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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
(VENICE COMMISSION)

**RUSSIAN FEDERATION**

**FINAL OPINION\***

**ON THE AMENDMENTS TO THE FEDERAL CONSTITUTIONAL LAW**

**ON THE CONSTITUTIONAL COURT**

**Adopted by the Venice Commission  
at its 107<sup>th</sup> Plenary Session  
(Venice, 10-11 June 2016)**

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\*The interim opinion appears in [the appendix](#) to this document.

**TABLE OF CONTENTS**

I.	Introduction .....	3
II.	Background and general remarks.....	4
III.	The Judgment of the Constitutional Court of the Russian Federation of 19 April 2016 No. 12- П/2016.....	4
IV.	Analysis of the 2015 amendments in the light of the visit of the Venice Commission delegation and of the Constitutional court's judgment of 19 April 2016.....	7
A.	The power of the Russian Constitutional Court to declare an international decision "non-executable".....	7
B.	The power of the Constitutional Court to assess the constitutionality of an individual measure of execution, such as an order to pay just satisfaction .....	9
C.	New Article 104 <sup>4</sup> paragraph 2 and Article 106 part 2 of the Federal law on the Constitutional Court.....	9
D.	The obligation of all State authorities, including but not limited to the Constitutional Court, to secure the execution of international decisions.....	10
E.	The involvement of the original applicants in the proceedings before the European Court of Human Rights in the procedure before the Constitutional Court in conditions respecting the equality of arms.....	10
V.	Conclusions.....	11
	APPENDIX (CDL-AD(2016)005) INTERIM OPINION ON THE AMENDMENTS TO THE FEDERAL CONSTITUTIONAL LAW ON THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION .....	13

## I. Introduction

1. By a letter of 11 December 2015, the First Deputy Chairperson of the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe conveyed that Committee's decision to request an opinion of the Venice Commission on the "draft legislation pending before the Russian Federation's parliament which would empower the Constitutional Court to determine whether findings by international bodies on protection of human rights and freedoms (including those of the European Court of Human Rights) are to be implemented or not". Such an opinion was to be adopted preferably at the Commission's 106<sup>th</sup> Plenary Session, in March 2016.
2. Federal Law of the Russian Federation no. 7-KFZ (CDL-REF(2016)006, hereinafter "the 2015 amendments"), introducing amendments to the Federal Constitutional Law no. 1-FKZ of 21 July 1994 on the Constitutional Court of the Russian Federation (CDL-REF(2016)007, hereinafter "the 1994 law")<sup>1</sup> was passed by the State Duma on 4 December 2015, ratified by the Federation Council on 9 December, signed by the President on 14 December and published the following day. The law entered into force on 15 December 2015.
3. On 2 February 2016, the Ministry of Justice of the Russian Federation appealed to the Russian Constitutional Court regarding the possible inability to enforce the judgment of the European Court of Human Rights (hereinafter "the ECtHR") in the case of "Anchugov and Gladkov v. Russia" of 3 July 2013.<sup>2</sup>
4. Having set up a working group composed of Mr Bogdan Aurescu, Mr Sergio Bartole, Mr Iain Cameron, Mr Paul Craig, Mr Wolfgang Hoffmann-Riem and Mr Martin Kuijer, at its 106<sup>th</sup> Plenary Session (10-11 March 2016) the Venice Commission adopted an interim opinion on the 2015 amendments (CDL-AD(2016)005). As the Russian authorities had been unable to host the working group to discuss the amendments prior to the March session, the opinion was adopted as an interim one and it was agreed that a final opinion would be prepared for the June session.
5. On 19 April 2016, the Constitutional Court of the Russian Federation rendered its judgment in the case "concerning the resolution of the question of the possibility of executing the judgment of the European Court of Human Rights of 4 July 2013 in the case of Anchugov and Gladkov v. Russia in accordance with the Constitution of the Russian Federation in respect to the request of the Ministry of Justice of the Russian Federation" (CDL-REF(2016)033).
6. On 27-28 April 2016, a delegation of the Venice Commission composed of Mr Bogdan Aurescu and Ms Simona Granata-Menghini travelled to Moscow and Saint Petersburg, where it met with representatives of the Ministry of Foreign Affairs, of the Ministry of Justice, of the Constitutional Court and of the Institute of Legislation and Comparative Law. The Venice Commission wishes to thank them for the constructive meetings.
7. The present final opinion was prepared on the basis of the rapporteurs' contributions. It was adopted by the Commission at its 107<sup>th</sup> Plenary Session (Venice, 10-11 June 2016).

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<sup>1</sup> [www.ksrf.ru/en/Decision/.../2016\\_April\\_19\\_12-P.pdf](http://www.ksrf.ru/en/Decision/.../2016_April_19_12-P.pdf)

<sup>2</sup> [http://hudoc.echr.coe.int/eng#{"appno":\["11157/04"\],"itemid":\["001-122260"\]}](http://hudoc.echr.coe.int/eng#{).

## II. Background and general remarks

8. The background information and the general comments relating to the 2015 amendments, as well as the comparison between the competences of the Russian Constitutional Court and those of other European Constitutional Courts are detailed in Chapters II, III, IV and VI of the interim opinion. Chapters V and VII of the interim opinion are considered valid, as modified by the present final opinion.

## III. The Judgment of the Constitutional Court of the Russian Federation of 19 April 2016 No. 12- П/2016

9. In its judgment of 19 April 2016, the Russian Constitutional Court examined the question of the possibility of executing the judgment of the European Court of Human Rights of 4 July 2013 in the case of Anchugov and Gladkov v. Russia in accordance with the Constitution of the Russian Federation. The application to the Constitutional Court had been made by the Russian Federation's representative to the European Court of Human Rights (Government Agent) and Deputy Justice Minister, on the ground of the "discovered uncertainty in the question of the possibility to execute" the above judgment.

10. Before the judgment was delivered, an open hearing was held by the Constitutional Court, at which the applicant Mr Anchugov as well as the lawyers representing the other applicant, Mr Gladkov, participated. Both applicants have been released from prison. According to the representatives of the Constitutional Court during the 27-28 April 2016 visit to Russia, the presence of the (representatives of) the applicants was requested by the applicants themselves and it was granted on an *ad hoc* basis, since there is no approved procedure (yet) regarding the handling of cases stemming out from the application of the December 2015 amendments to the Constitutional Law of the Russian Constitutional Court.

11. The Constitutional Court stated at the outset that the Russian constitutional legal order is not subordinate to the European conventional system and, for the sake of the effectiveness of the norms of the European Convention on Human Rights, the European Court of Human Rights should respect the national constitutional identities. The Court nevertheless "recognised the fundamental significance of the European system of protection of human and civil rights and freedoms, judgments of the European Court of Human Rights being part of it" and was "ready to look for a lawful compromise for the sake of maintaining this system, reserving the determination of the degree of its readiness for it, so far as it is the Constitution of the Russian Federation which outlines the bounds of the compromise in this issue". The Constitutional Court, "as the final instance" of resolving the question of the possibility to execute judgments of the ECtHR must find "a reasonable balance in carrying out this power, so that the decision taken by it should on the one hand answer the letter and spirit of the judgment of the ECtHR, and on the other not come into conflict with the fundamental principles of the constitutional order of the Russian Federation and the legal regulation of human and civil rights and freedoms established by the Constitution of the Russian Federation".<sup>3</sup>

12. The Court then proceeded to the analysis of the principles developed by the ECtHR as concerns disenfranchisement of prisoners. It also analysed the constitutional provisions and principles on the recognition and on the possibility of restriction of electoral rights. The Court, on the basis of the previous Soviet/Russian constitutions and of the travaux préparatoires of the current one, stated that the will of the constituent legislator was undoubtedly that all convicted persons "kept in places of deprivation of liberty under a court sentence" be disenfranchised. This made it impossible to interpret Article 32 of the Russian Constitution otherwise. On the other hand, when the European Convention on Human Rights was ratified by Russia, no issue

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<sup>3</sup> Constitutional Court of the Russian Federation, judgment No. 12-P/2016 of 19 April 2016, CDL-REF(2016)033, point 1.2, p. 5.

of contradiction between Article 32 and Article 3 of Protocol 1 was raised, which in its view meant that, at that time, the two provisions were compatible. The judgment of the ECtHR in *Anchugov and Gladkov* suggested an interpretation of Article 3 of Protocol No. 1 which “implicitly contemplat[ed] the alteration of Article 32.3 of the Constitution of the Russian Federation, to which Russia [...] gave no consent during [...] ratification [of the ECHR]. A contradiction with the Russian Constitution existed not in respect of the European Convention as such, but only in respect of the interpretation thereof given by the ECtHR to the issue of disenfranchisement of prisoners, “which was an evolutive one rather than a well-established one”. In the Court’s view, there was no consensus among Council of Europe member states on this issue, which consensus was instead necessary for the ECtHR to proceed with an evolutive interpretation.<sup>4</sup>

13. The Court reiterated that there were no grounds to interpret the ban contained in Article 32 as not being absolute and the federal legislator did not have the discretionary power to remove the ban in respect of certain categories of prisoners. The Court considered that it was entitled, as an exceptional case, to disagree (with the ECtHR) but that it was ready to search for a lawful compromise within the limits of what the Russian constitution allows. The Court pledged to adopt a responsible and restrained approach to the solution of the question of the implementation of the judgments of the European Court of Human Rights.<sup>5</sup>

14. The Constitutional Court interpreted Article 32 of the Constitution as meaning “convicted persons isolated from the society in places of deprivation of liberty”, from which it ensued that “deprivation of liberty” in that context had to be understood as a “special kind of criminal penalty”. Disenfranchisement was imposed only in connection with this special kind of penalty; individuals serving other types of penalty did not lose their voting rights. Deprivation of liberty within that meaning could not be imposed for crimes of small gravity except in the presence of aggravating circumstances. As a consequence, courts, when imposing sentences of deprivation of liberty in colony-settlements or correctional colonies, took into account the effects of disenfranchisement of such sentence. The Constitutional Court therefore disagreed with the finding of the ECtHR that the Russian system of disenfranchisement of convicted prisoners was imposed in an automatic and indiscriminate manner which did not take into account the length of the sentence or the nature and gravity of the offence and was not based on a discretionary law-applying decision establishing a link between the need for disenfranchisement and the circumstances of a specific case. The Court added statistical data to the effect that in 2015 the number of persons sentenced to real deprivation of liberty and thus disenfranchised was significantly smaller than the number of persons sentenced for small crimes and therefore not disenfranchised.<sup>6</sup>

15. The Constitutional Court then addressed the practice of the ECtHR to indicate general measures which the respondent State needs to take in response to the finding of a violation of the ECHR. The Constitutional Court recalled that it is primarily for the State concerned to choose, subject to the supervision of the Committee of Ministers, the means to be used in its domestic legal order for the discharge of its obligations under Article 46 ECHR. In judgments finding a systemic violation of the ECHR, the ECtHR could assist the State in identifying the type of measure that could be taken to resolve the situation; the ECtHR could also indicate one specific measure in cases when the nature of an established violation of the ECHR was such as to limit the choice of measures. In *Anchugov and Gladkov*, the ECtHR suggested that the Russian Federation execute its decision through some form of political process or by interpreting the Russian Constitution in harmony with the ECHR. The Constitutional Court

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<sup>4</sup> Ibidem, point 4.1-4.3, pp. 6-12.

<sup>5</sup> Ibidem, point 4.4, pp. 13-14.

<sup>6</sup> Ibidem, points 5.1-5.3, pp. 14-18.

considered that the interpretation of Article 32 which it offered in this judgment together with the pertinent judicial practice did not present any contradiction with Article 3 of Protocol No. 1.<sup>7</sup>

16. The Constitutional Court nevertheless indicated that the federal legislator had the power “to optimize the system of criminal penalties, including by means of transfer of individual regimes of serving deprivation of liberty to alternative kinds of penalties” and to amend the criminal and criminal-executive legislation so as to transform sentences in colonies-settlements for non-intentional crimes and intentional crimes of small gravity into a separate kind of criminal penalty not involving the deprivation of voting rights.<sup>8</sup>

17. Further, the Constitutional Court expressed the view that the ECtHR ought to have examined the specific circumstances of the cases of Mr Anchugov and Mr Gladkov, and not the Russian legislation *in abstracto*. According to the standards developed by the ECtHR itself, disenfranchisement for serious crimes, that is crimes punishable by 3 or more years of imprisonment, did not violate the principle of proportionality. The two applicants had been sentenced to 15 years of imprisonment in commutation of death sentences, so that their disenfranchisement was not contrary to Article 3 of Protocol No. 1.<sup>9</sup>

18. Finally, the Constitutional Court examined the question whether measures of individual character needed to be taken and stated in the first place that it was impossible to offer *restitutio in integrum* in connection with the past elections during the period 2000-2008. At any rate, reconsideration of the applicants’ disenfranchisement was not admissible, given that they had been convicted of particularly grave crimes.<sup>10</sup>

19. In conclusion, the Constitutional Court held: that it was impossible to execute the judgment of the ECtHR in the case of Anchugov and Gladkov in the sense of amending the legislation of the Russian Federation to exclude from disenfranchisement some categories of convicted persons serving a sentence in places of deprivation of liberty; that the execution of that judgment was possible to the extent that it meant ensuring justice, proportionality and differentiation of application of the restriction of electoral rights (as this was already the case under the current criminal system); that the federal legislator was competent to optimize the criminal system including by transferring individual regimes of serving deprivation of liberty to alternative kinds of penalties not entailing disenfranchisement; and that the execution of measures of individual character was impossible.<sup>11</sup>

20. During the visit of 27-28 April 2016, the representatives of the Constitutional Court emphasized that even if the judgment of the Constitutional Court in this case (like in any other case) is compulsory, the reference in it to the competence of the federal legislator to change the criminal legislation is just a suggestion, in other words an option which may be followed or not by the Parliament. Also, the representatives of the Ministry of Justice confirmed that this proposal of the Constitutional Court is just a recommendation and mentioned that it is too early to say if they will initiate (or not) a legislative proposal aimed at changing the criminal legislation, since the Ministry is still assessing the legal implications of the 19 April judgment.

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<sup>7</sup> Ibidem, point 5.4, p. 18.

<sup>8</sup> Ibidem, point. 5.5, p. 19.

<sup>9</sup> Ibidem, point 6, p.p. 19-20.

<sup>10</sup> Ibidem, point 7, p. 20.

<sup>11</sup> Ibidem, pp. 21-22.

#### **IV. Analysis of the 2015 amendments in the light of the visit of the Venice Commission delegation and of the Constitutional court's judgment of 19 April 2016.**

21. In its interim opinion, the Venice Commission expressed serious concerns as regards the compatibility of the 2015 amendments with the obligations of the Russian Federation under international law, notably Article 46 of the European Convention on Human Rights. The Commission found in particular:

- a. that the Constitutional Court ought not to have been given the power of declaring an international decision "non-executable", but only of assessing the compatibility with the Russian constitution of a given modality of enforcement proposed by the Russian authorities, with the exception of a modality indicated specifically by the ECtHR;
- b. that the Constitutional Court should not have the power to assess the constitutionality of an individual measure of execution, such as an order to pay just satisfaction;
- c. that new Article 104<sup>4</sup> paragraph 2 and Article 106 part 2 of the Federal law on the Constitutional court (providing that following a decision by the Constitutional Court that a judgment of the ECtHR is non-executable, no measures of executions may be taken in the Russian Federation) should be removed since they are in conflict with the obligations stemming from the Vienna Convention on the Law on Treaties and Article 46 ECHR;
- d. that all State authorities, including but not limited to the Constitutional Court, were under the obligation to find appropriate measures – including alternative ones (for instance, but not limited to them, to amend the legislative framework, including the Constitution), if a given modality is found to be incompatible with the Constitution - to execute the international decision;
- e. Finally, that the original applicants in the proceedings before the European Court of Human Rights need to be involved in the procedure before the Constitutional Court in conditions respecting the equality of arms.

22. The present final opinion proceeds from the analysis carried out in the interim opinion. The following considerations take into account the information gathered during the visit to the Russian Federation and the judgment of 19 April that are relevant for the interpretation of the 2015 amendments. The Venice Commission stresses that it is not competent to address the question of the execution of the judgment of the ECtHR in the case of Anchugov and Gladkov, which is of exclusive competence of the Committee of Ministers of the Council of Europe.

##### **A. The power of the Russian Constitutional Court to declare an international decision "non-executable"**

23. The finding that a whole judgment is non-executable means that *under the Constitution in force* there are no means of executing such judgment. In such a case, there remains only one possibility for the State to respect its international obligation to abide by such judgment: amending the Constitution.

24. It is not very frequent that constitutional amendments are required to remedy a violation or to prevent further violations of the ECHR, but there have indeed been several of these cases, and several respondent States duly initiated a process of constitutional reform which resulted in amendments which were later considered by the Committee of Ministers of the Council of Europe as appropriate measures of general character.<sup>12</sup> These States did so without a judgment of the Constitutional Court declaring the impossibility to find a constitutional manner of execution. The Russian authorities, however, have explained to the Venice Commission that the aim of the 2015 amendments was to remove from the Executive the power to reach such a

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<sup>12</sup> Constitutional amendments were carried out as a general measure of execution notably in Greece, Hungary, Italy, Slovak Republic and Turkey, (see at <http://www.coe.int/en/web/execution/home>).

conclusion: this power, in their view, naturally belongs to the Constitutional Court. For this reason, under the new procedure the Government Agent has been empowered to bring before the Constitutional Court a judgment of the ECtHR containing a “discovered contradiction” with the Constitution, seeking that the Court explore and assess whether or not there exist options of execution.

25. While so far there exists only one example of application of the 2015 amendments so that it is not possible to establish if this would be the practice in the future, the Venice Commission is of the opinion that the Constitutional Court should not be tasked with the identification of all the means of execution of an international judgment. The choice of the best way of enforcing a decision by an international court is a political and administrative matter, not a constitutional one and it is primarily the responsibility of the government. If it were tasked with the whole question of enforcement, the Constitutional Court would risk becoming the political arbiter of all controversies surrounding international decisions. The Constitutional Court can usefully contribute to the execution of international decisions but it can only play the role of a “negative legislator”: it cannot actively create new normative acts (on the sub-statutory, statutory or constitutional level) which may be required in the process of execution. As a consequence, a finding of unconstitutionality of a particular modality of execution of a decision of an international court has to be the starting point for the work of other state powers/organs. The Constitutional Court may therefore be asked (only) to assess whether a specific form or modality (measure) of execution raises an issue of constitutionality (such cases should be rather exceptional). Clearly, in the course of this assessment, if there are issues of constitutionality the Court may, when it is possible, indicate an alternative manner of execution which will strike the “lawful compromise” mentioned in the judgment of 19 April 2016.

26. As the Venice Commission has said in its interim opinion, the finding that a whole judgment is “non-executable” is problematic. “Non-executable” in the sense that there is no constitutional manner of execution inevitably points to the only solution that is compatible with the State’s international obligations: amending the Constitution (which is obviously not for the Constitutional Court to indicate as a means of execution). As a consequence, the discretionary power of the other State authorities ends up being significantly reduced. The 2015 amendments (new Article 104<sup>4</sup> paragraph 2 and Article 106 part 2 of the Federal law on the Constitutional court) even explicitly and radically rule out – at least in their wording – the possibility of amending the Constitution by providing that no measures of execution may be taken if a judgment is found to be non-executable. This definitive attitude of giving up the execution of the judgment is in breach of the State’s international obligations. To the contrary, the finding by the Constitutional Court that a given modality of execution proposed by the Government Agent (or other State authorities) is not constitutionally acceptable does not raise an issue, insofar as the question of execution is then referred back to the other State institutions (the government, the parliament) which are responsible under international law for the enforcement of the judgment (see recommendation below). Thus, the Constitutional Court does not risk entering into a conflict with the international organisation or the international court.

27. In sum, the Venice Commission considers that the question of the execution of an international decision should not be delegated in its entirety to the Constitutional Court; the Commission therefore recommends that the wording of the revised Federal Law on the Constitutional Court be amended to provide that the Government Agent (or other State authority) may seek a decision of the Constitutional Court on the compatibility with the Russian constitution of a specific modality of execution which it intends to take, when it has doubts that such a modality may raise issues of constitutionality.

**B. The power of the Constitutional Court to assess the constitutionality of an individual measure of execution, such as an order to pay just satisfaction**

28. If it is admissible that the question of the compatibility with the Constitution of an execution measure of general character be brought before the Constitutional Court, the same cannot be said for individual measures, especially in case of orders to pay just satisfaction.

29. The 2015 amendments do not exclude that orders for payment of just satisfaction be brought before the Constitutional Court. It was clear during the visit of 27-28 April 2016 that the Russian authorities do not rule out this possibility in principle; according to them, it depends on the specific case. The Anchugov and Gladkov case did not contain any orders for payment of just satisfaction; hence, this decision does not constitute a useful precedent in this respect. Moreover, even if the ECtHR judgment did not indicate an individual measure, the 19 April judgment of the Constitutional Court concluded that the “execution of the judgment of the European Court of Human Rights of 4 July 2013 ... with regard to measures of individual character ... is impossible”. In its judgment of 19 April, the Constitutional Court indicated that the benchmark for assessing the enforceability of a judgment is “its compatibility with the fundamental principles of the constitutional order of the Russian Federation and the legal regulation of human and civil rights and freedoms established by the Constitution of the Russian Federation”.<sup>13</sup>

30. It is very difficult to conceive that an order for payment of a sum of money may be found to be unconstitutional in the light of Chapters 1 and 2 of the Constitution. However, as this may not be totally ruled out, the Venice Commission recommends that the revised Federal Law on the Constitutional Court of the Russian Federation explicitly exclude orders for payment of sums of money (on account of just satisfaction as well as for legal costs) from the competence of that Court.

**C. New Article 104<sup>4</sup> paragraph 2 and Article 106 part 2 of the Federal law on the Constitutional Court**

31. Pursuant to new Article 104<sup>4</sup> paragraph 2 and Article 106 part 2 of the Federal law on the Constitutional Court, following a decision by the Constitutional Court that a judgment of the ECtHR is non-executable, no measures of executions may be taken in the Russian Federation. As the Venice Commission has stated in its interim opinion, these provisions are in direct conflict with the obligations stemming from the Vienna Convention on the Law on Treaties and from Article 46 ECHR.

32. In its interim opinion, the Venice Commission found that the 2015 amendments presented an “all or nothing” solution (para. 73): “they move from the premise that possible conflicts have to be settled either through refusing the implementation of ECtHR judgments – which is inadmissible – or through declaring that there is no conflict between these judgments and the Russian Constitution, a “black or white alternative”. At the 106<sup>th</sup> Plenary Session, the Russian representatives argued that the Constitutional Court of Russia, if the hurdle to execution could not be lifted, had the possibility of addressing the Federal Assembly for further measures to be taken, and that the Court, in its assessment of the enforceability of a judgment of the European Court of Human Rights, would not take a “black or white” approach but would try to reconcile the constitution and the judgment and to indicate the means to avoid further collisions. Admittedly, in its judgment of 19 April 2016, the Constitutional Court seems to have interpreted new Article 104<sup>4</sup> paragraph 2 and Article 106 part 2 in a rather flexible fashion; the Court has

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<sup>13</sup> These correspond to Chapters 1 and 2 of the Constitution of the Russian Federation, which, together with Chapter 9 on the constitutional amendment and revision of the constitution, may not be amended by the Federal Assembly. Their amendment requires the decision by a Constituent Assembly to adopt a new constitution (Article 134 of the Constitution).

declared the Anchugov and Gladkov judgment to be non-executable in terms of a non-literal interpretation of Article 32 of the Constitution and of an ensuing legislative reform, and has found that the Russian constitutional order already complies with the criteria for the application of Article 3 of Protocol No. 1 to the ECHR. Yet, the Court has indicated a possible legislative reform which the Federal legislator had the power to initiate and which would have represented a fuller enforcement of the judgment of the ECtHR. The Court therefore, despite its finding of non-enforceability, referred the case to the other State authorities (even if in this respect its recommendation is not binding – see paragraph 20 above). At the same time, the effectiveness of the approach of the Constitutional Court in the application of the December 2015 amendments cannot be assessed properly until after the legislation recommended is adopted (if it is adopted), and also on the basis of the subsequent practice of the Constitutional Court in implementing the December 2015 amendments.

33. While it seems clear that the Constitutional Court has not spared its efforts to avoid a conflict with Strasbourg, which is to be welcomed, the Venice Commission maintains its recommendation to remove new Article 104<sup>4</sup> paragraph 2 and Article 106 part 2 of the Federal law on the Constitutional Court.<sup>14</sup>

#### **D. The obligation of all State authorities, including but not limited to the Constitutional Court, to secure the execution of international decisions**

34. The Venice Commission, as it has done in its interim opinion and above, underlines that the execution of an international decision is an obligation incumbent upon the State as a whole, that is, on all State institutions. For this reason, the Venice Commission reiterates its recommendation that the revised Federal Law on the Constitutional Court contain a provision indicating explicitly that, should the Constitutional Court find that a given *modality of execution* (see recommendation above) is incompatible with the Constitution, the question must be referred back to the Executive and other State institutions for further action in order to find alternative ways to execute the international decision, without excluding any possible option to this end.

#### **E. The involvement of the original applicants in the proceedings before the European Court of Human Rights in the procedure before the Constitutional Court in conditions respecting the equality of arms**

35. In its interim opinion, the Venice Commission, having noted that the Constitutional Court could decide the case “without holding a hearing”, raised the issue of the due protection of the right of the original applicants in the case before the Strasbourg Court to submit their observations on equal conditions as the Russian authorities.

36. In the proceedings relating to the case Anchugov and Gladkov, the Constitutional Court held an open hearing, and both applicants were invited to participate in it. One did so in person, the other through his representatives. The Constitutional Court explained to the Venice Commission delegation that it has the power to call any witnesses and experts it considers necessary.

37. In the light of the above, the Venice Commission does not find that the possibility for the Constitutional Court to decide a case under the 2015 amendments without holding a hearing jeopardises as such the respect for the original applicants’ right to submit arguments. However, in the light of the explanations provided by the Constitutional Court (see above paragraph 10), the Venice Commission recommends the inclusion of appropriate rules in the Rules of procedure of the Constitutional Court, to provide for the participation of the original applicants in

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<sup>14</sup> During the visit of 27-28 April 2016, the representatives of the Constitutional Court indicated that they see no reason to modify the December 2015 amendments in the sense recommended by the Venice Commission.

the oral hearing, if there is one, or for their right to make written submissions, if no oral hearing is held.

## **V. Conclusions**

38. The Venice Commission wishes to stress at the outset that the execution of the judgments of the European Court of Human Rights is an unequivocal, imperative legal obligation, whose respect is vital for preserving and fostering the community of principles and values of the European continent. The Commission attaches the greatest importance to it.

39. In its interim opinion, the Venice Commission presented background information and general comments that will not be repeated in this opinion. As to the analysis of the 2015 amendments contained in the interim opinion, it remains valid subject to the following new considerations in the light of the information gathered during the visit to the Russian Federation and of the judgment delivered by the Constitutional Court on 19 April 2016 in the case of Anchugov and Gladkov.

40. The 2015 amendments to the Constitutional Law on the Constitutional Court of the Russian Federation have empowered the latter court to declare decisions of international courts, notably of the European Court of Human Rights, as “unenforceable”. In the only case which has so far been brought under the 2015 amendments, the Government Agent has referred to the Court the whole international decision, asking it to identify all possible manners of execution and to assess whether any of these is compatible with the Constitution.

41. The Venice Commission is of the opinion that the Constitutional Court should not be tasked with the identification of the manners of execution of an international judgment. The choice of the best way of enforcing a decision by an international court is usually a political/administrative matter, not a constitutional one and it is primarily the responsibility of the government. If it were tasked with the whole question of enforcement, the Constitutional Court would risk becoming the political arbiter of all controversies surrounding international decisions. The Constitutional Court may be asked (only) to assess whether a specific form or modality (measure) of execution raises an issue of constitutionality (such cases should be rather exceptional). While the finding by the Constitutional Court that a whole international decision is non-executable is problematic, the finding by the Constitutional Court that a given modality of execution proposed by the Government Agent (or other State organ) is not constitutionally acceptable does not raise an issue, insofar as the question of execution is then referred back to the other State institutions (the government, the parliament) which are responsible under international law for the enforcement of the judgment.

42. As a consequence, in the Commission’s opinion it is crucial that the revised Federal Law on the Constitutional Court provide that, should the Constitutional Court find that a given modality of execution is incompatible with the Constitution, the question must be referred back to the Executive and other State institutions for further action. The provision that no execution measure may be taken if the Constitutional Court finds that a judgment is non-enforceable is in direct conflict with Russia’s international obligations under the Vienna Convention on the Law of Treaties and Article 46 ECHR and should be removed.

43. If it is admissible that the question of the compatibility with the Constitution of an execution measure of general character be brought before the Constitutional Court, the same cannot be said for individual measures such as orders to pay just satisfaction.

44. The possibility for the Constitutional Court to examine cases referred to it under this procedure without holding a hearing does not as such jeopardise the original applicant’s right to make submissions. However, the Venice Commission recommends the inclusion of appropriate rules in the Rules of procedure of the Constitutional Court, to provide for the participation of the

original applicants in the oral hearing, if there is one, or for their right to make written submissions, if no oral hearing is held.

45. The Venice Commission, in order for the 2015 amendments to be compatible with international standards, recommends amending the revised Federal Law on the Constitutional Court as follows:

- a. Providing that the Government Agent (or other State organ) may seek a decision of the Constitutional Court only on the compatibility with the Russian Constitution of a specific modality of execution which the Russian authorities intend to take, when they have doubts that such an already identified modality may raise issues of constitutionality; the modalities of execution indicated specifically by the ECtHR in its judgments may not be subject to such procedure;
- b. Providing that individual measures, especially orders for payment of just satisfaction, may not be submitted to the Constitutional Court;
- c. Removing new Article 104<sup>4</sup> paragraph 2 and Article 106 part 2 of the Federal law on the Constitutional Court;
- d. Providing that should the Constitutional Court find that a given modality of execution is incompatible with the Constitution, the question be referred back to the Executive and other State institutions for further action in order to find alternative ways to execute the international decision, without excluding any possible option to this end.

46. The Venice Commission remains at the disposal of the Russian authorities for any further assistance they may wish to receive in this connection.

## APPENDIX

CDL-AD(2016)005

### INTERIM OPINION ON THE AMENDMENTS TO THE FEDERAL CONSTITUTIONAL LAW ON THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION

#### TABLE OF CONTENTS

<a href="#">I. Introduction</a>	13
<a href="#">II. The legal background</a>	14
<a href="#">A. Domestic provisions</a>	14
<a href="#">B. The judgment of the Constitutional Court of the Russian Federation of 14 July 2015 No. 21-П/2015</a>	15
<a href="#">III. The 2015 amendments</a>	18
<a href="#">IV. General comments</a>	20
<a href="#">A. Implementation of international human rights treaties into the domestic legal order</a>	20
<a href="#">B. The specific international obligations arising out of the European Convention on Human Rights</a>	23
<a href="#">C. Methods to solve possible tensions between decisions of the European Court of Human Rights and national law</a>	26
<a href="#">V. Analysis of the 2015 amendments</a>	30
<a href="#">VI. Comparison between the new powers of the Constitutional Court of the Russian Federation and those of other selected European Constitutional Courts</a>	33
<a href="#">A. Germany</a>	33
<a href="#">B. Italy</a>	34
<a href="#">VII. Conclusions</a>	35

#### **I. Introduction**

47. By a letter of 11 December 2015, the First Deputy Chairperson of the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe conveyed that Committee's decision to request an opinion of the Venice Commission on the "draft legislation pending before the Russian Federation's parliament which would empower the Constitutional Court to determine whether findings by international bodies on protection of human rights and freedoms (including those of the European Court of Human Rights, ECtHR) are to be implemented or not". Such an opinion was to be adopted preferably at the Commission's 106<sup>th</sup> Plenary Session, in March 2016.

48. Federal Law of the Russian Federation no. 7-KFZ (CDL-REF(2016)006, hereinafter “the 2015 amendments”), introducing amendments to the Federal Constitutional Law no. 1-FKZ of 21 July 1994 on the Constitutional Court of the Russian Federation (CDL-REF(2016)007, hereinafter “the 1994 law”) was passed by the State Duma on 4 December 2015, ratified by the Federation Council on 9 December, signed by the President on 14 December and published the following day. The law entered into force on 15 December 2015.

49. On 2 February 2016, the Ministry of Justice of the Russian Federation appealed to the Russian Constitutional Court regarding the possible inability to enforce the judgment of the ECtHR in the case of “Anchugov and Gladkov v. Russia” of 3 July 2013.

50. A working group was set up, composed of: Mr Bogdan Aurescu, Mr Sergio Bartole, Mr Iain Cameron, Mr Paul Craig, Mr Wolfgang Hoffmann-Riem, and Mr Martin Kuijer.

51. As the Russian authorities were not able to host meetings with the rapporteurs before the March Plenary Session, the present opinion is presented as an interim one. The Venice Commission hopes that such meetings will be organised after March 2016, so that the Russian authorities may present their arguments and a final opinion may be prepared for the June 2016 session.

52. The present interim opinion is based on the rapporteurs’ contributions. It was discussed at the joint meeting of the Sub-Commission on Constitutional Justice and on International Law on 10 March 2016 and was subsequently adopted by the Commission at its 106<sup>th</sup> Plenary Session (Venice, 11-12 March 2016).

## **II. The legal background**

### **A. Domestic provisions**

53. Article 15.4 of the Russian Constitution provides that “*Universally recognized principles and norms of international law as well as international agreements of the Russian Federation should be an integral part of its legal system. If an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of the international agreement shall be applied.*”

54. Article 17.1 of the Russian Constitution provides: “*The basic rights and liberties in conformity with the commonly recognized principles and norms of the international law are recognized and guaranteed in the Russian Federation and under this Constitution.*”<sup>15</sup>

55. Article 79 of the Constitution provides that: “*The Russian Federation may participate in inter-state associations and delegate some of its powers to them in accordance with international agreements if this does not restrict human or civil rights and liberties or contravene the fundamentals of the constitutional system of the Russian Federation.*”

56. Article 125, Section 2 item “d” of the Russian Constitution provides that the Russian Constitutional Court may “consider cases on the correspondence to the Constitution of the Russian Federation of [...] d. international treaties and agreements of the Russian Federation

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<sup>15</sup> A 2003 ruling of the Russian Supreme Court confirmed that international law has priority over the laws of the Russian Federation, but not over the Russian Constitution, except maybe for the generally recognized principles of international law, 'deviation from which is impermissible' : Supreme Court of the Russian Federation (plenum), decision no 5 of 10 October 2003 on the application by ordinary courts of the universally recognized principles and norms of international law and the international treaties of the Russian Federation, (2004) 25 HRLJ 108-111, paras. 1 and 8, cited by Anne Peters, Supremacy Lost: International Law Meets Domestic Constitutional Law, Vienna Online Journal on International Constitutional Law, Vol. 3, 2009. Available at SSRN: <http://ssrn.com/abstract=1559002>, p. 187 (emphasis added).

which have not come into force". This was confirmed by the 2015 Judgment of the Russian Constitutional Court.<sup>16</sup>

57. Russia ratified the European Convention on Human Rights in 1998. Since that time, the ECHR became an integral part of the Russian legal system and is recognized – through the effect of the second sentence of Article 15.4 – as having prevalence over Russian legislation. According to the Russian Constitutional Court (RCC) itself, as mentioned in its judgment of 14 July 2015 (CDL-REF(2016)019, hereinafter “the 2015 judgment”) (section 1, 1st paragraph), “[i]n accordance with Article 46 of this Convention the Russian Federation in particular, as indicated in Article 1 of the said Federal law, recognized ipso facto and without special agreement the jurisdiction of the European Court of Human Rights as obligatory on the issues of interpretation and application of the Convention and Protocols thereto in the events of supposed violation of the provisions of these contractual acts by the Russian Federation, when the alleged violation took place after their coming into operation in respect of the Russian Federation.”)

58. The same ruling by the RCC also mentions (section 1, 2nd paragraph), that “[a]ccording to Article 32 of the Federal Law of 15th July, 1995 No. 101-FZ “On International Treaties of the Russian Federation”<sup>17</sup>, the President of the Russian Federation and the Government of the Russian Federation take measures aimed at ensuring fulfilment of international treaties of the Russian Federation (Item 1); Federal bodies of executive power and authorized organizations, within whose competence fall issues regulated by international treaties of the Russian Federation, ensure fulfilment of the Russian Party’s obligations on treaties and exercise of the Russian Party’s rights following from these treaties, as well as observe fulfilment of their obligations by other parties of treaties (Item 2)”.

#### **B. The judgment of the Constitutional Court of the Russian Federation of 14 July 2015 No. 21-П/2015**

59. The 2015 amendments to the 1994 law were enacted following a decision of the Constitutional Court dated 14 July 2015 (CDL-REF(2016)019). The RCC’s judgment was delivered in response to an inquiry from a group of deputies of the State Duma, the lower house of parliament, concerning the enforcement of ECHR judgments in Russia. The case is significant, since the great majority, arguably all, the provisions in the subsequent law of December 2015 are drawn directly from the Constitutional Court’s judgment. It is therefore important to consider the decision, since it provides guidance as to how the Constitutional Court might interpret the law of December 2015.

60. The Constitutional Court made clear that the Russian Constitution had priority, with the consequence that a decision from the ECtHR that contradicted the Russian Constitution could

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<sup>16</sup> According to the legal position expressed by the Constitutional Court of the Russian Federation in the Ruling of 2 July 2013 no. 1055-O, the review of constitutionality of a Federal law on ratification of an international treaty, including the review of the procedure of adoption, as a general rule may be carried out only prior to the entry of this international treaty into force (which usually does not coincide with the moment of completion of the process of adoption of the relevant Federal law on ratification of an international treaty); otherwise it would not only contradict the universally recognised principle of international law ‘pacta sunt servanda’ and could call in question the observance by the Russian Federation of obligations which were voluntarily taken up, including those following from the Vienna Convention on the Law of Treaties, but would also seem at variance with Article 125 (Item d of Section 2) of the Constitution of the Russian Federation and the provisions of sub-item d of item 1 of Section 1 of Article 3 of the Federal Law “on the Constitutional Court of the Russian Federation”, which implements it and which allows the Russian Constitutional Court to decide the conformity to the Russian Constitution only of international treaties having not entered into force (see Section 1.2 paragraph 1 of the judgment of the RCC No. 21-P/2015 of 14 July 2015, CDL-REF(2016)019).

<sup>17</sup> Federal Law No. 54-FZ of the 30th of March 1998 “On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto”.

not be executed in Russia. This was repeatedly affirmed throughout the judgment, see for example paras. 2.2, 3, 4.

61. Thus the Constitutional Court stated at p. 11 of the translated judgment that, 'Within the context of the adduced provisions of the Vienna Convention on the Law of Treaties this means that a decision of an authorized inter-state body, including a judgment of the European Court of Human Rights, cannot be executed by the Russian Federation with regard to measures of individual and general character imposed on it, if interpretation of the norm of an international treaty, which this decision is based on, violates respective provisions of the Constitution of the Russian Federation.'

62. The same sentiment is expressed at p. 15, where the Constitutional Court states that, 'Bound by the requirement to observe an international treaty having entered into force, such as the Convention for the Protection of Human Rights and Fundamental Freedoms, the Russian Federation is nevertheless obliged to ensure the supremacy of the Constitution of the Russian Federation within the framework of its legal system, which forces it in the event of emerging of any collisions in this field, whereas the Constitution of the Russian Federation and the Convention for the Protection of Human Rights and Fundamental Freedoms are based on the same basic values of the protection of human and civil rights and freedoms, to give preference to the requirements of the Constitution of the Russian Federation and thereby not follow literally the judgment of the European Court of Human Rights in the event if its execution contradicts constitutional values.'

63. Two rationales for this position can be discerned from the judgment. They may, for ease of analysis, be termed the internal and the external rationale.

64. The *internal rationale* is predicated on the Constitutional Court's reading of the hierarchy of norms within the Russian legal system, which places the Russian Constitution at the apex of this hierarchy. While Russia can ratify international treaties, neither these treaties nor decisions made pursuant to them modify the hierarchy where the Russian Constitution is at the apex.

65. This rationale is apparent in the following extract, pp. 10-11 of the judgment, 'At the same time, as follows from the Constitution of the Russian Federation, its Articles 4 (Section 1), 15 (Section 1) and 79 enshrining Russia's sovereignty, supremacy and the highest legal force of the Constitution of the Russian Federation, and inadmissibility of implementation into the legal system of the state of international treaties, participation in which can entail restrictions of human and civil rights and freedoms or allow any infringements to the constitutional system of the Russian Federation and thereby break constitutional prescriptions, neither the Convention for the Protection of Human Rights and Fundamental Freedoms as international treaty of the Russian Federation nor legal positions of the European Court of Human Rights based on the Convention containing appraisals of national legislation or concerning the need to alter its provisions, do not abrogate for the Russia's legal system the priority of the Constitution of the Russian Federation and therefore are subject to execution within the framework of this system only with the condition of recognition of supreme legal force exactly of the Constitution of the Russian Federation.'

66. It follows that Russia lacks competence to become party to a treaty that could violate its constitutional provisions (see p. 13 of the judgment), 'Since Russia, within the meaning of Articles 15 (Sections 1 and 4), 79 and 125 (Section 6) of the Constitution of the Russian Federation, has no right to conclude international treaties contradicting the Constitution of the Russian Federation, and the rules of an international treaty if they violate constitutional provisions, which undoubtedly have particular importance for Russia, may not and must not be implemented in its legal system, based on the supremacy of the Constitution of the Russian Federation, it is the obligation of bodies of state power, when implementing international treaties, which contemplates correlation of the legislation of the Russian Federation with its

obligations under international treaties, to recognize, observe, and protect human and civil rights and freedoms as they are defined by the Constitution of the Russian Federation, and to prevent violations of the constitutional system foundations.'

67. The same imperative is applicable to a decision made pursuant to an international treaty. Thus there could be 'an international treaty, which at the moment of accession of the Russian Federation to it both from its literal meaning and the meaning attributed to it in the course of application by an interstate body, authorized to do it by the international treaty itself, was in conformity with the Constitution of the Russian Federation, subsequently by means of interpretation alone (particularly at sufficiently high degree of abstract character of its norms, inherent, in particular, in the Convention for the Protection of Human Rights and Fundamental Freedoms) was rendered concrete in its content in the way that entered into contradiction with the provisions of the Constitution of the Russian Federation.'(pp. 13-14).

68. The *external rationale* sought to bolster the internal rationale through recourse to principles of interpretation derived from the Vienna Convention on the Law of Treaties. Thus the Constitutional Court at p. 12 acknowledged the centrality of *pacta sunt servanda*, but held that the Vienna Convention also established 'the general rule of interpretation of treaties, stipulating that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (Item 1 of Article 31).' From this the Constitutional Court deduced the following proposition, 'Thus, an international treaty is binding for its participants in the meaning which can be elucidated with the help of the adduced rule of interpretation. From this point of view, if the European Court of Human Rights, interpreting a provision of the Convention for the Protection of Human Rights and Fundamental Freedoms in the course of the consideration of a case, gives to a notion used in the Convention a meaning other than the ordinary one or carries out interpretation contrary to the object and purpose of the Convention, the state, in respect of which the judgment has been passed on this case, has the right to refuse to execute it as it goes beyond the obligations, voluntarily taken by this state upon itself when ratifying the Convention. Accordingly, the judgment of the European Court of Human Rights cannot be regarded obligatory for execution, if as a result of interpretation of a specific provision of the Convention for the Protection of Human Rights and Fundamental Freedoms on which this judgment is based, it was carried out in violation of the general rule of interpretation of treaties, the meaning of this provision will diverge from imperative norms of customary international law (*jus cogens*), to which without doubts the principle of sovereign equality and respect for rights inherent in sovereignty and the principle of non-interference with internal affairs of states belong.'

69. The following conclusions can be drawn from the judgment of July 14 that are relevant for the legal status and likely interpretation of the amending law of December 2015.

70. First, the Constitutional Court's decision of July 2015 embodied its view of the constitutional relationship between an international treaty and the Russian Constitution. The logical corollary is that even if the amending law of December 2015 had never been enacted, the legal status quo concerning the relationship between the ECHR and Russian law would remain that expressed in the July 2015 Decision, unless and until the Constitutional Court made a further decision that qualified or resiled from the earlier ruling.

71. Secondly, the judgment furnishes indication as to how the Constitutional Court is likely to interpret the key terms in the amending law, which are framed in terms of 'contradiction' between the ECHR and the Russian Constitution, and 'conformity' between the two legal regimes.

72. It is clear, on the one hand, that the Constitutional Court favours dialogue with the ECtHR, and seeks to avoid a conflict if this is possible. Thus the Constitutional Court states that 'In the Russian Federation resolution of this kind of conflicts is entrusted, by virtue of the Constitution

of the Russian Federation, to the Constitutional Court of the Russian Federation, which in the extremely rare cases deems it appropriate to use “the right to objection” for the sake of making its contribution (following colleagues from Austria, Great Britain, Germany and Italy) to the formation of balanced practice of the European Court of Human Rights, but not for the sake of self-isolation from its decisions, which reflects consensus worked out by states-parties to the Convention, but proceeding from the need of constructive interaction and mutually respectful dialogue with it. In such a context the Judgment of the Constitutional Court of the Russian Federation of 6th December, 2013 No. 27-P as well as the present Judgment should be regarded as aspiration to avoid serious complications in the relations of Russia not only with the European Court of Human Rights, but also with the Council of Europe in the situation when a judgment of the European Court of Human Rights contemplates making amendments to Russian legislation, fraught with violation of human and civil rights and freedoms fixed by the Constitution of the Russian Federation, much more considerable than the one which the European Court of Human Rights objected against’ (pp. 27-28).

73. It is, on the other hand, equally clear from the Constitutional Court’s judgment that it regards the constitutional brake that it fashioned, which has been embodied in the 2015 law, as real, not just hypothetical. According to the Constitutional Court, conflicts may arise as a result of the way in which provisions of the ECHR are given concrete expression in particular cases, as a result of the interpretation of the ECHR performed by the Strasbourg Court. Such an interpretation of the Convention may in turn have far-reaching implications for a particular sphere of social, economic and political policy, whereas the Russian authorities believe such an interpretation to be inconsistent with its Constitution. This is readily apparent from the discussion concerning Markin and Anchugov on pp. 18-21 of the judgment, and from the subsequent paper delivered by President Zorkin entitled ‘Challenges of Implementation of the Convention on Human Rights’, given at the St Petersburg Conference in October 2015.<sup>18</sup> The Court’s judgment, and the conference paper, seek to analogize from practice in some other contracting states, see pp. 16-19 of the judgment in translation: ‘In all the adduced cases of conventional-constitutional collisions the issue is not of contradictions between the Convention for the Protection of Human Rights and Fundamental Freedoms and national constitutions as such, but of the collision of the interpretation of a conventional provision, given by the European Court of Human Rights in a judgment on a specific case, and the provisions of national constitutions, including in their interpretation by constitutional courts (or other highest courts invested with analogous powers). Appraising norms of internal legislation on conformity to constitutions of their states, these national judicial bodies, when passing a decision, proceed from the interpretation, taking into account the balance of constitutionally protected values and international-law regulation of personal status, that better protects human and civil rights in the legal system of this state, bearing in mind not only those having directly appealed for protection, but all those whose rights and freedoms may be affected.’<sup>19</sup>

### **III. The 2015 amendments**

74. The Amendments are aimed at entitling the Constitutional Court to declare decisions of international courts as unenforceable. The newly provided power of the Constitutional Court shall be exercised “at the request of the federal executive authority which has competence for

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<sup>18</sup> International Conference on “Enhancing national mechanisms for effective implementation of the European Convention on Human Rights”, St Petersburg, 22-23 October 2015, proceedings available at: <https://go.coe.int/swS20>.

<sup>19</sup> The substitution of the interpretation of the ECHR by the Constitutional Court for the interpretation of the ECtHR is claimed to be based on Article 79 of the Russian Constitution which authorizes the adhesion of the Federation to international organization only if the compliance with the constitutional rights and freedoms and the basic fundamental principles is ensured. See however Article 125 (Item “d” of Section 2) of the Constitution of the Russian Federation, which together with the provisions of Sub-Item “d” of Item 1 of Section 1 of Article 3 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation” prohibits the constitutionality control of a treaty already in force for the Russian Federation.

protecting the interests of the Russian Federation in litigations before an inter-State body on the protection of human rights and freedoms” (Article 1.1)). This implies a judgment about the relevant interests of the Russian Federation relating to the implementation of an international judicial decision concerning human rights and freedoms which have been the object of complaints submitted to an international court against the Russian Federation.

75. The ground for consideration of the case by the Constitutional Court shall be a petition concerning the uncertainty about the possibility of enforcing an international decision taken on the basis of an international treaty “interpreted admittedly at variance with the Constitution of the Russian Federation” (Article 1. 2)). This provision is evidently aimed at expanding the competence of the Court, from deciding about the compatibility with the Russian Constitution of international treaties and agreements *not yet in force*, to deciding the enforcement of international decisions *adopted on the basis of treaties presently in force*, to which Russia is a party.<sup>20</sup>

76. Article 1.3) enables the Court to resolve the question of the possibility of enforcing the decision of the inter-State human rights body without holding a hearing, if the Constitutional Court concludes that the question may be resolved on the basis of legal views expressed in its earlier judgement and a hearing is not necessary to guarantee the rights of the party concerned.

77. The decisions of the Constitutional Court in the concerned matter “shall be referred to as a judgment which shall be passed in the name of the Russian Federation” (Article 1.4).

78. According to the new Article 104 of the Constitutional Law on the Constitutional Court (Chapter XIII Examination of cases regarding the possibility of enforcing decisions of an inter-state human rights body), the judgment about the enforceability of those decisions in accordance with the Russian Constitution shall be adopted “from the viewpoint of the fundamental principles of the constitutional regime of the Russian Federation and regulations on rights and freedoms of man and citizen established by the Constitution of the Russian Federation“. This provision provides the yardstick to be adopted by the Court in dealing with these cases, and it therefore puts in question even the compatibility of an international decision with the provisions of the Constitution, notwithstanding the fact that once Russia becomes a contracting party to an international treaty or agreement, the conformity of the latter with the Russian Constitution has either been declared by the Russian Constitutional Court or has to be presumed (because the constitutionality of a treaty may not be controlled after the treaty has entered into force: see above). The terms used in this Article (protection of “sovereign interests”, concerning the “feasibility of the enforcement of a.... decision”, conformity with “the human rights regime established by the Constitution ...”) are very broad and seem to allow the court to refer to public interest, even if its protection is not enshrined in a specific human rights provision of the Constitution.

79. It is interesting that, on the one side, both the new Article 105 and Article 106 allow the President and the government of the Russian Federation to ask the Court for the interpretation of constitutional provisions “in the light of a discovered contradiction between the provisions of an international treaty of the Russian Federation as interpreted by the inter-State human rights body and the provisions of the Constitution“; and, on the other side, they entrust the Court with the power of removing uncertainty in the understanding of constitutional provisions “with regard to a discovered contradiction between the provisions of an international treaty of the Russian Federation as interpreted by the inter-State human rights body and the provisions of the Constitution“. The mere fact that the Russian President and Government are accorded the power to petition the Constitutional Court in order to determine whether a ‘discovered

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<sup>20</sup> But see Article 125, item “d” of Section 2) which prohibits the constitutionality control of a treaty already in force for the Russian Federation.

contradiction' between the ECtHR decision and the Russian Constitution can be resolved does not in itself intrude on the interpretive authority and discretion of the Constitutional Court. It would indeed be strange, given the regime introduced by the amending law, if the Russian President and Government were not empowered in the manner set out in Article 105. The framing of this provision is significant nonetheless and it is likely to have an impact on the subsequent litigation. Article 105 means that the Russian President and Government can frame their case to the Constitutional Court on the basis that there is a discovered contradiction between the ECtHR decision and the Russian Constitution, the corollary being that the former should be regarded as unenforceable pursuant to Article 104(4) paragraph 2, unless the Constitutional Court finds some way to resolve the 'contradiction'. There may of course be instances where such contradiction is readily apparent from the face of the respective provisions. There will, however, be many instances where the contradiction, so far as it exists, is less immediately apparent. It is 'discovered' in the sense that it is the result of a view taken of the Russian Constitution by the President or Government, in circumstances where it is not self-evident or obvious from the face of the relevant constitutional provision. As stated above, the interpretive stance taken by the President or Government does not bind the Constitutional Court, which makes the final determination. The stance taken by the President and Government nonetheless at the very least provides the starting point for the subsequent judicial deliberations, and will be the interpretation that has to be displaced in order that the ECtHR decision can be enforced. The stance taken by the President and Government could exert an important 'weight' when the Constitutional Court reaches its conclusion.

80. The judgments following the examination of the cases shall state whether or not the international decision may be enforced, in whole or in part, in conformity with the Constitution. It is evident that the Russian legislator wants to overcome the fact that the international treaty or agreement was (normally) previously judged in conformity with the Constitution before its ratification by the Constitutional Court. Therefore the law speaks about "discovered contradiction", that is a contradiction which could not be perceived at the time of the ratification. It will depend on the practical interpretation of the text of the treaty or of the agreement, and the law is written in such a way that the contradiction is supposed to derive from the interpretative choice made by the inter-State rights body which is in charge of the observance of the treaty (or agreement).

#### **IV. General comments**

##### **A. Implementation of international human rights treaties into the domestic legal order**

81. The domestic solutions in respect of the relation between the international and the domestic legal order are very diverse. The Venice Commission has examined this question in detail in some of its previous works, notably in the Report on the implementation of Human Rights Treaties.<sup>21</sup>

82. In some countries, such as Belgium, France and the Netherlands, treaties which are binding upon the states are regarded as part of the law of the land as soon as certain basic conditions have been met (a monist-style approach). As a consequence, the treaty can be applied by national courts. Countries like Sweden and the United Kingdom belong to a group of states, where the courts consider that treaties binding on the state under international law which have not been incorporated in some way in the national legal order do not create rights for individuals. In these (more dualist systems) it is always necessary to either incorporate the

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<sup>21</sup> See Venice Commission, Report on the implementation of international human rights treaties in domestic law and the role of courts, CDL-AD(2014)036: Venice Commission, The Status of International treaties on human rights, CDL-STD (2005)042.

contents of a treaty in a national legal norm or expressly stipulate in legislation which treaty norms must be considered to have force of law.

83. Similarly, there is a wide variety as to the status of the ECHR in domestic law in relation to constitutional provisions. In Austria, the ECHR is given effective constitutional status. In some countries, such as the Netherlands,<sup>22</sup> the provisions of the Convention have priority over provisions of the constitution. In Romania, the constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights and with other treaties to which Romania is a party, thus ensuring a permanent adaptation of the Romanian constitution to the ECHR. If there are any inconsistencies between the treaties on the fundamental human rights to which Romania is a party and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions.<sup>23</sup> In most countries, such as the Russian Federation, the Convention has a sub-constitutional status. In Germany too, the ECHR is subordinate to the German constitution, but it has a special status.<sup>24</sup>

84. The choice of the relation between the national and the international systems is a sovereign one for each State to make;<sup>25</sup> whatever model is chosen, however, the State is

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<sup>22</sup> On the one hand, Article 120 of the Constitution of the Netherlands prohibits a judge checking the constitutionality of Acts of Parliament (in line with the doctrine of the supremacy of Parliament). However, at the same time, Articles 93 and 94 of the Constitution provide for direct applicability of international legal norms. Rules of international law are part of the law of the land as soon as they become binding on the Kingdom of the Netherlands. Self-executing provisions of treaties have priority – in the event of conflict – over national legislation, including Acts of Parliament and even the Constitution. Provisions of the Convention are considered to be such 'self-executing' provisions. As a result, Convention standards may be invoked by a party before any domestic court and every Dutch court is empowered to disapply a legal provision or declare such a provision nonbinding if it is in conflict with higher law, such as the Convention. In doing so, the Dutch judge applies the so-called 'incorporation doctrine', meaning that the norm (ie. a provision of the Convention) is interpreted as it has been interpreted by the Strasbourg Court. It is therefore not decisive whether the Court judgment was against the Netherlands or against a third country (de facto erga omnes effect). As a result of the above, a human rights-related debate in the Netherlands will likely focus on international human rights treaties. And of those international treaties, the European Convention on Human Rights is by far the most relevant for practical purposes, if only because of the detailed case law of the European Court of Human Rights.

<sup>23</sup> Article 20 of the Romanian Constitution.

<sup>24</sup> In general, the German Constitution (Grundgesetz, briefly GG) determines that an approval to a treaty of public international law – such as the ECHR – by the German Parliament incorporates the treaty as a Federal statute (Article 59 (2) sentence 2 GG). Following the idea of hierarchy of norms, this means that the ECHR is subordinate to the German constitution (German Federal Constitutional Court (GFCC), Decision of 4 May 2011, 2 BvR 2365/09, 2 BvR 740/10, 2 BvR 2333/08, 2 BvR 1152/10, and 2 BvR 571/10, para. 86, [http://www.bverfg.de/e/rs20110504\\_2bvr236509en.html](http://www.bverfg.de/e/rs20110504_2bvr236509en.html)). But it has a special status: It does not have the status of a provision of the German constitution, but neither is it devoid of constitutional significance. Because of the substantive orientation of the German constitution to human rights and the openness of the German constitution in relation to international public law (GFCC, Order of 14 October 2004, 2 BvR 1481/04, para. 33, [http://www.bverfg.de/e/rs20041014\\_2bvr148104en.html](http://www.bverfg.de/e/rs20041014_2bvr148104en.html)), provisions of the ECHR not only have the legal status of a Federal statute, but also entail further legal consequences for German law, including provisions of the German constitution. The GFCC held that the provisions of the ECHR serve, on the level of constitutional law, as interpretation aids to determine the contents and the scope of fundamental rights and of rule-of-law principles of the German constitution (GFCC, Order of 14 October 2004, 2 BvR 1481/04, BVerfGE 111, 307 (315 f.); Decision from 26 February 2008, 1 BvR 1602, 1606, 1626/07, para. 52 [http://www.bverfg.de/e/rs20080226\\_1bvr160207.html](http://www.bverfg.de/e/rs20080226_1bvr160207.html)). This means that the guarantees of the ECHR have 'constitutional significance' (GFCC, Decision of 4 May 2011, 2 BvR 2365/09, 2 BvR 740/10, 2 BvR 2333/08, 2 BvR 1152/10, and 2 BvR 571/10, para. 88, [http://www.bverfg.de/e/rs20110504\\_2bvr236509en.html](http://www.bverfg.de/e/rs20110504_2bvr236509en.html)). Due to the special relevance of the ECHR in German constitutional law, the ECHR has another legal status as ordinary international treaties. Consequently, the recent decision of the GFCC of Dec. 2015 (2 BvL 1/12 "treaty override") does not contradict the foregoing explanations, related to the role of the ECHR in German law.

<sup>25</sup> ECtHR, *Swedish Engine Drivers' Union v. Sweden*, judgment of 6 February 1976, § 50. Direct applicability of the Convention is not required either: ECtHR *James a.o. v. the United Kingdom*, judgment of 21 February 1986, appl. no. 8793/79, par. 85. See also André Nollkaemper, *National Courts and the International Rule of Law*, Oxford University Press, 2012, p. 68-70; Interpretation of the Statute of the Memel Territory (United Kingdom v France), PCIJ, Ser A/B, no. 49, p. 336-337. Interestingly, research has shown that the character of the

bound by international law, under Article 26 of the Vienna Convention on the Law on Treaties (*Pacta sunt servanda*), which stipulates that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” Article 27 of the Vienna Convention (“Internal law and observance of treaties”) further stipulates that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. ...”. No legal argument at national law, including constitutional law, can justify an act or omission which turns out to be in breach of international law.<sup>26</sup>

85. The effects of international law within a State’s domestic legal system represent an essential part of the good faith (*bona fide*) observance of international legal provisions. In several situations, international law forces States to adopt conduct which necessarily creates effects in their internal legal order. In all cases where individuals (or any private entities) are the addressees of international legal norms,<sup>27</sup> either by being granted rights or by having obligations imposed, a legal framework has to exist within domestic law in order for those norms to be duly applied. If the State does not comply with the respective international obligations, then international responsibility intervenes.<sup>28</sup>

86. That is why the International Law Commission (ILC) of the UN established in its 2001 “Draft articles on Responsibility of States for Internationally Wrongful Acts,”<sup>29</sup> that “[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law”<sup>30</sup> (Article 3 “Characterization of an act of a State as internationally wrongful”<sup>31</sup>).

87. The law of state responsibility recognises that all branches of government, not simply the executive which is responsible for international relations, can breach international law.<sup>32</sup> The

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constitutional system for the implementation of international law through case-law is much less important in explaining the impact of international law than is often assumed: J. Gerards & J. Fleuren (eds.), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in national case-law*, Intersentia 2014, p. 371.

<sup>26</sup> Treatment of Polish nationals, PCIJ Rep. 1932, Ser A/B, No. 44, p. 4.

<sup>27</sup> Ian Brownlie, *Principles of Public International Law*, 7th Ed., Oxford University Press, 2008, p. 519.

<sup>28</sup> See Bogdan Aurescu and Ion Galea, *Constitutional Landmarks and de lege ferenda Proposals on the Relationship between International Law and Domestic Law in Romania*, Romanian Journal of International Law, Volume 16 (July-December 2015), p. 21.

<sup>29</sup> Adopted by ILC with commentaries at its fifty-third session and submitted to the United Nations General Assembly as a part of the ILC’s report covering the work of that session, published in the *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, as corrected.

<sup>30</sup> Emphasis added.

<sup>31</sup> 2001 “Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries” of the International Law Commission (ILC) of the UN, article 3 “Characterization of an act of a State as internationally wrongful”. In the commentary to this article, ILC shows that “(1) Article 3 makes explicit a principle ... that the characterization of a given act as internationally wrongful is independent of its characterization as lawful under the internal law of the State concerned ... [A] State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law ...” (3) That conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful is ... well settled ... The principle was reaffirmed many times: ‘... a State cannot adduce ... its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force [Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44, p. 24].’ (...) (9) As to terminology, in the English version the term “internal law” ... covers all provisions of the internal legal order, whether written or unwritten and whether they take the form of constitutional or legislative rules, administrative decrees or judicial decisions.”

<sup>32</sup> See, e.g., Robert E. Brown Claim (US v GB) 6 RIAA 120 (1923) and Article 4 of the ILC Articles on State Responsibility 2001, [http://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf) (“The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions...”).

execution of international obligations stemming from a treaty in force for a certain State is incumbent upon the State as a whole, i.e. all State bodies, including the Constitutional Court. If the Constitution has provisions contrary to the treaty which is already part of the domestic legal system – a situation which should have been addressed in the process of expressing consent to be bound by that treaty (through ratification, accession, approval or acceptance of that treaty) – it is the duty of all State bodies to find appropriate solutions for reconciling those provisions of the treaty with the Constitution (for instance through interpretation or even the modification of the Constitution), otherwise the international responsibility of the State will be engaged, with all consequences deriving from it, including countermeasures and/or sanctions.

88. International human rights law further establishes the obligation for each State party to use all the means at its disposal to give effect to the rights recognised in the treaty. States are free to choose the ways and means of implementing their international legal obligations, provided that the result is in conformity with those obligations. They are saddled with an obligation of result and not only with an obligation of conduct. In this respect, the principle of subsidiarity is essential, putting upon the States the main responsibility to ensure respect for and redress an alleged violation of a human rights treaty. In order to turn the idea of subsidiarity into reality, there should be effective ways and means at the domestic level to implement the human rights provisions concerned. In the case of those provisions that are of a self-executing character or have been transformed into provisions of domestic law which are justiciable, an effective domestic legal remedy implies the possibility of bringing an action by an individual or a group before a court, providing that the court has the power to examine the alleged violation against the benchmark of the treaty. If a violation is found, measures of enforcement must be provided for. The principle of exhaustion of domestic remedies applies as a means to ensure the powers of national judges to interpret the international human rights obligations in the first place and to avoid duplication.<sup>33</sup>

## **B. The specific international obligations arising out of the European Convention on Human Rights**

89. As to the specific situation of the ECHR, Article 1 sets forth that “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” In order to ensure the observance of the engagements undertaken by the High Contracting Parties, the European Court of Human Rights was set up, on a permanent basis (Article 19).

90. It follows that the States parties accepted not only the conventional obligations referring to the rights and freedoms listed in the Convention and its Protocols, but also the creation of a mechanism having the competence to examine and decide on the way they ensure those rights and freedoms within their jurisdiction. The role of the Court is defined in Article 32, and covers all matters concerning not only the application, but also the interpretation of the Convention by the States Parties:

*“1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto...”<sup>34</sup>*

91. In other words, upon becoming a party to the Convention, the state parties expressly accept the competence of the ECtHR to interpret, and not only apply, the Convention. By becoming a party to the Convention, the States parties assumed the obligations: (1). to secure the individual human rights and fundamental freedoms listed in the ECHR; (2). to have their

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<sup>33</sup> Venice Commission, Report on the implementation of international human rights treaties in domestic law and the role of courts, op. cit., § 40.

<sup>34</sup> Emphasis added.

conduct verified by an international tribunal on human rights having the competence to establish if the respective conduct was in conformity with the provisions of the ECHR, this verification being undertaken by interpreting and applying the ECHR to the factual and legal circumstances of each specific case at the time of decision of the case.

92. Article 46, paragraph 1, ECHR contains a mandatory obligation on contracting states to comply with judgments of the ECtHR:

*“The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.”*

93. Article 46(1) ECHR is an unequivocal legal obligation. Its centrality was reaffirmed by the CDDH report on the longer-term future of the Convention mechanism, which stressed that there could be no exceptions to the obligation in Article 46.<sup>35</sup>

94. In its Grand Chamber judgment in the case of Scozzari and Giunta v. Italy, the Court elaborated on the meaning of Article 46 ECHR:

*“It follows, inter alia, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects (see, mutatis mutandis, the Papamichalopoulos and Others v. Greece (Article 50) judgment of 31 October 1995, Series A No. 330-B, pp. 58–59, § 34). Furthermore, subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court’s judgment.”<sup>36</sup>*

95. The freedom enjoyed by the State to choose the means by which to comply with a Court judgment is not only subject to the supervision exercised by the Committee of Ministers, but is also limited in substance.<sup>37</sup> The Court also stipulated that the payment of the monetary award under Article 41 of the Convention does not obviate other remedial measures with a view to achieving restitutio in integrum.<sup>38</sup>

96. The interpretation of the ECHR by the Court, as reflected in its decisions/judgments, is compulsory for the States parties as the decisions/judgments themselves and, of course, the ECHR per se. *“Final judgments of the ECtHR ... have formal legal force; a judgment of formal legal force has, at the same time, substantive legal force. Thus, the parties to a case are bound by the elements of a judgment”*,<sup>39</sup> including the interpretation performed by ECtHR within them.

<sup>35</sup> CDDH report on the longer term future of the system of the European Convention on Human Rights (CDDH(2015)R84 Addendum I, §§170 and 200. See also the Brussels Declaration which was adopted in March 2015: the Conference stressed “that full, effective and prompt execution by the States Parties of final judgments of the Court is essential”.

<sup>36</sup> Appl. nos. 39221/98 and 41963/98, judgment of 13 July 2000, § 249.

<sup>37</sup> One should note in this respect that some argue that “[i]n its recent practice, the ECtHR tends to limit the freedom of the State in selecting suitable measures, indicating what individual measures or general measures to be taken in order to give effect to its judgment”: see Andrea Caligiuri and Nicola Napoletano, *The Application of the ECHR in the Domestic Systems*, Symposium: The Future of the ECHR System, The Italian Yearbook of International Law, Volume 20(2010), p. 146.

<sup>38</sup> Ibidem, § 250.

<sup>39</sup> See Christoph Grabenwarter, *The European Convention on Human Rights: Inherent Constitutional Tendencies and the Role of the European Court of Human Rights*, ELTE Law Journal, p. 107.

97. Article 1 ECHR does not exclude any part of a member State's jurisdiction, including the Constitution, from scrutiny under the Convention.<sup>40</sup>

98. The judgments of the Court therefore enjoy the authority of *res judicata*, both formally (they could not be modified or contested beyond the ways permitted by the ECHR – through referral before the Grand Chamber – or by the Rules of the Court – through requests for interpretation or revision) and substantively (their content and conclusions are final and obligatory for the parties concerned). This effect of the judgments follows necessarily from the provisions of Article 46 of ECHR (as an engagement assumed by every State Party) stipulating that the contracting parties undertake to abide by the final judgment of the Court in any case which they are parties. “Article 46 does not distinguish between State organs but equally binds the legislature, the executive and the judiciary. From the ECHR's point of view, it is decisive that an end is put to the breach of the ECHR.”<sup>41</sup> According to the jurisprudence of the ECtHR,

*“The Court notes the Government's argument that the restriction complained of is enacted in a chapter of the Russian Constitution, amendments to or revision of which may involve a particularly complex procedure .... It reiterates in this connection that its function is in principle to rule on the compatibility with the Convention of the existing measures. It is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention .... In the present case, it is open to the respondent Government to explore all possible ways in that respect and to decide whether their compliance with Article 3 of Protocol No. 1 can be achieved through some form of political process or by interpreting the Russian Constitution by the competent authorities – the Russian Constitutional Court in the first place – in harmony with the Convention in such a way as to coordinate their effects and avoid any conflict between them.”<sup>42</sup>*

99. State bodies (including the Constitutional Court) have to “comply with the legal situation under the ECHR but also to remove all obstacles in their domestic legal system that might prevent an adequate redress of the applicant's situation.”<sup>43</sup> In addition, Article 46.3-5 of ECHR confers on the ECtHR a superior role as far as the execution by the State (through its State bodies) of its judgments.<sup>44</sup>

100. The interpretation of the conventional provisions by the ECtHR in a judgment is based on the special character of the Convention “as an instrument of European public order (ordre

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<sup>40</sup> Case *Anchugov and Gladkov v. Russia* (Applications nos. 11157/04 and 15162/05), 3 July 2013, paragraph 108.

<sup>41</sup> Christoph Grabenwarter, *The European Convention on Human Rights: Inherent Constitutional Tendencies and the Role of the European Court of Human Rights*, ELTE Law Journal, p. 108.

<sup>42</sup> Case *Anchugov and Gladkov v. Russia*, Applications 11157/04, 15162/05, 3 July 2013, paragraph 111 (emphasis added).

<sup>43</sup> Case *Maestri v. Italy*, Application 39748/98, 17 February 2004, paragraph 47, cited in Christoph Grabenwarter, *The European Convention on Human Rights: Inherent Constitutional Tendencies and the Role of the European Court of Human Rights*, ELTE Law Journal, p. 108.

<sup>44</sup> “(3). If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. ... (4). If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfill its obligation under paragraph 1. (5). If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken.”

public) for the protection of individual human rights”<sup>45</sup> and the “changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved”.<sup>46</sup>

101. The obligation to abide by the judgment of the ECtHR issued in a case against a State party implies the compliance with the findings of the Court in that judgment. This execution covers individual redress, but is not limited to it. The State may also be required, with the aim of putting its domestic legal system in conformity with the conventional provisions, as interpreted by the Court, to revise its legislation, to reform its administrative or judicial practice. The expectation that a Court judgment may lead to reform of the domestic legislation or of judicial practice stems clearly from ECtHR case-law.<sup>47</sup>

102. The conclusion is that the execution of a judgment is, first of all, an obligation of result, and, secondly, that the judgment must be executed in such a way that ensures that both individual and general measures are taken to redress the consequences of the violations established by the ECtHR and to prevent future similar violations, even if the choice of means lies generally with the State party (under the supervision of the Committee of Ministers).

103. It is clear from the conventional engagements, as interpreted by the Court, entrusted with this mission by the Contracting Parties when they ratified the ECHR, that the State does not have the choice to execute or not to execute, but that choice is limited only to the means of execution. Even this choice of the State is not absolute: the State must also respect the other principle derived by the Court in its case-law, which is to ensure that any reform at national level is in accord with the requirements of the Convention.<sup>48</sup> One should also note that “[i]n its recent practice, the ECtHR tends to limit the freedom of the State in selecting suitable measures, indicating which individual measures or general measures to be taken in order to give effect to its judgment.”<sup>49</sup>

104. In this regard, one may also refer to the various roles of judgments of the Court:

*“The Court’s judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (Article 19).”*<sup>50</sup>

### **C. Methods to solve possible tensions between decisions of the European Court of Human Rights and national law.**

105. In the multi-layered legal order that exists in Europe today, tensions between various layers of the European legal order are unavoidable. There are mechanisms to alleviate those

<sup>45</sup> Case *Loizidou v. Turkey*, Preliminary Objections, Application 15318/89, 23 March 1995, paragraph 93.

<sup>46</sup> Case *Christine Goodwin v. UK*, Application 28957/95, 11 July 2002, paragraph 74.

<sup>47</sup> Case *Vermeire v. Belgium*, Application 12849/87, 29 November 1991, paragraphs 25-26.

<sup>48</sup> See the above-mentioned Grand Chamber judgment in the case of *Scozzari and Giunta* but also *Broniowski v. Poland*, Application 31443/96, 22 June 2004: “Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court’s judgment” (para. 192) (emphasis added).

<sup>49</sup> Andrea Caligiuri and Nicola Napoletano, The Application of the ECHR in the Domestic Systems, Symposium: The Future of the ECHR System, The Italian Yearbook of International Law, Volume 20 (2010), p. 146.

<sup>50</sup> Case *Ireland v. United Kingdom*, Application 5310/71, 18 January 1978, paragraphs 154-155.

tensions between ECtHR decisions and national (constitutional) law, including the interpretation given by national constitutional courts.

106. The ECtHR examines national law as part of the context of the case. As is well known, the mechanism the ECtHR applies when it wants to avoid conflicts with national rights conceptions is the margin of appreciation doctrine. The ECtHR defers frequently to the views of the national courts. For example, when it comes to the determination of whether a certain right is acknowledged in national law,<sup>51</sup> when it comes to balancing various rights,<sup>52</sup> or when it comes to choices made by the domestic authorities on issues involving an assessment of the priorities in the context of the allocation of limited State resources.<sup>53</sup> This general practice of restraint is sensible: a right expresses a community standard, and different political communities have different standards. As Weiler puts it, they establish 'fundamental boundaries'.<sup>54</sup> Generally speaking, where the Court finds a 'common European conception' this in general justifies a narrow margin of appreciation. Ascertaining the relative weight of two opposing rights involves looking into substantive moral justifications. The national constitutional or supreme court is usually best placed to weigh these competing justifications. In some cases, the ECtHR has shown special respect for constitutional rights provisions, or the judgments of constitutional, or supreme courts interpreting constitutional rights catalogues.<sup>55</sup> There are, however, cases where violations have been found anyway.<sup>56</sup>

107. The ECtHR should be prepared to accept relatively wide divergences between European states when it comes to balancing rights.<sup>57</sup> But, and this is crucial: the ECtHR, if it is to do its job, should only defer to national balancing exercises when these have been performed in accordance with principles laid down by the ECtHR. Thus, it always has the option of examining the balance struck and the process of striking it.<sup>58</sup>

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<sup>51</sup> 'Where ... the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction, on the basis of the relevant Convention case-law and principles drawn therefrom, this Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law ... and by finding, contrary to their view, that there was arguably a right recognised by domestic law', *Roche v UK* App no 32555/96 (ECtHR, 2005-X) para 120.

<sup>52</sup> 'Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts': *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) at para 88 referring, inter alia, to *Palomo Sánchez and Others v Spain* App nos 28955/06, 28957/06, 28959/06 and 28964/06 (ECtHR (Grand Chamber), 12 September 2011) para 57.

<sup>53</sup> ECtHR, [dec] 8 July 2003, *Sentges v. the Netherlands*, appl. No. 27677/02.

<sup>54</sup> Joseph Weiler, 'Fundamental Rights and Fundamental Boundaries', in *The Constitution of Europe - do the New Clothes have an Emperor*, (Cambridge, CUP, 1998).

<sup>55</sup> See *Leyla Sahin v Turkey* App no 44774/98 (ECtHR, 29 June 2004) (Turkish constitutional requirement of secularism and ban on wearing headscarfs at university), *Dogru v France* App no 27058/05 and *Kervanci v France* App no 31645/04 (ECtHR, 16 December 2008) (laïcité and ban on wearing headscarves at schools), *A, B and C v Ireland* App no 25579/05 (ECtHR, 16 December 2010) (constitutional rights of the foetus/unborn child, where the Court also referred to a 'firmly held' moral view amongst the population in Ireland).

<sup>56</sup> eg *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008) [2008] ECHR 1345. See further *Wizerkaniuk v Poland* App no 18990/05 (ECtHR, 5 July 2011) and the ECtHR's initial rejection of the BVerfG's approach to balancing integrity/expression in *von Hannover v Germany* App no 59320/00 (ECtHR, 24 June 2004) [2004] ECHR 294 (later 'clarified' in *von Hannover (No 2) v Germany* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012, see further below, paras 59-60).

<sup>57</sup> See A Mowbray, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights' (2010) 10 *Human Rights Law Review* 289, 313. 'Balancing the rights at stake, as well as the gains and losses of the different persons affected by the process of transforming the States' economy and legal system, is an exceptionally difficult exercise. In such circumstances, in the nature of things, a wide margin of appreciation should be accorded to the respondent State': *Broniowski v Poland* App no 31443/96 (ECHR, 22 June 2004) para 182.

<sup>58</sup> See the dissenting opinion of Judge Lopez Guerra in *Axel Springer AG v Germany*.

108. The prime means of avoiding or minimising the resultant problems is ‘dialogue’.<sup>59</sup> There are various mechanisms for this. The ECtHR, as it was originally constructed, had an in-built informal dialogue mechanism, in that the judges were part-time. This is no longer the case, but bilateral ‘dialogue’ within the ECtHR is still provided by the presence of the national judge in any chamber or Grand Chamber judgment.

109. Since a judgment of the ECtHR has to be implemented due to Article 46 ECHR, the main importance of a dialogue lies in finding ways to coordinate the interpretation and application of the ECHR by the ECtHR in future cases. One possible method derives from the fact that the ECtHR can either explicitly reconsider or ‘clarify’ a judgment in a later case on the basis of clarifications given subsequently by a national court.<sup>60</sup> The national Court can use a new case with more or less similar implications as the former one to develop a new approach to reconcile the requirements of the ECHR and national constitutional law, giving the ECtHR- if applied to - a chance to overthink its former position. An example for this are the “Caroline-decisions”, as referred to in para 66 et seq.. A third method is the procedural mechanism for ensuring a particular degree of respect for provisions of national law regarded as of special importance, namely the possibility of referral, or appeal, of a chamber judgment to the Grand Chamber.<sup>61</sup> An additional method, which will be available when Protocol 16 enters into force, is for a higher national court to request an advisory opinion.

110. The possibilities of conflict can also be reduced from within national constitutional orders through the willingness to interpret national constitutional provisions in a manner that is sympathetic to the requirements flowing from ECtHR judgments.

111. The division of power between the branches of the state (government, legislature and judiciary) is a matter for constitutional law (except where the state has undertaken specific international law obligations affecting this division, e.g. a duty to provide for judicial review in certain situations). Thus, for example, constitutional doctrines relating to the role of the courts (vis-à-vis the legislature) can provide that the domestic courts should have strong evidence that something is in violation of the ECHR before they engage in constitutional review based on the ECHR.

112. An interesting example of dialogue between the ECtHR and a national court is found in Germany. Until now there has been no decision of the ECtHR which has not been implemented

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<sup>59</sup> See Michael O’Boyle, “The Role of Dialogue in the Relationship Between the European Court of Human Rights and National Courts”, in: *The Realisation of Human Rights: When Theory Meets Practice. Studies in Honour of Leo Zwaak*, Intersentia, p. 91. See also, in the context of the CJEU, A. Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford, Oxford University Press, 2010).

<sup>60</sup> For example, the part of the judgment in *Mulkiye and Ahmed Osman v UK*, App no 23452/94 [1998] ECHR 101, which was troublesome for the UK, was reconsidered in *Z and others v UK* App no 29392/95 (ECtHR, 10 May 2001), ‘The Court considers that its reasoning in the Osman judgment was based on an understanding of the law of negligence ...which has to be reviewed in the light of the clarifications subsequently made by the domestic courts and notably the House of Lords’. As regards clarification, see below, paras 67-68. Another good example is the case of *Al-Khawaja and Tahery v. UK*. In the early 2000s, Mr Al-Khawaja was convicted of indecent assault and Mr Tahery of wounding with intent to cause grievous bodily harm. Their convictions had in common that they were principally based on hearsay evidence, or so the applicants claimed. A chamber of 7 judges ruled in January 2009 that Article 6 of the Convention had been breached. It reached that conclusion unanimously. Nonetheless, leave to appeal was granted and the case was referred to the Grand Chamber. Before the Grand Chamber decided the case, however, the Supreme Court of the United Kingdom had the possibility in the case of *R. v. Horncastle and Others* to comment on the Chamber judgment. The Grand Chamber was subsequently able to take into account the comments of the domestic judges directed at the very judgment referred to it. The outcome is known: the Grand Chamber concluded that there had been no breach of the Convention by fifteen votes to two (*Al-Khawaja and Tahery v. UK*, App. Nos. 26766/05 22228/06 [2011]).

<sup>61</sup> *Soile Lautsi and others v Italy* App no 30814/06 (ECtHR, 18 March 2011).

by Germany via its state institutions.<sup>62</sup> However, there have been cases in which the GFCC's interpretation of fundamental rights was not completely identical with the interpretation of the ECtHR. Two cases which exemplify possible conflicts between the German constitution and the ECHR show in which way and by which means the GFCC deals with incompatibilities.

113. The first case concerned photos of Caroline Prinzessin von Hannover – a famous person in Germany – and her children published in a German magazine. She sued the magazine claiming – amongst others – that her right to privacy had been infringed. The German Federal Court of Justice (Bundesgerichtshof) ruled that the publication did not violate her right to privacy, mainly because she is a figure of contemporary society “par excellence”<sup>63</sup>. For these persons, there is a legitimate interest of the public to know how the person behaves outside her representative functions. In addition, the right to the freedom of the press has to be taken into account. She challenged this decision in front of the GFCC arguing that the judgment of the German Federal Court of Justice had infringed her fundamental right to privacy. The GFCC mainly rejected the complaints of Caroline Prinzessin von Hannover on the same grounds.<sup>64</sup> She filed an application against the Federal Republic of Germany at the ECtHR claiming that the decisions of the German courts had infringed her right to respect for her private and family life as guaranteed by Article 8 of the ECHR. The ECtHR made it clear that “despite the margin of appreciation afforded to the State in this area, the Court considers that the German courts did not strike a fair balance between the competing interests.”<sup>65</sup>

114. In the aftermath of this ECtHR-judgment, the GFCC had to review a further judgment of the Bundesgerichtshof, again concerning Caroline Prinzessin von Hannover. The Court emphasised that its review also includes the question whether the weighing of fundamental rights by the national court contradicts “constitutionally relevant standards in the ECHR” (BVerfGE 120, p. 180).<sup>66</sup> German courts have to integrate the decisions of the ECtHR into the respective partial legal area of the national legal system.<sup>67</sup> The GFCC found – taking into account the reasoning of the ECtHR judgment, distinguishing different situations of possible violations of privacy and justifying the need for minor adjustments of the principles laid down in earlier decisions of the GFCC– that the Bundesgerichtshof had not fully complied with his duty in one of the cases involved. The GFCC's balancing of the right to privacy and the right to the freedom of the press was in a later judgment accepted by the ECtHR.<sup>68</sup> The “dialogue” between the Courts solved the conflict.

115. The second case concerned the German law on preventive detention. The GFCC had ruled in 2004 that the retroactive prolongation of this measure of German criminal law was compliant with the German Constitution, in particular with the right to liberty (Article 2 (2) sentence 2 GG) and the prohibition of retrospective punishment (Article 103 (2) GG).<sup>69</sup> From the

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<sup>62</sup> A. Nußberger, Enhancing National Mechanism for Effective Implementation of the European Convention on Human Rights, Saint Petersburg conference 22-23 October 2015 – Report on Germany, p. 2.

<sup>63</sup> BGHZ 131, 361.

<sup>64</sup> GFCC, Judgment of 15 December 1999, 1 BvR 653/96, [http://www.bverfg.de/e/rs19991215\\_1bvr065396en.html](http://www.bverfg.de/e/rs19991215_1bvr065396en.html)

<sup>65</sup> *Von Hannover v. Germany*, App. No. 59320/00 (ECtHR, 24 June 2004), para. 79, <http://hudoc.echr.coe.int/eng?i=001-61853>

<sup>66</sup> Translation into English: GFCC, Order of 26 February 2008, 1 BvR 1602, 1606, 1626/07, para. 73, [http://www.bverfg.de/e/rs20080226\\_1bvr160207en.html](http://www.bverfg.de/e/rs20080226_1bvr160207en.html).

<sup>67</sup> GFCC, Order of 26 February 2008, 1 BvR 1602, 1606, 1626/07, para. 75, [http://www.bverfg.de/e/rs20080226\\_1bvr160207en.html](http://www.bverfg.de/e/rs20080226_1bvr160207en.html).

<sup>68</sup> *M. v. Germany*, App. No. 19359/04 (ECtHR, 17 December 2009), <http://hudoc.echr.coe.int/eng?i=001-96389>.

<sup>69</sup> GFCC, Decision from 5 February 2004, 2 BvR 2029/01, [http://www.bverfg.de/e/rs20040205\\_2bvr202901.html](http://www.bverfg.de/e/rs20040205_2bvr202901.html) (available only in German).

point of view of the GFCC, taking into account the established German twin-track system of sanctions in criminal law the retroactive prolongation of preventive detention had not been qualified as a penalty but as a measure of correction and prevention. The ECtHR decided in 2009 in a case against Germany that the German provisions on retroactive prolongation of preventive detention violate Article 5 and Article 7 of the Convention, inter alia because preventive detention has to be classified as a penalty within the meaning of Article 7 (1) ECHR in the view of the ECtHR.<sup>70</sup>

116. After the 2009-judgment of the ECtHR, the GFCC reconsidered its earlier decision from 2004 in 2011 (BVerfGE 128, p. 326).<sup>71</sup> The Court incorporated the judgment of the ECtHR from 2009 in its new decision. Consequently, the interpretation of Article 7 (1) ECHR given by the ECtHR was taken into account.<sup>72</sup> The GFCC also explicitly referred to the ECtHR judgment when weighing the different fundamental rights affected in the case and the public interest in the framework of the proportionality principle. The GFCC decided that the German provisions on retroactive prolongation of preventive detention were not in accordance with the German Constitution interpreted in light of the ECtHR case law.

## V. Analysis of the 2015 amendments

117. A distinction needs to be made at the outset between on the one hand a provision which enables the Constitutional Court to express a legal opinion on the compatibility between the interpretation of the Convention provided by the Court in a specific case and the Constitution as it stands, and on the other hand a provision which enables the Constitutional Court to express a legal opinion of the 'executability' of a particular judgment of the ECtHR (i.e. the (im)possibility of executing a particular Court judgment). In so far as the amendments in the text of the Constitutional Law on the RCC reflect that the Constitutional Court is empowered to rule on conformity with the Constitution of a measure of execution of an international decision proposed by a Russian authority, they are not in violation of international law. If a Constitutional Court considers that constitutional law appears to put obstacles in the way of applying at national law a judgment of the ECtHR in a concrete case, then good arguments can be made for it (as the GFCC did) trying first to reconcile the conflicting obligations. If these cannot be reconciled, then it may be that there is no more that the constitutional court can do.

118. But there may be new occasions in the future which allow developing alternatives to reconcile the ECHR and national constitutional law. A dialogue between the ECtHR and the Constitutional Court can continue. Besides this, the obligation to comply with the ECHR is an obligation on the State. If the Constitutional Court can do no more, other parts of the state, i.e. the constitutional legislator, can take over the dialogue and either seek an acceptable solution to the problem, or take steps to terminate its treaty obligation.

119. The amendments empower the Russian Constitutional Court to rule on the "executability" of Court judgments. In other words, if the Constitutional Court cannot "remove the uncertainty" about the contradiction between the Constitution and the international decision, pursuant to Article 106 no measures (acts) aimed at the enforcement it may be taken (adopted) within the territory of the Russian Federation. The amendments thus adopt an "all or nothing" solution: they move from the premise that possible conflicts have to be settled either through refusing the implementation of ECtHR judgments – which is inadmissible - or through declaring that there is

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<sup>70</sup> *M. v. Germany*, App. No. 19359/04 (ECtHR, 17 December 2009), <http://hudoc.echr.coe.int/eng?i=001-96389>, para. 97 et seq. and 124 et seq.

<sup>71</sup> GFCC, Decision from 4 May 2011, 2 BvR 2365/09, para. 96, [http://www.bverfg.de/e/rs20110504\\_2bvr236509en.html](http://www.bverfg.de/e/rs20110504_2bvr236509en.html).

<sup>72</sup> GFCC, Decision from 4 May 2011, 2 BvR 2365/09, para. 100 et seq., [http://www.bverfg.de/e/rs20110504\\_2bvr236509en.html](http://www.bverfg.de/e/rs20110504_2bvr236509en.html).

no conflict between these judgments and the Russian Constitution, a “black or white” alternative.

120. Even if the review had as object the conformity of the interpretation used by ECtHR in its decision/judgment (and not of the ECHR provisions as such), the conclusion is the same: it is impossible to separate the ECHR from its jurisdictional interpretation by the ECtHR (as explained above). As a matter of fact, the Russian Constitutional Court embraces, in general terms, the same view in its ruling of July 2015: paragraph 3 of section 3 states that “an international treaty is binding for its participants in the meaning which can be elucidated with the help of the adduced rule of interpretation.” It should also be noted that by ratifying the ECHR in 1998, the Russian Federation accepted the supervisory mechanism at a time when the extent of the interpretative activity of the European Court of Human Rights already appeared rather clearly (see above para 43-45). Therefore, even assuming that in a given judgment the ECtHR had engaged in an evolutive interpretation, the respondent State would nevertheless be bound to execute it in full.

121. Ruling on the “executability” of Court judgments, the RCC will – drawing inspiration from its July 2015 judgment, examine if (1). the interpretations by the ECtHR “entail restrictions of human and civil rights and freedoms” as regulated by the Russian Constitution, (2). the Constitution “is more complete” than the ECHR or (3). the ECtHR interpreted the ECHR in a manner contrary to its object and purpose. Since this last supposition is highly unlikely, this opinion will focus on the first and the second grounds.

122. As for the first criterion, it is hard to imagine that the ECtHR would find a violation if the domestic legal order indeed provides for a higher level of protection. The fact that the ECHR only provides for the minimum standard is reflected in Article 53 ECHR, which sets forth that “*Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.*”

123. As for the second criterion, it is worthwhile noting that according to some parts of the international law doctrine “international norms which disregard fundamental rights and suffer from democratic deficiencies should be unenforceable in the domestic legal order. The authors deem such a ‘constitutional right to resistance’ necessary for states to be able to accept as a general matter the supremacy and an eventual direct applicability of international law.”<sup>73</sup> But such a mechanism can function only when the parameters of dialogue described above – including the obligation under Article 46 of the Convention – are respected.

124. As to the motive of non-execution based on the “violation of a norm of internal law of a particular importance”, one should note that according to the Vienna Convention of the Law of Treaties this norm has to be related to the expression of consent to be bound by a treaty: Article 46.1 provides that “[a] State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.” This means that the respective norm has to do only with the procedure of ratification, accession, approval or acceptance of a treaty, as provided in the Constitution, and not with any constitutional provision, like the ones included in Chapters 1 (“The Fundamentals of the Constitutional System”) and 2 (“Rights and Freedoms of Man and Citizens”) of the Russian Constitution.

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<sup>73</sup> See Anne Peters, *Supremacy Lost: International Law Meets Domestic Constitutional Law*, Vienna Online Journal on International Constitutional Law, Vol. 3, 2009. Available at SSRN: <http://ssrn.com/abstract=1559002>, p. 195.

125. As to the “abstract character” of ECHR norms (which therefore “calls” for interpretation by ECtHR, interpretation which might become contradictory with the Constitution), there is an abundant body of legal doctrine which argues for the self-executing (or even direct effect) character of the substantive rights provided by ECHR.

126. The amendments primarily refer, as also shown in the July 2015 ruling, to the execution of general measures, meaning that in its future activity based on the amendments the Russian Constitutional Court will not only limit itself to balancing private competing interests and rights, but it will re-balance the general interest of the State (as reflected by the numerous references, in the July ruling, to the State sovereignty as consecrated by the Russian Constitution) and those of the individual whose rights were found as breached by the ECtHR in its judgment. However, the ECtHR has normally already undertaken this reasoning (on balancing the interest of the State and the interest of the individual) in its judgment, following a procedure where the State was represented and was able to put forward its arguments. In this case, reaching a different conclusion than the one already pronounced, with final and mandatory character, by the ECtHR, as a result of the decision of the Russian Constitutional Court based on its new competences, is unacceptable.

127. As the German Federal Constitutional Court affirmed<sup>74</sup>, it is only when implementation of a judgment involves balancing between *private* competing interests that it is possible to reach a different conclusion from that of the ECtHR, and then only if the reasons for reaching such a different solution have been duly argued. To re-balance the interest of the State and the individual interest at stake would not only mean to act contrary to *res judicata*, but also to ignore the interest of the State for the respect of human rights and the obligation to respect the ECtHR judgments.

128. To refuse the execution of a judgment of the ECtHR would also mean to ignore the interest of the individual whose right was violated and in favour of whom the ECtHR judgment has decided individual measures. The action by the RCC on the basis of the amendments is not only blocking the execution of the judgment as far as the general measures are concerned. It is paralyzing, according to the amendments, “all measures of execution”, so also the payment of the just satisfaction decided by the Strasbourg Court; this is equally inadmissible.

129. It is of course natural that a measure of execution selected by the State should not be in contradiction with the Constitution; it may well be that a Constitutional Court cannot remove the contradiction with the constitution. As mentioned above, this is a matter for constitutional law. But the amendments do not state that if a certain measure of execution is contrary to the Constitution, then the State authorities should choose other means. They are very strict in firmly stipulating that the execution as a whole is blocked. So, no other measure can be undertaken for the purpose of reconciling the domestic system with the decisions/judgments of ECtHR in order to make their execution possible.

130. The political relevance of this conclusion is underlined by the fact that the submission of the complaint of the federal authority before the Constitutional Court is seen as an aspect of the competence of that authority “for protecting the interests of the Russian Federation”, whereas any such complaint should be based on legal arguments only (Article 1.1)). Moreover, the power of submitting complaints is allowed not only in view of the protection of the rights of the citizens, but also in the perspective of the compliance with the constitutional principles as a whole (Article 1. 2)).

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<sup>74</sup> see case no. 2 BvR 1481/04 “Görgülü”, 14 October 2004, English translation available at [http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2004/10/rs20041014\\_2bvr148104en.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2004/10/rs20041014_2bvr148104en.html); among others also 2 BvR 209/14, § 43, 18 December 2014.

131. The protection of the position of the citizens is weakened, as far as the Court is authorized to decide the case “without holding a hearing” (Article 1. 3), revised Article 47<sup>1</sup> of the 1994 law), in possible violation of the principle of fair trial. Only the position of the federal authority which submitted the complaint appears to be relevant, while the position of the people concerned may be formally disregarded. However, complaints brought forward by the federal authority will ordinarily concern a judgment of the ECtHR following an individual petition based on Article 34 of the Convention. In that case, the judgment will affect an individual person or a group of persons, whose rights have to be ensured in the proceedings before the RCC.

132. By empowering Russia to refuse to execute the judgments of the ECtHR, the amendments also impinge on the effectiveness of the judgments and of the rights protected by them depending on their execution, thus effectively denying the right of access to the ECtHR.<sup>75</sup>

133. In its ruling of July 2015, the RCC also invoked the doctrine of the *margin of appreciation* (along with the principle of subsidiarity) in order to justify the solution which was later set forth in the December amendments. The ECtHR grants the state a margin of appreciation. If there is a uniform practice or a common European standard on the matter under scrutiny by ECtHR, then the margin tends to be narrow, while if there are great differences among the member states, a wider margin tends to be allowed. But this reasoning is in many cases performed by the ECtHR during the proceedings before it (the Strasbourg Court evaluates whether the respondent state has overstepped or not the margin of appreciation afforded to it in this field and has failed or not to secure the applicants' rights) and it is reflected as such within the judgment. After the judgment is issued, it has to be executed as such, because its findings comprise already the interpretation given by the ECtHR, including its assessment on the margin of appreciation. In this process of executing the judgment, the state cannot reopen the issue of the margin of appreciation, which was already opened, debated and definitively closed by the ECtHR when the judgment was issued. By doing so, the state (in our case, Russia through the Constitutional Court) would question the interpretation performed by ECtHR, and oppose its own interpretation to that of the ECtHR. This conduct would be equivalent to a reopening at national level of the Strasbourg proceedings, which were already closed once and for all.

## **VI. Comparison between the new powers of the Constitutional Court of the Russian Federation and those of other selected European Constitutional Courts**

### **A. Germany**

134. The comparison of the jurisprudence of the German Federal Constitutional Court (GFCC) with the competences of the Russian Constitutional Court laid down in the amendments to the Russian Law shows that there are evident differences.

135. First, the amendments to the Russian Law introduce a procedure which allows a direct review of the constitutionality of an ECtHR-decision and leads to a decision about the feasibility of the enforcement of an ECtHR-decision in Russia (Supplement part one of Article 3 (3) of the Russian law). The claimant must be a Russian federal executive body competent to operate in the field of protecting Russia's sovereign interests. The Russian authority can base its claim solely on the allegation that an ECtHR-decision infringes the Russian Constitution (part 2 of

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<sup>75</sup> See mutated mutandis Case *Hornsby v. Greece*, Application 18357/91, 19 March 1997, paragraph 40; see also Antonio Augusto Cancado Trindade and Dean Spielmann, *A Century of International Justice and Prospects for the Future. Retrospective d'un siècle de justice internationale et perspectives d'avenir*, Wolf Legal Publishers, The Netherlands, pp. 27-28. Antonio Augusto Cancado Trindade cites in this respect the case-law of the Inter-American Court of Human Rights (the judgment in the case *Baena Ricardo and Others (270 Workers) v. Panama*, paras. 72-74, 82-83).

Article 36 of the Russian law). Such a procedure does not exist in the German legal system. Possible incompatibilities can reach the GFCC only if a claimant argues that a decision of a national court or – in extreme cases – a national law or a national authority's decision infringes one of his fundamental rights laid down in the German Constitution. He can justify his claim by the argument that the national court has violated his fundamental right which has to be interpreted in light of the ECHR, including the reasoning of judgments of the ECtHR. If there had been a different interpretation of the respective fundamental right or another weighing of fundamental rights by the GFCC, this Court is called to apply the ECtHR-decision in these cases. In this framework, the Court has to respect the constitutional duty of openness of the German Constitution towards obligations of public international law which includes cooperating with international courts. By which means the GFCC implements these requirements could be seen by the two cases presented above in paragraphs 67-70. In addition, this opinion has already pointed out that there are other modes of a "dialogue" or cooperation between the ECtHR and national Courts.

136. Second, the Russian law empowers the Russian Constitutional Court to rule about the conformity of an ECtHR-decision with the Russian Constitution. The decision binds all other Russian courts as well as public authorities and interdicts the application of the respective ECtHR-judgment (Article 104 and supplement Article 106 part 2 of the Russian law). It prevents dialogue and does not allow to find solutions in the future. Such an effect does not follow from judgments of the GFCC even if the Court considers the reasoning of the ECtHR as not being in compliance with the German Constitution.

137. Third, the amended Russian law seems to be constructed at the basis of a concept of clear distinction between constitutional law and public international law. On the other hand – as noted above – it is not expressly excluded that the Russian Constitutional Court tries to interpret the Russian Constitution in light of the ECHR and its application by the ECtHR. Decision No 21 of the Russian Constitutional Court can be read in such a manner, that this is accepted in theory, although not necessarily followed in practice.

138. In contrast, the German constitutional law system – seen as law in action - is based on the idea of cooperation and harmonisation between the two legal regimes. It is the duty of the GFCC to find a solution in a concrete case which respects both the German Constitution and the ECHR. This is why the interpretation of fundamental rights laid down in the German Constitution must take into account the ECHR and ECtHR judgments.

## **B. Italy**

139. The Italian Constitutional Court supports the opinion that the case-law of ECtHR is binding the Italian judges with regard to the interpretation of the provisions of the Convention, which those judges have to apply in their judgements. These binding effects are recognized not only to judgments concerning Italy, but also to judgments concerning other countries as far as they concern facts of the life which have to be dealt by the Italian judges. Therefore, if there is a contradiction between Italian law and the provisions of the Convention, the judges are bound to interpret Italian law in conformity with the conventional law and the case-law of the ECtHR. If reconciliation is not possible, the judges have to submit the problem to the Constitutional Court, which has retained the competence to judge the conflicts between the Convention and Italian law sub specie of the judicial review of legislation as far as the Italian legislator is bound by the Constitution itself (Article 117) to observe the conventional provisions.

140. It is at this stage that the Constitutional Court intervenes to check the conformity of the Italian legislation with the Convention and the case-law of the ECtHR, and it has to give priority to the conventional law. It can disregard such a solution only in the case that the guarantee of the human rights and fundamental freedoms insured by the Convention implies a limitation or a

restriction of the internal constitutional protection of those rights and freedoms (Article 53 ECHR).

141. This interpretative line is not contradicted by the decision adopted by the Constitutional Court in the *Maggio* case<sup>76</sup> that the Russian doctrine and case-law quote. In that case the Court balanced the different interests at stake according to the Strasbourg case-law, giving to the State's interests – the Court said - a relevance which that case-law allows.

## VII. Conclusions

142. The 2015 amendments to the Constitutional Law on the Constitutional Court of the Russian Federation have empowered the latter court to declare decisions of international courts, notably of the European Court of Human Rights, as “unenforceable”. Such judgment would be based on the incompatibility of such decisions with the “fundamentals of the Russian constitutional system” and the “human rights regime established by the Constitution of the Russian Federation”. The consequence of such a finding by the Constitutional Court would be that “no actions/acts whatsoever” aimed at enforcing the international decision may be taken/adopted in the Russian Federation. This comprises both general and individual measures of execution as well as future decisions.

143. If pursuant to domestic law the Constitutional Court cannot remove the contradiction between the Constitution and an international decision, notably a judgment of the European Court of Human Rights, it may be bound to simply declare it. However, this does not terminate the State's obligation to enforce the international decision. Whatever model of relations between the domestic and the international system is chosen, a State is bound under Article 26 of the Vienna Convention on the Law on Treaties to respect ratified international agreements and pursuant to Article 27 of the Vienna Convention it cannot invoke the provisions of its internal law as justification for its failure to perform a treaty, including the European Convention on Human Rights. The execution of international obligations stemming from a treaty in force for a certain State is incumbent upon the State as a whole, i.e. all State bodies, including the Constitutional Court; thus, it is the duty of all State bodies to find appropriate solutions for reconciling those provisions of the treaty with the Constitution (for instance through interpretation or even the modification of the Constitution).

144. Instead, the Russian Constitutional Court has been empowered to declare an international decision as “unenforceable”, which prevents the execution of that decision in any manner whatsoever in the Russian Federation. This is incompatible with the obligations of the Russian Federation under international law.

145. A possible declaration of unenforceability of a judgment of the European Court of Human Rights violates Article 46 of the European Convention on Human Rights, which is an unequivocal legal obligation and includes the obligation for the State to abide by the interpretation and the application of the Convention made by the Court in cases brought against it. The interpretation of ECHR by the Court, as reflected in its decisions/judgments, is as compulsory for the States parties as the decisions/judgments themselves and the ECHR per se. The freedom of choice as to the execution of judgments refers to the manner of execution, which is not absolute. The State has to execute; only the modality of execution may be at States' discretion, although even this discretion is not unfettered.

146. States have to remove possible tensions and contradictions between rulings of the European Court of Human Rights and their national systems, including – if possible - via means of dialogue. This is a tool which has proven its effectiveness in many instances, in several

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<sup>76</sup> Italian Constitutional Court, Judgment 19-28 November 2012, No. 264.

Council of Europe member States. The Russian Federation should have recourse to dialogue, instead of resorting to unilateral measures, which are at variance with the Vienna Convention on the law of treaties which stipulates that a state has to interpret the treaty “in good faith” (Article 31).

147. The amendment to Article 47 provides for a decision “without a hearing”. As a decision to enforce, or not enforce, a judgment of the ECtHR concerning a Russian applicant obviously affects that applicant, then it is necessary to respect fully the principle of equality of arms and offer the possibility for the former applicant to submit his or her observations.

148. The Venice Commission comes to the conclusion that, if the 2015 amendments are maintained, the Federal Constitutional Law on the Constitutional Court of the Russian Federation, as modified, needs to be amended in light of the foregoing analysis. At least the following measures should be taken:

- The power and any reference to the power of the Constitutional Court to rule on the “enforceability” of an international decision should be removed from the Federal Constitutional Law on the Constitutional Court; “enforceability” should be replaced by “compatibility with the Russian Constitution of a modality of enforcement, proposed by the Russian authorities, of an international decision”; this power should be excluded in respect of a specific measure of execution indicated by the European Court of Human Rights itself in its judgment;
- The Federal Constitutional Law on the Constitutional Court should make clear that individual measures of execution contained in judgments of the European Court of Human Rights, such as the payment of just satisfaction, may not be the object of an assessment of constitutionality;
- New Article 104<sup>4</sup> paragraph 2 and Article 106 part 2 of the Federal Constitutional Law on the Constitutional Court should be removed;
- Provision should be made in the Federal Constitutional Law on the Constitutional Court for the duty of the Russian authorities, if the Constitutional Court rules that a measure of enforcement is incompatible with the Russian Constitution, to find alternative measures for executing the international decision. One of these possibilities might be to amend the legislative framework, even the Constitution.
- Article 47 of the Federal Constitutional Law on the Constitutional Court should be amended so as to ensure that any proceedings before the Constitutional Court of the Russian Federation involving the assessment of the compatibility with the Russian Constitution of a measure of execution of an international decision should necessarily involve the individual who acted as applicant before the relevant international court or body.

149. The Venice Commission is at the disposal of the authorities of the Russian Federation for any possible assistance as to how to bring the Federal Constitutional Law on the Constitutional Court as amended in conformity with international standards.