effect to human rights obligations. Within the Council of Europe, we have many different constitutional models and approaches. The Assembly encourages steps towards increased mutual understanding of, and mutual respect between, these different constitutional models, noting that when dealing with matters of a constitutional nature, many different factors need to be borne in mind in understanding the institutional, cultural, legal and historical context of a given system.

9. The Assembly considers that it is important to find ways to ensure that national and supra-national instances can effectively collaborate and communicate, rather than seek a single, uniform solution to complex constitutional issues. However, the Assembly notes that this does not mean that the Council of Europe should accept that national constitutional courts defend departures from the human rights standards required by the Convention, as interpreted by the European Court of Human Rights.

10. The Assembly underlines the clear and unambiguous nature of the obligation on member States to comply with final binding judgments of the European Court of Human Rights under Article 46, paragraph 1, of the Convention and underlines that domestic legal or constitutional issues are not a valid excuse for a failure to comply with such judgments. The Assembly calls on national governments, parliaments and courts to approach such matters in a constructive fashion in order to find timely, practical solutions to any potential legal differences.

11. The Assembly recalls that, in general, tensions tend to relate more to the interpretation and application of Convention rights by the European Court of Human Rights and by national courts in a given case, rather than to disagreements over the Convention rights in and of themselves. The Assembly suggests that national constitutional and supreme courts should seek, where possible, to align their human rights analysis as closely as possible with the analytical approach taken by the European Court of Human Rights. Such an approach can be a useful tool in ensuring a consistent approach between the jurisdictions and in avoiding unnecessary conflicts. The Assembly considers that an approach by domestic courts that seeks, as far as is possible, to harmonise conflicting provisions through interpretation is to be preferred over any strict hierarchy of norms that seeks to disapply either domestic law or the Convention.

12. The Assembly considers that more might be done to improve the knowledge and familiarity of domestic judges with the case law of the European Court of Human Rights, and to improve the extent to which domestic judges – and in particular superior jurisdictions – actively engage with the case law of the European Court of Human Rights when interpreting and applying Convention rights in the national context. Not only would that improve the uniform application of Convention rights throughout the Council of Europe area, but it would also ensure that the correct legal considerations are being taken into account by domestic courts, with their deeper understanding of the factual, legal, cultural and contextual circumstances in their State. This is important because the European Court of Human Rights' reasoning often needs to be applied in a highly contextualised way to the particular circumstances of the domestic legal order. Moreover, such an approach serves to improve the level of judicial dialogue and therefore the quality of judgments of both the European Court of Human Rights and of national courts, whilst ensuring that such exchanges are based on mutual respect. In this light, the Assembly recalls the usefulness of provisions such as that contained in section 2 of the British Human Rights Act, that require courts to "take into account" the case law of the European Court of Human Rights that is relevant to the matter before them. Such an approach can assist domestic courts in resolving human rights matters effectively and swiftly at the national level, with the correct application of the European Court of Human Rights' reasoning, and thus requiring less recourse to the supervisory jurisdiction of the European Court of Human Rights. Such an approach makes it easier for the European Court of Human Rights to be satisfied that the correct legal analysis is being followed by the national courts, thus assisting the European Court of Human Rights in its margin of appreciation analysis. It can also lead to improved judicial dialogue between the domestic courts and the European Court of Human Rights and thus can help to avoid potential conflicts between them.

13. The Assembly reiterates the importance of mutual respect between the various judicial instances, and the importance of judicial dialogue in continuously improving the quality of judicial reasoning and in ensuring constructive solutions to any potential conflicts between jurisdictions. In this context, the Assembly notes the importance of both formal judicial dialogue, in the form of judgments by the respective courts, as well as informal judicial dialogue to improve mutual understanding and respect.

14. The Assembly recalls in particular the positive developments with the establishment and functioning of the Superior Courts Network as a unique forum for dialogue and knowledge sharing on Convention case law and comparative law, and welcomes further reflection from superior national courts as well as from the European Court of Human Rights on how to make the best use of this network. The Assembly encourages the development of training activities (conferences, webinars, study visits and secondments) to ensure improved mutual understanding between the European Court of Human Rights and national superior courts, so that the respective courts are able to understand the context and perspective of each others' judgments and to find the appropriate accommodations to align judicial understanding. It welcomes the recent opening of the Superior Courts Network to the CJEU and regional human rights courts as observer courts and encourages further developments in this regard.

15. The Assembly welcomes the system of advisory opinions of the European Court of Human Rights envisaged under Protocol No. 16 to the Convention (CETS No. 214) as a useful tool in resolving potential conflicts between highest national courts and the European Court of Human Rights, and in improving judicial dialogue. It regrets however that only 19 member States have ratified the Protocol and that only seven requests for advisory opinion have so far been submitted by national courts.

16. The Assembly recalls the useful role that is played by the European Commission for Democracy through Law (Venice Commission) in resolving potential conflicts, especially those relating to constitutional law or provisions of a constitutional nature. The Assembly recognises the expertise of the Venice Commission in relation to constitutional issues, including the composition of courts and the election of judges, and calls on all actors to make best use of the opinions of the Venice Commission in approaching such complex issues.

17. The Assembly is aware of the ongoing work towards the accession of the European Union to the Convention and, in the context of that work would like to stress the importance of mutual respect and dialogue between the European Court of Human Rights and the CJEU. It notes that matters of interpretation of the Convention rights must in the end be determined by the European Court of Human Rights whereas the CJEU has the final word on the interpretation of European Union law.

18. The Assembly calls on Council of Europe member States to:

18.1. abide by, and take all necessary steps to implement, swiftly, the final judgments of the European Court of Human Rights, in line with the clear unconditional obligation under Article 46, paragraph 1, of the Convention;

18.2. comply with any interim measures issued by the European Court of Human Rights, in accordance with the obligations stemming from Article 34 of the Convention;

18.3. refrain from taking any steps which could exacerbate any potential conflict between the national constitutional order and the European Court of Human Rights;

18.4. develop mechanisms designed to encourage mutual understanding, mutual respect and judicial dialogue between national and European courts, in particular in relation to constitutional provisions, whilst emphasising that such systems should be designed to assist in developing judicial thinking and reasoning, following constructive dialogue focussed on resolving specific legal issues, rather than creating the impression of an attack on the legal system in question as a whole;

18.5. consider developing improved mechanisms to ensure that domestic courts appropriately engage with the case law of the European Court of Human Rights, thus ensuring that the correct legal considerations are being applied by domestic courts, with the benefit of their deeper understanding of the factual, legal, cultural and other contextual circumstances in relation to that State;

18.6. work with the Council of Europe on embedding the application of the Convention in national judicial practices, including co-operation with the Organisation on developing and implementing new tools for integrating Convention knowledge within national judicial practices;

18.7. ratify Protocol No. 16 to the Convention, as soon as possible, as a useful tool in resolving potential conflicts between national courts and the European Court of Human Rights, and in improving the quality of judicial dialogue, and if they have already done so, make the best use of this tool;

18.8. support judicial dialogue and knowledge sharing on Convention issues through the Superior Courts Network and other existing tools, including by making voluntary contributions to the relevant Council of Europe programmes aimed at strengthening the Superior Courts Network and making the European Court of Human Rights' knowledge-sharing platform available in non-official languages;

18.9. make the best use of the expertise of the Venice Commission, especially in constitutional matters, in order to seek to pre-empt potential difficulties, or to seek to find constructive solutions to potential problems.

## B. Explanatory memorandum by Mr George Katrougalos, rapporteur

### 1. Introduction

1. Following a motion for a resolution entitled “European Convention on Human Rights and national constitutions”,<sup>3</sup> tabled on 25 June 2021, the Committee on Legal Affairs and Human Rights appointed me as rapporteur on this subject at its meeting on 5 November 2021.

2. The motion, of which I am the author, recalls that “one of the aims of the Council of Europe is the achievement of greater unity between its member States, based on common values, including the creation of a common European space for human rights. Such unity is fundamental for an effective and meaningful democracy governed by the rule of law.” In this context, the European Court of Human Rights (“the Court” or “ECtHR”) is the guardian of this *ordo juris communis Europae*, as it is enshrined in the European Convention on Human Rights (ETS No. 5, “the Convention”). While Article 1 of the Convention requires the States Parties to secure to everyone within their jurisdiction the rights and freedoms defined therein, Article 1 does not make any distinction as to the type of norm concerned, nor does it exclude any part of the member States’ jurisdiction. However, in a number of States Parties to the Convention, constitutional and supreme courts “often consider that constitutional provisions take precedence over ratified international treaties, including the Convention”.

3. The signatories of the motion believe that “full respect of the Convention and the national constitutional order is not antithetical but fully complementary”. Such an approach can be seen in the case law of the Court, as well as in the interpretative approach taken to clauses guaranteeing human rights in national constitutions, which is often done by reference to the Convention. The motion therefore called on the Parliamentary Assembly to “further strengthen politically and legally this position by investigating and comparing good national practices of constitutional texts and national case law and by proposing institutional solutions which would minimise friction between constitutional courts and the European Court of Human Rights”.

4. Consideration of potential conflicts between national constitutions and the Convention can have some similarities with the relationship between national constitutions and the requirements of EU law. Indeed, with the ongoing work towards EU accession to the Convention it is also possible that similar tensions could develop with regard to the relationship between EU law and the Convention (and therefore the Court of Justice of the European Union (CJEU) and the ECtHR).

5. As part of this work I sent a questionnaire to national parliamentary research services through the European Centre for Parliamentary Research and Documentation (ECPRD) to ask about the relationship between each State’s national constitution, the Convention and international obligations protecting human rights. The questionnaire specifically asked about any national case law on the relationship between the Convention and the national constitution, the extent to which supreme or constitutional courts refer to the Convention when adjudicating human rights issues, and any case law on the relationship between EU law and the Convention. A summary of the responses to that questionnaire can be found in the appendix to this report.

6. On 5 September 2022, the committee held a hearing with the participation of Professor Helen Keller, Chair for Public Law, European and Public International Law, University of Zurich, and Ms Simona Granata-Menghini, Secretary of the European Commission for Democracy through Law (Venice Commission). On 12 October 2022, the Committee held an exchange of views with the participation of Professor Joseph Weiler, University Professor, New York University School of Law. During these hearings I explored potential innovative ideas, such as whether the idea for a “mixed grand chamber” to help resolve conflicts of competence between the EU and its member States could be applied in a Convention context.

7. In this report, I first set out the position of the Convention in national legal systems before considering the implementation of ECtHR judgments within national systems. I then consider the situation when ECtHR judgments may touch upon national constitutional obligations, and highlight some recent examples showing friction between the case law of ECtHR, and the national legal order. I will then set out the perspectives that have been shared in the course of this work, before drawing some conclusions focussing on the importance of mutual respect and understanding in the new synergetic legal order that has emerged in Europe (sometimes called multilevel or coordinate constitutionalism). This legal order involves respective deference by the national constitutional court, the ECtHR and the CJEU to each other’s decisions provided those decisions respect mutually agreed essentials.

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3. [Doc. 15336](#).

## 2. The position of the Convention in national legal orders

8. International human rights treaties have a clear impact on domestic law, as they impose obligations on States parties and deal with the relations between the State (and its public authorities) and private actors, such as individuals. This raises the issue of the relationship between international human rights treaties and domestic legal orders, including national constitutions, which has been examined on many occasions by the Venice Commission. This question becomes even more complex when the human rights treaty in question establishes a judicial system of control (such as is the case as concerns the three regional systems of human rights protection: European, American and African). In such a case, not only will the human rights treaty need to be integrated in the domestic legal order, but also the obligations flowing from the case law of the relevant judicial body.<sup>4</sup> In this section, I will first consider the relationship between international law and domestic law – in particular in light of the different monist and dualist approaches and the obligation to implement international human rights treaties – before considering the relationship between national constitutions and human rights treaties, and then the emerging multilevel constitutionalism in Europe.

### 2.1. From the perspective of international law: the traditional monist and dualist approaches

9. Traditionally, there are two main approaches to the relationship between international and national law: the monist approach and the dualist approach.<sup>5</sup>

10. The *monist approach* (monism) is based on the idea that international law and national law are two components, or two different manifestations, of one and the same legal system.<sup>6</sup> Under a traditional monist approach, treaties do not need to be transposed by domestic legal instruments in order to be integrated in the domestic legal order and can be invoked before national courts without prior transposition, provided that the nature and content of the relevant provision is sufficiently clear (namely if they have a “self-executing” character).<sup>7</sup> Such States usually have an “incorporation clause” in the constitution or in another legal instrument (for example organic/constitutional law or statute)<sup>8</sup> stating that international law or specific international treaties or types of international law are part of the domestic legal order. For example, an incorporation clause is included in the Constitutions of Albania, Armenia, Bulgaria, the Czech Republic, Lithuania, the Netherlands, Poland, and Portugal. Human rights treaties tend to have a relatively significant status in the normative hierarchy in States with a monist approach.<sup>9</sup>

11. According to the *dualist approach* (dualism), national law and international law are two separate legal systems, which have different legal subjects and different sources. Thus, in a traditional dualist approach, international treaties do not apply directly within the domestic legal order. In order for the obligations contained in a treaty to have domestic legal effect, the treaty’s provisions need to be integrated into the domestic legal order by means of a statute or another source of national law. Treaties may not be invoked directly before national courts, while provisions of domestic law inspired by them or even merely repeating them may.<sup>10</sup> Three main legal techniques – transformation, adaptation or adoption – tend to be used to incorporate international law into domestic law.<sup>11</sup>

12. The two traditional most purist types of monism and dualism are largely constructs of the previous century, predating the development of European Union Law, the Convention and modern practices. In reality, a monist approach may often require specific legislative action to implement treaty obligations in order for those obligations to be given full effect in domestic law, whilst a dualist approach will often involve domestic

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4. There is comprehensive literature on this issue, as regards the European experience, cited by the Venice Commission, “Report on the implementation of international human rights treaties in domestic law and the role of the courts”, adopted at its 100<sup>th</sup> plenary session (Rome, 10-11 October 2014), CDL-AD(2014)036, footnote 2.

5. See for example J.G. Starke, “Monism and Dualism in the Theory of International Law”, 17 *Brit. Y.B. Int'l L.* 66 (1936), quoted in CDL-AD(2014)036, *op. cit.*, footnote 14.

6. CDL-AD(2014)036, *op. cit.*, para. 18.

7. *Ibid.*, para. 86.

8. *Ibid.*, para. 19. The other legal techniques showing adherence to monism consist in either including concrete references to international law in laws or other domestic acts or basing them on non-written, customary rules or case law.

9. *Ibid.*, para. 86.

10. *Ibid.*, para. 22.

11. *Ibid.*, para. 23. Transformation refers to the model in which the text of an international treaty is literally “incorporated” into a statute or another source of domestic law. Adaptation includes not only “incorporation” from international to national law, but also substantive modifications (the United Kingdom Human Rights Act of 1998, which introduced within the law of the United Kingdom some of the provisions of the European Convention on Human Rights is one such example). Adoption refers to the use of provisions of international treaties, or other sources of international law, in the case law of national courts, in cases where such sources were not transformed and/or adapted within the domestic legal order.

courts having a certain regard for the wider international legal context. Today many States combine elements of both approaches within their legal orders and most States have adopted a “mixed type”, with the general trend being towards moderate monism (often with special treatment reserved to international human rights treaties). In general, common law countries (for example the United Kingdom, Ireland) and some other European countries (for example, Finland, Hungary, Norway, Sweden) tend to have a dualist approach, while countries which have made a political transition after the fall of communism in Central and East European countries adopt a monist approach.<sup>12</sup> Neither monism nor dualism provide a sufficient answer for determining the factors that influence the integration of human rights treaties into domestic law and States following either approach can be very successful in implementing the obligations flowing from such treaties.<sup>13</sup>

## **2.2. States’ responsibility to implement human rights treaties under international law**

13. The choice of the relationship between international law and the national legal order is a sovereign decision of each State.<sup>14</sup> Nevertheless, whatever model is chosen, a State is bound by its obligations under international law and the principles of international law. In relation to treaties that a State has entered into, this includes the principle of *pacta sunt servanda*.<sup>15</sup> A State’s internal law, including constitutional law, may not be invoked to justify an act or omission which turns out to be in breach of international law (see Article 27 of the Vienna Convention on the Law on Treaties).<sup>16</sup> If the State does not comply with the obligations stemming from an international treaty, then international responsibility arises.<sup>17</sup>

14. A State is responsible for breaches of international law that are due to the conduct of any State organ “whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.”<sup>18</sup> In implementing their obligations stemming from international law, States are free to choose the ways and means, provided that the result is in conformity with those obligations (“obligation of result” rather than “obligation of conduct” or “obligation of means”).<sup>19</sup>

## **2.3. The status of human rights treaties in national constitutions**

15. The status of human rights treaties, including the Convention, in the domestic legal order varies from country to country. Some national legal orders contain an explicit reference to the status of international human rights treaties; in others their status has to be deduced from the domestic rules concerning international law in general; in others again, the national legal order does not contain legal rules as to the legal status of international treaties.<sup>20</sup>

16. As can be seen from the Appendix containing a summary of the results of the questionnaire, when there is an explicit reference to international human rights treaties, different approaches can be taken by Council of Europe member States. One of the following solutions tends to be adopted:<sup>21</sup>

- the constitution stipulates that international human rights treaties shall prevail over domestic law (for example Bosnia and Herzegovina);<sup>22</sup>

12. CDL-AD(2014)036, *op. cit.*, paras 22 and 16.

13. *Ibid.*, para. 24.

14. See Venice Commission, “Russian Federation. Final opinion on the amendments to the Federal Constitutional Law on the Constitutional Court”, adopted at its 107th plenary session (Venice, 10-11 June 2016), CDL-AD(2016)016, para. 84.

15. This reflects customary international law, and is also contained in Article 26 of the Vienna Convention on the Law on Treaties of 1969, which provides: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

16. *Ibid.*, Article 27: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. (...)”.

17. CDL-AD(2016)016, *op. cit.*, para. 85. See in this regard *Grzęda v. Poland* (GC), 15 March 2022, application No. 43572/18, para. 340, where the ECtHR recognises the importance of this principle, including with regard to constitutional law.

18. Article 4.1 of the “Draft articles on Responsibility of States for Internationally Wrongful Acts”, adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session; *Yearbook of the International Law Commission, 2001*, vol. II (Part Two).

19. CDL-AD(2016)016, *op. cit.*, para. 88.

20. CDL-AD(2014)036, *op. cit.*, para. 25. In such countries, this status is defined referring to unwritten rules, customary law and the case law of national, mainly constitutional courts (for example Austria and some countries of Latin America). However, in Austria the Convention is given effective constitutional status; see CDL-AD(2016)016, *op. cit.*, para. 83.

21. *Ibid.*, paras 26-28.

- the constitution stipulates that human rights treaties have constitutional status (for example in some countries of Latin America).<sup>23</sup>
- the constitution stipulates that treaties (including human rights treaties) have a legal status above domestic law, but not over the constitution (for example Albania, Armenia, Azerbaijan, Bulgaria, Croatia, the Czech Republic, Estonia, France, Georgia, Germany, Greece, the Republic of Moldova, North Macedonia, Poland as well as the Russian Federation);<sup>24</sup>
- the most recent trend, with<sup>25</sup> or without a specific constitutional provision, is for the courts to construe national law, including constitutional provisions, in conformity with the Convention, so as to ensure maximal protection of human rights.<sup>26</sup> In this way, international human rights treaties are introduced to the “bloc of constitutionality” and in case of conflict of norms, priority is given to the norm most favourable to the protection of the individual.

#### **2.4. The position of the case law of the ECtHR in national legal systems**

17. Whilst the focus is often on the formal relationship between the national constitutions and the Convention, this is usually not where the tension lies. Where difficulties tend to arise relates more to how the Convention Articles are interpreted and applied by the ECtHR and by national courts. What is therefore of particular interest is not solely how the Convention itself is given effect in domestic law, but how national courts treat the case law of the ECtHR when applying rights domestically.

18. From the responses to the questionnaire, it seems clear that whilst nearly all domestic courts regularly refer to ECtHR case law, there generally seems to be some latitude (whether in theory, in practice or both) for domestic courts as to the weight to be given to its case law. In many respects, that is understandable given that (i) the Convention only mentions judgments being binding on the parties to a given case (Article 46(1) Convention); (ii) the factual, legal and contextual circumstances affecting the reasoning in any given judgment of the ECtHR can vary enormously, meaning that applying ECtHR judgments and ECtHR reasoning needs to be done in a highly contextualised way; and (iii) the case law and reasoning of the ECtHR can evolve and develop, not least through healthy exchange in the form of judicial dialogue between the ECtHR and national courts.

19. There are a variety of approaches in how domestic courts therefore consider the case law of the ECtHR. Many efforts exist to improve the access of domestic judges to ECtHR judgments (especially those that could be relevant to them). However, approaches will vary, and the context-specific nature of ECtHR judgments means that they need to be applied having understood both the national context in question as well as the context of the ECtHR judgment in any given case. Whilst there are different ways that national judges and indeed public bodies can have regard to the interpretations handed down by the ECtHR, more could perhaps be done to disseminate ECtHR judgments (for example in languages other than English and French), to improve national courts' understanding of ECtHR case law, to consider best practice among States, and to encourage constructive engagement with ECtHR case law at the national level.

20. There are also a number of useful Council of Europe tools and projects on embedding the application of the Convention in national judicial practices, including through tools such as the Superior Courts Network and the ECtHR's knowledge-sharing platform. This platform helpfully provides guidance notes and case law to improve knowledge sharing on the interpretation and application of the Convention articles. Improved

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22. Article II.2 of the Constitution of Bosnia and Herzegovina clearly stipulates that the rights and freedoms set forth in the Convention and Protocols shall apply directly in Bosnia and Herzegovina and “(...) shall have priority over all other law”. However, this is a particular case as the Constitution is itself part of an international treaty, namely the Dayton agreement (Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina, signed on 14 December 1995).

23. *Ibid.*, para. 27.

24. For more details, see CDL-AD(2014)036, *op. cit.*, para. 28.

25. In Romania, the constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights and with other treaties to which Romania is a party (Article 20.1 of the Constitution of Romania) and “where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions” (Article 20.2 of the Constitution of Romania). Similarly in Spain, Article 10.2 of the Constitution stipulates that fundamental rights have to be interpreted in conformity with the Universal Declaration on Human Rights and human rights treaties.

26. On the case law of the German Federal Constitutional Court see CDL-AD(2016)016, *op. cit.*, para. 83 and footnote 24. For Netherlands see G. Betlem, “Giving Effect to Public International Law and European Community Law before domestic courts”, *European Journal of International Law* (EJIL), vol. 14, 2003, 569-589.

availability of the platform in non-official languages would greatly assist domestic courts in applying the case law of the ECtHR effectively at the national level without needing recourse to the ECtHR. Further work to uphold such activity should therefore be welcomed, including through financial contributions to support such work.

### **2.5. The emerging multilevel constitutionalism in Europe: national constitutions, European Union law and the Convention**

21. The traditional view is the doctrine of constitutional supremacy whereby the constitution is the highest norm in a State's national legal order. The increase in legally binding international norms, with stronger methods of enforcement (especially at a regional level) has challenged the traditional approach to the hierarchy of norms. The clearest examples of such issues relate to the Convention and also to the place of EU law, given the primacy of EU law for EU member States. The concept of "multilevel constitutionalism" has therefore been developed as an effort to seek to reconcile the potential conflicts in hierarchy between national constitutions, the Convention and EU law<sup>27</sup>.

22. Multilevel constitutionalism considers the European legal space to be one integrated system, composed of national constitutions, the Convention and, for the member states of the European Union, European Union law. In this context, the supranational (European Union and the Convention) and national constitutional orders are interwoven and interdependent; they form one system of law, producing, ideally, one legal solution in each particular case. The term "multilevel" does not imply a formal hierarchy; the supranational is an additional constitutional level but not hierarchically higher than the national constitutions.

23. Multilevel constitutionalism indicates that the various autonomous legal orders are separate but permeable. The different legal orders are interconnected by rules that seek to prevent situations in which two conflicting legal answers apply to the same legal problem. Obviously, in order to ensure the harmony of the interconnected legal orders, it is indispensable to have a functional dialogue between the respective courts.<sup>28</sup> The ECtHR on many occasions has stated its willingness to engage in such a "judicial dialogue". This has been particularly apparent when the ECtHR looks for a "European consensus", or "common approach to dealing with a particular issue by the majority of High Contracting Parties".<sup>29</sup> The ECtHR also engages in dialogue with other international instruments and judgments or rulings by international and regional human rights bodies.<sup>30</sup>

## **3. National constitutions and the execution of ECtHR judgments**

### **3.1. Legal obligation to execute ECtHR judgments**

24. By adhering to the Convention, States Parties to the Convention not only agreed to secure to everyone within their jurisdiction the rights and freedoms enshrined in the Convention and its Protocols (Article 1 of the Convention) but also to create the European Court of Human Rights, a mechanism to ensure the observance of the obligations stemming from the Convention (Article 19 of the Convention). According to Article 32(1) of the Convention, the jurisdiction of the Court covers "all matters concerning the interpretation and application of the Convention and the Protocols thereto". In its role in authoritatively interpreting the Convention rights and ensuring the observance of its obligations in accordance with Article 19, the Court's case law is thus relevant to all States, to the extent that it helps "to elucidate, safeguard and develop the rules instituted by the

27. I. Pernice, "Multilevel Constitutionalism in the European Union", in *European Law Review*, 2002, 511 s.

28. M. Poiares Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action", in N. Walker (ed.), *Sovereignty in Transition*, Oxford 2003, p. 501 ff.

29. *V. v. United Kingdom*, application No. 24888/94, judgment of 16 December 1999 (Grand Chamber) and *A., B. and C. v. Ireland*, application No. 25579/05, judgment of 16 November 2010 (Grand Chamber); cf. J. McBride, "The doctrines and methodology of interpretation of the European Convention on Human Rights by the European Court of Human Rights", Council of Europe, 2021, p. 40 ff. See recently *Fedotova and Others v. Russia* (Grand Chamber), application No. 40792/10 and others, judgment of 17 January 2023, at paras 166-177.

30. "The Convention ... cannot be interpreted in a vacuum and should as far as possible be interpreted in harmony with other rules of international law concerning the international protection of human rights .... Indeed, as follows from Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, the Convention should as far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the international protection of human rights."; see *Correia de Matos v. Portugal*, application No. 56402/12, judgment of 4 April 2018 (Grand Chamber) and *Hämäläinen v. Finland*, application No. 37359/09, judgment of 16 July 2014 (Grand Chamber).

Convention”.<sup>31</sup> As stressed by the ECtHR in its case law, Article 1 of the Convention does not exclude any part of a member State’s “jurisdiction” from scrutiny under the Convention, including the constitution, through which this “jurisdiction” is often exercised in the first place.<sup>32</sup>

25. Furthermore, Article 46(1) of the Convention stipulates that “the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties” and Article 46(2) grants the Committee of Ministers the power to supervise the execution of the Court’s final judgments. This means that where the Court finds a violation of the Convention or its Protocols, that judgment imposes on the respondent State a legal obligation under Article 46(1) to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*). As a result, in some situations the State has a legal obligation not just to pay the sums awarded by the Court by way of just satisfaction under Article 41 of the Convention, but also to take other measures to redress the effects of the violation for the applicant (“individual measures” – such as the return of property, the reopening of domestic proceedings or the release of a detained person). Moreover, if need be, the State has to take “general measures”, in order to prevent future similar violations (for example, to revise its legislation, or to modify its administrative or judicial practice). The State Party (under the supervision of the Committee of Ministers) generally has a choice of means as to the measures to adopt, provided they address the concern.<sup>33</sup> The binding character of the obligation stemming from Article 46(1) of the Convention has been reiterated by the Committee of Ministers in its numerous decisions concerning the execution of specific ECtHR judgments and by the Assembly in its resolutions on the implementation of ECtHR judgments.<sup>34</sup> The Court has even indicated that this obligation under Article 46(1), can, depending on the context, be binding upon the domestic courts of the relevant State.<sup>35</sup>

### **3.2. Possible clashes over primacy of the constitution in the national legal order and execution of ECtHR judgments**

26. A conflict between an international treaty and a constitution or, where they exist, constitutional (organic) laws, is always a complex legal problem, as it confronts the highest normative instruments of a country with instruments adopted at the international level. In such a case, national authorities, and often national courts, will need to find a solution to the conflict. Options include amending the domestic law, including the constitution; seeking to amend the international legal obligation; using interpretative techniques; or using a solution based on the hierarchy of norms, which implies the non-application either of domestic law or of the international human rights treaty (which will not resolve the conflict if an incompatibility with international legal obligations remains).

27. In States where the constitution is ranked higher than the Convention, there exists a possibility that the constitutional court might find a contradiction between the constitution and an interpretation by the European Court of Human Rights of a given provision of the Convention. Such a finding cannot affect the obligation to execute an ECtHR judgment.<sup>36</sup> A conflict can be avoided through “(...) the willingness to interpret national constitutional provisions in a manner that is sympathetic to the requirements flowing from ECtHR judgments”<sup>37</sup> and in “extreme cases, even the possibility of amending the Constitution could be envisaged”.<sup>38</sup>

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31. *Rantsev v. Cyprus and Russia*, application No. 25965/04, judgment of 7 January 2010, at para. 197; *Jerenovics v Latvia* (GC), application No. 44898/10, judgment of 5 July 2016, at para. 109.

32. See for instance, ECtHR, *Anchugov and Gladkov v. Russia*, applications Nos. 11157/04 and 15162/05, judgment of 4 July 2013, para. 50. See also *Grzeda v. Poland*, cited above, para. 340, “The principle that States must abide by their international obligations has long been entrenched in international law; in particular, ‘a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force’ (see the Permanent Court of International Justice’s Advisory Opinion on Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory ...). The Court observes that, under the Vienna Convention on the Law of Treaties, a State cannot invoke its domestic law, including the Constitution, as justification for its failure to respect its international-law commitments (see Article 27 of the Vienna Convention ...)”.

33. See, for instance, *Maestri v. Italy*, application No. 39748/98, judgment of 17 February 2004, para. 47. The Court recalled, *inter alia*, that “... in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible ...” with the Convention. See also *Advance Pharma sp.z o.o v. Poland*, No. 1469/20, judgment of 3 February 2022, paras 363-366.

34. See, for instance, para. 7 of [Resolution 2358 \(2021\)](#), adopted by the Assembly on 26 January 2021.

35. *Fabris v France*, para. 75, “This imposes an obligation on the domestic courts to ensure, in conformity with their constitutional order and having regard to the principle of legal certainty, the full effect of the Convention standards, as interpreted by the Court.”

28. The practice of States Parties to the Convention shows that several States have been able to find appropriate solutions, either by a process of constitutional reform (for example in Armenia, Hungary, Italy, Lithuania, Serbia, the Slovak Republic, Türkiye and Ukraine) or through changes in the case law of their constitutional courts (for instance, in Austria, Croatia or the Czech Republic), which were subsequently accepted by the Committee of Ministers as appropriate general measures.<sup>39</sup>

29. In this context, the role of the constitutional court is of particular importance. One interesting example is the execution of the *Anchugov and Gladkov v. Russia* judgment,<sup>40</sup> in which the Constitutional Court of the Russian Federation demonstrated a “certain openness to dialogue with the European Court of Human Rights”.<sup>41</sup> In its ruling of 19 April 2016, delivered after the ECtHR judgment, the Constitutional Court reaffirmed the imperative character of the constitutional provision which was at the origin of the violation of the applicants’ rights but at the same time indicated to the federal legislator a way out of the impasse. Consequently, the domestic legislation was amended, and the Committee of Ministers considered that the ECtHR judgment had been fully executed.<sup>42</sup>

### 3.3. Judicial dialogue between the ECtHR and the highest courts

30. In the case of the Convention, there is a special relationship with national courts because of the interactions between the ECtHR and national courts in the interpretation of the Convention. This allows for a “dialogue of judges”, which includes mutual references to the case law of the ECtHR, on the one hand, and to that of national courts, on the other, “(...) not only when such cross-citations have a positive impact and promote understanding, but also when they lead to debate or oppose judicial solutions”.<sup>43</sup> Such dialogue is in line with a State’s obligation to interpret a treaty in “good faith”.<sup>44</sup> It can also allow States Parties to the Convention to remove possible tensions and contradictions between rulings of the ECtHR and their national systems and has proven its effectiveness in many instances, in several Council of Europe member States.<sup>45</sup>

31. A dialogue between the European Court of Human Rights and the highest domestic courts is an appropriate forum for finding a solution before the ECtHR finds a violation of the Convention and the matter is examined by Committee of Ministers under Article 46 of the Convention.<sup>46</sup> The ECtHR has considered this dialogue as one of its priorities and, in October 2015, the Superior Courts Network (SCN) was launched, following the encouraging statements contained in the Brussels Declaration adopted at the High-level Conference in March 2015.<sup>47</sup> The SCN now comprises 103 superior courts from 44 States Parties to the Convention. The SCN is a unique forum, where knowledge on Convention legal issues is shared continuously,

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36. Venice Commission, “Russian Federation – Opinion on the draft amendments to the Constitution (as signed by the President of the Russian Federation on 14 March 2020) related to the execution in the Russian Federation of decisions by the European Court of Human Rights”, adopted by the Venice Commission on 18 June 2020 by a written procedure replacing the 123<sup>rd</sup> plenary session, CDL-AD(2020)009, para. 62.

37. CDL-AD(2016)016, *op. cit.*, para. 110.

38. CDL-AD(2020)009, *op. cit.*, para. 57.

39. Council of Europe, DG1, Department for the execution of ECtHR judgments, [Constitutional matters. Thematic Factsheet](#), May 2020.

40. *Ibid.* It concerns a blanket ban on voting rights imposed on all convicted offenders deprived of their liberty on the basis of a provision of the Constitution (violations of Article 3 of Protocol No. 1). In para. 111 of this judgment, the Court stated that “(...) it is open to the respondent Government to explore all possible ways ... and to decide whether their compliance with Article 3 of Protocol No. 1 can be achieved through some form of political process or by interpreting the Russian Constitution by the competent authorities – the Russian Constitutional Court in the first place – in harmony with the Convention in such a way as to co-ordinate their effects and avoid any conflict between them.”

41. CDL-AD(2020)009, *op. cit.*, para. 58.

42. Final Resolution [CM/ResDH\(2019\)240](#), adopted on 25 September 2019. The Constitutional Court noted that the federal legislator could optimise the criminal punishment system, so that some sanctions, although entailing the compulsory restriction of freedom, would not involve restrictions on voting rights (see para. 2 of the operative part of this Ruling, *in fine*). Subsequently, on 1 January 2017, a new category of criminal punishment – community work – was introduced to the Criminal Code and another amendment to the Criminal Code provided for the possibility to replace the non-served part of a custodial sentence by a more lenient punishment in the form of community work. For more details see at [Case Description](#) of this case in HUDOC-EXEC.

43. CDL-AD(2014)036, *op. cit.*, para. 99.

44. According to Article 31.1 of the Vienna Convention on the Law on Treaties, “a treaty shall be interpreted 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.”

45. CDL-AD(2016)016, *op. cit.*, para. 146.

46. CDL-AD(2020)009, *op. cit.*, para. 63.

47. High-level Conference on the “Implementation of the European Convention on Human Rights, our shared responsibility”, 26-27 March 2015.

through bilateral and multilateral exchanges (annual forums, webinars, dissemination of the Court's case law through a secured website on a weekly basis). National courts also provide the ECtHR with information on their respective domestic systems, assisting the Court in its comparative work when looking for a potential European consensus on a particular legal subject. The SCN has recently been opened to the CJEU and the Inter-American Court of Human Rights as observer courts, thereby facilitating exchanges on international human rights standards.

32. Moreover, the dialogue between the highest national courts and the ECtHR can now be reinforced through the possibility to seek advisory opinions from the European Court of Human Rights “on questions of principle relating to the interpretation and application of the rights and freedoms defined in the Convention and the protocols thereto” in the context of a case pending before those courts (as provided for in Article 1 of Protocol No. 16 (CETS No. 214)). It is nevertheless regrettable that only 19 States Parties to the Convention have ratified Protocol No. 16<sup>48</sup> and that this avenue has so far been used only in a few cases (seven requests submitted).

#### 4. Execution and consideration of ECtHR judgments: some recent examples

33. In the last few years, new tensions arose around the relationship between the Convention and the case law of the ECtHR, on one hand, and national legal orders, on the other. For example, there have been well-publicised frictions about amendments to the Russian Constitution relating to the implementation of the *OA O Neftyanaya Kompaniya YUKOS v. Russia* judgment.<sup>49</sup> On 19 January 2017, the Russian Constitutional Court delivered a judgment concluding that it was impossible to implement the ECtHR judgment on just satisfaction in this case without contravening the Russian Constitution.<sup>50</sup> In 2020, the Russian Constitution was amended to provide that decisions of interstate bodies are not enforceable in the Russian Federation if they contradict the Constitution, and that only the Russian Constitutional Court can resolve matters concerning the possibility of enforcing decisions of interstate bodies that contradict the Russian Constitution. In its opinion of 18 June 2020, the Venice Commission considered that granting to the Constitutional Court the power to declare an ECtHR judgment non-executable contravened the Convention and it was “alarmed” by the constitutional entrenchment of such a power.<sup>51</sup> In its [Resolution 2358 \(2021\)](#), the Assembly called on the Russian Federation to modify the amendments to Articles 79 and 125(5)(b) of the Constitution in light of the Venice Commission's opinion, but these recommendations have not been followed.

##### 4.1. Poland

34. The recent Polish reforms to its judiciary have caused some controversy, not least given the apparent refusal of the Polish authorities – including the newly reformed judiciary – to abide by the final judgments of the ECtHR on this topic.

35. In its judgment of 7 May 2021 in *Xero Flor v. Poland*,<sup>52</sup> the ECtHR found a violation of Article 6 of the Convention because of the composition of the Polish Constitutional Tribunal and questioned the validity of the election of several judges.<sup>53</sup> Similarly, in the *Reczkowicz* group of cases, the ECtHR found violations of the right to a tribunal established by law, contrary to Article 6 of the Convention, due to the participation in domestic proceedings of the Polish Supreme Court judges that were appointed in an inherently deficient procedure on the motion of the National Council of the Judiciary, lacking independence from the legislature

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48. It entered into force following 10 ratifications on 1 August 2018. See at: [www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=214](http://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=214).

49. Application No. 14902/04, judgments of 20 September 2011 (on the merits) and of 31 July 2014 (just satisfaction, Article 41). The Court held that there had been various violations of the Convention concerning tax and enforcement proceedings brought against the applicant oil company (mainly of Article 6 and Article 1 of Protocol No. 1) and allocated a total amount of nearly €1.9 billion to the shareholders of the applicant company by way of just satisfaction.

50. [Case Description](#) in HUDOC-EXEC, as of 15 March 2022. That was due to the amendments to the Federal Law on the Constitutional Court passed in December 2015, examined by the Venice Commission Opinion, CDL-AD(2016)016, *op. cit.*

51. CDL-AD(2020)009, *op. cit.*, paras 64 and 68.

52. Application No. 4907/18, judgment of 7 May 2021.

53. The ECtHR found, in particular, that the election of certain judges to the Constitutional Tribunal was irregular as it was not in conformity with the Polish constitutional provisions relating to the election of judges to the Constitutional Tribunal. Judges had already been elected by the previous Sejm (just not approved by the President) therefore it was inappropriate for the new Sejm to seek to re-elect different judges in their place. These irregularities infringed the applicant company's right to a tribunal established by law, contrary to Article 6 of the Convention, given the participation in judicial deliberations concerning its constitutional complaint of irregularly appointed judges.

and the executive, noting the wider context of reforms aimed at weakening judicial independence.<sup>54</sup> In its judgment of 29 September 2021 in *Broda and Bojara v Poland*,<sup>55</sup> the ECtHR found a violation of Article 6 of the Convention (access to court), on account of the premature termination of the applicants' terms of office as vice-presidents of a regional court.

36. The Polish Constitutional Tribunal delivered two judgments in response to the ECtHR's recent case law criticising the reform of the Polish judiciary. In the judgment of 24 November 2021,<sup>56</sup> delivered at the request of the Minister of Justice-Prosecutor General, following the ECtHR's *Xero-Flor* judgment, the Constitutional Tribunal declared that Article 6(1) of the Convention, to the extent that the term "court" used in that provision referred to it, was unconstitutional. It also found that Article 6(1) of the Convention was incompatible with the Constitution, in so far as it conferred on the ECtHR the competence to assess the legality of the election of judges to the Constitutional Tribunal. On 10 March 2022,<sup>57</sup> again at the request of the Minister of Justice-Prosecutor General and in response to the ECtHR's judgments concerning the reform of the Supreme Court and the National Council of the Judiciary, the Constitutional Tribunal found that Article 6(1) of the Convention was contrary to the Polish Constitution, as the organisation and jurisdiction of domestic courts and the appointment of judges should be left to the competence of the State Party.

37. Successive decisions of the Committee of Ministers have recalled the clear unconditional obligation on Poland to comply with binding final judgments of the ECtHR in line with its obligation under Article 46(1) of the Convention,<sup>58</sup> and deplored the authorities' position that the European Court acted beyond its legal authority in adopting the *Xero Flor* judgment. The Committee of Ministers also recalled that to avoid similar violations of the right to a tribunal established by law, "the authorities should take rapid remedial action: (i) to ensure that the constitutional court is composed of lawfully elected judges, and should therefore allow the three judges elected in October 2015 to be admitted to the bench and serve until the end of their nine-year mandate, while also excluding from the bench judges who were irregularly elected; (ii) to address the status of decisions already adopted in cases concerning constitutional complaints with the participation of irregularly appointed judge(s); and (iii) to propose measures to prevent external undue influence on the appointment of judges in the future". In addition, in the *Reczkowicz* group the Committee of Ministers recalled that the main underlying problem leading to Article 6 violations was the appointment of judges upon a motion of the recomposed National Council of the Judiciary and urged the authorities to guarantee the right of the Polish judiciary to elect judicial members of the Council and to address the status of all judges appointed upon a motion of the recomposed National Council of the Judiciary and decisions issued with their participation. The Committee of Ministers also referred to the need to introduce an adequate framework for examining the legitimacy of judicial appointments and removing the risks of disciplinary liability for judges who implement the Article 6 requirements in this context.

38. The findings on unconstitutionality in the Polish Constitutional Court's judgments K6/21 and K7/21 challenge the competence of the ECtHR under Article 32 of the Convention. It is thus incumbent on Poland to interpret and, where necessary, amend its laws in such a way as to avoid any repetition of the violations found by the ECtHR in these cases. Unfortunately, this has not occurred to date, notwithstanding the exceptional procedure of an inquiry by the Secretary General of the Council of Europe having been launched under Article 52 of the Convention.<sup>59</sup>

39. This case is unusual, but also illustrative of the interaction between the national, EU and Convention levels due to the ensuing action at the EU level in relation to the concerns identified by the Convention relating to the Polish judicial reforms. For example, at the EU level, on 15 February 2023, the Commission had

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54. *Reczkowicz v. Poland*, judgment of 22 July 2021. The cases in this group include *Broda and Bojara v. Poland*, application No. 26691/18, judgment of 29 June 2021; *Reczkowicz v. Poland*, application No. 43447/19, judgment of 22 July 2021; *Dolińska-Ficek and Ozimek v. Poland*, applications Nos. 49868/19 and 57511/19, judgment of 8 November 2021 and *Advance Pharma Sp. z o.o.*, application No. 1469/20, judgment of 3 February 2022.

55. *Broda and Bojara v Poland*, judgment of 29 June 2021.

56. K6/21.

57. K7/21.

58. The most recent *Xero Flor* and *Reczkowicz* decisions were adopted at the CM-DH meeting in December 2022.

59. On 7 December 2021, the Secretary General initiated a Procedure in accordance with Article 52 of the Convention following the judgments of the Polish Constitutional Court in the case K6/21 and subsequently the case K7/21. The report concluding the procedure (*SG/Inf(2022)39*) was published on 9 November 2022. It concluded that as a result of the findings of unconstitutionality in judgment K6/21, the obligation of Poland under the European Convention on Human Rights to ensure the enjoyment of the right to a fair trial by an independent and impartial tribunal established by law to everyone under its jurisdiction had not been fulfilled. Action is required by Poland to comply with its international obligations, which include ensuring that its internal law is interpreted and, where necessary, amended in such a way as to avoid any repetition of the same violations.

referred Poland to the CJEU for violations of EU law by the Polish Constitutional Tribunal and its case law. The Commission had opened an infringement procedure against Poland on 22 December 2021. This followed the rulings of the Polish Constitutional Tribunal, where it had considered provisions of the EU Treaties incompatible with the Polish Constitution, expressly challenging the primacy of EU law. In addition, some of the measures aiming at fulfilling the milestones regarding the reform of the justice system as contained in the Council of the European Union's decision on the approval of the assessment of the recovery and resilience plan for Poland,<sup>60</sup> have been presented to the Committee of Ministers as measures to execute the judgments from the *Reczkowicz* group and further legislative amendments in this respect are under adoption. While it can be hoped and encouraged that these measures will also be useful towards executing the ECtHR judgments, the Committee of Ministers' position on the fundamental role of the reform of the National Council of the Judiciary to ensure that its judicial members are elected by their peers should be recalled.

40. Whilst there could be some hope for a solution of sorts, other factors might indicate a worsening of the situation. Cases in relation to the Polish judicial reform continue to be brought before the European Court of Human Rights, with interim measures being indicated in some cases. Recently the Polish Government has informed the ECtHR Court Registry that it will not comply with an interim measure under Rule 39 of the Rules of Court issued in the cases *Leszczyńska-Furtak v. Poland*, *Gregajtys v. Poland* and *Piekarska-Drażek v. Poland*.<sup>61</sup> These interim measures related to the transfer of judges from the Criminal Division to the Labour and Social Security Division of the Warsaw Court of Appeal, seemingly in response to these judges expressing their opinion in relation to the legality of appointment of other judges. The Polish authorities justified this refusal to comply with the interim measures of the ECtHR by referring to a statement of the President of the Warsaw Court of Appeal and the Constitutional Court's judgment of 10 March 2022 as questioning the authority of the ECtHR to intervene in cases concerning the judiciary.

#### 4.2. The United Kingdom

41. In the United Kingdom, the government has introduced legislation to replace the Human Rights Act with a Bill of Rights, "in order to restore a proper balance between the rights of individuals, personal responsibility and the wider public interest", while retaining the UK's commitment to the Convention. The plan is to "restore Parliament's role as the ultimate decision-maker on laws impacting the UK population", allowing more scope to decide how the UK interprets rulings from the European Court of Human Rights.<sup>62</sup> In particular, the UK Supreme Court will have "the final say on UK rights by making clear that they should not blindly follow the Strasbourg Court" and that they will be interpreted "in a UK context, with respect for the country's case law, traditions, and the intention of its elected law makers".<sup>63</sup> More recently the UK Government has introduced the 'Illegal Migration Bill' which also seems to envisage increased conflicts with the Convention and the ECtHR, and indeed includes a specific provision relating to the application of interim measures indicated by the ECtHR, as does the Bill of Rights Bill. These legislative reforms will be the subject of a report entitled "UK reform of its human rights legislation: consequences for domestic and European human rights protection".<sup>64</sup> Whilst the majority of these reforms are not so much a case of a conflict between courts, as a State adjusting its models of giving effect to the Convention domestically, the provisions seem likely to result in increased discord between the national courts and the ECtHR, and the provisions relating to compliance with interim measures could be cause for some concern.

42. Of particular note, the UK's human rights legislation contains an interesting example in relation to how a State's judiciary can have regard to the case law of the ECtHR. Section 2 of the UK's Human Rights Act does not require domestic courts to follow the case law of the ECtHR, however it does require UK Courts to "take into account" ECtHR case law that is relevant to the case before them. It is often remarked that it is this provision that has led to UK cases being resolved effectively at the national level, with the correct application of ECtHR reasoning being applied. This is considered in turn to have contributed to the UK having the lowest number of ECtHR applications (and indeed admissible applications), *per capita*, of Council of Europe member States for the last few years. Effectively, requiring domestic courts to have regard to the case law of the ECtHR means that matters are resolved effectively at the domestic level. The UK judges thus apply the same case law and reasoning as the ECtHR judges, therefore this has also led to improved judicial dialogue between the UK Courts and the ECtHR as it is easier for the ECtHR to be satisfied that the correct procedural analysis is followed domestically, thus helping in any margin of appreciation analysis. The recent Bill of Rights

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60. COM(2022)268final.

61. [Press release](#) from the ECtHR.

62. [Plan to reform Human Rights Act – GOV.UK \(www.gov.uk\)](#).

63. *Idem*.

64. UK reform of its human rights legislation: consequences for domestic and European human rights protection, [Introductory Memorandum](#).

proposals suggest significantly reducing the strength of this provision thus diminishing the advantages of this helpful approach. Irrespective of UK legislative developments, it should be noted that the approach of explicitly requiring the courts to have appropriate regard to ECtHR case law is a useful way of improving both judicial dialogue and the domestic application of the Convention, and preventing conflicts.

## **5. Information received in the course of the work on this report**

### ***5.1. Results from the questionnaire circulated to national parliaments***

43. The results of the questionnaire are summarised in the Appendix. As can be seen, there are a variety of different ways that States' constitutions interrelate with the Convention in terms of the hierarchy of norms and the extent to which the Convention is or is not given an explicit place within the constitution. There is not always clear case law on the topic. In relation to EU law, the solution often seems to be to try to find complementary readings of EU law, national law and the Convention.

### ***5.2. Hearings***

44. At the hearing of the Committee on Legal Affairs and Human Rights, on 5 September 2022, Professor Keller noted the necessary tension between the ECtHR and Contracting States in respecting State sovereignty whilst also ensuring respect by States of their Convention obligations. She noted that conflicts were natural and presented valuable opportunities for reflection to be addressed through constructive dialogue (for example prisoner voting rights in the UK). However, sometimes there was more principled and malicious resistance (such as the approach of the Russian Constitutional Court). She recalled that the Convention is a "co-operative system", using a variety of instruments to engage in a constructive dialogue with domestic courts. The ECtHR supported the primary role of domestic courts in securing Convention rights as part of the "responsible courts doctrine", and would apply a less strict standard of review provided domestic courts took the ECtHR's jurisprudence into account and the issue concerned settled case law.

45. In relation to the idea of having a mixed Grand Chamber for difficult constitutional cases, Professor Keller considered that a mixed Grand Chamber would weaken the Convention system and had no advantages compared to the present system, noting, (1) a mixed Grand Chamber was incompatible with the Convention – the ECtHR was by its nature an international court; (2) the involvement of domestic judges in the ECtHR's decision making would give rise to a perception of bias and would potentially undermine the legitimacy and credibility of the Court; (3) a hybrid court is completely unknown in the context of international protection of human rights; (4) a mixed Grand Chamber would undermine and reduce the legitimacy of the ECtHR's jurisprudence since it could be seen as the reflection of the unilateral will of one State, rather than an independent ECtHR; and (5) if the constitutional court's judges had already considered the issue when exhausting domestic remedies, they should not then also be involved in the same case – equally if its judges do not regularly consider human rights matters then they would lack the necessary expertise. She noted that as long as there were problems within a national judiciary, it was very dangerous to introduce them on a European level.

46. In relation to EU accession to the Convention, Professor Keller considered that it posed real challenges for the CJEU and the ECtHR, particularly in light of EU conditionality and issues around compatibility with the Convention system. The approach of the ECtHR was to focus on margin of appreciation and judicial dialogue. In this respect she considered it to be unhelpful to try to impose a hierarchy between the different international legal systems; international law was necessarily multi-layered. As such, it would be important to facilitate judicial dialogue between national courts, the ECtHR and the CJEU to resolve any potential future challenges.

47. Ms Granata-Menghini recalled that in difficult cases, it was important to distinguish between legal impossibility and non-desirability. She noted that at least 12 countries had changed their constitutions following judgments of the ECtHR. Whilst there was a margin of appreciation for States in implementing Court judgments, the composition of constitutional courts did have consequences that needed to be addressed (for example Poland). The issue was often one of political will on the part of domestic courts and authorities in resolving a given challenge. She recalled that the Venice Commission played a role and could help where there was a lack of knowledge by constitutional courts.

48. At the hearing of the Committee on Legal Affairs and Human Rights, on 12 October 2022, Professor Weiler explained the specificities of the EU legal system, given the rather extreme form of supremacy of EU law within the EU legal system, which meant that even the most minor or technical rules of EU law were considered by the CJEU to have priority over national constitutions. However, he noted that there had been recent "rebellions" against this from the highest national courts, such as those of Denmark, Hungary, Poland,

Czech Republic, France and Italy. These courts had effectively said that in certain circumstances they could not accept the supremacy of EU law and therefore allowed themselves the possibility of rejecting the supremacy of the CJEU. He attributed this change in attitude to the growth of the EU, implying greater diversity and divergencies in social, political and cultural sensibilities amongst its member States. He also considered that the supremacy of EU law only applies where the EU measure in question was *intra vires*, and noted that there could be differing views between EU and national-level bodies as to where that balance of competence was to be struck, with the EU institutions including the CJEU tending to favour increasing EU powers. The national constitutional courts argued that due to the principle of delegated powers, it was for national constitutional courts to decide if the State delegated that power to the EU in the first place (rather than the EU having the power to decide whether the power was delegated to it). He thought it was important to recognise that the EU was a pluralistic order different to the homogeneity of the six States back in the 1960s when many of the EU principles were devised. As such, a sensitive approach to member States' constitutional orders was needed.

49. However, conflicts could be resolved smoothly at times. For example, in the Italian case *Taricco*, the Italian Constitutional Court considered that the EU instrument went against fundamental principles, and that Italy could not have conferred powers to offend fundamental principles. It therefore asked the CJEU to rethink its position, which it did. Whilst within the EU context a single jurisdiction helped with the principle of equality before the law and uniform application of the law, one could not always avoid the objections of national constitutional courts. To help deal with such challenges, Professor Weiler had suggested the possibility of creating a mixed chamber of the CJEU to deal with issues of *intra/ultra vires*. Its decisions would be binding, and it would contain a selection of national judges. He hoped that this would substantially reduce the instances and risks of clashes between the EU/CJEU and national constitutions/national constitutional courts. The presence of national constitutional court judges would also help to improve awareness of national constitutional sensibilities.

50. As an idea for the Convention context, Professor Weiler suggested that, if the Grand Chamber knew it needed to deliberate on a decision relating to a delicate constitutional matter, then it could have an *in camera* hearing involving the ECtHR and a selection of national constitutional court judges. This could include a judge from the member State concerned (but not only that State). The matter to be discussed could be whether the issue fell within the margin of appreciation accorded to member States under the Convention. There should be no decision-making power for such hearing; it would be more of a conversation to help inform the Convention about the issue, using the wisdom of the constitutional court judges from a diverse number of States. Even if the ECtHR judges did not change their mind following such a discussion, it would at least help to improve the quality of their reasoning, making it more convincing in the eventual judgment.

51. In relation to EU accession to the Convention, Professor Weiler considered that there should be no difference between the CJEU and the German or Latvian constitutional courts, as compared to the ECtHR. The ECtHR should not treat the CJEU any differently to any other constitutional court of a member State.

## 6. Conclusions

52. As stressed by the Venice Commission, in the multi-layered legal order that exists in Europe today, tensions between various layers of the European legal order are unavoidable.<sup>65</sup> The Convention, as interpreted by the ECtHR, often requires States Parties to amend their legislation, sometimes including their constitution or constitutional laws in order to respect their Convention obligations. Such requirements can seem to go to the heart of sovereignty and States can therefore find such changes difficult to deliver at times. However, it is crucially important to overcome any reluctance in order to safeguard the implementation of the Convention as a living and binding instrument. Given the legal and political imperative to overcome such resistance and challenges, additional mechanisms could be envisaged, so as to alleviate tensions between the case law of the Court and national laws. Judicial dialogue is one obvious example where improvements can help to overcome difficulties.

53. An example of a more innovative mechanism is the recent proposal to establish a mixed chamber of the CJEU with national judges,<sup>66</sup> in cases where there is a question as to whether EU legislation is *intra vires*, and in the context of perceived clashes between national constitutions and EU law.<sup>67</sup> In this proposal the mixed chamber would only rule on the distribution of competences between the EU and its member States

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65. CDL-AD(2016)016, *op. cit.*, para. 105.

66. D. Sarmiento, J.H.H. Weiler, "The EU Judiciary After Weiss: Proposing A New Mixed Chamber of the Court of Justice", *VerfBlog*, 2 June 2020, <https://verfassungsblog.de/the-eu-judiciary-after-weiss/>.

and it should have jurisdiction to declare null and void an EU act – reversing a prior decision of the CJEU validating such an act – that entails a serious breach of the principle of conferral. Such creative ideas can assist in finding solutions to complex problems in an increasingly interconnected legal space.

54. I encourage further creative thinking as to options to help to progress mutual understanding and mutual respect between the different legal orders and different courts. However, continuing violations of Article 46(1) of the Convention should not be tolerated. Moreover, thought could perhaps be given to how to better develop the mechanisms set out in Article 46(4) or (5). After such an Article 46(4) judgment, the concerned State Party might then have a choice between amending its constitution or facing the consequences of its reticence, eventually through suspension of its participation in the Council of Europe's bodies.<sup>68</sup>

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67. See, for instance, the decision of the French Conseil Constitutionnel Decision No. 2006-540 DC of 27 July 2006. See the remarks of its president to the president of the Republic on the occasion of the New Year 2005 (Cahiers du Conseil constitutionnel No. 18, July 2005): “no matter how far primacy may go, European law cannot put into question what is explicitly inscribed in our constitutional texts and everything that is inherent in our constitutional identity in the double meaning of the word ‘inherent’, namely crucial and distinguishing. In other words: the crux of the Republic”.

68. According to the Venice Commission, “[i]f the Constitution has provisions contrary to the treaty ... – it is the duty of all State bodies to find appropriate solutions for reconciling those provisions of the treaty with the Constitution (for instance through interpretation or even the modification of the Constitution), otherwise the international responsibility of the State will be engaged, with all consequences deriving from it, including countermeasures and/or sanctions.” CDL-AD (2016)016, *op. cit.*, para. 87.

## Appendix

### A. Introduction

Parliaments of 34 Council of Europe member States answered the questionnaire sent through the European Centre for Parliamentary Research and Documentation (ECPRD), providing details about national legal provisions and judicial practice. The following countries have responded to the questionnaire: Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Cyprus, Croatia, Czech Republic, Estonia, Finland, France, Georgia, Germany, Hungary, Iceland, Ireland, Latvia, Lithuania, Luxembourg, Montenegro, the Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, San Marino, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Türkiye and the United Kingdom.

References below to member States refer to those who responded to the questionnaire.

### B. Summary of the replies provided in response to the questionnaire

#### 1. According to the national Constitution, which is the hierarchical position of the European Convention of Human Rights in relation to the Constitution?

Member States' responses to this question differed depending on their legal tradition. Through the answers, it can be seen that it is a lot more complex than a simple difference between monist and dualist countries (namely countries that consider international treaties as part of the domestic legal system and those that require particular steps to be taken for an international treaty to be incorporated into domestic law).

##### *Convention > Constitution*

**Türkiye** seemed to be the rare example where international obligations duly put into effect would prevail over the Constitution and where there was no possibility for the Constitutional Court to control international agreements on the grounds that they are unconstitutional.<sup>69</sup>

**Switzerland** is a unique case as the Constitution states that judicial bodies must apply federal acts and international law.<sup>70</sup> The response highlighted that international law must be applied even if unconstitutional. In addition, considering that the Constitution provides that its potential partial revision shall not violate international law<sup>71</sup> and that federal acts and international law are authoritative for judicial bodies, the Swiss hierarchy of norms could even be described with the Convention and domestic laws equal to each other and above the Constitution. However, there is no established practice as to how the courts would resolve any such conflict of norms.

##### *Convention = Constitution*

In some responding countries, such as **Austria**, as per Article II of the Amendment to the Federal Constitutional Law, and **Slovenia**, as per Article 15, paragraph 5, of the Constitution, the Convention holds constitutional status.<sup>72</sup>

The Constitution of **Latvia** does not explicitly outline a hierarchy of norms in relation to specific international obligations. However, by interpreting its Article 89, the Constitutional Court has clarified that international human rights norms and the Constitution are to be treated as being in harmony, suggesting a possibly equal status between the two. A similar situation can be observed in the **Czech Republic**, where settled case law established that the Convention, as an international treaty on human rights and fundamental freedoms, is part of the constitutional order and has a special status.<sup>73</sup>

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69. Article 90, para. 5, Turkish Constitution.

70. Article 190, Federal Constitution of Switzerland.

71. Article 194(2), Federal Constitution of Switzerland.

72. The text states that "No human right or fundamental freedom regulated by legal acts in force in Slovenia may be restricted on the grounds that this Constitution does not recognise that right or freedom or recognises it to a lesser extent." The Convention is not mentioned explicitly, but is included in this article.

73. Interpreting Article 1(2) of the Constitution.

In **Montenegro**, the only hierarchy of norms explicitly stated in the Constitution clarifies that international law is above domestic legislation. Nonetheless, Article 17 states that “rights and freedoms shall be exercised on the basis of the Constitution and confirmed international agreements”, providing room to argue that the Constitution is higher than but may also be equal to the Convention. This argument can be supported as similar language is employed in several other provisions of the Constitution.<sup>74</sup>

#### *Constitution > Convention*

The vast majority of responding countries consider their Constitution the most supreme source of law. Within this category, the Convention may either have a status greater than domestic legislation or equal to it.

In **Cyprus**, ordinary laws must respect international agreements (subject to the principle of reciprocity, which does not apply in respect of Convention obligations). Moreover, there is an argument that the Convention is gaining supra-constitutional significance, as, per Article 1 A, the Cypriot Constitution cannot contradict laws enacted on the basis of EU obligations. By this logic, as fundamental rights protected by the Convention constitute general principles of the EU,<sup>75</sup> the Convention is gaining an enhanced status.

**Romania**, in its response, noted “the supremacy of the Romanian Constitution in relation to international law” as a principle deriving from the constitutional norms. However, it recalled that the interpretation and application of the Constitutional provisions concerning rights and freedoms should be carried out in accordance with international human rights treaties binding on Romania. Moreover, as per Article 20 of the Constitution, where any inconsistencies exist between the covenants and treaties on fundamental human rights that Romania is a party to (which include the Convention), and national laws, the international laws shall take precedence unless the Constitution or national laws comprise more favourable provisions.

**Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, France, Georgia, Portugal, San Marino** and the **Slovak Republic** explicitly set out in their Constitutions that international law or international human rights law (of which the Convention is part), are above domestic law. However such status does not necessarily imply that ordinary laws can be annulled in case of incompatibility with the Convention (e.g. **France** whose Conseil constitutionnel refuses to examine whether a French law complies with international obligations such as the Convention).<sup>76</sup> In **Finland**, and **Norway** the status of international law with respect to domestic legislation is not explicitly mentioned in the Constitution. Yet, case law and/or other legal instruments allow for the argument that the Convention, as a human rights instrument, precedes domestic law. In **Sweden**, the Constitution explicitly provides that no ordinary laws may be adopted that contravene the Convention,<sup>77</sup> thus leading some to argue that the Convention has an intermediary position between the Constitution and ordinary law.

Several other States such as **Iceland, Ireland, Lithuania, Montenegro**, and **Spain** explicitly provide in their Constitutions that international obligations have the same status as domestic law, usually where they have been incorporated in the national legal system through the passing of an act.

In **Germany**, the Convention has the same status as an ordinary federal statute. However, the German Basic Law also provides that general principles of international law have primacy over ordinary federal statutes,<sup>78</sup> and many rights enshrined in the Convention are general principles of international law and to that extent have primacy over ordinary federal statutes. This status is, however, dependent on the individual right in question.

In **Poland**, “the Constitution shall be the supreme law of the Republic of Poland”<sup>79</sup> with the caveat that “the Republic of Poland shall respect international law binding upon it”.<sup>80</sup> Moreover, the Convention takes precedence over domestic statutes if the two cannot be reconciled.<sup>81</sup> The Polish response noted that “the Polish Constitution has a similar system of fundamental rights protection to that contained in the Convention and ... the constitutional provisions should be construed in harmony with international treaties”.

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74. Articles 81, 118, 145, 149.

75. Treaty on the European Union, art. 6(3); European Union Charter of Fundamental Rights, Article 53.

76. Conseil constitutionnel, decision No. 74-54 DC, 15 January 1975.

77. Instrument of Government, Article 19.

78. Basic Law for the Federal Republic of Germany, Article 25.

79. Polish Constitution, Article 8, para. 1.

80. Polish Constitution, Article 9.

81. Polish Constitution, Article 91, para. 2.

Further, as the **United Kingdom** does not have a codified Constitution, it does not express a formal hierarchy of norms. Nonetheless, as the Convention rights have been incorporated into national law through the Human Rights Act, they are equal to domestic primary legislation. A similar approach is taken in **Hungary** which requires international human rights treaties to be promulgated in an Act of Parliament in order to have the force of law domestically, however the Constitutional Court considers that, in case of conflict with ordinary laws, the laws giving effect to an international treaty must prevail.

Finally, it is worth mentioning that human rights obligations, including those flowing from the Convention, were used as an interpretative tool in many countries to ensure that the requirements of the Constitution itself were, to the extent possible, interpreted in a manner that was compatible with human rights obligations binding on the State (for example **Estonia, Norway, Slovak Republic, Spain, Sweden**) – see question 3 below for further detail.

## **2. In the Constitution, is there any specific reference to the Convention and to the norms of international law related to human rights protection?**

The majority answered that although their Constitutions do not specifically refer to the Convention, they do refer to international law and human rights. Some responding countries, such as **Austria, Bosnia and Herzegovina, Cyprus, San Marino, Sweden** and **Türkiye** mention the Convention explicitly in their Constitutions. Others (such as **Croatia, Finland, Norway, Portugal**, and the **Slovak Republic**) mention international human rights law or fundamental freedoms.

Many responding countries, such as **Albania, the Czech Republic, France, Georgia, Germany, Hungary, Latvia, North Macedonia, Romania, and Switzerland** simply refer to international law, treaties or agreements in their Constitutions, viewing the Convention as part of their international obligations.

Some Constitutions that do not mention the Convention are nonetheless modelled after it, sometimes presenting text that is substantially almost identical to the rights contained in the Convention (**Bulgaria, Croatia, Estonia, Romania, and Slovenia**) or at least including a number of the rights contained in the Convention (for example **Belgium, Hungary, Norway, Sweden**). In **Ireland**, whilst the majority of rights are protected in the Constitution, the Convention is additionally incorporated into Irish law through a separate Act, which is an ordinary law whose rights fall to be considered after consideration of any constitutional claims.

More unique language is found in the Constitution of **Poland**, with the Preamble referring to “universal human values”.

## **3. Is there any case law on the relationship between the Constitution and the Convention, in case of conflict of norms?**

Many responding countries pointed to decisions on the relationship between the Constitution and Convention, which in the majority of cases clarify the Constitutional provisions that set out the hierarchy of norms. Many countries similarly highlighted that the relationship between constitutional provisions and the Convention was often considered when interpreting provisions guaranteeing human rights within the constitution, rather than matters relating to a conflict as such (for example **Ireland**).

In **Bosnia and Herzegovina** and **France**<sup>82</sup> courts apply and support Constitutional supremacy. In **Poland**, the Constitutional Court, in a case relating to whether or not the Constitutional Court is a “tribunal” for the purposes of the right to a fair trial protected under Article 6 of the Convention, recently upheld the supremacy of the Polish Constitution over the Convention, and declared that Article 6 of the Convention was unconstitutional to the extent that it allows the international or national courts to assess the compliance of legal acts relating to the judiciary, the jurisdiction of the courts or the procedure of electing members of the National Council of the Judiciary”.<sup>83</sup>

In **Spain**, case law<sup>84</sup> has clarified that internationally proclaimed rights constitute a “canon of decisive relevance”<sup>85</sup> when interpreting the Constitution and therefore that the Convention is an “obligatory criterion”<sup>86</sup> for the interpretation of certain rights contained in the Constitution. Hence, contrary to what is provided in the Constitutional provisions, the Convention can inform the Constitution. Similarly, courts in **Portugal** and

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82. [Conseil d'État, Assemblée, 30 October 1998, Sarran et Levacher.](#)

83. [Polish Constitutional Court, judgment of 24 November 2021, No. K6/21; judgment of 10 March 2022, No. K7/21.](#)

84. [Spanish Constitutional Court Judgement \(STC\) 36/1991.](#)

85. [STC 22/1981.](#)

86. [STC 97/1999.](#)

**Cyprus** support the interpretation of the Constitution in light of the Convention, with the Constitutional Court of Cyprus stating that protecting human rights entails constitutional as well as international obligations.<sup>87</sup> In **Croatia**, the Constitutional Court has taken the position that any incompatibility with the Convention is an incompatibility with the rule of law, the rights protected under the Convention, and the principles of constitutionality and legality protected under the Convention – as such the norms are not seen as being in conflict.<sup>88</sup> Additionally, in **Lithuania** and **Estonia**, courts considered that the Constitution or domestic law cannot be invoked to prohibit human rights developments, including as prescribed by the Convention<sup>89</sup> and that new rights may derive from international law, including the Convention,<sup>90</sup> respectively.

Conversely, in **Germany**, the Federal Constitutional Court set limits on its interpretation of the Constitution in line with the Convention by stating that its domestic laws should only be interpreted in line with the Convention within the limits of constitutionally-recognised methods of interpretation and “where the Basic Law is interpreted in a manner open to the Convention, the case law of the European Court of Human Rights must be integrated as carefully as possible”.<sup>91</sup> In **Belgium**, the stance on the hierarchy of norms differs as between the Court of Cassation and the Constitutional Court. The case law of the Cour de Cassation makes clear that international treaty provisions that have direct effect take precedence of national law, and even over the Constitution.<sup>92</sup> However, the Constitutional Court’s case law seems more premised on the Constitution being superior to international law, and has stated that the legislator or institutions may not have a “carte blanche” in acceding to international treaties that would be contrary to the Constitution. The Constitutional Court has, however, developed case law on the concordance between the rights and freedoms in the Constitution and those in the Convention such that conflicts do not arise in this area in reality.

When faced with a conflict of norms, **Austrian** courts will apply the right which is most favourable to the applicant. When this leads to a loss of the respondent’s rights, the courts will try to find a harmonising interpretation or merge together different aspects of the fundamental rights.<sup>93</sup>

#### 4. In case your country is a member of the European Union, is there any case law regarding the relationship between the European Union law and the Convention?

Twenty-two of the responding countries are Member States of the EU. Of those, eleven were able to provide information on this relationship, for many of the others there did not seem to be any case law clarifying the relationship between EU law and the Convention (for example **Poland**).

In some countries, such as **Cyprus**<sup>94</sup> and **Finland**, EU law and the Convention are considered to complement each other in human rights issues. Indeed many of the responses focussed on the extent to which the EU Charter of Fundamental Rights was inspired by and needed to be interpreted in light of the Convention rights and related ECtHR case law.

In **Hungary**, although EU law is mentioned in the Constitution but Convention is not explicitly, Hungarian courts have found that “the protection of fundamental rights is the first obligation of the State” and that as a consequence following EU law could not be used as a pretext for breaching of Convention rights, thus suggesting that in case of conflict between EU law and the Convention, respect for human rights protected under the Convention would prevail.<sup>95</sup>

In **Romania**, in areas where exclusive competence belongs to the EU, regardless of the international treaties it has concluded, the implementation of international obligations should be subject to EU rules only.<sup>96</sup>

87. Constitutional Court of Cyprus, *Dracos et al v. Public Service Commission* (1991) 1 AAD 696.

88. Croatian Constitutional Court, Decision No. U-I-745/1999 of 8 November 2000 (Official Gazette 122/00).

89. “Conclusion of the Constitutional Court of the Republic of Lithuania on the compliance of Articles 4, 5, 9, 14 of the European Convention on Human Rights with the Constitution of the Republic of Lithuania”, <https://lrkt.lt/lt/teismo-aktai/paieska/135/ta422/content>.

90. Constitutional Court of Estonia, RKPSJK, 3-4-1-1-04, 25 March 2004, p 18; RKKK, 3-1-1-21-06, 5 May 2006.

91. German Federal Constitutional Court, Judgment of 12 June 2018 – 2 BvR 1738/12; judgement of 4 May 2011 – 2 BvR 2365/09.

92. *Etat Belge v. S.A. “Fromagerie Franco-Suisse Le Ski”*, Belgian Court of Cassation, 27 May 1971 in relation to the primacy of provisions of international law having direct effect over national law. This principle was extended in 2004 to international obligations equally having precedence over the Constitution.

93. Eg. VfSlg. 19.349/2011; 19.813//2013; VfSlg. 19.994/2015; 20.117/2016; 20.261/2018.

94. *Hadwen v. Republic*, Supreme Court judgment of 17 July 2014, ECLI:CY:AD:2014:A537.

95. Hungarian Constitutional Court decision No. 22/2016. (XII. 5.).

96. Constitutional Court of Romania, decision No. 683/2012; decision No. 64/2015.

In **Sweden**, the Constitution makes clear that EU membership cannot lead to undermining the protection for rights and freedoms under the Convention, although this provision has not, to date, been applied by the Swedish courts.<sup>97</sup> The Swedish Courts have however considered that the precedence of EU law and CJEU interpretations of the law could be limited “only if the application in the specific case would otherwise constitute a serious and unambiguous violation of the Convention”.<sup>98</sup> In **Ireland**, the Supreme Court had made efforts to read the European Arrest Warrant Act 2003 as requiring that a surrender would need to be compatible with Convention obligations in order to be enforced.<sup>99</sup>

In **Norway**, the Supreme Court, and then the ECtHR have considered how best to weigh the Convention freedom of association under Article 11 of the Convention and the freedom of establishment under EU law. The Norwegian Supreme Court ruled that boycott (protected under Article 11 of the Convention) must, amongst other things, be reconciled with the rights that flow from the EEA (European Economic Area) Agreement.<sup>100</sup> The ECtHR in its judgment clarified that from the perspective of Article 11 of the Convention, EEA freedom of establishment is not a counterbalance to the fundamental rights, such as freedom of association, but rather it is one element... to be taken into consideration in the assessment of proportionality under Article 11.<sup>101</sup>

The **United Kingdom** noted that (at least before Brexit) remedies in case of an incompatibility of primary law with EU law were stronger (legislation could be struck-down) than in the case of an incompatibility with the Convention, where the courts may only make a declaration of incompatibility.

In **Germany**, when dealing with human rights issues arising out of the interpretation of the Charter of Fundamental Rights of the EU, the Convention as well as its court’s decisions must be taken into account. Indeed the Order of the Federal Constitutional Court clearly sets out the interplay and mutually supportive roles of the different instances dealing with rights protection: “Within the framework of the multi-level co-operation (...) the Federal Constitutional Court ensures the protection of fundamental rights in co-operation with the Court of Justice of the European Union, the European Court of Human Rights and the constitutional and supreme courts of the other member States”.<sup>102</sup>

## **5. Do the courts, and especially the Supreme or the Constitutional Courts, refer to the Convention, when adjudicating human rights issues?**

Almost all responding countries answered that their courts refer to the Convention when adjudicating on human rights issues (**Albania, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, France, Georgia, Germany, Iceland, Ireland, Latvia, Lithuania, the Netherlands, Norway, Poland, Portugal, San Marino, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Türkiye, the United Kingdom**). Nevertheless, the degree to which the Convention and/or the European Court of Human Rights’ decisions are persuasive authority differs.

In **Luxembourg** and the **Slovak Republic**, courts tend to refer to the Convention and ECtHR judgments only when legal arguments on the application of European Convention rights were brought by the parties.

In **Georgia**, courts are required to refer to the Convention and jurisprudence of the European Court of Human Rights by the Civil and Criminal Procedure Codes.

In the **United Kingdom**, section 2 of the Human Rights Act 1998 stipulates that courts must take into account the European Court’s decisions when interpreting Convention rights and section 3 requires the courts to interpret legislation in a way which is compatible with Convention rights.<sup>103</sup>

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97. Chapter 10, Article 5 of the Instrument of Government.

98. Swedish Supreme Court, NJA 2914, p. 79.

99. *Minister for Justice and Equality v. Vestartas* [2020] IESC 12.

100. *Holship Norge AS v. Norwegian Transport Workers’ Union*, The Supreme Court, HR-2016-2554-P, (case No. 2014/2089).

101. *Norwegian Confederation of Trade Unions (LO) and Norwegian transport Workers’ Union (NFT) v. Norway* [2021] (application No. 45487/17).

102. Federal Constitutional Court, Order of 1 December 2020, 2 BvR 1845/18.

103. If provisions equivalent to those in the recent Bill of Rights Bill were to become law, the strong link between the Convention and ECtHR jurisprudence and its application by domestic courts would change and would likely weaken – however, a lot will depend on how the domestic courts interpret any future interpretative provisions in any revised Human Rights Act or Bill of Rights.

In **Iceland**, references are made to the Convention in cases, but according to Article 2 of the Act on the European Convention on Human Rights, Iceland is not bound by decisions of the institutions of the Council of Europe, including ECtHR rulings.<sup>104</sup>

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104. Article 2, Act on the European Convention of Human Rights No. 62/1994.