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'Principled Resistance' to ECtHR Judgments: Dogmatic Framework and Conceptual Meaning

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I. Introduction

The legitimacy of international courts has most recently come under significant pressure.[1] This translates, e.g., in Burundi having been the first State to withdraw, with effect of 27 October 2017, from the jurisdiction of the ICC.[2] Shortly before that date, the South African Government had attempted to do likewise but had been stopped by a national court decision, relying on separation of powers arguments, i.e. on reasons of a constitutional law nature.[3] The fact that a national court's reliance on the constitution is supportive of international adjudication, however, nowadays appears to be the exception rather than the rule. Even the ICJ, being the principal judicial organ of the United Nations (Article 92 UN Charter), has seen a number of cases where national supreme or constitutional courts relied on the national constitution in order to defy a pronouncement of that Court.[4] The same holds true for the regional context: The CJEU is currently confronted with 'national identity' arguments in order to prevent application of EU law, major proponents being the German Federal Constitutional Court[5] and, most recently, the Italian Constitutional Court.[6] With regard to the European Convention on Human Rights ('the Convention'), the Russian Constitutional Court is famous for having effectively blocked execution of two ECtHR judgments finding a violation of Convention law.[7]

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[1] See, to name just a few, A von Bogdandy/I Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (2014); N Hayashi/CM Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (2017); N Grossman et al (eds), *Legitimacy and International Courts* (2018); see also KJ Alter/LR Helfer/MR Madsen (eds), *International Court Authority* (2018). From a human rights perspective, see e.g. A Føllesdal/JK Schaffer/G Ulfstein (eds), *The Legitimacy of International Human Rights Regimes. Legal, Political and Philosophical Perspectives* (2013); B Calı/A Koch/N Bruch, 'The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights' (2013) *35 Human Rights Quarterly* 955–984.

[2] Withdrawal depository notification C.N.805.2016.TREATIES-XVIII.10; see M Ssenyonjo, 'State withdrawal notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and The Gambia' (2018) 29 *Criminal Law Forum* 63–119; see also 'Burundi becomes first nation to leave international criminal court', The Guardian of 28 October 2017, online available at <https://www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court>.

[3] North Gauteng High Court, *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* (83145/2016) [2017] ZAGPPHC 53, 22 February 2017; see M du Plessis/G Mettraux, 'South Africa's Failed Withdrawal from the Rome Statute' (2017) 15 *Journal of International Criminal Justice* 361–370.

[4] US Supreme Court, *Sanchez-Llamas v Oregon*, 548 US 331 (2006); *Medellín v Texas*, 552 US 491(2008); Italian Constitutional Court, Judgment No 238/2014.

[5] Federal Constitutional Court, Judgment of 30 June 2009, Nos 2 BvE 2/08 et al, BVerfGE 123, 267; Order of 15 December 2015, No 2 BvR 2735/14, BVerfGE 140, 317.

[6] Italian Constitutional Court, Order No 24/2017 of 23 November 2016.

[7] Russian Constitutional Court, Judgment No 12-П/2016 of 19 April 2016; Judgment No 1-П/2017 of 19 January 2017.

This begs the question whether such an accumulation of international law-averted national court decisions is just a coincidence or whether it forms part of a broader trend, which, though only tentatively and for lack of a well-established terminology, is called ‘principled resistance’ here. Before framing the contours of the ‘principled resistance’ concept (III.), the dogmatic international law framework that allows such developments to take place will be explained (II.). Given the general nature of the topic, this will mean that not only (not even primarily) ECtHR cases are dealt with but cases of other international courts, such as the ICJ. Still, it is necessary to deal with those cases in order to make clear the dogmatic arguments employed by national courts when deviating from international court judgments. Finally, the chapter concludes with a description of the analytical setting, giving reasons for the selection of countries scrutinised (IV.).

II. The International Law Framework of ‘Principled Resistance’

1. The Principle of Supremacy of International Law

As a starting point, we must have recourse to the principle of supremacy of international law, which Sir Gerald Fitzmaurice so aptly characterised as ‘one of the great principles of international law’.[8] It ensures that States cannot escape international obligations they have entered into by reliance on obstacles coming from their respective internal legal sphere. If it were otherwise, i.e. if States were allowed to justify non-implementation of an international obligation by reliance on reasons of national law, they could unilaterally withdraw from their international engagements. It is submitted that this would be the end of international law *as an order of law*.

a. Treaty Law

The supremacy principle is deeply embedded in several branches of international law. With regard to treaty law, it is nowadays enshrined in Article 27 VCLT,[9] stipulating that: ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’. At the same time, this very rule is regarded a deeply-rooted norm of customary international law. One of the earliest expressions can be found in the *Alabama Arbitration Award*, holding that concerning the obligations flowing from the Treaty of Washington,[10] ‘the government of Her Britannic

[8] G Fitzmaurice, ‘The general principles of international law considered from the standpoint of the rule of law’ (1957 II) 92 *Recueil des Cours* 1-227, at 85.

[9] Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331.

[10] Treaty between Great Britain and the United States for the Amicable Settlement of all Causes of Difference between the Two Countries of 8 May 1871, in C Parry (ed), *Consolidated Treaty Series* vol 143 (1977), p 145.

Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed'.[11] In the case law of the PCIJ, the principle served as 'one of the corner stones of its jurisprudence'.[12] In the *SS Wimbledon* case, that Court held that a 'neutrality order, issued by an individual State, could not prevail over the provisions of the Peace Treaty'.[13] Most explicitly, the PCIJ held in the *Greco-Bulgarian 'Communities'* case that 'it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty'.[14] The supremacy principle was equally endorsed in the jurisprudence of the ICJ.[15]

Apart from the jurisprudence of international courts and arbitral tribunals, the principle of supremacy of international law vis-à-vis municipal law is equally well-reflected in State practice. This transpires from a number of reactions to reservations made upon treaty ratification. Most notably, Guatemala upon ratification of the Vienna Convention on the Law of Treaties itself declared: 'A reservation is hereby formulated with respect to article 27 of the Convention, to the effect that the article is understood to refer to the provisions of the secondary legislation of Guatemala and not to those of its Political Constitution, which take precedence over any law or treaty'. This reservation was objected to by a number of governments as being incompatible with the Convention's object and purpose.[16] Costa Rica made a similar reservation, which equally met with the disapproval of several States. A reservation made by the United States when ratifying the Convention on the Prevention and Punishment of the Crime of Genocide[17] ('nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States') was objected to by a number of governments, for the reason that 'as a generally accepted rule of international law a party to an international agreement may not, by invoking

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[11] *Alabama Claims Arbitration (United States of America v Great Britain)*, Award of 14 September 1872, 29 *Reports of International Arbitral Awards* 125–134, at 131; see T Bingham, 'Alabama Arbitration' in *Max Planck Encyclopedia of Public International Law* (October 2006).

[12] G Schwarzenberger, *International Law*, vol I (3rd edn 1957), p 69.

[13] *Case of the SS 'Wimbledon' (United Kingdom and Others v Germany)*, Judgment, PCIJ Series A No 1 (1923), p 29.

[14] *The Greco-Bulgarian 'Communities'*, Advisory Opinion, PCIJ Series B No 17 (1930), p 32.

[15] Most explicit reference in: *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, ICJ Reports 1988, p 12, para 57; see generally P Tomka/J Howley/V-J Proulx 'International and Municipal Law before the World Court: One or Two Legal Orders?' (2015) 35 *Polish Yearbook of International Law* 11–45, at 17–18, with further references.

[16] See A Arena, 'The Twin Doctrines of Primacy and Pre-emption' in R Schütze/T Tridimas (eds), *Oxford Principles of European Union Law, vol I: The European Union Legal Order* (2018), pp 300–349, at 314.

[17] 78 UNTS 277.

the terms of its internal law, purport to override the provisions of the Agreement'.[18] Pakistan's reservation made with regard to both the International Covenant on Civil and Political Rights[19] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[20] which made the application of several articles contingent on them being 'not repugnant to the Provisions of the Constitution of Pakistan and the Sharia laws' was widely disapproved and later withdrawn by the Pakistani Government.[21] Suffice it to demonstrate the wide acceptance that the supremacy principle has found in State practice.

Under municipal law, the constitution normally enjoys an elevated rank with regard to ordinary legislation. This leads to the question whether in case of a conflict between an international treaty and the national constitution, special considerations concerning supremacy apply. The above examples have demonstrated endeavours to translate the superior rank which national constitutions enjoy under municipal law to the international plane. From the perspective of international law, however, the answer is clear-cut: no special status of the national constitution can be accepted. In the word of the PCIJ: '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'.[22] Were it otherwise, States could manipulate all too easily the contents of their international obligations by ascribing a certain rule constitutional, rather than ordinary statute rank.

b. Law of State Responsibility

The rule of supremacy of international law and of irrelevance of opposing municipal law would be incomplete if it concerned only the primary obligations of treaty law. As will be seen,[23] it might well happen that a State is unable to implement a treaty due to municipal law reasons. In such a situation, the State is not only excluded from relying on municipal law as a justification for the non-performance of the treaty. According to Article 3 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts,[24] the characterization of an act of a State as internationally wrongful 'is not affected by the characterization of the same act as lawful by internal law'. Similarly, under Article 32 of the said ILC Articles, the

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[18] Objection made by the government of Ireland (*Multilateral Treaties Deposited with the Secretary-General*, vol I (2009), p 150). Similar objections were made by the governments of Estonia, Finland and the Netherlands (ibid).

[19] 999 UNTS 171.

[20] 1465 UNTS 85.

[21] *Multilateral Treaties* (fn 18), pp 190 et seq; see L Langer, *Religious Offence and Human Rights. The Implications of Defamation of Religions* (2014), p 121.

[22] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, 1932, Series A/B, No 44, p 24.

[23] See text accompanying fn 63.

[24] GA Resolution 56/83, Annex.

'responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations' to make reparation. This latter provision translates the rule of irrelevance of national law for primary obligations into the realm of secondary obligations arising out of the breach of the primary ones.[25] As a result, international law is 'immunised' against influences coming from the national legal sphere—with the exceptions to be discussed next.

2. *Deviations from the Supremacy Principle*

a. Article 46 VCLT

The Vienna Convention on the Law of Treaties contains one exception to the supremacy principle which is found in Article 46 VCLT. According to that provision:

(1) A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
(2) A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

This provision is a compromise between two major schools of thought existing before the Vienna Convention came into existence. According to the first school (called 'theories of international relevance' or 'constitutionalist approach'), constitutional limitations of the treaty-making power were regarded as relevant internationally because international law was understood to contain a *renvoi* to municipal law concerning the question of who is able to express the will of the State.[26] By contrast, the opposing school of thought ('theories of international irrelevance' or 'internationalist approach') relied on the head of State's *jus omnimodo repraesentationis* and maintained that for reasons of legal certainty, constitutional limitations of the treaty-making power could not prevail internationally.[27] For a correct understanding of Article 46 VCLT, it is important to note that even under the 'theories of international relevance', only constitutional constraints of a procedural nature were regarded as internationally opposable.[28] These theories were not meant to convey the idea that also substantive constitutional law provisions could be relied upon with the aim of invalidating the consent to be bound by an international treaty.

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[25] P-M Dupuy, 'Relations between the international law of responsibility and responsibility in municipal law' in J Crawford/A Pellet/S Olleson (eds), *The Law of International Responsibility* (2010), pp 173–183, at 175.

[26] For references, see WK Geck, *Die völkerrechtlichen Wirkungen verfassungswidriger Verträge* (1963), pp 32 et seq; L Wildhaber, *Treaty-Making Power and Constitution* (1971), pp 149 et seq.

[27] For references, see Geck (fn 26), pp 25 et seq; Wildhaber (fn 26), pp 147 et seq.

[28] Geck (fn 26), p 37.

Under Article 46 VCLT, the question has come up about the correct understanding of the phrase ‘provision of its internal law regarding competence to conclude treaties’. A minority of international scholars supports the view that this term relates to both procedural and substantive law provisions. To that end, they mainly rely on the drafting history of Article 46 VCLT.[29] From the present author’s perspective, this position is unconvincing, in particular when taking into account the pre-VCLT situation: If in the doctrinal views expressed before, the relevance of constitutional constraints of the treaty-making power were discussed only with regard to procedural, not substantive ones, it is hard to conceive that Article 46 VCLT should have changed this position without a clear indication to the contrary. The wording of Article 46 VCLT (‘provisions … regarding competence’) rather conveys the impression that it is restricted to provisions of a formal or procedural nature. Therefore, it is submitted that the correct understanding of Article 46 VCLT means that substantive constraints—even if they concern a rule of ‘fundamental importance’[30]—cannot be relied upon internationally so as to invalidate the consent to be bound by that treaty.[31]

b. Internationalisation of Domestic Values

Given the narrow ambit of the exception provided for under Article 46 VCLT, it becomes more and more difficult to reconcile the exigencies of national law with the international law requirements. As André Nollkaemper rightly observes, this is due to the fact that ‘a relatively larger part of international law seeks to regulate domestic matters, and […] that protection of fundamental rights at international level is relatively poorly ensured’.[32] Commenting on the CJEU’s *Kadi I* judgment, he develops an approach which may be characterised as ‘internationalisation of domestic values’.

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[29] T Rensmann, ‘Article 46’ in O Dörr/K Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (2nd edn 2018), MN 34; A Verdross/B Simma, *Universelles Völkerrecht* (3rd edn 1984), § 691; ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), Article 46 MN 8 (though with the qualification that it ‘does not include the implementation of a treaty once concluded’).

[30] See A Nollkaemper, ‘Rethinking the Supremacy of International Law’ (2010) 65 *Zeitschrift für öffentliches Recht* 65–85, at 73 (‘Whether or not a particular rule that would be set aside because of the principle of supremacy is a *fundamental* rule does not make a difference’) (emphasis original).

[31] In this sense also M Bothe, ‘Article 46 Convention of 1969’ in O Corten/P Klein (eds), *The Vienna Conventions on the Law of Treaties. A Commentary*, vol II (2011), MN 11; R Kolb, *The Law of Treaties. An Introduction* (2016), pp 91–92; FM Palombino, ‘Compliance with international judgments: between supremacy of international law and national fundamental principles’ (2015) 75 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 503–529, at 506; MN Shaw, *International Law* (7th edn 2017), pp 712–713.

[32] Nollkaemper, ‘Rethinking the supremacy’ (fn 30), p 71.

In *Kadi I*, the CJEU took a strictly dualistic approach.[33] It may be recalled that this case concerned the anti-terrorism regime established under several Security Council resolutions and the deficits in fundamental rights protection concerning suspect terrorists contained therein. It is remarkable that the CFI in that case had endeavoured to strike a balance between the exigencies of the UN Charter on the one hand and of EU fundamental rights protection on the other hand, arguing that '[a]ny review of the internal lawfulness of the contested regulation, especially having regard to the provisions or general principles of Community law relating to the protection of fundamental rights, would […] imply that the Court is to consider, indirectly, the lawfulness of those resolutions'.[34] This led to a review of the contested regulation restricted to breaches of *jus cogens*.[35] Contrary to that, the CJEU opined that controlling the acts of EU law implementing the Security Council resolutions would result in no indirect (and inappropriate) form of Security Council control by the EU judiciary.[36] Therefore, it applied the full range of EU fundamental rights review, which resulted in the invalidation of the impugned regulations.

Nollkaemper's argument is that the CJEU, although formally applying a principle of 'domestic' law (namely: EU fundamental rights), upholds a principle which is also deeply rooted in international law so that the apparent conflict between domestic law and international law can be described as a conflict between two opposing international law positions as well.[37] In fact, the CJEU jurisprudence had the effect of the Security Council resolutions being amended with the aim to enhance fundamental rights protection.[38] Antonios Tzanakopoulos takes a similar stance arguing that while *Kadi I* was 'made on domestic law grounds, the constitutional or fundamental right sought to be protected, namely that to a fair trial, is deeply

[33] See B Fassbender 'Triepel in Luxemburg – Die dualistische Sicht des Verhältnisses zwischen Europa- und Völkerrecht in der "Kadi-Rechtsprechung" des EuGH als Problem des Selbstverständnisses der Europäischen Union' (2010) 63 *Die Öffentliche Verwaltung* 333–342; more nuanced: J Kokott/C Sobotta, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?' (2012) 23 *European Journal of International Law* 1015–1024, at 1017 et seq; see also A Tzanakopoulos, 'The *Solange* argument as a justification for disobeying the Security Council in the *Kadi* judgments' in M Avbelj/F Fontanelli/G Martinico (eds), *Kadi on Trial. A Multifaceted Analysis of the Kadi Trial* (2014), pp 121–134, at 122 et seq.

[34] Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649, para 215.

[35] Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649, para 226.

[36] Case C-402/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, paras 286 et seq.

[37] Nollkameper, 'Rethinking the supremacy' (fn 30), p 78.

[38] See, basically, B Fassbender, 'Targeted sanctions imposed by the UN security council and due process rights: A study commissioned by the UN office of legal affairs and follow-up action by the United Nations' (2006) 3 *International Organizations Law Review* 437–485; further, e.g., M Bothe, 'Security Council's Targeted Sanctions against Presumed Terrorists: The Need to Comply with Human Rights Standards' (2008) 6 *Journal of International Criminal Justice* 541–555; L Van den Herik, 'The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual' (2007) 20 *Leiden Journal of International Law* 797–807.

internationalized, having found expression both in widely ratified international treaties, and in customary international law'.[39]

The advantage of this approach is obvious: By shifting the conflict from the domestic-international relationship to the international level as such, it avoids detracting from the supremacy principle which, as a result, remains intact. In this sense, it is not an 'exception' to the supremacy principle. A special feature of the anti-terrorist regime is that it was enacted by the Security Council, an organ which is practically free from judicial control within the UN system itself. Under such circumstances, the explanatory model developed by Nollkaemper and Tzanakopoulos may have its merits. It is submitted, however, that it does not fit well into the context of the present study, namely, national resistance to international court judgments. This may be best illustrated by the recent decision taken by the Italian Constitutional Court in the so-called *Jurisdictional Immunities* case.

In this well-known series of cases, the question was at stake whether Germany could rely on immunity from the jurisdiction of Italian courts with regard to compensation claims for war crimes committed during the Second World War. The Italian judiciary, most notably the Supreme Court in *Ferrini*, took the view that the traditional concept of jurisdiction for *acta jure imperii* had to give way to peremptory norms of international law, such as the prohibition of war crimes.[40] By contrast, the ICJ in the subsequent *Germany v Italy* judgment ruled that such an exception from the immunity principle could not be established under international law as it currently stood.[41] To this, the Italian Constitutional Court replied by Decision No 238/2014, declaring (*inter alia*) the ICJ judgment unenforceable in the Italian legal order, due to a breach of the requirements of judicial protection as enshrined in Articles 2 and 24 of the Italian Constitution. It thereby expressly referred to the *Kadi I* judgment of the CJEU.[42]

The difference between the two scenarios is clear: While in *Kadi I*, the CJEU afforded fundamental rights protection which, due to the institutional design of the UN, was impossible to reach at the international level, in *Germany v Italy* the ICJ *had* already balanced the immunity principle with the exigencies of human rights protection but had come to a conclusion unfavourable for the latter. This makes it difficult (if not impossible) to interpret the Decision No 238/2014 in line with the Nollkaemper/Tzanakopoulos narrative.[43]

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[39] A Tzanakopoulos, 'Domestic Courts in international law: The international law function of national courts' (2011–2012) 34 *Loyola of Los Angeles International and Comparative Law Review* 133–168, at 161; see also Tzanakopoulos (fn 33), p 133.

[40] Italian Court of Cassation, Judgment No 5044/2004, *International Law Reports* 128, 658.

[41] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment, ICJ Reports 2012, p 99.

[42] Italian Constitutional Court, Decision No 238/2014, especially para 3.4.

[43] M Iovane, 'The Italian Constitutional Court judgment No 238 and the myth of the "constitutionalization" of international law' (2016) 14 *Journal of International Criminal Justice* 595–605, at 605; see also Palombino (fn 31), p 525.

What the Italian Constitutional Court did was to apply the particular *domestic* concept of fundamental rights protection to the immunities issue. Due to the ICJ's previous judgment, it could not even purport to apply the international concept of judicial protection. At the same time, the Constitutional Court's reasoning makes it clear that it endeavours to push forward the development of international law.[44] Such a role is generally regarded inappropriate for judges. As Lord Hoffmann put it in *Jones v Saudi Arabia*, 'it is not for a national court to "develop" international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states'.[45] Similarly, Christian Tomuschat in *Germany v Italy* had argued on behalf of the German government: 'Judges cannot be front-runners, they have no mandate to act as legislative bodies with a view to promoting political goals'.[46]

c. Contestation

Still, Decision No 238/2014 has instigated a debate whether under certain strict conditions, non-implementation of international judgments may be legitimate. While the decision was harshly criticised by some authors such as Robert Kolb, accusing the Court of 'radicalized or high-peak dualism' and of having committed a 'sort of judicial putsch',[47] others have shown more sympathy with the Italian Constitutional Court arguing that its 'decision can be understood as a legitimate attempt to balance the demands of two legal orders, each with their own rule of law logic and values'.[48] The decision was seen as reinforcing a 'trend towards a stronger respect of human rights, achieved through domestic courts against the international

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[44] Italian Constitutional Court, Decision No 238/2014, especially para 3.3 *in fine:* 'At the same time, however, this may also contribute to a desirable – and desired by many – evolution of international law itself' (translation available at <www.cortecostituzionale.it>). See P De Sena, 'The judgment of the Italian Constitutional Court on State immunity in case of serious violations of human rights or humanitarian law: a tentative analysis under international law' (2014) *Questions of International Law* 17–31, at 27 et seq. For a critical assessment of this part of the decision, see R Kunz, 'The Italian Constitutional Court and "constructive contestation"' (2016) 14 *Journal of International Criminal Justice* 621–627 arguing that due to the reliance on constitutional law reasons, the Constitutional Court is unlikely to contribute to developing further the rules of customary law.

[45] *Jones v Kingdom of Saudi Arabia* [2006] UKHL 26, para 63.

[46] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Verbatim Record 2011/17, p 22; commenting on this: M Krajewski/C Singer, 'Should judges be front-runners? The ICJ, state immunity and the protection of fundamental human rights' (2012) 16 *Max Planck Yearbook of United Nations Law* 1–34.

[47] R Kolb, 'The relationship between the international and the municipal legal order: reflections on the decision no 238/2014 of the Italian Constitutional Court' (2014) *Questions of International Law* 5–16, at 11 & 13.

[48] G Palombella, 'German War Crimes and the Rule of International Law' (2016) 14 *Journal of International Criminal Justice* 607–613, at 607.

legal order' which, in the long run, could 'have the beneficial effect of promoting a more coherent human rights culture in international law'.[49]

This debate draws inspiration from the *Solange* jurisprudence of the German Federal Constitutional Court[50]: Just as this jurisprudence appears to have successfully contributed to the development of fundamental rights protection at EU level, showing resistance to the CJEU's claim for unfettered supremacy of EU law vis-à-vis national law, the same should apply to the relationship between domestic judges and international courts and tribunals. Thus, Anne Peters wrote well before Decision No 238/2014 that such posture of national courts could be seen as 'an "emergency brake" and thereby one condition for the opening-up of states' constitutions towards the international sphere. On the long run, reasonable resistance (*sic!*) by national actors might compel the international law-makers and appliers to engage in democratization and improve human rights protection against international actors themselves'. She adds, however, an important qualification, namely that 'any refusal to apply international law based on domestic constitutional arguments must be strictly limited to constitutional core values, and may be permissible only "as long as" the constitutional desiderata have not been even in a rudimentary fashion incorporated into international law itself'.[51] Similarly, Armin von Bogdandy invoking *Kadi* had argued that there 'should always be the possibility, at least in liberal democracies, to limit, legally, the effect of a norm or an act under international law within the domestic legal order if it severely conflicts with constitutional principles'.[52] It would seem that Decision No 238/2014 fits quite well into this description.

André Nollkaemper depicted this way of interaction between national and international judges as 'contestation'.[53] It is distinct from the former approach in that the national judge cannot be said to protect values of the international legal order but rather shields the national legal order against international influences relying on values and principles of domestic law. Veronika Fikfak characterised this reliance on national law as 'strong' review, in contrast with cases of 'weak' review where the judge relies, at least in substance, on international law principles (i.e. the above 'internationalisation of domestic values'), with the aim of entering into a dialogical

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[49] M Lando, 'Intimations of unconstitutionality: The supremacy of international law and judgment 238/2014 of the Italian Constitutional Court' (2015) 78 *Modern Law Review* 1028–1056, at 1038.

[50] Federal Constitutional Court, Order of 29 May 1974, No BvL 52/71, BVerfGE 37, 271 ('Solange I'); see Palombino (fn 31), p 507, referring also to the so-called counter-limits doctrine of the Italian Constitutional Court.

[51] A Peters, 'Supremacy lost: international law meets domestic law' (2009) 3 *Vienna Journal of International Constitutional Law* 170–198, at 194 & 198.

[52] A von Bogdandy, 'Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law' (2008) 6 *International Journal of Constitutional Law* 397–413, at 412.

[53] A Nollkaemper, 'Conversations among courts: domestic and international adjudicators' in CPR Romano/KJ Alter/C Avgerou (eds), *The Oxford Handbook of International Adjudication* (2013), pp 523–549, at 537.

relationship with his or her international counterpart.[54] As for Nollkaemper, apart from some positive aspects, he warns of a 'darker side' of contestation: 'Once we accept that a claim based on domestic principles can override a claim for performance of a decision of an international court, the question is whether there are any limits to the principles that can be invoked, and how this can be reconciled with the interests of a stable international legal order'.[55]

It should be noted, though, that reliance on national (constitutional) values against international obligations does not always have the same detrimental effect. This is particularly true where national judges do not oppose the substance of an international court judgment but feel merely unable to implement it themselves, due to separation of powers arguments. The US Supreme Court's *Medellín* judgment is a case in point.[56] In such case, the lack of direct effect of a treaty obligation might prevent national judges from implementing an international judgment, thereby delegating this task to the legislative branch of government (or to the executive, as the case may be).[57] Far more problematic, however, are cases where the national judge opposes the very outcome of the international case *as such*. It would seem that the Italian Constitutional Court's Decision No 238/2014 fits into this description. The Constitutional Court's reliance on constitutional law reasons has even been read as inhibiting implementation of the ICJ judgment by way of a revision of the Constitution.[58]

National courts are enabled to oppose international court judgments by the fact that supremacy in terms of international law is confined to the international realm, meaning that solely from the perspective of international law, States may not invoke municipal law to evade their international obligations.[59] It does not mean that under national law, States are prevented from doing so. This is in marked contrast with the rules of EU law where the CJEU in its seminal *Costa v ENEL* judgment held that the 'terms and the spirit' of the founding treaties '*make it impossible* for the States […] to accord precedence to a unilateral and subsequent measure' over norms of EU law.[60] As a consequence, norms of national law must be set aside in case of a conflict

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[54] V Fikfak, 'Judicial Strategies and their Impact on the Development of the International Rule of Law' in M Kanetake/A Nollkaemper (eds), *The Rule of Law at the National and International Levels. Contestations and Deference* (2016), pp 45–66. The distinction between 'strong' and 'weak' review was originally developed in the US context by Mark Tushnet, see M Tushnet, 'Weak-Form Judicial Review and "Core" Civil Liberties' (2006) 41 *Harvard Civil Rights-Civil Liberties Law Review* 1–22; M Tushnet, 'Dialogic Judicial Review' (2008/09) 61 *Arkansas Law Review* 205–216.

[55] Nollkaemper (fn 53), p 537.

[56] US Supreme Court, *Medellín v Texas*, 552 US 491(2008).

[57] See Palombino (fn 31), pp 508 et seq, according to whom the direct effect fulfils a similar function as the counter-limits doctrine.

[58] Kolb (fn 47), p 12.

[59] A Nollkaemper, *National Courts and the International Rule of Law* (2011), p 198.

[60] Case 6/64 *Costa v ENEL* [1964] ECR 585, at 593–594 (emphasis added).

with norms of EU law.[61] International law, by contrast, does not go so far as to require States to set aside norms of national law in case of a conflict. Thus, under the supremacy of international law, we might end up with two fundamentally opposing results coexisting side by side as was acknowledged by the ICJ in the *ELSI* case: 'Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision'.[62]

It is against this background that national authorities are enabled to declare that due to obstacles coming from the national legal sphere, an international court judgment cannot be implemented. At times, this is associated with the dualist concept of the relationship between domestic law and international law.[63] Empirical research shows, however, that the divide between monist and dualist systems, albeit fundamental in theory, produces little effects in practice, in terms of the likelihood of contradictions between the domestic and the international legal order.[64] What appears to be more relevant is how the relationship between international law and the national constitution is construed. In most countries, the constitution is accorded the highest rank in the national legal order while international treaties enjoy a rank below—either the rank of an ordinary statute or an elevated rank between statute law and the constitution. In case of a conflict between a norm of constitutional law and a treaty stipulation, the solution will normally be found in accordance with the 'lex superior' principle—the legal norm higher in rank will prevail over the norm of lower rank.[65] This is true for the national legal sphere but not from the perspective of international law: As was shown before, the supremacy doctrine under international law allows for no 'constitutional law' exception.[66]

Seen from this perspective, the question may be asked what is so problematic about national courts contradicting the outcome of international court proceedings. If the States are not required to grant international law supremacy in their respective domestic legal sphere, does this not mean that the coexistence of opposing results is thereby accepted? Does a pluralist/heterarchical understanding of the relationship between domestic law and international law not reflect reality more appropriately

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[61] See generally Arena (fn 16); M Claes, 'The Primacy of EU Law in European and National Law' in A Arnull/D Chalmers (eds), *The Oxford Handbook of European Union Law* (2015), pp 178–211; for an account of the historical development, see KJ Alter, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe* (2001).

[62] *Elettronica Sicula SpA (ELSI) (United States of America v Italy)*, Judgment, ICJ Reports 1989, p 15, para 73. See also B Stern, 'The Elements of an internationally wrongful act' in J Crawford/A Pellet/S Olleson (eds), *The Law of International Responsibility* (2010), pp 193–220, at 210–211.

[63] Kolb (fn 47), p 9.

[64] See M Breuer, 'Impact of the Council of Europe on National Legal Systems' in S Schmahl/M Breuer (eds), *The Council of Europe. Its Law and Policies* (2017), MN 36.67 et seq.

[65] See generally E Vranes, '*Lex Superior, Lex Specialis, Lex Posterior* – Zur Rechtsnatur der "Konfliktlösungsregeln"' (2005) 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 391–405.

[66] See text accompanying fn 22.

than the (futile) search for a constitutionalist/hierarchical reading?![67] It is submitted that as a descriptive model, legal pluralism has its merits. As a normative concept, however, it has considerable flaws.[68] For it would be a misconception and overly formalistic to argue that the effects of a national court judgment opposing the outcome of an international case would be confined to the national realm.[69] The international obligation does not cease to exist merely because there is a conflict with national law. Rather, under the rules of State responsibility, the State will be required to bring its national legal order in conformity with the international law requirements, if need be by means of enacting new legislation.[70] If enacting such legislation is excluded by the pronouncement of a national court, the conflict will be perpetuated *sine die*. This clearly impairs the very functioning of the international rule of law.[71] The 'damage to international justice […] is manifest'.[72]

3. The Convention Context

Cases of opposition have not only occurred at the international level but also in the Convention context. It is with great concern that former Human Rights Commissioner Nils Muižnieks wrote in his 2016 Activity Report:

> Direct challenges to the authority of the Court within a handful of member states have […] become more explicit and vocal in recent years. These are of particular concern because the integrity and legitimacy of the Convention system is at stake.[73]

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[67] For the different concepts, see e.g. M Avbelj, *The European Union under Transnational Law. A Pluralist Appraisal* (2018), pp 21 et seq; von Bogdandy (fn 52), pp 399 et seq; N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010).

[68] See M Poiares Maduro, 'Three Claims of Constitutional Pluralism', in M Avbelj/J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (2012), quoting Alexander Somek (p 72): 'constitutional pluralists give up precisely where an answer is most needed: what happens when the constitutional conflict cannot be prevented or solved?' (Somek's contribution in the same volume does not contain the quote: A Somek, 'Monism: A Tale of the Undead?' *loco citato*, pp 343–379). See also Tzanakopoluos (fn 33), p 133, dealing with the CJEU's *Kadi I* judgment and arguing that the *Solange* argument 'cannot, in and of itself legally "justify" disobedience of SC decisions, even if it may well explain it'.

[69] In this sense also Nollkaemper, 'Rethinking the supremacy' (fn 30), p 71; Palombino (fn 31), pp 507–508, against K Schmalenbach, 'Article 27' in O Dörr/K Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (2nd edn 2018), MN 3.

[70] Kolb (fn 47), pp 11–12.

[71] Nollkameper, 'Rethinking the supremacy' (fn 30), p 67.

[72] Kolb (fn 47), p 13.

[73] N Muižnieks, *Annual Activity Report 2016* (2017), p 71.

Similarly, Judge Pinto de Albuquerque believes that '[s]ome domestic authorities are betting on the failure of the European system of human rights. They leave no taboo unturned.'[74]

The dimension of this development appears to be new. There have always been ECtHR judgments whose execution proved to be difficult, mainly for political reasons. One might think, e.g., of the *Loizidou* case where it took the Turkish authorities more than 5 years solely to pay the just satisfaction awarded by the ECtHR[75] (further reactions are still awaited so that the case is still on the Committee of Ministers' docket). Following the just satisfaction judgment in the *Cyprus v Turkey* inter-State case related to the same problem,[76] the Turkish authorities openly proclaimed that they were not going to pay the amount of money awarded by the Court.[77] Since then, the Committee of Ministers on numerous occasions 'insisted … on the unconditional obligation to pay the just satisfaction awarded by the European Court and reiterated [its] call on the Turkish authorities to pay without delay the sums awarded in the judgment of 12 May 2014'.[78] Thus, while the day-to-day business in executing ECtHR judgments has been functioning pretty well, there are (and have always been) some high-profile cases where implementation proved difficult.

The cases with which the present volume is concerned are of a different nature, as will be shown by the *Yukos* case: In that case, the ECtHR ordered the Russian State to pay the former shareholders of the dissolved oil company the sum—unprecedented in Convention history—of EUR 1,866,104,634.[79] The Russian Constitutional Court, in turn, decided in January 2017 that for reasons of Russian constitutional law, the ECtHR judgment could not be executed.[80] Put differently, in addition to the unwillingness of the political actors, apparent both in *Loizidou* and in *Cyprus v Turkey*, the question of payment of just satisfaction was translated into a *legal* issue, with the Russian Constitution inhibiting the proper implementation of the ECtHR's

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[74] *GIEM Srl and Others v Italy* [GC] Appl Nos 1828/06 et al (ECtHR, 28 June 2018), partly concurring, partly dissenting opinion by Judge Pinto de Albuquerque, para 70.

[75] See *Loizidou v Turkey* (Article 50) Appl No 15318/89 (ECtHR, 28 July 1998), on the one hand; Resolution ResDH(2003)190, adopted by the Committee of Ministers on 2 December 2003, on the other hand.

[76] *Cyprus v Turkey* (Just Satisfaction) [GC] Appl No 25781/94 (ECtHR, 12 May 2014).

[77] 'Turkey to ignore court order to pay compensation to Cyprus', available at <http://www.reuters.com/article/us-turkey-cyprus-davutoglu-idUSBREA4C0AX20140513>.

[78] CM/Del/Dec(2016)1250/H46-26 (March 2016); CM/Del/Dec(2016)1259/H46-33 (June 2016); CM/Del/Dec(2016)1265/H46-28 (September 2016); CM/Del/Dec(2016)1273/H46-29 (December 2016); CM/Del/Dec(2017)1280/H46-31 (March 2017); CM/Del/Dec(2017)1288/H46-3 (June 2017); CM/Del/Dec(2017)1302/H46-32 (December 2017); CM/Del/Dec(2018)1318/H46-24 (June 2018); CM/Del/Dec(2018)1324/H46-20 (September 2018); CM/Del/Dec(2018)1331/H46-28 (December 2018).

[79] *OAO Neftyanaya Kompaniya Yukos v Russia* (Just Satisfaction) Appl No 14902/04 (ECtHR, 31 July 2014).

[80] Russian Constitutional Court, Judgment No 1-П/2017 of 19 January 2017.

judgment, similar to the Italian Constitutional Court's reaction in the *Jurisdictional Immunities* case.

In order to avoid misunderstandings, it should be noted that cases of 'principled resistance' are by no means restricted to just satisfaction issues. They may also (and usually will) concern substantive issues of Convention interpretation, such as, e.g., the ban on voting rights for serving prisoners. The example of just satisfaction was chosen because payment of the sum awarded is fairly technical in nature and a clear-cut issue that normally leads to no execution problems.[81] As Jörg Polakiewicz wrote back in 1993: the 'judgments in which the Court awards just satisfaction […] constitute an unconditional obligation to pay the specified sum of money to the applicant'.[82] Against this background, it comes as a surprise that in *Yukos,* execution of a just satisfaction order has become a *legal* issue in terms of Russian constitutional law. This is what makes these cases distinct from other non-execution cases. At the same time, this is what makes 'principled resistance' interesting from a theoretical point of view because fundamental questions on the relationship between international law and national (mainly constitutional) law are raised.

III. The Concept of 'Principled Resistance'

Since 'principled resistance' is not a fixed term in international law, it will be necessary to explain the concept employed for the purposes of this volume. Seen in the abstract, conflicts between the Convention and national constitutional law are unlikely to arise, for a number of reasons: first, the Convention is widely regarded as a 'minimum standard', with the effect that conflicts of this kind should normally be avoided. Second, the margin of appreciation doctrine allows the ECtHR to take national peculiarities into account.[83] In the present context, however, the margin of appreciation doctrine is of little help. Situations of 'principled resistance' by definition arise only in cases where the ECtHR found a Convention violation. This implies that the national authorities *overstepped* their margin of appreciation, i.e. the constitutional law concerns adduced by the government before the Court were not weighty enough for allowing a deviation from Convention principles.

If under such circumstances, a constitutional court finds that a particular ECtHR judgment is in conflict with national constitutional law, this may send a signal that is *per se* detrimental for the Strasbourg Court because claiming such a conflict exists

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[81] See F de Londras/K Dzehtsiarou, 'Mission impossible? Addressing non-execution through infringement proceedings in the European Court of Human Rights' (2017) 66 *International and Comparative Law Quarterly* 467–490, at 472.

[82] J Polakiewicz, *Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte* (1993), p 366.

[83] See, e.g., *A, B and C v Ireland* [GC] Appl No 25579/05 (ECtHR, 16 December 2010), paras 229 et seq; *Lautsi v Italy* [GC] Appl No 30814/06 (ECtHR, 18 March 2011), para 68; *SAS v France* [GC] Appl No 43835/11 (ECtHR, 1 July 2014), para 157.

may be tantamount to claiming that the Court 'got it all wrong', that the Court is mistaken *as a matter of principle*. This is one possible dimension of the term 'principled resistance' and involves a profound disagreement between a national actor and the ECtHR. As a consequence, the Court's legitimacy and legal authority may be deeply called into question.

1. National/Constitutional Identity

Reliance on reasons of constitutional law may add another layer to the problem, for the following reasons: Typically, constitutions are more difficult to amend than ordinary statutes. Some provisions might even form the 'noyau dur', in the sense that they are excluded from amendment under the existing constitution altogether (e.g., the *Ewigkeitsklausel* under German law, Article 79(3) of the Basic Law).[84] Furthermore, the constitution is essential for forming and preserving the 'identity' of a given State. By relying on a norm of constitutional character, therefore, the respective actor may also claim that there is a conflict between the 'national identity' and the Convention as interpreted by the ECtHR.[85]

What does this mean for the execution of the criticised judgment? Holding that an ECtHR judgment is in conflict with 'national identity' normally implies that the said judgment *cannot*, and *will not*, be implemented. One cannot change 'national identity' like changing clothes. Therefore, an ECtHR judgment will find an insurmountable obstacle where 'national identity' is at stake. Such cases, if they were to subsist (or even to spread) call into question the very system of Convention supervision by the ECtHR. Under Article 46 § 1 ECHR, States undertake 'to abide by the final judgment of the Court in any case to which they are parties'. Arguing that a particular ECtHR judgment violates national identity frustrates the binding force of the judgment given. Unilateralism is unacceptable from the Convention point of view[86] because it enables the States to select which judgments they are ready to accept. One cannot but agree with what former Human Rights Commissioner Muižnieks wrote in his 2016 Activity Report: 'If these pernicious practices continue

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[84] See C Grewe, 'Methods of Identification of National Constitutional Identity' in A Saiz Arnaiz/C Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (2013), pp 37–48, at 40–41; from a political science perspective, see M Hein, 'Impeding constitutional amendments: why are entrenchment clauses codified in contemporary constitutions?' (2019) 54 *Acta Politica* 196–224. See further R Albert/BE Oder (eds), *An Unamendable Constitution? Unamendability in Constitutional Democracies* (2018).

[85] It must be admitted, though, that 'constitutional identity' and 'national identity' are not necessarily synonyms; for further analysis, see JL Martí, 'Two Different Ideas of Constitutional Identity: Identity of the Constitution v Identity of the People' in A Saiz Arnaiz/C Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (2013), pp 17–36.

[86] L Wildhaber, 'Bemerkungen zum Vortrag von BVerfG-Präsident Prof. Dr. H.-J. Papier auf dem Europäischen Juristentag 2005 in Genf' (2005) *Europäische Grundrechte-Zeitschrift* 743–744, at 744.

and spread, they will only hasten the downfall of the European human rights protection system.'[87] In the same vein, Judge Pinto de Albuquerque warned about the 'obvious […] risk of a contagion of disobedience among Council of Europe member States', with the effect that '[t]he whole Convention system is in danger'.[88]

The national identity argument has attracted considerable attention within the EU context.[89] With Article 4(2) TEU, it has at least a textual starting point while the consequences flowing from that provision are strongly contested.[90] So, while in the EU context the national/constitutional identity argument is fairly well-known, in the Convention context it would seem to be relatively new. Not only does the Convention make no (explicit) reference to national identity, also the literature on the subject has remained scarce, though not entirely non-existent.[91] Occasionally, Article 53 ECHR has been interpreted as the Convention's counterpart to Article 4(2) TEU[92] but this appears to be a mismatch. Not only is there another counterpart under EU law, namely, Article 53 of the Charter of Fundamental Rights. What is essential is that Article 53 ECHR has an entirely different function, in that it allows the States Parties to maintain a higher standard of fundamental rights protection, compared to that required under the Convention. It thereby does not have the function to protect the 'core' of a given State's national identity against influences coming from the Convention level. Rather, it applies to all constitutional provisions, whether central or peripheral for the preservation of national identity.

In sum, for present purposes the concept of 'principled resistance' may be said to have the following characteristics: (1) It is a legal conflict, normally resulting from a clash between the national constitution and the Convention. (2) The conflict leads to a permanent blockade, in the sense that an ECtHR judgment cannot and will not be implemented. This may result either (a) from a deep disagreement between a national actor and the Court on the protection of human rights or (b) from a conflict between the ECtHR judgment and 'national identity' (or indeed both of them). If

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[87] Muižnieks (fn 73), p 8.

[88] *GIEM Srl and Others v Italy* [GC] Appl Nos 1828/06 et al (ECtHR, 28 June 2018), partly concurring, partly dissenting opinion by Judge Pinto de Albuquerque, para 92.

[89] See L Burgorgue-Larsen (ed), *L'identité constitutionnelle saisie par les juges en Europe* (2011); E Cloots, *National Identity in EU Law* (2015); A Saiz Arnaiz/C Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (2013).

[90] See M Claes, 'National Identity: Trump Card or Up for Negotiation?' in A Saiz Arnaiz/C Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (2013), pp 109–139, on the one hand, A von Bogdandy/S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 *Common Market Law review* 1417–1453, on the other hand.

[91] See L López Guerra, 'National Identity and the European Convention on Human Rights' in A Saiz Arnaiz/C Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (2013), pp 305–321; D Szymczak, 'L'identité constitutionnelle dans la jurisprudence conventionnelle' in L Burgorgue-Larsen (ed), *L'identité constitutionnelle saisie par les juges en Europe* (2011); E Cloots, *National Identity in EU Law* (2015), pp 45–60.

[92] See B Peters, 'The Rule of Law Dimension of Dialogues Between National Courts and Strasbourg' in M Kanetake/A Nollkaemper (eds), *The Rule of Law at the National and International Levels. Contestations and Deference* (2016), pp 201–225, at 208–209.

understood this way, 'principled resistance' calls into question the very system of Convention supervision.

2. *Similar Concepts*

Although the concept of 'principled resistance' as developed above appears to be new, some similar concepts can be found in the literature that are to be distinguished.

a. Andreas Føllesdal

In a 2014 contribution, Andreas Føllesdal explained that the current criticisms from some Member States may give rise to what he termed 'principled non-compliance'. This was seen by him as an 'accountability mechanism and ultimate correction device', akin to 'civil disobedience' in order to correct an overly dynamic interpretation by the ECtHR.[93] Føllesdal did not elaborate his concept any further. Suffice it for present purposes to notice the use of the term 'principled'.

b. Fiona de Londras and Konstantsin Dzehtsiarou

Fiona de Londras and Konstantsin Dzehtsiarou in a 2017 contribution address the phenomenon of non-execution of ECtHR judgments. In this regard, they distinguish between 'principled non-execution' and 'dilatory non-execution'. The former is explained as follows: it relates to 'cases where States refuse to execute because of a deep-seated disagreement not only with the outcome but, perhaps more significantly, with the *principle* of an international court's decision "overturning" a domestic, democratically arrived at position in respect of a particular matter'.[94] This definition shows quite a number of characteristics of the notion of 'principled resistance' as developed above. It would seem that de Londras and Dzehtsiarou have a more or less similar understanding, in particular as they refer to the case law of both the Russian and the German Constitutional Courts that has, in a way, inspired the present research. What is different, however, is the research question: The phenomenon of 'principled' and 'dilatory' non-execution is being dealt with merely in passing, the principal argument being that the newly introduced mechanism under Article 46 § 4 ECHR will prove counterproductive in practice. Thus, the authors do not ask about doctrinal similarities or dissimilarities of different cases of 'principled

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[93] A Føllesdal, 'Accountability and Authority' in Council of Europe (ed), *The long-term future of the European Court of Human Rights* (2014), pp 78–85, at 84.

[94] See de Londras/Dzehtsiarou (fn 81), p 474 (emphasis original).

non-execution', let alone the question whether such incidents can account for a new paradigm.[95]

For the sake of completeness, it should be noted that the distinction between 'principled' and 'dilatory' non-execution has attracted fundamental criticism by Alice Donald, for two reasons: First, she regarded the concept of principled non-execution to be 'unhelpful as an explanatory category', second she held that it 'risks dignifying behaviour which is severely and insouciantly corrosive of respect for the Convention system'.[96] Since this very criticism equally relates to the concept of 'principled resistance' as developed here, it must be carefully addressed.

As for the first point, Donald argues that States are not unitary actors but 'collections of actors which, through their relative strengths and interactions, both collaborative and competitive, determine whether, and to what extent, implementation occurs'. Therefore, she concludes that 'states, as such, are incapable of reaching a stable, "principled" view of whether a judgment is unreasonable to the extent that it should not be implemented'. For illustration purposes, Donald refers to the divergent UK reactions in the prisoners voting case.[97] In this regard, her argument has some merits.[98] But if 'principled resistance' is defined as has been done above—as a legal, rather than political, conflict between the national constitution and an ECtHR judgment, the argument is less convincing. In particular (but not solely) in States having a constitutional court system, it may well be that for the State as a unitary body, implementation proves to be impossible. It may even be that other branches of government do not share the view expressed by the constitutional court. But the binding force of the constitutional court judgment may prevent them from holding otherwise.

As for the second point, Donald refers to the dictionary definition of the term 'principled' which is 'acting in accordance with morality and showing recognition of right and wrong'. Thus, she argues, it is 'incapable of having a pejorative meaning'. Therefore, the mere use of this term is said that it 'inescapably lends such behaviour legitimacy, even if it is acknowledged to have negative consequences for other states and for the Convention system'.[99] Again, it is admitted that her criticism has some merits. This holds particularly true for the positive connotation the term 'principled' may have. In the end, however, this will depend on the perspective of the interlocutor: Seen from the national perspective, cases of 'principled resistance' may be regarded as necessary in order to protect and preserve 'national' or 'constitutional identity'. The values protected against the (presumed) Strasbourg

[95] In a more recent publication, one of the authors makes use of the said concept to qualify the Russian Constitutional Court's jurisprudence as 'unprincipled disobedience', see K Dzehtsiarou/F Fontanelli, 'Unprincipled disobedience to international decisions: A primer from the Russian Constitutional Court' (2018) *European Yearbook on Human Rights* 319–341.

[96] A Donald, 'Tackling Non-Implementation in the Strasbourg System: The Art of the Possible?', 28 April 2017, available at <https://www.ejiltalk.org>.

[97] Ibid.

[98] See the contribution by Ed Bates, Chap. 7, in this volume.

[99] Donald (fn 96).

interference are thus of high morality. But seen from an international law perspective, things are different. This is exactly what has been described above as 'two fundamentally opposing results coexisting side by side'.[100]

What is more, it is submitted that for analytical purposes, it is even necessary to introduce 'principled resistance' as a category of its own. In terms of implementation, it makes a tremendous difference whether implementation of a particular ECtHR judgment is merely delayed—due to the lack of political goodwill, of the complexity of the problems that need to be solved, of disagreement between national actors, etc.—or whether implementation is entirely blocked, due to reasons of a constitutional law dimension. Against the background of most recent cases in this regard, it would be unhelpful simply to close the eyes. Quite to the contrary, one has to find out how such cases can be explained in order to finally come to a solution.

c. Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch

Another concept that is similar to, but not identical with the concept of 'principled resistance' has been most recently developed by a team of authors around Mikael Rask Madsen. They differentiate between 'pushback' and 'backlash', the former being understood as 'ordinary resistance occurring within the confines of the system but with the goal of reversing developments in law' while the latter is defined as 'extraordinary resistance challenging the authority of an [international court] with the goal of not only reverting to an earlier situation of the law, but also transforming or closing the [international court]'.[101] At first sight, one might be tempted to conclude that the notion of 'backlash' is the analytical equivalent to 'principled resistance'. Upon closer scrutiny, however, it becomes clear that both concepts are fundamentally different. First and foremost, the notion of 'backlash' as employed by Madsen et al goes much further than the 'principled resistance' concept. It is not confined to the execution of international judgments but embraces options like exiting an international court or shutting it down.[102] Second, it is not a genuinely legal concept but addresses the problem from a sociological point of view. Thus, unlike the present approach, it does not use dogmatic reasoning as an analytical tool. This has, third, as a consequence that phenomena qualified as 'principled resistance' for present purposes, appear as cases of mere 'pushback'. This becomes particularly clear when Madsen et al claim that 'resistance stemming from Member State courts, often the supreme or constitutional courts of the Member States, can strictly

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[100] See text preceding fn 62.

[101] MR Madsen/P Cebulak/M Wiebusch, 'Backlash against international courts: explaining the forms and patterns of resistance to international courts' (2018) *International Journal of Law in Context* 197–220, at 203.

[102] In this regard, the understanding coincides with the use of 'backlash' as developed by W Sandholtz/Y Bei/K Caldwell, 'Backlash and international human rights courts' in A Brysk/M Stohl, *Contracting Human Rights. Crisis, Accountability and Opportunity* (2018), 159–178, at p 159. Since the model developed by Madsen et al is more elaborate, the following considerations will concentrate on the latter.

speaking not in itself produce backlash outcomes as defined above'.[103] In consequence, cases of the Russian or German Constitutional Courts do not appear as 'backlash'[104] whilst for present purposes, they may count for 'principled resistance' cases,[105] in line with the understanding of 'principled non-execution' by de Londras and Dzehtsiarou.[106]

All this is not to say that the 'pushback/backlash' paradigm developed by Madsen et al be flawed or that it does not have its merits. Quite to the contrary, it may be very useful—but for different purposes. Mikael Madsen will have the opportunity to comment on the 'principled resistance' concept in the next chapter.[107] For present purposes, it might be concluded that both concepts are not rivals—they complement each other, offering different answers to different questions.

IV. Analytical Setting

A number of volumes have been edited in the past dealing with the Convention's impact at the national level.[108] Although the concepts of all these volumes are slightly different, they have one thing in common: They aim at giving a full picture of the Convention's and the ECtHR's influence at the national level. This implies, first, a country-by-country approach, giving account of the Convention's status under the respective national law. Second, the reactions of all branches of government, i.e. of the legislative, the executive and the judiciary, are taken into account. And third, those volumes are not primarily concerned with cases of national

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[103] Madsen/Cebulak/Wiebusch (fn 101), p 205.

[104] The case of the Russian Constitutional Court 'can produce effects that *resemble* backlash' (ibid, emphasis only here). But see somewhat more nuanced on p 211: 'There is no doubt that the Russian case exemplifies strong resistance to an [international court]. But whether this will translate into pushback or backlash depends in practice on how systematically and frequently it will be used'.

[105] See text accompanying fn 111 and 135.

[106] See de Londras/Dzehtsiarou (fn 81), p 474.

[107] See MR Madsen, Chap. 2, in this volume.

[108] See R Blackburn/J Polakiewicz (eds), *Fundamental Rights in Europe. The ECHR and Its Member States, 1950–2000* (2000); H Keller/A Stone Sweet (eds), *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (2008); G Martinico/O Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Law. A Comparative Constitutional Perspective* (2010); J Gerards/J Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-law. A Comparative Analysis* (2014); S Popelier/S Lambrecht/K Lemmens (eds), *Criticism of the European Court of Human Rights. Shifting the Convention System: Counter-Dynamics at the National and EU Level* (2016). Some books are concerned only with the situation in one particular country: G Repetto, *The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective* (2013); KS Ziegler/E Wicks/L Hodson (eds), *The UK and European Human Rights. A Strained Relationship?* (2015); L Mälskoo/W Benedek (eds), *Russia and the European Court of Human Rights. The Strasbourg Effect* (2017).

'resistance' to the ECtHR but rather aim to establish positive examples where the Court has had an influence at the national level.

The present volume does not intend to give such a complete picture of ECtHR judgment implementation in a given country. Rather, a particular feature of the following research is concentration on legal issues and on situations resulting in a final deadlock between national (constitutional) law and the Convention. Concentrating on such 'pathological' cases, as one may call them, certainly bears a certain risk of giving a wrong impression concerning a country's overall record in ECtHR judgment implementation. This risk is outweighed, however, by the clarity resulting from the focus on dogmatic concepts (the 'DNA', so to speak, of the pathological cases). This focus will help us to identify similarities or dissimilarities, even if the cases at hand might appear very divergent at first sight. Furthermore, it will help us to understand whether the most recent accumulation of 'principled resistance' cases is a mere coincidence or whether there is a common denominator worth being called a 'new paradigm'.

Still another influential analytical approach to the phenomenon of national courts disagreeing with the ECtHR is that of 'dialogue between judges'.[109] True, not each and every disagreement between a national court and the ECtHR necessarily amounts to 'principled resistance'. In this sense, disagreement between national judges and the ECtHR can also and has been interpreted as a kind of 'dialogue' which has the positive effect of reinforcing mutual understanding, rather than fostering confrontational attitudes.[110] One of the principal tasks of the present volume will be to find out which cases actually deserve the classification of 'principled resistance', as opposed to mere 'disagreement' cases. Still, the focus of the 'dialogue between judges' debate is different: 'Principled resistance' may be said to be the end of dialogue, in that the national actor aims to protect national characteristics against influence coming from the Convention level.

1. Selection of Country Reports

The country reports form the centre piece of the current volume. This requires a word of explanation as for the selection of countries. At first sight, the selection might seem fairly one-sided—only one country from Eastern Europe is represented (Russia) while the remaining five countries are from Western Europe (Germany, Italy, Austria, Switzerland, and the UK). Furthermore, the number of countries

[109] See generally, A Müller (ed), *Judicial Dialogue and Human Rights* (2017), with further references.

[110] See, e.g., LR Glas, *The Theory, Potential and Practice of Procedural Dialogue in the European Convention on Human Rights System* (2016); Lord Kerr, 'The need for dialogue between national courts and the European Court of Human Rights' in: S Flogaitis/T Zwaart/J Fraser (eds), *The European Court of Human Rights and its Discontents. Turning Criticism into Strength* (2013), pp 104–115.

under scrutiny appears to be relatively small: only six countries, against a total of 47 States being parties to the Convention. This is explained, however, by the current approach of concentrating on 'pathological' cases as it considerably reduced the number of potential candidate countries. Still, a caveat is called for in this regard: The subsequent identification of 'principled resistance' cases is only tentative, applying a *prima facie* test. It is not intended to bind the respective rapporteurs in their qualification of what is or is not to be regarded 'principled resistance'. The countries included may be briefly explained as follows:

In Germany, the status of the Convention and of ECtHR judgments is governed by the *Görgülü* Decision given by the Federal Constitutional Court in 2004.[111] In that decision, the Federal Constitutional Court sent an ambivalent message: on the one hand, the Federal Constitutional Court helped to overcome a lower instance court's resistance to the judgment given by the ECtHR.[112] On the other hand, however, the Federal Constitutional Court could not resist underlining that it retained the last word of constitutional sovereignty. Therefore, at least in theory there may be cases where an ECtHR judgment cannot be implemented in Germany, due to reasons of constitutional law, although this scenario has not materialised so far. According to the Karlsruhe court, judgments of the ECtHR are to be 'taken into consideration' rather than 'observed'. And the Federal Constitutional Court held that in civil law cases, ECtHR judgments must not be applied 'schematically' but that it is for the domestic judge to 'integrate' a Strasbourg judgment into the relevant part of the German legal order.[113] It was clear from the outset that this jurisprudence could serve other constitutional courts willing to deviate from Strasbourg jurisprudence as a template. Luzius Wildhaber, then-President of the ECtHR, reports that soon after *Görgülü*, he received media calls from Russia, Poland, Turkey and Switzerland asking why the respective countries should still adhere to a Strasbourg judgment.[114] This scenario actually materialised in 2015 when the Russian Constitutional Court, relying (*inter alia*) on *Görgülü*, decided that the Russian Constitution held a rank higher than the Convention and that therefore, ECtHR judgments might find an obstacle in provisions of Russian constitutional law.[115]

In Italy, the status of the Convention is governed by the decisions given in the so-called 'twin-cases' Nos 348[116] and 349[117] by the Italian Constitutional Court in 2007. In these decisions, the Constitutional Court developed the concept of 'norme interposte', i.e. the Convention enjoys an intermediate rank between ordinary legislation and the Constitution. In 2015, the Constitutional Court added two further

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[111] Federal Constitutional Court, Order of 14 October 2004, No 2 BvR 1481/04, BVerfGE 111, 307.

[112] *Görgülü v Germany* Appl No 74969/01 (ECtHR, 26 February 2004).

[113] Federal Constitutional Court, Order of 14 October 2004 (fn 111); translation available at <http://www.bundesverfassungsgericht.de>.

[114] Wildhaber (fn 86), pp 743–744.

[115] Russian Constitutional Court, Judgment No 21-П/2015 of 14 July 2015.

[116] Italian Constitutional Court, Judgment No 348/2007.

[117] Italian Constitutional Court, Judgment No 349/2007.

decisions (Nos 49[118] and 50[119]) holding that Italian courts are obliged to follow only an established case law of the ECtHR. Thereby, the Constitutional Court opened the door for deviations. Having regard to the conflict between the Constitutional Court and the ICJ in the *Jurisdictional Immunities* case,[120] the question comes up whether something similar could happen with regard to the ECtHR.

Austria is an atypical case as the Convention holds a constitutional rank under national law. From that, one might be tempted to conclude that conflicts of the type described above—namely, conflicts *between* the national constitution and the Convention—are excluded from the outset. However, the *Miltner* case of the Austrian Constitutional Court (relied on also by the Russian Constitutional Court) is an example to the opposite. In that case, the question was at stake whether the system of administrative review as established at the time in Austria was in conformity with the evolving jurisprudence of the ECtHR under Article 6 § 1 ECHR. The Austrian Constitutional Court held that should the ECtHR require an abandonment of the system, it 'would be bound by the constitutional basis of the state organisation even in case of a violation of the Convention'.[121] The *Miltner* judgment was an expression of strong discontent with the dynamic interpretation practised by the ECtHR. Despite the constitutional rank enjoyed by the Constitution under Austrian constitutional law, the Constitutional Court pointed to some possible constitutional obstacles in implementing ECtHR jurisprudence. Thus, the judgment can be said to stand up the *prima facie* test of 'principled resistance'.

In Switzerland, there are usually no significant problems in implementing ECtHR judgments. In recent times, however, criticism of the Court has increased.[122] This culminated, in 2016, in the Swiss People's Party (Schweizer Volkspartei) officially launching a federal popular initiative called 'Swiss law instead of foreign judges (Self-determination initiative)' ('*Schweizer Recht statt fremde Richter (Selbstbestimmungsinitiative)*').[123] In a popular vote of 25 November 2018, the initiative was rejected by a two-thirds majority.[124] If adopted, the Swiss Constitution would have been modified by inserting new provisions to the effect that the Federal Constitution takes precedence over conflicting international law, except in cases of *jus cogens*. The aim of the popular initiative was to protect the self-determination of the Swiss people against (allegedly) undue interference coming from 'foreign judges', in

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[118] Italian Constitutional Court, Judgment No 49/2015.

[119] Italian Constitutional Court, Judgment No 50/2015.

[120] See text accompanying fn 40.

[121] Austrian Constitutional Court, Case B267/86, VfSlg 11500/1987; English translation according to (1987) 30 *Yearbook of the European Convention on Human Rights* 275–276, at 276.

[122] See H Aemisegger, 'Probleme der Umsetzung der EMRK im schweizerischen Recht' in: T Jaag/C Kaufmann (eds), *40 Jahre Beitritt der Schweiz zur EMRK* (2015), pp 201–229; T Altwicker, 'Switzerland: The Substitute Constitution in Times of Popular Dissent' in S Popelier/S Lambrecht/K Lemmens (eds), *Criticism of the European Court of Human Rights. Shifting the Convention System: Counter-Dynamics at the National and EU Level* (2016), pp 385–411.

[123] Text of the initiative: Bundesblatt 2017 5411 (in German), 5079 (in French).

[124] See 'Swiss voters reject "self-determination" initiative', Financial Times of 25 November 2018, available at <www.ft.com>.

particular those of the ECtHR. Thus, the popular initiative shared the main characteristics of 'principled resistance' although it should be added that a conflict between Swiss constitutional law and the Convention would have arisen only in the future. But the technique employed was essentially legal in nature, something that called for including Switzerland in the country reports.

The United Kingdom has some peculiarities, due to the country's lack of a written constitution. Thus, the scenario of a national supreme authority relying on the text of the constitution in order to justify deviations from a Strasbourg judgment cannot materialise. In order to come to terms with the 'principled resistance' concept which mainly centres around the conflict between the Convention and national constitutional law, it has to be accommodated to the peculiarities of the British situation. It is submitted that especially the controversy surrounding the blanket ban on voting rights for serving prisoners[125] has a constitutional dimension because the doctrine of sovereignty of Parliament is at stake.[126] This case certainly shows some aspects of a lack of political will to execute an ECtHR judgment but the political arguments are inextricably linked with legal ones. The fact that by the end of 2018, the Committee of Ministers accepted a new British proposal and closed its examination under Article 46 § 2 ECHR[127] does not mean that the case has lost its merits. To the contrary, the principle of automatic disenfranchisement remained intact, so the disagreement between the Strasbourg Court and national actors (in particular the Parliament in Westminster) can be said to subsist. Furthermore, this case clearly had a very 'unfortunate spill-over effect' to Russia,[128] as will be seen below. Therefore, while there are some peculiarities which are at least in part due to the specialities of the British constitutional system, this case shares the main characteristics of 'principled resistance' as defined above.[129]

Russia finally, is the most obvious case.[130] The status of the Convention was clarified by a judgment of the Russian Constitutional Court where the superior rank of the Russian Constitution vis-à-vis the Convention was stressed, the Court relying, inter alia, on the German Federal Constitutional Court's *Görgülü* decision and on the Italian Constitutional Court's Decision No 238/2014.[131] By the end of 2015, the Russian State Duma passed a law introducing a new procedure before the

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[125] *Hirst v UK No 2* [GC] Appl No 74025/01 (ECtHR, 6 October 2005); *Greens and MT v UK* Appl Nos 60041/08, 60054/08 (ECtHR, 23 November 2010).

[126] In this sense also: de Londras/Dzehtsiarou (fn 81), pp 475 et seq.

[127] ResDH(2018)467, adopted by the Committee of Ministers on 6 December 2018.

[128] *Hutchinson v UK* [GC] Appl No 57592/08 (ECtHR, 17 January 2017), dissenting opinion of Judge Pinto de Albuquerque, para 35.

[129] The prisoners' voting rights problem is qualified as 'backlash' by Sandholtz/Bei/Caldwell (fn 102), pp 166–167.

[130] The cases mentioned below are categorised as 'backlash' cases by Sandholtz/Bei/Caldwell (fn 102), pp 165–166.

[131] Russian Constitutional Court, Judgment No 21-П/2015 of 14 July 2015.

Russian Constitutional Court.[132] Under that procedure, the Russian Constitutional Court may find whether or not a given ECtHR judgment can be implemented in Russia. This procedure, which has been critically assessed by the Venice Commission,[133] was applied for the first time in the *Anchugov and Gladkov* case[134] concerning the right to vote of serving prisoners. In contrast with the situation in the United Kingdom, the ban on voting rights is part of the Constitution, not of ordinary legislation. By a judgment given in April 2016, the Russian Constitutional Court declared, in an unequivocal manner, that an amendment of the Russian Constitution is practically excluded. At the same time, it underlined that implementation of the ECtHR's *Anchugov and Gladkov* judgment is possible within the constraints of current legislation.[135] The said procedure was applied a second time in the *OAO Neftyanaya Kompaniya Yukos* case mentioned above where the ECtHR had awarded the applicant company almost EUR 1.9 billion in just satisfaction.[136] By a judgment given in January 2017, the Russian Constitutional Court declared this judgment to be impossible to execute, due to an irreconcilable conflict with the Russian Constitution.[137] It should be noted that meanwhile, the Russian State has paid costs and expenses as ordered by the ECtHR amounting to EUR 300,000.[138] This demonstrates that the Russian State does not inhibit cooperation with the Court altogether. What is left, however, is the bulk of the just satisfaction sum as awarded by the Court. The problem of how this judgment should be implemented, therefore, remains unresolved to date.

2. Cases Not Selected for Country Reports

Some more countries have been considered for inclusion into the country reports but were finally rejected because the cases at hand did not share the main characteristics of 'principled resistance' as defined in this volume. Countries like Poland,[139]

[132] Федеральный конституционный закон от 14.12.2015 N 7-ФКЗ «О внесении изменений в Федеральный конституционный закон ‹О Конституционном Суде Российской Федерации›» [Federal Constitutional Law No 7-FKZ of 14 December 2015 'On introducing amendments to the Federal constitutional law "On the Constitutional Court of the Russian federation"'], Federal Gazette No 6855 (284); for an English translation, see CDL-REF(2016)006.

[133] Interim Opinion No 832/2015, CDL-AD(2016)005; Final Opinion No 832/2015, CDL-AD(2016)016.

[134] *Anchugov and Gladkov v Russia* Appl Nos 11157/04, 15162/05 (ECtHR, 4 July 2013).

[135] Russian Constitutional Court, Judgment No 12-П/2016 of 19 April 2016.

[136] *OAO Neftyanaya Kompaniya Yukos v Russia* (Just Satisfaction) Appl No 14902/04 (ECtHR, 31 July 2014).

[137] Russian Constitutional Court, Judgment No 1-П/2017 of 19 January 2017.

[138] See DH-DD(2017)1342 of 28 November 2017. The Committee of Ministers criticised, however, that the payment did not cover default interest, see CM/Del/Dec(2019)1340/H46-20, para 3.

[139] See, e.g., Venice Commission, Opinion 833/2016 on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, CDL-AD(2016)001-e; Opinion 860/2016 on the Act on the Constitutional Tribunal, CDL-AD(2016)026-e.

Hungary[140] or Turkey[141] currently raise grave concerns regarding their respect for the rule of law. With regard to Poland, this resulted, by the end of 2017, in the first-ever trigger of the Article 7 TEU procedure by the European Commission.[142] With regard to Hungary, the European Parliament in September 2018 encouraged the introduction of the Article 7 TEU procedure.[143] Alarming as such developments might be, they are not the result of a conflict between a national actor and the ECtHR about implementation of a particular judgment. It may well be that such conflicts will arise in the future. At present, these countries were omitted, due to a lack of pertinent cases.

Sometimes, the Azerbaijani case of *Ilgar Mammadov*[144] has been grouped together with *OAO Neftyanaya Kompaniya Yukos*, mentioned above.[145] In this case, the ECtHR *inter alia* held that the applicant's pre-trial detention did not 'meet the minimum standard set by Article 5 § 1 (c) of the Convention for the reasonableness of a suspicion required for an individual's arrest and continued detention'.[146] Despite this judgment, Mr Mammadov remained in custody and the Azerbaijani courts sentenced him to 7 years imprisonment.[147] In the meantime, this case has resulted in the first-ever application of the procedure under Article 46 § 4 ECHR,[148] as well as in a second ECtHR judgment finding a violation of Article 6 § 1 ECHR with regard to the trial against Mr Mammadov that lead to his prison sentence[149] (as opposed to his pre-trial detention that formed subject of the first set of ECtHR proceedings). It is

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[140] See A von Bodgandy/P Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania* (2015); RD Kelemen/M Blauberger, 'Introducing the debate: European Union safeguards against member states' democratic backsliding' (2017) 24 *Journal of Public Policy* 317–320; D Kochenov/A Magen/L Pech, 'Introduction: The Great Rule of Law Debate in the EU' (2016) 54 *Journal of Common Market Studies* 1045–1049; L Pech/KL Scheppele, 'Illiberalism within: rule of law backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3–47.

[141] See, e.g., Venice Commission, Opinion 872/2016 on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media, CDL-AD(2017)007-e; Opinion 875/2017 on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, CDL-AD(2017)005-e; see also B Saatçioğlu, 'De-Europeanisation in Turkey: The Case of the Rule of Law' (2016) 21 *South European Society and Politics* 133–146; B Fabricius, 'New threats to the rule of law in Council of Europe member States: selected examples', AS/Jur (2017) 27, paras 56 et seq (Turkey), 66 et seq (Poland).

[142] European Commission, Press Release IP/17/5367 of 20 December 2017.

[143] European Parliament, P8_TA-PROV(2018)0340 of 12 September 2018.

[144] *Ilgar Mammadov v Azerbaijan* Appl No 15172/13 (ECtHR, 22 May 2014).

[145] See P-Y Le Borgn', 'The implementation of judgments of the European Court of Human Rights', Doc 14340 of 12 June 2017, para 24.

[146] *Ilgar Mammadov v Azerbaijan* Appl No 15172/13 (ECtHR, 22 May 2014), para 100.

[147] Sheki Court of Appeal, Decision of 29 April 2016, Case No 1(107)-31/2016; English translation available at DH-DD(2016)705; confirmed by Supreme Court, Judgment of 18 November 2016, Case No 1(102)-1431/2016; English translation on file with the author.

[148] Press Release ECHR 390 (2017) of 14 December 2017.

[149] *Ilgar Mammadov v Azerbaijan (No 2)* Appl No 919/15 (ECtHR, 16 November 2017).

submitted that although there was an obvious divergence between the ECtHR and the reaction of the Azerbaijani courts, this was not the result of 'principled resistance' as defined in this volume. For neither did the Azerbaijani courts identify a conflict between the Constitution and the Convention, nor did they claim to act in protection of national or constitutional identity. The divergence was, rather, the result of a difference in taking evidence and establishing facts. In the meantime, Mr Mammadov was released by the Azerbaijani courts, though only conditionally for a 2-year probation period.[150] Thereby, the conflict has decreased without, however, being resolved in its entirety. All in all, the *Ilgar Mammadov* case, despite its problematic character and undoubtedly high level of politicisation,[151] should not be seen as falling into the category of 'principled resistance'.[152]

In other countries, cases of a conflict between the national constitution and the Convention occurred without, however, fulfilling the main characteristics of 'principled resistance' as defined above. This concerned the Grand Chamber judgment in *Sejdic and Finci* where the Court held that the eligibility criteria in parliamentary elections in Bosnia and Herzegovina were not in line with the requirements under Article 3 of Protocol No 1.[153] Since the eligibility criteria are found in the Constitution as part of the Dayton Agreement,[154] there is a necessity to have a constitutional amendment. This process has met political difficulties so that up until now, no consensus among the political leaders could be reached. Those difficulties, however, would seem to be of a political, rather than legal, nature.[155] So, while there is some argument that in this case, the constitutional identity of the newly created State of Bosnia and Herzegovina is at stake,[156] it is submitted that this case does not share the main characteristics of 'principled resistance' as defined above.

The necessity to amend the constitution also exists in Lithuania, following the ECtHR's judgment in *Paksas*.[157] In that case, the ECtHR found a violation of Article

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[150] See information by the Azerbaijani Government of 4 September 2018, DH-DD(2018)816.

[151] See: Statement of Secretary General Jagland of 29 April 2016; Le Borgn' (fn 145), paras 26 et seq; A Destexhe, 'Azerbaijan's Chairmanship of the Council of Europe: What follow-up on respect for human rights?' AS/Jur (2017) 28, paras 70 et seq; Interim Resolution ResDH(2015)43, adopted by the Committee of Ministers on 12 March 2015; Interim Resolution ResDH(2015)156, adopted by the Committee of Ministers on 24 September 2015; Interim Resolution ResDH(2016)144, adopted by the Committee of Ministers on 8 June 2016.

[152] This coincides with the qualification by de Londras/Dzehtsiarou (fn 81), p 480 who regard this case as an example of 'dilatory non-execution', rather than 'principled non-execution'.

[153] *Sejdić and Finci v Bosnia and Herzegovina* [GC] Appl Nos 27996/06, 34836/06 (ECtHR, 22 December 2009).

[154] General Framework Agreement for Peace in Bosnia and Herzegovina of 14 December 1995 (1996) 35 *International Legal Materials* 89 (the Constitution of Bosnia and Herzegovina is contained in Annex 4).

[155] See information given in DH-DD(2017)380 of 31 March 2017.

[156] D Szymczak, 'Interdiction des discriminations vs identité constitutionnelle des Etats parties : Quelques considérations à propos de l'arrêt *Sejdic et Finci c/ Bosnie Herzégovine*' (2009) 7 *Annuaire de Droit Européen* 795–826.

[157] *Paksas v Lithuania* [GC] Appl No 34932/04 (ECtHR, 6 January 2011).

3 of Protocol No 1 with regard to the former President of the Republic having been impeached and subsequently disqualified from standing for parliamentary elections. By the end of 2016, the Lithuanian Constitutional Court delivered a judgment to the effect that the Resolution adopted by the Seimas (the Lithuanian Parliament) to restore the rights of former President Paksas were in breach of the Constitution.[158] This judgment shares some features of 'principled resistance' as defined above, in particular regarding the Constitutional Court's reliance on the superiority of the Constitution. But it contains neither a disagreement with the ECtHR's findings nor reliance on the 'national identity' argument. To the contrary, the Lithuanian Constitutional Court even held that there is a duty flowing from the Constitution to remove the incompatibility with the provisions of Article 3 of Protocol No 1. Thus, it would seem that the Constitutional Court mainly criticised the way in which Parliament intended to implement the ECtHR's judgment. It did not aim to protect the national constitutional order from outside interference as is typical for 'principled resistance' cases.[159] In October 2018, a draft law intended to amend the Constitution was tabled in the Seimas but failed to reach the majority necessary at first reading. Still, the Lithuanian agent in Strasbourg underlined that 'a number of other highest State officials and political leaders […] have already expressed their full understanding of the necessity to intensify their efforts in the execution of the judgment in the *Paksas* case and their commitment to achieve a tangible progress in the most complex legislative process of amending the Constitution'.[160] Again, there are no signs of principled unwillingness to abide by the Strasbourg ruling, let alone of constitutional obstacles to do so.

With regard to Hungary, a conflict between the constitution and the Convention was established in *Alajos Kiss* where the ECtHR criticised the automatic disenfranchisement of people under full or partial guardianship as was foreseen by the former Hungarian Constitution.[161] According to the information provided for by the Hungarian Government, with the adoption of the new Hungarian Constitution this provision was altered to the effect that there is no automatic removal of voting rights for persons placed under guardianship but voting rights can only be removed after an individualised judicial evaluation.[162] Although the Committee of Ministers has

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[158] Lithuanian Constitutional Court, Ruling No KT31-N17/2016 of 22 December 2016, case No 7/2016; English summary available at <http://www.lrkt.lt/en>; see also information given in DH-DD(2017)386 of 3 April 2017.

[159] The difference between *Paksas* and the cases decided by the Russian Constitutional Court is equally underlined by A Padskocimaite, 'Constitutional Courts an (Non)execution of Judgments of the European Court of Human Rights: A Comparison of Cases from Russia and Lithuania' (2017) 77 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 651–684.

[160] DH-DD(2018)1058 of 26 October 2018. In reaction, the Committee of Ministers exhorted all concerned to 'redouble their efforts to ensure that the necessary constitutional amendments are adopted, at least on the first reading, during the Seimas' 2019 spring session, ending 30 June 2019', see Interim Resolution ResDH(2018)469, adopted by the Committee of Ministers on 6 December 2018. For most recent information, see DH-DD(2019)503.

[161] *Alajos Kiss v Hungary* Appl No 38832/06 (ECtHR, 20 May 2010).

[162] DH-DD(2012)1156; see also the Government's Revised Action Report, DH-DD(2015)9; for most recent information by the Hungarian Government, see DH-DD(2019)50.

not yet adopted a final resolution, it would seem that this case does not disclose any signs of ‘principled resistance’.

3. Questionnaire

For the preparation of the country reports, a questionnaire was compiled with the aim to give clearer guidance concerning the dogmatic questions that should be addressed. It was brought to the attention of the rapporteurs with the proviso that not all points needed to be addressed in their entirety but that they should serve as an orientation for drafting the country reports (the notion of ‘a court’ had to be replaced by other actors where necessary in the respective national context):

- Did a court argue that the ECtHR went too far in interpreting the Convention?
- Did a court argue that the ECtHR misinterpreted the applicable national law and that a given judgment should not be followed for that reason?
- Is the categorisation of your country as monist or dualist relevant for cases non-implementation?
- Is there a difference, from the perspective of your national courts, between settled ECtHR case law and isolated judgments in terms of their binding force?
- In terms of binding force, is there a difference, from the perspective of your national courts, between ECtHR cases decided against your own country and against other countries?
- What is the role of the (superior) rank of the national constitution vis-à-vis the Convention for cases of non-implementation of ECtHR judgments?
- Are there cases where courts relied on national identity to justify non-implementation of an ECtHR judgment?
- Are there examples where national courts relied on the ‘lex posterior’ rule for justifying non-implementation of an ECtHR judgment? If not, could this scenario materialise in your country?
- Are there other factors (e.g. separation of powers arguments) that were adduced for justifying non-implementation of ECtHR judgments?

4. Outlook

Foregoing considerations have shown a growing tendency (at least at a *prima facie* level) of national courts or other national actors objecting, in a principled way, to pronouncements of the ECtHR. This coincides with a certain tendency in the global context of national courts opposing judgments delivered by the ICJ, which made

scholars speculate about a revival of Triepalianism.[163] Such developments stand in stark contrast with the doctrine of supremacy of international law, which allows only for marginal exceptions under the provision of Article 46 VCLT.

Already before the blunt rejection of the ICJ judgment by the Italian Constitutional Court in the *Jurisdictional Immunities* case, dogmatic models were developed with the aim of reconciling such instances with the supremacy of international law. It is far from clear, however, whether the instances of 'principled resistance' to ECtHR judgments can be explained by the said models. The Italian Constitutional Court's judgment was clearly motivated by the effort to enhance protection of fundamental rights at the international level, which the Constitutional Court regarded insufficient. In the Convention context, fundamental rights issues are automatically taken into account by the ECtHR. In such cases, the question is rather whether the ECtHR has struck the right balance between the human rights concerns of the applicant and the concerns of other individuals, or of the society as a whole. They are characterised by a tendency to protect national peculiarities, or 'national identity', against influences coming from the outside, thereby posing the question whether it is appropriate for judges to decide on certain policy issues.

Furthermore and besides this, it is far from clear whether the instances of 'principled resistance' to ECtHR judgments referred to above share a common denominator. It might well be that they are just an accumulation of instances similar on their face but employing different dogmatic concepts and following different rationales. Only in the former case would it be justified to call them a 'new paradigm'. All this necessitates going into the very details of national jurisprudence before being able to answer the overall question: 'principled resistance' to ECtHR judgments—a new paradigm?

[163] See A Peters, 'Let Not Triepel Triumph – How To Make the Best Out of Sentenza No. 238 of the Italian Constitutional Court for a Global Legal Order', 22 December 2014, available at <https://verfassungsblog.de>; G Boggero, 'The Legal Implications of Sentenza No. 238/2014 by Italy's Constitutional Court for Italian Municipal Judges: Is Overcoming the "Triepelian Approach" Possible?' (2016) 76 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 203–224.