The Binding Effect and the Implementation of the Judgments of the European Court of Human Rights

with special regard to Germany and Greece

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Anastasia Kallidou

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I hereby affirm that I wrote the dissertation myself and that I have not used any sources or aids other than those specified.

Supervisor: Prof. a.D. Dr. Dr. h.c. Dr. h.c. Philip Kunig
Second examiner: Prof. Dr. Heike Krieger

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List of Abbreviations and Acronyms

a.o.	and others
ACHR	American Convention on Human Rights
AFCC	Act on the Federal Constitutional Court
App.	Application
Art.	Article
CCiP	Code of Civil Procedure
CCrP	Code of Criminal Procedure
CoE	Council of Europe
CoM	Committee of Ministers
CoS	Council of State
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
Ed.	Editor
Eds.	Editors
EEC	European Economic Community
esp.	especially
etc.	et cetera
EU	European Union
FCC	Federal Constitutional Court
ff.	following pages
i.e.	id est
ibid.	ibidem
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
Id.	idem
ILC	International Law Commission
No.	number
Nos.	numbers
p.	page
PACE	Parliamentary Assembly of the Council of Europe
para.	paragraph
paras.	paragraphs
PCIJ	Permanent Court of International Justice
pp.	pages
pt.	point
pts.	points
Rec.	Recommendation
Res.	Resolution
SCC	Supreme Court of Cassation
SHC	Special Highest Court
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
v.	versus
VCLT	Vienna Convention on the Law of Treaties

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Introduction

The Convention for the Protection of Human Rights and Fundamental Freedoms, commonly known as the European Convention on Human Rights,[1] was opened for signature in Rome on the 4th of November 1950 by the then newly formed Council of Europe[2], coming into force on 3 September 1953. Initially signed by only twelve CoE Member States,[3] the Convention now counts forty-seven members,[4] twenty eight of which are also EU members,[5] ranking amongst the most widely-signed legal documents worldwide. After more than sixty years in existence, the Convention no longer requires special recommendations, as it indisputably constitutes a central reference document for the protection of fundamental rights in Europe. Its powerful influence and its strategic significance have been consistently commended by both theory and praxis, while there is no question that the Convention, together with the Council, embodies a record of exemplary success at European and international level.[6] However, things have not always been so pleasing, and the ECHR system, even human rights themselves, have gone through major changes and have faced significant challenges from the time of their inception. Human rights have only been truly recognised in the recent years of modern history, while their full enjoyment did not precede much before the fifties. In essence, human rights are the product of the European thought of the 17th and 18th centuries, as crystallised in the French Declaration of the Rights of Man and of the Citizen[7].[8] Since those times, human rights have experienced rapid development and strong growth, but it was not until signing the UN Universal Declaration of Human Rights[9] in 1948 that they have received broad acceptance. The UDHR was in fact the first document to give a normative dimension to human rights, which, up until that time, have merely been addressed as a philosophical idea, despite the fact that the Charter of the United Nations[10] had already previously provided for a general frame for their protection. The

[1] Hereinafter also referred to as Convention or ECHR. The updated version of the Convention is available under: http://www.echr.coe.int/Documents/Convention_ENG.pdf (20/10/2017).
[2] Hereinafter also referred to as Council or CoE. The Council of Europe should not be confused with the Council of the European Union or the European Council.
[3] Belgium, Denmark, France, Germany, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Turkey and the United Kingdom.
[4] The updated status of signatures, ratifications, declarations, reservations to the Convention and its Protocols is available under: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005 (10/11/2017).
[5] On 23 June 2016 citizens of the United Kingdom (UK) voted to leave the European Union (EU). On 29 March 2017 the UK formally notified the European Council of its intention to leave the EU by triggering of Article 50 of the Lisbon Treaty. After several delays, the withdrawal of the United Kingdom from the European Union (also known under the term Brexit) is now scheduled for the 31 October 2019. For the time being, the United Kingdom remains a full member of the EU and rights and obligations continue to fully apply. More information available under: https://europa.eu/european-union/about-eu/countries/member-countries/unitedkingdom_en#brexit (2/7/2019).
[6] Buergenthal/ Thürer: Menschenrechte, pp. 187, 192.
[7] The Declaration of the Rights of Man and of the Citizen (French: Déclaration des droits de l' homme et du citoyen) was adopted between 20 and 26 August 1789, by France's National Constituent Assembly and constitutes an important document of the French Revolution and in the history of human and civil rights.
[8] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 200.
[9] Hereinafter also referred to as Universal Declaration or UDHR. The UDHR was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 as Resolution 217A. The Universal Declaration is available under: http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf (20/10/2017).
[10] The Charter of the United Nations was signed on 26 June 1945 in San Francisco and came into force on 24 October 1945. The UN Charter is available under: https://treaties.un.org/doc/publication/ctc/uncharter.pdf (20/10/2017).

Universal Declaration and the Convention on the Prevention and Punishment of the Crime of Genocide[11] have been considered a reaction to the atrocities of the Second World War and the first decisive steps towards a new era of universal recognition of basic human rights. Within this context, it is clear to see why human rights are often associated with the Universal Declaration and the events of the Second World War.[12] The Convention would follow the same path just a few years later, with its 'founding fathers' sharing the view that, the post-war reconstruction of the European continent had to happen through the gradual harmonisation of the main characteristics of state, society and economy.[13] There is no doubt that the Convention proudly counts between those early and inspirational attempts, which were initially designed for preventing war, but then evolved into instruments for the protection of human rights.[14] Specifically with regards to minority rights, the Convention has been characterised as the first important attempt to protect the rights of minorities, following relevant declarations and treaties adopted after the First World War.[15] It is this close association of international human rights law with the history of nations that explains why its opponents consider it a field of law representative of the power relations of the time of its emerge and one seeking merely the avoidance of violence.[16]

The appealing success of the Convention is closely related to the fact that the ECHR membership has been included among the obligatory requirements for states that wish to become members of the Council of Europe.[17] Created under the patronage of the Council of Europe, the ECHR is representing one of its major achievements and the two together embody interdependent parts of the same policy.[18] The Council itself has formed on 5 May 1949 by ten Western European countries,[19] following the collapse of the Soviet Union and undertaking a historical step of an open stance towards newer democracies; a move adding at the same time to its already extended volume of responsibilities.[20] Additionally, the unification of the East and

[11] The Convention on the Prevention and Punishment of the Crime of Genocide or CPPCG was signed on 9 December 1948 as General Assembly Resolution 260A and came into force on 12 January 1951. The CPPCG is available under: https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf (20/10/2017).
[12] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 200.
[13] Rozakis: The Jurisprudence of the European Court of Human Rights (translated from Greek), p. 1835.
[14] Greer: The European Convention on Human Rights, pp. 56-57, 316.
[15] Guradze: Die Europäische Menschenrechtskonvention. Konvention zum Schutze der Menschenrechte und Grundfreiheiten nebst Zusatzprotokollen, p. 37. Guradze refers to unilateral declarations and bilateral and multilateral treaties. Villiger argues that in regard to minority rights especially, the ECHR has been evidently inspired to a great extent by the UDHR and the League of Nations (Villiger: The European Convention on Human Rights, p. 88). The League of Nations was an intergovernmental organisation established on 10 January 1920 as a result of the Paris Peace Conference at the end of the First World War and at the initiative of the victorious Allied Powers.
[16] Narr/ Roth: Menschen-Recht-Gewalt-Frieden, p. 165.
[17] Villiger: The European Convention on Human Rights, p. 90. Article 9 of the Parliamentary Assembly Resolution 1031(1994), introduced that accession to the Council of Europe could only occur if accompanied with becoming a party to the ECHR. Article 1 of Resolution 1031 also stressed the obligation for all (old and new) CoE Member States to respect the guarantees enshrined in the Statute of the CoE and the ECHR. Resolution 1031 is available under: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=16442&lang=en (10/10/2017). On its part, Article 3 of the Statute of the Council of Europe provides that all Member States of the Council are required to endorse the principles of human rights and the rule of law. The Statute of the CoE is available under: https://rm.coe.int/1680306052 (20/10/2017).
[18] Dembour: Who Believes in Human Rights? p. 19.
[19] Belgium, Denmark, France, Ireland, Italy, Luxemburg, Netherlands, Norway, Sweden, United Kingdom, with Greece and Turkey following three months later on 9 August 1949 and Iceland and West Germany almost a year later on 7 March 1949 and 13 July 1949 respectively.
[20] Naskou-Perraki: The Law of Institutional Organisations (translated from Greek), p. 378.

the West was an event that laid chronologically close to the fall of the Berlin Wall,[21] an event which alone marked the historically significant period of the late eighties and early nineties.[22] The ECHR itself was created in order to operate as a defence shield against future dictatorships and as a window for the Eastern European states, to show the world a face other than a communistic one.[23] In turn, former socialist societies used this opportunity to demonstrate their political openness and, their ability to embrace a new constitutionalism in the sense of adopting stable Constitutions that focus mainly on the practical aspects of human rights protection.[24] With the fear of communism disappearing from the European landscape, the ECHR started playing a role different than representing simply an instrument through which European countries were proving their compliance with core democratic principles.[25] In this setting, the European Court of Human Rights[26] also had an increasingly challenging role to play, namely to preserve and promote, on the one side, the universality of human rights, whilst, on the other side, functioning as a mechanism of transitional justice.[27] This situation has also provided the chance for the Court to prove its sensitivity for special political environments, like the ones in which the new Member States were now flourishing.[28] It becomes obvious that the 'special weight' of the Convention and the Court can hardly be underestimated, as both have actively and effectively contributed to the creation of a single European area for the protection of human rights.[29] Historically, the Convention has followed the tracks of the European integration process and is currently responsible for the protection of the fundamental rights and freedoms of approximately eight hundred million citizens; playing alongside a unifying role, also a symbolic role. Though still struggling, Europeanisation, has successfully survived critics which, to their biggest part, are driven by concerns related to an emerging type of alleged legal imperialism.[30] The Convention has articulated a common European identity and remains its indispensable feature,[31] reflecting the core purpose of the Council of Europe which is the maximum possible unity between Member States.[32] In a nutshell, the Convention is conceived a peace project creating the necessary structures for the further stimulation of the common European goals, by means of forming a safe core of mature political culture and thus, plays a role distanced from that of a mere restorative mediator.[33] To conclude, it can be supported that the Convention has successfully served the vision of its founding fathers, as expressed in the post-war Europe and as continued by their successors.[34]

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[21] German: Berliner Mauer (1961-1989).
[22] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 28.
[23] Gilch: Die Reformen am Europäischen Gerichtshof für Menschenrechte unter Besonderer Berücksichtigung des 14. Zusatzprotokolls zur EMRK, p. 11.
[24] Janis/ Kay/ Bradley: European Human Rights Law, pp. 830, 853.
[25] Bates: The Evolution of the European Convention on Human Rights, pp. 5, 22. Bates calls this a basic "test of membership" for the democratic club of European States.
[26] Hereinafter also referred to as Court, European Court, Strasbourg Court or ECtHR.
[27] Sweeney: The European Court of Human Rights in the Post-Cold War Era, p. 38.
[28] Arold: The Legal Culture of the European Court of Human Rights, p. 21.
[29] Trekli: Binding Force and Execution of Judgments (translated from Greek), p. 623.
[30] Birkinshaw: European Public Law. The Achievement and the Challenge, p. 9.
[31] Koenigs/ Taşkın: »Wir Sind Doch Europäer«, p. 193; Goldhaber: A People's History of the European Court of Human Rights, p. 175. Goldhaber even believes that human rights law 'would be far the most satisfying basis for a communal identity'.
[32] Article 1(a) of the CoE Statute cites as: "The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress."
[33] Xenos: The Positive Obligations of the State under the European Convention of Human Rights, p. 15.
[34] Rozakis: The Jurisprudence of the European Court of Human Rights (translated from Greek), p. 1844.

There is no doubt that the Convention is a milestone document and the Court is a unique institution entrusted with its interpretation and application.[35] However, is the ECHR regime also effective? In a historical period where overregulation of human behaviour prevails and where legislative complexity is a daily phenomenon, the question arises as to whether the laws that are not being respected still meet the objectives for which they have been primarily set. A possible answer has been long provided by philosopher and scientist Aristotle,[36] who had argued that "a good legal order does not exist when laws are good, but find no obedience". Taking into account the current challenges and the emerging realities, this dissertation discusses the strengths and the weaknesses of the European Convention system, constituting a timely contribution to existing literature on human rights. More specifically, this study looks at the European Convention on Human Rights and the legal product of the European Court of Human Rights and critically assesses their impact on the domestic law and practices of Member States. In particular, it observes closely the effect of the ECHR in the legal system of Germany and Greece and examines its implementation by the competent state bodies charged with the protection of human rights, focusing mainly on the role of the supreme national courts. In that context, the dissertation is organised into five chapters. The first chapter covers theoretical aspects of the key features and legal doctrines governing the operation of the Convention and the Court, offering an engaging introduction designed to provide the necessary insights for the in-depth analysis of the following chapters. Having set the scene, the second chapter addresses the position and the impact of the Convention on the internal legal system of its Member States. By doing so, this chapter contains an analysis of the role of the general principles of international law in delivering a dogmatic basis for a potentially binding effect of the Convention, as well as an analysis of the use of the Convention as an 'aid' in the process of interpreting national law. The third chapter features the main issues around the implementation and enforceability of the Court's judgments at the domestic level, examining the means of compliance, the supervision procedures, as well as the consequences of non-compliance, while it also enters the debate on the power of interpretive precedents. The fourth and fifth chapters follow the thematic structure of the previous two chapters, presenting an analysis of the acceptance of the Convention and the case-law of the Court in the Federal Republic of Germany and in the Hellenic Republic respectively. By attempting to determine their relationship vis-à-vis the Convention system and their ability to respond effectively to complexities, these case-studies highlight, in the light of selected legislation and case-law, country-specific particularities and tools developed at national level in order to enhance the realisation of the Convention's potential effects. In this context, this dissertation has a dual dimension, namely to illuminate, on the one hand, the rather normatively vague landscape of European human rights law and jurisprudence and, on the other hand, to empirically approach the capacity of the Convention system to shape domestic law and policies in two different countries. At the end, the concluding remarks focus on the reflection of the overall success and effectiveness of the regime in the light of the topics discussed and question the next stage of the Convention's life, through the eyes of the author. For the convenience of the reader, an annex with translations of the most important German and Greek legislation relevant to this study, is provided.

Germany and Greece have been selected as cases for an in-depth analysis, primarily because of the author's familiarity with both legal systems, a result of the author's educational and professional course, which has allowed to afford enough data to address the question of interest from a country-specific perspective. Both countries have an early presence in European affairs, with Greece having acceded the Council of Europe as its 11th member State on 9 August 1949

[35] As regulated in Article 32 ECHR.
[36] Aristotle (384-322 BCE): Politics, Issue 4, Chapter 7.

and Germany as its 14th Member State on 13 July 1950 while they both count among the first signatories of the European Convention on Human Rights. Further common features include the strong influence of German law on Greek law and a long scientific tradition of cooperation, especially in the field of civil and civil procedural law, a factor that could potentially create expectations for uncovering certain common trends in the process of complying with their obligations under the Convention. However, the countries' profiles with regard to compliance with ECHR law and to the enforcement of ECtHR judgments differ greatly, at least in terms of numbers, with Greece representing around 4.6% of the more than 21,000 judgments having been delivered by the Court and thus counting among the ten countries that have mostly concerned the Court since its establishment in 1959, whereas Germany, despite its significantly larger population, a roughly 1.5%.[37] In fact, the countries vary widely in terms of the background factors which influence the performance of their respective legal systems, making them two diverse cases, in the sense that Germany has a sophisticated legal science, shaping a great example of a comprehensive legal system recognised globally already a couple of decades ago,[38] while Greece still suffers inadequate resources and decision processes, combined with a limited human rights expertise and awareness, something that can be seen in the systemic deficits and structural defects present in other Eastern European states too. The findings of these case studies, though not generalizable, illuminate key issues to which other states within the ECHR system can relate, thus adding to the established theory that is developed in the first three chapters of the dissertation while they also reveal important aspects for shaping policies to overcome existing obstacles encountered by most of the Member States.

[37] The statistics of state violations for the period 1959-2018 are available under https://www.echr.coe.int/Documents/Stats_violation_1959_2018_ENG.pdf (6/6/2019).
[38] Weiss: The Impact of the European Convention on Human Rights on German Jurisprudence, p.60.

Chapter One

THE EUROPEAN SYSTEM OF HUMAN RIGHT PROTECTION

1. The European Convention on Human Rights

1.1. Physiognomy of the Convention

1.1.1. ECHR as Europe's Bill of Rights

There is no doubt that the Convention has changed significantly over the years, having evolved into what has been called a *Europe's Bill of Rights* and, having undertaken a role which its drafters and High Contracting Parties could not have foreseen in the fifties.[39] The Convention has indeed a unique character, as highlighted by the fact that it is regularly used as a model instrument for shaping and approaching human rights treaties in general.[40] The ECHR system, as opposed to other international human rights protection regimes, has set very high standards, especially in terms of its institutional mechanisms for enforcement and compliance.[41] Under the particularities that have contributed to distinguishing the Convention as a 'class of its own', counts the fact that the Convention encompasses, alongside international elements, also elements of constitutional nature.[42] In this context, the Convention has been described as a "hybrid instrument"[43] and as a "constitutional instrument of ordre public européen"[44]. The text of the Convention is revealing quite evidently that it has been inspired to a great extent by national constitutions, with most of the rights and freedoms enshrined in it finding their correlatives in national constitutions.[45] As a result and despite its international origin, the Convention lies, at least in terms of its content, object and purpose closer to national constitutions.[46] Vice versa, nearly all constitutions of the so-called 'civilised' world, do reflect rules, norms and principles which are characteristic of international human rights law.[47] The constitutional character of the Convention lies also within its overall restrictive effect, in the sense that it intervenes to define the powers of Member States for the sake of a collective human

[39] Bates: The Evolution of the European Convention on Human Rights, p. 168. In page 75, Bates argues that the impossibility to have foreseen the future development of the ECHR becomes also evident in the statement of the principal authors of the treaty, FYFE and TEITGEN, who have said that the Convention was back then merely an agreement between a group of states aiming to fight totalitarianism.
[40] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, pp. 94-95.
[41] Zimmermann: Dispute Resolution, Compliance Control and Enforcement in Human Rights Law, p. 47.
[42] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, pp. 94-95.
[43] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, pp. 62-63. Paraskeva cites ROZAKIS: The ECHR and its Application by the ECtHR (translated from Greek) in: Union of Greek Criminologists: The European Convention on Human Rights (translated from Greek), Athens: Sakkoula 2004, p. 24.
[44] The Court has characterised the Convention as a "constitutional instrument of European public order (ordre public)" in case of Loizidou v. Turkey (Preliminary Objections) (App. No. 15318/89, 23/3/1995), para 75. The term is also referred to in: Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, pp. 63-65.
[45] Addo: The Legal Nature of International Human Rights, p. 290. Addo is referring especially to national constitutional, criminal and tort law.
[46] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 411.
[47] Chortatos: Introduction to Contemporary International Law and the Problem of Relationship between International and Internal Law (translated from Greek), pp. 127, 131.

rights protection, a protection traditionally provided by national constitutions.[48] Another similarity between the ECHR and national constitutions can be seen in the fact that both are based on the political 'will', in other words, on the 'desire' to be bound.[49] Moreover, the protection guaranteed by the ECHR system shall not be considered as a narrow 'legitimate tolerance' on the part of states, but rather, as one with an extended influence that reaches the significance of national liberal rights.[50] However, the opposite view is also supported, namely that the reality of the different levels of protection guaranteed by the legal systems of the Member States themselves, does not allow sufficient space for an understanding of the ECHR system as a 'constitutionalising device'.[51]

1.1.2. ECtHR as a quasi-constitutional court

Along with the Convention, the Court has also enjoyed the reputation of a Constitutional Court since the nineties.[52] Despite flourishing in an environment that lacks the characteristics of those legal systems in which constitutional courts operate, the Court has managed to adopt a highly influential role.[53] Due to the defence of the rights of individuals vis-à-vis the state traditionally belonging to the field of constitutional law,[54] and because of the competencies of the Court stretching into these fields, a parallel between the two becomes inevitably apparent. In this respect, the role of the Court to issue *advisory opinions* further strengthens this constitutional character.[55] The Court is often even compared to the European Court of Justice,[56] since both of them, despite differing in their jurisdictional functions, contribute valuably to the European legal protection, having no reason to 'envy' the impact of constitutional courts.[57] Nevertheless, constitutionalists tend to argue on a purely dogmatic basis and have yet to be convinced of the complete fulfilment of the constitutional requirements within the Court's operational framework.[58] For the Court itself, acquiring a purely constitutional character would mean adjudicating only on cases that touch upon *core* human rights issues, something that cannot be supported on the basis of the current regulatory framework and practice.[59] Furthermore, it is argued that the diverse realities in the nearly fifty Member States constitute a major constraint in the process of recognising the Court as a Constitutional Court, revealing the still embryonic stage of such a development.[60]

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[48] Chiariello: Der Richter als Verfassungsgeber? pp. 212-213.
[49] Chrysogonos: The European Convention on Human Rights (translated from Greek), p. 70. Chrysogonos further states that this 'will for Constitution' is known in German as 'Wille zur Verfassung'.
[50] Letsas: A Theory of Interpretation of the European Convention on Human Rights, p. 36.
[51] Hennette-Vauchez: Constitutional v. International p. 163.
[52] Bates: The Evolution of the European Convention on Human Rights, p. 20.
[53] Ibid.
[54] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 63.
[55] Sisilianos: Introduction (translated from Greek), p. 16.
[56] Hereinafter also referred to as ECJ.
[57] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 21. The Court adjudicates only on human rights enshrined in the ECHR, whereas the jurisdiction of the ECJ covers a broader range of matters affecting the European Union.
[58] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 56.
[59] Ibid.
[60] Hennette-Vauchez: Constitutional v. International? p. 162.

1.2. Catalogue of fundamental rights and freedoms[61]

1.2.1. Scope of application

1.2.1.1. The spectrum of the human rights palette

The rights included in the Convention have already before been regulated by the UDHR on a global and more comprehensive scale., However, despite the fact that most of the ECHR rights do find their 'relatives' in the Universal Declaration, some of the rights enshrined in the Convention have only been added to the *International Bill of Human Rights*[62] some years later.[63] Furthermore, despite their obvious similarities, the two documents differ in essential points. One main difference concerns the degree of the protection granted and is evident already in the titles of the documents.[64] The title Declaration *of* Human Rights on the one hand, is indicative of the intention of its drafters to incorporate *all* human rights, while on the other hand, the title Convention *on* Human Rights is revealing of the intention to only include *a part* of the broader human rights palette.[65] It is a fact that the rights guaranteed by the Convention are mainly *civil* and *political rights*, as complemented by *property rights*,[66] whereas the UDHR contains, next to these, also *economic*, *social* and *cultural rights*. The gap in the protection of these rights by the Convention is definitely a negative aspect of the ECHR system,[67] however, at least with regard to economic and social rights, protection was later on championed by the *European Social Charter*[68]. As generally acknowledged, civil and political rights represent what has been called the 'first generation' of rights, contrasting with economic, social and cultural rights of the 'second generation' and with the 'third generation' solidarity rights.[69] Whilst it is widely supported that human rights remain indivisible, without hierarchy between them and equally important, international law and practice still offer inadequate protection when it comes to *collective* and *solidarity rights.*[70] The Court is actively working, by means of its interpretations,

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[61] It should be mentioned that human rights are often referred to as fundamental freedoms, while some theoreticians have been particularly involved in identifying and appraising the differences between the two concepts. For the purposes of this research human rights are approached as a synonym of fundamental freedoms, following the path marked out by the preamble of the Convention. Paragraph 5 of the preamble to the ECHR cites as: "Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend." In this context, it seems that fundamental freedoms and human rights are used as equivalents.

[62] The International Bill of Human Rights constitutes of the UDHR, the International Covenant on Civil and Political Rights (hereinafter also referred to as ICCPR) with its two Optional Protocols and the International Covenant on Economic, Social and Cultural Rights (hereinafter also referred to as ICESCR). ICCPR and ICESCR were both adopted in 1966, based on the Resolution 543 of 5 February 1952 on the Preparation of two Draft International Covenants on Human Rights of the General Assembly and came into force in 1976. The Resolution is available under: https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/067/98/IMG/NR006798.pdf?OpenElement (20/10/2017).

[63] An example here is the prohibition of imprisonment for debt, which came into force in 1968 by Article 1 of Protocol No. 4 to the ECHR, whereas it was added to the International Bill of Rights in 1976 by Article 11 ICCPR.

[64] Xenos: The Positive Obligations of the State under the European Convention of Human Rights, p. 11.

[65] Ibid.

[66] Some authors argue that the prohibition of forced or compulsory labour as regulated in Article 4(2), on), the right to join trade-unions regulated in Article 11(1) and the right to education provided by Article 2 of Protocol No. 1 have the nature of social rights.

[67] Perrakis: Dimensions of the International Protection of Human Rights (translated from Greek), p. 238.

[68] The CoE's European Social Charter opened for signature on 18 October 1961 and came into force on 26 February 1965. The revised version, embodying in one instrument all rights guaranteed by the Charter of 1961 and its additional Protocol of 1988, opened for signature on 3 May 1996 and came into force on 1 July 1997.

[69] Roukounas: International Protection of Human Rights (translated from Greek), pp. 15-20.

[70] Perrakis: Dimensions of the International Protection of Human Rights (translated from Greek), pp. 308-309.

towards the inclusion of new rights in the scope of the Convention, such as the *right to a healthy environment*;[71] in this last case, under the condition of its combination with a right already explicitly enshrined in the text of the Convention.[72] It appears unavoidable that, in the near future, the ECHR system will have to rethink its 'coverage', in the sense of expanding its human rights catalogue and of providing more enhanced protection.[73]

1.2.1.2. Structure of the Convention

In terms of its form and content, the Convention consists of a preamble and a main text, with *Protocols* Nos. 1, 4, 6, 7, 12 and 13 having been annexed to it. The preamble refers, inter alia, to the very aim of the Council, as set out in Article 1 of its Statute, namely to the achievement of a closer unity between its members and it reminds that the maintenance of human rights is best guaranteed through democracy and mutual cooperation. The preamble finishes by denoting the commonly shared and cherished values in Europe, such as the *rule of law* and, as a whole, it draws the central line running through the entire document of the Convention. By means of explicitly referring to the Universal Declaration, the preamble openly reveals that the Convention has been largely inspired by the former. However, the preamble fails to mention Article 3 of the Statute of the Council, which regulates the obligation of Member States to respect human rights, whilst it also appears unsatisfactory in terms of providing guidelines for the interpretation of the normative provisions of *Section I*.[74] In what regards the main text of the Convention, this consists of fifty-nine Articles, which are grouped into *Sections*. Section I contains Articles 2 to 18 and encloses all rights and freedoms,[75] Section II covers Articles 19 to 51 and regulates the specifics on the functioning of the Court, whilst Section III contains eight Articles that constitute what is referred to in the text as "miscellaneous provisions".

1.2.1.3. The broad wording of ECHR provisions

The phrasing of the Convention is formulated in a rather 'timid', if not elliptical, manner, even compared to national constitutions, which themselves traditionally contain rather vague norms.[76] The rules contained in the ECHR have been characterised as 'open norms', in other words, as broadly formulated.[77] It is supported that the existing gaps in the text of the Convention have been absolutely intended by its creators who, in this way, have entrusted the

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[71] The protection of the environment has its beginning in the case of López Ostra v. Spain (App. No. 16798/90, 9/12/1994).
[72] Rozakis: The Jurisprudence of the European Court of Human Rights (translated from Greek), p. 1838.
[73] Janis/ Kay/ Bradley: European Human Rights Law, pp. 878, 898.
[74] Guradze: Die Europäische Menschenrechtskonvention. Konvention zum Schutze der Menschenrechte und Grundfreiheiten nebst Zusatzprotokollen, pp. 42-43. Article 3 of the CoE Statute cites as: "Every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I."
[75] Section I contains following rights and freedoms: the right to life (Art. 2); the prohibition of torture (Art. 3); the prohibition of slavery and forced labour (Art. 4); the right to liberty and security (Art. 5); the right to a fair trial (Art. 6); the right to no punishment without law (Art. 7); the right to respect for private and family life (Art. 8); the freedom of thought, conscience and religion (Art. 9); the freedom of expression (Art. 10); the freedom of assembly and association (Art. 11); the right to marry (Art. 12); the right to an effective remedy (Art. 13); the prohibition of discrimination (Art. 14); the derogation of rights in time of emergency (Art. 15); the restriction on political activities of aliens (Art. 16); the prohibition of abuse of rights (Art. 17) and the limitation on the use of rights restrictions (Art. 18).
[76] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 341; Lambert-Abdelgawad: The Execution of Judgments of the European Court of Human Rights, p. 65.
[77] Dröge: Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention, p. 233.

demarcation of the scope of the rights to the discretion of the courts.[78] In the same direction moves the notion that the broad wording has intended to grant the maximum possible protection to the biggest possible amount of recipients.[79] It is this characteristic 'unwillingness' of 'creators' of international human rights treaties to cover all essential aspects that shapes yet another reason why modern human rights development has been criticised for incompleteness.[80] It is a fact that, the broad wording of the Convention's text, does not always demonstrate quite explicitly the way in which the protection of the rights of individuals is to be guaranteed by the states.[81] As mentioned previously, this trend is common in modern international law - a field relatively harmless compared to the intrusive nature of national law - whilst it constitutes the outcome of a long practice and experience which have shown that cooperation with states could otherwise be at stake. In the light of these issues, it appears wiser for the purpose of the unobstructed continuation of international law, that the latter directs itself towards being established as a latent 'behavioural guide' rather than subjecting states to strict controls. Moreover, mindful of the fact that law as a system governing human behaviour is not stagnant but rather evolves within the society, the 'wide language' of legal rules allows for their long-lasting existence even when the setting is substantially different to the one of the time of their adoption. In any case, the Convention has definitely not gained its prominence for being wide-ranging in terms of its normative regulation, but for providing the mechanisms that will ensure the effective protection of the rights it encompasses.[82] On its part, the Court has been able, through its extensive case-law, to enrich the rather poor wording of the ECHR and thus to contribute to a significant increase in the legal importance of the Convention.[83]

1.2.1.4. ECHR and international law as communicating vessels

At the same time and despite existing criticism about an incomplete regulation of human rights in Europe, it is broadly supported that, European citizens are actually experiencing a period of 'bureaucratisation' of human rights.[84] It is fact that the Convention indeed interrelates with several other legal instruments, which are valid and applicable in Europe. Therefore, the Convention is not to be observed as an isolated document but as a part of the responses to the demand for centralised and coherent protection. International treaties are considered as operating in a two-way dynamic, in a manner that assimilates the nature of 'communicating vessels', supporting and supplementing each other.[85] Besides, human rights law and humanitarian law are now considered more complementary than contradictory, with the classical division between the *law of peace* and the *law of war* been long abandoned.[86] As a result, the parallel existence of a series of international documents next to the obligations set by

[78] Ibid.
[79] Sarmas: The Case-law of the European Court of Human Rights and the Commission (translated from Greek), p. 41.
[80] Paulmann: Menschenrechte Sind Strittig, pp. 10-11.
[81] Dröge: Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention, p. 240. As an example of the broad wording of the Convention's text see Article 1 ECHR which cites as: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." In page 241, Dröge says that the word 'reconnaissent' in Article 1 of the French version (which is also an authentic version) is even more difficult than the English 'secure' to be understood as an obligation to protect.
[82] Manganas/ Chrysanthakis/ Vandoros/ Karatza: The European Convention on Human Rights (translated from Greek), p. 3.
[83] Chrysogonos: The European Convention on Human Rights (translated from Greek), pp. 31-74.
[84] Greer: The European Convention on Human Rights, p. 55.
[85] Sisilianos: Introduction (translated from Greek), p. 4.
[86] Köchler: The Principles of International Law and Human Rights, p. 15.

national law, creates multiple obligations for states, on a number of levels. These documents of international origin are not only of different legal quality and normative power but also introduce diverse procedures, without a pre-set model for their coordination.[87] In that context, the view is supported that, the European system lacks in homogeneity since these instruments unavoidably overlap one another, lacking a clear image of a hierarchical arrangement between them.[88] On the other hand, without the legal protection provided by these documents, human rights would remain simply wishful thinking while it is observed that, many decisions of international bodies remain inapplicable exactly because of their only limitedly binding character.[89]

1.2.2. Extension of the list of rights via Protocols

The original version of the ECHR contained only thirteen rights, however, these were later supplemented by means of subsequent Protocols, the so-called *substantive Protocols*. Differently than *procedural Protocols* which affect institutional and procedural matters, substantive Protocols extend the list of rights by introducing new, substantive provisions.[90] It has been observed that most of the rights added with subsequent Protocols were already discussed during the negotiations on the creation of the Convention, but were not included in the final text because no consent could be reached on their part.[91] Similarly, Protocols themselves often comprise fewer rights than referred to in their drafts, a glaring proof of the difficulties in the process of achieving consensus.[92] Out of the sixteen Protocols that have been adopted by now, substantive are the Protocols Nos. 1, 4, 6, 7, 12 and 13 while procedural are the Protocols Nos. 2, 3, 5, 8, 9, 10, 11, 14, 15 and 16, which, because of their nature, have been directly incorporated into the text of the Convention.

From a more prudent assessment of the substantive Protocols, following remarks appear noteworthy: Protocol No. 1, also called simply 'Protocol',[93] has introduced three new rights; the right to peaceful enjoyment of property, the right to education and the right to free elections by secret ballot. The right to property forms a very good example of the aforementioned debate that took place during the drafting process of the ECHR, having raised concerns as to a possibly deterrent effect that it could have on communistic states.[94] Protocol No. 4[95] has also brought major changes, having established the prohibition of imprisonment for non-fulfilment of contractual obligations, the freedom of movement and of choosing one's residence, the prohibition of the expulsion of nationals and the prohibition of the collective expulsion of aliens.

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[87] Roukounas: International Protection of Human Rights (translated from Greek), p. 46.
[88] Buergenthal/ Thürer: Menschenrechte, p. 294.
[89] Kleeberger: Die Stellung der Rechte der Europäischen Menschenrechtskonvention in der Rechtsordnung der Bundesrepublik Deutschland, pp. 21-22.
[90] Dembour: Who Believes in Human Rights? p. 21.
[91] Ibid., p. 20; Buergenthal/ Thürer: Menschenrechte, p. 193.
[92] For example, the Committee has rejected a proposal suggesting to include in Protocol No. 4 the principles of the recognition as a person before the law and of the equality before the law. See: pts. 35 and 36 respectively, of the Explanatory Report to Protocol No. 4.
[93] Protocol No. 1 opened for signature in March 1952 and entered into force in May 1954.
[94] Gilch: Die Reformen am Europäischen Gerichtshof für Menschenrechte unter Besonderer Berücksichtigung des 14. Zusatzprotokolls zur EMRK, p. 17; Sweeney: The European Court of Human Rights in the Post-Cold War Era, pp. 91, 103, 111, 119, 125. Sweeney also underlines that a further problematic matter that the Court had to deal with, was that of restitutions for nationalisation and expropriation practices that have taken place under the rise of the communist regime. In any case, it appears that incorporating the right of property in the fifties was a daring step which would have been a lot easier to take some decades later, after the fall of communism in Europe.
[95] Protocol No. 4 opened for signature in September 1963 and entered into force in May 1968.

It is argued that Protocol No. 4 had not merely added new norms to the existing list of rights, but that it had at the same time attempted to bring the Convention in line with the international protection needs, as these would soon afterwards be expressed by the ICCPR.[96] Protocol No. 6 on its part,[97] has regulated the abolition of the death penalty in peace time, while Protocol No. 7[98] has amended certain aspects of the already established rights to liberty and security, to a fair trial and to no punishment without law[99]. More specifically, Protocol No. 7 has addressed issues such as the right of aliens to procedural guarantees in the event of expulsion, the right of a person convicted of a criminal offence to have the sentence reviewed by a higher tribunal, the right to compensation in the event of a miscarriage of justice and, the right not to be tried or punished in criminal proceedings for an offence for which one has already been acquitted or convicted. It is supported that, similarly to Protocol No. 4, Protocol No. 7 has also moved towards bridging the incompatibilities that existed between the ECHR and the ICCPR.[100] What concerns Protocol No. 12,[101] it has incorporated a general prohibition of discrimination on any ground by any public authority,[102] since the non-discrimination guarantee of Article 14 ECHR was until then covering only discriminations that have occurred with regard to the enjoyment of ECHR rights.[103] In this vein, until Protocol No. 12 came into force, Article 14 has been characterized, due to its limited scope, 'parasitic', in the sense that it provided a protection divergent from what was regarded a genuine protection of equal treatment under the law.[104] One shall however mention that, previous to the establishment of Protocol No. 12, the Court had been already applying an 'inclusive' practice, skilfully placing nearly all discriminatory practices under the umbrella of Article 14.[105] Lastly, Protocol No. 13[106] has encompassed the abolition of the death penalty in all circumstances, including crimes committed in times of war or imminent threat of war and, by doing this, it complemented the protection already granted by Protocol No. 6.

[96] Bates: The Evolution of the European Convention on Human Rights, p. 164. The International Covenant on Civil and Political Rights or abbreviated as ICCPR was adopted and opened for signature, ratification and accession on 16 December 1966 and entered into force in 23 March 1976.
[97] Protocol No. 6 opened for signature in April 1983 and entered into force in March 1985.
[98] Protocol No. 7 opened for signature in November 1984 and entered into force in November 1988.
[99] Also known as the legal principle of ne bis in idem (Latin).
[100] Bates: The Evolution of the European Convention on Human Rights, p. 164.
[101] Protocol No. 12 opened for signature in November 2000 and entered into force in April 2005.
[102] Gilch: Die Reformen am Europäischen Gerichtshof für Menschenrechte unter Besonderer Berücksichtigung des 14. Zusatzprotokolls zur EMRK, p. 31.
[103] Article 14 on the Prohibition of discrimination cites as: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."
[104] Bates: The Evolution of the European Convention on Human Rights, p. 164.
[105] Gilch: Die Reformen am Europäischen Gerichtshof für Menschenrechte unter Besonderer Berücksichtigung des 14. Zusatzprotokolls zur EMRK, p. 31.
[106] Protocol No. 13 opened for signature in May 2002 and entered into force in July 2003.

1.3. Underlying Convention principles

1.3.1. Subsidiarity

1.3.1.1. The concept of human rights universality

In previous decades, where several international organisations and treaties have emerged, there has been a lot of emphasis on the concept of the *universality* of human rights; a fact that has positively contributed to the *internationalisation* of their protection.[107] Internationalisation is not to be confused with the concept of *globalisation*, since the former focuses on states as central power-holders, whereas the latter principally suggests that all human relations are decisive in the process of the distribution of powers.[108], Different opinions have been expressed as to the effects of globalisation on human rights, arguing on the one hand that global law could possibly heal the particular economical ruthlessness with which governments face human rights, and on the other hand, that globalisation pursues a universal legal principle leading to the degradation of human rights.[109] The debate around *universalism* and *regionalism* of international law has long been present, with the field of human rights showing a tendency towards regionalisation, on the basis of the weaknesses and regulatory barriers of the universal system, which allegedly hamper effectiveness.[110] At the same time, it is supported that universality of human rights protection actually does not imply their centralisation under a single authority, but rather, goes hand in hand with the principle of *subsidiarity*, which itself promotes a division of responsibilities.[111] Vice versa, it is also argued that, respecting subsidiarity and *national sovereignty* does not exclude acknowledging that all legal norms are parts of one universal system, together safeguarding the essentials for the preservation of the legal science and of what has been called the "unity of knowledge".[112] Even the universal character of human rights as such is disputed, with a number of theoreticians raising that human rights are only conceivable and claimable in specific areas of the world and therefore, are not globally present. More specifically, it is stressed that human rights constitute a product of the modern era, reflecting mainly the needs of the western world and placing individual rights above communal ones, which themselves are rather distinctive of eastern civilisations.[113] What is clear is that, the enjoyment of human rights is not and cannot be uniform throughout the world, however, this shall not be the flag to retreat from the promotion of a universal ideology of human rights.[114] At the same time, one should be aware of the fact that the conceptual 'relativisation' of human rights involves risks, as it may lead to their restriction, for instance in the name of responsibilities being imposed on individuals in order to counterbalance the protection granted to them by the state.[115]

[107] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, pp. 84-85.
[108] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, p. 62.
[109] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 306, 338, 376.
[110] Paulus: Dispute Resolution, p. 361.
[111] Wildhaber: Recent Criticism of the European Court of Human Rights, p. 165.
[112] Köchler: The Principles of International Law and Human Rights, p. 7.
[113] Paulmann: Menschenrechte Sind Strittig, p. 3. Paulmann underlines that the development of international law reflects the outcome and the claims of the states after the Second World War.
[114] Perrakis: Dimensions of the International Protection of Human Rights (translated from Greek), p. 313.
[115] Benedek: Zur Bedeutung von Pflichten des Individuums im Internationalen Menschenrechtsschutz, p. 33.

1.3.1.2. The supplementary role of the European protection system

The subsidiary role of the European human rights protection system in relation to the protection provided by the national legal orders has been repeatedly emphasised in theory and practice.[116] It is no secret that, even an all-encompassing regional system, much less a universal one, cannot replace the protection granted at the national level. In fact, the widely-held view in literature that is regularly also expressed in the Court's case-law, considers states as primarily responsible for the protection of human rights and, external actors only as a supplementary, yet valuable, assistance.[117] Similarly, the role of the Court shall not be confused with that of national courts since the former does not serve as a substitute of national judicial authorities.[118] By the same token, it is supported that, international controlling mechanisms are of complementary and corrective nature and thus shall not come into play, unless a state persists on refusing to abide by its international obligations.[119] In this regard, it is also highlighted that the entire structure of international law is based on the fundamental principle that it shall be activated only when national law and practice prove insufficient.[120] Placing Member States in the forefront can also have other benefits, such as a reduction in the Court's workload, given the fact that, when human rights are adequately respected within the national borders, there is no breeding ground for new applications created.[121] In this context, former president of the Court Mr. Costa, sees in subsidiarity a precautionary measure against the occurrence of new violations.[122] Nevertheless, the highly desired state compliance is not an easily achievable goal, and one should not forget that, the very reason for the creation of the ECHR at first place has been exactly the deficiencies in the protection guaranteed by the Member States.[123] In order to improve compliance, Member States have to firstly improve their national protective mechanisms, on the basis of legislative, administrative and judicial reforms, or otherwise the vicious cycle of transferring national problems to the European Court is more likely to be continued.[124] In this regard, it is highlighted that, systemic deficits and structural defects are mainly present in the legislative and administrative processes of the domestic systems.[125] On the other hand, if the dynamic between international and national justice does not improve, and if national courts do not put their knowledge of domestic particularities into good use, the whole Convention system could be at risk.[126] Additionally, because of the difficulties in negotiating legislative instruments, the emerging trend is actually moving towards an enhanced participation of domestic courts in the process of safeguarding internationally protected rights.[127]

[116] Sisilianos: Introduction (translated from Greek), p. 15. As for example during the High Level Conference on the Future of the European Court of Human Rights (Interlaken Conference), held on 18 and 19 February 2010. The Conference was otherwise highlighted by the Russian ratification of Protocol No. 14, which allowed for Protocol 14 to enter into force.
[117] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, p. 85.
[118] Grabenwarter/ Pabel: Europäische Menschenrechtskonvention, p. 89.
[119] Roukounas: International Protection of Human Rights (translated from Greek), p. 108.
[120] Tomuschat: Human Rights, p. 123.
[121] Bates: The Evolution of the European Convention on Human Rights, p. 515.
[122] Costa: National Aspects of the Reform of the Human Rights Protection System, p. 474.
[123] Klein: Europäische Menschenrechtskonvention und Deutsche Grundrechtsordnung, p. 20.
[124] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 193.
[125] Gilch: Die Reformen am Europäischen Gerichtshof für Menschenrechte unter Besonderer Berücksichtigung des 14. Zusatzprotokolls zur EMRK, p. 248.
[126] Christoffersen: Individual and Constitutional Justice. pp. 181-182.
[127] Sloss: Treaty Enforcement in Domestic Courts, p. 58.

1.3.1.3. Subsidiarity under Protocol No. 15

The general tendency towards 'internalisation' has been reflected in Protocol No. 15, which has brought with it two major reforms, which addressed the issue of the application of the *principle of subsidiarity* and the *margin of appreciation* doctrine.[128] The Protocol has opened for signature in June 2013 but still awaits due to its mandatory character ratification by all Member States and thus, has yet not come into force awaiting.[129] The principle of subsidiarity mainly indicates, as mentioned previously, that the protection granted by the Convention scheme shall only be considered as supplementary to the one provided by the Member States themselves. The principle was in fact nothing new to the ECHR, as it could already be found as an underlying philosophy behind the prerequisite to *exhaust all national remedies*[130] in order to bring an action to the Court.[131] In that context, it is made evident that the Convention and the Court have always praised the rule that their intervention and action should only be dealt with as a 'means of last resort'.[132] The doctrine of margin of appreciation in turn, reflects a concept analogous to the principle of subsidiarity in a way that the two mutually influence each other.[133] More specifically, the margin of appreciation principle implies that the Court must respect and promote national particularities, leaving within the remit of the individual states the decision on the methods chosen and applied by them, even more when these decisions concern issues of sociological, cultural, moral or economical nature.[134] A practical consequence of the application of the margin of appreciation is that states are able to impose restrictions to the rights guaranteed by the Convention,[135] under the condition that these constraints are legitimate, proportionate and duly justified.[136] Similarly to the principle of subsidiarity, the margin of appreciation has not emerged in an unforeseen way, but rather, has long been applied as an *interpretive principle*, therefore having been referred to as a 'natural product' of the current dynamics.[137] The fact that the Court approaches the margin of appreciation quite broadly together with the lack of specific guidance by Protocol No. 15 have raised critical voices, worrying of an emerging unlimited scope of the margin in the sake of the very core of human rights.[138] Furthermore, both principles have been criticised for reflecting a very state-centred approach that contradicts the rest of the ECHR text and its overall humanistic approach, whilst at the same time hampering the harmonisation efforts of the Court.[139] It is even supported that, the introduction of these two principles at this specific stage of progress of the Convention was

[128] Protocol No. 15 brings some further changes, such as the shortening of the time limit from six to four months for an application to be submitted to the Court, the removal from Article 35(3)(b) ECHR of the admissibility requirement for a case to have been duly considered by a domestic tribunal and the abolishment of the right of the parties to object to relinquishment of jurisdiction in favour of the Grand Chamber.
[129] As of November 2017, 37 states have ratified Protocol No. 15. The current status of signatures and ratifications is available under: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213/signatures?p_auth=lDUrynOU (10/11/2017).
[130] As required from Article 35(1) ECHR.
[131] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 42.
[132] Ibid; Tomuschat: Human Rights, p. 123; Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 69. Paraskeva specifically underlines that the Court is not a court of last instance but a court of last resort.
[133] Kloth: Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights, p. 16.
[134] Ibid.
[135] Even the right to a fair trial of Article 6 ECHR can be subject to restrictions.
[136] Kloth: Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights, p. 20.
[137] Van de Heyning: Fundamental Rights Lost in Complexity, p. 192.
[138] Ibid., pp. 193, 196-197.
[139] Sisilianos: Introduction (translated from Greek), p. 16.

an unnecessary reaction, which could evolve into a critical venture with unknown future effects.[140]

1.3.1.4. Subsidiarity and sovereignty: conceptual competitors or components of the same structure?

There are certain linkages between the subsidiarity principle and national sovereignty in the context of the European human rights policy. In what regards the concept of sovereignty, this can be approached from different angles, such as a judicial or a sociological one.[141] Basic common element of these approaches remains that the state possesses a capacity comparable to a type of 'inner honour', which shall be protected by all means and under all circumstances.[142] The notion of honour might appear irrational at first, as it is mainly a characteristic of individuals, however, it is often used to describe the amount of freedom that states enjoy as members of the international community.[143] At the same time, one should be aware of the fact that state sovereignty has occasionally in history moved away from being an element of freedom and a prerequisite for the enjoyment human rights,[144] and has served as a fuel for national imperialism.[145] Besides, as mentioned, the predominant reason why international law has slowly taken over, was the desire following the Second World War, to limit the powers of states so that no state could ever again concentrate excessive power which it could, under circumstances, use arbitrarily.[146] In this context, the scope of sovereignty can in no case be adequately addressed if examined only within the limits of national borders, but should rather be observed within the context and under the lens of international relations.[147] Sovereignty issues are today still very relevant and it is widely supported that the very essence of international law is based exactly on the power enjoyed and exercised by individual states.[148] However, a 'strict' consideration of the principle of sovereignty would be completely incompatible with the concept of the protection human rights in the way that this is being currently conceived by the international community.[149] Appositive development of the modern era, is that states generally tend to avoid imposing limits on the enjoyment of human rights, in contradiction with the past, where the notion of sovereignty was used to refute anything that had the capacity to interfere with the domestic affairs or to impose certain obligations on the state.[150] The sensitivity of most states towards human rights issues and their active participation in shaping and expanding international law, constitute an encouraging sign towards an all-embracing understanding of human rights protection.[151] At the same time, a smaller number of states is fixated to entrenching their sovereignty rights, a conduct that could jeopardise the aforesaid holistic process.[152] It is even argued that, by exercising sovereignty to the extreme and, by abstaining from international agreements, states are indirectly annulling the application

[140] Ibid.
[141] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, pp. 154-155.
[142] Ibid.
[143] Ibid., p. 151.
[144] Köchler: The Principles of International Law and Human Rights, p. 21.
[145] Ibid., p. 14.
[146] Chortatos: Introduction to Contemporary International Law and the Problem of Relationship between International and Internal Law (translated from Greek), p. 160.
[147] Orakhelashvili: The Interpretation of Acts and Rules in Public International Law, p. 37.
[148] Köchler: The Principles of International Law and Human Rights, pp. 17-18.
[149] Ibid., p. 12.
[150] Narr/ Roth: Menschenrechte und Völkerrecht im Schlund Globalisierter Prävention, p. 25.
[151] Dohna: Die Grundprinzipien des Völkerrechts über die Freundschaftlichen Beziehungen und die Zusammenarbeit zwischen den Staaten, p. 265.
[152] Ibid.

of international law, therefore exposing themselves to the danger of war.[153] On the other hand, it is also noted that human rights have by now achieved their independence from states, despite states still being projected as the key players, a result of the participation of the latter in the relevant proceedings.[154] A radical approach even suggests that only individuals are sovereign and therefore, states should stop raising claims of their own sovereignty, as the latter is subordinate to and dependant on the individuality of human beings.[155]

1.3.2. Non-reciprocity

1.3.2.1. The principle of reciprocity

The *principle of reciprocity*, so-called 'Golden Rule', dates back in history and represents the give-and-take balance in relationships, in the sense of treating others in the way that one wishes to be treated oneself, and thus, encompasses a notion of altruism.[156] Despite the fact that the principle of reciprocity constitutes a central concept of international relations, its inclusion in modern national constitutions is often avoided, because of the complex issues related to its application and with which national judges are rather unfamiliar.[157] The doctrine of reciprocity is not alien to international agreements,[158] whereby its central aim is the creation of a constructive cooperation between states based on mutual interests.[159] More specifically, the principle is based on the understanding that, in order to achieve common goals, the equal involvement of all states and the equal respect for rules of international law are essential.[160] Reciprocity further aims at establishing equality of treatment between nationals and non-nationals, by regulating that a state cannot invoke international law against another state, unless it accepts the rule of reciprocity as binding on itself too.[161] Moreover, the principle also supports the *enforceability* of the rights and obligations that arise from international agreements.[162] Nonetheless, the principle can turn out to be disadvantageous for the application of international law in the case that a state breaches its obligations, since there is the risk that other states invoke this behaviour and the lack of reciprocity demonstrated in order to similarly disregard their own obligations.[163]

1.3.2.2. ECHR: an agreement in favour of individuals

This last situation is exactly what the Convention has aimed to avoid by creating rights and freedoms that are *non-reciprocal* and, by imposing *objective obligations* on states from which they could not depart on the basis of the misconduct of another state or group of states.[164] The respect for the non-reciprocity principle can be best explained by the fact that the Convention has been signed by states who wished to genuinely guarantee a certain range of rights to their

[153] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, p. 154.
[154] Dembour: Who Believes in Human Rights? p. 26.
[155] Köchler: The Principles of International Law and Human Rights, pp. 12-13.
[156] Wesche: Gegenseitigkeit und Recht. Eine Studie zur Entstehung von Normen, pp. 313-314.
[157] Roukounas: International Law (translated from Greek), p. 184.
[158] For example, Vienna Convention on the Law of Treaties (VCLT) Article 60(1), (3).
[159] Wesche: Gegenseitigkeit und Recht. Eine Studie zur Entstehung von Normen, p. 378.
[160] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, p. 164.
[161] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), pp. 144-145, 183.
[162] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, p. 165.
[163] Ibid.
[164] Roukounas: International Protection of Human Rights (translated from Greek), p. 131.

citizens, what has been called an 'agreement in favour of third persons'.[165] Already in the sixties, the Commission had pronounced in the *Pfunders*[166] case, that states, by signing the Convention, did not intend "to concede to each other reciprocal rights and obligations".[167] Since then, the doctrine has been further developed by the jurisprudence of the Court, such as through case *Ireland*[168], whereby the Court stated that, the "Convention comprises more than mere reciprocal engagements". In this context, the Convention differs significantly from traditional international law, which is mainly an expression of *contract law* which operates under reciprocal and transactional relations between the states.[169] Consequently, the ECHR rather resembles other human rights treaties, differing from typical multilateral instruments of public international law in terms of its purpose and means.[170] The fact is that, the Convention, by establishing rights and freedoms claimable against states, has linked the state directly to the individual.[171] With the *right of individual petition*, the individual has gained for the first time, tremendous influence over his own human rights protection.[172] On a large scale, the individual is considered as the one holding the safeguarding of peace in his hands, which he can promote through the exercise of control over state behaviour.[173] The significance of the opportunity of individual abuses coming into light further lies into the fact that, violations do not any further need to escalate to an outrageous level until they are noticed.[174] The right of individual petition is of particular importance also due to the fact that, self-help measures against states are prohibited under the current societal contract and, individuals have no other defence 'weapons' in their availability.[175] In this vein, it becomes a central and highly topical objective that, the tools offered to individuals for the protection of their rights, shall at least remain effective.[176] Up to the present day, the right of individual petition is considered the 'sharpest weapon' in international law towards the effective protection of human rights and thus, it is inevitably faced with considerable hesitancy by international actors.[177] However, when addressing concerns over an uncontrolled development of the right of individual complaint, one should not forget that, states are free in their choice as to their accession to the ECHR and that they hold the power to, upon consensus, amend the treaty at any time.[178]

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[165] Vertrag zu Gunsten Dritter, Pfeffer: Das Verhältnis von Völkerrecht und Landesrecht, p. 160.
[166] The famous Pfunders case is the case of Austria v. Italy (App. No. 788/60, 11/01/1961). The Committee's position in para. 139 was that 'the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe'. Craven: Legal Differentiation and the Concept of the Human Rights Treaty in International Law, p. 407.
[167] Perrakis: European Law of Human Rights (translated from Greek), p. 59; Klein: Europäische Menschenrechtskonvention und Deutsche Grundrechtsordnung, p. 18.
[168] Ireland v. UK (App. No. 5310/71, 18/01/1978) The Court's position in para. 239 was that 'the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations'. Christoffersen: Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights, p. 52.
[169] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, pp. 109-110; Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 41.
[170] Perrakis: European Law of Human Rights (translated from Greek), p. 59.
[171] Sarmas: The Case-law of the European Court of Human Rights and the Commission (translated from Greek), pp. 41-42.
[172] Xenos: The Positive Obligations of the State under the European Convention of Human Rights, p. 18.
[173] Ibid., p. 213.
[174] Paulus: Dispute Resolution, p. 357.
[175] Pfeffer: Das Verhältnis von Völkerrecht und Landesrecht, pp. 161-162.
[176] Ibid.
[177] Delbrück: Menschenrechte und Grundfreiheiten im Völkerrecht anhand Ausgewählter Texte, Internationaler Verträge und Konventionen, p. 55.
[178] Tomuschat: Human Rights, p. 370.

1.3.2.3. Positive obligation of states to act proactively

It is widely supported that, the responsibilities undertaken by the states under the Convention, do not only require their 'negative action', in the sense of refraining from acts incompatible with the rights granted, but also, their 'positive action' towards guaranteeing enhanced protection.[179] It is relevant to mention that, the traditional theory of human rights was differentiating rights in the categories of civil and political rights on the one hand and, economic and social rights on the other.[180] The categorisation was primarily based on the fact that, the former group of rights was calling for states to abstain and therefore related to violations occurring through *actions*, whilst the latter included the obligation to act, thus relating also to violations occurring through *omissions*.[181] At the same time, the growing case-law on individual human rights violations through omissions, was slowly setting aside the rather dogmatic position on the diversification in the legal nature of rights.[182] In fact, the judicial system of the ECHR has already since the early eighties highlighted that, a passive behaviour from Member States cannot be considered adequate for the protection level aimed by the Convention.[183] The judicial mechanism has in that context made clear that, alongside negative obligations, also *positive obligations* form part of the scope of the rights guaranteed.[184] It is being discussed that, the rule according to which states are responsible also for their omissions, is reflected in the very title of the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*[185] and specifically, in the French version of it.[186] It is actually being argued that, the words "faits internationalement illicites" has been chosen exactly because of its neutrality and its ability to cover both acts and omissions.[187] As direct state violation has nowadays become rather the exception than the norm, the need to focus on the positive instead of the negative obligations and to adopt a standpoint far away from a laissez-faire attitude, has become more evident than ever before.[188] In more recent case-law, the Court justifies such positive obligations on the basis of a combination of the particular ECHR Article at issue with Article 1 ECHR, with the latter serving to that end as the cornerstone of the Convention.[189] The Court's case-law on the responsibility of states from both acts and omissions has also contributed decisively to a wide interpretation of the Convention and, in particular, of Articles 2, 3, 5 and 8 ECHR.[190] Even in relation to Article 3, which is a provision that predominantly encompasses an obligation of abstention, the Court has recognised obligations for positive action.[191] In regard to Article 8, the Court has repeatedly held that, the right to respect for private and family life does not simply

[179] Sarmas: The Case-law of the European Court of Human Rights and the Commission (translated from Greek), p. 43. Sarmas refers to the cases of Aydin v. Turkey (App. Nos. 28293/95, 29494/95 and 30219/96, 10/01/2001) and Marckx v. Belgium (App. No. 6833/74, 13/06/1979).
[180] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 62.
[181] Ibid.
[182] Ibid., p. 63.
[183] Perrakis: European Law of Human Rights (translated from Greek), p. 63. Perrakis refers to cases of Airey v. Ireland (App. No. 6289/73, 9/10/1979); Gaskin v. UK (App. No. 10454/83, 7/7/1989); Artico v. Italy (App. No. 6694/74, 13/5/1980); Öztürk v. Germany (App. No. 8544/79, 21/2/1984) and Plattform Ärzte für das Leben v. Austria (App. No. 10126/82, 21/6/1988).
[184] Ibid.
[185] Adopted in 2001 by the International Law Commission at its fifty-third session and subsequently submitted to the General Assembly. The Draft Articles with commentaries are available under: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (20/10/2017). Hereinafter also referred to as Draft Articles on the Responsibility of States or Draft Articles.
[186] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 61.
[187] Ibid.
[188] Xenos: The Positive Obligations of the State under the European Convention of Human Rights, p. 2.
[189] Perrakis: European Law of Human Rights (translated from Greek), p. 63.
[190] Sisilianos: The Human Dimension of International Law (translated from Greek), pp. 62-63.
[191] Ibid., p. 63.

involve state abstinence, but also, the adoption of measures that facilitate its undisturbed enjoyment.[192] The Court has occasionally highlighted even the importance of the intervention of criminal law for the purpose of the full enjoyment of Article 8 ECHR.[193] However, as a matter of fact, the Court has still not openly discussed the exact potentials and limits of the positive obligations of Member States.[194] In general terms, under *positive obligations*, the Court also understands situations of violations that do not stem from the state or at least, not directly from the state.[195] In this context, the question of, whether and to what extent, states are obliged to actively facilitate the full enjoyment of rights, is intertwined with the debate around a possible *horizontal effect* of this obligation.[196] The Strasbourg judicial system has early enough emphasised that, positive obligations can indeed have a horizontal effect, in the sense that, their scope can extend even to private relationships between individuals; so that that the misconduct of an individual can be considered a failure on the part of the state itself or an act tolerated by it.[197]

1.3.2.4. International law as a matrix of obligations between individuals

Classical international law, besides consisting of mainly reciprocal obligations, was basically creating obligations that affected the relationships between the states and their citizens.[198] Even where these norms were considered to be *self-executing*,[199] they were not directly involving individuals, neither were they binding on them.[200] The impression was widespread that, an international treaty can only bind Member States and thus affected the organs of the state only in a second phase.[201] This traditional approach reinforced the comprehension of human rights as *defence rights* against the state, namely as protective means in the hands of individuals in cases where state actions or actions attributable to the state have caused harm.[202] The western legal theory has only recently acknowledged individuals as subjects of international law, while post-communist countries were familiar with a system under which, international law was considered a matter of external policy; thus unable to create rights and responsibilities for individuals.[203] The path for the abandonment of this narrow approach has been mapped out by an opinion delivered by the Permanent Court of Justice[204] in 1928, according to which, the content of an international treaty may create rights and obligations for individuals too, which

[192] Ibid., pp. 63, 77; Klein: Europäische Menschenrechtskonvention und Deutsche Grundrechtsordnung, p. 19. The plethora of decisions on Article 8 ECHR can be to some extent explained by the fact that due to its nature and content, this right is more vulnerable than other rights to attacks by individuals.
[193] Ibid.
[194] Mowbray: The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights, p. 2; Dröge: Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention, p. 5.
[195] Dröge: Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention, p. 5.
[196] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 218.
[197] Perrakis: European Law of Human Rights (translated from Greek), p. 63. Perrakis refers to case X and Y v. the Netherlands (App. No. 8978/80, 26/3/1985) López Ostra v. Spain (App. No. 16798/90, 9/12/1994).
[198] Paulus: Germany, p. 211.
[199] The concept of *self-executing* norms will be analysed later.
[200] Paulus: Germany, p. 211.
[201] Roukounas: International Law (translated from Greek), p. 188.
[202] Stahl: Schutzpflichten im Völkerrecht, pp. 203, 437-438. The term 'defence rights' is a free translation of the German term 'Abwehrrechte' used by Stahl.
[203] Chortatos: Introduction to Contemporary International Law and the Problem of Relationship between International and Internal Law (translated from Greek), pp. 66, 79, 81, 83-84.
[204] Permanent Court of International Justice (1922-1946), often called the World Court, was attached to the League of Nations. Hereinafter also referred to as PCIJ.

shall be applicable by national courts.[205] It constitutes common ground that, international law has by now entered into all areas of social life and that, treaties do not anymore contain as many generalisations as in the past.[206] In fact, treaty provisions are often so detailed that they do not even require additional measures so as to be applied domestically.[207] As a result of these developments, a variety of rights and obligations of modern European human rights law are thought to be applying to relations between individuals too, whereby the state intervenes, mainly through the judiciary, only in order to correct the problems arising from their interaction.[208] In this context, human rights are conceived as *protective rights*, with the state carrying the *responsibility for protection*, despite a violation not stemming directly from them.[209] From another perspective, a state is not responsible for the actions of individuals per se, however, it is held responsible for its own actions in relation to the behaviour of individuals.[210] It is argued that, the only real exception to the rule that the state is not responsible for acts of individuals per se, is introduced by Article 9 of the Draft Articles on the Responsibility of States.[211] The Article outlines that, the conduct of individuals shall be considered an act of a state when a "person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities".[212]

1.3.2.5. Extent of state responsibility

It is a fact that, the rules governing the extent of *state responsibility* present shortcomings, thus introduce an element of uncertainty, which has given rise to numerous debates.[213] One such debate concerns the question of whether states enjoy a greater margin of discretion in relation to protective rights than in relation to defence rights.[214] There are attempts to justify this position on the basis that, protective rights have nearly unlimited capacities to which a state can hardly respond, while defence rights can be handled easier.[215] A further debate is developed around the notion that the rights enshrined in the Convention are, in principle, defence rights, however, there exists an increasing discussion on their approach as protective rights.[216] It applies that, for certain ECHR provisions, either because of their historical background or simply because of their grammatical construction, it is difficult to imagine how they could be intended to cover violations caused by individuals.[217] Different is the case of other ECHR rights, for which an

[205] Roukounas: International Law (translated from Greek), p. 189.
[206] Ibid., p. 190.
[207] Ibid.
[208] Paulus: Germany, p. 211.
[209] Stahl: Schutzpflichten im Völkerrecht, pp. 122-123, 203. The term 'protective rights' is a free translation of the German term 'Schutzrechte' used by Stahl.
[210] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 72. In page 74, Sisilianos states that in case Artico v. Italy (App. No. 6694/74, 13/5/1980), which has raised the question of the violation of right to a fair trial due to omissions of the lawyer that has been designated by the competent national court, the general principle according to which the state is not responsible for the actions of individuals, but only for its own actions in relation to such actions becomes very evident.
[211] Ibid., p. 73.
[212] Ibid.
[213] Ibid., p. 71.
[214] Stahl: Schutzpflichten im Völkerrecht, pp. 47, 50-51. In page 102, Stahl distinguishes between 'protective rights' (Schutzrechte), which embody the obligation of positive action and only exceptionally negative action by the state and 'defence rights' (Abwehrrechte), which require negative action, in the sense of governmental refrain.
[215] Xenos: The Positive Obligations of the State under the European Convention of Human Rights, p. 4.
[216] Stahl: Schutzpflichten im Völkerrecht, p. 438. Stahl refers to case of Young, James and Webster v. UK (App. Nos. 7601/76 and 7806/77, 13/08/1981) as an expression of the position of the Court that 'defence rights' are also 'protective rights'.
[217] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 222.

application can be successfully submitted to the Court, claiming that the state has failed to protect against an attack originating from an individual.[218] In this regard, it is observed that for certain rights, the Court has accepted the existence of implied positive obligations, in an effort to guarantee the effectiveness and practicality of their protection.[219] Within this context, it results that, positive obligations can be derived from the application of the *effectiveness principle*, while it is at the same time argued that, positive obligations are linked to nearly all *interpretative principles*.[220] On the other hand, accepting that the principle of effectiveness is generally able to produce positive obligations, could be translated as accepting the existence of positive obligations throughout all the text of the Convention, since the latter is subject to the effectiveness principle as a whole and not only as a part.[221] In any case, it seems dogmatically and pragmatically more correct to carefully approach, analyse and interpret each right separately in order to accurately define its defensive or protective character. There even exists a discussion on whether human rights are coming along with a set of duties and obligations imposed on *individuals* themselves, as part of their role as members of the society; whereby the suggestion of cultural behavioural obligations shall not be confused with the undisputed existence of legal restrictions.[222] It is also highlighted that, it is mainly the 'fragile states' who pay special attention to the maintenance of loyalty towards them, and who tend to impose obligations on their citizens with the intention of binding them under a certain type of social contract.[223] In relation to this last debate, it has been stressed that, legally enforced human behaviour contradicts the very nature of human rights, which is directly interconnected with freedom and with the nature of humans as such.[224]

1.3.3. 'Living instrument'

1.3.3.1. The roots of the evolutive interpretation doctrine

The approach of the ECHR as a 'living instrument'[225] reflects a doctrine according to which, the Convention is an instrument that evolves with time and, one that shall therefore be approached in the light of the present-day conditions. The doctrine also suggests taking into consideration economic, cultural, social and political factors as well as recent developments in science and technology.[226] The application of the doctrine in the process of the interpretation of

[218] Ibid., pp. 68-69, 218.
[219] Mowbray: The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights, p. 221. About the linkage of positive obligations and the principle of effectiveness see also Xenos: The Positive Obligations of the State under the European Convention of Human Rights, p. 207.
[220] Dröge: Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention, p. 374.
[221] Ibid., p. 232.
[222] Benedek: Zur Bedeutung von Pflichten des Individuums im Internationalen Menschenrechtsschutz, pp. 34, 36. Benedek cites BRUNE: Menschenrechte und Menschenrechtsethos, p. 15.
[223] Ibid., p. 36.
[224] Ibid., p. 34. Benedek cites BRUNE: Menschenrechte und Menschenrechtsethos, p. 15.
[225] The term has been widely used in literature, such as in Buergenthal/ Thürer: Menschenrechte, p. 237; Stahl: Schutzpflichten im Völkerrecht, p. 57; Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 101; Loucaides: The European Convention on Human Rights, p. 13.
[226] Loucaides: The European Convention on Human Rights, p. 13. The evolutive or dynamic interpretation model and the approach of the Convention as a 'living instrument' have first emerged in the case of Tyrer v. UK (App. No. 5856/72, 25/4/1978) para. 103, followed by a number of other cases, such as Marckx v. Belgium (App. No. 6833/74, 13/06/1979) para. 58; Airey v. Ireland (App. No. 6289/73, 9/10/1979) para. 26; Soering v. UK (App. No. 14038/88, 7/7/1989) paras. 102 and 106; Selmouni v. France (App. No. 25803/94, 28/7/1999) para. 101; Kress v. France (App. No. 39594/98, 7/6/2001) para. 70 and further consolidated in more recent case-law.

the Convention, is also known as *evolutive* or *dynamic interpretation*, in the sense that the Strasbourg case-law shall not remain distanced from the contemporary circumstances. This interpretative method has been so far widely studied and, has been approached with various terms, such as 'doctrine in the light of the current society'[227] or 'interpretation of a progressive manner'[228]. It is even supported that, the fathers of the ECHR have avoided a detailed reference to the conceptual boundaries of the rights guaranteed by its text, exactly because they intended to allow their evolutive definitional transformation.[229] It is also held that, the application of this principle is reinforced by the preamble of the Convention itself, which refers to "securing the (…) observance" of the rights enshrined, a choice of words which allegedly reveals the intention of its creators to extend and to safeguard the protection of the rights in the future too.[230] In this context, it is highlighted that, a lasting defence shield could only be guaranteed by means of amending the Convention's text or else, by accepting wide interpretations of the already existing text.[231] A further notion offered up in literature suggests that, this model of interpretation has its roots in Article 31(3) (b) of the *Vienna Convention on the Law of Treaties*[232].[233] This specific Article outlines that, for the interpretation of a treaty, besides the treaty context, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be taken into account.

1.3.3.2. Dynamic interpretation as a bridge between regulatory limitations and jurisprudential arbitrariness

It is argued that, the doctrine of living instrument contributes to the effectiveness of the Convention, as it requires the adaptation of the Convention to contemporary conditions, so as to guarantee a genuine and effective human rights protection.[234] A promising function of this principle, which is also found in the case of the *effectiveness principle*, is that it bridges the gap between a treaty amendment and an interpretation that moves beyond the text of the treaty.[235] More specifically, through the application of this principle, Member States are more easily persuaded to accept the authority of ECHR law, overcoming the barriers of negotiation processes and normative changes.[236] The Court on its part, is making considerable efforts to consolidate the environment within which the Convention could establish its presence as a living instrument.[237] At the same time, the Court has been careful and relatively reserved in the application of the principle, in an effort to refrain from interpretive excesses that could lead to a contra legem interpretation.[238] This is essentially the result of the Strasbourg jurisprudence

[227] Arold: The Legal Culture of the European Court of Human Rights, p. 39.
[228] Loucaides: The European Convention on Human Rights, p. 13.
[229] Rozakis: The Jurisprudence of the European Court of Human Rights (translated from Greek), p. 1836.
[230] Ibid.
[231] Ibid.
[232] Hereinafter also referred to as Vienna Treaty, Vienna Convention or VCLT. The Vienna Convention was concluded on 23 May 1969 and entered into force on 27 January 1980, having as of October 2017 114 parties. An updated status on the signatories and parties of the VCLT is available under: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&Chapter=23&Temp=mtdsg3&lang=en (15/11/2017).
[233] Forowicz: The Reception of International Law in the European Court of Human Rights, p. 11.
[234] Letsas: A Theory of Interpretation of the European Convention on Human Rights, p. 79.
[235] Ibid.
[236] Ibid.
[237] Addo: The Legal Nature of International Human Rights, p. 294; Rozakis: The Jurisprudence of the European Court of Human Rights (translated from Greek), p. 1839. Rozakis refers to Article 6 ECHR as an example of the Court treating the Convention as a 'living instrument', by including in its scope also trials that have similar but not identical characteristics to civil and criminal trials.
[238] Sisilianos: Introduction (translated from Greek), p. 8.

having been repeatedly criticised for its 'progressive' application of the Convention, an uneasiness which the Court struggles to avoid.[239] Herewith, it has been argued that, the Court has become an authority of supranational character, having a strong impact on Member States, mainly enabled through its progressive approach.[240] In fact, it is not only the states, but also theoreticians that have approached this interpretation model with a great degree of cautiousness and have in this context argued that its application shall remain within narrow bounds.[241] At the same time, one should remain aware of the fact that law is not static and, that it therefore inevitably evolves dynamically over time, so that an application that is too obsessed with the letter of the text could prove unsuited for the very nature of the norms. We should also not forget that the states remain the central decision-makers, holding the legislative privilege in their hands and, therefore, upon consensus, may modify the Convention if they consider that the Court has exceeded its powers.[242]

2. The European Court of Human Rights

2.1. From its genesis to a permanent Court

2.1.1. The two-tiered system and judicial protection as an optional clause

In the first years of its operation, little expectations were vested in the role of the Court, mainly due to the pronounced damage caused by the Second World War and the unlikelihood of an exit from the situation of total destruction that prevailed in the social structure.[243] Nonetheless, there has been hope that the Court could play a meaningful role in uniting Europe, by means of serving as a platform of paradigmatically applied ethics and of fully respected democratic values.[244] Already from the time of its creation, the Court has been innovative, being the first international judicial authority to possess an enforcement mechanism for the execution of its judgments.[245] At the same time, the introduced control mechanism had been a major step in the direction of limiting national sovereignty and, sovereignty claims were now bridged with the commitment to respect human rights.[246] However, states were not right from the beginning prepared to undergo an external control, and thus, such a vital change had to occur both prudently and gradually.[247] As a result, at the beginning, the Court was dealing only with *inter-State cases*, this being the only mandatory parameter of its jurisdiction at that time. In what regarded individual applications, doubts about a possible misuse of the right of individual petition were strongly present.[248] Thereby, states retained the freedom of choice to accept or

[239] Rozakis: The Jurisprudence of the European Court of Human Rights (translated from Greek), pp. 1833, 1838.
[240] Forowicz: The Reception of International Law in the European Court of Human Rights, p. 14.
[241] Sisilianos: Introduction (translated from Greek), p. 8; Dijk/ Hoof: Theory and Practice of the European Convention on Human Rights, p. 79.
[242] Rozakis: The Jurisprudence of the European Court of Human Rights (translated from Greek), p. 1842.
[243] Bates: The Evolution of the European Convention on Human Rights, p. 75.
[244] Ibid., p. 54.
[245] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, pp. 63-64.
[246] Ibid., p. 63.
[247] Guradze: Die Europäische Menschenrechtskonvention. Konvention zum Schutze der Menschenrechte und Grundfreiheiten nebst Zusatzprotokollen, p. 39.
[248] Schermers: The Merger of the Commission and Court of Human Rights, p. 9. Schermers mentions that states were anxious about extremist groups taking advantage of the ECHR protection system.

deny the Commission's competence to examine such cases.[249] Likewise, the jurisdiction of the Court was optional, in that states were at liberty to approve or refuse its jurisdiction over a specific case, by means of an explicit *declaration*.[250] As a result of the reluctance of states and of their fear of a possible 'offensive' approach against them, both the Court's jurisdiction and the right of individual petition have long remained optional clauses.[251] To combat this fear of the states, the ECHR creators have adopted a series of interlocks, which could protect from an extensive use of the right of individual petition, while it was not until the nineties that its application was uniformly recognised.[252] Anyhow, before the official establishment of its *de jure* nature, the individual complaint procedure had already developed a strong *de facto* momentum.[253] In fact, the situation applying previously, was nothing more but the result of political compromises during the negotiation processes, which would inevitably have to be readdressed at some point.[254] The lack of enthusiasm for an external judicial control started declining as the states progressively began trusting the ECHR system, a point where the idea of creating a 'full-time' Court has emerged.[255]

2.1.2. Protocol No. 11 and the establishment of a permanent court

Catalytic for the new era of the Court, has been the entry into force of Protocol No. 11, by virtue of which, a new 'permanent' Court has been established. The former 'two-tier' system of Court and Commission was abolished and the previous adjudicative role of the *Committee of Ministers*[256] was reduced to that of supervising the execution of judgments.[257] At the same time, the Court had no statutory document regulating the specifics of its relationship with the institutions of the Council, to which it was closely related in its working processes.[258] It is argued that, Member States, by allowing the Court formulate its own *Rules of Court* instead of providing themselves a ready Statute, has been something that very much nourished the freedom of the Court.[259] At the same time, the 'new' Court inevitably had to come through a transitional period, during which it had to prepare for the discharge of its forthcoming responsibilities, such as its, previously unknown, compulsory jurisdiction. There should be no confusion as to the fact that, the new-fangled Court was conceived as a 'first-hand' court and definitely not as a fusion of the previously existing institutions that used to embody the ECHR judicial system.[260] Nonetheless, the Court undoubtedly had many similarities to its forerunner, such as the fact that, it was still sitting in the same establishments in Strasbourg and that, it still lacked the operational capacity to draw up its own budget.[261] Furthermore, simply because the Court has undertaken its full-time role only after 1998, does not mean that it was not a 'real'

[249] Ibid., p. 9.
[250] In case the respondent state had accepted the jurisdiction of the Court, there was a period of three months after the transmission of the report to the Commission, within which the case had to be brought before the Court.
[251] Janis/ Kay/ Bradley: European Human Rights Law, p. 76.
[252] Sisilianos: Introduction (translated from Greek), p. 11.
[253] Ibid.
[254] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, pp. 96-97.
[255] Bates: The Evolution of the European Convention on Human Rights, p. 431.
[256] Hereinafter also referred to as Committee or CoM.
[257] The adjucative role of the Committee was abolished by Protocol No. 11 but it retained its role of supervising states' compliance with the Court's judgments.
[258] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 106.
[259] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 58.
[260] Bates: The Evolution of the European Convention on Human Rights, p. 462.
[261] Lester: The European Court of Human Rights after 50 years, p. 106; Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 99. As provided by Article 50 ECHR, the expenditure on the Court is to be borne by the CoE as a part of the CoE's general budget and therefore, is also subject to the approval of the Committee of Ministers in the course of the examination of the overall budget.

Court before this event.[262] In any case, Protocol No. 11 has been a milestone project which, not only brought with it innovative changes but one which would also alter the global understanding of the international protection of human rights in the upcoming years. It is even argued that this Protocol has brought the Convention closer to the promotion of the shared values and the policy objectives of the *European movement* as a whole.[263] Despite the fact that the Court was unable to determine legal relations by means of *final* decision, in the sense that it could not annul the national act(s) that have caused the violation, states, however, remained sceptical about the overpowering of the Court and about its potential development into a type of fourth instance with supranational powers.[264] A scepticism also reflected in their reluctance to sign and ratify subsequent Protocols.[265] Member States are, in fact, still today not completely familiar with the process of supra-nationalisation as a consequence of enhanced integration and, therefore, still demonstrate a somewhat reluctant attitude.[266] A relevant concern expressed in this regard, underlines the fact that there exists no 'democratic response' to the Court's rulings, namely that there exists no authority that could review the Court's judgments and possibly declare them wrongful.[267] Conversely, it is highlighted that, the original role of the Court as it was conceived by its creators, lies far away in time, and, accordingly, that the insistence of states to deny a *binding effect* of the Court's judgments, which could at the same time guarantee their *enforceability*, is quite anachronistic.[268] In this respect, it is even argued that, if more states would sign and ratify human rights treaties and, if more courts would operate in the way the Strasbourg Court does, the vision of a World Court of Human Rights would not appear so remote as it is today.[269] Considering the present dynamics in the international arena, not only the idea of a World Human Rights Court, but even the formation of another international human rights court, seems unrealistic.[270]

2.1.3. Procedural changes introduced by amending Protocols

Despite the establishment of the new Court having tackled many of the past problems, however, it failed to fulfil the need for new changes, an objective that is relevant still today. Similarly to the substantive Protocols, the case of constantly added procedural Protocols reveals the ongoing need to target mechanisms which are considered outdated and no longer compatible with the needs and requirements of a fast evolving system.[271] Despite the various minor and major alterations of the original ECHR version, the probability of further amendments has not yet been eliminated; a fact that is, by some, considered a serious shortcoming in the development

[262] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 99.
[263] Gilch: Die Reformen am Europäischen Gerichtshof für Menschenrechte unter Besonderer Berücksichtigung des 14. Zusatzprotokolls zur EMRK, p. 30.
[264] Prinz: Artikel 29 bis 51 EMRK, pp. 266-277. The information paper on the admissibility of an application based on the respective video of the Court, part of the COURTalks-disCOURs video series which aim to provided assistance to legal professionals and civil society representatives, states in page 5: 'And finally, the Strasbourg Court is not a court of 'fourth instance', it is not a court of appeal, or a court of revision or of cassation. It cannot question the domestic courts' establishment of the facts in your case, nor their assessment or application of domestic law, nor your guilt or innocence in a criminal case'. The paper is available under: http://www.echr.coe.int/Documents/COURtalks_Inad_Talk_ENG.PDF (20/10/2017).
[265] Ibid.
[266] Arold: The Legal Culture of the European Court of Human Rights, p. 34.
[267] Wildhaber: Recent Criticism of the European Court of Human Rights, p. 161.
[268] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 240.
[269] International Commission of Jurists: The Rule of Law and Human Rights, p. 16.
[270] Villiger: The European Convention on Human Rights, p. 90.
[271] Bates: The Evolution of the European Convention on Human Rights, p. 165.

process.[272] Most of the times, the needs are so apparent, that the upcoming adjustments are perceptible long before they are actually adopted. [273] This is evident also in the last two Protocols Nos. 15 and 16, which cover ideas that have emerged already during the Brighton Conference in 2012.[274] In this regard, the timeline of the modifications of procedural provisions demonstrates the course of the developments in the ECHR judicial system, before and after the establishment of the Court as we know of it today.

Starting with Protocol No. 2,[275] this Protocol has been significant in that it granted the Court the competence to deliver *advisory opinions*. Similarly to what is known from national law, the advisory opinion procedure allowed the Court to issue, upon request of the Committee of Ministers, opinions concerning the interpretation of the Convention and the Protocols thereto. A competence which, however, the Court has used only rarely; in fact, only twice to this day.[276] Relevant to Protocol No. 2 is Protocol No. 16 which has yet not come into force.[277] Protocol No. 16 aims to extend the advisory competence by introducing the possibility of national highest courts and tribunals, pending a case before them, to submit to the Court a request for an opinion relating to the interpretation or application of the Convention. It is argued that as an inspiration for this change has served the consultation procedure which has long been applied by the European Union, however, with the difference that the advisory opinions delivered by the ECJ are of binding nature.[278] Nevertheless, the fresh impetus given by Protocol No. 16 is particularly important, since it facilitates the highly desired cooperation between national judges and Strasbourg judges, while it further enhances the constitutional character of the Court.[279] In what regards Protocol No. 3[280], this Protocol covered issues on the functioning of the Commission, such as the abolishment of the Sub-Commission and, the competence of the Commission to reject a petition when it has found that a ground for rejection has been established. For its part, Protocol No. 5[281] has brought about changes relating to the length of the terms of office of the members of the Court and the Commission. It should be mentioned here, that Protocols Nos. 2, 3 and 5 have been criticised for having presented only minimal amendments to the existing scheme considering the amount of years passed and the know-how gained since the entry of the Convention into force.[282]

Protocol No. 8,[283] has later replaced by Protocol No. 11 and has, most importantly, touched upon the procedure of the filtering incoming applications. The Commission was now given the

[272] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 58.
[273] Sisilianos: Introduction (translated from Greek), p. 16.
[274] Ibid.
[275] Protocol No. 2 opened for signature in May 1963 and entered into force in September 1970.
[276] On 12 February 2008 and on 22 January 2010, both on 'certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights'.
[277] The Protocol will come into force only for states who ratify it and after it has been ratified by a minimum of 10 Member States. As of November 2017 eight states have ratified Protocol No. 16, namely Albania, Armenia, Estonia, Finland, Georgia, Lithuania, San Marino, Slovenia. The current status of signatures and ratifications is available under: http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/214/signatures?p_auth=fzaw8luV (10/11/2017).
[278] Sisilianos: Introduction (translated from Greek), p. 16.
[279] Ibid.
[280] Protocol No. 3 opened for signature in May 1963 and entered into force in September 1970.
[281] Protocol No. 5 opened for signature in January 1966 and entered into force in December 1971.
[282] Bates: The Evolution of the European Convention on Human Rights, pp. 164-165.
[283] Protocol No. 8 opened for signature in March 1985 and entered into force in January 1990.

ability to, under certain circumstances,[284] decide sitting in formations smaller than in plenum, a fact that has undoubtedly accelerated the whole procedure. More specifically, the Commission has been equipped with the capacity to set up small committees which could unanimously decide on the admissibility of a case or, strike a case out of its list.[285] These developments have provided essential assistance, in that they enhanced the Commission's capacity to deal with the increasing influx of individual complaints reaching the ECHR judicial system, the result of the popularity of the Convention.[286] With Protocol No. 9[287] the previous situation according to which only the Commission and the states could submit an application to the Court has changed. Individuals were now afforded the right to refer a case to the Court and be parties of the proceedings before it, with a sound legal framework for their protection having finally been established.[288] The possibility was, however, provided only for those cases in which the *respondent state* had recognised the Court's jurisdiction. Despite the ground-breaking changes made by Protocol No. 9, the Protocol still could not offer a panacea, while its successor, Protocol No. 11, was already before the entry of Protocol No. 9 into force at the initial stages of its emerge.[289] Some of the shortcomings still present were relating to the *admissibility criteria*, the applications to the Court had to meet and which formed a rather incomprehensible protection mechanism that even lawyers were unfamiliar with.[290] Concerning Protocol No. 10,[291] this Protocol was regulating the voting process of the Committee,[292] aiming at simplifying the decision-making procedure for those cases that would not be referred to the Court by the Committee. However, this Protocol has never come into force, with its purpose having been rendered redundant, since Protocol No. 11 had, in the meanwhile, already come into force.

By the entry into force of Protocol No. 11[293], not only has Protocol No. 10 lost its purpose, but also, Protocol No. 9 has been repealed.[294] This Protocol is, until today, considered of uttermost importance for a number of reasons, some of which have been already highlighted. In more detail, one of the major changes introduced has been the abolishment of the possibility of *optional declarations*, with which states could reject the jurisdiction of the Court and the right of individual petition. The Protocol has also eliminated the previous 'two-tier' system, according to which, applicants could lodge their claims only with the Commission, which was then deciding on their admissibility and on whether they should be further transferred to the

[284] Given that they can be dealt with 'on the basis of established case-law' or that they 'raise no serious question affecting the interpretation or application of the Convention', as provided by Article 1(2) of the Protocol.
[285] Given that 'such a decision can be taken without further examination', as provided by Article 1(3) of the Protocol.
[286] Gilch: Die Reformen am Europäischen Gerichtshof für Menschenrechte unter Besonderer Berücksichtigung des 14. Zusatzprotokolls zur EMRK, p. 28.
[287] Protocol No. 9 opened for signature in November 1990 and entered into force in December 1994.
[288] Gilch: Die Reformen am Europäischen Gerichtshof für Menschenrechte unter Besonderer Berücksichtigung des 14. Zusatzprotokolls zur EMRK, p. 29. According to Article 5(1)(e) of the Protocol 'The following may refer a case to the Court… the person, non-governmental organisation or group of individuals having lodged the complaint with the Commission'. This provision meant that individuals who have lodged their complaint with the Commission and have been turned down, could now request the Court to deal with the case, regardless of whether the Commission or the state have referred the case to the Court.
[289] By virtue of the entry into force of Protocol No. 11 and according to its Article 2(8) Protocol No. 9 has been repealed.
[290] Tomuschat: Human Rights, p. 244; Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 133.
[291] Protocol No. 10 opened for signature in March 1992.
[292] According to Article 1 of the Protocol, the two-thirds majority was replaced by a simple majority.
[293] Protocol No. 11 opened for signature in May 1994 and entered into force in November 1998.
[294] Article 2 (8) of Protocol No. 11 cites: "Protocol No. 9 shall be repealed".

Court for decision; a procedure often leading to a complete lack of participation of the Court.[295] Additionally, the former existence of diverse organs with judicial or quasi-judicial competence, was increasing the jeopardy of dealing multiple times with the same case and, of delivering conflicting decisions.[296] In this connection, the new amendment has brought an end to the ambiguity and the non-uniformity of the system, which originated from overlapping competencies between the Court, the Commission and the Committee of Ministers. Simultaneously, the judicial character of the Court has been strengthened, its authority has been enriched and, it was around this time that the Court has finally reached a certain degree of 'maturity'; what has been described as "the Court has come of age".[297] It is argued that, Protocol No. 11 was reflecting the once still premature idea, as expressed in the Hague Congress of 1948, to, have one single judicial authority.[298] The modifications announced by Protocol No. 11 were further highly essential, because the ECHR scheme has not changed much since the time that the Convention had come into force; in this context, a radical reconsideration, some forty five years later, seemed strictly necessary.[299] It is noted that, Protocol No. 11 has been in this regard a landmark document, having met nearly all eagerly awaited expectations for alterations to the old system.[300] Despite the fact that this Protocol was particularly designed to offer relief to the Court from the ever-increasing number of incoming applications,[301] however, once again, it has not succeeded in providing a permanent solution.[302] It is argued that, the structural amendment of the system has been indeed fundamental, however, that it has mostly touched organisational aspects which increased the productivity of the Court, but which could not remove the barriers to the demand for efficiency.[303] A point raised in literature figuratively describes that, the Human Rights Building in Strasbourg that currently houses the Court, is a reflection of Protocol No. 11, both being planned for a purpose different than the one they eventually turned out to serve.[304] The excessive amount of applications has gradually reached a point, which is often referred to as a situation whereby the Convention has become a "victim of its own success".[305] On the other hand, it is discussed that, the growing number of incoming claims should not necessarily be viewed as a miscarriage or failure of the goal for a more efficient performance of functions, as set by Protocol No. 11,, but rather, as a positive indicator of the Court's new

[295] Bates: The Evolution of the European Convention on Human Rights, p. 512; Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 134; Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 39; Arold: The Legal Culture of the European Court of Human Rights, p. 23.
[296] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 27.
[297] Bates: The Evolution of the European Convention on Human Rights, p. 467. Bates cites former ECtHR President ROLV RYSSDAL, having stated that especially after Loizidou case the Court "has come of age".
[298] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 133. Irene Karper probably refers to § 13 of the Political Resolution of the Hague Congress of 7 - 10 May 1948, which has as follows: "The Congress is convinced that in the interests of human values and human liberty, the Assembly should make proposals for the establishment of a Court of Justice with adequate sanctions for the implementation of this Charter, and to this end any citizen of the associated countries shall have redress before the court, at any time and with the least possible delay, of any violation of his rights as formulated in the Charter."
[299] Bates: The Evolution of the European Convention on Human Rights, pp. 20-21.
[300] Schermers: The Merger of the Commission and Court of Human Rights, p. 13.
[301] Dembour: Who Believes in Human Rights? p. 25.
[302] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 100.
[303] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 135; Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 57.
[304] Liddell: European Court of Human Rights-Institution in Development, p. 140.
[305] Ibid., p. 21.

capacities to deal with greater amounts of work.[306] In any case, the need for a new reform was to rise again soon, since the influx of applications, described as an 'iceberg' showing only its highest point to the outside, would not prove manageable for too long under the structures available.[307] On the part of the states, which were already accustomed to the former system, adaptation difficulties have led to delaying their consent for the adoption of this Protocol.[308] At the same time, voices in literature saw this change as a fatal one, arguing that it has created hesitancy and procrastination to Member States, rendering it difficult, if not impossible, to return back to the 'two-tier' system.[309] In their view, the two-tier system was vital for safeguarding the institute of individual petition and the long-term credibility of the Court.[310]

Protocol No. 14 bis,[311] has been of a special nature, in that it has allowed, pending the entry of Protocol No. 14 into force,[312] for the application of two procedural components analogous to those that were to be introduced by Protocol No. 14, by those states which have already signed Protocol No. 14.[313] Due to its provisional character, the Protocol ceased to apply from the day that Protocol No. 14 has become effective, something that coincided with Russia's abandonment of its rooted reluctance to ratify it. Protocol No. 14 has also been called the "reform of the reforms",[314] believed to have transferred existing experience and practice to the next level. The tools made available to the Committee of Ministers for the realisation of its objectives were, on the one hand, the capacity to request the Court to interpret a judgment so as to define the appropriate measures for its execution and, on the other hand, the power to bring a case before the Court when a state has refused to abide by a *final judgment*. Further changes concerned the admissibility criteria,[315] the ability of judges to declare cases inadmissible when sitting in single formations and, the power of judges sitting in Committees of three to deliver judgments on the merits of cases that were touching upon well-established case-law[316]. The fundamental principle behind the developments brought about by Protocol No. 14 was the decentralisation of competences and, the partition of applications into their smaller components.[317] It is believed that this method has, at least temporarily, assisted the Court in operating effectively and swiftly, by amplifying the filtering mechanism and by disburdening the Court from time-consuming routine work.[318] Likewise other Protocols, the need for the changes that have been finally introduced by Protocol No. 14, was clear already from the first years of the existence of the Convention, although its exact content became a lot more defined

[306] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, pp. 41-42.
[307] Ibid., p. 23. Paraskeva cites SCHERMERS: The Eleventh Protocol to the European Convention on Human Rights, p. 370.
[308] Ibid., p. 39.
[309] Lester: The European Court of Human Rights after 50 years, p. 103.
[310] Ibid.
[311] Protocol No. 14 bis opened for signature in May 2009 and entered into force in October 2009.
[312] Protocol No. 14 opened for signature in May 2004 and entered into force only in June 2010.
[313] More specifically, single judges would be able to reject manifestly inadmissible applications and three-judge committees to decide on the merits of cases, where there has been a well-established case-law.
[314] Dembour: Who Believes in Human Rights? p. 25.
[315] According to Article 12 of the Protocol, Article 35(3)(b) ECHR now cited as: 'the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.', a restriction which has been removed by Article 5 of Protocol No. 15.
[316] According to the Explanatory Report to Protocol No. 14 para. 68, 'Well-established case-law', is, in principle, case-law that has been consistently applied by a Chamber.
[317] Bates: The Evolution of the European Convention on Human Rights, p. 500.
[318] Lester: The European Court of Human Rights after 50 years, p. 107.

after the entry into force of Protocol No. 11.[319] However, notwithstanding that Protocol No. 14 has been drafted only short time after Protocol No. 11 had come into force, by no means did it tackle the visible major deficits in any satisfactory manner or depth, nor did it prove determinant on the remaining shortfalls.[320] In this regard, the Protocol has been compared even to soft-law regulations of minimum legal effect and, portrayed as a disappointing camouflage of the worrying reality, which was characterised by limitations in addressing the number of incoming applications.[321] Regardless of the bold or not character of the changes, Protocol No. 14 has undoubtedly served as a motivation for plentiful forthcoming discussions, which reflected on the new role that the Court would be called upon to play in the near future.[322] Yet another key contribution of this Protocol has been the fact that, it strengthened expectations for a possible future accession of the European Union to the Convention.[323] With the entry into force of the *Treaty of Lisbon* in 2009,[324] Article 6(2) TFEU[325] has eventually provided for the legal basis for such an accession, whilst Article 59(2) of Protocol No. 14 has acknowledged the right of the EU to accede the Convention.

2.2. Proceedings before the Court

2.2.1. Admissibility criteria

2.2.1.1. Types of applications lodged with the Court

There are two types of applications that can be submitted to the Court; the *individual* application lodged by a person, a group of individuals, a company or an NGO and, the *inter-State cases* brought by a state or a group of states. On both occasions, addressee of the application remains the State Party to the Convention, which, in this context, is called, the *respondent state*. In what regards individual applications, it is argued that these resemble the procedure followed before national constitutional courts, whilst inter-State cases are said to resemble a typical international legal remedy.[326] Inter-State complaints were traditionally lodged by states, in an effort to safeguard the rights of their nationals that resided abroad or, in order to promote a joint cross-border policy for the preservation and enhancement of shared values.[327] Practically, inter-State complaints are functioning as a disincentive against state misbehaviour and thus, serve as an innovative practice, even by European standards.[328] However, the inter-State procedure has been used only rarely,[329] a fact which demonstrates the unwillingness that exists between states,

[319] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 25; Bates: The Evolution of the European Convention on Human Rights, p. 495.
[320] Ibid., pp. 135-137.
[321] Bates: The Evolution of the European Convention on Human Rights, pp. 502, 514.
[322] Harmsen: The Reform of the Convention System, p. 140.
[323] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, pp. 135-137.
[324] The Treaty of Lisbon, also known as the Reform Treaty, was signed in December 2007 and entered into force in December 2009, amending the Treaty of Rome and the Maastricht Treaty.
[325] The Treaty on the Functioning of the European Union (TFEU), alongside with the Treaty on European Union (TEU), previously known as the Treaty of Rome and the Maastricht Treaty respectively, are the two treaties which form the constitutional basis of the European Union.
[326] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, pp. 108-109.
[327] Ibid.; Tomuschat: Human Rights, p. 241.
[328] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 109. To describe this function, Karper talks of 'Auffangfunktion'.
[329] In cases Greece v. United-Kingdom (App. Nos. 176/56 and 299/57); Austria v. Italy (App. No. 788/60); Denmark, Norway, Sweden and the Netherlands v. Greece (3321/67 to 3323/67, 3344/67 and 4448/70); Ireland v. United-Kingdom (5310/71 and 5451/72); Cyprus v. Turkey (1974, 1975, 1977 and 1994); Denmark, France, Norway, Sweden and the Netherlands v. Turkey (6780/74, 6950/75, 8007/77 and 25781/94); Denmark v. Turkey

to file complaints against each other. Outlining a fear that, such behaviour may be regarded as hostile and may even trigger a domino effect, leading to widespread reactions.[330] Contrarily, the overall recognition and significance of the individual complaint procedure, as reflected in the numbers of incoming applications, is thought to be revealing of an irreversible trend for individualisation in human rights protection.[331] In numeric terms, only few inter-State applications have so far been brought before the Strasbourg judicial system, which, compared to the more than 50,000 thousand individual complaints, represent a rather minor part of the cases dealt with by the Court.[332] Direct consequence of the hesitation of the states to lodge a complaint against another state, is that, ultimately, the burden for the protection against anti-human rights state practices falls on individuals and on unlocking the potentials of their right of individual petition.[333]

2.2.1.2. Jurisdiction ratione personae, loci, temporis and materiae

The scope of the jurisdiction of the Court has taken on a special role in the process of declaring an application admissible, in that a lack of jurisdiction in terms of *ratione personae*, *ratione loci*, *ratione temporis* or *ratione materiae* will dispense the Court from further examining the case. Due to the nature of these requirements, the Court will, in principle, consider the issues related to its jurisdiction on its own motion and at any stage of the proceedings; therefore, regardless of whether the respondent state has raised a relevant *preliminary objection* or not.[334] In what concerns the Court's jurisdiction ratione personae, this involves that, addressee of a complaint to the Court is always a state, which is accused of an alleged violation of the provision of the Convention; a violation committed either directly by the state or, which is somehow attributable to it.[335] It is self-evident that, the state must have ratified the Convention or the relevant Protocol[336] thereto which contains the provision that has allegedly been violated. In this vein, an application cannot be lodged against individuals[337] or, international organisations[338] which have not acceded the Convention. In relation to the ratione loci jurisdiction, this requires that the alleged violation has occurred within the territorial jurisdiction of the responsible state or, on a territory effectively controlled by it[339].[340] The jurisdiction ratione temporis, namely the temporal jurisdiction, presupposes that the alleged violation has occurred *after* the date of entry of the Convention into force in the respective state.

(34382/97); Georgia v. Russian Federation (13255/07, 38263/08, 61186/09, 20958/14, 43800/14, 49537/14 and 42410/15); Ukraine v. Russian Federation (three times in 2014 and once in 2015) and Slovenia v. Croatia (54155/16). For a more detailed insight into the inter-State complaints with links to the Reports of the Commission, to the Resolutions of the Committee and to Press releases is available under: http://www.echr.coe.int/Documents/InterStates_applications_ENG.pdf (20/10/2017).

[330] Dembour: Who Believes in Human Rights? p. 22; Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, pp. 108-109.

[331] Paulus: Dispute Resolution, p. 361.

[332] Perrakis: European Law of Human Rights (translated from Greek), p. 70.

[333] Dijk/ Hoof: Theory and Practice of the European Convention on Human Rights, p. 45.

[334] This actually occurs because juridiction concerns its own competence and not the admissibility in its narrow sense.

[335] Rules of the Court 46(a) and 47(d) require to name the Contracting Party/ies against which an application is made.

[336] See De Saedeleer v. Belgium (App. No. 27535/04, 24/7/2007) para. 68.

[337] See Durini v. Italy (App. No. 19217/91, 12/1/1994).

[338] See Stephens v. Cyprus, Turkey and the United Nations (App. No. 45267/06, 11/12/2008).

[339] See Drozd and Janousek v. France and Spain (App. No. 12747/87, 26/6/1992) paras. 84-90.

[340] Diplomatic and consular missions are an example of state's liability outside the territory of the state. See relevant cases of Al-Skeini v. UK (App. No. 55721/07, 7/7/2011) para. 134 and M. v. Denmark (App. No. 17392/90, 14/10/1992) para. 1.

Thus, in principle,[341] it does not render the state responsible to provide redress for violations that have occurred *prior* to its ratification of the Convention[342]. As to the jurisdiction ratione materiae, this concerns the subject-matter of the case, entailing that the right has to fall within the limits of the scope of the Articles of the Convention or the Protocols thereto, in order for it to be invoked.

2.2.1.3. Admissibility criteria per se

Not only the criteria concerning the jurisdiction of the Court have to be met, but also certain criteria relating to the application itself have to be fulfilled, in order for an application to be declared admissible. These are laid down both in the Convention and in the Rules of Court[343].[344] More specifically, Rule 46 of the Rules of Court entailing requirements for inter-State applications and Rule 47 of the Rules of Court outlining preconditions for individual applications,[345] cover the form and content of an application; such as accompanying documents, facts, names, statements etc.[346] At the same time, Article 35 ECHR introduces the so-called *admissibility criteria*.[347] Such are the *exhaustion of national remedies*, the prohibition of raising a *substantially different* matter, the *significant disadvantage* suffered and, the prohibition of a *manifestly ill-founded* character of the application. It should be noted that, there is no possibility for an appeal against a decision which has declared an application inadmissible. Therefore, failure to comply with these criteria will result in the application not being subject to further examination by the Court. In the case that an application consists of several complaints and, one or some of them is declared inadmissible, the application will not be dismissed as a whole, but only as to the part that failed to meet the requirements. The control of admissibility exerted by the Court, has raised concern about its negative impact on the Court's ability to issue justified judgments within reasonable time.[348] The two elements of duly justified judgments and reasonable time of proceedings, are highly praised in the Court's case-law and it is on the basis of these that the Court assesses the correctness of national judgments.[349] In fact, the ability of courts to deliver sound and 'intellectually coherent' judgments is, by some authors, considered the central problem in the process of delivering justice.[350] In this context, voices in literature argue that the Court should completely discontinue deciding on the admissibility of

[341] Different is the case that facts prior to ratification are related to a situation that has occurred after that date or they extend beyond that date.
[342] See Kopecký v. Slovakia (App. No. 44912/98, 28/9/2004) para. 38.
[343] The new edition of the Rules of the Court, which incorporates amendments made by the Plenary Court on 1 June and 5 October 2015 and entered into force on 1 January 2016, is available under: http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf (20/10/2017).
[344] Inter-State applications are characterised by unique particularities, which distinguish them from the individual complaint procedure and which require a different approach; thus, for the purposes of this research, focus will be placed on the latter.
[345] An exception to these requirements is introduced by Rule 47(5.1.), which provides for the possibility of an individual complaint to be examined by the Court even when it does not fulfil the necessary conditions.
[346] More practical guidelines on the form of an individual application can be found in the end of the document of the Rules of Court and more specifically in pages 54 to 56, which contain the 'Practice Directions', issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 1 November 2003. The Practice Directions supplement Rules 45 and 47 and were amended on 22 September 2008, 24 June 2009, 6 November 2013 and 5 October 2015.
[347] Rule 46(d) and 47(1)(g) also explicitly refer to these admissibility criteria.
[348] Bates: The Evolution of the European Convention on Human Rights, p. 513.
[349] Ibid.
[350] Janis/ Kay/ Bradley: European Human Rights Law, p. 878.

applications, a time-consuming task increasing its workload and pushing it away from its essential function, which is to deal with the substance of the matter.[351]

Following the order in which the admissibility criteria are mentioned in the Convention, the first criterion laid down in Article 35(1) ECHR concerns the exhaustion of national remedies and compliance with a six-month time-limit[352]. The time afforded to the applicant is regarded enough in order for him to consider whether to lodge an application, prepare his support line and inform his authorised representative[353].[354] It is said that the six-month period serves the purposes of legal certainty by ensuring that, cases are examined within a reasonable time and that, interested parties are not kept in a state of uncertainty for a long time.[355] Additionally, the six-month limit is considered accordant with the expected interest of the litigants, who should regularly check and remain updated on the status of judicial procedures underway.[356] Therefore, disregard of valid and applicable rules and procedures of domestic law that results in failure to take legal action, cannot be cured and, lack of legal knowledge is "not regarded as a factor absolving an applicant from the duty to exhaust domestic remedies"[357]. In what regards the exhaustion of national remedies, as Article 35 indicates, it constitutes a requirement arising from the *generally recognised rules of international law*; thus, forming part of customary international law. The effect of this prerequisite is that it renders recourse to the Court a 'means of last resort', able to be used only after all efforts at the national level have failed.[358] In that sense, the precondition of the exhaustion of national remedies reflects the understanding that, real guarantor of the protection of human rights is the first instance, the first level of jurisdiction, which is exercised by national judges.[359] In this context, this admissibility criterion is considered a keystone of the principle of subsidiarity, serving the Court's aim of ensuring that decisions are taken as close to the citizen as possible.[360] The exhaustion of national remedies also presupposes that the alleged breach has, at least in its *substance*,[361] been raised before national authorities; nevertheless, it is not necessary for the applicant to have explicitly referred to the relevant Article(s) of the Convention[362]. Herewith, it should be noted that, as 'domestic remedies'[363] count only those remedies that are *truly* available to the individual and therefore, not measures that exist theoretically but which are inappropriate or find no application.[364] For instance, in the case of massive or grave human rights violations, national remedies are, almost automatically, considered as paralysed, thus, as *practically* non-existent.[365] Similarly, the

[351] Ibid., p. 884.
[352] The six-month period starts from the date of the issuance of the final domestic decision. If the alleged violation constitutes a continuing situation, the six-month period remains inapplicable as long as the situation continues and begins only upon its termination.
[353] See Sabri Güneş v. Turkey (App. No. 27396/06, 24/5/2011) para. 39.
[354] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 111.
[355] Ibid.
[356] Ibid.
[357] See Dello Preite v. Italy (App. No. 15488/89, 27/2/1995).
[358] Tomuschat: Human Rights, p. 247.
[359] Schmalz: Das Verhältnis zwischen Europäischer und Nationaler Rechtsprechung, p. 15.
[360] Dembour: Who Believes in Human Rights? p. 23; Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 111.
[361] See Gäfgen v. Germany (App. No. 22978/05, 3/6/2010) paras. 142,144 and 146 and Karapanagiotou a.o. v. Greece (App. No. 1571/08, 28/10/2010) para. 29.
[362] See Ahmet Sadik v. Greece (App. No. 18877/91, 15/11/1996) para. 33 and Fressoz and Roire v. France (App. No. 29183/95, 21/1/1999) para. 38.
[363] This normally means a claim brought before a civil, criminal or administrative court, followed by an appeal and a further appeal, where applicable.
[364] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 71.
[365] Roukounas: International Protection of Human Rights (translated from Greek), p. 42.

obligation for the exhaustion of national remedies is extinguished, when the procedure before national courts would in all probability be futile or ineffective.[366] In any case, estimations on the probability of a failure of an application have to be based on settled and consistent practice of national courts in the context of analogous cases, while, mere doubt on the chances of success does not alone constitute enough condition[367].[368] Moreover, for cases of continuous or sequential violations that have already been unsuccessful on the domestic level, the procedure before national courts does not need to be repeated and, the applicant, can directly refer his case to the Court.[369] Inter-State complaints seem to be establishing a further exception to the rule of exhaustion of national remedies, as it results from an examination of cases *Cyprus v. Turkey* and *Netherlands, Denmark, Norway v. Greece*.[370] Additionally, there also exist cases which have the character of 'half-exceptions', whereby applicants are, on the one hand, indeed expected to exhaust national remedies, however, the completion of national procedures is allowed to occur on a later stage, namely after the submission of their application to the Court.[371] It becomes obvious that, the rule of exhaustion of national remedies does not apply with automaticity, but rather, with a certain degree of flexibility. In this sense, the Court is taking a realistic account not only of formal procedures, but also, of the general context; concentrating on the factual situation and aiming at the 'realness' of the protection granted to the individual.

The second admissibility criterion set out in Article 35(2) (a) ECHR, is that the applicant has to be identifiable from the information provided in the application, while anonymous applications will not be considered by the Court. According to Rule 47(4) of the Rules of Court, applicants who do not wish to disclose their identity to the public, may submit a relevant request to the Court,[372] justifying the need for such a departure from the general rule of public access to information[373]. The third criterion laid down in Article 35(2) (b) ECHR, relates to the fact that, an application has to concern a matter which, in its substance, has not been already examined by the Court or, been already submitted to another international supervisory body for examination[374]. The provision further recognises the possibility to raise not only new, but also, *old* matters, given that relevant new information is provided. In assessing the similarity of cases, the Court, principally, examines whether the applications refer to the same parties, same facts, and same legal provisions or have the same scope of claims.[375] It is argued that, this assessment process has some common components with the so-called *repetitive cases*, in that it reflects the unwillingness of the Court to deal with identical issues that 'steal' from its precious time and distract its attention from the more substantial matters.[376] The fourth admissibility criterion prescribed by Article 35(3) (a) ECHR, involves the requirement of an application to be compatible with the provisions of the Convention, therefore, with the ratione materiae and with

[366] See Selmouni v. France (App. No. 25803/94, 28/7/1999).
[367] See Mehiar v. Greece (App. No. 21300/93, 10/4/1996).
[368] Matthias/ Ktistakis/ Stavriti/ Stefanaki: The Protection of Human Rights in Europe (translated from Greek), pp. 28, 189.
[369] Ibid., p. 188. Matthias/ Ktistakis/ Stavriti/ Stefanaki refer in this regard to case Hornsby v. Greece (App. No. 18357/91, 19/3/1997).
[370] Roukounas: International Protection of Human Rights (translated from Greek), p. 42.
[371] Edel: The Length of Civil and Criminal Proceedings in the Case-Law of the European Court of Human Rights, pp. 80-81. Edel refers in this regard inter alia to cases Brusco v. Italy (App. No. 69789/01, 6/9/2001) and Andrášik a.o. v. Slovakia (App. Nos. 57984/00, 60237/00, 60242/00, 60679/00, 60680/00, 68563/01, 60226/00, 22/10/2002).
[372] Either in the application form or as soon as possible afterwards.
[373] In that case, the applicant will be designated by his initials or simply by a letter.
[374] Such as the United Nations Human Rights Committee.
[375] See Vojnović v. Croatia para. 28, Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2) parsa. 63.
[376] Bates: The Evolution of the European Convention on Human Rights, pp. 485-486.

the jurisdiction of the Court. The Article further prescribes that an application shall not constitute an *abuse* of the right of individual petition and shall not be *manifestly ill-founded*. Abuse shall be understood in this context with its regular sense, namely as the harmful exercise of the right, of individual petition or, as its use in a way manifestly contrary to its purpose, in an attempt to cause uneasiness and in a way that does not aim a genuine benefit from the democratic processes.[377] On the other hand, a manifestly ill-founded application is not to be approached with its ordinary sense, namely as an application for which it is immediately obvious that it lacks foundation, but rather, as one with few chances of success.[378] The fifth criterion laid down in Article 35(3) (b) and added relatively recently by Protocol No. 14, requires that a *significant disadvantage* has been suffered by the individual in order for his application to be declared admissible. Hereby, cases relating to the unlawful deprivation of liberty, cases with significant financial impact, or cases with great practical impact such as those affecting a bigger amount of citizens, will more likely be declared admissible. Under the situation that applied prior to the entry into force of Protocol No. 14, an applicant had to prove his status as a direct, indirect[379] or potential victim, in order to 'protect' his application from being characterised an *actio popularis.*[380] This last requirement has been obviously added in order to tackle the ever-increasing caseload of the Court and in order to reinforce the guarantees against the unnecessary exercise of the right of individual petition; thus, to assist the Court in concentrating as much as possible on substantial cases. At the same time, while it is argued that the significant disadvantage requirement is in line with the admissibility criteria applied also by other international courts, there are concerns as to whether it is in line with the European public order that has been established by the Convention.[381] Moreover, the estimation of the *significance* of the disadvantage suffered is, by some, considered a complex issue, since it requires a case-specific consideration by the Court already at a very early stage of the proceedings.[382]

2.2.2. Interpretive principles

2.2.2.1. Lack of defined interpretation rules

It is obvious that, interpretation, as a process of determining the intended meaning of the law, is crucial in order to eliminate textual inconsistencies and ambiguities. Ambiguities are inevitable in the field of law, since law, and especially human rights law, is typically broadly formulated.[383] Even an extremely detailed legal text could not cover the diversity of the possible future events, while a legislator, by nature, can never be sufficiently predictive of the developments in the social setting and, of the capacity of human beings in inventing new ways for breaching the law. In this context, it is widely argued and it has even been regulated in Article 31(2) VCLT that, in addition to a treaty's main *text*, also its *context* must be taken into account; thus, the preamble, the annexes and other relevant useful documents[384].[385] At the same

[377] As explained in the Practical Guide on Admissibility Criteria issued by the CoE and the Court, updated edition 2014, p. 37, available under: www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf (20/10/2017).
[378] Ibid., p. 82.
[379] Indirect is a victim whose complaint is closely enough linked to the death or disappearance of his relative.
[380] Dembour: Who Believes in Human Rights? p. 23; Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 109.
[381] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 115.
[382] Ibid., p. 114.
[383] Fechner, Frank: Abstrakt-Konkret: Die Grundrechte im Spannungsfeld von Gesetzgebung und Rechtsprechung am Beispiel des Persönlichkeitsrechts, p. 9.
[384] Such as preparatory works, negotiations, discussions etc.
[385] Roukounas: International Law (translated from Greek), p. 200.

time, there is a legitimate expectation that, human rights bodies are consistent in their interpretation line, however, the special character of many of these bodies render a standardised behaviour a challenging task.[386] With regard to the local European reality, the wide variety of different influences has shaped a blended interpretation model, which has been referred to as the "European style of interpretation".[387] The Convention itself, does not contain any explicit interpretation rules, embracing a standard that is common for the vast majority of legal documents.[388] Nevertheless, Article 17 ECHR provides for the prohibition to interpret the Convention in a way which destructs or limits the rights and freedoms enshrined in it. Article 17 ECHR, a provision listed under the material rights of Section I, is thought to stand for a 'disguised' interpretation guideline with a relevant normative dimension.[389] Given the absence of explicit interpretative rules, it could be even argued that, Article 17 ECHR supersedes the rest of interpretation guidelines which have been formed by practice. Along with the lack of rules provided, another difficulty in the interpretation process is the existence of two equally authentic, yet unidentical, versions of the Convention, an English and a French one, which may lead to unaligned interpretative approaches, with the cost of their realignment to be borne by the Court.[390]

2.2.2.2. The Court's distinctive interpretation line

The Court is regarded, in principle, as independent in terms of the interpretative dimensions it gives to the Convention; differently to what applies for national judicial organs, which are subject to the control of the Court and expected to comply with the interpretations of the latter.[391] Furthermore, the fact that the Convention has been characterised a "constitutional instrument of European public order",[392] raises the question as to whether also its interpretation should resemble that of national constitutions. In this context, it is relevant to highlight that, because national constitutions encompass the fundamental principles for the exercise of governmental authority, their interpretation often adopts a political dimension. Human rights law on its turn, is, at least in 'biological' terms, but a 'genus' of the family of public international law, so that it could be expected for its interpretation to be in accordance with what applies in the field of public international law.[393] However, despite ECHR law being a basic component of international law, the Court has always cautiously approached international law and limited its use to the very essential.[394] In fact, the legal doctrines followed by the Court in its decision-making process, have even been characterised as non-coherent with the typical interpretation rules of public international law and a product of the distinctive features of human rights agreements.[395] Notwithstanding its relatively 'distant' behaviour, the interpretation line

[386] Forowicz: The Reception of International Law in the European Court of Human Rights, p. 400.
[387] Viljanen: The European Court of Human Rights as a Developer of the General Doctrines of Human Rights Law, p. 77.
[388] Loucaides: The European Convention on Human Rights, p. 1.
[389] Guradze: Die Europäische Menschenrechtskonvention. Konvention zum Schutze der Menschenrechte und Grundfreiheiten nebst Zusatzprotokollen, p. 202. Article 17 ECHR cites as: "Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention".
[390] Forowicz: The Reception of International Law in the European Court of Human Rights, p. 33.
[391] Arold: The Legal Culture of the European Court of Human Rights, p. 34.
[392] Frowein: Die Einwirkung der EMRK auf das Verfassungssystem der Mitgliedstaaten, p. 62.
[393] Forowicz: The Reception of International Law in the European Court of Human Rights, p. 23.
[394] Ibid., p. 370.
[395] Stahl: Schutzpflichten im Völkerrecht, pp. 54-55. Stahl refers to the systemic integration model, the dynamic interpretation and the interpretation according to the effectiveness principle as particularities of the human rights

followed by the Court has served as a role model, with a pronounced effect on other human rights bodies, which have approached the whole process constructively by deducing valuable conclusions for their own practices.[396] The Court has also adopted a specific stance in what regards the application of the Vienna Convention, also known as the 'treaty of treaties'.[397] In what regards specifically the application of the Vienna Convention, the question has been raised as to whether the treaty shall apply also to cases that involve CoE State Parties which have yet not signed it.[398] At the same time, there exist several non-parties to the Vienna Convention which have however recognised its content, or parts of it, as *customary law*, since this appears to be in the common interest of the international community.[399] Despite the practice of only rarely referring to the Vienna rules, the judicial system of the ECHR has pretty early acknowledged their importance in the interpretation process; in fact, doing so long before the VCLT came into force, in the context of the *Golder* case[400].[401] The well-known *Golder* case, has been the first to present some principles of interpretation, while a careful reading of the Commission's then report reveals that, even supplementary means were called into use, such as preparatory works, other UN documents and, relevant practices.[402] These principles, together with other ones that were later developed in the case-law of the Commission, were 'inherited' to the Court, which embraced them by means of an active and critical reflection.[403] In fact, the subsequent approach of the Court has enriched the interpretive principles to such a degree that, has led to its characterisation as a 'progressive' or 'activist' approach.[404] It is a fact that, mostly with its *evolutive* and *autonomous* interpretation, the Court has proven its capacity to move far beyond what is prescribed by the Vienna Treaty.[405] It is argued that, in doing this, the Court has aimed to underline its law-making character and, to deepen the understanding on human rights protection in Europe.[406] Overall, it is undisputed that, the guidelines included in the VCLT have played a major role in the determination of the interpretation course that the Court has followed throughout the years, although more as a facilitator than as a provider of quick-fix solutions.[407] Central reason for this last event has been the fact that, the VCLT is itself a vague text, which cannot easily provide for solid solutions; thus, rendering it necessary for the Court to consider other sources too.[408]

2.2.2.3. Plurality of the interpretation methods applicable

The *interpretation methods* applied by the Court can be divided into two main categories; those aligning themselves with national law and, therefore, *limiting* the application scope of the Convention and, those *expanding* the Convention's scope in serving the purposes of

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treaties which have evolved from the classical methods, therefore constituting no separate interpretation principles.

[396] Ibid., p. 80. Stahl cites KRINGS: Grund und Grenzen Grundrechtlicher Schutzansprüche, p. 60.

[397] Letsas: A Theory of Interpretation of the European Convention on Human Rights, pp. 58-59.

[398] For example, Andorra, Azerbaijan, France, Iceland, Norway, Monaco, Romania, San Marino and Turkey are parties to the Council of Europe and the ECHR but not parties to the VCLT.

[399] Dijk/ Hoof: Theory and Practice of the European Convention on Human Rights, p. 72.

[400] VCLT came into in 1980, while the Commission has accepted Articles 31-33 of the VCLT as applicable already in 1975, in the case of Golder v. UK (App. No. 4451/70, 21/2/1975) paras. 29, 35.

[401] Loucaides: The European Convention on Human Rights, p. 6.

[402] Ibid., pp. 3, 6.

[403] Ibid., p. 14.

[404] Dijk/ Hoof: Theory and Practice of the European Convention on Human Rights, p. 74.

[405] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 284.

[406] Ibid.

[407] Forowicz: The Reception of International Law in the European Court of Human Rights, pp. 23-24.

[408] Dijk/ Hoof: Theory and Practice of the European Convention on Human Rights, p. 72.

international law. A closer look to these interpretive models reveals that, the ones limiting the scope of the Convention are the *autonomous* interpretation, the *consensual* interpretation, the *historical* interpretation, the *margin of appreciation*, the interpretation according to the *principle of proportionality* and the *judicial (self-) restraint*. On the other hand, the models expanding the scope of the Convention are the *evolutive* interpretation,[409] the interpretation according to the *effectiveness* principle, the *systemic integration,* the *comparative* interpretation, the *objective* interpretation and the *judicial activism*. It shall be noted that, due to the strong similarities and the significant overlaps between different doctrines of the same category, it is not always easily visible which doctrine has been applied each time, whilst the case may also be that the Court has applied more than one at a time. The interpretive methods in fact are, as it becomes evident also by their occasional simultaneous application, so closely entwined with each other, that it is even argued that, they shall be considered as parts of a whole and not as separate units.[410] At the same time, the lack of a single, comprehensive and also effective interpretation model is a widely-acknowledged fact, which cannot be disregarded.[411] Mindful of this, the Court often moves above and beyond expectations, by creatively approaching and, by illuminating surprising elements of the Convention's protection scope.[412] The vague textual formulation of the Convention itself allows for its 'inclusive' character and for an 'interventional' character of the Court, a fact that becomes apparent in the current case-law trend.[413] However, it is stressed that, interpretations that place further obligations upon Member States, should be approached carefully and be reduced to the absolutely necessary.[414] In this context, it is also argued that, the interpretation models *expanding* the competence of the Court must always be examined for their dogmatic correctness.[415] The truth is that, the formation and evolution of the Court's judgments towards a more restrained or a more dynamic model is dependent on a number of factors. At the same time, it can be observed that, whenever a national or international court strongly opposes national policies, there is a tendency of criticising it for adopting a far too political character, in the sense of indirectly exercising government policy; a criticism the ECtHR could not escape.[416] The role of judges is also often viewed sceptically on the basis of them being subject to external influences and, international judges have again not been an exception in this regard.[417] It is argued that the existing scepticism manifests an unease of national authorities to undergo an external control and, a retreat to sovereignty.[418] Moreover, that the conversation on the independence of the Court is no longer a luxury that Europe can afford, but rather, a growing concern.[419] In any case, no matter which interpretation model the Court each time decides for, there are certain boundaries that are to be respected at all times, such as the prohibition of a contra legem interpretation, in the sense that

[409] The *evolutive* or *dynamic* interpretation has, due to its importance, been analysed separately in the context of the doctrine of 'living instrument' and therefore, is not included in this Chapter.
[410] Viljanen: The European Court of Human Rights as a Developer of the General Doctrines of Human Rights Law, p. 78.
[411] Greer: The European Convention on Human Rights, p. 323.
[412] Matthias/ Ktistakis/ Stavriti/ Stefanaki: The Protection of Human Rights in Europe (translated from Greek), p. 32.
[413] Pfeffer: Das Verhältnis von Völkerrecht und Landesrecht, p. 155.
[414] Stahl: Schutzpflichten im Völkerrecht, pp. 66-70. Sandra Stahl sees three requirements to assess the necessity of new obligations: a) that the imposed obligation does not touch upon the very core of the right, b) that there is an urgent social or scientific interest and c) that there is at least a predominant consent from Member States.
[415] Pfeffer: Das Verhältnis von Völkerrecht und Landesrecht, p. 153.
[416] Wildhaber: Recent Criticism of the European Court of Human Rights, p. 169.
[417] Ibid., p. 161; Voeten: Politics, Judicial Behaviour and Institutional Design, pp. 69-70.
[418] Wildhaber: Criticism and Case-Overload, p. 9.
[419] As stated in the speech of former President of the European Commission Romano Prodi in the European Parliament on 5 May 2004. SPEECH/04/225 is available under: http://europa.eu/rapid/press-release_SPEECH-04-225_en.htm?locale=en (20/10/2017).

a court cannot rule against applicable law and that an interpretation cannot outweigh existing rules.[420]

2.2.2.4. Methods limiting the scope of the Convention

2.2.2.4.1. Autonomous interpretation

In what regards the *autonomous* interpretation, this model indicates that, the terms of the Convention act in a completely autonomous manner which closely parallels a type of "semantic independence".[421] In this context, the legal wording of the Convention should not be confused with or defined by the meaning that, similar or identical terms of national or international law might have.[422] Additionally, wherever the Convention explicitly refers to national law, this shall by no means be understood as establishing a conceptual link between ECHR provisions and provisions of national law.[423] It is also highlighted that, the meaning attributed to terms of the Convention by national officials or by the public is also irrelevant.[424] The Convention's autonomous capacity actually requires that the Convention is interpreted by national authorities with the content and the weight recognised to it by the Court, as this results from its case-law.[425] In this regard and, in order to achieve the Convention's full comprehension, national authorities have the obligation to remain informed and, should the need arise, be re-educated about the special nature of the Convention and about the effects of the terms it contains. The Commission and the Court have never taken every opportunity to point out the application of the theory of autonomous concepts as a substantial legal doctrine of their jurisprudence. A typical example of this autonomous meaning can be found in the term *accused* that appears in Article 6(3) ECHR and which is conceived by the ECHR organs in a very different way than it is conceived by national judicial authorities.[426] Yet another example has been provided by the *Engel* case,[427] in which the Commission has found an asymmetry between the legal concepts, holding that a certain clause did "not have the scope ascribed to it by the two applicants".[428] The term *democratic society* has also taken on an independent meaning within the ECHR system, with the Court frequently emphasising the essential components of its conceptual basis.[429] In this respect, in case *Handyside*[430] the Court referred to pluralism, tolerance and broadmindness as basic elements of a democratic society; in case *Golder*[431] to the principle of supremacy of law

[420] Stahl: Schutzpflichten im Völkerrecht, p. 71.
[421] Letsas: A Theory of Interpretation of the European Convention on Human Rights, p. 42.
[422] See case Chassagnou a.o. v. France (App. Nos. 25088/94, 28331/95 and 28443/95, 29/4/1999), para. 100.
[423] Dijk/ Hoof: Theory and Practice of the European Convention on Human Rights, p. 77.
[424] Letsas: A Theory of Interpretation of the European Convention on Human Rights, pp. 40, 46.
[425] Forowicz: The Reception of International Law in the European Court of Human Rights, p. 10.
[426] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 209.
[427] Engels a.o. v. the Netherlands (App. Nos. 5100/71, 5101/71/, 5102/71, 5354/72 and 5370/72, 8/6/1976).
[428] The concept of *criminal offence* was addressed in cases Campbell and Fell v. UK (App. Nos. 7819/77 and 7878/77, 28/6/1984); Özturk v. Germany (App. No. 8544/79, 21/2/1984) and Chassagnou a.o. v. France (25088/94, 28331/95 and 28443/95, 29/4/1999); of *civil servant* in Pellegrin v. France (App. No. 28541/95, 8/12/1999); of *lawful detention* in Eriksen v. Norway (App. No. 17391/90, 27/5/1997) and Jeznach v. Poland (27580/95, 14/12/2000); of *possessions* in Gasus - Dosier und Fordertechnik GmbH v. Netherlands (App. No. 15375/89, 23/2/1995); of *victim* in Asselbourg a.o. v. Luxembourg (App. No. 29121/95, 29/6/199 and of *witness* in Kostovski v. the Netherlands (App. No. 11454/85, 20/11/1989).
[429] Perrakis: European Law of Human Rights (translated from Greek), p. 27; Roukounas: International Protection of Human Rights (translated from Greek), pp. 134-135.
[430] Handyside v. UK (App. No. 5493/72, 7/12/1976).
[431] Golder v. UK (App. No. 4451/70, 21/2/1975).

as a prerequisite for democracy; in case *Refah Partisi*[432] it emphasised that democracy is the only political model compatible with the Convention; in case *Şahin*[433] it stressed the importance of secularism for the protection of the democratic system and in case *Young, James and Webster*,[434] it underlined that democracy requires a fair treatment that includes refraining from the abuse of the dominant position.[435]

2.2.2.4.2. Consensual interpretation

The *consensual* interpretation prerequisites, as the word reveals, a *consensus*, in the sense of adopting only interpretations that reflect the mutual agreement of the Contracting States.[436] It is supported that, the tendency towards this 'common determination' has its roots in the preamble of the Convention, which refers to the collective values and shared aims of the states.[437] On the other hand, considering the ever-growing number of Member States, finding a commonplace seems like the Court has a further 'Sisyphean task' to undertake; that of taking into consideration diverse expectations and of demonstrating increased sensitivity. It is argued that, there exists no interpretation model that can actually resolve the problem of disintegration that currently occurs in Europe, and which is rooted in the simultaneous coexistence of international law, domestic law and, partially, EU law.[438] On the other hand, it is held that, despite the existing difficulties, the Court applies the Convention by faithfully following the will of its founding fathers and that of the Contracting States.[439] To this purpose, the Court has even established safeguards which prevent a misuse of its powers; examples of such safeguards are the application of the *margin of appreciation* principle as well as the 'reality checks' with regard to the European trends applicable in a particular field.[440] Such 'tests' concern whether a significant number of Member States are already granting a certain level of protection and, whether there exists a common denominator between Member States that possibly signifies general acceptance.[441] As a result, in a number of cases, the observed lack of consensus on a particular matter, has been interpreted as an indicator of the extended leeway that states enjoy and with which the Court shall not interfere.[442] On the other hand, several cases[443] call the reliance on an international consensus into question and justify the application of a *dynamic* interpretation also in absence of a consensus, by accepting the existence of a so-called 'virtual consensus'.[444]

2.2.2.4.3. Historical interpretation

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[432] Refah Partisi (the Welfare Party) a.o. v. Turkey (App. Nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13/02/2003).
[433] Leyla Şahin v. Turkey (App. No. 44774/98, 29/6/2004).
[434] Young, James and Webster v. UK (App. Nos. 7601/76 and 7806/77, 13/08/1981).
[435] Perrakis: European Law of Human Rights (translated from Greek), p. 27.
[436] Forowicz: The Reception of International Law in the European Court of Human Rights, p. 9.
[437] Ibid.
[438] Ibid., pp. 399, 402. Partially because not all CoE members are also EU members.
[439] Rozakis: The Jurisprudence of the European Court of Human Rights (translated from Greek), p. 1834.
[440] Ibid., pp. 1834, 1840.
[441] Ibid., p. 1840. Rozakis underlines that where the Court finds that consensus is absent, it will not dare to take a completely new direction.
[442] Demir and Baykara v. Turkey (App. No. 34503/97, 21/11/2006) paras. 53-54, 61-62 and 65, Golder v. UK (App. No. 4451/70, 21/2/1975) separate opinion of Judge Fitzmaurice, Rees v. UK (App. No. 9532/81, 17/10/1986); Cossey v. UK, judgment of (App. No. 10843/84, 27/9/1990).
[443] Marckx v. Belgium (App. No. 6833/74, 13/06/1979) para. 41, Dudgeon v. UK (App. No. 7525/76, 22/10/1981) para. 60, Christine Goodwin v. UK (App. No. 28957/95, 11/7/2002) para. 85, Sheffield and Horsham v. UK (App. Nos. 22985/93 and 23390/94, 30/7/1998) para. 35, Fretté v. France (App. No. 36515/97, 26/2/2002) para. 41.
[444] The term 'virtual consensus' appears in Soering v. UK (App. No. 14038/88, 7/7/1989) para. 102.

The *historical* interpretation presupposes that ECtHR judges have to search for and, to subsequently consider in their decision-making process, the historical background to the Convention; therefore, it requires their involvement in a long and complex procedure. Most notably, this method reflects the Court's practice of taking into account, there where the text allows for it, such as where legal loopholes arise, the Convention's *Travaux Préparatoires*[445]. The use of the Preparatory Works as additional means is supported by Article 31 of the Vienna Convention, according to which, agreements and instruments relating to the treaty that are made in connection with its conclusion, shall also be taken into consideration in the interpretive process.[446] However, preparatory documents are themselves often insufficiently detailed, and as such, can hardly enable an integrated historical interpretation.[447] At the same time, it has been argued that, exploring the historical roots of the Convention with the aim to determine its current meaning, could be regarded as disrespectful towards countries that have acceded the Convention at a later stage and shall therefore, be used only as a 'secondary' means of interpretation.[448] There are a number of similarities between this interpretation model and the so-called *originalist* theories of *intentionalism* and *textualism*,[449] in the sense that these also distance themselves from 'innovative' approaches. While both intentionalism and textualism have the past as their reference point, the former focuses on understanding the *will* of the creators, while the latter on understanding the intended *meaning* of the text.[450] In this context, the historical interpretive model differs materially from the *evolutive* interpretative model which rather tends to minimise the utility of means referring to the past.[451]

2.2.2.4.4. Margin of appreciation

In what regards the *margin of appreciation*[452] principle, this is thought to have its roots in domestic law and to the fact that, governmental authorities enjoy an operational leeway, while they are at the same time subject to scrutiny as to how they make use of this freedom.[453] It is further supported that, this doctrine echoes the flexibility of the Vienna Treaty, which allows Member States to agree, under certain conditions, to handle treaty issues differently than laid down in its text; a principle that has ensured the long life of the Vienna Treaty.[454] In the ECHR system, states are as well granted a margin of freedom as to the application of the Convention, however, the limits of this margin are to be determined by the jurisprudence of the Court.[455] In this context, in the case of *Handyside*,[456] the Court has held the position that, the discretionary

[445] The term 'Preparatory Works' covers documents that were produced during the drafting procedure of the Convention and Protocol (No. 1), such as reports of discussions in the Consultative Assembly, the Committee of Ministers and other committees. The official version of the Travaux Préparatoires is available under: http://www.echr.coe.int/Documents/Library_Collection_TravPrep_Official_ENG.pdf (20/10/2017).
[446] Roukounas: International Law (translated from Greek), p. 204
[447] Quénivet: Human Rights Law and Peacekeeping Operations, p. 107.
[448] Stahl: Schutzpflichten im Völkerrecht, p. 61.
[449] Letsas: A Theory of Interpretation of the European Convention on Human Rights, pp. 59-60.
[450] Ibid., p. 60. Letsas provides as an example of the application of intentionalism the cases of Banković a.o. v. Belgium a.o. (App. No. 52207/99, 19/12/2001), James a.o. v. UK (App. No. 8793/79, 21/2/1986), Nolan and K. v. Russia (App. No. 2512/04, 12/2/2009) and of textualism the case of Johnston a.o. v. Ireland (App. No. 9697/82, 18/12/1986).
[451] Dijk/ Hoof: Theory and Practice of the European Convention on Human Rights, p. 78.
[452] The margin of appreciation has for example been applied in Handyside v. UK (App. No. 5493/72, 7/12/1976) para. 48; Evans v. UK para. 77 (25/4/2007); Door and Dublin Well Woman v. Ireland (29/10/1992) para. 68; Hatton a.o. v. UK (App. No. 36022/97, 03/7/2003) para. 122; Dickson v. UK, (App. No. 44362/04, 4/12/2007) para. 85; Tavli v. Turkey (App. No. 11449/02, 9/2/2007) para. 29.
[453] Dijk/ Hoof: Theory and Practice of the European Convention on Human Rights, p. 84.
[454] Roukounas: International Law (translated from Greek), p. 120.
[455] Paulus: Germany, p. 212.
[456] Handyside v. UK (App. No. 5493/72, 7/12/1976).

power granted to states goes hand in hand with the European control.[457] The application of the margin of appreciation principle is also understood in the sense of states having only a "thin" commitment to international law, as compared to their "thick" commitment towards national laws and national legal tradition.[458] As expected, Member States, on their part, highly praise the application of the principle and the practice of acknowledging their own particularities and of placing them in the centre of attention.[459] Nevertheless, whilst the margin might sound particularly promising for striking a good balance between national and international policies, states request an even wider recognition of their ability to tackle national issues and an ever-broadening field of application of the principle.[460] It is also argued that, this type of judicial discretion is actually beneficial for the promotion of the European diversity and for the strengthening of national sovereignty.[461] Moreover, it is supported that, the margin of appreciation seems to abide by the right of a nation to self-determination, a principle of modern international law commonly regarded as *jus cogens*[462] and one based on the respect for the states' full autonomy in deciding for their fundamental issues.[463] In this respect, it is noted that, the Court contributes to the harmonisation of national jurisdictions, while valuing and preserving the European diversity and the unique opportunities which this affords.[464] On the other hand, the fact that states are given the power to shape human rights ethics according to their respective views, inevitably leads to a lack of uniformity in the application of the doctrine and has therefore caused much concern and criticism.[465] More specifically, it is highlighted that, the principle contrasts with the efforts to guarantee greater autonomy to the provisions of the Convention, as it puts the focus on 'external' powers rather than on the internal dynamics of the Convention.[466] As regards its practical application, the margin can be called into play in several contexts, such as in the event of a conflict between a right of an individual and the general interest of the society, in the event of the need of harmonisation between national and European interests and in the case of interpretation of ambiguous parts of the Convention.[467] The application of the principle is not an easy task since the Court must simultaneously defend the application of the principle and, justify its position as to the non-occurrence of the alleged violation.[468] What practically occurs is that, before the Court recognises the application of the margin of appreciation, it has already examined the facts and verified the application of the *principle of proportionality* in the measures that have been adopted by the state.[469] However, the margin does not apply in matters that can be decided on the basis of the Court's settled case-law, such as cases where European consensus on the application of the proportionality principle exists.[470] As a result, the application of the margin has become somewhat tempered, since the

[457] Rozakis: The Jurisprudence of the European Court of Human Rights (translated from Greek), p. 1840.
[458] Sweeney: The European Court of Human Rights in the Post-Cold War Era, p. 252.
[459] Dijk/ Hoof: Theory and Practice of the European Convention on Human Rights, p. 93.
[460] Ibid., p. 94.
[461] Arold: The Legal Culture of the European Court of Human Rights, pp. 38-39.
[462] Jus cogens refers to certain, fundamental, peremptory norms of international law from which no derogation is ever permitted.
[463] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, pp. 183-184.
[464] Perrakis: European Law of Human Rights (translated from Greek), p. 99.
[465] Blackburn/ Polakiewicz: Fundamental Rights in Europe, p. 81.
[466] Roukounas: International Protection of Human Rights (translated from Greek), p. 133.
[467] Forowicz: The Reception of International Law in the European Court of Human Rights, p. 8; Rozakis: The Jurisprudence of the European Court of Human Rights (translated from Greek), p. 1840.
[468] Dijk/ Hoof: Theory and Practice of the European Convention on Human Rights, p. 93.
[469] Rozakis: The Jurisprudence of the European Court of Human Rights (translated from Greek), p. 1840. This also justifies why the case-law on the margin of appreciation provides at the same time such a rich insight into the application of the proportionality principle.
[470] Ibid.

enrichment of the Court's case-law leaves only limited space for deviating interpretations.[471] Lastly, as previously mentioned, the margin of appreciation is regulated, together with the principle of subsidiarity, by Protocol No. 15 which has yet to come into force; therefore, a waiting process is required in order to see how both will evolve and more importantly, to what extent they will help tackle current challenges.

2.2.2.4.5. Proportionality principle

The *proportionality principle*[472] encompasses a well-balanced relationship between the aim pursued on the one hand and, the restrictive measure imposed on the other. In the ECHR context, the principle incorporates the Court's investigation on the appropriateness, the reasonability and necessity of the restrictions to the Convention imposed by Member States. The values behind this principle are nothing new to the ECHR system, with the strive for a proper assessment of claims and, the need for a fair balance between public and individual interest, having always been an integral part of the Court's procedures.[473] Despite having been approached already by the *Handyside* case[474], it was not until relatively recently that the proportionality principle has gained its outmost importance, having become a *general principle* of the ECHR system.[475] It is clear that, this cost-benefit assessment cannot always be objective, since it is very much based on the particular significance of both the respective right and the purpose served.[476] Consequently, the *proportionality test* may lead to the recognition by the Court of a wider or a narrower margin of appreciation for the state concerned; therefore permitting variable margins, dependent on the circumstances.[477] In this context, it is also argued that the Court often does not even proceed to a thorough review of proportionality, since it considers national courts the most appropriate to evaluate national measures.[478]

2.2.2.4.6. Judicial (self-) restraint

The *judicial (self-) restraint* model,[479] imposes a kind of restriction on the freedom that is typically enjoyed by judges, in the sense of obliging them to stick to the core content of their competence, which lies with the *interpretation* of existing laws and not within the *creation* of new ones.[480] In this respect, it is also stressed that, the *trias politica* doctrine of constitutional law is, inter alia, based on the acknowledgment that, judicial authorities are incapable of

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[471] Ibid., p. 1841.
[472] The proportionality principle has for example been applied in Lambert v. France (App. No. 23618/94, 24/8/1998) paras. 31-41; Ždanoka v. Latvia (App. No. 58278/00, 16/3/2006) paras. 106-111; Parti Nationaliste Basque - Organisation Régionale d' Iparralde v. France (App. No. 71251/01, 7/9/2007) para. 45.
[473] Dijk/ Hoof: Theory and Practice of the European Convention on Human Rights, pp. 80-81. Dijk/ Hoof refer in this regard to cases Brogan a.o. case (App. Nos. 11209/84, 11234/84, 11266/84 and 11386/85, 29/11/1988) and Soering v. UK (App. No. 14038/88, 7/7/1989).
[474] Handyside v. UK (App. No. 5493/72, 7/12/1976).
[475] Kloth: Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights, p. 15.
[476] Dijk/ Hoof: Theory and Practice of the European Convention on Human Rights, p. 85.
[477] Ibid. This also explains why the case-law on the margin of appreciation provides at the same time a rich insight into the application of the proportionality principle.
[478] Rozakis: The Jurisprudence of the European Court of Human Rights (translated from Greek), p. 1840.
[479] The judicial(self-)restraint model has for example been applied in Salduz v. Turkey (App. No. 36391/02, 27/11/2008) and Navone v. Monaco (App. Nos. 62880/11, 62892/11 and 62899/11, 24/10/2013).
[480] Forowicz: The Reception of International Law in the European Court of Human Rights, p. 10; Merrills: The Development of International Law by the European Court of Human Rights, pp. 230-231.

effectively tackling societal challenges.[481] In what regards the Court's judgments specifically, their often far-reaching character has been as well faced with hesitancy and criticised for democratic deficiency, so that the model of judicial (self-) restraint seems appropriate in order to calm down the uneasiness across Member States.[482] And while the judicial restraint method might at first sight seem to be contradicting *judicial activism*, however, the two are considered as 'two sides of the same coin', in the sense that, they are both needed and can even apply cumulatively.[483]

2.2.2.5. Methods expanding the scope of the Convention

2.2.2.5.1. Effectiveness principle

From the methods expanding the scope of the Convention, the *effectiveness principle*, also known as *effet utile*, is designed to grant to the Court the power to interpret ECHR law in a way that is, ultimately, effective for the protection of individuals.[484] It is argued that, the principle is indirectly included in Article 31(1) of the Vienna Convention, which provides that a treaty must be interpreted "in good faith" and "in the light of its object and purpose", namely of its ratio legis; aiming to achieve a 'useful effect', while avoiding an excessively teleological interpretation.[485] In this sense, provisions of international law are to be interpreted in a manner that guarantees their effectiveness and consistency with the aim for which they have been established.[486] It becomes obvious that, unlike abstract and theoretical approaches which can prove misleading or even utopian for the protection of human rights, the effectiveness principle is concerned with attaining tangible objectives.[487] The principle suggests that, even rights which are not explicitly mentioned in the text of the Convention, but which facilitate its 'useful effect', are to be considered as derivable by its textual arrangements.[488] It is said that, the principle of effectiveness also presupposes that the Convention shall predominate in those cases where it comes into conflict with national law, this being required in order to ensure its effectiveness.[489] In any case, the application of the principle is not an easy task, since it involves seeking, within a historical context, the 'useful effect' as envisaged by the drafters of the Convention; a process that can rather unlikely offer a clear image of the then existing priorities.[490] Additionally, measuring the effectiveness of international norms is in itself demanding, as it requires adequate approaches and a multifaceted flow of information.[491] Overall, this principle is considered a highly valuable tool, since it prioritises effectiveness in the application of the Convention and since it succeeds in persuading states to accept the authority of ECHR law without having to go

[481] Dijk/ Hoof: Theory and Practice of the European Convention on Human Rights, p. 95. The Latin term of *trias politica* mainly refers to the theory of separation of powers in a government.
[482] Arold: The Legal Culture of the European Court of Human Rights, p. 34.
Hjalte Rasmussen makes a groundbreaking critique on the judicial activism exercised by the ECJ European Court of Justice in his book: Rasmussen: On Law and Policy in the European Court of Justice, pp. 42-46.
[483] Mahoney: Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights, pp. 57-88.
[484] Forowicz: The Reception of International Law in the European Court of Human Rights, p. 12; Stahl: Schutzpflichten im Völkerrecht, p. 57; Pfeffer: Das Verhältnis von Völkerrecht und Landesrecht, p. 155; Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, pp. 100-101. The effectiveness principle has for example been applied in Kamasinski v. Austria (App. No. 9783/82, 19/12/1989), Kudla v. Poland (App. No. 30210/96, 26/10/2000).
[485] Roukounas: International Law (translated from Greek), pp. 199, 201.
[486] Vangeenberghe/ Schlenzka: Die Menschenrechte in der Praxis des Europarates, p. 3.
[487] Forowicz: The Reception of International Law in the European Court of Human Rights, p. 12; Stahl: Schutzpflichten im Völkerrecht, p. 57.
[488] Dijk/ Hoof: Theory and Practice of the European Convention on Human Rights, p. 74.
[489] Loucaides: The European Convention on Human Rights, p. 2.
[490] Pfeffer: Das Verhältnis von Völkerrecht und Landesrecht, p. 155.
[491] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, p. 162.

through an amendment procedure.[492] In this context, the principle becomes increasingly essential in systems with relatively weak enforcement capacities of which the effectiveness is contested; a fact that also justifies why it gains a more central role on the international than on the national level.[493] It has been expressed that, the effects of the principle extend even further and that, in the event of the absence of the principle, international agreements would be way more vulnerable towards political interests.[494] On the other hand, criticism has been raised with regards to the fact that, by focusing on the useful and practical effects, the application of the principle is reminiscent of the practices applicable in international relations and political science; being therefore not purely legal in nature.[495] Further criticism has highlighted that, the principle of effectiveness, by allowing states an extremely large area of involvement, it suggests a value-free approach of international law, which is incompatible with the efforts of promoting a universality of human rights protection.[496]

2.2.2.5.2. Systemic integration

The *systemic integration* is a model of interpretation which has been called also *dogmatic interpretation.*[497] The essence of this principle is that, an interpretation shall approach the matter at issue as an *integrated* part of the international legal system, which consists of different but, mutually reinforced powers. The systemic integration doctrine is thought to have its roots in Article 31(3) (c) of the Vienna Convention, which suggests that, in the interpretation of a treaty, "any relevant rules of international law applicable in the relations between the parties" are to be taken into account.[498] It is also said that, despite being applied in the field of *public* international law, the doctrine does accept the complementary use of general principles of *private* law as a useful tool in the interpretation process.[499] Despite the fact that, ambiguities in the application of the principle have led to it being used only rarely, this interpretation method is, by some, considered the most prominent among the ones principles expanding the scope of the Convention.[500] It has also been argued that, this interpretation model, together with the *evolutive*[501] interpretation, are perceived by the Court as reflections of international customary law.[502]

2.2.2.5.3. Comparative interpretation

The *comparative* interpretation,[503] as the name reveals, suggests gaining a comparative insight into the various legal systems of Member States, as a means of assisting the interpretation process.[504] It becomes apparent that, the comparative interpretation, as a condition of taking

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[492] Forowicz: The Reception of International Law in the European Court of Human Rights, p. 12.
[493] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, p. 162.
[494] Orakhelashvili: The Interpretation of Acts and Rules in Public International Law, p. 392.
[495] Köchler: The Principles of International Law and Human Rights, p. 11.
[496] Ibid., p. 22.
[497] Stahl: Schutzpflichten im Völkerrecht, p. 63. Stahl refers in this regard to case Bankovic a.o. v. Belgium a.o. (App. No. 52207/99, 12/12/2001) para. 43.
[498] Forowicz: The Reception of International Law in the European Court of Human Rights, p. 13.
[499] Loucaides: The European Convention on Human Rights, p. 11.
[500] Forowicz: The Reception of International Law in the European Court of Human Rights, p. 13.
[501] Of Article 31(3)(b) VCLT.
[502] Buergenthal/ Thürer: Menschenrechte, p. 237.
[503] The comparative interpretation has for example been applied in Opuz v. Turkey (App. No. 33401/02, 9/6/2009); Van der Heijden v. the Netherlands (App. No. 42857/05, 3/4/2012); Konstantin Markin v. Russia (App. No. 30078/06, 7/10/2010).
[504] Loucaides: The European Convention on Human Rights, pp. 11-12.

into account the specifics of each Member State, it has certain similarities with the *margin of appreciation*; whilst, as a condition of unfolding present trends, it relates to the *evolutive* interpretation.[505]

2.2.2.5.4. Objective interpretation

In what regards the doctrine of *objective* interpretation,[506] this reflects the realisation that the nature of human rights treaties is substantially different to that of typical agreements of international law, which traditionally seek to create rights and obligations between states.[507] In this vein, due to their uniqueness, human rights treaties need a commensurate interpretation model, namely one that prioritises the individual and pushes state interests into the background.[508] In other words, the doctrine concerns the need to interpret human rights treaties *objectively*, in the sense of focusing on the protection of the individual as an 'object'.[509]

2.2.2.5.5. Judicial activism

As far as *judicial activism* is concerned,[510] this principle gets different meanings in different parts of the world.[511] Common denominator of its conceptual approaches is the duty of the judiciary to build upon and, to develop existing laws; thus, to move beyond a sterile application of the letter of the law.[512] This doctrine is not only applied by the Court in the interpretative process, but also, in a number of other contexts; such as in the identification of reaction measures and in *Recommendations*.[513] This principle seems to be characterised by elements opposite to those of the *judicial restraint* principle, since the latter rejects the idea of quasi-legislative functions being performed by the judiciary. Hereby, it should be mentioned that, the debate on the interaction between these two principles takes place on a more fertile ground, when connected with the constitutional dialog.[514]

2.2.3. Decisions and judgments

2.2.3.1. Admissibility stage

The judicial procedure starts by examining whether an application meets all admissibility criteria laid down in the Convention and, if criteria are not met, then the case is declared inadmissible. It should be noted that, the vast majority[515] of applications submitted to the Court

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[505] Viljanen: The European Court of Human Rights as a Developer of the General Doctrines of Human Rights Law, p. 95.
[506] The objective interpretation has for example been applied in Brogan a.o. case (App. Nos. 11209/84, 11234/84, 11266/84 and 11386/85, 29/11/1988); Austria v. Italy (App. No. 788/60, 11/1/1961) known as Pfunders case and Ireland v. UK (App. No. 5310/71, 18/1/1978) para. 239.
[507] Stahl: Schutzpflichten im Völkerrecht, pp. 55-56.
[508] Viljanen: The European Court of Human Rights as a Developer of the General Doctrines of Human Rights Law, pp. 79-80.
[509] Stahl: Schutzpflichten im Völkerrecht, pp. 55-56.
[510] The judicial activism principle has for example been applied in Hirst (No. 2) v. UK (App. No. 74025/01, 6/10/2005) and in Greens and M.T v. UK (App. Nos. 60041/08 and 60054/08, 23/11/2010).
[511] Forowicz: The Reception of International Law in the European Court of Human Rights, pp. 13-14.
[512] Ibid.
[513] Popovic: Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights, pp. 361 ff.
[514] Viljanen: The European Court of Human Rights as a Developer of the General Doctrines of Human Rights Law, p. 79.
[515] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 110.

are declared inadmissible because they fail to fulfil one or more of these requirements, a fact that speaks for the lack of the familiarity of applicants,[516] and most gravely, of legal practitioners with the specifics of the ECHR system.[517] In this context, it has been argued that, admissibility quota cannot be increased until the necessary organisational and procedural reforms have been undertaken by Member States.[518] An admissibility decision may be made by a single judge, a three-judge committee, or a seven-judge chamber, while, as previously mentioned, decisions on inadmissibility are not subject to appeal. As a result, only those cases that have been declared admissible[519] will be examined on their merits, however, before proceeding onto the next stage, the Court will encourage parties to negotiate and settle their dispute by means of a *friendly settlement*. In the event of successful negotiations which reach a friendly settlement between the applicant and the respondent government, the Court will strike the application out of its list of cases. The Court may in fact strike an application out at any stage of the proceedings, if it no longer deems it justified to continue the examination.[520]

2.2.3.1. Merits stage

Against this background, if an application has survived both the admissibility test and being struck out at an earlier stage, the Court will eventually proceed and examine it on its *merits*. A judgment on the merits may be delivered by a three-judge committee, a seven-judge chamber or the seventeen-judge Grand Chamber, while, similarly to what applies for the decisions on inadmissibility, judgments on the merits are final. By virtue of not being subject to appeal, it is said that judgments on the merits resemble irrevocable judgments of national courts.[521] Thereby, the possibility to *refer* a judgment of the Chamber to the Grand Chamber when the case raises an issue of general importance and,[522] to request a *revision* of a judgment when decisive information has come into light,[523] are considered as the only 'remedies' against the Court's judgments[524].[525] In the case that the parties fail to take legal action within three months for a referral and six months for a revision, the judgment of the Chamber will, on expiration of the time-limit, become final. It should be mentioned that, apart from being subject to time restrictions, the necessity and relevance of these 'remedies' are also subject to the Court's opinion, which remains with the authority to refuse a fresh consideration of the case.

A more centralised view of the way that judicial formations deal with allocated applications, allows for a better understanding of the distribution of functions and responsibilities within the Sections of the Court and the Chambers formed in those[526]. In this respect, a single-judge formation will decide on the admissibility of individual applications where "such decision can be taken without further examination", namely where it is immediately obvious that the application is 'far-fetched'.[527] Likewise, a three-judge Committee may decide on the

[516] Applicants are *not* obliged to be represented by a *lawyer* at the start of the procedure.
[517] The Court's efforts in this regard include publishing material in several languages.
[518] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 116.
[519] And for which no friendly settlement has been achieved.
[520] Article 37 ECHR.
[521] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 377.
[522] Article 43 ECHR and Rule 73 of the Rules of Court.
[523] Rule 80 of the Rules of Court.
[524] In the contrary, the Grand Chamber's judgments are according to Article 44(1) ECHR always directly final.
[525] However, Protocol No. 15 plans to remove the right of the parties to a case to object to relinquishment of jurisdiction in favour of the Grand Chamber.
[526] The Court has five Sections, which are the administrative entities within which Chambers, namely the judicial formations of the Court are formed.
[527] Article 27(1) ECHR.

admissibility of individual applications where such a decision can be taken easily on the basis of the material submitted.[528] However, three-judge Committees can also deliver, together with the decision on the admissibility, a judgment on the merits, there where the underlying question of the individual application is covered by well-established case-law[529]. A seven-judge Chamber may decide on the admissibility as well as on the merits of individual applications and inter-State complaints[530], whilst it is free to choose between considering admissibility and merits separately or concurrently. In what regards the seventeen-judge Grand Chamber, this deals with both individual and inter-State applications, although only on an exceptional basis[531]. More specifically, the Grand Chamber may hear a case that has been *relinquished* to it by a Chamber,[532] *referred* to it by the parties as an appeal against a judgment of the Chamber[533] or as a request for revision[534], or *referred* to it by the Committee of Ministers on the basis of the refusal of a Member State to abide by a final judgment[535].

The above-mentioned responses of the Court's judicial formations, may come in the form of a *decision*, a *judgment* or an *advisory opinion*. *Decisions* are delivered by a single judge, a Committee or a Chamber, and usually concern the admissibility of an application,[536] or they are striking applications out of the list of the Court's cases[537]; thus, do not rule on the merits. At the same time, as the Rules of Court provide, when the Grand Chamber considers that the request for an advisory opinion does not fall within its field of competence, it shall declare this by means of a reasoned decision[538]. The Rules of Court actually make a generalised use of the word decision[539], including in this the outcome of settling internal issues, such as organisational and administrative, which are not of any interest to the public but in terms of transparency.[540] For example, such decisions may concern the election of the judges[541], interim measures[542], the

[528] Article 28(1)(a) ECHR.
[529] In this case and according to Rule 53(1) of the Rules of the Court, the judgment has to be unanimous.
[530] In this case and according to Article 29 ECHR and Rule 54A of the Rules of Court, the judgment can be made by a majority.
[531] Article 31 ECHR.
[532] Article 30 ECHR. A referral under Rule 73 of the Rules of Court is made by the applicants as an appeal against the Chamber's decision and a request for fresh consideration by the Grand Chamber, whereas a relinquishment under Rule 72 Rules of Court is made by a Chamber and is based on the importance or the originality of the arisen case related to the interpretation of the Convention.
[533] Article 43 ECHR specifies that this is possible only 'in exceptional cases'.
[534] Rule 80 of the Rules of Court.
[535] Article 46(4) ECHR.
[536] Art. 37(1) ECHR and Rule 43(3) of the Rules of Court. In combination with Articles 27, 28 and 29 ECHR. Rules 52A(1), 53(1) and 54(1) of the Rules of Court describe the authority of a single judge, a Committee and a Chamber respectively to decide on declaring the application as inadmissible or on striking it out of the Court's list of cases.
[537] Article 39(3) ECHR and Rule 43(3) of the Rules of Court on striking out because of a friendly settlement been reached and Article 37 ECHR on striking out for various reasons. In relations to friendly settlements it should be mentioned that the parties cannot come to any decision they desire but they shall remain loyal to the values of the ECHR and the Protocols thereto.
[538] Rule 87(2) of the Rules of Court.
[539] The broad sense in which the word 'decision' is used, could cause frustration at first sight, as not all decisions have the characteristics of a typical judicial decision, but some of them rather refer to internal decision-making structures.
[540] Kilian: Die Bindungswirkung der Entscheidungen des EGMR auf die Nationalen Gerichte der Mitgliedsstaaten der EMRK vom 4. November 1950, pp. 93-94.
[541] Rule 2 of the Rules of Court.
[542] Rule 39 of the Rules of Court.

granting of free legal aid[543] as well as investigative measures[544].[545] *Judgments* on the other hand are delivered by a Committee, a Chamber or the Grand Chamber and may relate to the merits of a case or to other special issues of substantial nature. Examples within this category are judgments on preliminary objections of the respondent government against the examination of the case on its merits;[546] judgments on *just satisfaction*;[547] judgments on the interpretation of a judgment, after a request been made from a party;[548] judgments on the interpretation of a judgment, after a referral been made by the Committee of Ministers;[549] judgments on whether a Party has failed to fulfil its obligation to abide by a final judgment to which it was party, after a referral been made by the Committee of Ministers;[550] judgments on the request of a party succeeding a judgment of the Chamber, for cases which raise an issue of general importance[551] and, judgments on a request made by a party for a revision of a judgment, for cases where decisive information was unknown at the time of the original judgment[552]. As to the form and style of the judgments, it has been noted that they follow a "strict pattern", prescribed by Rule 74 of the Rules of Court, while the facts and the reasons in point of law, are, by some, considered as their most essential elements.[553] The Grand Chamber may, as previously mentioned, deliver, at the request of the Committee of Ministers[554], *advisory opinions*[555] concerning the interpretation of the Convention. These opinions, despite not being binding, are as well final and may be subject only to editorial revision. As highlighted before, despite the fact that the Court has had its advisory jurisdiction already since the introduction of Protocol No. 2, it has made use of this competence only twice up to this date.[556]

[543] Rule 100(1) of the Rules of Court.
[544] Rule A1 of the Annex to the Rules of Court.
[545] Some more examples from the Rules of Court are Rule 22(2) on deliberations providing that 'No other person may be admitted except by special decision of the Court', Rule 23A on decisions by tacit agreement regulating that "the President may direct that a draft decision be circulated', Rule 34(3)(d) on the use of languages 'any decision made under the foregoing provisions of this paragraph shall remain (…)', Rule 38A on the examination of matters of procedure providing that 'Questions of procedure requiring a decision by the Chamber shall be considered simultaneously' and Rule 44(1) on the third-party intervention ruling that 'The Registrar shall similarly notify any such Contracting Party of a decision to hold an oral hearing in the case.' In the same way, the word 'decision' is even used when referring to a typical judgment (a one including an examination on the merits) such as in the example of Rule 75(1) on ruling on just satisfaction in which it is stated that 'if a specific claim has been submitted in accordance with Rule 60 and the question is ready for decision'.
[546] The latter Chapter of the pleading would in this case be titled as 'Preliminary objection on (...)' and not as 'Alleged violation of Article (...)', according to the Practice Direction 11(f) on Written Pleadings of the Rules of Court.
[547] Article 41 ECHR and Rule 75 of the Rules of Court.
[548] Rule 79 of the Rules of Court.
[549] Article 46(3) ECHR and Rule 93 of the Rules of Court.
[550] Article 46(4) ECHR and Rule 99 of the Rules of Court.
[551] Article 43 ECHR and Rule 73 Rules of the Court.
[552] Rule 80 of the Rules of Court.
[553] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, pp. 58-59.
[554] As already mentioned, this power shall, after the entry of Protocol No. 16 into force expand also to Member States.
[555] Articles 47, 48 ECHR and Rules 82-90 Rules of Court.
[556] Perrakis: Dimensions of the International Protection of Human Rights (translated from Greek), p. 221; Leach: Taking a Case to the European Court of Human Rights, pp. 12-13.

2.3. Current challenges

2.3.1. Repetitive cases and the pilot-judgment procedure

One of the problems that the Court and hence, the whole ECHR system is currently suffering from, is the so-called *repetitive* or 'clone' cases, which are cases that raise an issue on which the Court has already ruled upon.[557] Repetitive cases should not be confused with *continuing violations*, since the latter refer rather to a kind of persistently ill-mannered application of the Convention by Member States.[558] More specifically, continuing violations are considered prolonged in time with regard to their *actus reus* and *mens rea*.[559] Meanwhile, a continuing violation can be established either as a repeated situation or, as an instant event with long-term results.[560] In fact, the element of continuality depends on a number of parameters and is therefore not easily detectable.[561] Continuing violations have some further particularities in relation to the ratione temporis competence of the Court, as they may also concern cases which have partially occurred before the date of entry into force of the Convention.[562] It should also be noted that, because of their often close relation to the political scene, the Court avoids dealing with continuing violations, in an attempt to prevent tension.[563] On the other hand, repetitive cases refer to cases which, in their substance, have already been dealt with by the Court, in the sense that the same core issues are repeatedly brought before the Court, requiring adjudication. The unfortunate situation of handling the same cases over and over, constitutes an indicator of the failure of Member States to comply with the standards of the Convention as expressed in the case-law of the Court; bringing individuals to raise identical complaints in the context of new violations by the same state.[564] The number of repetitive cases brought before the ECtHR could be reversed by an efficient implementation of *general measures*, such as the changes in legislation, government policy, judicial or administrative practice, which help prevent future violations.[565] As the heavy workload of the Court does not allow the luxury of tolerance, the Court has been also trying to gradually concern itself less with repetitive cases, a move considered vital for its 'survival'.[566] In this vein, as a means of dealing with large groups of identical cases deriving from the same underlying problem, the Court has introduced the so-

[557] Bernhardt: Entwicklungen der Europäischen Menschenrechts-Konvention Jenseits des Vertragstextes, p. 92.
[558] Loucaides: The European Convention on Human Rights, p. 17.
[559] Ibid., p. 19.
[560] Leeb: Die Innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im Entschiedenen Fall, p. 29; Loucaides: The European Convention on Human Rights, p. 18. An example of a continuing violation with present results is the case of disappearances. The concept of 'continuing situation' was first introduced in the De Becker v. Belgium (App. No. 215/56, 27/3/1962). Continuing violations may as well concern inter-State cases. A typical examples of inter-State continuing violations has been the Turkey-Cyprus issue, which is the only time that the Court has found a Member State responsible for continuing violations of so many rights, affecting so many people and over such a long period.
[561] Loucaides: The European Convention on Human Rights, p. 32.
[562] Ibid.
[563] Ibid.
[564] Bates: The Evolution of the European Convention on Human Rights, p. 493.
[565] Lambert-Abdelgawad: The Execution of Judgments of the European Court of Human Rights, p. 65.
[566] Bates: The Evolution of the European Convention on Human Rights, p. 467.

called *pilot-judgment*[567] procedure.[568] However, it should be mentioned that, in doing so, the Court has not aimed at replacing the responsibility of states to adopt general measures.[569] What specifically happens under this procedure, is that the Court 'freezes' the cases that have a repetitive character, for a certain period of time, namely whilst awaiting the respondent government to adopt the general measures necessary to comply with a similar previous judgment.[570] Consequently, the Court is saving on time, work and costs, by providing only the guidelines that shall be followed by the states straightforwardly, rather than delivering a proper judgment.[571] In this regard, it has also been held that, the approach of dividing cases into groups based on their characteristics, departs from the traditional concept of individual protection and therefore, grants the Court an even more constitutional character.[572] In this context, it is maintained that, following the practice of national constitutional courts, in the sense of prioritising cases that have a constitutional interest for the state or for Europe, and of further shaping the admissibility criteria, can prove helpful in achieving a fair balance of the current problems and expectations.[573]

As it becomes obvious, the pilot-judgment procedure differs considerably from the standard procedure, while it has even been argued that it resembles the Court's capacity to issue *Recommendations*.[574] The pilot-judgment procedure is currently applying only on a certain type of cases, namely those concerning so-called *systemic* or *structural* violations and which, therefore, require large-scale reactions. However, even for these cases, it is disputed whether the pilot-judgment procedure is always an appropriate choice, as it remains questionable, whether it can effectively address their often highly complicated background of structural deficiencies.[575] In this respect, it is also said that, systemic problems are often based on inadequate technical settings and therefore, it is more essential to accompany the execution of judgments with targeted actions.[576] At the same time, there are concerns on whether this procedure actually accelerates or further postpones the whole process, since applications remain on a 'standby' mode for unknown time.[577] Moreover, it is highlighted that, the procedure still displays weaknesses in terms of its legal standing; therefore, a generalisation of its application

[567] The pilot-judgment procedure has for the first time been applied in case Broniowski v. Poland (App. No. 31443/96, 22/6/2004) followed by a number of cases such as Hutten-Czapska v. Poland (App. No. 35014/97, 19/6/2006); Olaru a.o. v. the Republic of Moldova (476/07, 22539/05, 17911/08 and 13136/07, 28/7/2009); Suljagic v. Bosnia and Herzegovina (App. No. 27912/02 3/11/2009); Maria Atanasiu a.o. v. Romania (App. No. 30767/05, 12/10/2010); Rumpf v. Germany (App. No. 46344/06, 2/9/2010); Athanasiou a.o. v. Greece (App. No. 50973/08, 21/12/2010); Dimitrov and Hamanov v. Bulgaria (48059/06, 10/5/2011); Kurić a.o. v. Slovenia (App. No. 26828/06, 26/6/2012); Michelioudakis v. Greece (App. No. 54447/10, 3/4/2012); Torreggiani a.o. v. Italy (App. No. 43517/09, 8/1/2013); Gerasimov a.o. v. Russia (App. No. 29920/05, 1/7/2014); Varga a.o. v. Hungary (App. Nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10/3/2015).
[568] Sisilianos: Introduction (translated from Greek), p. 17.
[569] Lambert-Abdelgawad: The Execution of Judgments of the European Court of Human Rights, p. 53.
[570] For more details, see Rule 61(3) of the Rules of Court has been added in 2011 and codified the already since the Borniowski case existing case-law.
[571] Bates: The Evolution of the European Convention on Human Rights, pp. 490-491.
[572] Ibid., p. 491.
[573] Greer: The European Convention on Human Rights, pp. 322-323.
[574] Lambert-Abdelgawad: The Execution of Judgments of the European Court of Human Rights, p. 48.
[575] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, pp. 103-104.
[576] Sobcak: Execution of Judgments, p. 185.
[577] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, pp. 104-105.

shall be avoided and shall only come into play when it constitutes a conditio sine qua non[578].[579] It is alleged that, the diverse practices followed by the Court will most likely be short-lived and that, the Court will soon have to define the kind of role it seeks to play.[580] More specifically, it is argued that, over the next few years, the Court will almost inevitably have to face the dilemma of either providing an *all-encompassing* individual protection to every citizen or, evolving into a pan-European standard-setter that grants only *severity-oriented* constitutional protection.[581]

2.3.2. The Herculean task of dealing with pending cases

Yet another challenge that the Court has to deal with and, which is at the same time closely related to the issue of repetitive cases, is the alarming number of *pending cases*. In theory, the problem of the almost hundred thousand pending cases that the Court is called upon to deal with, has been conceptually approached as a "Herculean task".[582] Central reason for the current situation has undoubtedly been the recognition of the right of individual petition, which has 'opened the tap' to the European protection of human rights, causing a mass influx of cases. The number of incoming applications is at the same time an indicator that, European citizens have eventually become familiar with their 'new' rights and that the Court has ultimately gained a great degree of trust across the European population.[583] On the negative side, another factor contributing to the ever-increasing number of applications has been the ineffective application of the Convention by Member States, a reality that unavoidably leads to new applications and one that shifts all the heavy work from the national level to the Court.[584] Yet another reason why incoming applications have increased immensely, was the accession of Central Eastern European Countries to the Convention after the collapse of the Soviet Union.[585] As expected, accession of new Member States was not trouble-free, and 'double standards' in terms of disparities between old and new Member States have soon been made evident. [586] In this context, it has been stressed that, it would have been beneficial for all sides, to allow Eastern European countries sufficient time to adjust to the new standards, however, steps have been taken in a rather fast manner.[587] The stance that the Court has adopted in this regard and which at that time appeared as the only possible way forward, was to expand its judicial activism and to deal with cases with an even greater openness.[588]

The heavy workload imposed on the Court shall not remain overlooked, as it is widely believed to be truly threatening its functionality.[589] Even the Court itself has warned that the current

[578] Also known as strict cause ratio.
[579] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, pp. 99, 104, 109.
[580] Ibid., pp. 54-55.
[581] Ibid.
[582] Bates: The Evolution of the European Convention on Human Rights, p. 480; Tomuschat: Human Rights, p. 245.
[583] Rozakis: The Jurisprudence of the European Court of Human Rights (translated from Greek), p. 1841; Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 33.
[584] Tomuschat: Human Rights, p. 245.
[585] Arold: The Legal Culture of the European Court of Human Rights, p. 21.
[586] Wildhaber: Recent Criticism of the European Court of Human Rights, p. 166.
[587] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, pp. 29-30.
[588] Wildhaber: Recent Criticism of the European Court of Human Rights, p. 166
[589] Bates: The Evolution of the European Convention on Human Rights, p. 478.

situation entails dangers for its effectiveness.[590] Given the present workload, past practices where judges were discussing cases for hours or even days within a friendly and collegial environment, in an effort to achieve friendly settlements, are long gone.[591] At the same time, while trying to relieve the Court from its current burden of workload, the quality and openness of the procedure should not be jeopardised.[592] In this context, it is argued that, in order to maintain its efficiency and functionality, the Court should move towards adopting a more strategic role, in the sense of providing only general guidance to Member States.[593] As to the right of individual petition and its shortcomings, it has been noted that, the benefits of it are actually so many that, if substituted by another mechanism, it is rather likely that greater complications would arise.[594] One of the first serious attempts to cope with the massive influx of cases has been Protocol No. 8,[595] however, even after the adoption of several subsequent Protocols particularly designed to tackle the backlog of incoming cases, the Court is still today struggling to rationalise its working methods. At the same time, since a couple of years, the Court has been using on a standardised basis a so-called "global formula" of almost identical reasoning, in the interest of the economy of the procedure and in order to strike out cases that fail to disclose any violation of the Convention.[596] As a result of the heavy workload, even when an application has made it to Strasbourg after long national procedures and finds itself finally listed under the huge number of incoming applications, it is not guaranteed that it will be eventually examined. As already mentioned, most applications get rejected at a very early stage, on grounds of their inadmissibility. At the same time, even for cases that actually make it through all obstacles, it takes years for them to be examined, despite the Court having itself stated that, an ideal average time to deal with a submitted application is approximately two years. Some applications are still treated as urgent[597], however, the two-year limit is exceeded on a regular basis, while, when fact-finding commissions come into play, the time needed extends well beyond reasonable expectations.[598]

[590] See Position Paper of the ECtHR on the Proposals for Reform of ECHR and Other Measures, as set out in the Report of CDDH of 4.4.2013, 12.9.2013, CDDH-GDR (2003)024 para. 4.
[591] Lester: The European Court of Human Rights after 50 years, p. 102.
[592] Brummer: Der Europarat, p. 170.
[593] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 403.
[594] Greer: The European Convention on Human Rights, p. 322.
[595] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 131.
[596] Ibid., p. 110. Karper specifically refers to year 2002.
[597] Such as cases where fear of imminent physical harm exists.
[598] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, pp. 36-37. Paraskeva argues that this mostly occurs in the case of systematic violations.

Chapter Two

RECEPTION OF THE ECHR IN THE NATIONAL LEGAL ORDERS

1. Relationship between national and international law

1.1. Theories of monism and dualism

The increase of international law-making bodies interfering with the national legal system and the fact that, decisions are not anymore met in national parliaments, inevitably leads to a gradual decrease in the stricto sensu democratic character of national legislation.[599] Simultaneously, international juridical integration is still not developed to an extent which could allow for a uniform rule allocating the legislative competence between the international and the national legal order.[600] Regarding the relationship between public international law and national law, and the possibilities for an integration of the former into the legal order of the latter, two major theories exist, *monism* and *dualism*, of which none has clearly prevailed.[601] As to the content of the two doctrines, it is agreed upon that, they have by now taken so many different forms and they have developed such a complex substance, that none of them is anymore applying in its pure form.[602] It is also discussed that, both monism and dualism present certain defects; monism, principally, due to its inability to recognise the needs of the society and, dualism due to its failure to explain the application of international law by national organs.[603] International law in turn, does not require from states the adoption of a monistic or a dualistic approach, but rather allows them to choose the conditions they deem appropriate for the harmonious correlation between national and international law.[604] Besides, a state may be formally a monist state but give only little effect to the Convention or, vice versa, be a dualist state but practically guarantee an increased power to the Convention. The fact is that, state practice can have at the same time both monistic and dualistic characteristics, deciding in favour of the one or the other theory on the basis of its needs and interests.[605] As a result, an extended theoretical debate around these theories sounds somewhat outdated, while their interaction on the basis of a 'functional coordination' seems to be gaining ground.[606] In this respect, it has even been argued that, if national and international law do not soon abandon this dichotomy and do not finally arrive at a single all-encompassing theory, both theories will most likely cease to offer a stimulating environment for discussion and may even cease to exist as doctrinal arguments.[607] For some theoreticians, international law is considered as divided into *legitimate* and *less-legitimate* law, whereby the former relates to norms of a purely legal nature for which a monistic approach is appropriate, while the latter rather relates to norms of a more political nature for which a dualistic approach is best suited.[608] In any case, the discussion around the interaction between international and national law requires a precise and balanced consideration, while

[599] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, p. 77.
[600] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 49.
[601] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 36.
[602] Krenzler/ Landwehr: A New Legal Order of International Law, p. 1022.
[603] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 41.
[604] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, p. 120.
[605] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 51.
[606] Ibid., pp. 39, 47.
[607] Krenzler/ Landwehr: A New Legal Order of International Law, p. 1022.
[608] Pfeffer: Das Verhältnis von Völkerrecht und Landesrecht, p. 144.

generalities can by no means cover the complexity of the reality.[609] It should also be highlighted that, regardless of which model a state chooses, it always remains bound by international law, in the sense that national law may not be used as a means of circumventing international law. In this vein, Article 46(1) of the Vienna Convention 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 (…) as invalidating its consent". By the same token, Article 27 VCLT prescribes that a state may not invoke its national provisions in order to justify its failure to comply with the obligations arising under a treaty.[610]

Monism initially emerged as a counter-model of dualism, sharing elements with natural law and with Kant's theory on the 'wholeness' of law.[611] In this sense, monism supports that the relationship of national law with international law shall be approached as one of genus versus species, with international law representing the genus that comprises of the laws of all nations.[612] According to the monistic approach, international and national law belong to a single universal legal order and therefore, for the actual incorporation of international law into the national structures, only an *implementing* or *executing mandate* is needed, i.e. an internal rule determining the specifics of the application of the international rule.[613] Under this theory, the relationship between national and international rules is best illustrated by the shape of a pyramid, whereby international law lies at its peak and national law at its bottom; with the rules of the bottom level drawing their power from the rules above.[614] Under *strict monism*, the primacy of international law remains unquestioned and even the validity of national laws is dependent on international law, whereas under *tempered monism*, international law simply lays down the boundaries for national law.[615] Monism also advocates a more dynamic role for the citizens and their recognition as subjects of international law, thus, as holders of rights and duties under international law.[616] In this regard, it is stressed that, citizens are themselves carriers of rights and responsibilities, however, because they lack a legal personality, they have to delegate certain powers to the state who is only technically facilitating the fulfilment of their entitlements.[617] On the other hand, *reversed monism* considers international law a part of national law and thus, national law as the one at the helm.[618] In a more extreme form and according to the legal doctrine of *outer state*, national law is both independent and predominant and may therefore at any time refrain from the application of international law.[619] In what regards the theory of dualism, it has developed significantly in the late 19th century, at a time when legal positivism was flourishing and, when the 'will of states' was considered the ultimate foundation and the single source of law.[620] Dualism essentially addresses international and

[609] Van Alstine: The Role of Domestic Courts in Treaty Enforcement, p. 564.
[610] Krateros: Problems of Interpretation of Article 28 para. 1 of the Constitution (translated from Greek), p. 102; Roukounas: International Law (translated from Greek), p. 70; Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 36.
[611] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 34.
[612] Dijk/ Hoof: Theory and Practice of the European Convention on Human Rights, p. 17.
[613] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 89.
[614] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), pp. 32-33.
[615] Ibid., p. 37.
[616] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, pp. 122-123, 125.
[617] Ibid., p. 122.
[618] Ibid., p. 96. Emmerich-Fritsche talks of 'umgekehrter Monismus', which has been here freely translated into 'reversed monism'.
[619] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, p. 94. Emmerich-Fritsche talks of 'Außenstaatsrechtslehre', which has been here freely translated into 'doctrine of outer state'.
[620] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), pp. 26-27. They cite TRIEPEL: Völkerrecht und Landesrecht and ANZILOTTI: Il Diritto Internationale Nel Giudizi Interni.

national law as two separate domains and emphasises the need for an 'act of reception' in order for international law to become claimable within the national legal order; an act which may take different forms as will be analysed below.[621] Conversely, *strict dualism* sees a clear distinction between the two legal systems and a capacity of international law in effecting the national level only there where national legislation has explicitly provided for such an option.[622]

1.2. Methods of incorporating international law

1.2.1. Obligation de résultat

The Convention is completely silent on the obligation of Member States to *incorporate* the Convention into their national law; thus, it demonstrates its preference to leave the issue to the discretion of the states.[623] It is also argued that, by doing so, the Convention aimed at providing, on the one hand, the general framework for the protection of human rights while inviting, on the other hand, states to enrich this framework and to develop its full potential.[624] It constitutes common practice for international agreements to avoid explicit references to the means for their effective implementation and, instead, to be concerned about certain results been brought by the Contracting States.[625] This obligation of the states for the achievement of particular outcomes has been called *obligation de résultat*[626].[627] The Court has held that, having regard to the diversities of the circumstances applying in Member States, fixed patterns as to the notions contained in ECHR Articles do not exist and, requirements vary considerably from case to case.[628] However, in no case shall this freedom be translated as an indication that Member States are released from their obligation to abide by the Convention's provisions.[629] Moreover, it is thought as self-evident that, individuals must be given the possibility to raise their complaints before national courts, at least by invoking the national provision which corresponds with the respective ECHR provision.[630] In this context, it is argued that Article 1 ECHR, by regulating that Member States "shall secure" the rights and freedoms laid down in the Convention, recognises these as complete provisions; thus, as able to create actionable claims.[631] It has also been noted that, Articles 1 and 13 ECHR strongly advise the effective application of ECHR

[621] Dijk/ Hoof: Theory and Practice of the European Convention on Human Rights, p. 16.
[622] De Jonge: Australia, p. 26.
[623] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 112.
[624] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 65.
[625] Dijk/ Hoof: Theory and Practice of the European Convention on Human Rights, p. 17; Pfeffer: Das Verhältnis von Völkerrecht und Landesrecht, pp. 147-148.
[626] The obligation of result becomes evident in cases Belilos v. Switzerland (App. No. 10328/83, 29/4/1988) and Scordino v. Italy (App. No. 36813/97, 29/3/2006).
[627] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), p. 47. Iliopoulos-Strangas cites POLAKIEWICZ: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 223; LEUPRECHT: The Execution of Judgments and Decisions, p. 793.
[628] Stahl: Schutzpflichten im Völkerrecht, p. 47. Stahl refers in this regard to case Johnston a.o. v. Ireland (App. No. 9697/82, 18/12/1986). Stahl further underlines that, having regard to the diversity of the practices followed by and the situations applivable in Member States, the notion of respect is not clear-cut.
[629] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 62.
[630] Pfeffer: Das Verhältnis von Völkerrecht und Landesrecht, p. 148.
[631] Roukounas: International Protection of Human Rights (translated from Greek), p. 128.

provisions, or otherwise a violation of the Convention may be established.[632] It is even supported that the two Articles, 1 and 13 ECHR, actually introduce an obligation of incorporation and, that they also suggest an incorporation with a higher normative power.[633] In any case, despite not being officially obliged to do so, all Member States have by now incorporated the Convention in one way or another.[634] It is therefore not exaggerated to state that, the Convention has an evident influence over states, clearly differentiated from what is known from other international treaties.[635] In this perspective and because of the extended integration of the Convention, the discussion around its incorporation seems outdated and not a realistic reflection of the current 'mood' that prevails around Europe.[636] It is even supported that, the fact that all Member States have so far incorporated the Convention indicates that incorporation has, through practice, become an indispensable obligation for newly acceding Member States.[637] However, such an alleged alteration through tacit acceptance cannot be easily accepted, as amendments of legal acts traditionally require the written form and the consent of Member States.[638]

The Court on its part has repeatedly expressed the view that, no specific rules exist as to the ways in which Member States should ensure the implementation of the Convention.[639] Through its case-law,[640] the Court has made clear that, states are not obliged to incorporate the Convention, however, it has also repeatedly affirmed that, incorporation is beneficial for the Convention's effective application.[641] Practice has shown that although not a panacea, incorporation is indeed an essential tool that helps Member States in fulfilling their international obligations.[642] Despite being a first step towards the sound implementation of ECHR standards, incorporation by itself unfortunately does not automatically result in a satisfactory degree of state compliance.[643] In what regards state compliance specifically, this should be approached only broadly, since effectiveness in the application of the Convention at the domestic level is subject to the substantially different capacities, traditions and structures of Member States.[644] As a result of this reality, compliance assessment projects are extremely demanding and only few literature sources actually prove a significant role on the part of formal incorporation in achieving compliance.[645] Simultaneously, incorporation is not a one-way street; abolishing or amending laws that are incompatible with the Convention can also help reach the desired results.[646] More specifically, when a state includes in its national law provisions with an effect

[632] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 66.
[633] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 37-39.
[634] Janis/ Kay/ Bradley: European Human Rights Law, p. 850.
[635] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 41, 409.
[636] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 67, to leei anachronistic discussion; Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 38.
[637] Pfeffer: Das Verhältnis von Völkerrecht und Landesrecht, pp. 149-150.
[638] Ibid., p. 152.
[639] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 37-39.
[640] See cases of James a.o. v. UK (App. No. 8793/79, 21/2/1986) and Lithgow a.o. (App. No. 8793/79, 8/7/1986).
[641] Pfeffer: Das Verhältnis von Völkerrecht und Landesrecht, p. 152.
[642] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 36, 43; Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 67.
[643] Van de Heyning: Fundamental Rights Lost in Complexity, p. 147; Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 43.
[644] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, pp. 104-105.
[645] Greer: The European Convention on Human Rights, p. 322.
[646] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 36-37.

equivalent to that of ECHR provisions, it is considered as compliant with its international commitments, even in the case that it refuses to officially incorporate the Convention.[647] Compliance through legislation is certainly not the quickest path to take, with the legislative procedure being a complex and time-consuming process.[648] Besides, legislative measures are regularly weighted it terms of their political cost, a fact that may hinder their adoption.[649] In this context, adapting national policies and national practice to the European standards is in itself able to, under certain conditions, prove sufficient in order to achieve the objectives set by the ECHR system.[650]

1.2.2. Formal incorporation process and the trend towards simplified techniques

In previous decades, there has been a change in the way in which international law enters into force both at national and international level, with an obvious trend towards the abolition of the process of ratification in favour of more simplified procedures.[651] In what regards specifically the ratification as an act of *international* law, this is frequently skipped due to reasons relating to the speed of the procedure.[652] This actually occurs in practice, despite the fact that, the ICJ has emphasised that *international ratification* is an act of fundamental importance for establishing commitment among Member States.[653] It seems that ratification has been slowly substituted by alternative means, which have the same legal effect, in the sense that they incorporate the consent of the state to be bound by a treaty.[654] Such means, which have actually been long accepted in international law are *accession*,[655] *acceptance*,[656] *approval*,[657] *signature*,[658] *exchange of instruments*,[659] but also, *any other means*[660] agreed so by the state.[661] In what regards the *national* ratification, this has been traditionally used in order for a treaty to enter into force on the national level. However, this process has either phased out through its lack of use or, there where it has still been retained, it has adopted a different meaning.[662] Where national ratification still applies as an official procedure, it mainly has the effect of determining the ranking of the treaty in the national hierarchy of laws; therefore, it becomes irrelevant and purposeless when the Constitution already contains a general provision for the hierarchical classification of treaties.[663] At the same time, it is also supported that, the domestic application of international treaties usually appears non-problematic in cases where the national legislator has proceeded with their incorporation by means of a ratification statute.[664] Moreover, one should not ignore the fact that, the incorporation of international law by national ratification

[647] Ibid., p. 38.
[648] Ibid., p. 406.
[649] Ibid., p. 39.
[650] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 58.
[651] Roukounas: International Law (translated from Greek), p. 161.
[652] Ibid., p. 131.
[653] Ibid. Roukounas refers in this regard to ICJ case Abatielou (1953).
[654] Ibid.
[655] Article 15 VCLT.
[656] Article 14 VCLT.
[657] Article 14 VCLT.
[658] Article 12 VCLT.
[659] Article 13 VCLT.
[660] Article 11 VCLT.
[661] Roukounas: International Law (translated from Greek), p. 131.
[662] Ibid., p. 161.
[663] Ibid., p. 163.
[664] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 199.

constitutes a reflection of the overall state policy in international relations and as such, it cannot be considered a purely internal matter.[665] There are cases where national ratification has been completely ousted and competent state bodies proceed from international ratification directly to *publication* in the Government Gazette.[666] As to the requirement of publication, there is an almost uniform practice of the states to regulate the obligation of publication either directly in the Constitution, or, indirectly in national law.[667] The justification basis behind the act of publication remains the same across states, namely their obligation to inform citizens and to respect the principle of transparency and open action.[668] It is observed that, national courts make the application of international treaties increasingly dependent on their publication, even more when these are invoked against individuals.[669] Nonetheless, the overall trend of simplification has affected publication too, in the sense that, in certain cases, it is completely eliminated.[670]

The reasons for the establishment of the process of national ratification of treaties by legislative act, are mainly historical, stemming, for the majority of European states, from the 19th century.[671] Back then, the international competence of the executive power was almost absolute and, national ratification was used as a means to guarantee the control of the legislature over international acts.[672] In this context, national ratification is, not mistakenly, considered an outcome of dualism.[673] Nowadays, there exist mainly three schemes of national ratification, which are categorised on the basis of how legislative competence is being distributed. These comprise the mixed competence of legislature and executive, the exclusive competence of the legislature, and the exclusive competence of the executive.[674] Whilst the *exclusive* competence designates that the respective branch of government is authorised to negotiate and conclude agreements on its own, *shared* competence can be exercised in different ways.[675] In shared competence, either is the legislature involved already from the embryonic stage when the decision to be bound is met, or, it becomes only later involved, by providing its consent for the incorporation of the treaty.[676] In this last case, the government may submit to the parliament, for its consent, either *some* very important agreements or *all* of the agreements that it seeks to conclude.[677] There where the Parliament participates in the national ratification, the treaty is not considered as incorporated into national law unless the Parliament offers its approval, however, even in the case that the Parliament blocks incorporation, the treaty will still bind the country on the international level.[678] It should be mentioned that, the national ratification of a treaty through parliamentary process is irrelevant to the date of its entry into force on the international level, since the two events may precede or succeed each other.[679] In this regard, if a treaty is firstly ratified by statute domestically but still has not entered into force internationally, its national application will be delayed until the treaty enters into force on the international level.[680]

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[665] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 173.
[666] Roukounas: International Law (translated from Greek), p. 161.
[667] Ibid., pp. 168-169.
[668] Ibid., p. 169.
[669] Ibid.
[670] Ibid., p. 161.
[671] Ibid. Roukounas refers to such exceptions having been Belgium, Greece, the Kingdom of Sardinia and later Italy and France.
[672] Ibid.
[673] Ibid.
[674] Ibid., pp. 132-133.
[675] Ibid., p. 133.
[676] Cassese: International Law, pp. 223-224.
[677] Roukounas: International Law (translated from Greek), p. 133.
[678] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), pp. 169-174.
[679] Ibid., p. 174.
[680] Ibid., p. 194.

As a general rule, it applies that, regardless of the method of incorporation that applies on the national level, the launch of the internal application cannot begin if the treaty has yet not come into force internationally.[681] Vice versa, if a treaty has already entered into force on the international level, the state becomes bound by the treaty on the date that it has finally incorporated it by national means.[682] The issue of the date of entry into force of treaties has been subject of extended scientific discussion, and it has occurred, mainly due to negligence, that a treaty has been ratified and has come into force on the national level without having been first ratified on an international level; also, that a treaty has practically come into force domestically without having been ratified by domestic means.[683]

There are different theories as to in what way exactly the incorporation of international law into the domestic legal system occurs, and which form what is called the *methods of incorporation*. In this context, generalisations may prove pointless formalities, while critical are the specific needs and the distinctive particularities of each legal system.[684] Besides, one should remain mindful of the fact that, international laws carry with them their own application scope and, they set their own standards.[685] Of the most widely known methods for incorporating an international treaty are *transformation*, *adoption* and *execution*.[686] In what regards the theory of *transformation*, it is also named *automatic standing incorporation,* since the international treaty is, upon its national ratification, considered as automatically transposed into national law.[687] This model of incorporation will usually be prescribed by the Constitution or by national legislation, while the relevant national provision will typically provide simultaneously for the normative value and the rank of the transposed norms within the domestic legal order.[688] It is even argued that, a reference of the internal rule to the domestic effect which the transformed norms will enjoy is actually necessary, or otherwise, their scope will be subsequently determined by the practice of national authorities.[689] According to this theory, the incorporation of international law occurs through a *transformation act*, which creates an internal rule identical to the international one.[690] In particular, it is supported that, through transformation, a new rule is being created, while the old rule loses its international quality and its previous context, being from thereupon interpreted similarly to domestic law.[691] On the other hand, it is also maintained that, by virtue of its transformation, the old rule leads a double life, in the sense that it may continue to be in force on the national level even after it has ceased to apply on the international level.[692] As a result, the transformation theory seems to be retaining, at least artificially, a distinction between international and national law.[693] At the same time, it becomes obvious that, by departing from its very nature, international law is running the risk of deterioration.[694] More specifically, approaching incorporated international law as national law and interpreting it with

[681] Ernst: Die Haltung Deutschlands und Frankreichs zur EMRK unter Besonderer Berücksichtigung der Anwendung des Art. 6 Abs. 3 in den beiden Staaten, p. 146.
[682] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 195.
[683] Roukounas: International Law (translated from Greek), pp. 166-167.
[684] Van Alstine: The Role of Domestic Courts in Treaty Enforcement, p. 566.
[685] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 51.
[686] Roukounas: International Law (translated from Greek), p. 163; Paulus: Germany, p. 217.
[687] Cassese: International Law, p. 220.
[688] Ibid.
[689] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, pp. 120, 124.
[690] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 89.
[691] Roukounas: International Law (translated from Greek), p. 163.
[692] Ibid.
[693] Paulus: Germany, p. 217.
[694] Roukounas: International Law (translated from Greek), p. 163.

instruments of national law, has been regarded as misguided.[695] It is also stressed that, since international law is neither created, nor amended or annulled by international law, national ratification is only a 'legal mantle' which the treaty uses in order to be applied domestically and, by no means does it render a treaty part of the national law.[696] It has however been contended that, the transformation method is in fact an invented trick of dualism that lacks a sound legal basis, since laws must traditionally follow the process of their *adoption* in order to become valid.[697] According to the theory of *adoption*, or in other words of the *legislative ad hoc incorporation*, apart from ratification, further legislative action is needed, in order to enable the domestic implementation of international law.[698] The theory of adoption suggests that the state must find ways to allow to the domestic law to operate in parallel to the international obligations of the state.[699] In this regard, the state is expected to introduce explicit or implicit rules which regulate the adaptation of internal law to international law; in this sense, the theory of adoption constitutes a product of dualism.[700] The 'enabling' legislation may either list in detail all the norms or, simply order their application.[701] In this latter case which simply authorises implementation, the procedure essentially resembles the automatic incorporation through transformation.[702] In this context, it has been supported that, transformation is a method suitable for norms which are *self-executing*, whereas adoption works better for norms which lack such a character.[703] At the same time, it is argued that, integration through adoption should nowadays be rejected on the basis of its radical character, which disregards differences between national and international law in terms of their validation processes.[704] In any case, a decision between transformation and adoption is rendered meaningless in the practical sense, since the answer as to whether treaty provisions will be regarded as *directly applicable* or not, depends solely on the way in which they will eventually be interpreted and applied by national courts.[705] In what regards the *execution* theory, this seems to be establishing a direct link between domestic and international law.[706] The theory of execution actually suggests that each state shall freely determine the ways by which international law is to be integrated into the national legal order, as well as the hierarchy it will enjoy; whereby, a specific act of domestic law will usually be required.[707] This specific act, however, does not alter the cause of the production of the international rule, its addressees or its systematic relationship in the context of international law, nor does it create a new substantive law.[708] The execution theory also allows for a more consistent interpretation of national law with international law, by accepting the use of interpretative rules which have been established only after the incorporation of the treaty.[709] Whilst, the transformation theory permits only the use of rules which have been valid already at the time of the incorporation of the treaty.[710] It is furthermore stressed that, the theory of

[695] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 131.
[696] Ibid., p. 187.
[697] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 42.
[698] Cassese: International Law, p. 221.
[699] Roukounas: International Law (translated from Greek), p. 163.
[700] Ibid.
[701] Cassese: International Law, p. 221.
[702] Ibid.
[703] Ibid., pp. 221-222.
[704] Paulus: Germany, p. 217.
[705] Ibid., p. 222.
[706] Kleeberger: Die Stellung der Rechte der Europäischen Menschenrechtskonvention in der Rechtsordnung der Bundesrepublik Deutschland, p. 84.
[707] Roukounas: International Law (translated from Greek), p. 163.
[708] Ibid.
[709] Kleeberger: Die Stellung der Rechte der Europäischen Menschenrechtskonvention in der Rechtsordnung der Bundesrepublik Deutschland, p. 84.
[710] Ibid.

execution is, as opposed to the transformation theory, the most appropriate one in defending the precedence of the Convention, since it supports that, there where national law does not ensure a certain ranking for international law, it is to be assumed that, the Convention itself contains a claim of priority.[711] The execution act ultimately ensures the full incorporation of international law, because it has the advantage of covering a wide range of incorporation practices; even those, according to which, integration occurs differently than by means of national ratification.[712] In this vein, it can be argued that, the execution theory seems to be overcoming the dilemma of monism and dualism.[713]

1.3. Ranking of international law in the hierarchy of laws

1.3.1. The internal effect of treaties at the discretion of states

It is widely accepted that, an international treaty, regardless of its possibly broad recognition by Member States, lacks the power to determine its rank within the national legal order.[714] Furthermore, due to the fact that no relevant generally applicable rule has been developed in international law, it is left upon the Member States to determine the position of international law in the national hierarchy of laws.[715] In this context, it is emphasised that, in the absence of a relevant regulatory basis in national law, the position that the ECHR will eventually enjoy within the national legal order cannot guarantee a regulatory content wider than the one it already has on an international level.[716] At the same time, it is expressed that, the incorporation of the Convention in the domestic legal order with superiority has become a de facto obligation for Member States.[717] In practice, it can be observed that, states grant different internal effect to international law, depending on a number of factors and, on their special interests.[718] In this manner, this approach differs from *monism*, which advocates the precedence of international law over national law and, from *strict monism*, which supports that international law is even able to determine its position within the national legal order.[719] On the part of international courts, these have always embraced the supremacy of international law; though, they have not been openly supportive of the notion of monism.[720] It should be made clear that, in any case, the *typical power* granted to the ECHR by each Member State, is not decisive for the degree of respect that the Convention will ultimately enjoy domestically and for the level of state compliance with ECHR standards.[721] Hereby, the effectiveness of the Convention is mostly determined by the willingness of national authorities to comply satisfactorily with the ideals of the European human rights protection system and with the Court's case-law.[722] Practice has furthermore shown that, critical for the overall value that the Convention elicits within the

[711] Ibid., p. 83.
[712] Roukounas: International Law (translated from Greek), p. 163.
[713] Ibid.
[714] Pfeffer: Das Verhältnis von Völkerrecht und Landesrecht, p. 103.
[715] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, p. 126.
[716] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), p. 59.
[717] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 43.
[718] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 113.
[719] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, pp. 128-129.
[720] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 41.
[721] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 169; Van de Heyning: Fundamental Rights Lost in Complexity, p. 151.
[722] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 169.

national borders, is the meaning attributed to its provisions in the process of the interpretation of the national Constitution.[723] Nevertheless, the element of typical power, due to its capacity as a systematic criterion of classification, is being discussed more extensively than the notion of commitment and that of willingness, which cannot represent a stable point of reference.[724]

1.3.2. Classification of international law in the pyramid of rules: (supra-) legislative and (supra-) constitutional levels

Beginning at the top and descending towards the bottom of the pyramid of hierarchy of laws, international law may lie above the Constitution or have the same classification with it, it may have more or the same power with national legislation and, it may even find itself ranking lower than national law. Despite the internal position of the Convention depending on the choice of the state, it is claimed that the primacy of the Convention is actually reinforced by EU law and more specifically, by Article 6(2) TEU and, by the references to the Convention in ECJ case-law.[725] In this context, it is stressed that Article 6(2) suggests approaching ECHR guarantees as *general principles* of Community law; thus, suggests recognising their precedence.[726] On the contrary, it is argued that the general priority of the Convention cannot result from Community law, as long as the Convention is not formally part of Community law and since the European Union has not yet acceded to the Convention.[727] In practice, it does not occur often that the ECHR is granted *supra-constitutional* status; nor does it happen that it acquires simply the status of an administrative act.[728] Austria has so far been the only state to adopt a far-reaching approach, by awarding constitutional status to the ECHR; consequently, in the case of conflict between the ECHR and the Austrian Constitution, the rule *lex posterior derogat legi priori* applies.[729] Granting constitutional status to the Convention further indicates that, in cases where the Court has found a violation of the Convention, this violation is to be treated similarly to a breach of constitutional law.[730] The constitutional rank also presupposes that citizens are able to claim their ECHR rights before the Constitutional Court, where such a court exists, or otherwise, to enjoy, in relation to their ECHR rights, a level of protection equivalent to constitutional protection.[731] More specifically, in the absence of a regulated procedure of constitutional appeal, national courts can still uphold their commitment to human rights, for instance when reviewing the constitutionality of laws.[732] In fact, even where the official hierarchical rank does not prescribe constitutional power to the Convention, national courts often make use of other options for 'protecting' the Convention as a *quasi-constitutional* norm.[733] On the other hand, in the case that the Convention ranks lower than the Constitution but still higher than national law, this means that, in case of a collision with national legislation,

[723] Chortatos: Introduction to Contemporary International Law and the Problem of Relationship between International and Internal Law (translated from Greek), p. 150.
[724] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 169.
[725] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 183; Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, p. 45.
[726] Ibid.
[727] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, p. 46.
[728] Van de Heyning: Fundamental Rights Lost in Complexity, p. 149.
[729] Janis/ Kay/ Bradley: European Human Rights Law, p. 850; Van de Heyning: Fundamental Rights Lost in Complexity, p. 149.
[730] Van de Heyning: Fundamental Rights Lost in Complexity, p. 173.
[731] Ibid., p. 152.
[732] Ibid., p. 153.
[733] Ibid., p. 207.

the Convention shall prevail over contrary national provisions. The *supra-legislative* power of the Convention simultaneously ensures that the Convention remains unaffected by political interests, in the sense that it cannot be substituted by subsequent national legislation. It can be observed that, countries from Central and Eastern Europe, coming from the collapse of the former socialist regime, tend to recognise a superior legal force to international treaties; probably an expression of their determination to fully integrate the demands of the international society.[734] It is discussed that the incorporation of the ECHR with a formal validity higher than that of national law is actually also encouraged by Article 13 ECHR, which prescribes the existence of an effective national remedy and, which would otherwise be deprived of any scope.[735] However, in most dualistic systems, international law is awarded the same normative value as national law.[736] It becomes obvious that, in the case that the Convention has the same power as national legislation, there is a risk of being superseded by subsequent national law, by virtue of application of the *lex posterior* principle.[737] However, here again, national courts can 'save' the Convention from being ousted, by recognising the application of the principle of *lex specialis derogat legi generali*; although the approach of the Convention as lex specialis has raised certain doctrinaire concerns.[738]

It becomes apparent that, the question of the hierarchical classification of the Convention takes on a special meaning when it comes to potential conflicts between the Convention and national law. It should be noted that, in order to affirm the existence of a *real* conflict, the Convention and the national law at issue have to be in clear opposition to each other; but even there where such a conflict is indeed established, cases where the two cannot be harmonised by means of interpretation are rare.[739] For instance, the ECHR is *not* considered as being in conflict with national law, when the latter results to a wider scope of protection. In fact, Article 53 ECHR explicitly provides that, the Convention shall not be interpreted in a way that limits the rights and freedoms ensured under the laws of a Member State. As a result, when national law provides a wider protection and the national judge justifies his position based only on national provisions, thus, without referring to the Convention, we are talking of a 'covert fulfilment' of the Convention.[740] On the other hand, in what regards restrictions of ECHR rights and freedoms, when these are imposed by the Convention itself, they are usually accompanied by guidelines for their application and by a justification as to their proportionality and necessity.[741] The situation is however different in the case that limits on the scope of the Convention are set by national law, for which it is accepted that, the ECHR allows national authorities an ample scope for action, by setting a *minimum standard* of protection below which Member States shall not fall.[742] In this respect, the Court calls on all national authorities to not proceed with restrictions

[734] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 170.
[735] Ibid.
[736] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, p. 127.
[737] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 69.
[738] Ibid.; Ratti: Negation in Legislation, p. 149. Ratti further explains that, when the two principles collide in a civil law legal system (as opposed to common law systems) the principle of lex specialis predominates, because of application of the principle of conservation of normative texts, according to which legislative texts should be preserved as long as possible.
[739] Paulus: Germany, pp. 111, 210.
[740] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, pp. 58-59.
[741] Matthias/ Ktistakis/ Stavriti/ Stefanaki: The Protection of Human Rights in Europe (translated from Greek), pp. 29, 31.
[742] Blackburn/ Polakiewicz: Fundamental Rights in Europe, p. 81. See cases Longin v. Croatia (App. No. 49268/10, 6/11/2012) paras. 52-54; Gäfgen v. Germany (App. No. 22978/05, 3/6/2010) para. 107 and Stanev v. Bulgaria (App. No. 36760/06, 17/1/2012) paras. 206-213.

of the standards enshrined in the Convention and stresses that, the ECHR constitutes the lowest acceptable threshold of protection.[743] It is in fact part of the responsibility of the Court to, not only safeguard the sound application of the Convention, but also, to examine whether the establishment of a restriction has been lawful and in accordance with ECHR values.[744] This function of the Court takes on a special meaning with reference to Article 6 ECHR and with the fundamental philosophy of the Court, which requires that, the right of access to a court must be a *real* one and not a *formal* one; in the sense that, similarly to the intolerance towards its *formal* restrictions, *practical* restrictions can be hardly tolerated.[745] An example of this can be seen in the *Delcourt* case,[746] where the Court has held that "the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and the purpose of that provision".[747] In this context, when the Convention offers a scope of protection wider than the corresponding national provisions, it takes on a 'supplementary protective role'.[748] This role becomes particularly relevant in the case of procedural rights, such as of Article 6(3) ECHR, since these enjoy special prominence under the Convention scheme, in the sense that they appear in a more detailed manner than they do in most national legal orders.[749] What has been observed in practice is that, states have greater difficulties complying with the level of protection of procedural rights than upholding civil liberties, a trend reflected also in the number of related ECtHR judgments.[750] In this regard, it is advised that states shall comprehend that, basis of all procedural guarantees is the *principle of effective legal protection*, which stems from the European constitutional principle of the rule of law.[751] It is specifically stressed that, *procedural* rules rather constitute a system organised so as to facilitate legal protection and as such, they shall not be interpreted in a way which circumvents the examination of the *substantive* issue.[752] It has also been maintained that, procedural provisions shall not seek their independent application, but shall rather, remain subordinate to the purpose of the trial, this being the diagnosis of the substance of a case.[753] In the context of the above observations, restrictions of the scope of the Convention are allowed only exceptionally and only when based on legitimate, proportionate and duly justified grounds.[754] Lastly, not all rights can be subject to restrictions; *absolute rights* protecting

[743] Karelos: The Influence of the Case-law of the European Court of Human Rights on Greek Jurisprudence, p. 1938.
[744] Matthias/ Ktistakis/ Stavriti/ Stefanaki: The Protection of Human Rights in Europe (translated from Greek), p. 29.
[745] Karelos: The Influence of the Case-law of the European Court of Human Rights on Greek Jurisprudence, p. 1935. Karelos refers to the example of restrictions imposed to Article 6 ECHR and which may be considered in conformity only if they demonstrably serve a legitimate purpose, such as the legal certainty or the sound administration of justice and if there exists a reasonable relationship of proportionality between restriction imposed and purpose served.
[746] Delcourt v. Belgium (App. No. 2689/65, 19/1/1970).
[747] Dijk/ Hoof: Theory and Practice of the European Convention on Human Rights, p. 391.
[748] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 97. Mellech talks of 'ergänzende Schutzfunktion' which has been freely translated into 'supplementary protective role'.
[749] Ibid., pp. 59-60.
[750] Pianka: Konkurrenzen und Konflikte beim Rechtsschutz im Europäischen Mehrebenensystem, p. 188. Pianka talks of 'Freiheitsrechte', which has been trabslated here into 'civil liberties'.
[751] Ibid.
[752] Rantos: The Impact of the Case-law of the European Court of Human Rights on the Right to Legal Protection in the Case-law of the Greek Courts, p. 1845.
[753] Ibid.
[754] Kloth: Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights, p. 20.

principles inherently connected with the value of human life and with the core of the democratic society shall be respected in all circumstances.[755]

2. Binding effect of the Convention

2.1. The symbiotic relationship between positivism and other legal sources

2.1.1. Subsidiary sources of international law

In regards to the notion of the Convention's binding nature, it is, one the one hand, supported that, the freedom of states is so essential that only what is expressly laid down in text can be conceived as valid; furthermore that, anything states have not explicitly forbidden, can be thought as tolerable.[756] On the other hand, it is expressed that, although it remains essential for all rules to be somehow linked to existing written law in order for their legal positiveness to be recognised, law, however, does not necessarily need to be written in order to be valid.[757] Contrary to the view of positivists, which supports that justice is limited only to the application of written law, it can be observed in the field of international law that, states tend to recognise the role of complementary legal sources in settling disputes.[758] In the case of the Convention specifically, such *subsidiary sources* of international law can help determine its effects, however, their exact impact is difficult to define. Subsidiary sources of international law are, according to Article 38(1) (d) of the ICJ Statute, international judicial decisions and the teachings of prominent publicists.[759] It should be noted in this regard that, differently to what applies for the undoubtedly influential role of jurisprudence, the influence of scientific engagement on the formation of international law is considered as somewhat overestimated.[760] *Resolutions* and *Recommendations* have in this context also a significant role, in that they reveal the current tendencies in international law, however, they never move beyond the treaty's material content; furthermore, their issuance is so frequent that it inevitably reduces their importance.[761] Additionally, the *principle of leniency* or *equity*, found in classical writings of international law of as early as the 16th century, is considered to be playing a corrective role when the *general rules of international law* arrive at the stage of personalisation.[762] Despite not being referred to as a source of international law in the Statute of the ICJ, equity does form part of the duty of the judge to always serve the idea of justice.[763] It is suggested that, *repetition* could also operate as an auxiliary tool in determining the direction in which the text of a treaty moves, since the repetitive adoption of a certain position by a majority of states is an indicator of a positive and definite intention of the international community.[764] At the same time, the

[755] Matthias/ Ktistakis/ Stavriti/ Stefanaki: The Protection of Human Rights in Europe (translated from Greek), pp. 29, 31. As absolute rights the authors mention Articles 3 (capital punishment and torture); Article 4(1) (slavery); Article 6 (sound application of justice) and Article 7(nullum crimen nulla poena sine lege).
[756] Lauterpacht: The Function of Law in the International Community, p. 85.
[757] Kunig: Das Rechtsstaatsprinzip, p. 84.
[758] Lauterpacht: The Function of Law in the International Community, pp. 66-67.
[759] Roukounas: International Law (translated from Greek), pp. 247-248.
[760] Ibid., p. 248.
[761] Ibid., p. 256.
[762] Ibid., p. 268. Equity has often been related to natural law, while it differs from the equity as known in the Anglo-Saxon Law.
[763] Ibid., p. 269.
[764] Ibid., p. 257.

application of repetition shall not be confused with the creation of customary law, since, in the case of mere repetition, the opinio juris element is missing.[765]

2.1.2. Primary sources of international law

Apart from the *subsidiary* legal sources there also exist *primary* legal sources which assist the theoretical efforts of establishing a legitimising basis for the concept of a binding effect of the Convention; the *general principles of international law.* The general principles have been first applied by the PCIJ, the predecessor of the ICJ, although, with a meaning different than the one they currently encompass.[766] Especially after the Second World War, a broad consensus has emerged, advocating that, certain universal principles are to be respected by all states, regardless of whether a state has become party to a relevant agreement containing these principles.[767] In this context, Article 38(1) (c) of the ICJ Statute, has explicitly included general principles of law in the declaratory list of the sources of international law. It should be mentioned that, the sources of international law in Article 38, were principally designed to be used only by the ICJ, but have soon become widely acknowledged; resulting in their utilisation by any court when dealing with international law.[768] In this respect, it is stressed that, the general principles of international law reflect a common denominator of both the national and the international legal system.[769] An alternative approach underlines that, it is the *repetition* and the *continuation* of the application of the principles of international law in international disputes that enriches them with legal power.[770] At a closer look, under the category of general principles of international law, fall those rules which apply for the purposes of resolving international disputes, regardless of whether they have the written form of a treaty or the characteristics of a custom. It is in fact underlined that, general principles constitute merely a manifestation of already existing norms of international statutory and customary law and that, therefore, they need no further formalities in order to be applied.[771] Their application however presupposes the non-existence of a relevant applicable treaty or custom, a fact that is thought to be revealing their role as an ancillary tool for the avoidance of the denial of justice.[772] On the other hand, it is argued that, these principles can be applied together with both written and customary law, however, in case of conflict, they would not prevail, due to the doctrine of *lex specialis*.[773] At the same time, the notion that international conventions on human rights constitute leges speciales which exclude the application of *general international law* is rejected.[774] Such arguments highpoint that, the relationship between the two categories is so complex and multifaceted, that renders the lex specialis doctrine inappropriate for the illumination of their interplay.[775] In fact, general international law and international human rights law are very closely related, with the former actively contributing to the realisation of the latter.[776] In any

[765] Ibid.
[766] Chortatos: Introduction to Contemporary International Law and the Problem of Relationship between International and Internal Law (translated from Greek), p. 103.
[767] Sandkühler: Menschenwürde, Menschenrechte und die Europäische Menschenrechtskonvention, p. 30.
[768] Schiedermair: Die Würde des Patienten, p. 74.
[769] Roukounas: International Law (translated from Greek), p. 244.
[770] Nádrai: Rechtsstaatlichkeit als Internationales Gerechtigkeitsprinzip, p. 29.
[771] Chortatos: Introduction to Contemporary International Law and the Problem of Relationship between International and Internal Law (translated from Greek), p. 102.
[772] Roukounas: International Law (translated from Greek), p. 243.
[773] Chortatos: Introduction to Contemporary International Law and the Problem of Relationship between International and Internal Law (translated from Greek), p. 102.
[774] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 60.
[775] Ibid.
[776] Ibid.

case, general principles, despite being recognised by the ICJ Statute, alongside treaty and custom, as a *primary* source of international law, their role often remains invisible, with courts noticeably avoiding to directly refer to them.[777]

2.1.2.1. The 'gap-filling' role of general principles of international law

General principles of international law play a vital role when it comes to filling legal gaps that result from the silence or the ambiguities of law.[778] Nevertheless, it can be observed that, the encounter of gaps has been diminishing, due to the ever-expanding scope of statutory and customary law.[779] The problem of the silence of law has concerned philosophy already in the 17th century, with Hobbes expressing the view that,[780] wherever the state has not provided for a relevant regulation, individuals shall enjoy liberties at their own discretion.[781] Although there still exists no consent in legal theory about the delineation of legal gaps, it is widely accepted that, gaps may result from the complete *absence* of a rule, the lack of a *definite* rule or even the *vagueness* of a rule that leads to flaws in its legal basis. Furthermore, a gap can be intended, meaning that a certain aspect has deliberately been left untouched, or, unintended, in the sense that the legislator has left unregulated an issue which required regulation. Most commonly, where legal gaps exist, it is alleged that, the parties did not wish to cover further aspects with their agreement; either so as to keep the scope restricted or so as to leave a large margin of specialisation to the interpreter.[782] In what regards unintentional gaps, it should be noted that, deficiencies within the legal rules, are a characteristic which concerns both the national and the international legal order; considered as unavoidable consequences of the very nature of law.[783] Gaps are in fact present in all fields of science, with their existence being permitted in the legal field, on the basis of trusting the overall comprehensiveness and the exhaustiveness of the legal system in providing an answer to almost any arising problem.[784] Furthermore, the international legal system forms no exception to the rule that, legal systems are comprising not only of legal rules, but also of a variety of elements, necessary to cover the maximum of practical cases.[785] Therefore, unregulated aspects are not considered as indicative of the ineffectiveness of law, but rather, as a part of the wholeness of the legal system.[786] A slightly overstated opinion takes the view that, even in the hypothetical situation of a legal system being based only on a few abstract rules, that system would still be complete, as long as the people under its rule would be obliged to refer to a final judge.[787] At the same time, supporting the notion that legal gaps do *not* exist and, coming to unforced conclusions about the completeness of law, could lead to an unfortunate reversal in the development of law.[788] It is observed that, gaps are actually more likely to exist in international law, which constitutes a set of rules that is the result of mutual compromises between different states; a set demonstrating a complex architecture that has been described as a silent 'agreement to disagree'.[789] Additionally, international law deliberately

[777] Klamberg: Evidence in International Criminal Trials, p. 488.
[778] Ibid.
[779] Ibid.
[780] In his book Leviathan, Chapter 21(on liberty), para. 21.18.
[781] Silence of law shall be distinguished from the situation of law falling silent, the so-called maxim of inter arma enim silent leges, which mainly occurs in times of war.
[782] Orakhelashvili: The Interpretation of Acts and Rules in Public International Law, p. 22.
[783] Lauterpacht: The Function of Law in the International Community, p. 406.
[784] Falcón y Tella: Equity and Law, p. 101.
[785] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 22.
[786] Orakhelashvili: The Interpretation of Acts and Rules in Public International Law, p. 13.
[787] Lauterpacht: The Function of Law in the International Community, p. 64.
[788] Ibid., p. 87.
[789] Ibid., p. 72.

avoids to touch upon certain issues which are considered vital for the states; not so much because of the need for their decentralised regulation, but rather, due to the disinclination of states to allow international law to move beyond the traditional boundaries.[790] In any case, despite the partial incompleteness of international law in comparison to national law, the predominant legal principle behind it, upholds that there are legitimate expectations for lawful conduct in the international arena too.[791] On a European scale, European law is not merely a collection of legal norms, but rather represents a convergence of legal, ethical, political, cultural and other principles, with the existence of gaps being unavoidable.[792] Considering the fact that the Convention itself is a rather broadly formulated text that contains numerous ambiguities, the role of additional sources in eliminating existing inadequacies becomes evidently essential.[793] In this context and despite the important role of the general principles, it should be noted that, similarly to other unwritten sources of law, general principles are themselves by default doomed to suffer from gaps in terms of the coverage offered.[794] In addition to the general principles of law, *interpretation principles* are yet another tool available to judges, which they can use to address regulatory deficiencies on a case-to-case basis.[795] Theoretically, gaps in the wording of the ECHR could also be filled by means of recognising their nature as rules of international customary law, however, the elements of uniform state practice and opinio juris would in this case be missing.[796]

2.1.2.2. Differentiation between general principles and general rules of international law

As a term, general *principles* of international law resemble the general *rules* of international law. While they both represent fundamental guidelines of international law present throughout the international legal system, however, it is argued that, general *rules* actually rather refer to international custom[797].[798] It is expressed that, yet another difference between the two lies within the fact that, *rules*, by virtue of constituting general customary law, are more likely to be formulated in codifying treaties.[799] At the same time, it is supported that the two are related with a generic-specific relationship, in the sense that, *principles*, constitute the general, while *rules*, the specific that results from the general.[800] In this context, it is even noted that, on the basis of the current practice in international law, the terms *international custom*, *general principles of international law*, *general rules of international law* and, *general international law*, constitute tautology.[801] Taking a closer look at Article 38(1) (c) of the ICJ Statute, one observes that, the wording refers to general principles of law *recognised* by *civilised* nations.[802] In this respect, it has been expressed that, the wording of Article 38(1)(c) is simply the result of reiterating the equivalent provision that was once included in the Statute of the PCIJ; at that

[790] Orakhelashvili: The Interpretation of Acts and Rules in Public International Law, p. 17.
[791] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, p. 103.
[792] Birkinshaw: European Public Law, p. 579.
[793] Van de Heyning: Fundamental Rights Lost in Complexity, p. 182.
[794] Kunig: Das Rechtsstaatsprinzip, p. 85.
[795] Orakhelashvili: The Interpretation of Acts and Rules in Public International Law, p. 25.
[796] Kilian: Die Bindungswirkung der Entscheidungen des EGMR auf die Nationalen Gerichte der Mitgliedsstaaten der EMRK vom 4. November 1950, p. 197.
[797] Or *general international law* or *generally applicable international law* etc.
[798] Roukounas: International Law (translated from Greek), pp. 242-243. Roukounas further explains that in order to seek for generally recognised rules of international law, methods of determining custom are used.
[799] Ibid., p. 239.
[800] Ibid., p. 240.
[801] Ibid.
[802] Ibid., p. 243.

time, international law approached the world as divided between the continental Europe, the Anglo-Saxons and the *others*.[803] It is maintained that, after the Second World War, almost every modern state is considered a 'civilised' state.[804] On the other hand, it is highlighted that, there are specific standards that are inherent in the concept of civilised states; such as the righteous conduct at national and international level, the respect of the rule of law and, the thorough protection of citizens.[805] It has also been emphasised that, what is considered by modern international law a civilised state, does not lie far away from the original concept of civilisation, which emerged centuries ago and, which reflected the elements of culture and development.[806] Further criteria added to the concept, suggest that a civilised state is expected to respect and to follow the core values and principles of the very notion of humanity.[807] In this vein, it is held that, general principles of international law, by increasing harmonisation, they are promoting the rightful conduct among states while respecting at the same time national sovereignty.[808] In the same regard, it is also stressed that, the principles of international law ultimately pursue the absence of violence; what is otherwise known as 'negative peace'.[809] In what regards modern European states and the European community as a whole, the direction is the same, that is, acting respectfully towards human history and remaining dedicated to the preservation of common values and to the future of nations.[810]

2.1.3. General principles of international law applicable to human rights treaties

In relation to the aforementioned principles, some of the most relevant, applying for human rights treaties, are, the principle of *consensus*, the *pacta sunt servanda* principle, the principle of *good faith*, the *rule of law*, the principle of *democracy*, the *peace obligation* principle, the *solidarity* principle and the *international responsibility of states*.[811] In what regards the principle of *consensus*, this refers to the collective will of states and, it is commonly used as an argument to emphasise the importance of collective decisions and actions.[812]

2.1.3.1. Consensus principle

The principle of consensus is approached together with the principle of *equality*, namely as an expression of the equal freedom of all states to be self-determined.[813] In this context, it is contended that, the intention of states to commit to certain obligations constitutes the reason of the legitimacy of international law and, therefore, the validity of such responsibilities is built exclusively upon national law.[814] As a result, it has been expressed that, the observance and maintenance of the consensus principle is essential not only for the sound development but also

[803] Ibid., p. 245.
[804] Pauka: Kultur, Fortschritt und Reziprozität, pp. 250, 255.
[805] Nádrai: Rechtsstaatlichkeit als Internationales Gerechtigkeitsprinzip, pp. 31, 160, 162.
[806] Pauka: Kultur, Fortschritt und Reziprozität, pp. 15, 21.
[807] Ibid., pp. 22, 94.
[808] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, p. 187.
[809] Ibid.
[810] Birkinshaw: European Public Law, p. 579.
[811] Principles not closely related to the problematic of the present dissertation or which have been analysed previously, such as in the context of the interpretive methods, will be excluded from this Chapter, resulting in the analysed principles being only an indicative list of the rich variety of principles existing in international law.
[812] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, p. 98.
[813] Ibid., p. 160.
[814] Ibid., p. 91; Chortatos: Introduction to Contemporary International Law and the Problem of Relationship between International and Internal Law (translated from Greek), p. 159.

for the preservation of international law, since the latter is founded exactly on the will of states; thus, the two inevitably go hand-in-hand.[815] Nonetheless, one should remain aware of the fact that, consensus is quite difficult to reach, especially in the context of large meetings, where interests naturally collide and tensions inevitably arise.[816]

2.1.3.2. Pacta sunt servanda

Similar to the principle of consensus is the legal principle of *pacta sunt servanda*, a Latin term meaning, in its literal sense, that 'agreements must be kept' and, one containing a general presumption against the unilateral termination of agreements.[817] The legitimacy of this principle is uncontested, while it has the good fortune to be forming a widely recognised and respected principle of national, international, private and public law.[818] Ultimately, the principle has been, allegedly for sociological reasons, laid down in text, specifically in Article 26 of the Vienna Convention.[819] At the same time, by the adoption of the Draft Articles on the Responsibility of States, the limits of the doctrine have been further expanded.[820] In its most fundamental sense, the principle refers to contracts and clauses, which must be observed with respect to their binding force between parties; however, it is encountered also in the field of international law.[821] The principle of pacta sunt servanda has constituted a central principle of international law already from the 19th century, at a time when it was still fighting the self-restraint of states and, still suffering to establish the obligatory character of treaties.[822] Back then, it had already been raised that, states, by concluding a treaty, they accept their self-limitation and that they are therefore, to the extent that they have given their consent, obliged to act in respect of the provisions and consequences of that treaty.[823] Nowadays, the principle reflects as well the understanding that, subjects of international law, by reaching unanimity and by arriving at a 'concurrence of wills', they create valid law, the disrespect of which is unaccepted; moreover, its disregard could threaten the harmonious co-existence of states.[824] On a regular basis, the principle finds application in the field of international law, and is by some even regarded, as the general objective and rationale of international law itself.[825] Consequently, the principle is treated both as a specific principle applying in the field of international law but also, as a hypothetical condition on which the whole construct of international convention law is based.[826] In this regard, it is underlined that, the principle has become a social necessity for the maintenance of a stable and lasting peace and for the safeguard of a high level of internal security.[827] An integral part of the principle of pacta sunt servanda is considered the principle of *good faith*, with the two sharing various common characteristics.[828] The principle of good

[815] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, p. 160.
[816] Ibid., p. 161.
[817] Roukounas: International Law (translated from Greek), p. 182.
[818] Fulda: Demokratie und Pacta Sunt Servanda, p. 93.
[819] Roukounas: International Law (translated from Greek), p. 182.
[820] Crawford: State Responsibility, p. 45.
[821] Dohna: Die Grundprinzipien des Völkerrechts über die Freundschaftlichen Beziehungen und die Zusammenarbeit zwischen den Staaten, p. 238.
[822] Roukounas: International Law (translated from Greek), p. 181. Roukounas explains that the criteria back then were not purely legal but the commitment of those theoreticians was so strong that in their attempt to limit the inconsistency of the legal foundation of this theory, they spoke of the common will of the states.
[823] Ibid.
[824] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, p. 163.
[825] Ibid.
[826] Roukounas: International Law (translated from Greek), p. 182.
[827] Ibid.; Dohna: Die Grundprinzipien des Völkerrechts über die Freundschaftlichen Beziehungen und die Zusammenarbeit zwischen den Staaten, pp. 223-224.
[828] Goodwin-Gill: State Responsibility and the 'Good Faith'Obligation in International Law, p. 85.

faith, mainly known from the Civil Code and from Commercial Law, is a principle widely present in major international treaties.[829] The principle is thought to have its roots in the Latin term *bona fide*, which has emerged as early as the Middle Ages.[830] Although the principle basically stresses the absence of fraud or deception, a generally accepted definition of the concept of good faith is missing.[831] In any case, the doctrine shall not be understood as making the observance of treaties subject to the goodwill or to the trustworthiness of parties, but rather, as a rule that highlights the necessity to observe the agreed in order to maintain the functionality of the international legal system.[832]

2.1.3.3. Rule of law

In what regards the *rule of law*, this principle almost automatically brings to mind a particular set of values associated with legality. However, the principle takes on several meanings, while its exact content has been neither explicitly defined in international law nor uniformly approached by international courts.[833] Common features of the principle can be found in several international agreements and in national constitutions; nevertheless, sensitive contextual aspects of the principle have still not been clarified.[834] This situation is partly due to the fact that, references to the rule of law, take place either in a brief or a stereotyped manner, being usually limited to simply linking the principle to other written legal instruments.[835] At the same time, another fact that adds to the difficulty of its contextual approach is that, the rule of law, similarly to law itself, does not encompass a fixed or passive concept, but rather, one that develops within an ever-changing environment.[836] Meanwhile, the lack of a uniform approach of the rule of law principle has proved beneficial for its generalised use.[837] More specifically, the rule of law is often used as a general maxim with characteristics similar to those of collective terms; merging a number of constitutional rules and principles under one umbrella.[838] In this context, it seems that, the rule of law enjoys an increasing importance among other constitutional norms, however, subordination and superiority relationships do not officially apply for constitutional rules.[839] In legal practice, a solution is often chosen over another for being *better* founded on the rule of law, while solutions which are *less* well-founded on the rule of law are also constitutionally acceptable.[840] Undisputed vital parameters of the principle of the rule of law constitute the respect of existing law, the separation of powers and the hierarchy of norms.[841] Furthermore, the rule of law, as a manifestation of the principle of justice, reflects

[829] Such as Article 2(2) UN Charta and Article 26 VCLT.
[830] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, p. 166.
[831] Goodwin-Gill: State Responsibility and the 'Good Faith' Obligation in International Law, p. 85.
[832] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, pp. 165-166.
[833] Addo: The Legal Nature of International Human Rights, p. 212. Addo mentions that there is a tendency of international Human rights treaties to have some common characteristics concerning their understanding of the rule of law, following the so-called 'Diceyan attributes' which include between others the supremacy of law, the equality before the law and the pre-eminence of judicial oversight. Addo cites DICEY: Introduction to the Study of the Law of the Constitution.
[834] Ibid.
[835] Kunig: Das Rechtsstaatsprinzip, pp. 139, 233.
[836] International Commission of Jurists: The Rule of Law and Human Rights, p. 2.
[837] Kunig: Das Rechtsstaatsprinzip, p. 258.
[838] Ibid., pp. 130, 135.
[839] Ibid., p. 231. Kunig specifically refers to the case of the Federal Republic of Germany, however this is a generally applicable trend.
[840] Ibid., pp. 273-274.
[841] Hofmann: Die Bindung Staatlicher Macht, pp. 5-7, 11. Hofmann underlines that seperation is normally thought in its hierarchical way, however, it can also be made in a vertical way, usually in regional or federal legal systems. Hofmann also refers to the hierarchy of norms in the way it was developed by the Vienna School.

a combination of the principles of proportionality and of procedural justice.[842] The elements of non-retroactivity and of effective legal protection are in this respect considered as counting among the essential components of the rule of law.[843] Hereby, it is also stressed that, genuine and comprehensive legal protection and effective legal guarantees are indispensable prerequisites of the rule of law, or otherwise the principle would be a dead letter.[844] Another characteristic of the rule of law is that it may be used as a political term, to signify a well-functioning society that is based on democratic structures and on a solid political commitment.[845] Expanding further, a democratic government and society based on the rule of law, are ideally not limited to benefiting only from the political and judicial aspects of the rule of law, but rather, explore its multifaceted economic, social and cultural dimensions.[846] Moreover, while the principle has been originally developed as a concept for the protection of the population against arbitrary action of the state, it has evolved, in the aftermath of the Second World War, into a vehicle for the promotion and protection of human rights in general.[847] It is even expressed that, actually, all human rights constitute aspects of the fundamental *right to the rule of law* and therefore, they should be approached and interpreted accordingly.[848] In particular, it is argued that, human rights encompass the obligation of states to do everything within their power to guarantee their effective protection, on the basis of a solidly functioning rule of law.[849] In this respect, human rights are distanced from their narrow approach as legal provisions for the protection of individuals and, gain a different meaning in the sense of representing a "principle of freedom" or an "ideal of freedom".[850] It should be noted that, no matter how comprehensive a piece of international legislation such as the ECHR may be, the threat of disrespect for the rule of law will always loom below the surface.[851] Thus, it has been supported that, the rule of law has more chances to be internationally and interculturally recognised and duly respected, if it is addressed as an 'ideal of freedom'.[852] Moreover, it is argued that, a broad approach of the rule of law, encompasses all the actors involved, being therefore at the same time supportive of the notion that, governments shall be held responsible for wrongful acts and omissions of their organs.[853] In relation to the role of the Strasbourg Court, it is underlined that, through its jurisprudence, the Court has contributed largely towards the establishment of a link between ECHR rights and the rule of law.[854] However, the Strasbourg organs have until now not succeeded in coordinating the uniform interpretation and application of the rule of law, so that the creation of a common environment still remains a challenge.[855] At the same time, despite being a widely disseminated constitutional principle among European states, the rule of law is only briefly mentioned in the preamble of the Convention; a fact that, for some, speaks for the primary aim of the ECHR being not the establishment of a community under the rule of law, but rather, the guarantee of specific rights and freedoms.[856] With this in mind, it is considered essential in order to produce a genuine European stamp for the principle of rule of law and, in order to facilitate its sustainable development on a European level, to

[842] Kunig: Das Rechtsstaatsprinzip, p. 460.
[843] Hofmann: Die Bindung Staatlicher Macht, pp. 16-17.
[844] Merli: Der Rechtsschutz, p. 31.
[845] Kunig: Das Rechtsstaatsprinzip, p. 123.
[846] International Commission of Jurists: The Rule of Law and Human Rights, p. 44.
[847] Loucaides: The European Convention on Human Rights, pp. 37-38.
[848] Nádrai: Rechtsstaatlichkeit als Internationales Gerechtigkeitsprinzip, p. 77.
[849] Ibid., pp. 31, 96-97.
[850] Ibid.
[851] Orakhelashvili: The Interpretation of Acts and Rules in Public International Law, p. 23.
[852] Nádrai: Rechtsstaatlichkeit als Internationales Gerechtigkeitsprinzip, p. 97.
[853] International Commission of Jurists: The Rule of Law and Human Rights, p. 46.
[854] Wiederin: Rechtsstaatlichkeit in Europa, pp. 315, 317.
[855] Ibid., p. 297.
[856] Ibid., p. 295.

engage in a constant and constructive dialogue between the ECHR system and the national jurisdictions.[857]

2.1.3.4. Democratic principle

The *democratic principle*, needs no special introduction, since its aspects are embedded in a plethora of written laws as well as in customary law.[858] Etymologically, the word constitutes a composite of the Greek words *demos* (people) and *kratos* (power); indicating that the power stems from the people. It is accepted that the principle of democracy requires the existence of democratic structures and institutions, while also involving the essential element of the rule of law as its indispensable value.[859] Additionally, the obligation of the authorities to justify their decisions, provides a safety net for democracy and for human rights, playing a central role for states that have accepted legality as the foundation of their conduct.[860] As a result of the above, the regulatory framework of the principle of democracy consists of a number of further principles such as the rule of law, the protection of human rights and fundamental freedoms, the free and civil society, the free and fair elections, the citizen participation, the independent media, transparency, accountability and equality. Moreover, it can be observed that, although no two democratic countries are exactly alike, the basic legal foundations are always the same and the expectations of people are equivalent. In the case of the ECHR system, the principle of democracy is mentioned neither in the Convention nor in the Statute of the Council; however, it is considered as indirectly anchored in both documents.[861] Despite the lack of normative regulation, the level of the application of the democratic principle and the overall situation of human rights in Europe appear generally satisfactory; in the sense of being characterised by a positive tendency to uphold the rule of law with increased vigilance.[862]

2.1.3.5. Peace obligation

Another noteworthy principle is the *peace obligation* principle, which, in essence, denotes the amicable settlement of disputes and the prohibition of the use of force and of intimidation against another state.[863] Hereby, it is supported that, mutual cooperation is rendered absolutely essential for the preservation of international peace.[864] In other words, that the viability of the international community as a whole and of the peace process in general, are largely dependent on the safeguarding of a stable international order.[865] In this regard, there is no doubt that, the very purpose of the legal organisation of our societies had been exactly the maintenance of peace.[866] Given the current structure of the international legal order and the ongoing global challenges, it seems a wiser option for states to avoid engaging in internationally wrongful acts,

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[857] Grabenwarter/ Pabel: Europäische Menschenrechtskonvention, p. 21.
[858] Fulda: Demokratie und Pacta Sunt Servanda, p. 219.
[859] Ibid., pp. 86, 88.
[860] Nádrai: Rechtsstaatlichkeit als Internationales Gerechtigkeitsprinzip, p. 31.
[861] Fulda: Demokratie und Pacta Sunt Servanda, pp. 26-28.
[862] Hofmann: Die Bindung Staatlicher Macht, p. 29.
[863] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, pp. 176, 178.
[864] Ibid., p. 687.
[865] Dohna: Die Grundprinzipien des Völkerrechts über die Freundschaftlichen Beziehungen und die Zusammenarbeit zwischen den Staaten, pp. 182, 184. Dohna refers in this regard to United Nations General Assembly Resolution 2625, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states which highlight the duty of states to cooperate in order to maintain international peace.
[866] Lauterpacht: The Function of Law in the International Community, p. 64.

since this could lead to division and confrontation; even to the isolation of the violent state.[867] Nowadays, international law is mainly concentrated in safeguarding a peaceful relationship between states, while keeping at the same time a cautious position as to the obligations that are being imposed on states.[868] However, what is today taken for granted has not always been the same; in the past, the 'war theory', so-called *jus ad bellum*, used to play a very central role and, states would touch upon this theory when seeking justification for engaging in war.[869] A concept close to that of peace is the concept of *solidarity*, which, compared with other concepts that govern relationships between states, is still insufficiently recognised and developed.[870] The main reason for the slow growth of the principle of solidarity can be found in the fact that, states are naturally concerned about the well-being of their own people and about the preservation of their own interests; thus, do not place their increased attention on cooperating effectively with external partners.[871] Mindful of this fact, Article 1 UDHR, by introducing the concept of a 'world law' applicable by all states, had been very far-reaching; however, as long as states do not rise above their narrow interests and do not seek a genuine cooperation, a discussion of a 'world state' appears meaningless.[872] In the context of the Convention, it is expressed that, states, even when not accused by another state, they still bear the responsibility to maintain the commitments agreed, especially by virtue of the fact the Convention is pervaded by the principle of solidarity towards humans and their rights.[873] It should also be mentioned that, the principle of solidarity differs from the *principle of reciprocity*, as the former entails the idea of altruism and a practice of concern for the welfare of others while the latter, the practice of exchanging things with others for the purposes of mutual benefit.

2.1.3.6. International liability

In what regards the *international liability* of states as a principle of general international law, it is argued that, it has played an important role in the formation of the human rights protection system in general but, more significantly, on a European level.[874] The principle finds also application also in human rights cases, directly or indirectly, and it is even reflected in ECtHR case-law.[875] Moreover, it is supported that, the Convention, by establishing a collective obligation which functions objectively for all Member States, it has accepted the international responsibility of states in the case of a violation of the rights enshrined in its text.[876] In this context, it is stressed that, the international liability of states actually serves as a safety net, guaranteeing the smooth relationship between the two legal orders and, ensuring the efficient implementation of both the Convention and the judgments of the Court.[877] The rules governing the international liability of states enclose three basic demands towards the violator; to *stop* the violation, to *repair* the damage suffered and to guarantee the *non-recurrence* of the violation.[878]

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[867] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, p. 687.
[868] Ibid., pp. 142, 144.
[869] Ibid., pp. 174-175, 187. The United Nations Charter of 1945 sets out the limits of jus ad bellum as a set of criteria that determine whether entering into war is permissible. Jus ad bellum should be distinguished from jus in bello, as the latter regulates the international humanitarian law applied by states already engaged in an armed conflict.
[870] Ibid., p. 145.
[871] Ibid.
[872] Ibid., pp. 104, 189.
[873] Roukounas: International Protection of Human Rights (translated from Greek), p. 131.
[874] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 81.
[875] Ibid., pp. 83-84, 95.
[876] Trekli: Binding Force and Execution of Judgments (translated from Greek), p. 621.
[877] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 49.
[878] Lambert-Abdelgawad: The Execution of Judgments of the European Court of Human Rights, p. 10.

More explicitly, the state's responsibility to cease an act or an omission which infringes ECHR rights, entails the performance of an actus contrarius, aimed to counterbalance the violating behaviour.[879] Accordingly, the obligation to repair the damage, requires the restoration of the original condition, in other words, a *restitutio in integrum*.[880] As to the responsibility to prevent the reoccurrence of a breach, this has the future as its reference point and, is therefore distanced from an imminent response to the violation; a fact that has raised concern about whether it forms part of the debate on the binding force of the Convention and ECtHR judgments or, of the debate on the binding force of *interpretive precedents*[881].[882] The first two obligations, widely recognised in public international law, are thought to be included as implied principles in the provisions of Articles 46(1) and 41 ECHR respectively.[883] Likewise, the responsibility for the non-repetition of the violation in the future is not explicitly referred to in the text of the Convention, however, it is argued that it can be derived indirectly from the above-mentioned Articles.[884] The international recognition of the principle of state responsibility can be witnessed by its application on several occasions, as affirmed by the ICJ.[885] Moreover, by the time of the establishment of the International Law Commission[886] in 1948, state responsibility was chosen as one of the first topics to be examined by the then newly formed body, however, doubts as to its prospects led to the temporary abandonment of the discussion.[887] But even earlier, in 1930, during the League of Nations Codification Conference in The Hague, state responsibility was already identified as a topic deserving attention, with most of the countries commenting that codification should be considered.[888] Finally, in 2001, the ILC's Draft Articles on the Responsibility of States officially regulated in Articles 30, 31 and 35 all three obligations implied by the principle of international state liability.[889] In this context, it is underlined that, the Court has repeatedly acknowledged the international responsibility of states, and more specifically, with the content resulting from the above-mentioned articles of the Draft Articles on the Responsibility of States.[890] Further, Article 3 of the Draft Articles regulates that "the characterisation of an act as internationally wrongful is governed by international law", meaning that a state cannot invoke its national law in order to justify its failure to comply with its international responsibilities.[891] At the same time, it can be observed that, contrary to the nature of the mechanism that is provided by the Convention for the protection of the individual, the Draft Articles follow a quite state-centred approach by virtue of granting only to the states the right to invoke the responsibility of another state.[892] However, despite mainly concerning

[879] Leeb: Die Innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im Entschiedenen Fall, p. 41.
[880] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 75.
[881] The debate on the effect oft he interpretive precedents will be analysed in Chapter three.
[882] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 380.
[883] Ibid., pp. 378, 380.
[884] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, pp. 96-97.
[885] See for example cases Corfu Channel (1949); Barcelona Traction Case (1970); Military and Paramilitary Activities in and against Nicaragua (1986); Gabčíkovo-Nagyamaros Project (1997); LaGrand (1999).
[886] Hereinafter also referred to as ILC.
[887] Crawford: State Responsibility, pp. 35-36.
[888] Ibid., pp. 28-29.
[889] Articles 30 titles 'Cessation and non-repetition', Article 31 'Reparation' and 35 'Restitution'.
[890] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 82.
[891] Commentary (7) to Article 3 further rules that the characterisation of a conduct as unlawful in international law also applies to 'cases where rules of international law require a state to conform to the provisions of its internal law', therefore including the human rights protection guaranteed by national law.
[892] More specifically Articles 42 and 48 of the Draft Articles on the Responsibility of States grant states the right to invoke the responsibility of another state when 'the obligation breached is owed to the international community as a whole', and according to Articles 49-53, the right to even take countermeasures.

interactions between states, it is argued that, the provisions of the Draft Articles can be applied by analogy in the field of human rights to the relations between states and individuals.[893]

2.2. Indirect effect

2.2.1. The Convention as an aid in the judicial interpretation process

The various ways in which the Convention may be applied at the national level constitute a reflection of either its *binding* or its *indirect effect*.[894] In what regards the *binding effect,* it mainly concerns the *incorporation* of the Convention and the possibility of individuals to rely on ECHR provisions for the protection of their rights before national authorities.[895] Whilst the *indirect effect* concerns, at least principally, the adaptation of national law to ECHR law by means of a judicial *interpretation* of the former in line with the latter.[896] Consequently, while the binding effect touches upon issues of purely legal nature, the indirect effect explores further influences of the Convention on the national legal order. It is undisputed that the Convention has not only granted European citizens tangible rights, but also, has largely affected Member States through the jurisprudence of the Court and, especially, through its settled case-law.[897] More specifically, ECHR rights, in the way that these are defined by the case-law of the Court, have affected Member States in terms of encouraging changes in national legislation, of providing motivation for the improvement of national interpretative methods or by increasing awareness and constructive dialogue.[898] Nevertheless, apart from those cases where explicit references to the Convention or to the Court's case-law are made, the overall effects of ECHR rights in the national legal orders of Member States are hard to detect. As mentioned previously, the indirect effect of the Convention is examined by the theory predominantly on the basis of its utilisation as an aid in the judicial interpretation process.[899] Here again, relevant judicial references vary greatly, from providing a thorough analysis on the compatibility of national provisions with the Convention, to being extremely laconic.[900] It is argued that, the indirect effect of the Convention on national judgments is mainly demonstrated through its *empowering*, *controlling* and *concretising function*.[901] What defines the empowering function of the Convention, is related to the fact that the Convention may be used as an additional element, in the end of the legal reasoning, so as to *empower* a result which has already been reached by the means available by national law.[902] By virtue of serving as an *additional* tool, the Convention plays in this context a rather 'decorative' role.[903] However, this role of the Convention should not be undervalued, since the authority of judgments is based exactly on their power of persuasion; a power that is strengthened through references to the Convention.[904] The

[893] Sisilianos: The Human Dimension of International Law (translated from Greek), pp. 83-84.
[894] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, pp. 42-43.
[895] Ibid., p. 48.
[896] Ibid.
[897] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 33.
[898] Ibid.
[899] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 48.
[900] Ibid.
[901] Ibid., pp. 49-52.
[902] Ibid., p. 49. Uerpmann talks of 'Bekräftigungsfuntion' which has been freely translated into 'empowering function'.
[903] Ibid., p. 50.
[904] Ibid.

controlling function comes into play when the Convention is being used as a tool to *control* the result of the legal reasoning, thus, when taken into consideration not during the interpretation process, but only at the later stage of the evaluation of the outcome.[905] A main difference between the controlling function and the empowering function is that the former takes on a significant role when a conflict of national law with the Convention is detected and the judge is called upon to interpret national law in accordance with the Convention.[906] The indirect application of the Convention is also reflected in its concretising function, in the context of which the Convention acquires a central role, by serving as a tool for the *concretisation* and the clarification of national provisions.[907] It should be mentioned that, the concretising function is predominantly activated there where national legislation is vague and inconsistent or when it contains a general clause while the Convention contains a rule enough clear and precise to throw light on the matter at issue.[908] Apart from the *binding* and the *indirect* effect of the Convention, the Convention may also find a *reflective* application by Member States.[909] The reflective effect basically relates to the practice of adopting internal rules which refer specifically to the Convention.[910] Such cases occur, for instance, when the national legislator takes the opportunity, following a conviction of the country by the ECtHR, to change domestic law by stating that conviction as a reason in the draft law or in the explanatory memorandum.[911] It becomes obvious that the main difference between the reflective and the indirect application is that, the former relates to legislation, whereas the latter to jurisprudence.[912] However, the two are closely interconnected, in the sense that, where the legislator has adapted national legislation so as to comply with the European human rights standards, the judge is expected to interpret the legislation accordingly.[913]

2.2.2. Legitimising basis for an indirect effect vs. Member States' practice

Not being of a purely legal nature, the concept of an indirect application of the Convention has raised concerns as to its legitimacy, particularly in terms of its legal correctness and legality.[914] An argument in favour of the indirect application of the Convention suggests that, the commitment of states to international law includes interpreting national law in a way that complies with the obligations they have undertaken under international law.[915] The indirect application of the Convention could also be justified on the basis of the *unity* of the legal system, more specifically, on the fact that, provisions shall be interpreted so as to avoid conflicts between them.[916] It should be noted that, a conflict between national courts and the Court is highly undesirable, since it could seriously harm the applicability of the Convention and, even turn into an agent of anarchy and disorder.[917] Further concerns are raised with regard to the overall influence of international law, highlighting that, it should be subject to limits and that,

[905] Ibid., p. 53.
[906] Ibid., p. 54. Uerpmann talks of 'Kontrollfunktion' which has been freely translated into 'controlling function'.
[907] Ibid., p. 50. Uerpmann talks of 'Konkretisierungsfunktion' which has been freely translated into 'concretising function'.
[908] Ibid., p. 52.
[909] Ibid., p. 57 ff. Uerpmann talks of 'spiegelbildlich' which has been freely translated into 'reflective'.
[910] Ibid., p. 57.
[911] Ibid.
[912] Ibid., p. 58.
[913] Ibid.
[914] Ibid., p. 109. Uerpmann refers to Legitimität and Legalität.
[915] Ibid., pp. 111-112.
[916] Ibid., p. 109.
[917] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 287.

and it should not touch upon sensitive issues relating to the interpretation of the national Constitution.[918] However, the principle of the interpretation of constitutional provisions in accordance with international human rights instruments is so widespread, that it even applies to countries where international agreements lack almost any legislative power and to countries which have not incorporated the ECHR.[919] The trend of calling international human rights law into play as a means of supplementing the constitutional provisions is, in fact, nothing new.[920] In the post-war era, human rights had already played a complementary role in cases where the protection granted by national constitutions was insufficient.[921] What is more, 'good marriages' between the ECHR and national constitutions can be seen in the practices of interpreting constitutional rights in the light of ECHR law, of incorporating the ECHR in the Constitution and, in amending the Constitution in order to bring it in line with the European human rights protection level.[922] In relation to this context, it is supported that, constitutions of the Member States together with ECHR law and EU law form a constitutional link which is reinforced, supplemented and evolving in a bidirectional manner.[923] Generally, there exists no uniform behaviour of the national courts towards the Court, whereby some of them demonstrate a general 'friendliness' while other limit themselves to occasional and empty references to the Court's case-law.[924] It has been observed that, national courts were in the beginning often reluctant, if not disapproving, of recognising any effect of the international judgments within the national borders.[925] National judges have often criticised the Court for its ever-expanding jurisdiction and for allegedly moving far beyond what has been agreed.[926] Nonetheless, it is doubtful whether this conduct of the judges has occurred with the character of a clear opposition or of that of a merely a theoretical analysis.[927] In any case, it appears advisable for national courts to stay loyal to the principle of international-law-friendly interpretations, as a validation of their commitment to the ECHR and in order to avoid the international liability of the state.[928] Fortunately enough, it can be observed that, most of the newly acceded to the Council states, do indeed maintain a human-rights-friendly approach.[929] At the same time, acting with openness and receptiveness towards the Convention and the Court's case-law does not automatically mean a satisfactory level of compliance also in practice.[930] In what extent national courts will actually apply international law is dependent on a number of qualities such as the type and the age of the national constitutional system, a fact revealing the major influence of various local parameters.[931] On its part, the Court actively helps promote a far-reaching harmonisation in the

[918] Chortatos: Introduction to Contemporary International Law and the Problem of Relationship between International and Internal Law (translated from Greek), p. 173. Chortatos cites ALFORD: Misusing International Sources to Interpret the Constitution, p. 57.
[919] Kastanas: Compliance with the Judgments of the European Court of Human Rights and the Contribution of the Greek Judge (translated from Greek), p. 120.
[920] Chortatos: Introduction to Contemporary International Law and the Problem of Relationship between International and Internal Law (translated from Greek), pp. 145-146.
[921] Ibid.
[922] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 410-411.
[923] Pianka: Konkurrenzen und Konflikte beim Rechtsschutz im Europäischen Mehrebenensystem, p. 184.
[924] Van Alstine: The Role of Domestic Courts in Treaty Enforcement, pp. 591-592.
[925] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 219.
[926] Van de Heyning: Fundamental Rights Lost in Complexity, p. 212.
[927] Ibid.
[928] Kilian: Die Bindungswirkung der Entscheidungen des EGMR auf die Nationalen Gerichte der Mitgliedsstaaten der EMRK vom 4. November 1950, pp. 211, 216.
[929] Van de Heyning: Fundamental Rights Lost in Complexity, p. 179.
[930] Ibid.
[931] Ibid., p. 559.

interpretation of ECHR provisions, which is considered a 'healthy' way of navigating differences between approaches in different countries.[932]

2.3. Direct effect

2.3.1. Arguments for a direct applicability of ECHR substantive rights

While the domestic formal validity of the Convention, namely its hierarchical ranking, defines its relation to other laws applying on the national level, its *self-executing* or so-called *directly applicable* character, adopts a different attribute. More specifically, the term self-executing refers to a quality that centres on the ability to directly invoke a provision at the national level. As previously mentioned, supporters of monism argue that the rights guaranteed by international law do not even need to be incorporated into national law in order to be invoked domestically.[933] Yet, conversely to monism, international law itself does not acknowledge its direct applicability in the domestic legal order.[934] Thus, in that regard, monism is not highly praised in the field of current international practice.[935] Additionally, the comparative interpretation method suggests that, it is not only international law which has been ratified that can be invoked, but also, any international nonbinding instrument or decision.[936] In any case, it is raised that, a self-executing effect of ECHR provisions for those countries which have incorporated the verbatim[937] text of the Convention, would facilitate that these provisions are applied as effectively and as faithfully as possible.[938]

It is being discussed that, the direct applicability of the Convention's substantive rights results from Article 1 ECHR as well as from the wording of other substantive provisions of Section I, such as from Article 6.[939] More specifically, it is supported that, the self-executing power of the provisions of Articles 2 to 18 is provided already by Article 1 ECHR, a fact that allegedly corresponds with the discussions that took place during the drafting phase of the Convention.[940] Hereby, it is stressed that, the very wording of Article 1 of the Convention, as revealed by the history of its adoption, has not been chosen accidentally.[941] In particular, it is underlined that, in a draft version of the Convention, Article 1 ECHR was referring to the obligation of the High Contracting Parties with the words "undertake to secure", which have then been replaced by the words "shall secure".[942] A change which, as claimed, points exactly the self-executing

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[932] Unkel: Berücksichtigung der Europäischen Menschenrechtskonvention in der Neueren Rechtsprechung der Bundesdeutschen Verwaltungsgerichte, pp. 48-49.
[933] Dijk/ Hoof: Theory and Practice of the European Convention on Human Rights, p. 17.
[934] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 51.
[935] Ibid.
[936] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 133. Uerpmann argues that in the context of comparative law, the role of the Convention is greatly reduced, since it is complemented by a number of other instruments.
[937] In the sense of a complete, self-contained and unchanged text.
[938] Roukounas: International Protection of Human Rights (translated from Greek), p. 129.
[939] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, pp. 45-46.
[940] Roukounas: International Protection of Human Rights (translated from Greek), pp. 128-129. The Registry's Preparatory Work on Article 1 ECHR is available under: http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART1-COUR(77)9-EN1290551.PDF (20/10/2017).
[941] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 201.
[942] Ibid.

character of the substantive rights of the Convention.[943] It is further highlighted that, this notion becomes even more pronounced in the French version of the draft and in the replacement of the initial "s'engagent à reconnaître" by the word "reconnaisent".[944] At the same time, the opposite view is also supported, namely that, by observing the Convention as a whole and, in the light of its purpose and of its Article 1, there can be no certain conclusion drawn in favour or against the view of a direct internal application.[945] The direct applicability of ECHR rights seeks a further justification basis in Article 34 ECHR, which regulates the right of individual petition. In this sense, Article 34 of the Convention is argued to be encompassing the right of a resident of a State Party to exercise ECHR rights before all national authorities, including national courts.[946] A further, logical approach suggests that, Article 13 ECHR regulating the right to an effective appeal, can acquire its meaning and increase its prospects of effectiveness only if its direct application in the domestic legal order is recognised.[947] Conversely, a prominent argument against the notion of the direct applicability of Article 13 ECHR is that, the right to an efficient appeal before a domestic instance can be applied only in those legal systems where such an appeal is already prescribed by the legislation.[948] In this respect, in the case of the absence of a relevant provision, an appeal would, in principle, first have to be legislated; therefore, it would require action by the state and the willingness of the latter to meet its international obligations.[949] Furthermore, the right to an effective remedy requires the violation of those rights specifically, which are enshrined in the Convention and cannot be activated by the violation of any other identical or similar national rights.[950] As a result, it is accepted that, by providing for the right to submit an appeal before a national authority, Article 13 ECHR does not simultaneously encompass the possibility to challenge national laws before national authorities on the basis of their alleged opposition towards the Convention.[951] In this context, the direct applicability of Article 13 ECHR is doubted because, on the one hand, it does not establish a remedy and, on the other hand, it can only be invoked in combination with another substantive provision of the Convention.[952]

2.3.2. The dubious content of the notion of self-executing norms

It is not quite clear which norms are considered self-executing, since there exists no relevant generally applicable rule.[953] Consequently, the directly applicable character has evolved into a term with many dimensions, a fact that renders its interpretive approach even more difficult.[954] In this light, it is supported that, while for certain categories of treaties such as the ECHR it is

[943] Ibid.
[944] Ibid.
[945] Kleeberger: Die Stellung der Rechte der Europäischen Menschenrechtskonvention in der Rechtsordnung der Bundesrepublik Deutschland, p. 48.
[946] Matthias/ Ktistakis/ Stavriti/ Stefanaki: The Protection of Human Rights in Europe (translated from Greek), pp. 27-28.
[947] Kleeberger: Die Stellung der Rechte der Europäischen Menschenrechtskonvention in der Rechtsordnung der Bundesrepublik Deutschland, pp. 46, 48.
[948] Ibid., p. 47.
[949] Ibid.
[950] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 40. Chrysogonos refers in this regard to cases Brannigan and McBride v. UK (App. Nos. 14553/89 and 14554/89, 26/5/1993) and Boyle and Rice v. UK (App. No. 9659/82, 27/4/1988).
[951] Ibid. Chrysogonos refers in this regard to case Leander v. Sweden (App. No.9248/81, 26/3/1987).
[952] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, pp. 46, 47.
[953] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, p. 119.
[954] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 114.

obvious that they contain self-executing provisions, this is not the case for other legal instruments.[955] Yet another view supports that, decisive for the self-executing character of a treaty is whether or not it creates "subjective rights" which can be protected by domestic courts.[956] On the other side, it is considered wiser to study the direct effect of each provision of the Convention separately, since their very scope and the consequences of their application vary greatly.[957] In this context, one should be careful that the search for self-executing provisions should not lead to denying the legal effects of those provisions which do not meet the criteria of direct applicability; thus, a delicate balance is necessary.[958] In an effort to conceptually approach the issue of direct applicability, it is stressed that, directly applicable is a norm by which all national organs are bound automatically and, which is immediately litigable by individuals; thus, one that does not necessitate transposition measures or any further action in order to be applied.[959] Under a similar approach, the self-executing character of a provision encompasses the ability of an individual to exercise ECHR rights before national authorities, by invoking the specific ECHR Article that has allegedly been violated or, at least, an equivalent Article of national law which protects the right in a similar manner.[960] Another view focuses on the ability of national courts to base their reasoning directly on the text of the Convention.[961] It is also discussed that, directly applicable is a provision that leads to the revocation of an administrative act or to the annulment of a national judgment, when these have been found to contradict the Convention.[962] A different route is followed by an opinion which supports that the self-executing character of provisions depends on national law.[963] A notion that seems paradox by default, as it tries defining the character of international law being based exclusively on elements of domestic law.[964] Other voices in literature support that the Convention has a self-executing character only insofar as the specific provision itself has such a character.[965] In this context, it is also outlined that, the same approach can be adopted also for ECtHR rulings, that is, to accept that they are directly applicable and binding upon national authorities only insofar as Articles 41 and 46(1) are themselves directly applicable.[966]

According to the prevailing view, an *objective* and a *subjective* criterion should be met in order for a rule to be conceived as having directly applicable character.[967] The objective criterion concerns the *content* of the rule, which in this regard has to be sufficiently complete and accurate, while the subjective criterion refers to the *will* of the parties, that is, their desire to attribute such a character to the rule.[968] In what concerns the precise *content* of the rule, this

[955] Roukounas: International Law (translated from Greek), p. 191.
[956] Ibid., p. 190.
[957] Dijk/ Hoof: Theory and Practice of the European Convention on Human Rights, p. 17.
[958] Roukounas: International Law (translated from Greek), p. 90.
[959] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, pp. 122-123.
[960] Matthias/ Ktistakis/ Stavriti/ Stefanaki: The Protection of Human Rights in Europe (translated from Greek), p. 188.
[961] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 112.
[962] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 47.
[963] Roukounas: International Law (translated from Greek), p. 190.
[964] Ibid.
[965] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, pp. 112-113.
[966] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, pp. 61-62; Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 113.
[967] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 44.
[968] Ibid. Uerpmann argues that, whether a provision is complete and accurate is judged with criteria of international law.

shall be understood in the sense of a rule that does not require complementary measures such as an enforcement act, in order to be applied.[969] In this process, the wording of the provision can prove quite enlightening, in the sense that, a provision which is explicitly addressed to states and which obliges with concrete *measures* can be regarded as concrete; while in case of doubt, the rule shall not be considered directly applicable.[970] Considering this logic, the provisions of the Convention which refer to the functions of ECHR organs and which mainly concern the international level, cannot easily be conceived as self-executing; however, exceptions may apply.[971] Nonetheless, it should be noted that, nowadays, a sterile grammatical interpretation of legal instruments is avoided, as it is widely accepted that, the letter of the provision constitutes only one indication out of many; thus, it cannot be used as the sole point of reference for demarcating the scope of a provision.[972] At the same time, a number of voices in literature tend to stress the significance of the subjective element,[973] however, a tendency to avoid seeking for the fulfilment of this criterion is evident. It can be observed that the subjective element of the *will of states* is slowly losing its significance, since, on the one hand, it is hardly justifiable whether all Contracting States have indeed aspired the direct application of the Convention or not, while on the other hand, the VCLT does not recognise such a great deal of power to the will of states.[974] The objective and the subjective criteria can also be empowered by elements found outside of the Convention.[975] Such an element, which reinforces the subjective criterion, and which therefore serves as an argument in favour of the notion that states have actually aimed at the directly applicable character of the Convention, is the *character* of the Convention itself.[976] Under this context, the self-executing nature of the Convention is based on the fact that human rights treaties differ substantially from typical international treaties, by way of having a non-contractual character and by focusing on granting rights to the individuals.[977] The distinctive character of the Convention becomes especially evident in the fact that it does not create reciprocal rights between states, while it serves as a basis for an *objective European legal order*.[978] From this perspective, yet another argument in support of the direct applicability of the Convention is that it serves as a criterion for determining the scope of national constitutional rights.[979] With regard to its prominent character, it is undisputed that the Convention enjoys a special status and a high quality reputation in the field of international law.[980] The uniqueness of the Convention lies further in the fact that, it has so clearly distanced itself from the classical framework of international law, that it can no longer be approached with the standard terms and teachings.[981] Yet another element that affects the subjective criterion is the *way of will externalisation*.[982] In this respect, it is stressed that, one way of 'externalising the will' of the states is through setting the aim and the purpose of the Convention, which in this case

[969] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, pp. 114-115; Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 186.
[970] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 44.
[971] Ibid., pp. 44-45.
[972] Stamatis: The Foundation of Legal Conclusions (translated from Greek), pp. 318 ff., 348 ff.
[973] Roukounas: International Law (translated from Greek), p. 190.
[974] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 121.
[975] Ibid., p. 117.
[976] Ibid.
[977] Tomuschat: Human Rights, p. 112.
[978] Also known under the Frence term ordre public européen.
[979] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 117.
[980] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, pp. 117-118.
[981] Ibid.
[982] Ibid., p. 119.

recommends that the rights of the Convention shall be protected as effectively as possible.[983] It is argued that, the *purpose of effectiveness* is also evident in Article 31(1) VCLT which speaks of a teleological interpretation and, that it is supplemented by Articles 1 and 52 ECHR as well as by Articles 1(b) and 3 of the CoE Statute.[984] Some authors even accept that the Convention has a predominantly effective character, a quality which ensures its direct legal effects and thus, its direct applicability.[985] Yet another method of externalising the will is the *systematic* method, which underlines the need for a systematic consideration of ECHR provisions, when seeking to determine their directly applicable character.[986] In the example of the Convention and on the basis of the coherence of the protection it provides, this method can prove advantageous.[987]

2.3.3. The contested direct applicability of Article 46(1) ECHR

As a consequence of the above, it could be supported that, accepting Article 46(1) ECHR as directly applicable, would mean that the state or, in the best case, the national authorities, are directly bound by ECtHR judgments, in the sense of being obliged to immediately adapt their conduct to what the Court has ruled.[988] Whilst denying the direct applicability of Article 46(1) ECHR would mean that, an obligation to implement ECtHR judgments arises only where a relevant national provision has specifically regulated and provided for this option. Coming back to the aforementioned criteria, as regards the *will of states* to give direct effect to Article 46(1) ECHR, it is expressed that, being a provision that is addressed to the *state* as a recipient and not to the *authorities*, Article 46(1) ECHR does not seem to entail such a will; thus, it is not directly applicable.[989] It is furthermore noted that, from an isolated reading of Article 46(1) ECHR, the direct applicability of the provision cannot be drawn as a conclusion.[990] However, it is attempted to establish such a capacity by combining this provision with elements found outside of the Convention.[991] In this context and on the basis of the *way of will externalisation*, it is raised that, in order to achieve effectiveness in the implementation of the Convention, it is required that, recipients of the ECtHR judgments are also the national authorities and not just the states.[992] Similarly, the *systematic* consideration of Articles 41 and 46(1) ECHR serves as a means of empowering the criterion of the will of states for the case of Article 46, in the sense that Article 41 would be deprived of any scope, if the obligation of states to comply with the Court's judgments would not be considered as directly applicable.[993] Vice versa, it is also supported that, the systematic unity of Articles 41 and 46(1) ECHR leads self-evidently to the conclusion that, Article 46 would be an empty word, if the obligations of Article 41 were not addressed to national bodies.[994] On the other hand, as regards the *clarity* of Article 46(1) ECHR, it is stressed that, the wording of the provision is actually so precise and comprehensive that it can undoubtedly be counted as a provision that finds independent application and thus, as one

[983] Ibid.
[984] Ibid.
[985] Perrakis: Dimensions of the International Protection of Human Rights (translated from Greek), p. 242.
[986] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 119.
[987] Ibid.
[988] Trekli: Binding Force and Execution of Judgments (translated from Greek), p. 622.
[989] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 116.
[986] Ibid., p. 117.
[987] Ibid.
[992] Ibid., p. 119.
[993] Ress: Wirkung und Beachtung der Urteile und Entscheidungen der Straßburger Konventionsorgane, p. 352.
[994] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 119.

of direct applicability.[995] Placing the focus not on the content of ECHR provisions but on judgments themselves, it is highlighted that, only those judgments which are specific to their facts and to their legal consequences can be considered as self-executing.[996] In any case, it would be easier to affirm the self-executing character of Article 46(1) ECHR if its wording, instead of regulating the general obligation of states to follow ECtHR judgments with measures they deem appropriate, it would dictate the obligation of states to annul the national act that has been found to be incompatible with the Convention.[997] Lastly, it is underlined that, the textual change in the initial draft of Article 1 ECHR, an alleged manifestation of the self-executing character of the substantive rights of the Convention, has not taken place in the case of Article 46 ECHR; a fact that speaks for the need of an 'act of implementation' in order for ECtHR judgments to be executed on the national level.[998]

[995] Trekli: Binding Force and Execution of Judgments (translated from Greek), p. 621.
[996] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 196.
[997] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 116.
[998] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 201. Uerpmann talks of 'Ausfuhrungsakt', which has been translated here into 'act of implementation'. Furthermore, he does not refer to current Article 46 but to former Article 53.

Chapter Three

DOMESTIC IMPLEMENTATION OF THE STRASBOURG JUDGMENTS

1. Binding force of ECtHR judgments

1.1. Regulatory gap

1.1.1. A concept not uniformly approached in literature

Regarding the question of whether ECtHR judgments have a *binding force* for Member States, one should be aware of the fact that, the concept of the binding force of international judgments itself, is not uniformly approached in literature.[999] While a number of scholars focus on the purely legal effects of *res judicata*, others include the ability of ECtHR judgments to *indirectly* affect national judgments, in the sense of influencing the interpretation of national laws[1000].[1001] Moreover, the Court has not specified any characteristics of the concept different from those already recognised by European law, which could possibly help demarcate the scope of the otherwise common legal phrase of 'binding effect'.[1002] A method of approaching the notion of the binding force of the Court's judgments is the comparative research, namely the seeking of similar elements in other international treaties.[1003] Under this method, the scope of the provisions of Articles 41 and 46(1) ECHR is sought in relevant treaties which confer upon international courts or other international institutions, the power to issue binding decisions.[1004] It can be observed that, within the UN there exists no such delegation of powers, however, such delegation meets at a regional level, such as in the case of the American Convention on Human Rights, whereby the enforcement of judgments in domestic law is dictated by the treaty itself[1005].[1006] Furthermore, most international courts traditionally cannot give *authentic interpretations,*[1007] unless explicitly mentioned in their establishing treaty or in their constitutive Statute.[1008] In the case of the ECtHR, in so far as its interpretations are regarded authentic, the term is incorrect, since 'authentic' in international law can be considered only an interpretation which Member States have accepted as such.[1009] In this regard, only states are able to agree on how the Convention shall be interpreted, an agreement which then stipulates

[999] Gutsche: Die Bindungswirkung der Urteile des Europäischen Gerichtshofes, p. 1.
[1000] Kilian: Die Bindungswirkung der Entscheidungen des EGMR auf die Nationalen Gerichte der Mitgliedsstaaten der EMRK vom 4. November 1950, p. 84.
[1001] For the purposes of this research, the terms binding force and legally binding will be used to indicate those effects of ECtHR judgments that are of purely legal character, while the indirect effects will be approached separately.
[1002] Gutsche: Die Bindungswirkung der Urteile des Europäischen Gerichtshofes, p. 221.
[1003] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 201.
[1004] Ibid.
[1005] Article 68(2) ACHR. The American Convention on Human Rights (ACHR), also known as the Pact of San José, was adopted at the Inter-American Specialised Conference on Human Rights, San José, Costa Rica, 22 November 1969.
[1006] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 202.
[1007] In the sense of a binding interpretation.
[1008] Kilian: Die Bindungswirkung der Entscheidungen des EGMR auf die Nationalen Gerichte der Mitgliedsstaaten der EMRK vom 4. November 1950, pp. 195-196.
[1009] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 215.

the Convention in a binding way.[1010] This interpretive power can be transferred by the states to an international tribunal, nevertheless, this does not seem to have occurred in the case of the ECtHR, since the Court deals only with individual cases, not being able to decide on the interpretation of the Convention in an abstract manner.[1011] In the same vein, it is argued that, the binding force of ECtHR judgments can only be regulated through the incorporation of the Convention and that it is therefore based on the individual decision of each Member State.[1012]

1.1.2. Lack of a cassatory effect of ECtHR judgments

The concept of the binding force of the Court's judgments shall be first approached on the basis of an analysis of the main characteristics of these judgments. Having said this, a judgment of the Court may be either positive, in cases where the Court has found a violation of the Convention, or negative, when the alleged violation could not be established.[1013] Considering the fact that, ECtHR judgments simply identify whether or not a violation has occurred, they constitute what has been called *declaratory* judgments which lack a *cassatory* nature.[1014] The lack of a cassatory effect practically means that, national measures are not automatically annulled after a judgment of the Court has become final.[1015] In other words, this translates into ECtHR judgments not affecting the validity of those national acts, laws or judgments that have been subject to the Court's examination and have been found in violation of the Convention.[1016] This is actually common for international judicial bodies dealing with human rights complaints, which, are mainly concerned with the detection of the violation as such.[1017] The declaratory character of the Court's judgments also fulfils the Court's intended role, which is to detect national measures and practices that are incompatible with the guarantees of the Convention and the Protocols thereto.[1018] The Court itself has repeatedly referred to its primary focus, this being the protection of human rights through the observance of state obligations, and not the exercise of remedial or deterrent functions, which occurs only supplementary and with which it is the Committee of Ministers that is mainly entitled.[1019] In that regard, it has also been raised that, the obligation of the Court to "ensure the observance of the engagements undertaken by the High Contracting Parties" as provided by Article 19 ECHR, is quite vague and legally unclear.[1020] It is clearly evident that this provision does not specify the limits within which the Court shall move in exercising this role.[1021] Nevertheless, despite not being of an intrusive nature, ECtHR judgments do have a deterrent effect on state misconduct.[1022] In other words, the fact that the ECHR does not provide for a strict regulation on the legal force of the Court's

[1010] Ibid.
[1011] Ibid., pp. 216-217.
[1012] Leeb: Die Innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im Entschiedenen Fall, p. 58.
[1013] Kilian: Die Bindungswirkung der Entscheidungen des EGMR auf die Nationalen Gerichte der Mitgliedsstaaten der EMRK vom 4. November 1950, p. 99.
[1014] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 55.
[1015] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, pp. 117-118.
[1016] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 55.
[1017] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 80.
[1018] Matthias/ Ktistakis/ Stavriti/ Stefanaki: The Protection of Human Rights in Europe (translated from Greek), p. 29.
[1019] Shelton: Remedies in International Human Rights Law, pp. 216-217. Shelton refers in this regard to case Salah v. Netherlands (App. No. 1948/2004, 11/1/2007).
[1020] Van de Heyning: Fundamental Rights Lost in Complexity, p. 171.
[1021] Ibid.
[1022] Shelton: Remedies in International Human Rights Law, pp. 213, 358.

judgments, does not mean that these do not produce any legal effect, as states remain obliged to abide by these judgments or otherwise they will be held internationally responsible.[1023]

1.1.3. Limits of the res judicata effect

As previously mentioned, the limits of the binding force of the Court's judgments have been discussed extensively in literature. Whereby, on the one hand, a *res judicata* effect is being completely rejected, whilst, on the other, even an extension of the *res judicata* beyond the particular case is supported. As the Latin term reveals, res judicata translates to a matter that has been already *judged*. The legal doctrine of res judicata, acknowledged in both national and international law, is fundamentally important for the preservation of legal certainty, as it prevents contradictions that could arise if the same subject matter was to be adjudicated upon in a different judicial proceeding.[1024] Put differently, the term traditionally encompasses the principle that, when a lawsuit has already been subject to judicial decision by a competent court, this decision is conclusive for the litigant parties in the sense that, parties are barred from raising the same issue in any subsequent litigation. The res judicata must be distinguished from the general legal doctrine of the *immutability* of judgments, as the latter indicates that a final judgment may not be amended by the same or another court, even if the amendment aims to correct a wrongdoing; thus, relates to irrevocability and non-appealability.[1025] In particular, immutability involves a central concern of legal certainty, that is, that an end must be put on every litigation, while it also ensures the longevity of judgments; however, it cannot prevent the issuance of a colliding subsequent judgment.[1026] It should be further noted that, the legal force of national and international judgments differs substantially, with the execution of international judgments, as contrasted with the execution of national judgments, remaining complex and fragmented; a fact that does not allow for a unified approach.[1027] The concept of res judicata is understood by national law as the main legal consequence of a final judgment, namely as the quality of binding a circle of persons on the affirmative or negative diagnosis of a legal relationship.[1028] In this respect, the legal effects of a final national judgment shall also cover the *core* question of the issue examined, when this is being freshly examined in the context of another case, however, detecting the core subject matter is a rather challenging task.[1029] Conversely, it is argued that, within the ECHR scheme, the res judicata mainly comprises the lack of competence of the national courts to review the Court's judgments on the basis of their correctness or lawfulness.[1030] Furthermore, the case-law of international courts traditionally accepts that, the effect of res judicata is limited to the *operative part* of a judgment.[1031] More specifically, with the exception of those cases where the *reasoning* is

[1023] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 225.
[1024] Kilian: Die Bindungswirkung der Entscheidungen des EGMR auf die Nationalen Gerichte der Mitgliedsstaaten der EMRK vom 4. November 1950, p. 29.
[1025] Gutsche: Die Bindungswirkung der Urteile des Europäischen Gerichtshofes, pp. 10, 15. Gutsche talks of 'Unabänderlichkeit', 'Unwiderruflichkeit' and 'Unanfechtbarkeit',which have been freely translated into immutability, irrevocability and non-appealability respectively.
[1026] Ibid., pp. 18, 23.
[1027] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 224.
[1028] Kilian: Die Bindungswirkung der Entscheidungen des EGMR auf die Nationalen Gerichte der Mitgliedsstaaten der EMRK vom 4. November 1950, p. 85.
[1029] Ibid., p. 86.
[1030] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 57.
[1031] Kilian: Die Bindungswirkung der Entscheidungen des EGMR auf die Nationalen Gerichte der Mitgliedsstaaten der EMRK vom 4. November 1950, p. 170.

absolutely decisive for the findings of the ruling, the res judicata does not involve the grounds or the reasoning, which, however, constitute necessary structural and ontological elements of a judgment.[1032] What is common in both national and international law is that, the res judicata is manifested in two different ways, a positive and a negative one. The positive component of the res judicata is referred to as *formal legal force* and the negative component is known as *substantive legal force*. The positive res judicata and the principle of *res judicata pro veritate habetur*[1033] reflect the irrefutable presumption of the correctness of a diagnosis; therefore, result in a judgment which is binding upon litigants even when the diagnosis might be mistaken.[1034] In this context, it is expressed that, the positive res judicata of the Court's judgments is illustrated by the fact that its final judgments are not subject to appeal.[1035] A further example of the application of the positive res judicata can be found in civil liability claims which are being raised domestically and for which, the state's unlawful conduct can be derived and confirmed by an earlier ECtHR judgment.[1036] On the other hand, the negative expression of res judicata indicates that the same matter cannot be raised again, either in the same court or in a different court; something also recognised by international customary law.[1037] In what regards the Convention specifically, it is argued that, the negative expression of the res judicata is expressed in Article 46(1) ECHR and in the requirement of states that have participated to the proceedings, to abide by the Court's final judgments.[1038] Additionally, Article 41 ECHR is as well considered a manifestation of the negative res judicata, in the sense that, national courts cannot examine a *just satisfaction* claim on which the Court has already ruled; and this, regardless of whether the Court has previously accepted or denied the claim.[1039]

1.1.4. Enforceability on the practical level and de lege lata solutions

The intense debate around the binding force of ECHR judgments, however, does not touch upon issues related to the *execution* of judgments and therefore, not much light is shed on the specifics of their *enforceability*.[1040] In early literature, the tendency was apparent to even completely disregard the practical impact of international judgments on the national level.[1041] Though the Parliamentary Assembly has as early as in 1972[1042] stressed the need for a stronger commitment to ECtHR judgments and, has proposed the drafting of an agreement that would render judgments enforceable within Member States.[1043] On its part, the Court referred in the case

[1032] Ibid.
[1033] A maxim meaning that 'an adjudicated thing is regarded as the truth', in the sense that a binding judgment that has been delivered upon a matter cannot be challenged for its correctness.
[1034] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 377.
[1035] Ibid.
[1036] Voulgaris: Implementation and Outcome of the judgments of the European Court of Human Rights in the Greek Legal Order (translated from Greek), pp. 98-99.
[1037] Kilian: Die Bindungswirkung der Entscheidungen des EGMR auf die Nationalen Gerichte der Mitgliedsstaaten der EMRK vom 4. November 1950, p. 132.
[1038] Ibid.
[1039] Voulgaris: Implementation and Outcome of the judgments of the European Court of Human Rights in the Greek Legal Order (translated from Greek), p. 98.
[1040] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), pp. 35-36, 38.
[1041] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 217.
[1042] On 23 October 1972, the Parliamentary Assembly adopted Recommendation 683(1972) on action to be taken on the conclusions of the Parliamentary Conference on Human Rights held in Vienna, suggesting in point C2 to 'draw up a European agreement rendering the decisions pronounced by the European Court of Human Rights enforceable in internal law'.
[1043] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 203.

Vermeire[1044] to the ineffective application of a judgment previously delivered by it, in the context of a fresh application that concerned another individual but still the same state; holding hereby, that the non-implementation of its earlier judgment constituted a behaviour contrary to the Convention.[1045] It is argued that, by this position, the Court has made clear that it conceives its judgments as having a *direct effect*.[1046] The Court has also recognised in *Hornsby*[1047], that the enforcement of its judgments constitutes an integral aspect of Article 6(1) ECHR, expressing its view that, in a different case, the right to a fair trial would be deprived of any meaning.[1048] The lack of interest on the issue of the enforceability of ECtHR judgments is also a consequence of the fact that, Member States, have committed themselves to respect the provisions enshrined in the Convention, however, have made no declaration as to the execution of the Court's judgments.[1049] Traditionally, treaties and the case-law of international courts and tribunals, emphasise the obligation of Member States to abide by specific provisions, however, they do not openly acknowledge the *direct effect* of judgments.[1050] Similarly, in the case of the Convention, it can be observed that, it does not contain a provision that obliges Member States to recognise the enforceability of ECtHR judgments.[1051] Given the fact that the execution of judgments may be regulated by the treaty itself, by the law ratifying the treaty, by subsequent legislation or, by the Constitution directly, in the case of ECtHR judgments, it is left to the discretion of states, to set up the procedures for their execution.[1052] In other words, since the Convention leaves the issue of the enforceability of judgments, regardless whether *declaratory* or *ordering*, untouched, a unilateral state enforcement action appears necessary in order for them to be executed.[1053] In this respect, countries such as Malta and Norway, having regulated on their own initiative the internal execution of ECtHR judgments, have demonstrated a particularly friendly behaviour towards the Convention.[1054] These positive exceptions also offer a sense of hope for a possibly new direction in state policy.[1055] It is argued that, a direct effect, at least at first glance, seems to be technically possible and practically achievable only in states which have by legislative act incorporated the ECHR into their national law.[1056] However, arguments in international literature suggest that, the direct effect constitutes an autonomous capacity thus, one independent from the incorporation process.[1057] Moreover, it is highlighted that, ECtHR judgments, as judgments of a predominantly *declaratory* character that merely confirm the existence of a violation in a specific case, cannot be thought as producing any direct

[1044] Vermeire v. Belgium (App. No. 12849/87, 8/11/1988).
[1045] Arnadóttir: Equality and Non-Discrimination under the European Convention on Human Rights, p. 100.
[1046] Ibid.
[1047] Hornsby v. Greece (App. No. 18357/91, 19/3/1997).
[1048] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 362.
[1049] Pfeffer: Das Verhältnis von Völkerrecht und Landesrecht, p. 158.
[1050] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 89.
[1051] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 361.
[1052] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 214.
[1053] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), pp. 51-52.
[1054] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 205; Voulgaris: Implementation and Outcome of the judgments of the European Court of Human Rights in the Greek Legal Order (translated from Greek), p. 105; Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 182.
[1055] Ibid.
[1056] Kilian: Die Bindungswirkung der Entscheidungen des EGMR auf die Nationalen Gerichte der Mitgliedsstaaten der EMRK vom 4. November 1950, p. 211.
[1057] Leeb: Die Innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im Entschiedenen Fall, p. 56.

effect.[1058] Recognising a *cassatory* effect to ECtHR judgments would be de lege ferenda more suitable, especially for the violations arising from national judgments, since execution complications are in this case even greater.[1059] Additionally, it is supported that, ECtHR judgments do not provide individuals with rights that are directly claimable before national authorities since the non-implementation of a judgment does not entitle the applicant with the right to seek their execution from national authorities.[1060] Differently, in what specifically concerns just satisfaction judgments that *order* a payment, these are often considered an exception; though again, literature is not uniform on their capacity to develop, besides a *res judicata*, an effect of *direct enforcement*.[1061] Especially for just satisfaction judgments, it is underlined that, due to their nature, they are more appropriate for a direct internal application, while it is also assumed that, no internal law is objecting the payment of a monetary compensation which has been granted by the Court.[1062] Judgments that award just satisfaction are, by some, even considered as the only type of judgment that has an actual legal effect.[1063] At the same time, it is stressed that, the arrangements of Article 41 ECHR, by providing that the Court shall afford satisfaction "*if* the internal law (…) allows only partial reparation" clearly suggest that, just satisfaction judgments shall not have automatic consequences.[1064] In this context, from the arrangements of Article 41 ECHR results that, the Convention may not be imposing the direct internal application of judgments, however, it does not exclude it either, since the provision actually refers to both cases.[1065]

A solution to address such regulatory gaps in the direct enforcement, could be provided by including both application and execution commands in the agreements signed between states; however, this requires taking a direction completely different from what is known as a standard path for concluding treaties under international law.[1066] Additionally, it is also expressed that, besides establishing relevant procedural arrangements, enforcement can be guaranteed by an analogous application of already existing national provisions, specifically those ordering the execution of national judicial decisions against the state.[1067] Another perspective that has failed to prevail, has advocated the recognition of the direct enforceability of ECtHR judgments through an analogous application of the national civil procedural provisions that regulate the recognition of foreign judgments.[1068] Hereby, it should be underlined that, an analogous application of national civil procedural law on international judgments requires that a state has previously explicitly accepted such a limitation to its sovereignty.[1069] What is more, different legal systems have different Civil Procedural Codes, a fact that renders a uniformly analogous

[1058] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), pp. 43-47.
[1059] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 385
[1060] Leeb: Die Innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im Entschiedenen Fall, p. 54.
[1061] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), p. 48.
[1062] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 213.
[1063] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 56.
[1064] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), pp. 45-47; Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 204. Uerpmann does not refer to current Article 41 but to former Article 50.
[1065] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 204.
[1066] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 208.
[1067] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 362.
[1068] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), pp. 58, 64.
[1069] Ibid., pp. 54-55.

application practically utopian.[1070] Despite the fact that such an analogous application would undoubtedly contribute to the effectiveness of the Convention, the notion has raised certain concerns, basically because of its lack of a de lege lata convincing basis.[1071] In any case, placing ECtHR judgments under the same umbrella as national judgments can lead to unreliable conclusions, since the judgments of the two legal orders differ essentially on several levels. In this regard, it has been stressed that, the issue of the direct enforceability of international judgments shall be answered on the basis of public international law, following the logic that the enforceability of national judgments is delimited by national legislation.[1072] Lastly, attempts to compare ECtHR judgments with ECJ judgments are also not very helpful, since Article 260 TFEU[1073] provides for the binding force of ECJ judgments on all national authorities, a regulation that the ECHR system clearly misses.[1074]

1.2. Dogmatic basis for an obligation to comply

1.2.1. The law of the Convention

It is commonplace for human rights treaties, not to provide a comprehensive enforcement system, a fact that creates the need for 'non-systemic' protection mechanisms which are to be found outside the treaty and, more specifically, in *general international law*.[1075] In this respect, it is argued that, Article 46 ECHR shall be interpreted in the light of the *general principles of international law*, such as the principle of the *international responsibility* of states and the principle that a state cannot invoke its national law in order to circumvent its international obligations.[1076] As the arguments from general international law have been already presented by the present thesis in the context of the analysis of the Convention's binding effect, the discussion on the *binding force* of the Court's case-law, will take place here on the dogmatic basis offered by the preamble and by Articles 1, 19, 32 and 46(1) of the Convention.[1077] More specifically, in supporting a connection of the obligation to abide by ECtHR judgments with Article 1 ECHR, it is debated that, a failure to comply with Article 46 ECHR establishes a failure of the state to perform its obligations under Article 1 ECHR.[1078] In this regard, it is stressed that, the wording of Article 46 ECHR, which regulates the effects of ECtHR judgments, should not be examined individually, but instead, alongside other provisions such as Article 1 ECHR, which sets the general framework for the operation of the substantive provisions of the Convention.[1079] In the same vein, it is argued that, in Article 1 ECHR, the protection of individuals is identified as the principal purpose of the Convention, the effectiveness of which

[1070] Ibid., p. 56.
[1071] Ibid., pp. 58, 64.
[1072] Ibid., p. 50.
[1073] Former Article 228 of the Treaty establishing the European Economic Community (TEEC), also known as Treaty of Rome.
[1074] Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, p. 24.
[1075] Tams: Enforcement, pp. 385, 402-403.
[1076] Trekli: Binding Force and Execution of Judgments (translated from Greek), p. 621.
[1077] Hoffmann: Die Europäische Menschenrechtskonvention und Nationales Recht, pp. 100-101.
[1078] Lambert-Abdelgawad: The Execution of Judgments of the European Court of Human Rights, p. 10; Trekli: Binding Force and Execution of Judgments (translated from Greek), p. 621.
[1079] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 200. Uerpmann does not refer to current Article 46 but to former Article 53.

can be best guaranteed through a binding effect of the Court's judgments.[1080] In what regards the role of Article 19 ECHR, it is underlined that, the Court by being the only body responsible "to ensure the observance of the engagements undertaken by the High Contracting Parties", it is specialised in human rights questions considerably more than national courts.[1081] Thus, it is also best suited for the Court to have the last word in what concerns the protection of human rights.[1082] The jurisprudence of the ECtHR does indeed convey an inclination of the Court towards humanism, which can be derived, inter alia, from the fact that, its judgments have literally pulled categories of people out from the swamp of social isolation.[1083] In this context, it is further highlighted that, the jurisprudential positions of the Court are characterised by both a liberal and a humanistic spirit.[1084] Often enough, ECtHR judgments materialise in a quite inventive way that makes the entrenching of the goals and values of the Convention seem only feasible through them.[1085] Moreover, it is widely accepted that, the Court, by following a liberal approach when reflecting supranational values, has been the one to have awarded to the ECHR system its actual radiation.[1086] It constitutes common truth that, through the years, the Court has given a real glow to the rather laconically worded Convention and that, it has vigorously fought in order to guarantee a strong response from a wide circle of addressees.[1087] As previously mentioned, it is generally recognised that, the Court has utilised the full potential of the Convention by establishing a *human rights public order* on a European level.[1088] In this regard, it is no exaggeration to support that, the whole European legal culture is forged by the jurisprudence of the ECtHR, which expresses timeless universal values and, which constitutes one of the most important pillars of the European integration.[1089] Conceptually similar to Article 19 ECHR is Article 32 ECHR, on the basis of which, arguments have been raised supporting that, the refusal of the binding effect of ECtHR judgments runs counter to the exclusive authority of the Court to interpret the Convention.[1090] Further arguments in favour of the binding force of ECtHR judgments are being derived from Article 46(1) ECHR itself, in the sense that, the *general* obligation for compliance becomes *definite* only in the ECtHR judgments, and, specifically, in the detection of a violation.[1091] Though, references to Article 46 ECHR as a basis for the binding effect of the Court's judgments are often problematical, since the exact parameters and extent of the scope of this Article remain rather unclear to the largest part of the legal and political world.[1092] Lastly, it is raised that, the argument of laxity of the obligation to comply with ECtHR judgments, contradicts Rules 80 and 81 of the Rules of Court, which

[1080] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 73.
[1081] Unkel: Berücksichtigung der Europäischen Menschenrechtskonvention in der Neueren Rechtsprechung der Bundesdeutschen Verwaltungsgerichte, p. 48.
[1082] Ibid.
[1083] Karelos: The Influence of the Case-law of the European Court of Human Rights on Greek Jurisprudence, pp. 1928, 1929.
[1084] Matthias: European Convention on Human Rights (translated from Greek), p. 16.
[1085] Ibid.
[1086] Matthias/ Ktistakis/ Stavriti/ Stefanaki: The Protection of Human Rights in Europe (translated from Greek), p. 32.
[1087] Matthias: European Convention on Human Rights (translated from Greek), p. 16.
[1088] Perrakis: European Law of Human Rights (translated from Greek), p. 99.
[1089] Karelos: The Influence of the Case-law of the European Court of Human Rights on Greek Jurisprudence, p. 1938.
[1090] Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, p. 31.
[1091] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, pp. 62-63.
[1092] Trekli: Binding Force and Execution of Judgments (translated from Greek), p. 618.

regulate the possibility of revising a judgment and of correcting obvious errors and which, therefore, provide ways to 'break' the allegedly non-existing legal effect of judgments.[1093]

1.2.2. The aim and purpose of the Convention

An increasing number of voices in theory advocate a higher degree of objective commitment to ECtHR judgments, by approaching the preamble of the Convention as an indicator of the distinctive role of the Convention for the European integration.[1094] In this respect, it is highlighted that, the binding nature of ECtHR case-law serves better the very aim and purpose of the Convention, as articulated in its preamble.[1095] Even arguments in favour of a *direct application* of the Court's judgments are drawn on the basis of the overall purpose of the Convention.[1096] Moreover, it is stressed that, a teleological approach of the Convention that recognises the long-term goal of establishing a more coherent union, tallies better with the recognition of a binding force of the Court's case-law.[1097] Further arguments are attempting to justify the requirement of compliance with the Court's judgments historically, based on the fact that, the Council of Europe was set up within the context of a 'European movement' which followed the Second World War and, which had the aim to promote unity and cooperation among its members. More specifically, according to Article 3 of the Council's Statute, Member States are expected to "collaborate sincerely and effectively in the realisation of the *aim* of the Council"; an aim which according to Article 1 of the same Statute is "to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress".[1098] From the above, it seems undoubted that, the purpose of the Convention is better served by a *fully binding force* of the Court's rulings, while the currently limited binding force is only a compromise in order to ensure the authority of national courts and the non-disturbance of national affairs.[1099] It is furthermore expressed that, the aim and the purpose of the Convention also presuppose that the rights of the Convention are protected *effectively*.[1100] Relevant is the notion that the *binding nature* of ECtHR judgments is essential for the *effectiveness* of the rights enshrined in the Convention.[1101] With regard to effectiveness, it is raised that, there where the Convention foresees the existence of a control mechanism, what is meant is an *effective* control.[1102] Conversely, it is expressed that, the obligation of national authorities to abide by ECtHR judgments may be based on the principle of effectiveness only if judgments themselves

[1093] Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, p. 31.
[1094] Unkel: Berücksichtigung der Europäischen Menschenrechtskonvention in der Neueren Rechtsprechung der Bundesdeutschen Verwaltungsgerichte, p. 43. Unkel refers to BERNHARDT, BLECKMANN, POLAKIEWICZ, STÖCKER, ZIMMER as scuh voices in theory.
[1095] Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, p. 23.
[1096] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 205.
[1097] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 351.
[1098] Trekli: Binding Force and Execution of Judgments (translated from Greek), pp. 617-618.
[1099] Unkel: Berücksichtigung der Europäischen Menschenrechtskonvention in der Neueren Rechtsprechung der Bundesdeutschen Verwaltungsgerichte, pp. 272-273.
[1100] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 119.
[1101] Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, p. 23.
[1102] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 205.

have characteristics that allow for their effective implementation.[1103] In this respect, it is highlighted that, because the national act, law or judgment that has been found in violation of the Convention continues to be valid and to produce effects, ECtHR judgments cannot be considered as having such effective characteristics and hence, national authorities cannot be considered as being bound by them.[1104] In the same regard, it is supported that, thus far as the judgments are not suitable for their *direct* internal enforcement, it also cannot be assumed that the legislator actually aspired to bind national authorities under these judgments.[1105] In relation to the above, it becomes evident that, the Convention does not contain a provision which confers upon the Court's judgments a certain *binding* effect, even less a *direct* effect, on the national level and therefore, de lege lata, such an effect is missing.[1106] In this context, it is underlined that, such a binding effect will be established only when the Court will have the power to annul national acts, laws and judgments that have been found to be incompatible with the Convention.[1107]

1.3. Orientation effect

1.3.1. The concept of res interpretata

The concept of the *interpretive authority* of ECtHR judgments concerns the question of whether the binding effect produced by a judgment, so-called *autorité de la chose jugée*, also extends beyond the context of the specific case, namely whether it also produces an *autorité de la chose interprétée*.[1108] As a term, *interpretive authority* is often used interchangeably with the terms *res interpretata* and *interpretive precedent.* However, since the Court has expressed concerns about the equation of the terms and, since there is still no consent in international theory as to their exact meaning and their legal foundation, a careful approach of these terms is needed.[1109] In any case, the legal principle of interpretive authority shall be distinguished from the *res judicata*, as the two espouse different theories with distinctive characteristics.[1110] It is observed that, the legal principle of res interpretata has not yet been adequately approached in legal theory, despite its essential role in the process of achieving greater integration in Europe.[1111] In fact, the question on the precedential power of international judgments is hardly ever discussed within the national borders and, even the Court itself avoids to take a fixed position on the matter.[1112] Similarly, the Committee of Ministers has thus far not adopted any particular stance

[1103] Ibid., p. 206.
[1104] Ibid.
[1105] Ibid., p. 207.
[1106] Ibid., pp. 216-217.
[1107] Ibid.
[1108] Malinverni, Giorgio: Ways and Means of Strengthening the Implementation of the European Convention on Humna Rights at National Level, p. 489; Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), pp. 36-37.
[1109] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 400. The court has expressed this opinion at cases Modinos v. Cyprus and Norris v. Ireland.
[1110] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 39.
[1111] This has also been emphasised by Pourgourides, Chairperson of the Committee on Legal Affairs of the Parliamentary Assembly in his contribution to the Conference on the Principle of Subsidiarity, Skopje, 1-2 October 2010. Pourgourides's contribution is available under: http://assembly.coe.int/CommitteeDocs/2010/20101125_skopje.pdf (20/10/2017).
[1112] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, pp. 279, 286.

on the issue, however, it is argued that, an indirect reference to res interpretata can be seen in the preamble to the Rec (2004)6[1113] of the Committee of Ministers, which outlines the obligation of Member States to check the compatibility of national measures with the Convention "in the light of the case-law of the European Court of Human Rights".[1114] On their part, individuals often refer to ECtHR judicial precedents before national courts, in an attempt to support their claims arising from the Convention.[1115] At first glance, the notion that ECtHR judgments are able of producing interpretive precedents might sound wrong, since the common law principle of *stare decisis* mostly constitutes an Anglo-American legal tradition, with which public international law is not familiar.[1116] Furthermore, across Europe, it is the civil law system that predominates, the rules of which refute the application of the maxim of stare decisis.[1117] In such an environment, the concept of interpretive precedent constitutes a relatively new debate, with which most European countries are unfamiliar and which, given the circumstances, could even be regarded a radical development for Europe's legal understanding.[1118] Nonetheless, it is stressed that, the obligation of states to not repeat the same violation in the future, as it is known from the principle of state liability, can hardly be considered a stricto sensu requirement to comply with the outcome of a specific case, while it seems more associated with the principle of *res interpretata*.[1119] The power of judicial decisions has also long been appraised by the ICJ Statute, whereby it is stated in Article 38(1) (d) that, judicial decisions are considered subsidiary sources of international law. In any case, a hypothetical recognition of the interpretive authority of the Court's judgments upon *all* Member States, would concern only the legal *reasoning* and not the *operative* part of a judgment, as the case is for the res judicata.[1120] Furthermore, the interpretive authority would cover not only the states that have *not* been party to the proceedings, but also, those states that have participated to the proceedings and who, at some future point, in the context of so-called 'parallel' cases, are accused of similar breaches.[1121]

1.3.2. The Court's stance towards the interpretive power of its judgments

The Court has consciously avoided direct references to the issue of the overall binding force of its interpretations. However, there are indications that the Court does consider its judgments a useful tool for illuminating the provisions of the Convention and for helping Member States stay in line with their obligations.[1122] In this respect, it is stressed that, the Rules of Court already contain certain relevant indications, such as Rule 44A, which regulates the obligation of states that were not parties to the litigation, to stand in a fully cooperative manner and to take all necessary measures towards the "proper administration of justice".[1123] Further indications can be found in the Court's case-law through which the Court, has not only demonstrated the desire

[1113] Recommendation Rec(2004)6 of the Committee of Ministers to Member States on the improvement of domestic remedies. Adopted on 12 May 2004, at the 114th Session of the Committee of Ministers.
[1114] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 94.
[1115] Kilian: Die Bindungswirkung der Entscheidungen des EGMR auf die Nationalen Gerichte der Mitgliedsstaaten der EMRK vom 4. November 1950, p. 111.
[1116] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 396.
[1117] Ibid., p. 395.
[1118] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 216. UK and Cyprus are the only common law systems in Europe.
[1119] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 380.
[1120] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), p. 38.
[1121] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 162. Haß talks of 'Parallelfällen'.
[1122] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 400-401. Chrysogonos refers in this regard to case Ireland v. UK (App. No. 5310/71, 18/1/1978) para. 154.
[1123] Van de Heyning: Fundamental Rights Lost in Complexity, p. 171.

for its case-law to gain a legal effect similar to that of judicial precedents,[1124] but also, has made clear its intention to gain a *law-making* character itself.[1125] More specifically, in the case of *Ireland*[1126], the ECtHR has declared that its decisions do not only serve to resolve individual cases, but rather, contribute to the development of the normative content of the Convention and assist Member States in respecting the commitments they have made.[1127] Moreover, in *Marckx*,[1128] the Court has held that "it is inevitable that the Court's decision will have effects extending beyond the confines of the particular case, especially since the violations found stem directly from the contested provisions and not from individual measures of implementation".[1129] In the *Pentidis* case[1130] the Court has acknowledged that, if the state proceeds, while the case is still pending before it, with the adoption of the measures underlined in the context of its *previous* similar judgment[1131], this would in itself be enough to resolve the *current* dispute.[1132] It is argued that, by holding this position in case *Pentidis*, the Court has provided for the possibility to achieve compliance in advance, that is before arriving to a possible conviction of the state; having thus introduced the concept of compliance with the interpretative precedent arising from a previous case.[1133] Additionally, in case *Broniowsky*,[1134] the Court has set precedent by identifying a systemic problem responsible for numerous violations and by accepting that, similar 'post-Broniowsky' cases would only need to prove their comparable position in order to get their claims satisfied.[1135] However, as the Court implicitly accepted in cases *Modinos*[1136] and *Norris*[1137], by no chance does the interpretative authority of its judgments reach the point of establishing a stare decisis for states to rely upon.[1138] Further arguments of the Court's appraisal of its own case-law can be derived by its standard practice to regularly refer to its previous relevant case-law in the context of the examination of fresh cases, thereby enhancing the validity of its judgments. As it held in the *Beard* case,[1139] although the Court "is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases". In this respect, it is accepted that, any decision of the Court to depart from interpretative solutions previously adopted in similar cases, needs to be adequately and specifically justified, because ignorance towards the judicial precedents and constant case-law changes can endanger the principle of equality.[1140] The Court does in fact have a quite well-established case-law, which provides a relatively stable environment of legal certainty and foreseeability and, one which operates successfully against arbitrariness and

[1124] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 288. Polakiewicz refers in this regard to case Ireland v. UK (App. No. 5310/71, 18/1/1978).
[1125] Ibid., p. 284.
[1126] Ireland v. UK (App. No. 5310/71, 18/1/1978) para. 154.
[1127] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 400; Kastanas: Compliance with the Judgments of the European Court of Human Rights and the Contribution of the Greek Judge (translated from Greek), p. 116.
[1128] Marckx v. Belgium (App. No. 6833/74, 13/6/1979) para. 58.
[1129] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 379.
[1130] Pentidis a.o. v. Greece (App. No. 23238/94, 9/6/1997).
[1131] The previous judgment was the Manoussakis a.o. v. Greece (App. No. 18748/91, 26/9/1996).
[1132] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 383. The measures were in this case granting authorisation to Jehovah's Witnesses to establish a place of worship.
[1133] Ibid.
[1134] Broniowski v. Poland (App. No. 31443/96, 22/6/2004).
[1135] Oette: Bringing justice to Victims? p. 230.
[1136] Modinos v. Cyprus (App. No. 15070/89, 22/4/1993).
[1137] Norris v. Ireland (App. No. 10581/83, 26/10/1998).
[1138] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 403.
[1139] Beard v. UK (App. No. 24882/94, 18/1/2001).
[1140] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 398.

lawlessness.[1141] In this vein, the Court's judgments have been characterised as sound and solid and often even as momentous, though, in certain cases consistency and coherence have been contested.[1142] At the same time, the practice of remaining loyal to jurisprudential solutions of the past and, of sustaining a solid legal basis for human rights judgments, does not only contribute to a coherent and consistent judicial approach, but it also helps eliminate suspicions of influence being exerted on the judiciary.[1143] In this regard, the Court's interpretations support the safeguarding of the principle of the impartiality of judges and the principle of equality, adding to the impression that the Court keeps a stable course regardless of the parties involved each time.[1144] In this context, it is supported that, the Court, by being a central judicial authority which acts independently and coherently, it is neither influenced by ideological stereotypes nor is it affected by political purposes.[1145] Following the same logic, it is noted that, national courts are required to provide detailed reasons in case they decide to depart from the Court's case-law.[1146] This obligation of national courts to fully justify their judgments in the case they deviate from ECtHR case-law, is thought to be incorporating an attempt to normalise the compromise of the non-fully binding force of the Court's judgments; an unfortunate compromise that contrasts the Court's authority.[1147]

1.3.3. Arguments from the law of the Convention

It is often attempted to recognise the power of interpretive precedents to the Court's judgments based on the legal ground provided by a combination of several ECHR provisions. In this sense, it is raised that, Articles 1, 32(1) and 52 ECHR make evident that, Member States have signed the Convention being fully aware of its effects on their sovereign powers and, of the consequences of a failure to fulfil the undertaken responsibilities.[1148] More precisely, it is argued that, Article 1 ECHR introduces the formal recognition of the rights embodied in the Convention, while Article 52 ECHR the requirement of their effective implementation that is always in accordance with the normative content attributed to them by the Court under Article 32(1) ECHR.[1149] It is also underlined that, the fact that Article 32(1) ECHR recognises the Court as the only competent authority to interpret the Convention, speaks for the fact that, the interpretations of the Court are, at least at the level of international law, binding.[1150] Additional conclusions are drawn from a combined reading of Articles 32(1) and 47 ECHR; hereto, it is raised that, the Court's competence to rule on all matters and answer all legal questions arising from the Convention and the Protocols thereto is an indication of the recognition of its 'interpretation monopoly', not excluding a parallel recognition of a *general binding force* of its

[1141] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, pp. 347-349.
[1142] Lester: The European Court of Human Rights after 50 years, p. 111.
[1143] McCrudden: Human Rights and Judicial Use of Comparative Law, p. 1; Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 397.
[1144] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 397-398.
[1145] Ibid., pp. 342-343.
[1146] Unkel: Berücksichtigung der Europäischen Menschenrechtskonvention in der Neueren Rechtsprechung der Bundesdeutschen Verwaltungsgerichte, pp. 272-273.
[1147] Ibid.
[1148] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 401-402, 415.
[1149] Ibid., p. 402.
[1150] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 215. Uerpmann does not refer to current Article 32(1) but to former Article 46(1).

judgments.[1151] Nevertheless, such a 'monopoly function' is denied by the contemporary opinions in relevant literature.[1152] At the same time, it is stressed that, Article 30 ECHR, by regulating that a Chamber may relinquish jurisdiction to the Grand Chamber when it fears that an answer to a serious question may be "inconsistent with a judgment *previously* delivered by the Court", it indirectly recognises the power of the Grand Chamber to define an interpretive path.[1153] Moreover, Articles 41 and 46(1) ECHR have often served as arguments defending the interpretive authority and supporting the obligation of states to stay loyal to the line adopted by the Court.[1154] Namely, it is expressed that, although Articles 41 and 46 ECHR do not explicitly foresee a binding effect for the interpretations provided by the Court, they do not deny their *general validity* either, if one also considers that Article 32(1) ECHR grants the Court the authority to set the interpretive boundaries of the Convention.[1155] It is raised in relation to this, that, since Article 44(1) ECHR regulates only the finality and the irrevocable nature of ECtHR judgments, that is the *formal* res judicata, the *substantive* res judicata, so-called res interpretata, is left to be governed by Article 46(1) ECHR.[1156] However, the ability of Article 46(1) ECHR to serve as a justification basis for the establishment of a res interpretata, is contested by some theorists.[1157] In particular, it is raised that, the principle of res interpretata does indeed have a different legitimising basis than the res judicata, however, since it does have the binding effect *inter partes* as its reference point, it cannot be derived from Article 46(1) ECHR but rather, from Articles 1 and 19 ECHR.[1158] Supporters of the res interpretata effect who oppose the view that such an effect can be based on Article 46(1) ECHR have, to some extent, certain points in common with the opponents of the res interpretata effect, who invoke Article 46(1) ECHR for their arguments. In particular, opponents of the res interpretata effect support that a combined reading of Articles 32(1) and 46 ECHR gives a clear signal of the fact that, subject to a Court's judgment is a specific case each time and therefore, the interpretation given by the Court is not binding on those Member States who were not parties to the litigation, not even at the level of international law.[1159]

1.3.4. The argument of judicial authority

Apart from the arguments of purely legal origin, claims in favour of the interpretive authority of the Court's judgments can also be found outside of the text of legal documents. Attributed to the symbolic role and the undisputed authority of the Court, such arguments support that ECtHR judgments are not only creating effects of purely legal nature, but also, have remarkable influences of other nature as well.[1160] The issue of judicial authority is very present throughout Europe, with the judicial precedents of the highest courts being extremely influential on the

[1151] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, pp. 163-164.
[1152] Ibid., p. 164.
[1153] Rozakis: The Jurisprudence of the European Court of Human Rights (translated from Greek), p. 1837.
[1154] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 97.
[1155] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, pp. 352-353.
[1156] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 197. Uerpmann does not refer to current Articles 44(1) and 46(1) but to former Articles 52 and 53 respectively.
[1157] This has also been emphasised by Pourgourides, Chairperson of the Committee on Legal Affairs of the Parliamentary Assembly in his contribution to the Conference on the Principle of Subsidiarity, Skopje, 1-2 October 2010. Pourgourides's contribution is available under: http://assembly.coe.int/CommitteeDocs/2010/20101125_skopje.pdf (20/10/2017).
[1158] Ibid.
[1159] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 215.
[1160] Gutsche: Die Bindungswirkung der Urteile des Europäischen Gerichtshofes, pp. 221-222.

new cases, despite not enjoying officially the power of stare decisis.[1161] In the case of the Court, the unique characteristics of the authority and stability governing its competencies and functions, serve as arguments for an increased *generally binding* force of its judicial rulings.[1162] In this context, it has also been supported that the Court has developed into a 'fine tuner' of human rights protection in Europe.[1163] The broad recognition of the Court as a 'final interpreter' is also revealed by the fact that the highest national courts have repeatedly referred to it as such.[1164] Moreover, the interpretative authority of judgments can also be based on the concept of the *European public order* of human rights.[1165] As previously mentioned, the constitutive character of the Court's case-law has contributed to the establishment of a human rights' *acquis européen*, similarly to the *acquis communautaire*[1166] of the European Union law.[1167] In this respect, the Court's own understanding of its constitutional role, as reflected in its frequent references to a European public order, would be a dead letter, if judgments were powerful only in the context of a particular case.[1168] As a result of the above, refusing to comply with the interpretive line followed by the Court, not only casts doubt on the authority of the Court, but also causes legal uncertainty in Europe.[1169] Former ECtHR President Jean-Paul Costa, has stressed the need to distinguish between the authority of the Court's *judgments* and the authority of the Court's *case-law*.[1170] More explicitly, Costa supports that, in what concerns the authority of individual ECtHR judgments, these produce both a *limited* effect within the context of the examined case and, a *broader* de facto power of authority.[1171] On the other hand, in what regards the Court's case-law in general, Costa emphasises the difficulties in defining its authority, as case-law does not form a uniform body, but rather, a blend of dissenting opinions and evolving trends.[1172] However, despite existing obstacles, Costa underlines that, the authority of the case-law remains undoubted, as proven by the fact that Member States invest considerable resources and make continuous efforts to ensure they stay in line with the Court.[1173] A similar distinction is made between *judgments* and *provisions*, in the sense that, judgments may not be of a *generally binding* nature themselves, however, by demonstrating a *clarification function*, they contribute to the development of the binding force of the respective interpreted *norms*.[1174]

[1161] Kilian: Die Bindungswirkung der Entscheidungen des EGMR auf die Nationalen Gerichte der Mitgliedsstaaten der EMRK vom 4. November 1950, p. 88.
[1162] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, pp. 287, 347.
[1163] Van de Heyning: Fundamental Rights Lost in Complexity, p. 143.
[1164] Ibid., pp. 172, 175.
[1165] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 402.
[1166] Also known as Community acquis or EU acquis or simply acquis.
[1167] Villiger: The European Convention on Human Rights, p. 73.
[1168] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 402.
[1169] Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, p. 31.
[1170] Costa: The Authority of the Jurisprudence of the ECtHR, p. 289.
[1171] Ibid., pp. 289-290.
[1172] Ibid., p. 289.
[1173] Ibid., pp. 290-291.
[1174] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 354. This approach seems to be closer to the power of judicial precedents as known by most European legal systems, where despite lacking a binding force, they are understood as a crucial parameter for the delineation of the purpose and boarders of the application of norms.

1.3.5. The practical effect of the bond established between states and the ECHR

A fundamental reason why states, despite the non-existence of a formal commitment to abide by the Court's case-law at all times, do however orientate towards the Court's judgments, lies within the Court's high esteem and within the legal bond established between the states and the Court.[1175] It is maintained that, this legal bond is reinforced by the judgments of the Court, which give 'flesh and bones' to the ECHR provisions.[1176] It constitutes common truth that, Member States have been profoundly affected by the Court's jurisdiction and have shaped their national policies accordingly.[1177] It is also argued that, the reason for the relatively obedient stance of the Member States is lying in the fact that, states have acceded the Convention with the intention to achieve objectives broader than the mere satisfaction of individual victims.[1178] It is even raised that, the newest state practice actually illustrates either an *explicit* or a *silent* recognition of the *generally binding force* of the Court's case-law.[1179] The cause for this latest state practice is thought to be linked with the increasing number of applications being submitted to the Court, the bright side of which is, the improved awareness for human rights protection and the realisation of the Court's role in this process.[1180] In fact, despite being officially free to choose whether or not they will abide by ECtHR judgments to which they have not been litigant parties, Member States, in practice, seriously consider the threat of a similar claim been filed against them and act accordingly.[1181] In particular, states tend to worry that their inaction may indicate the commitment of a violation and, subsequently, lead to their conviction.[1182] Thus, states are putting their considerable efforts into ensuring that they behave in accordance with the Court's case-law.[1183] In this context, states take account of the Court's case-law and benefit from its *orientation effect*, which helps them to align smoothly with the provisions enshrined in the Convention.[1184] The fact that states actively try to guarantee the uniform application of the Convention, towards achieving an enhanced harmonisation, is considered, by some, as indicative of the implicit acceptance of an *erga omnes* power of the Court's rulings.[1185] On their part, national courts and even constitutional courts, tend to approach the Court's jurisprudence in a very particular way, which has been described with the words *as if it was* binding.[1186] In this vein, it is noted that, besides its normative force, the Convention has also developed a substantial factual weight, namely a de facto effect evident in its use by national courts in the process of interpreting national law and even the Constitution.[1187] Nevertheless, whilst the practical effects of the Court's rulings on state behaviour are apparent and have even become increased over time, their legal standing remains questioned and it seems that, compliance still remains voluntary and a result of the authority and the respect that the Court enjoys.[1188] In any

[1175] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 165.
[1176] Grabenwarter/ Pabel: Europäische Menschenrechtskonvention, p. 98.
[1177] Van de Heyning: Fundamental Rights Lost in Complexity, pp. 172, 175.
[1178] Rozakis: The Jurisprudence of the European Court of Human Rights (translated from Greek), p. 1838.
[1179] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), pp. 37-38.
[1180] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 225.
[1181] Villiger: The European Convention on Human Rights, pp. 72-73.
[1182] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 173.
[1183] Ibid.
[1184] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, pp. 118, 121. Karper uses the German term 'Orientierungswirkung' which has been freely translated into 'orientation effect'.
[1185] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, pp. 347-349.
[1186] Van de Heyning: Fundamental Rights Lost in Complexity, pp. 174, 178.
[1187] Grabenwarter/ Pabel: Europäische Menschenrechtskonvention, pp. 21, 23-24.
[1188] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 279.

case, it is advisable for Member States to continue following the Court's case-law on the basis of an understanding of its vital role for the protection of human rights and for the maintenance of stability in Europe.[1189] In this context, it is underlined that, states should actually adopt such a behaviour even based on a sense of a 'soft' responsibility arising from their respect for the ECHR system and, regardless of the lack of a strict obligation resulting from the wording of the Convention.[1190] In general terms, it is regarded as necessary for the functionality of the ECHR system that states cooperate in order to relieve the Court from any unnecessary additional burden. An undoubtedly effective method to achieve this goal is, by following the interpretive precedents and, by avoiding to create a fertile breeding ground for human rights violations.[1191] Hereby, the guidance function of the Court's case-law for a preventive state conduct is crucial and shall therefore not be overridden by cultural or other factors that apply behind national borders.[1192] An additional reason why national jurisdictions should adjust their practices to the path that is being paved by the Court is that, the majority of citizens do not have the financial means to appeal to the ECtHR and thus, they often end up relying merely on the domestic courts in their quest for justice.[1193] In relation to this, the case-law of the Court clearly points out that, the terms *public interest* and *citizen* constitute two sides of the same coin, if not two identical concepts, and that the former is served adequately only when performing if favour of the latter.[1194] Overall, a mechanism that forces states to comply stricto sensu with ECtHR judgments does not seem to exist, and even less does it seem to exist in regard to the Court's interpretive precedents.[1195] As a result, the predominant opinion in relevant literature denies an erga omnes effect reaching beyond the provisions of Article 46(1) ECHR and finds no sufficient legal standing or justification in the positions of the supporters of the opposite view.[1196] Consequently, it currently seems hard to justify an erga omnes effect of ECtHR judgments based on the arguments that are being presented by its advocates, though its opponents do not categorically reject the possibility of such an effect to emerge in the future.[1197]

2. Execution of ECtHR judgments

2.1. Addressees

2.1.1. The capacity of states and national authorities as addressees

According to the pattern that applies for obligations arising from national law of states organised under the decentralised system, one could expect that, addressees of the obligations arising from Article 46(1) ECHR are the competent national authorities. However, in the field of international law things are unclear in this respect and the implementation of ECtHR

[1189] Gilch: Die Reformen am Europäischen Gerichtshof für Menschenrechte unter Besonderer Berücksichtigung des 14. Zusatzprotokolls zur EMRK, p. 248.
[1190] Ibid.
[1191] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 42-43.
[1192] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, pp. 86-87.
[1193] Karelos: The Influence of the Case-law of the European Court of Human Rights on Greek Jurisprudence, p. 1932.
[1194] Ibid., p. 1935.
[1195] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 375.
[1196] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 164.
[1197] Ibid., pp. 165, 173.

judgments remains a challenging task. In fact, there is vagueness not only on determining the competent authority that is responsible to take the necessary responsive measures, but also in the sense that, even the *capacity* itself of national authorities to be regarded as addressees is contested. More specifically, the notion that national authorities can be conceived as addressees of international judgments finds an opponent in the theory of dualism, according to which, international judgments do not have an automatic effect and, only states are to be considered as *subjects* of international law and thus, as the single addressees of international law.[1198] Traditionally, according to the *three-element theory*, a state constitutes a subject of international law only when it is able to exercise effectively within a specific *territory*, its *sovereign authority* over some *nation*.[1199] However, the recognition of the *rule of law* as a fundamental international principle has created new requirements for the recognition of a state as legitimate and sovereign by the international community; the national level of human rights protection currently constitutes a crucial parameter in this regard.[1200] Differently than authorities, states have an international legal personality and the capacity to bear rights[1201] and duties; a capacity that gives them the ability to be categorised under the subjects of international law, also known as *international persons*.[1202] Furthermore, states are closely related to the international legal order and the two tend to blur competences.[1203] In the eighties and with the level of the then development of the international community, the notion that judgments of international courts would not be binding exclusively on the states, would sound completely utopian.[1204] Furthermore, the results from a historical interpretation of the material to the Convention, does not provide a clear picture of the issue of the obligation of state bodies to comply with the Court's judgments.[1205] Though, what does become clear from the historical elements is that, the Court, was perceived as a purely international jurisdiction, while states had serious concerns about the possibility of the Court interfering in national affairs.[1206] As a result, the classical distinction between international and domestic law was at that time still very present.[1207] At the same time, the fact that the ECHR does not foresee a *direct effect* for the Court's judgments, is seen as indicative of the fact that, national authorities themselves cannot be held liable in case they do not proceed with executing these judgments.[1208] On the other hand, it is supported that Articles 1, 13 and 52 ECHR constitute enough manifestation of the binding effect of judgments on national courts and generally on national authorities.[1209] Moreover, nowadays, globalisation

[1198] Kilian: Die Bindungswirkung der Entscheidungen des EGMR auf die Nationalen Gerichte der Mitgliedsstaaten der EMRK vom 4. November 1950, p. 113.
[1199] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, pp. 59-60. Emmerich-Fritsche underlines that this theory does not require a legitimate state authority; the authority hast to be effective, no matter if it was gained arbitrarily. On the other hand, when a system does not fulfil the three elements then it is not considered a state, but a de facto regime.
[1200] Nádrai: Rechtsstaatlichkeit als Internationales Gerechtigkeitsprinzip, pp. 99, 161.
[1201] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, p. 105. Emmerich-Fritsche refers to rights such as the right of existence, sovereignty, state identity, legal equality and the prohibition of force.
[1202] Cheng, Bing: Introduction to Subjects of International Law, p. 30.
[1203] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, p. 70.
[1204] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, p. 61. Stanoeva cites MOSLER: Eine Allgemeine, Umfassende, Obligatorische, Internationale Schiedsgerichtsbarkeit, pp. 607-608.
[1205] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 208.
[1206] Ibid.
[1207] Ibid.
[1208] Janis/ Kay/ Bradley: European Human Rights Law, p. 849. Janis/ Kay/ Bradley refer in this regard to case Ireland v. UK (App. No. 5310/71, 18/1/1978).
[1209] Leeb: Die Innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im Entschiedenen Fall, p. 56: Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 227. Polakiewicz does not refer to current Article 52 but to former Article 57.

has changed the face of the international legal order, which can no longer be conceived as a construct based merely only on the consent of states.[1210] With this in mind, individuals start being recognised not only as holders of rights, but also, as bearers of responsibilities, while international law starts being conceived as able to intervene in the relationships between individuals by creating such rights and responsibilities; something that highlights an important argument for the recognition of even individuals as subjects of international law.[1211]

In relation to the Court's position to this matter, the institution has held in cases *Loukanov* and *Wille*[1212] that, neither the *type* nor the *hierarchical* position of the state body are relevant for confirming the responsibility of the state.[1213] Similarly, in *Ireland*[1214] the Court has ruled that, a state is liable for the conduct of its authorities, including higher and subordinate authorities.[1215] Moreover, even in the case-law of Member States, certain references are present concerning the fact that, the binding effect of the Court's judgments shall affect all state organs.[1216] General international law goes a step further, by establishing the international liability of states for acts or omissions even of persons or groups of people who are not official state actors.[1217] More specifically, the Draft Articles on the Responsibility of States regulate that the state can be held responsible for the actions of any authority acting in the capacity of a state organ, even when it is acting ultra vires or contrary to orders.[1218] The aim of such provisions is to extend the circle of the persons and entities whose behaviour can be attributed to the state, especially to those who have been authorised by the state to exercise governmental power and to take actions of public character.[1219] According to general international law, states are expected to take all necessary measures even where an infringement of rights arises from the relationships between individuals.[1220] In this respect, states are expected to intervene into individual personal affairs in order to guarantee righteous social attitudes.[1221] In its capacity as a judicial organ of the Convention, the Commission has in the past expressed its opinion that, civil servants, diplomatic and consular authorities may establish the international liability of the Member States to which they belong, regardless of the territory on which the violation has occurred.[1222] The Court has continued this track by providing for the generalised rule that, a state is responsible for all actions of all state organs inside and outside its territory.[1223] In case *Loizidou*[1224] the Court has referred to judgment *Drozd and Janousek*[1225], repeating its position

[1210] Ip: Globalisation and the Future of the Law of the Sovereign State, pp. 636-655, esp. page 642.
[1211] Perrakis: European Law of Human Rights (translated from Greek), p. 63; Chortatos: Introduction to Contemporary International Law and the Problem of Relationship between International and Internal Law (translated from Greek), pp. 83-84.
[1212] Loukanov v. Bulgaria (App. No. 21915/93, 20/3/1997 and Wille v. Lichtenstein (App. No. 28396/95 28/10/1999).
[1213] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 74; Sisilianos: The Human Dimension of International Law (translated from Greek), p. 64.
[1214] Ireland v. UK (App. No. 5310/71, 18/1/1978) paras.159 and 239.
[1215] Leeb: Die Innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im Entschiedenen Fall, p. 57.
[1216] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 227.
[1217] See Articles 5 to 8 of the Draft Articles on the Responsibility of States.
[1218] Sisilianos: The Human Dimension of International Law (translated from Greek), pp. 64, 67.
[1219] Ibid., pp. 67-68.
[1220] Ibid., p. 75.
[1221] Ibid., p. 80.
[1222] Ibid., p. 45. Sisilianos refers in this regard to cases X v. Germany (App. No. 1611/62, 25/9/1965 and W.M. v. Denmark (App. No. 17392/90, 14/10/1992).
[1223] Ibid., p. 46.
[1224] Loizidou v. Turkey (App. No. 15318/89, 23/3/1995) para. 63.
[1225] Drozd and Janousek v. France and Spain (App. No. 12747/87, 26/6/1992) para. 91.

that, the acts of state organs cause the liability of the state regardless of whether they take place within or outside national borders.[1226] As a result, states may be held responsible for a broad spectrum of acts and omissions of their organs, including those committed outside the national territory and those producing effects beyond national borders.[1227] It remains questionable whether the state may as well be held responsible for actions that it takes in relation to its obligations arising from other international agreements, as for example in the case that a state is simultaneously party to the EU and the CoE.[1228]

2.1.2. The separation of powers

In states where the rule of law is applicable, such as European states, the model of governance is based on the political doctrine of separation of powers, so-called *trias politica principle*.[1229] However, separation of powers in Europe is generally not considered a strict one, with past experiences having shown that, in practice, legislative and executive powers often overlap in a way that renders the setting of a fixed and transparent competence framework problematic.[1230] In any case, the separation of powers does not diminish the power of the legislature and the executive in determining specific aspects of the organisational structure of the judiciary, however, without touching upon substantive issues and by remaining respectful of the independency of the judiciary.[1231] Conversely, for many Eastern European Member States, the independency[1232] of the judiciary is something new and remains, despite the impressive steps forward, a serious concern along with the problems related with ensuring high professional standards and adequate remuneration for the judiciary.[1233] Nevertheless, influences or even attempts to influence the judiciary, most commonly stemming from the executive[1234], are to be treated harshly, considering the value of having the justice delivering unbiased judgments, a vital element of every democracy.[1235] Simultaneously, it shall be mentioned that, many CoE Member States come from legal backgrounds and traditions that are not enthusiastic towards the idea of legal plasticity, therefore opting for a more distinguishable separation of powers and

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[1226] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 46.
[1227] Ibid., pp. 51-59; Dijk/ Hoof: Theory and Practice of the European Convention on Human Rights, pp. 9-10.
[1228] Tomuschat: Der Beitritt der Europäischen Union zur EMRK, p. 72; Jagland: Reform of the European Court of Human Rights, p. 238.
[1229] International Commission of Jurists: The Rule of Law and Human Rights, p. 30.
[1230] Hofmann: Die Bindung Staatlicher Macht, p. 11.
[1231] International Commission of Jurists: The Rule of Law and Human Rights, p. 31.
[1232] Steinfatt: Die Unparteilichkeit des Richters in Europa im Lichte der Rechtsprechung des Europäischen Gerichtshofs für Menschenrecht, p. 25, highlights the fact that independency of the judiciary from external influences, especially from the executive, shall not be confused with the impartiality of judges, as the latter means conclusions freed from personal bias. Furthermore, Hofmann: Die Bindung Staatlicher Macht, p. 28, underlines that the overall notion of judicial independence of judges does not only require their official independence and their protection from the exertion of external pressures, but also, their mental independence, as it is otherwise unimaginable to attain high quality justice. Additionally, International Commission of Jurists: The Rule of Law and Human Rights, p. 30 stresses that judicial independence shall not in any way indicate the power of judges to act arbitrarily or disproportionately.
[1233] Merli: Der Rechtsschutz, p. 33.
[1234] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 243: In case Anagnostopoulos and other v. Greece (App. No. 39374/98, 7/11/2000) it was considered that the intervention of the legislature in judicial proceedings with the intention to distort the judiciary in the execution of its functions is contrary to Article 6(1) ECHR, whereby the reason and the desired results that led to the interference are irrelevant, thereby preventing an approach of provisions as being truly interpretative in order to grant them retroactive effect.
[1235] Steinfatt: Die Unparteilichkeit des Richters in Europa im Lichte der Rechtsprechung des Europäischen Gerichtshofs für Menschenrecht, p. 318.

disapproving external obligations, especially those imposed on national courts.[1236] However, one should also be mindful of the fact that, the application and the effectiveness of the ECHR is a result of the interrelation and correlation of various factors and thus, putting all pressure onto one single actor actually contrasts the real practice.[1237] Cooperation is indeed an integral component of the existing composite structure, since, even when all important decisions have been taken, a relatively bureaucratic public sector can practically hinder, if not prevent, a state's abidance by its international commitments.[1238] In this context, it is considered a smart choice for all state authorities to do their best to not expose the country to the risk of a conviction by the Court and of a possible subsequent monetary compensation.[1239] Moreover, it is supported that, the obligation of the national legal order to adapt laws, rules, policies and practices to the case-law of the Court has by now become an *acquis*.[1240] In this respect, state actors are expected to put nothing less than their full effort and dedication in the process of realising the full legal and political consequences of the Court's judicial rulings, or otherwise the rule of law could be seriously endangered.[1241] It is further maintained that, the obligation of state organs does not only include the full respect for the Court's judgments, but also, when required, the positive stimulation of their enforcement.[1242] Moreover, by respecting the principle of the rule of law and the international obligations of the state, actors of all three governmental branches serve as a positive role model for civilians.[1243] The argument for the contribution of all actors is also raised on the basis that, ultimately, all three powers constitute a single "legal apparatus".[1244] Thus, all of them are considered, both individually and collectively, responsible for the protection of human rights.[1245] Additionally, it is expressed that, the view of all national authorities being bound by the Court's judgments is also in line with the concept of the *unity of the state.*[1246] Besides, the notion seems to be further supported by the general principle of *collective liability* according to which, the damage caused by a state to another state or to the international community, gives rise to the liability of the whole population.[1247]

2.1.2.1. Role of the executive

The government is, in a narrow sense, embodied in the executive power, since the executive is the one mainly charged with the task of state governance.[1248] In particular, the role of the executive is the maintenance of law and order alongside with the safeguarding of internal security and the abstinence from the abuse of power.[1249] In this regard, it is expected that, in order to fulfil their responsibility for the implementation of the judgments of the Court on the

[1236] Birkinshaw: European Public Law, pp. 580-581.
[1237] Van de Heyning: Fundamental Rights Lost in Complexity, p. 157.
[1238] Tomuschat: Human Rights, p. 124.
[1239] Trekli: Binding Force and Execution of Judgments (translated from Greek), p. 624.
[1240] Perrakis: Dimensions of the International Protection of Human Rights (translated from Greek), p. 242.
[1241] Tomuschat: Human Rights, p. 254.
[1242] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 229.
[1243] International Commission of Jurists: The Rule of Law and Human Rights, p. 49.
[1244] Ambos: Straflosigkeit von Menschenrechtsverletzungen, p. 337.
[1245] Ibid.
[1246] Leeb: Die Innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im Entschiedenen Fall, p. 57. Leeb refers in this regrad to case Ireland v. UK (App. No. 5310/71, 18/01/1978).
[1247] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, pp. 166-167. The concept of collective liability is not conceivable in cases where a state has caused damage to its own people.
[1248] Blondel: Executives, p. 283.
[1249] International Commission of Jurists: The Rule of Law and Human Rights, p. 11.

domestic level, states firstly resort to their executive power.[1250] Nevertheless, the restrictive approach of considering the executive as the only organ entrusted with state governance and tasked with ensuring the application of international judgments, seems to have been long abandoned.[1251] In fact, if the administrative authorities refuse to comply, the state will still have to fulfil its international obligations by resorting to the legislature.[1252] At the same time, the Court remains stable in its view that, it is unacceptable for high-ranking administrative officials to be unaware of the content of the Convention.[1253]

2.1.2.2. Role of the legislature

Furthermore, putting the legislative power at the forefront is in line with the principle of the rule of law which requires that, the legislature provides individuals with the guarantee of full and equal enjoyment of rights, in an environment where respect for human dignity flourishes.[1254] However, as long as the legislative procedure remains a slow process and until the illegal situation changes by means of a legislative act, the contribution of all actors can prove decisive in providing temporary solutions.[1255] In this respect, changes in the *practice* and the adoption of additional non-legislative measures may be quite helpful, despite being only of subsidiary nature.[1256] What the legislature can actually do in order to achieve compliance with the international obligations of the state, is to *amend* or *appeal* that national legislation which contradicts international law or, when necessary, to *adopt* new laws which are compatible with the Convention.[1257] It is underlined that, the international obligation of the states to adapt national laws in accordance with their commitments under international law, actually results from the preamble of the Convention as well as from Articles 1 and 13 ECHR; an obligation which is thought to be extending to constitutional provisions and which exists regardless of the official position of the ECHR in the national legal order.[1258] Moreover, the Court itself has repeatedly referred to the fact that, national legislation which is conflicting with ECHR provisions leads to the international liability of the state.[1259] It is furthermore widely known in international legal relationships that, states which continue to apply legislation that is incompatible with their international obligations and which not proceed with adjusting their legislation, are likely to be held internationally responsible.[1260] Consequently, a state can even be held responsible for actions of the national legislator, who otherwise enjoys a large amount of discretion in reflecting political choices.[1261] In practice, the Court only rarely directly refers

[1250] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 72.
[1251] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 226.
[1252] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 408.
[1253] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 64. Sisilianos refers in this regard to case Ireland v. UK (App. No. 5310/71, 18/01/1978).
[1254] International Commission of Jurists: The Rule of Law and Human Rights, p. 9.
[1255] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 400.
[1256] Ibid., p. 405.
[1257] Ibid., pp. 400, 404.
[1258] Matthias: European Convention on Human Rights (translated from Greek), p. 18.
[1259] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 65. Sisilianos refers in this regard to cases Young, James and Webster v. UK (App. Nos. 7601/76 and 7806/77, 13/08/1981) and Goodwin v. UK (App. No. 17488/90, 27/3/1996).
[1260] Roukounas: International Law (translated from Greek), p. 71.
[1261] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 65. Sisilianos refers in this regard to case Refah Partisi (the Welfare Party) a.o. v. Turkey (App. Nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13/02/2003).

to the incompatibility of a national legal norm with the Convention.[1262] As a result, the respondent state is often wavering between the measures that it shall adopt, unsure of whether or not a judgment implies the need for legislative changes.[1263] Besides, as legislative action is neither directly advised by the Court nor can it be forced, its initiation lies ultimately upon the conscience and the sense of political responsibility of the national legislator. In that context, it becomes obvious that, further decisive factors are the ranking of human rights in the political agenda and the overall international profile of the country.[1264]

2.1.2.3. Role of the judiciary

With regard to the national courts' practice of disregarding international law, it is similarly argued that, their conduct can place the state in the position of being held internationally accountable.[1265] In this respect, national judges are obliged to take into account the international obligations of the country, especially in cases where the country is exposed to the risk of an international conviction for the non-application or non-observance of the Convention; an event that would be politically undesirable.[1266] Thus, the question arises for judgments concerning human rights, as to whether the judges are in this case interpreting the law or they are simultaneously clouding their judgment with a political decision.[1267] It is also maintained that, if human rights are not addressed as an autonomous field of law, then the judge who is interpreting them, could be considered not as a judicial organ but, as a lato sensu politician.[1268] In any case, national constitutions among Europe have succeeded in making clear that, judges are subject only to law and not to political considerations.[1269] The overall role that national courts play in the implementation of international judgments is indeed important, however, still rather subsidiary in comparison to the possibilities of the legislative authority.[1270] It constitutes common truth that, a smooth collaboration between the national courts and the Court can only constitute a supplementary means of bolstering the regulatory framework and that, essential changes can be best achieved through the legislative procedure.[1271] In this respect, it is outlined that, the respect of national courts towards ECtHR judgments does not in itself constitute enough guarantee for their effective implementation.[1272] At the same time, judges throughout Europe are, in principle,[1273] entrusted with the task of delivering justice by *interpreting* existing law, and not by *creating* new laws in an effort to cover identified regulatory deficiencies.[1274] Keeping in mind that the judiciary does not have the competence to perform legislative tasks, the burden of filling regulatory gaps should not be shifted to the judiciary and such inefficiencies should be directly and adequately addressed by the legislature.[1275] Nevertheless, the Court often welcomes the opportunities that allow itself to move beyond what is explicitly

[1262] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 241.
[1263] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 96.
[1264] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 395.
[1265] Kilian: Die Bindungswirkung der Entscheidungen des EGMR auf die Nationalen Gerichte der Mitgliedsstaaten der EMRK vom 4. November 1950, p. 83.
[1266] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 115.
[1267] McCrudden: Human Rights and Judicial Use of Comparative Law, p. 1.
[1268] Ibid.
[1269] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 115.
[1270] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 400, 405.
[1271] Ibid., p. 400.
[1272] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 207.
[1273] With the exception of UK.
[1274] Pfeffer: Das Verhältnis von Völkerrecht und Landesrecht, p. 153.
[1275] Roukounas: International Protection of Human Rights (translated from Greek), p. 129.

regulated in the Convention, namely to develop existing norms and produce new ones.[1276] At the same time, it is widely held that, the role of the judges is, apart from applying existing law, to eliminate the ambiguities in national and international law, by adopting interpretive solutions which help overcome practicability and effectiveness problems, while staying connected with the social reality.[1277] In this context, where gaps in the law exist, the judge has an important role to play, which lies in rationalising the law and in enabling it to undertake the function for which it has been adopted, which is no other than meeting the needs of the society [1278] Furthermore, the Court has stressed that, a state cannot be built but only on the foundation of a true and impartial justice which does not merely apply the letter of the law, but one which also facilitates the struggle of ideas and the freedom of thought.[1279] In the case of the Convention, national judges have the decisive power in their hands to shape the Court's jurisprudence towards *judicial activism* or *judicial restraint*.[1280] Moreover, the Court has been systematically emphasising that, governments need to notify judicial authorities on the judgments of the ECtHR and especially on those of particular interest for the state, a measure which, despite its soft character, often leads to reversals in the jurisprudence or to other measures been taken by the judiciary.[1281]

Contrary to the application of international law which is usually constitutionally unproblematic, especially after having been incorporated by legislative act, the internal execution of international judgments raises certain issues, given the fact that, the judicial competence constitutionally belongs to national judges.[1282] Issues of authority are nothing new to the judiciary, a branch which traditionally enjoys a great degree of strictly respected independence. National courts of one jurisdiction never use the case-law of another jurisdiction, unless this appears absolutely necessary.[1283] However, national courts in both monist and dualist states do make use of international law and case-law, even for the purposes of the interpretation of their respective constitutions.[1284] Issues of authority become more sensitive in the case of highest national courts, which are traditionally conceived as the final arbiters and which therefore, are less enthusiastic about being subject to external control. However, by virtue of being part of the judicial branch, there is a minimum requirement that even the highest national courts, whether it be the supreme or the constitutional courts, comply with the judgments been delivered by the Court.[1285] Constitutional courts often do use the Court's case-law as a guidance towards better compliance, however, they avoid explicitly referring to it, in an effort to avoid identifying the specifics regulating the relationship between the two legal orders.[1286] Philippe Boillat,[1287] former Director General of Human Rights and Rule of Law of the Council has emphasised that, national supreme courts can offer inspiration and guidance to lower ordinary courts, by means of growing in their own case-law.[1288] Boillat further sees in national supreme courts the

[1276] Chiariello: Der Richter als Verfassungsgeber? pp. 275-276.
[1277] Ibid., p. 265.
[1278] Karelos: The Influence of the Case-law of the European Court of Human Rights on Greek Jurisprudence, p. 1930.
[1279] Ibid., p. 1935. Karelos refers in this regard to case Giannousis and Kliafas v. Greece (App. No. 2898/03, 14/12/2006).
[1280] Voeten: Politics, Judicial Behaviour and Institutional Design, p. 70.
[1281] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 94.
[1282] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, pp. 199-200.
[1283] McCrudden: Human Rights and Judicial Use of Comparative Law, p. 17.
[1284] Van Alstine: The Role of Domestic Courts in Treaty Enforcement, p. 595.
[1285] Greer: The European Convention on Human Rights, p. 321.
[1286] Van de Heyning: Fundamental Rights Lost in Complexity, p. 177.
[1287] Philippe Boillat was appointed, from May 2007 to July 2017, Director General of the Directorate General Human Rights and Rule of Law.
[1288] Boillat: The Independence of the Judiciary, p. 303.

possibility of serving as filter mechanisms between the European and the national jurisdiction.[1289] In this context, it is particularly important that the highest national courts, supreme or constitutional, comply with ECtHR judgments or otherwise, together with endangering the international reputation and standing of the state, they set a very bad example for lower courts.[1290] However, the attitude of highest courts towards the European system is not always characterised by diligence and reliability.[1291] Nevertheless, specifically in what concerns the new Member States of the Council, it is observed that, it is mainly their constitutional courts and not their ordinary courts that are focused on respecting ECtHR judgments and on facilitating the functioning of the ECHR protection mechanism.[1292] National ordinary courts often stand in the middle of the two jurisdictions, whereby, on the one side, national highest courts tend to stick to national law while, on the other side, the European Court pursues openness towards the law of the Convention.[1293] This in turn, illustrates that, the effectiveness of the protection of human rights and fundamental freedoms lays at the crossroad of national ordinary courts, national highest courts and the ECtHR; therefore, the sound cooperation among all judicial institutions involved is fundamental.[1294] States are not the only ones influenced by the Court's rulings, but rather, the Court itself often relies on the particularities of national legal orders in its search for more inclusive approaches.[1295] The former President of the Court, Jean-Paul Costa, has repeatedly highlighted the strong two-way link between the Court and the national judicial authorities, based on experience-sharing from which the Court has a lot to benefit.[1296] Officially, there exists no hierarchy between national courts and the ECtHR, as the latter rules only on cases that touch upon the rights and freedoms enshrined in the Convention.[1297] At the same time, the international legal system suffers an inadequate hierarchical structure, revealed in those appeals which have been allocated to different international organs and which consequently run the risk of divergent decisions.[1298] Additionally, the particular nature of European law and the difficulties in its interpretation relating thereto, inevitably create a risk of divergences between decisions and a threat of subsequent complications due to the collision of interests.[1299] To add to the difficulties, the vast majority of national judges are not familiar with international law, since in the course of their careers they cannot afford the time to gain the expertise required by a field as complex and specialised as that of international law.[1300] Meanwhile, whenever national courts deal with cases that touch upon human rights issues, they are essentially called to prove their ability in undertaking the role of a *human rights court*; a fact which makes even more evident why the Convention has to be fully respected in this process.[1301] In this respect, the importance of educating all actors involved in the process of delivering justice, such as judges, prosecutors,

[1289] Ibid., p. 377.
[1290] Lemmens: Guidance by Supreme Courts to Lower Courts on the Requirements of the European Convention on Human Rights, pp. 313-314.
[1291] Ibid., pp. 307, 310.
[1292] Van de Heyning: Fundamental Rights Lost in Complexity, p. 179.
[1293] Ibid., p. 472.
[1294] Ibid., p. 473.
[1295] Ibid., p. 183.
[1296] Costa: The Authority of the Jurisprudence of the ECtHR, p. 291.
[1297] Kilian: Die Bindungswirkung der Entscheidungen des EGMR auf die Nationalen Gerichte der Mitgliedsstaaten der EMRK vom 4. November 1950, p. 209.
[1298] Roukounas: International Protection of Human Rights (translated from Greek), pp. 117-118.
[1299] Gutsche: Die Bindungswirkung der Urteile des Europäischen Gerichtshofes, p. 26.
[1300] Murphy: Does International Law Obligate states to Open their National Courts to Persons for the Invocation of Treaty Norms that Protect or Benefit Persons? p. 118.
[1301] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 113.

lawyers and high-ranking officials, is apparent.[1302] It is expected that, Protocol No. 16, by allowing to highest courts and tribunals of Member States to request the Court to give advisory opinions, it will change the judicial environment and enhance the dialogue between national and European judges; hopefully leading to a better understanding of the common underlying principles and to the establishment of a coherent European framework for integration.[1303]

2.1.3. The prevailing theory

As a result, the prevailing theory does not witness in the Convention characteristics that could justify the reasons for placing it in a different position than the rest of the international agreements.[1304] Moreover, it does not recognise a direct binding force of the Court's judgments over national organs.[1305] In other words, despite the undisputed distinctive features of the ECHR system and the level of the de facto respect that the Court receives, an officially powerful effect of the Convention and the Court's judgments on the national level is not yet recognised.[1306] In this context, arguments supporting the binding effect of ECtHR judgments over all national organs, underline the necessity of focusing even more closely on the *authority* of the Court and on the *direct effect* of judgments.[1307] However, accepting the notion that the Court's judgments are directly binding upon all state bodies, would require rethinking its whole status and possibly, recognising to it an authority similar to that of the ECJ, the judgments of which enjoy priority over national rulings.[1308]

2.2. Means of compliance

2.2.1. Restitutio in integrum

2.2.1.1. The lack of guidance following a Court's judgment

Once an ECtHR judgment has been delivered and become final, an essential question arises as to the possibilities for the execution of that judgment at the domestic level. And while a judgment rejecting an alleged violation does not generate any benefit for the applicant, thus has no practical interest for the victim, the execution of a judgment finding a violation is highly desired by the applicants.[1309] There exist different measures and means that the respondent state can adopt in order to execute a judgment and to comply, in this way, with its international obligations. The *execution* as a process refers to the direct obligation of the respondent state to implement the Court's judgment and to realise its full effect at the national level, within the

[1302] Wardyński: Education in Human Rights as an Important Element of Reform of the European Human Rights Protection System, p. 175.
[1303] Sisilianos: Introduction (translated from Greek), p. 16.
[1304] Leeb: Die Innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im Entschiedenen Fall, p. 57.
[1305] Ibid.
[1306] Ibid.
[1307] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 73.
[1308] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 236.
[1309] Kilian: Die Bindungswirkung der Entscheidungen des EGMR auf die Nationalen Gerichte der Mitgliedsstaaten der EMRK vom 4. November 1950, pp. 108-109.

limits of the res judicata which has been produced by the judgment.[1310] On the other hand, the term *compliance* refers to a concept broader than that of execution, including, besides the direct measures in the context of the specific case, also a long-term abidance by the judgment and by the effects produced in the context of the *res interpretata*.[1311] As aforementioned, the Court simply *declares* the occurrence of a violation, however, without specifying its causes; thus, without indicating whether an infringement has arisen from the legislation itself or from the application of the legislation.[1312] Furthermore, it constitutes standard practice of the Court to not propose concrete measures which are to be adopted by the state in order to comply with the judgment.[1313] As a result, not only does not the Convention give any guidance on the precise content of a state's obligation stemming from an ECtHR decision, but also, the Court itself does not provide any relevant information in its judgments.[1314] Numerous applicants have requested that the Court proceeds by setting out specific orders, but the Court still remains uncompromising to its position that, such conduct would be inconsistent with its aspired overall role.[1315] This insistence of the Court to not propose concrete measures has given rise to concerns and criticisms, voiced in literature. These debate on whether judgments that lack such content, truly succeed in resolving the problem at issue and in delivering justice to those who have recoursed to it.[1316] Additionally, in exceptional cases where the Court has indeed entered into fields that touch upon the sensitive issue of the measures which shall be adopted by the states, it has done so not in the *operative* part of the judgment, but in the context of *obiter dicta*.[1317] In this regard, it has been argued that, focus should be placed on extending the operative part of judgments by means of including in them at least the *causes* of the violation.[1318] At the same time, it is also debated that, until such essential changes in the content of the operative part occur, the reasoning part of judgments can already start contributing more actively to the demarcation of the limits of the obligation to comply.[1319] In this respect, it is raised that, nothing actually speaks against the reasoning part serving as a guiding line for states, defining concrete steps for the implementation of judgments.[1320] It is further stressed that, this approach actually goes hand in hand with the track that the Convention has taken since the seventies and according to which, the res judicata also extends to the *reasoning* part of the judgment; on the basis that the reasoning underlies and is inherently connected to the finding of the violation contained in the operative part.[1321] Diverging from the standard practice of the Court to remain uninvolved appears the case of *just satisfaction* judgments, which are of an *ordering* nature and thus, differ from the classical *declaratory* judgments; hereby, the Court orders a specific performance, namely the payment of a certain amount of monetary compensation to the applicant.[1322] As previously mentioned, in regard to just satisfaction judgments, it has been supported that, their

[1310] Trekli: Binding Force and Execution of Judgments (translated from Greek), p. 625.
[1311] Ibid.
[1312] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 207. Uerpmann refers in this regard to case Öztürk v. Germany (App. No. 8544/79, 21/2/1984).
[1313] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 183.
[1314] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, pp. 45-46.
[1315] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 91.
[1316] Greer: The European Convention on Human Rights, p. 318.
[1317] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 47.
[1318] Matscher: Zur Prozessualen Einordnung der Urteile des EGMR, p. 141.
[1319] Ibid., p. 142.
[1320] Ibid.
[1321] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, pp. 37-38.
[1322] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 193.

operative part should be recognised as *directly enforceable* within the domestic legal order, since the mere supervision of the execution of such judgments is inconsistent with their special nature.[1323]

A different than the standard approach can be seen in the *pilot-judgment* procedure, whereby the Court, apart from identifying the *systemic* problem, also provides clear directions as to the desirable measures. In fact, a new trend of the Court to provide directions can be observed, in an attempt to improve administration of justice and to protect rights more effectively, by facilitating the efforts of national authorities.[1324] In this context, the Committee of Ministers has invited the Court with Res(2004)3, to assist both the states and the Committee by identifying structural problems and their sources, especially when there is a high probability of similar violations occurring in the future.[1325] In an attempt to comply with the above-mentioned Resolution, the Court has, in 2004, for the first time delivered a pilot-judgment, known as the *Broniowski* case,[1326] whereby it has approached the application scope of Articles 41 and 46 ECHR.[1327] More specifically, the Court has held that, *general measures*, legal and administrative, had to be taken at the national level in order to address the structural problem that has been detected.[1328] Many similar cases have followed since then, to mention some, in *Hutten-Czapska*[1329] the Court called the state to take legislative or other appropriate measures; in *Lukenda*[1330] it underlined the existence of a systemic problem due to the inadequate legislation and inefficient administration of justice; in *Tekin Yildiz*[1331] it held that an appeal should be legislatively established;[1332] in *Sarica and Dilaver*[1333] it stated that it was necessary to take general measures at national level; in *Manushaqe Puto a.o.*[1334] it called the state to take general measures in order to effectively secure the right to compensation from the date on which the judgment became final; in *Athanasiou a.o.*[1335] it found a dysfunction of national law and called on the state to adopt within a year a remedy in respect of the length proceedings before the administrative courts; in cases *Finger*[1336] and *Dimitrov and Hamanov*[1337] it asked the state to establish an appeal within a year; in *Varga a.o*.[1338] it suggested reducing the number of prisoners by using non-custodial punitive measures and, in the relatively recent case *Rezmiveș a.o.*[1339], to introduce measures in order to reduce overcrowding and improve conditions of detention.[1340] Additionally, the Court has lately began delivering even more well-founded and detailed judgments, so that the discretionary power of states in the process of the interpretation

[1323] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 414; Lambert-Abdelgawad: The Execution of Judgments of the European Court of Human Rights, p. 13.
[1324] Sansonetis: Just Satisfaction (translated from Greek), p. 615.
[1325] Ibid., p. 612.
[1326] Broniowski v. Poland (App. No. 31443/96, 22/6/2004). In Broniowski the Court found a violation of the applicant's right to property.
[1327] Sansonetis: Just Satisfaction (translated from Greek), p. 612.
[1328] Ibid.
[1329] Hutten-Czapska v. Poland (App. No. 35014/97, 19/6/2006).
[1330] Lukenda v. Slovenia (App. No. 23032/02, 6/10/2005).
[1331] Tekin Yildiz v. Turkey (App. No. 22913/04, 10/11/2005).
[1332] Sansonetis: Just Satisfaction (translated from Greek), p. 613.
[1333] Dilaver v. Turkey (App. No. 11765/05, 27/5/2010).
[1334] Manushaqe Puto a.o. v. Albania (App. Nos. 604/07, 43628/07, 46684/07 and 34770/09, 31/7/2012).
[1335] Athanasiou a.o. v. Greece (App. No. 50973/08, 21/12/2010).
[1336] Finger v. Bulgaria (App. No. 37346/05, 10/5/2011).
[1337] Dimitrov and Hamanov v. Bulgaria (App. Nos. 48059/06 and 2708/09,
[1338] Varga a.o v. Hungary (App. Nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10/3/2015).
[1339] Rezmiveș a.o. v. Romania (App. Nos. 61467/12, 39516/13, 48231/13 and 68191/13, 25/4/2017).
[1340] Sansonetis: Just Satisfaction (translated from Greek), p. 614.

of ECtHR judgments has become narrower.[1341] Consequently, the majority of judgments nowadays allows for at least an indirect assessment of the optimum measures to be adopted by the state for the respective case.[1342] However, it should be highlighted that, this minimum information is not always illuminating, especially for cases that are characterised by a certain level of complexity.[1343]

2.2.1.2. State response measures under the obligation for restitution

Following a ruling in which the Court has found a violation of one or more rights enshrined in the Convention, Article 46(1) ECHR requires that the respondent state puts an end to the violation and fulfils its *restitutio in integrum* obligation. In that context, restitutio in integrum is considered the first rung on the 'ladder' of the implementation of a Court's judgment on the national level. A *restitution* is actually preferable to *just satisfaction*, something reflected in the fact that monetary compensation may come into play only there where, due to legal or physical impracticabilities, restitution cannot be performed effectively.[1344] Highlighting the importance of the principle of restitutio in integrum, it has been argued that, restitutio is an expression of the 'transformative power' that the Convention has when it comes to producing real outcomes out of political ideals.[1345] The restitutio is considered to have significantly contributed to the formation of a legal framework which supports a state conduct that is compliant with the Convention.[1346] The principle was firstly implemented in 1994, in case *Hentrich*,[1347] and afterwards in case *Papamichalopoulos a.o*.[1348].[1349] Since then, it has been repeatedly emphasised in the Court's case-law, however, the Court has not yet arranged strict conditions in regard to the exact *means* for the restoration of the status quo ante.[1350] It can be observed that, in ECtHR jurisprudence, the restitution is conceived more as a 'prompt' for the state to proceed with determining the necessary measures, because of the Court being itself unable to define and apply the changes that will wipe out the legal and material consequences of a violation.[1351] In this respect, it is maintained that, by upholding this stance, the Court is not perfectly aligned with the provisions of Article 35 of the Draft Articles on the Responsibility of States according to which, the obligation of the state for restitution should be limited only on the basis of *practical impossibility* or *disproportionality* towards the benefit.[1352] It is even expressed that, by negating itself such an authority, the Court is inevitably diminishing the role of its own judges who, despite the level of authority they enjoy, are restricted to simply declaring violations and granting monetary compensations.[1353] Theoretically, the Court could proceed with taking bolder steps, by deciding on an adequate restitutio in integrum itself, thus by setting the limits for effectively remedying the violation occurred.[1354] However, the Court's orientation differs substantially from this theoretical approach and the Court does not aspire to playing such a role for the time being, as it firmly believes that, such a conduct does not belong

[1341] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, pp. 88-89, 95.
[1342] Ibid., p. 225.
[1343] Matscher: Zur Prozessualen Einordnung der Urteile des EGMR, p. 141.
[1344] Addo: The Legal Nature of International Human Rights, p. 301.
[1345] Ibid., p. 300.
[1346] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 225.
[1347] Hentrich v. France (App. No. 13616/88, 22/9/1994).
[1348] Papamichalopoulos a.o. v. Greece (App. No 14556/89, 26/6/1993).
[1349] Sansonetis: Just Satisfaction (translated from Greek), p. 605.
[1350] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 82.
[1351] Ibid., p. 83.
[1352] Ibid., p. 82.
[1353] Tomuschat: Human Rights, p. 252.
[1354] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 76.

to its current competence field.[1355] Simultaneously, one should be mindful of the fact that, there are certain national issues which are considered a taboo for each society and which therefore, cause sensitive reactions when it comes to direct solutions been provided 'from the outside'. For example, in case *Hirst*[1356], the judgment of the Court finding a violation due to the deprivation of the voting rights of prisoners, came into conflict with a principle established for almost one and a half century in the national legal system.[1357] Similarly, in case *A, B and C*[1358] on the access to legal abortion, the judgment of the Court came into conflict with a strong religious element present in a strict legislative framework and which allowed an abortion only when the *life*, and not just the *health*, of the expectant mother should be in danger.[1359] In the context of the above and in enabling a never-ending cycle to continue spiralling, Member States continue deciding in their own discretion and in their best interest and the Court continues hesitating to propose concrete measures for the effective implementation of its judgments on a national level.[1360] In any case, until the Court fleshes out its vaguely worded proposals and until the states en masse cease being unenthusiastic to follow its proposals, state-compliance will remain a rather problematic aspect of the European human rights protection.[1361]

It becomes apparent that, the overall stance of the Convention and the Court is quite reserved, while it is left upon the states to decide on how to comply with their duties and on the appropriate measures that will guarantee a restitutio in integrum.[1362] Furthermore, it should be mentioned that, the measures and methods adopted by the states with regard to providing reparation for the violation fall within the scope of the doctrine of *margin of appreciation*; meaning that, Strasbourg allows for a certain space for 'manoeuvre' to states in the process of fulfilling their obligations.[1363] The respondent state remains in this process the single and exclusive body with the authority to exercise public power, by adjusting national decisions, acts and practices.[1364] Nevertheless, the execution of the Court's judgments remains a challenging task both for Member States who are primary responsible for it, as well as for the national mechanisms who shoulder the whole procedure.[1365] Even where international law partly provides for some methods and tools for its implementation, these often turn out to be ineffective, as their application contains, in contrast to national law, complex practicalities that can hardly be predefined.[1366] Consequently, the factual ability of states to uphold their obligations and to abide by ECtHR judgments varies considerably and is largely dependent on the type of violation, and on the capacities available domestically.[1367] Though, it would be misleading to support that, the only problematic aspect of the effectiveness of the execution of judgments lies in the determination of the appropriate *means* of compliance and in the lack of national *capacities*, since execution is an issue largely linked to the *binding effect* of judgments

[1355] Ibid.
[1356] Hirst (No.2) v. UK (App. No. 74025/01, 6/10/2005).
[1357] Trekli: Binding Force and Execution of Judgments (translated from Greek), pp. 620-621.
[1358] A, B and C v. Ireland (App. No. 25579/05, 16/12/2010).
[1359] Trekli: Binding Force and Execution of Judgments (translated from Greek), pp. 620-621.
[1360] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 88.
[1361] Lambert-Abdelgawad: The Execution of Judgments of the European Court of Human Rights, p. 29.
[1362] Leeb: Die Innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im Entschiedenen Fall, p. 19.
[1363] Letsas: A Theory of Interpretation of the European Convention on Human Rights, p. 104.
[1364] Kilian: Die Bindungswirkung der Entscheidungen des EGMR auf die Nationalen Gerichte der Mitgliedsstaaten der EMRK vom 4. November 1950, p. 203.
[1365] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 415.
[1366] Delbrück: Menschenrechte und Grundfreiheiten im Völkerrecht anhand Ausgewählter Texte, Internationaler Verträge und Konventionen, p. 50.
[1367] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 380.

which itself remains a rather grey zone.[1368] In this light, it has been proposed in literature that, the binding force of both the Convention and the Court's judgments should be addressed as one single issue and thus, under one universal model.[1369] It remains true that, no uniform pattern exists as to the measures and policies that should be adopted following a Court's judgment, as these are appropriately adjusted to the particularities of each legal system.[1370] For instance, in developing countries the need for a more in-depth analysis both before and after the adoption of measures is clearly apparent.[1371] At the same time, the content and nature of the restitutio in integrum, the competent state organs and the time required for compliance are very dependent on the type of injury and on the complexity of each case.[1372] Nonetheless, there do exist two basic categories in which measures are divided according to their main characteristics, namely the *general* and the *individual* measures. More specifically, general measures usually concern legislative alterations or changes in administrative and judicial practice, and thus, tend to bring more permanent results by affecting a broad amount of citizens.[1373] General measures may for example include the adoption of a legislation which introduces an effective remedy, legislative or regulatory amendments which lift undue restrictions, changes in administrative practice, and changes in the interpretation of national law or simply the publication of the relevant ECtHR judgment so as to make it available to the scientific and political world.[1374] In this context, in case *Matthews*[1375] the Court has held that, the commitment of State Parties under Article 46(1) ECHR involves, inter alia, the obligation to take general measures in order to effectively prevent new violations similar to those found; thus, the Court has qualified general measures as legal obligations.[1376] It becomes obvious that, this position outweighs by far the approach according to which compliance is achieved by simply applying the *operative* part of a judgment, which relates only to the particular dispute.[1377] Individual measures on the other hand concern only the specific case at issue and focus on the satisfaction of the individual who has sought justice; being therefore usually of administrative nature,[1378] with the exception of several judicial measures. Examples of individual measures include the restoration of contacts, the revocation of expulsion orders, granting a residence permit, striking out an unjustified criminal conviction, reopening the domestic proceedings and, in general regards, measures that wipe away the damage suffered by the individual.[1379]

2.2.1.2.1. Violations arising from an administrative act

Dividing national response measures according to the source of the violation, there where the Court has found a violation to have occurred through an administrative act, it is expected from

[1368] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 103.
[1369] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 183. Uerpmann cites RESS: Wirkung und Beachtung der Urteile und Entscheidungen der Straßburger Konventionsorgane, pp. 1775, 1790, 1795.
[1370] International Commission of Jurists: The Rule of Law and Human Rights, pp. 28, 46.
[1371] Ibid.
[1372] Leeb: Die Innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im Entschiedenen Fall, pp. 46, 54.
[1373] Sisilianos: The Human Dimension of International Law (translated from Greek), pp. 92, 94.
[1374] See also: Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, especially Rule 6.2.
[1375] Matthews v. UK (App. No. 24833/94, 18/2/1999).
[1376] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 92.
[1377] Ibid.
[1378] Ibid., p. 89.
[1379] See also: Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, especially Rule 6.2.

the executive to proceed with the revocation of this act.[1380] This procedure seems to work without great practical difficulties and is in fact considered the most effortless, since the administrative body can respond immediately, by *recalling* the unlawful act or, in the case of an omission, by *issuing* the necessary act.[1381] In this respect, it is argued that, the fact that the Committee of Ministers comprises the foreign ministers of Member States, offers a certain advantage to the Committee, since the organ remains in direct contact with government representatives.[1382] On the other hand, in the case that the administrative act has simply carried out the intent of a *legislative* statute, the tactic of annulling the act but still upholding the legal norm, cannot be considered an effective response.[1383] In such a case, the problem lies within the legislative policy and therefore, it is the legal norm that should be ultimately examined for its conformity with ECHR provisions.[1384]

2.2.1.2.2. Violations arising from a legal norm

As regards cases where the cause of the violation lies within a national legal norm, the task of complying with a Court's judgment obviously entails more challenges.[1385] Besides, in contrast to what applies for administrative measures and practice, legislative measures lie outside of the scope of the direct influence of the political body of the Committee of Ministers and therefore, its role cannot be as active.[1386] At the same time, as the Court does not provide for specific guidelines in the operative part of its judgments, it never advises issuing, amending or repealing national law and therefore, states remain doubtful about whether or not such drastic action is actually needed.[1387] The fact is that, the practice of amending or repealing provisions of national law which are incompatible with the Convention is considered a very effective method of compliance that can even take place regardless of whether or not the Convention has been incorporated into national law.[1388] It should also be noted that, unless domestic law provides for the possibility of abolishing a law erga omnes by judicial decision, the legislative procedure will continue constituting the only means for adequate compliance, in terms of harmonisation.[1389] Though, the main challenge of the legislative procedure is that, the option of an instant response is not available, since the process of issuing, amending or repealing laws takes considerable time to be completed.[1390] Meanwhile, while awaiting for the time-consuming legislative project to be performed, a response by administrative authorities or by national courts could prove highly helpful.[1391] In fact, it can occur that, an adequate response can be temporarily provided by measures other than legislative ones, which thus render a legislative

[1380] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, pp. 79-80.
[1381] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 380-381; Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, pp. 79-80.
[1382] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 94.
[1383] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 86.
[1384] Ibid.
[1385] Matthias/ Ktistakis/ Stavriti/ Stefanaki: The Protection of Human Rights in Europe (translated from Greek), p. 186. Matthias/ Ktistakis/ Stavriti/ Stefanaki refer in this regard to cases Broniowski v. Poland (App. No. 31443/96, 22/6/2004) and Scozzari and Giunta v. Italy (App. Nos 39221/98 and 41963/98, 13/7/2000).
[1386] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 94.
[1387] Matscher: Zur Prozessualen Einordnung der Urteile des EGMR, p. 141.
[1388] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 37.
[1389] Ibid., pp. 39, 405.
[1390] Kilian: Die Bindungswirkung der Entscheidungen des EGMR auf die Nationalen Gerichte der Mitgliedsstaaten der EMRK vom 4. November 1950, pp. 199-200.
[1391] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 257.

action not urgently needed.[1392] In this context, changes in national law may be bypassed, when an interpretation of the national norm in line with the Convention constitutes enough guarantee for the prevention of future violations.[1393] Another helpful measure could be seen in the practice of avoiding the application of a legal norm which has been found in violation with the Convention, however, this measure is considered ineffective and often also risky, in the sense that it can lead to the dilution of the respect for ECHR provisions.[1394] On the other hand, it is underlined that, good administrative and judicial practice actually constitutes an appropriate measure of compliance only for cases where violations do not arise from the law directly, but rather, from its application by the executive or from its interpretation by the courts.[1395]

A highly sensitive issue that may arise when legislative measures are adopted for the redress of a violation is that the legislature may give *retroactive effect* to its acts. In this respect, it is expressed that, full compliance actually *requires* that the legislative act is issued with a retroactive effect, so as to reverse all the harmful results of the violation.[1396] It is even maintained that, the effects of a retroactive legislative act, by reaching beyond the particular case, they provide compliance equivalent to the respect for *interpretative precedents*.[1397] In any case, a drastic intervention by means of giving retroactive effect to the law lies upon the discretion and the sensitivity of the national legislator and, upon his understanding of the international obligations of the country.[1398] On the other hand, the principle of *non*-retroactivity is met quite often in the various European legal systems, both as a general legal principle and a general principle of administrative law.[1399] The principle of non-retroactivity dates back in the Roman imperial period, where the rights having been acquired, so-called *ius quaesita*, were warmly celebrated and passionately safeguarded.[1400] The fundamental idea behind the principle of the non-retroactivity of law is that, the stability of legal norms and the conceivability of their consequences are determining for human behaviour, in the sense that, unjustified changes may violate the legitimate expectations of citizens. By the same token, it is stressed that, drastic retroactive changes that subvert events which have been completed and which are already producing their legal effects, should be applied only as an exception; or otherwise they could lead to undesirable social outcomes and jeopardise the principle of legal certainty.[1401] In this regard, it is highlighted that, especially in civil cases, the rights of third persons are directly affected and thus, they could be threatened by a possible retroactive effect.[1402] Similarly, in the context of administrative procedures, while the abrogation of an administrative act attempts to

[1392] Kilian: Die Bindungswirkung der Entscheidungen des EGMR auf die Nationalen Gerichte der Mitgliedsstaaten der EMRK vom 4. November 1950, pp. 201-202.
[1393] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 96.
[1394] Ibid., p. 95.
[1395] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 407.
[1396] Ibid., p. 405.
[1397] Ibid., p. 395.
[1398] Ibid.
[1399] Despite its wide recognition, non-reotractivity does not have a higher normative value and therefore, does not bind the legislator, who may adopt norms that have a retroactive effect. In the context of administrative law, non-retroactivity translates into administrative acts being generally valid from their issuance and not having a retroactive effect. However, it can occur, following the decision of an administrative court that the competent administrative authority has to issue an act with retroactive effect, in oder to undo the damage found by the court.
[1400] Simáčková/ Kotásek: Überlegungen zur Rückwirkung beim Übergang zur Demokratie, p. 63.
[1401] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 405-406; Simáčková/ Kotásek: Überlegungen zur Rückwirkung beim Übergang zur Demokratie, p. 61. Furthermore, the possibility of retroactively rendering unlawful actions lawful entails the danger of being abusively used by political actors, who may for example pass legislation in favour of the state and in this way even intervene ongoing trials where the state is a party.
[1402] Lambert-Abdelgawad: The Execution of Judgments of the European Court of Human Rights, p. 18.

serve the principle of legality, it might however prove detrimental to the protection of the justified hopes of the individuals; namely of their confidence in evolving in a definite legal environment.[1403] As a result, it is argued that, whenever legal retroactivity does take place, it must be duly reasoned, fully justified and, specifically[1404] targeted at the case at issue.[1405] With regards to the aforementioned, it becomes obvious that, the principle of legal certainty can occasionally relieve the state from its obligation to retroactively overturn a previous legal regime upon issuance of a judgment by the Court.[1406] The Court itself, mindful of the fact that, retroactive changes could lead to undesirable social consequences, it has taken a careful stance by declaring that, when interpreting the Convention in the light of contemporary conditions, the Court does not ignore the conditions that have been previously formed by national law.[1407] Nevertheless, the Court recognises as an exception to the principle of non-retroactivity, the application of a more recent criminal law on past cases, known as *retroactivity in mitius*, which entails the circumvention of the legislation valid at the time of the offense in favour of the application of the youngest law, when the latter leads to a more favourable outcome for the offender.[1408] A further exception to the principle of non-retroactivity is tolerable in those cases when the newly enacted legislation is extremely essential for the general interest, however again, only under the condition that the legislation has not been adopted in such an unforeseeable manner that violates the legitimate expectations of the individuals affected.[1409] A retroactive effect is also allowed in extremely critical situations, which are closely related to major changes in the fundamental values of a society.[1410] It should be mentioned that, the Court even accepts a departure from the well-established principle of non-retroactive punishment, known as *nullum crimen nulla poena sine lege*[1411].[1412] With regards to this, the Convention itself provides explicitly in Article 7(2) ECHR for the possibility of a retroactive punishment of a person whose conduct was not criminal according to the law valid at the time of the offense, but which however, was, considered criminal according to the general principles of international law.

2.2.1.2.3. Violations arising from a judicial judgment

Besides, although the operative event for the mobilisation of the European protection might have been a legal norm or an administrative act, target of the Court's judgment will most commonly be a national judgment. This occurs due to the prerequisite for an application to the Court, this being that all other avenues, namely all domestic remedies, need to have been already exhausted.[1413] Consequently, when *reopening the proceedings* in the context of which

[1403] Schilling: Deutscher Grundrechtsschutz zwischen Staatlicher Souveränität und Menschenrechtlicher Europäisierung, p. 172.
[1404] However, voices in literature also support that a retroactive effect of the law shall rather be of a general nature, or otherwise the danger of serving individual interests and not the interests of society as a whole is greater.
[1405] Simáčková/ Kotásek: Überlegungen zur Rückwirkung beim Übergang zur Demokratie, p. 67.
[1406] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 405-406.
[1407] Ibid., p. 405.
[1408] Simáčková/ Kotásek: Überlegungen zur Rückwirkung beim Übergang zur Demokratie, p. 63. Refers in this regard to case Berlusconi v. Italy (App. No. 58428/13, the Court will be holding a hearing in this case on 22 November 2017).
[1409] Ibid., pp. 66-67.
[1410] Ibid., p. 62.
[1411] Also known as the principle of legality.
[1412] Simáčková/ Kotásek: Überlegungen zur Rückwirkung beim Übergang zur Demokratie, pp. 68-69.
[1413] Matthias/ Ktistakis/ Stavriti/ Stefanaki: The Protection of Human Rights in Europe (translated from Greek), p. 28.

the judgment found in violation of the Convention has been issued and if the competent court freshly dealing with the case finds that the violation does not lie in the interpretation itself but instead, has an unlawful norm as its operative event, the court will have to declare the law as inapplicable.[1414] Declaring a law that is not compatible with the ECHR as inapplicable seems to be also in line with the view of monism under which, ECHR provisions and ECtHR judgments are *self-executing* and national law shall not be further implemented until the necessary amendments have taken place. [1415] It is further highlighted that, where a national provision stands in contrast with well-established ECtHR case-law, Article 1 ECHR demands that that provision no longer applies, on the basis that, any subsequent application would constitute a new breach of the Convention.[1416] However, discarding a legislation for being non-compatible with the Convention may give rise to practical problems, such as the unlikelihood of finding another legislative norm that satisfies the requirements of the Convention.[1417] In this vein, judges must avoid interpretations leading to a denial of justice and they must remain aware of their obligation to always arrive at a reasoned and fair decision.[1418] In the case that a judicial judgment *itself*, and not a legislation, is found to have violated the Convention, a response from the state appears quite problematic, since the necessary tools are usually not available in the national legal systems of Member States. More specifically, as an application to the ECtHR requires the exhaustion of all national remedies, there naturally remain no other judicial avenues available to the individual to pursue.[1419] Additionally, the revocation or the abolishment of judicial judgments through legislative channels is inadmissible, since such a conduct would violate the principle of the separation of powers.[1420] In this context, considering that, all domestic judicial remedies have been exhausted and that, the very last judgment has already become final and irrevocable, the reopening of proceedings appears as a one-way street.[1421] It is argued that, in certain cases, the *nature* of the judgment itself or the *condition* of the victim may render the reopening of the proceedings necessary.[1422] Such cases where the reopening of the proceedings is considered compulsory, are those of national judgments that have serious substantive or procedural defects and of victims who still suffer from the damaging effects.[1423] At the same time, the reopening of proceedings should serve the purposes of a restitution, something that was made clear in case *Piersack*,[1424] where the Court held that, the reopening has brought, mutatis mutandis, "a result as close to restitutio in integrum as was possible". Nonetheless, as the purpose of a genuine restitution is not always achievable by means of a retrial, the reopening of judicial proceedings, though effective, does not constitute a panacea.[1425] For instance, in cases where the sentence has already been executed *prior* to the ECtHR judgment which found the violation, the unfeasibility of a real restitution and the likelihood of

[1414] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 395.
[1415] Lambert-Abdelgawad: The Execution of Judgments of the European Court of Human Rights, p. 6.
[1416] Schilling: Deutscher Grundrechtsschutz zwischen Staatlicher Souveränität und Menschenrechtlicher Europäisierung, p. 160.
[1417] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 395.
[1418] Christensen: Was Heißt Gesetzesbindung? p. 27.
[1419] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 384.
[1420] Ibid.
[1421] Ibid., p. 415.
[1422] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, pp. 82-83, 85; Villiger: The European Convention on Human Rights, p. 86.
[1423] Ibid. See also Recommendation No. R (2000)2 of the Committee of Ministers to Member States on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, especially Article II. Adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers' Deputies.
[1424] Piersack v. Belgium (26/10/1984), para. 11.
[1425] Leeb: Die Innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im Entschiedenen Fall, p. 16.

reaching only partial restoration is evident.[1426] Furthermore, the re-examination of a national decision in cases where the violation concerns the exceeding of the reasonable time of proceedings, does not seem to be offering much of a redress, since the new domestic proceedings will further prolong the total time of the proceedings; thus, rendering the option of a *just satisfaction* a more appropriate solution.[1427] It is further highlighted that, for civil cases touching upon property issues, given the circumstances, the damage can be best restored by granting monetary compensation rather than by means of a retrial.[1428] Generally speaking, in the case that other measures than the reopening of procedures can guarantee a restitutio in integrum or, in the case that a just satisfaction can offer sufficient reparation, a retrial shall be avoided.[1429] In this context and as previously highlighted, the Court may consider the option to order a just satisfaction only in cases where otherwise only a partial restitution would be achieved.[1430]

It is stressed that, despite the Court not being itself able to order the *reopening of proceedings*, the reopening actually indirectly derives from the obligations of Article 46 ECHR.[1431] The Committee of Ministers recognises the significance of the *right to a retrial* and has expressed its view that it considers it an extremely efficient way for effective and all-encompassing reparations.[1432] In this regard, the Committee of Ministers has by Rec(2000)2[1433] on the re-examination or reopening of cases, called on Member States to "ensure" the capacity of national legal orders to provide an adequate, as far as possible, restitutio in integrum.[1434] Following the adoption of the Recommendation, several countries have introduced amendments to their Civil and Criminal Codes concerning the right to a retrial.[1435] It is further underlined that, despite the indisputably influential direction provided by the Recommendation, these positive developments shall be attributed to the Member States themselves, which have indeed proceeded with taking the necessary measures.[1436] Despite the undoubtedly considerable efforts, the option of the reopening of proceedings, or of retrial, should be enshrined in even more Civil and Criminal Procedure Codes, since the extent of its adoption has not been so far satisfactory.[1437] *Retrial* as a means of remedying a violation of the Convention that has been caused by means of a judgment, could be introduced either by a special *new* appeal or, by extending the scope of already existing appeals to cases which concern breaches of the Convention.[1438] What practically happens by ordering a new trial of a case upon which it has already been finally adjudicated is that, the applicant is repositioned to the situation that existed

[1426] Ibid., p. 17.
[1427] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, pp. 84, 86; Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 393.
[1428] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 388.
[1429] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, pp. 84, 86.
[1430] Leeb: Die Innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im Entschiedenen Fall, p. 17.
[1431] Van de Heyning: Fundamental Rights Lost in Complexity, p. 159.
[1432] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 82.
[1433] Recommendation Rec(2000)2 of the Committee of Ministers to Member States on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, especially Article II in combination with Articles 10 ff. of the Explanatory Report. Adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers' Deputies.
[1434] Chrysogonos: The European Convention on Human Rights (translated from Greek), pp. 71-72; Sisilianos: The Human Dimension of International Law (translated from Greek), p. 88.
[1435] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 89.
[1436] Chrysogonos: The European Convention on Human Rights (translated from Greek), p. 71.
[1437] Villiger: The European Convention on Human Rights, p. 86.
[1438] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 386.

prior to that adjudication.[1439] Moreover, in the context of the reopening of proceedings, the domestic court called upon to freshly deal with the same dispute, mainly concentrates on the issue of the nonconformity of the ruling with the Convention.[1440] The reopening however, does not automatically mean that a more beneficial outcome for the litigant is guaranteed, as the judge freshly dealing with the case is obliged to only take the Court's judgment into consideration while he is not expected to necessarily depart from the original findings.[1441] It is stressed that, besides the obvious importance that the reopening has for the *applicant*, there is also another function that is yet served by the overturning of judicial rulings; that being, helping national *judges* realise in practice the role of the Court.[1442] At the same time, the fact that the Recommendation cites as: "adequate possibilities of re-examination of the case, *including* reopening of proceedings" and, the explanatory memorandum refers to the Recommendation as being "also applicable to administrative or other measures or proceedings", reveals that re-examination does not only concern the *judiciary*, but also, the *executive*.[1443] In this respect, it is supported that, this approach actually reflects the rule of customary international law according to which, Member States are responsible for the acts of *all* state organs.[1444] In the light of the above, it appears advisable to approach the reopening of proceedings openly, so as to achieve the best possible outcomes.[1445] Conversely, it is emphasised that, when a breach stems from a judicial judgment and because the judgment has the force of *res judicata*, it shall only be re-examined under very specific conditions or otherwise it would raise a number of issues such as the jeopardising of legal certainty.[1446] Currently, it can be observed that, the reopening of *criminal* procedures is more widespread in Member States than the reopening of *civil* proceedings, which still remains an exception.[1447] As it is expressed, the predominant reason for this difference in the option of retrial is that, criminal cases are usually easily reversible, while civil and administrative cases usually involve a certain complexity.[1448] Yet another central reason for this differentiation is that, a criminal procedure involves only the applicant and has only personal consequences on that person, whereas a civil procedure might as well affect third parties and therefore, entails the process of balancing conflicting interests.[1449] Moreover, another reason that priority is given to the criminal proceedings is that, they may result in a criminal record of that natural person, something that also carries a psychological and societal impact and which shall therefore be undone when wrongful.[1450] In this context it shall be mentioned that, the option of a *pardon* as an official act of forgiving a criminal

[1439] Villiger: The European Convention on Human Rights, p. 85.
[1440] Schilling: Deutscher Grundrechtsschutz zwischen Staatlicher Souveränität und Menschenrechtlicher Europäisierung, p. 175.
[1441] Voulgaris: Implementation and Outcome of the judgments of the European Court of Human Rights in the Greek Legal Order (translated from Greek), p. 102; Van de Heyning: Fundamental Rights Lost in Complexity, p. 163.
[1442] Chrysogonos: The European Convention on Human Rights (translated from Greek), p. 71.
[1443] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 89.
[1444] Ibid.
[1445] Leeb: Die Innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im Entschiedenen Fall, p. 14.
[1446] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, p. 73.
[1447] Van de Heyning: Fundamental Rights Lost in Complexity, pp. 160, 162-163. Austria, Bulgaria, Croatia, Czech Republic, Denmark, France, Germany, Greece, Lithuania, Luxemburg, Malta, Norway, Poland, Slovenia and Switzerland, have already regulated the reopening of criminal procedures.
[1448] Schilling: Deutscher Grundrechtsschutz zwischen Staatlicher Souveränität und Menschenrechtlicher Europäisierung, p. 175.
[1449] Van de Heyning: Fundamental Rights Lost in Complexity, pp. 160, 162-163.
[1450] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 386; Voulgaris: Implementation and Outcome of the judgments of the European Court of Human Rights in the Greek Legal Order (translated from Greek), p. 102.

conviction, has the nature of a clemency act and does not seem to provide for an adequate reparation either, since it does not have the characteristics of an authentic legal action.[1451] Nonetheless, as already mentioned, the reopening of criminal proceedings, does not automatically cause the disappearance of the conviction, since the new proceedings may result to a sentence identical to the one initially imposed.[1452]

2.2.2. Just satisfaction

2.2.2.1. The substitutional role of monetary compensation

Alongside the restitutio in integrum of Article 46(1) ECHR, which constitutes the first rung on the 'ladder' of the implementation of ECtHR judgments at the national level, second rung is the *just satisfaction*, regulated by Article 41 ECHR. The just satisfaction constitutes a form of financial compensation afforded to the injured party and, as previously highlighted, it may come into play only where the means available for a restitution prove insufficient. *Satisfaction* is a concept known also from Article 37 of the Draft Articles on the Responsibility of States according to which, it shall be offered "for the injury caused by that act insofar as it cannot be made good by restitution or compensation". Nevertheless, *satisfaction* takes on a different meaning in the Draft Articles, where it is being conceived as a form of reparation distinct from *compensation*.[1453] In what concerns the actual inability to achieve effective restitution, this is measured with criteria of legal and practical nature and as a criterion it is satisfied mainly in cases when, at the time of the issuance of the ECtHR judgment, the violation has already been terminated or the damage has already been suffered to its full extent.[1454] It is even debated that, the fact that the institution of just satisfaction serves as a 'substitute' in cases where an adequate restitution is not feasible, reveals the structural difficulties that states but also the whole ECHR system are confronting with.[1455] At the same time, it is argued that, in the case of a hypothetical absence of the institution of just satisfaction, the Court would most likely move towards adopting more drastic steps and thus, would possibly also ensure a higher level of state compliance.[1456] In any case, it is widely held that, the institution of just satisfaction constitutes a step in the direction of making the Convention a more perceptible document with tangible features, distancing itself from its classical conception as abstract and vague.[1457] In this vein, it is highlighted that, besides granting individual relief to the victim, the institution of just satisfaction is contributing to the realisation of the vision of a *European public order*.[1458]

It should be mentioned that, the insufficiency of a restitution been offered by the respondent state, does not automatically lead to the granting of a just satisfaction, since the Court affords such a compensation only when it deems it necessary. In fact, the Court may consider that a compensatory relief in the form of a just satisfaction is inappropriate for the nature of a specific violation. [1459] In respect of this competence, the Court has in several cases adopted the view that, the mere finding and declaring of the existence of a violation was enough to restore the

[1451] Leeb: Die Innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im Entschiedenen Fall, p. 15.
[1452] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 391. See Comment to Article 37 of the Draft Articles on the Responsibility of States.
[1453] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 85.
[1454] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 75.
[1455] Addo: The Legal Nature of International Human Rights, p. 308.
[1456] Ibid.
[1457] Ibid, p. 307.
[1458] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 351.
[1459] Sisilianos: The Human Dimension of International Law (translated from Greek), pp. 85-86.

damage caused and thus, no further measures were needed.[1460] For instance, just satisfaction is usually considered an appropriate means to redress the effects of *civil* court judgments, whilst the need to remove the effects of *administrative* judicial decisions appears less urgent, given the fact that there exists the possibility of having the competent administrative authority revoke the administrative act at issue.[1461] On the other hand, it is maintained that the requirements of an effective judicial protection and of an effective application of the rule of law, render a monetary compensation an essential part of every restoration that is being provided for judgments with unlawful characteristics.[1462] In this context, the restrained position of the Court in granting just satisfaction constitutes a proof of the Court's belief that, its main character lies predominantly in finding and declaring the incompatibility of a state's behaviour with its obligations under the ECHR.[1463] Additionally, the Court will principally grant monetary compensation only when a relevant claim[1464] has been raised by the applicant and it will never grant an amount that exceeds the applicant's request.[1465] In fact, the Court grants a just satisfaction only rarely and even then, only relatively low amounts.[1466] Nevertheless, it is in the best interest of the states and even financially more advantageous for them, to have efficient domestic systems of relief, as otherwise, the compensations granted by the Court will usually be more costly.[1467] In regard to the decision on just satisfaction as such, this can be met either *together* with the decision on the main substance of the case or be postponed until the state responds, in order to be then decided upon *separately*.[1468] In any case, the Court will not decide on the question of just satisfaction unless the claim is 'mature'.[1469] In a practical sense, by postponing the decision on just satisfaction, the state is given the opportunity to improve compliance by bringing about the changes that are required to become aligned with the Convention and the judgment delivered by the Court.[1470] The acknowledgement of the above effects has, in recent years, led the Court to start moving in the direction of delivering its decisions on just satisfaction *separately* from its decisions on the merits, using this as a key tool for exerting pressure on states to abide by its judgments.[1471]

2.2.2.2. Practicalities of implementation

As a measure, just satisfaction is considered one without great practical difficulties, since state compliance is in this case achieved by simply proceeding with the payment of the amount that has been awarded by the Court to the applicant.[1472] With respect to cases where the state rejects

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[1460] Ibid. Sisilianos refers in this regard to case: Jabari v. Turkey (App. No. 40035/98, 11/7/2000) para. 54.
[1461] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 386.
[1462] Merli: Der Rechtsschutz, p. 34.
[1463] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 82.
[1464] Under the provisions of Rule 60 of the Rules of Court.
[1465] Grabenwarter/ Pabel: Europäische Menschenrechtskonvention, p. 89. Grabenwarter/ Pabel refer in this regard to case Motière v. France (App. No. 39615/98, 5/12/2000).
[1466] Janis/ Kay/ Bradley: European Human Rights Law, p. 99. In this context, it could be argued that, establishing higher monetary compensations than the ones currently awarded, could serve as a deterrent against state non-compliance.
[1467] Edel: The Length of Civil and Criminal Proceedings in the Case-Law of the European Court of Human Rights, p. 92.
[1468] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, pp. 60, 105.
[1469] Ibid.
[1470] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 117.
[1471] Villiger: The European Convention on Human Rights, pp. 82-83. As for example applied to cases Brumarescu v. Romania (App. No. 28342/95, 23/1/2001); Gencel v. Turkey (App. No. 53431/99, 23/10/2003) and Broniowski v. Poland (App. No. 31443/96, 22/6/2004).
[1472] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 111.

the payment of the just satisfaction awarded, it is argued that, a *new* violation is established, and specifically a violation of Article 1(1) of Protocol No. 1 to the Convention, on the basis that, compensation constitutes a sufficiently specific claim that falls within the scope of the *property right*.[1473] Another means of protection when the state refuses to pay the amount awarded could be the seeking of a compensation against state assets by means of *third-party confiscation*, such as in the hands of third countries or of international or supranational organisations; however this option has yet not been subject of extensive theoretical discussion.[1474] Definitely, the regulatory basis for a third-party confiscation is currently missing, as this would require the prior conclusion of a relevant agreement between the Council of Europe and the respective countries or organisations.[1475] As aforementioned, it is widely accepted that, just satisfaction is a measure without great practical difficulties and one which, due to its nature, is more appropriate for a domestic *direct application*.[1476] The direct applicability of just satisfaction is also being supported on a different basis, namely by the notion that *all* ECHR rights, including the *right* to just satisfaction, are, after the incorporation of the Convention into national law, *directly invocable* before national authorities.[1477] In this context, it is attempted to recognise just satisfaction as a *substantive right* by raising that, Article 1 ECHR, in referring to the protection of the rights included in Section I, it cannot be construed as precluding the recognition of further rights, such as of the right to just satisfaction.[1478] The non-inclusion of the just satisfaction as a substantive right in Section I of the Convention can be historically explained by the fact that its application presupposed the recognition of the jurisdiction of the Court by the respondent state.[1479] Article 41 ECHR does indeed originate from a time when states were still very sensitive in regard to their sovereignty issues, however, neither did any of the subsequent amendments of the Convention freshly approach the provision.[1480] The prevailing view suggests that, despite being a relatively concrete measure in terms of its content and despite having the nature of an *order*, just satisfaction does not enjoy direct enforceability on the domestic level.[1481] Hereby, it is maintained that, since the Convention does not regulate the direct enforceability of Article 41 ECHR, such a power does not come in question at all.[1482] Following the same logic, it is supported that, just satisfaction, as a right 'born' by international law, it shall be approached as having been incorporated with the power that it already enjoys in international law; namely without a power to force its enjoyment.[1483] This view further suggests that, just satisfaction is simply being *recognised* by the national legal order and therefore, it is expected to be merely taken into account by national

[1472] Lambert-Abdelgawad: The Execution of Judgments of the European Court of Human Rights, p. 12.
[1473] Chrysogonos: The Incorporation of the ECHR in the National Legal Order, p. 362.
[1474] Ibid., pp. 362-363. For example, by seizing an amount of money which was agreed to be given to the state by the European Union.
[1475] Ibid.
[1476] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 213.
[1477] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), p. 72.
[1478] Ibid., p. 73.
[1479] Ibid.
[1480] Tomuschat: Human Rights, p. 361.
[1481] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 90.
[1482] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, pp. 268-270.
[1483] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), p. 72.

courts and authorities.[1484] In any case, it seems logical to accept that, the just satisfaction functions as a 'pseudo-substitute' for an, at least minimum, interference in national affairs.[1485]

2.2.2.3. Combination of different remedial measures

Despite its long existence, the institution of just satisfaction still contains ambiguities, mainly a result of the fact that, none of the official versions of the Convention defines what the exact content of a just satisfaction should be.[1486] In this vein, it is stressed that, an approach of the term of just satisfaction with a *broad* sense is rather preferable, as it is only in this way that the goal of restoration can be effectively achieved.[1487] However, an element of cautiousness is required in order to avoid too wide-ranging definitions, also given that, the Court has itself abstained from a progressive interpretation of just satisfaction.[1488] For instance, Article 41 ECHR shall not be interpreted as leading to an obligation to *terminate* the violation.[1489] Nonetheless, it is also observed that, the mere award and payment of a just satisfaction does not automatically mean that all the consequences of a violation have been eliminated.[1490] In view of this fact, when the nature of the violation requires it, the applicant must be restored to the state in which he was finding himself prior to the occurrence of the breach; hereby, according to the responsibilities resulting from the principle of restitutio in integrum.[1491] In this regard, the Court has stated in *Scozzari and Giunta*[1492] that the state, is expected to not only pay the respective amount, but also, to choose the measures that will put an end to the violation and redress its effects.[1493] A couple of years later, in 2006, the Committee of Ministers had crystallised the Court's position by adopting the *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements*[1494].[1495] In the sixth rule it was provided that, the Committee of Ministers examines not only the *amount* paid, but also, whether individual measures have been taken in order for the injured party to be *restored* in the situation that applied prior to the breach.[1496] It is discussed that this sixth rule is relevant to the arrangements of Articles 30a and 35 of the Draft Articles on the Responsibility of States, which require both *ceasing* the unlawful act and *restoring* things to the situation which existed before the occurrence of the violation.[1497] As a result, it can be supported that, granting a just satisfaction does not automatically render the entitlement to a restitutio in integrum invalid, but rather, the claim for restitution continues to exist parallel to the just satisfaction and

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[1484] Ibid.
[1485] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 350.
[1486] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 104. Haß refers to the so-called Vagrancy case, namely case of De Wilde, Ooms and Versyp v. Belgium (App. Nos. 2899/66, 2832/66 and 2835/66, 18/6/1971), as the first time that the issue of just satisfaction was considered by the Court.
[1487] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 117.
[1488] Addo: The Legal Nature of International Human Rights, p. 309.
[1489] Leeb: Die Innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im Entschiedenen Fall, p. 48.
[1490] Sansonetis: Just Satisfaction (translated from Greek), p. 605.
[1491] Ibid.
[1492] Scozzari and Giunta v. Italy (App. Nos 39221/98 and 41963/98, 13/7/2000) para. 249. See, mutatis mutandis, also the case of Papamichalopoulos a.o. v. Greece (App. No 14556/89, 26/6/1993) para. 34.
[1493] Sansonetis: Just Satisfaction (translated from Greek), pp. 605-606.
[1494] Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements. Adopted by the Committee of Ministers on 10 May 2006 at its 964th meeting and amended on 18 January 2017 at its 1275th meeting.
[1495] Sisilianos: The Human Dimension of International Law (translated from Greek), pp. 90-95.
[1496] Ibid.
[1497] Ibid., p. 90.

as a type of cumulative claim.[1498] Consequently and according to the Court's settled case-law on Article 41 ECHR, the provision does not exclude a combination of different forms of redress, such as a restitutio in integrum together with a monetary compensation.[1499] It should be mentioned that, this approach also appears consistent with Article 34 of the Draft Articles on the Responsibility of States according to which, full restoration can be achieved by a combination of the available methods, namely of *restitution*, *compensation* and *satisfaction*.[1500] Additionally, the Convention does not contain any provision which, in the case that a just satisfaction has been awarded, reject the establishment of the *civil liability* of the state, neither one that reject the right of the individual to obtain a *further compensation* under national law.[1501] In this respect, it is argued that, the award and the payment of a just satisfaction, do not prevent the applicant from seeking *further compensation* for damages which have their source in the violation or which are somehow causally linked to it.[1502] Similarly, the *right* to just satisfaction should not be confused with the possibility of achieving compensation through the *enforcement* of an ECtHR judgment.[1503] More specifically, it is stressed that, individuals may raise a *civil liability* claim before national courts on the grounds of Article 46(1) ECHR and of the obligation of Member States to abide by final judgments regardless of whether the Court has awarded a just satisfaction or not.[1504] Nonetheless, it is doubtful how a failure of a state to comply could establish its civil liability and therefore, the prospects of success of such a claim are rather limited.[1505] Furthermore, a second compensation for the same damage is not provided as an option and therefore, a claim of civil liability is legitimate only to the extent that it has not been already covered by the just satisfaction.[1506] Besides, since such a claim would be based on the general provisions of *national* law, it is consequently also subject to regulation by the competent national authorities.[1507]

[1498] Leeb: Die Innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im Entschiedenen Fall, p. 27.
[1499] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 83. Sisilianos refers in this regard to cases Belvedere Alberghiera v. Italy (App. No. 31524/96, 30/5/2000) and Hentrich v. France (App. No. 13616/88, 22/9/1994).
[1500] According to the Draft Articles on the Responsibility of States, there are three forms of reparation which the responsible state may have to provide in, the restitution, compensation and satisfaction. And while restitution refers to re-establishing 'the situation which existed before the wrongful act was committed' (Article 35A), compensation 'shall cover any financially assessable damage including loss of profits insofar as it is established' (Art 36(2)), and satisfaction 'Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality' (Article 37(2)).
[1501] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 370-371; Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 278.
[1502] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 370-371; Leeb: Die Innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im Entschiedenen Fall, p. 22.
[1503] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), p. 72.
[1504] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, pp. 217, 221.
[1505] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), pp. 68, 90.
[1506] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 370-371; Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 278.
[1507] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 371.

2.2.2.4. The tangible content of the institution of just satisfaction

When the Court does take the decision to award a just satisfaction, the financial compensation may include, besides *material* losses and *procedural* expenditures, also *immaterial* damages.[1508] Other costs and charges caused throughout the procedure may be as well covered, but only under certain conditions, namely only if the applicant has moved, in relation to the undertaken expenditures, within the boundaries of necessity and proportionality.[1509] In any case, both material and immaterial losses, in order to be covered by a just satisfaction, there has to be a causal link between the violation that gave rise to the damage and the damage caused.[1510] On its part the Court has made significant efforts to define a common basis on which the amount due should be calculated, however, these have yet not been fruitful.[1511] Particularly in what constitutes immaterial damages, these are even more difficult to define, since the criteria that determine emotional suffering and psychological grief are inevitably vague.[1512] Nevertheless, it is accepted that, in order for a just satisfaction to be considered effective, it has to be relevant to the nature, duration and gravity of the violation; moreover, to the purpose for which it has been established, that is, to serve as a 'real' compensation.[1513] The Court further struggles to safeguard that the amount awarded will eventually have the value that the Court has envisaged, taking therefore into account special factors, such as the local currency.[1514] In its attempt to ensure the actual value of the just satisfaction, the Court holds the position that the amount awarded, especially the part relating to moral damages, should be exempt from seizure or otherwise the purpose of compensation would be substantially cancelled.[1515] It is argued that, from this stance of the Court, it becomes clearly evident that, the Court supports and follows the logic of a *full* reparation.[1516] In an effort to back the just satisfaction, the Court has even addressed the problem of delays in the paying of the amount awarded by starting, back in the nineties, to set deadlines for the payment of just satisfaction; despite such powers not having been expressly provided to it by the Convention.[1517] Since then, the practice has become established and the deadline has been fixed at three months, while a default interest running from the date that the amount became due, has as well been included; so as to ensure that delays will at least not turn to the benefit of the state.[1518] The issue of default interest is also met in Article 38 of the Draft Articles on the Responsibility of States, which regulates that such interest is payable when deemed necessary "in order to ensure *full* reparation".[1519] Moreover, the payment of interest has frequently been regarded as a lato sensu penalty, in the sense that it serves as a means of pressure against state non-compliance.[1520] In this respect, it is underlined that, the payment of just satisfaction has departed from its initial *compensatory* character and

[1508] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 117.
[1509] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 111.
[1510] Ibid., pp. 106-107, 109-110.
[1511] Lambert-Abdelgawad: The Execution of Judgments of the European Court of Human Rights, p. 16.
[1512] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, pp. 109-110.
[1513] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 351.
[1514] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 85. According to the Practice Directions on Just Satisfaction, published by the Court and attached to the official document of the Rules of the Court, monetary compensations are awarded in euros, and in the exceptional case they are awarded in another currency, the exchange rate applicable on the date of payment will be used.
[1515] See also case Velikova v. Bulgaria (App. No. 41488/98, 18/5/2000).
[1516] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 85.
[1517] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 367-368. Chrysogonos refers to the fact that the problem of delay was already evident since the eighties and that the Court has started setting deadlines in 1991.
[1518] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 86; Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 368.
[1519] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 86.
[1520] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 368.

has evolved into having a certain *punitive* character, intended to prevent violations from occurring.[1521]

2.3. Supervision of the execution

2.3.1. Committee of Ministers

2.3.1.1. The innovative scheme of a human rights supervisory mechanism

The main body that deals a posteriori to judgments with the supervision of their execution at the national level, is the *Committee of Ministers*[1522] of the Council of Europe. Differently to what applies today, under Article 32(1) of the original 1950 version of the Convention, the Committee even had the power to confirm or refuse the existence of an alleged violation, namely to decide on the *merits* of a case, a power which it has lost after Protocol No. 11 has come into force. Nevertheless, despite the fact that Protocol No. 11 has removed the adjudication power from the Committee of Ministers, the Committee still maintained the important function of ensuring the compliance of governments with the Court's judgments.[1523] In fact, this competence is considered as the very demonstration of the core difference between the ECHR human rights protection system and other international human rights protection systems.[1524] More specifically, there exists no other international human rights agreement foreseeing the establishment of a supervisory mechanism.[1525] And while the exceptional importance that the ECHR system places on supervision may not be directly evident from the wording of the Convention, however, it is clearly prevailing in the Court's case-law.[1526] It is even argued that, the Committee is largely responsible for the effectiveness and the success of the ECHR system and that, supervision has added significantly to the credibility of the scheme as a whole.[1527] In this respect, it is further advocated that, the Committee has by now taken on a symbolic role, providing stimulus for the sounder execution of judgments.[1528] Nevertheless, it is a common truth that the Committee still cannot contribute in a way which would guarantee the lastingly compliant behaviour of Member States.[1529] Consequently, constant cooperation between the Committee and the states remains so essential that it cannot be ignored and replaced by unilateral practices.[1530] Simultaneously, the realisation of the common goals and ideals without the parallel existence of a mechanism for their international supervision is still a utopian scenario.[1531]

[1521] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 117.
[1522] Hereinafter also referred to as Committee or CoM.
[1523] Perrakis: Dimensions of the International Protection of Human Rights (translated from Greek), p. 239.
[1524] Sisilianos: Introduction (translated from Greek), p. 13.
[1525] Brummer: Der Europarat, p. 90.
[1526] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 70. Paraskeva refers in this regard to case Akdivar v. Turkey (App. No. 21893/93, 16/9/1996) para. 65.
[1527] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 81.
[1528] Lambert-Abdelgawad: The Execution of Judgments of the European Court of Human Rights, p. 33.
[1529] Greer: The European Convention on Human Rights, p. 322.
[1530] Blackburn/ Polakiewicz: Fundamental Rights in Europe, p. 76.
[1531] Addo: The Legal Nature of International Human Rights, p. 318.

2.3.1.2. Political character of the body of Committee of Ministers

The Committee should not be understood only as a body of special importance for the process of the execution of judgments, since it constitutes at the same time the decision-making body of the Council while it also stands as a guide towards a unified and democratic Europe.[1532] The body consists of the Foreign Affairs Ministers of all Member States or otherwise, of their permanent diplomatic representatives in Strasbourg.[1533] On the basis of what it is comprised of, it is evident that, the Committee is a body with a manifestly political character. Under the current circumstances and, as long as state compliance is based on a rather 'cloudy' legal landscape and is measured to a great extent by political factors, the ministerial organ has a paramount role to play.[1534] At the same time, the text of the Convention itself has a distinctive political character, by way of focusing on democracy and of seeking its application from the respective governments.[1535] In this context, it can be supported that, the Convention is *primarily* an intergovernmental and *secondarily* an interparliamentary cooperation.[1536] Despite the fact that the normative regulation of human rights has undoubtedly been the starting point for their broad reception, it can be argued that, an important factor for their immense growth has been exactly their affinity to politics and to international relations. As a result, denying that human rights are often used for the sake of achieving political goals and of building interstate relations could be considered as turning a blind eye. Still, the rather limited budget of the Convention reveals the position it has gained so far in the political agenda; namely its limited political weight.[1537] Meanwhile, the fact that the Committee takes on such an active role in the determination of the requirements for state compliance reveals that, its functions lie far beyond a mere supervision of the execution of judgments and that, it is entrusted with both an executive and a judicial role.[1538] Consequently, it is widely accepted that, despite its nature as a political organ, the Committee is also granted with competences that have a legal character.[1539] In this respect, it is still considered timely to ask whether the Committee of Ministers, as a political body involved in a judicial process, constitutes a foreign matter within the ECHR system or an indispensable element of the whole procedure.[1540] Moreover, the fact that the Committee is an organ comprising of political actors, constitutes enough justification for the lack of knowledge for the procedures related to the execution of judicial decisions which, by nature, are of a purely legal character.[1541] In this respect, criticism stresses that non-compliance is often treated in the light of political considerations and that, the general stance of the Committee is not based on objective and measurable criteria.[1542] Furthermore, concerns are raised as to whether the presence of a political body could involve a risk potential for the independence of ECHR organs, especially in the case of inter-State complaints where the issue of politicisation is even more present.[1543]

[1532] Brummer: Der Europarat, p. 87.
[1533] In practice, it is often observed that Ministers for Foreign Affairs do not participate in Committee of Ministers, but rather, delegate this role to their permanent diplomatic representatives in Strasbourg.
[1534] Perrakis: European Law of Human Rights (translated from Greek), p. 100.
[1535] Sisilianos: Introduction (translated from Greek), p. 1.
[1536] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 29.
[1537] Ibid.
[1538] Shelton: Remedies in International Human Rights Law, p. 217.
[1539] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 205. See also Article 46(2) ECHR and Chapter IV of the CoE Statute.
[1540] Pabel: Ministerkomitee und EMRK, p. 99.
[1541] Trekli: Binding Force and Execution of Judgments (translated from Greek), p. 618.
[1542] Perrakis: Dimensions of the International Protection of Human Rights (translated from Greek), p. 239.
[1543] Ibid., pp. 238-239.

2.3.1.3. Pending state compliance and means of exerting pressure

As previously noted, with the exception of just satisfaction judgments, the judgments of the Court are of *declaratory* character and do not include a specific *enforcement order*; thus, often result to difficulties in defining the degree of compliance and the level of execution related to them.[1544] Furthermore, the procedure of the execution of judgments is described quite laconically in Article 46(2) ECHR, which provides that "the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution" and which therefore, differs in its content gravely from relevant national enforcement provisions.[1545] It has even been raised that, the procedure followed by the Committee cannot be considered in itself a sufficient guarantee for a fair trial, since it does not constitute *enforcement* as it is known from national Procedural Codes, but rather, it resembles lobbying activities pursued by political bodies.[1546] The fact is that, the processes in the performance of the Committee's functions clearly demonstrate that, the nature of the surveillance is mainly political and mostly based on a *dialogue* that is being created.[1547] In particular, the Committee establishes a dialogue with the state concerned, aiming to address ambiguities and tackle deficiencies in the implementation process.[1548] Nevertheless, it is doubtful whether a procedure different than the one that is being currently followed and one lacking the current political features could practically apply in the field of international law.[1549] In fact, the existing procedure has been characterised as 'obvious' and 'appropriate', since all Member States are represented in the Committee; a fact that ensures its capacity to effectively exert the pressure necessary.[1550] In this regard, it is supported that, the obligation of accountability in front of a political body of the Council of Europe creates by itself an increased political pressure and one that is hard to imagine how a Member State could possibly avoid.[1551]

The procedure that follows a judgment that has become final commences by having the respondent state submit, as soon as possible, an *action plan* to the Committee of Ministers. As the name reveals, this plan defines the actions that the state seeks to take and it includes an indicative timetable for the adoption of these measures. On its part, the Committee may make use of several further measures, in an effort to assist the execution of a judgment for as long as the case is still pending before it. One of the measures that the Committee has in its disposal is the *interim resolutions*. According to Rule 16 of the *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements* adopted on the basis of Article 46(2) ECHR, the Committee may, through *interim resolutions*, express its concerns and make recommendations as to the level of execution achieved thus far. Although resolutions do not incorporate sanctions, their role should not be underestimated as they often present a great factual effect.[1552] In fact, despite being nonbinding, interim resolutions have proven to be effective means of exerting political pressure and of promoting compliance.[1553] In this context, it has been highlighted that, the pressure exerted by the Committee of Ministers is currently limited to the adoption of interim resolutions, a fact revealing the importance of their

[1544] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 181.
[1545] Chrysogonos: The European Convention on Human Rights (translated from Greek), p. 67.
[1546] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 363.
[1547] Pabel: Ministerkomitee und EMRK, p. 99.
[1548] Brummer: Der Europarat, p. 81.
[1549] Pabel: Ministerkomitee und EMRK, p. 99.
[1550] Ibid., pp. 99-100. Pable cites OKRESEK, having characterised the current process as 'naheliegend' and 'zweckmäßig'.
[1551] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 212.
[1552] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 207.
[1553] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 121.

contribution.[1554] *Recommendations* are yet another tool that the Committee has in its hands in order to facilitate the execution of judgments at the national level. According to Article 15(b) of the Statute of the Council of Europe, the Committee can, by means of a Recommendation, disclose its conclusions and request from governments to subsequently inform it of the actions taken with regard to the Recommendations made. Once again, while not binding, Recommendations are very effective and, considering the fact that they are adopted by unanimous agreement, they are highly valued.[1555] In the context of the above and mindful of the active involvement of the Committee, an action plan is considered an evolving document, in the sense that it may be revised several times throughout the execution process if the originally planned measures are no longer appropriate under the light of the developments. Moreover, since January 2011, the supervision of the action plans by the Committee has followed a new 'twin-track' procedure[1556], in an effort to ensure the continuous monitoring of the progress and a regular updating of plans. The next steps in this process include keeping cases under supervision until all required measures have been taken and until an *action report*[1557] has been submitted by the state. Upon submission of the action report, the obligation of the state can be terminated and the case eventually closed, by means of a *final resolution* of the Committee. Ordinarily, the Committee will adopt a final resolution when the damage suffered has been adequately redressed or the just satisfaction has been paid to the applicant. Nonetheless, the Committee has often closed a case by final resolution, being satisfied by the mere fact that the state has published the ECtHR judgment or has otherwise made it available to governmental, legislative and judicial authorities.[1558] In general, it can be observed that, the

[1554] Perrakis: European Law of Human Rights (translated from Greek), p. 77.

[1555] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, pp. 274-275. The author mentions that in particular the Recommendation Rec(2004)6 have prove to be a practical instrument that has helped Member States abide by the Convention.

[1556] Reform of the working methods of the Committee of Ministers undertaken after the Interlaken Conference, resulted in the twin-track supervision process and gave action plans and reports a new crucial role. The twin track procedure refers to the fact that most cases follow the standard and simplified procedure, while there also exists an enhanced procedure applied for certain cases. These indicators for the classification is cases under the enhanced supervision procedure have been crytsallised in Article 19 of the iGuide Committee of Ministers Procedures and working methods (19 February 2016), available under: https://wcd.coe.int/ViewDoc.jsp?p=&id=1950611&direct=true (15/11/2017). These indicators are: cases requiring urgent individual measures, cases revealing important structural or complex problems, for pilot-judgments and for inter-State cases.

[1557] Practically, the final updating of the action plan takes the form of an action report. Further reading on the action report: Information document CM/Inf/DH(2010)37, 6 September 2010 - Supervision of the execution of judgments and decisions of the European Court of Human Rights: Implementation of the Interlaken Action Plan - Modalities for a twin-track supervision system, Appendix I, paras. 5-7; Information document CM/Inf/DH(2009)29rev of 3 June 2009 - Action Plans - Action Report; Information document CM/Inf/DH(2010)45 final, 7 December 2010 - Supervision of the execution of judgments and decisions of the European Court of Human Rights: Implementation of the Interlaken Action Plan - Outstanding issues concerning the practical modalities of implementation of the new twin-track supervision system.

[1558] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, pp. 209-210; Kastanas: Compliance with the Judgments of the European Court of Human Rights and the Contribution of the Greek Judge (translated from Greek), p. 128-130, 132. Kastanas author refers in this regard to cases (with a focus on Greece) Papageorgiou v. Greece (App. No. 24628/94, 22/10/1997) concerning the legislative intervention in pending judicial civil proceedings, where the Committee closed the case after being convinced for the direct effect of the judgment and after the Greek government has invoked a series of judgments of Greek courts which have refused to apply laws that retroactively regulated legal relations and phased out judicial proceedings in which the state was a party; cases Garyfallou v. Greece (App. No. 18996/91, 24/9/1997) and Sidiropoulos a.o. v. Greece (App. No. 26695/95, 10/7/1998), where the Committee did not consider it necessary to await the adoption of general measures and gave special emphasis to the dissemination of the Court's judgments to Greek judges and the publication of the judgment's text translated into Greek and scientifically annotated in law journals of wide circulation. On the other side, there are also cases where no modification of the legal provisions(formal and

Committee relates the level of compliance with a Court's judgment not so much to the type of *violation*, but rather, to the situation of the *victim*.[1559] In this context, the individual is being put in the forefront, contrasting the rest of the procedure, which basically takes place between national authorities and ECHR organs.[1560] Lastly, an *infringement procedure* may come into play only in exceptional cases and it concerns situations where the Committee has referred to the Court its view that a state refuses to comply while the Court on its turn has expressed a different view; hereby, uncertainty arises as to the role that the Committee is expected to play.[1561]

It has been highlighted that, following the establishment of the judicial protection of human rights, the main focus has been since then on the courts than on other implementation authorities.[1562] However, compliance with human rights judgments may occasionally require the parallel adoption of political, social, economic and cultural measures, all aimed at creating the appropriate conditions for the development of an environment within which basic rights can flourish.[1563] In this respect and due to their special nature, the enforcement methods of these entitlements vary greatly and compliance cannot always be quantitatively measured.[1564] It can be also observed that, besides formal procedures, other means have as well a great potential in generating and maintaining a stable setting for an integrated protection of human rights. As a result, the adoption of a holistic approach and the combination of a variety of measures can help prevent the reoccurrence of violations, by creating the right environment. Furthermore, despite the fact that the Committee has never openly declared targeting the reoccurrence of the same or identical violations, its practice of putting forward the adoption of *general measures* on a national level gives a very clear signal of the opposite.[1565] Due to the absence of detailed provisions in the Convention and of specific guidelines in ECtHR judgments, the Committee actually enjoys a great degree of freedom concerning the way it will make use of the means available.[1566] In fact, the Committee not only has many means of influence in its disposal, but it is also characterised by a relative flexibility and adaptability in regard to their use, a quality very helpful for the current shape of the process.[1567] In this context, it is even argued that, the *evolutive* approach, which allows the Court a wide spectrum of interpretative solutions as to the scope of the substantive provisions, also applies to the provisions concerning the control mechanism and thus, allows a wide range of possibilities to the Committee too.[1568] Lastly, it can be noticed that, in recent years, the Committee has altered its approach from being reluctant to adopting a stricter stance, in the sense that is uses all accessible means in order to perform its functions effectively.[1569]

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substantive) was required; case Kokkinakis v. Greece (App. No. 14307/88, 25/5/1993), where the Committee of Ministers did not ask for the repeal of the legislation regarding proselytism but was satisfied merely by the fact that the text of the judgment has been sent by circular of the Minister of Justice to the President and the Prosecutor of the Supreme Court of Cassation, the presidents and prosecutors and appeals court of first instance.

[1559] Lambert-Abdelgawad: The Execution of Judgments of the European Court of Human Rights, p. 21.

[1560] Ibid., p. 32.

[1561] Grabenwarter/ Pabel: Europäische Menschenrechtskonvention, pp. 99-100. See also Article 46 para. 4 ECHR.

[1562] Tams: Enforcement, pp. 392, 394, 399.

[1563] Delbrück: Menschenrechte und Grundfreiheiten im Völkerrecht anhand Ausgewählter Texte, Internationaler Verträge und Konventionen, p. 50.

[1564] Tams: Enforcement, pp. 392, 394, 399.

[1565] Sisilianos: The Human Dimension of International Law (translated from Greek), pp. 81, 94.

[1566] Lambert-Abdelgawad: The Execution of Judgments of the European Court of Human Rights, p. 42.

[1567] Pabel: Ministerkomitee und EMRK, p. 100.

[1568] Sisilianos: Introduction (translated from Greek), p. 8.

[1569] Lambert-Abdelgawad: The Execution of Judgments of the European Court of Human Rights, p. 36.

2.3.2. Other actors

2.3.2.1. Parliamentary Assembly

The diverse mechanisms involved in the process which comprises of dispute settlement, compliance, control and enforcement, are operating under a multi-faceted interaction that could be compared to the performance of communicating vessels.[1570] For instance, the Court needs the assistance of the Committee of Ministers and of and the *Parliamentary Assembly*, without which its judgments would remain ineffective, while the Council needs a judicial organ to rely on and to promote the fulfilment of its tasks.[1571] Likewise, the Committee of Ministers, despite being the main supervisory organ, it does not conduct the whole monitoring procedure on its own, but instead, it is assisted in the performance of its functions by various other organs and actors. One of these organs is the Parliamentary Assembly[1572]. The Assembly constitutes one of the two[1573] statutory organs of the Council of Europe and both a representative body of national parliaments and an advisory body of the Committee of Ministers. The Assembly was initially called *Consultative Assembly*, a name revealing of the tasks assigned to the organ and one which would not change until some decades later.[1574] In a nutshell, the Assembly is dedicated to upholding human rights and to promoting democracy in the forty-seven Member States of the Council of Europe, being therefore entrusted with an extremely demanding mission.[1575] As opposed to the *Congress*, the Assembly deals with the whole spectrum of topics that concern the Council and, unlike the *Committee*, the organ is largely involved in public proceedings.[1576] Whilst its role might not be directly tangible, the fact that the Assembly deals with the huge spectrum of issues and that it is addressed with all possible questions, is what ensures its privileged position.[1577] In fact, the Assembly performs a wide variety of diverse functions, described both in the Convention and in the Council's Statute.[1578] A unique attribute of this organ is that it has the power to act autonomously in terms of choosing its own agenda and the topics of importance to deal with.[1579] Part of its functions comprises helping new Member States abide by the legal obligations that they have undertaken, this being regarded as the first step in the process of upholding human rights standards.[1580] One of the nine general committees of the Assembly is the so-called *Monitoring Committee*[1581]. The Monitoring Committee oversees, both in new and old Member States, whether the commitments made are respected and it provides for a general overview of the local political situation.[1582] In this context, the Assembly publishes an annual report reflecting the implementation level of the Convention in the various Member States and focusing mainly on countries that are delaying

[1570] Zimmermann: Dispute Resolution, Compliance Control and Enforcement in Human Rights Law, p. 16.
[1571] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 108.
[1572] Parliamentary Assembly of the *Council of Europe* (*PACE*) hereinafter also referred to as Assembly.
[1573] The second one is the Committee of Ministers, the decision-making body of the CoE.
[1574] Brummer: Der Europarat, p. 93.
[1575] Schuster: Die Rolle der Parlamentarischen Versammlung des Europarates bei der Umsetzung der Europäischen Konvention zum Schutz der Menschenrechte und Grundfreiheiten, p. 157. It could be argued that its role assimilates that of a 'watchdog', comparable to the role the European Commission plays for the European Union.
[1576] Brummer: Der Europarat, p. 73. Brummer mentions that the Congress deals only with the core pillars of the Council's action.
[1577] Ibid., p. 93.
[1578] See also Articles 23, 24 of the CoE Statute and Article 22 ECHR.
[1579] Brummer: Der Europarat, p. 85.
[1580] Ibid., p. 111.
[1581] Also known as Committee on the Honouring of Obligations and Commitments by Member States of the CoE.
[1582] Schuster: Die Rolle der Parlamentarischen Versammlung des Europarates bei der Umsetzung der Europäischen Konvention zum Schutz der Menschenrechte und Grundfreiheiten, pp. 152-154.

performance. Another committee of the Assembly, involved in the process, is the *Committee on Legal Affairs and Human Rights*, which examines the general background of arising problems and thus, plays an essential role in supporting the accuracy of the solutions suggested by the Assembly; constituting as such the de facto legal adviser of the Assembly.[1583] Moreover, the fact that the Assembly consists of representatives of the Member States, is a factor that facilitates the organ in realising its functions, since it renders the approach of national authorities and the request information on the process of compliance easier.[1584] This personal and direct bond of the parliamentary delegation and the states has guaranteed to the Assembly its distinct character and its continuing importance in the execution procedure.[1585] In addition, although the control of the sound application of the Convention does not genuinely belong to the field of competencies of the Assembly, the Assembly however, often makes use of the ability to draw information from Member States on the development status; helping in this way the Committee to exercise its monitoring functions.[1586] The Committee of Ministers and the Parliamentary Assembly actually work closely together in both formal and informal contexts, whereby third parties can also be involved in the exchange process.[1587] The wholly supportive role of the Assembly towards the Committee is also expressed in its suggestions for certain reforms and in the exertion of political pressure upon Member States.[1588] The Assembly maintains a supportive role even in the rare case that the Committee decides to make use of strict measures.[1589] In total, cooperation between the Assembly and the Committee has been very frequent and it has improved in recent years; a fact which can be seen in the establishment of a constant correspondence and in the even more enhanced teamwork.[1590] Future aspiration of the Assembly is to further enrich its role by boosting its involvement in the monitoring procedure, a task that until today remains main competence of the Committee of Ministers.[1591] As it stands currently, the Assembly has virtually no power to oblige the observance of its instructions and suggestions, however, it undoubtedly has a considerable political influence and a symbolic meaning for Europe.[1592] Within the framework of its present functions, the Assembly also lacks the competence to impose sanctioning measures on Member States, such as the restricting of seating, debating and voting rights during its proceedings.[1593]

2.3.2.2. European Court of Human Rights

Another close associate of the Committee of Ministers in the execution procedure is the European Court of Human Rights itself. In fact, the Court remains by definition a key player in the process of human rights enforcement, as it is only after the Court has delivered a judgment that the Committee may take action; a gradation that has been called an enforcement "after the fact".[1594] The institutional interdependence between the Committee and the Court becomes even more evident when one considers the fact that, the Committee has been, as aforementioned and until the entry into force of Protocol No. 11, entrusted with tasks of purely adjudicatory nature

[1583] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 216.
[1584] Ibid., p. 215.
[1585] Lambert-Abdelgawad: The Execution of Judgments of the European Court of Human Rights, pp. 61, 63.
[1586] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 108.
[1587] Brummer: Der Europarat, p. 87.
[1588] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 108.
[1589] Brummer: Der Europarat, p. 174.
[1590] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 215.
[1591] Ibid., p. 216.
[1592] Brummer: Der Europarat, p. 121.
[1593] Ibid., p. 85.
[1594] Tams: Enforcement, p. 400.

and which today belong to the exclusive competence of the Court.[1595] Currently, the Court collaborates with the Committee only when this appears necessary, such as in cases where interpretation issues arise[1596] or cases where a decision has to be met as to whether a party has failed to fulfil its obligations[1597] or, as to whether the case shall be closed[1598]. At the same time, the *Department for the Execution of Judgments* of the Court, under the mandate of the *Directorate General Human Rights and Rule of Law*, may as well assist the Committee and the states throughout the process of judgment execution.[1599] A further competence of the Court related to the execution of judgments lies in its the power to issue urgent measures, so-called *interim measures*, pursuant to Rule 39 of the Rules of Court.[1600] Interim measures apply only exceptionally, namely in cases where the Court considers that, because of the particular circumstances the applicant risks suffering an irreparable harm[1601] and they are valid only until a final decision has been delivered. Despite the broad acceptance of interim measures as binding on the state concerned, counter-arguments with regard to their binding character are being raised on the basis that, such a competence has not been explicitly granted to the Court by the Convention.[1602] In this context, it is emphasised that, the wording of Rule 39 itself is indicative of the fact that the drafters did not have the intention to give interim measures any binding effect.[1603] Overall, the Court regards itself a vital and supportive partner, facilitating considerably the achievement of the targets set by the Committee.[1604] Nevertheless, bearing in mind that the Court is, pursuant to Article 32(1) ECHR, responsible not only for the interpretation but also for the *application* of the Convention and the Protocols thereto, one could expect it to have more enhanced competencies in the process of the execution of its judgments. According to some voices in literature, the role of the Court in the supervision procedure remains rather limited, despite the Court being keen to play a more active role by delivering for instance instructions and recommendations which can have a greater effect on state behaviour.[1605] In this respect, the cases *Broniowski*[1606] and *Asamide*[1607] are considered a manifestation of the Court's aspiration to gain a greater role in the supervision of the execution of its judgments.[1608] Nevertheless, it has happened previously that the Court has provided instructions which, at the time of their issuance, lacked a biding force but which, have later

[1595] Rozakis: The Jurisprudence of the European Court of Human Rights (translated from Greek), p. 1835.
[1596] See also Article 46(3) ECHR.
[1597] After Protocol No. 14 came into force, the Committee of Ministers has, on the basis of Article 46(4) ECHR, the possibility to refer to the Court cases for which it considers that a state is failing to abide by a final judgment.
[1598] See also Article 46(5) ECHR.
[1599] The Department if for example organising round tables, workshops, conferences, seminars. A list of the current activities of the Department is available under: http://www.coe.int/en/web/execution/round-tables-conferences-missions (20/10/2017). The mandate of the department is available under: https://rm.coe.int/16805a997c (20/10/2017).
[1600] An indicative factsheet on interim measures, is available under: http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf (20/10/2017).
[1601] In this regard, iterim measures usually concern the suspension of an expulsion or an extradition.
[1602] Kilian: Die Bindungswirkung der Entscheidungen des EGMR auf die Nationalen Gerichte der Mitgliedsstaaten der EMRK vom 4. November 1950, p. 104. Kilian advises to examine together with this Article, Article 41 of the ICJ Statute.
[1603] Tomuschat: Human Rights, p. 249.
[1604] Van de Heyning: Fundamental Rights Lost in Complexity, p. 225. Van de Heyning refers in this regard to case Verein gegen Tieffabriken v. Switzerland.
[1605] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, pp. 183-184.
[1606] Broniowski v. Poland (App. No. 31443/96, 22/6/2004).
[1607] Asamide v. Georgia (App. No. 71503/01, 8/4/2004).
Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, pp. 191-192.

been incorporated into the Rules of Court.[1609] Furthermore, it is underlined that, more than a decade ago, the Committee had, officially by Resolution Res(2004)3, given the Court the 'green light' to suggest measures by inviting the Court to identify "what it considers to be an underlying systemic problem and the source of this problem".[1610] In the same Resolution the Committee has made clear that, the aimed contribution of the Court should "assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments".[1611] Following this Resolution and in an effort to overcome inadequacies, the Court has adopted a different approach and has moved towards providing more detailed justifications of its judgments.[1612] Despite the positive aspects of a stronger involvement of the Court in the enforcement process, one should not forget that, an even greater participation of the Court would lead to an even longer duration of the whole procedure. Additionally, it is doubtful whether it would increase the effectiveness of the enforcement at all.[1613] Currently, the greatest obstacle to a more enhanced involvement of the Court is the lack of the appropriate legal basis for such a conduct.[1614] Traditionally, an international organisation follows its statutory document, where such a document exists, otherwise, the treaty upon which is has been established.[1615] As the Court lacks a statutory document, such *expressed* powers or 'signs' of relevant *implied* powers to supervise the execution of judgments are to be sought in the Convention and in the Rules of Court, which however, are not very illuminating in this regard.[1616] Nonetheless, it is widely accepted in international law that, international organisations are granted a number of *unwritten* competencies, which arise from agreements concluded and practices developed in the course of their operation.[1617]

2.3.2.3. Congress, Secretary General, Commissioner for Human Rights and Human Rights Trust Fund

Another organ assisting the Committee of Ministers in its monitoring procedure is the *Congress*,[1618] which is entrusted with the task of overviewing the preservation of democracy and the standards set by the Council on a regional and local level.[1619] As a political assembly representing local and regional authorities, the Congress might seem to have a supplementary role, however, the Committee of Minsters and the Member States have repeatedly highlighted their highest appreciation towards the Congress.[1620] The Congress is delivering advice to the Committee as to the best modalities to promote democracy, while at the same time, it is receiving advice from the Committee and the Parliamentary Assembly with regard to the particularities of local authorities.[1621] A further facilitator of the whole procedure is the

[1609] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 195. Haß refers in this regard to case Moreira de Azevedo v. Portugal (App. No. 11296/84, 28/8/1991). The three months deadline for the paymeny of the just satisfaction was then introduced in Article 75(3) of the Rules of Court.
[1610] Sisilianos: Introduction (translated from Greek), p. 13.
[1611] Ibid.
[1612] Lambert-Abdelgawad: The Execution of Judgments of the European Court of Human Rights, p. 46.
[1613] Pabel: Ministerkomitee und EMRK, p. 100.
[1614] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 194.
[1615] Ibid., p. 201.
[1616] Ibid., p. 193. Haß mentions that the doctrine of implied powers, a concept often referred to by the ICJ and widely present in the Anglo-American legal family, refers to powers implicitly deriving from other powers, which are themselves expressly laid down in a document.
[1617] Ibid., p. 201.
[1618] Congress of Local and Regional Authorities of Europe (CLRAE).
[1619] Brummer: Der Europarat, p. 189.
[1620] Ibid., p. 191.
[1621] Ibid., p. 185.

Secretary General[1622], whom, together with the responsibility for the strategic management and the pursuing of the objectives of the Council, is also assigned with competencies related to the compliance of Member States with human rights standards. The Secretary General is otherwise referred to as the 'supreme servant' of the Council, while his activity also includes aligning institutions with each other.[1623] A very interesting aspect of the role of the Secretary General in the protection of human rights is his competence under Article 52 ECHR to request from Member States to provide reports on the application level of the provisions enshrined in the Convention. Although, in reality, this competence has little practical importance, since the Secretary hardly ever makes use of this power.[1624] Besides, the role of the Secretary General in the ECHR system remains rather weak, in the sense that it includes responsibilities which can be triggered only after the organ has been assigned with relevant duties from the Council or the Committee.[1625] Another body involved is the *Commissioner for Human Rights*[1626], an independent body of the Council of Europe entrusted with the mission to foster the effective observance of human rights and to assist Member States in complying with their international commitments.[1627] In doing this, the Commissioner is acting on several levels, whilst the ever-expanding actions of this institution include identifying shortcomings and encouraging reform measures.[1628] Additionally, the *Human Rights Trust Fund*[1629] may as well provide support throughout the execution procedure by means of financially supporting the efforts of Member States to implement the Convention at the national level and to ensure the full and timely execution of ECtHR judgments.

2.3.2.4. Facilitators outside the ECHR system

Member States can also play a vital role in the execution process, not only in cases that affect themselves, but also in cases which concern other Member States. In this respect, states can provide incentives for other states and encourage those states who are reluctant, less committed or simply less experienced, to cooperate and adjust their behaviours.[1630] In fact, the monitoring procedure, in the first years of the existence of the Convention, has indeed been thought as a tool that could facilitate the compliance of new, Eastern members of the Council of Europe, which were expected to face difficulties throughout their transition process.[1631] At the same time, it is surprising that, although states often show reluctance in upholding their own responsibilities towards citizens, they show no hesitation in protecting the human rights of their citizens when these have been violated by other states.[1632] In this respect, states could have a role in revealing unlawful practices applied by other Member States.[1633] Nevertheless, it is noted that, this practice of concentrating to a protection 'from the outside' lies closer to the nature of

[1622] The Secretary general heads the Secretariat General of the Council of Europe.
[1623] Brummer: Der Europarat, p. 138.
[1624] Zimmermann: Dispute Resolution, Compliance Control and Enforcement in Human Rights Law, p. 26.
[1625] Brummer: Der Europarat, p. 136.
[1626] Established in 1999. The fundamental objectives of the Commissioner for Human Rights are laid out in Resolution(99) 50 on the Council of Europe Commissioner for Human Rights, adopted by the committee of ministers on 7 May 1999).
[1627] Perrakis: European Law of Human Rights (translated from Greek), p. 47.
[1628] Ibid.
[1629] The Human Rights Trust Fund (HRTF), was established in March 2008 by the Agreement between the Council of Europe, the Council of Europe Development Bank and Norway, later joined by Germany, Netherlands, Finland, Switzerland and United Kingdom.
[1630] Gilch: Die Reformen am Europäischen Gerichtshof für Menschenrechte unter Besonderer Berücksichtigung des 14. Zusatzprotokolls zur EMRK, p. 250.
[1631] Brummer: Der Europarat, p. 73.
[1632] Paulus: Dispute Resolution, p. 357.
[1633] Ibid.

human rights at the time of their emergence, when they were still conceived as norms claimable against other states that were disregardful of democratic rules.[1634] National judiciaries and parliaments are yet two more potential cooperation partners of the Committee which can make a valuable contribution but which have thus far not been used in an optimum manner.[1635] The contribution of international organisations who play a dominant role in the international field and who have a unique power of influence, could also prove beneficial, in terms of persuading states of the necessity of preserving the internationally applicable standards.[1636] Diplomatic pressure is yet another effective tool for ensuring that states meet their commitments, while it at the same time does not negatively affect the judicial path, which the individual may later choose or may already be going.[1637] Nonetheless, diplomatic protection is traditionally used to serve state interests and not the rights of individuals.[1638] Lastly, during the supervision process, applicants themselves, NGOs and national human rights institutions may submit *communications* which contribute to significantly to shaping a successful outcome of the procedure.

3. Consequences of non-compliance

3.1. Reasons for state non-compliance

Overall, it seems that states are succeeding in complying with most of the Court's judgments, including those judgments which touch upon controversial issues and which thus attract public attention; the so-called 'cause-célèbres'.[1639] It constitutes a positive fact that, the majority of states does not blatantly disobey judgments and that, non-compliance mainly lies within the difficulties that states face in following up in an adequate and timely manner.[1640] The reasons for state non-compliance are usually related to the extent of the reforms required at national level and to the lack of those legislative, administrative or judicial mechanisms which would permit a smooth acceptance of ECtHR decisions by the internal legal order.[1641] Additional reasons may relate to financial shortages of the state or to the content of the judgment itself which, as a standard practice, is not very illuminating on the causes of the violation.[1642] Decisive in this respect are also the public opinion and the reactions of the society, which are mainly triggered by cases that touch upon taboo issues or issues related to moral perceptions.[1643] In what concerns the political reasons behind non-compliance, these are only rarely raised by the Member States, however, the significance of their impact is undoubted.[1644] Nevertheless, states do at times invoke reasons of failed public policy in an attempt to escape their responsibilities, whilst, other times, they do not justify the reasons for their non-compliance at all.[1645] Furthermore, when a new application relating to the same issues that have previously caused

[1634] Letsas: A Theory of Interpretation of the European Convention on Human Rights, p. 21.
[1635] Van de Heyning: Fundamental Rights Lost in Complexity, p. 226.
[1636] Lambert-Abdelgawad: The Execution of Judgments of the European Court of Human Rights, p. 45. Lambert-Abdelgawad refers in this ergad to case Ilaşcu a.o. v. Moldova and Russia (App. No. 48787/99, 8/7/2004).
[1637] Zimmermann: Dispute Resolution, Compliance Control and Enforcement in Human Rights Law, p. 38.
[1638] Paulus: Dispute Resolution, p. 360.
[1639] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 364; Villiger: The European Convention on Human Rights, p. 85.
[1640] Bates: The Evolution of the European Convention on Human Rights, p. 493.
[1641] Kastanas: Compliance with the Judgments of the European Court of Human Rights and the Contribution of the Greek Judge (translated from Greek), p. 114.
[1642] Ibid.
[1643] Ibid. Such issues can for example be homosexuality or religion.
[1644] Ibid., p. 113.
[1645] Ambos: Straflosigkeit von Menschenrechtsverletzungen, p. 203.

non-compliance is lodged with the Court, states may provide reasoned opinions for their persistent behaviour.[1646] In this context, the opinions provided may affect the Court, in the sense that they might lead it to reconsider its stance and to eventually change it in their favour.[1647] As mentioned above, compliance of Member States with the Court's judgments is to a large extent considered effective, however, there has been cases where the respondent state has clearly refused to abide by its commitments.[1648] Such an example can be seen in the behaviour of the Turkish government with regards to the *Loizidou*[1649] judgment, whereby Turkey has blatantly disregarded its international obligations; a case which has affected negatively the esteem of the ECHR system.[1650] The case of *Loizidou* is often addressed in literature as the most typical example of direct state refusal; a refusal which in this case is thought to have been largely based on the fact that the execution of the judgment would bring about political implications.[1651] A surprising aspect of the case was the fact that the state did not refer to economic or other difficulties in order to justify its disobedience, but rather, contested the very content of the judgment and the res judicata resulting from it.[1652] Another typical case of non-compliance was the *Hakkar* case[1653], whereby the applicant remained detained despite the Court having declared the unlawfulness of his imprisonment.[1654] Case *Stran-Andreadis*[1655] is as well often referred to as a case of non-compliance, as in this case, it took two years after the issuance of the Court's judgment and certain threats of expulsion from the Council until, eventually, and the sum awarded has been paid.[1656]

3.2. Lack of a sanctioning regime

Under the current scheme, the ECHR system lacks an organ assigned with the competence to issue detailed instructions to the respondent state and to bring its behaviour into conformity with the ECtHR ruling.[1657] It is a fact that, as long as international law lacks a central power which could enforce compliance, the proper execution of international judgments will be left upon the discretion and the willingness of the Member States to perform their duties in a rightful manner.[1658] At the same time, the ECHR system also suffers the non-existence of sanctions, monetary fines and punishments, which could be used as means of pressure against the states. It has been observed that, the absence of punishment measures often results to the prolongation of the violation, since, when no sentence is threatening, states will typically take advantage of

[1646] Janis/ Kay/ Bradley: European Human Rights Law, p. 849.
[1647] Ibid. Janis/ Kay/ Bradley refer in this regard to case Z. a.o. v. UK (App. No. 29392/95, 21/5/2001), where the Court has found that it has not fully understood the procedural arrangements of national law in the previous case of Osman v. UK (App. No. 23452/94, 28/10/1998).
[1648] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 364. Chrysogonos refers in this regard to cases Stratis Andreadis v. Greece (App. No. 13427/87, 9/12/1194) where there was a delay of about two years and Loizidou v. Turkey (App. No. 15318/89, 23/3/1995), where the Turkish Government explicitly refused to comply.
[1649] Loizidou v. Turkey (App. No. 15318/89, 23/3/1995)
[1650] Ibid., p. 365.
[1651] Kastanas: Compliance with the Judgments of the European Court of Human Rights and the Contribution of the Greek Judge (translated from Greek), p. 111.
[1652] Ibid.
[1653] Hakkar v. France (App. No. 19033/91, 27/6/1995).
[1654] Kastanas: Compliance with the Judgments of the European Court of Human Rights and the Contribution of the Greek Judge (translated from Greek), p. 112.
[1655] Stratis Andreadis v. Greece (App. No. 13427/87, 9/12/1194).
[1656] Kastanas: Compliance with the Judgments of the European Court of Human Rights and the Contribution of the Greek Judge (translated from Greek), p. 112.
[1657] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 107.
[1658] Emmerich-Fritsche: Vom Völkerrecht zum Weltrecht, pp. 113-114.

all the time they have in their availability.[1659] As previously noted, the only 'monetary punishment' that states have to confront, is the payment of interest in the case that a just satisfaction has been awarded. Nevertheless, despite the evident non-existence of punishment provisions, the rules and principles of international law require that an infringing behaviour must be corrected, particularly in cases where serious violations have occurred.[1660] In this respect, and since the Convention itself encompasses rules and principles of international law, a violation of ECHR provisions inevitably triggers the application of these rules and principles.[1661] It could even be supported that, given the fact that, the UDHR has acquired the status of *jus cogens*,[1662] and that, the ECHR expresses similar panhuman values, the violation of the Convention raises issues of violation of jus cogens. Furthermore, it has also been stated that, when a state violates public international law, it is committing an international criminal offence; how this offence is to be handled depends on the relationship between international and national law.[1663] Immunity of state officials from foreign criminal jurisdiction is yet another interesting topic which could be reconsidered, in the sense of establishing the possibility to prosecute officials who commit *human rights crimes*.[1664] However, tackling criminal impunity on an international level would require rethinking the international criminal justice system as a whole, given the fact that the ICC, under its present jurisdiction, can prosecute individuals only for the international crimes of genocide, crimes against humanity, war crimes and crimes of aggression. [1665] At the same time, it is expressed that, the criminalisation of human rights violations is not compatible with the nature of ECHR rights which have the nature of "primary standards".[1666] More specifically, it is stressed that, criminal law, differently to human rights law, consists of 'secondary standards'; although certain provisions of the Convention such as the right to compensation under Article 5(5), ECHR seem to share the same characteristics as secondary standards.[1667]

3.3. Political pressure within the Council of Europe

By virtue of the lack of specific sanctioning provisions, the ECHR evidently suffers from a regulatory gap in terms of the channels available for achieving compliance; perhaps a result of the belief of its creators that the permanent voluntary execution of judgments was guaranteed.[1668] In this respect, it is highlighted that, the only means that the ECHR system has in its availability against a Member State's failure to comply, is the political peer pressure.[1669] The instruments implemented to exert pressure may take various forms, however, severe

[1659] Arold: The Legal Culture of the European Court of Human Rights, p. 35.
[1660] Ambos: Straflosigkeit von Menschenrechtsverletzungen, p. 204.
[1661] Leeb: Die Innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im Entschiedenen Fall, pp. 5-6.
[1662] Chortatos: Introduction to Contemporary International Law and the Problem of Relationship between International and Internal Law (translated from Greek), p. 220.
[1663] Ambos: Straflosigkeit von Menschenrechtsverletzungen, p. 208.
[1664] Such as in cases relating to arbitrary detention, prison conditions, excessive sentences, discrimination etc.
[1665] Ambos: Straflosigkeit von Menschenrechtsverletzungen, p. 347.
[1666] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 90. The German terms 'Primärnormen' has been freely translated into 'primary norms'.
[1667] Ibid., pp. 91-92. Uerpmann furthermore supports that, where no such 'secondary standards' exist in the text of the Convention, these are sought outside of the Convention.
[1668] Perrakis: European Law of Human Rights (translated from Greek), p. 80.
[1669] Bates: The Evolution of the European Convention on Human Rights, p. 493; Grabenwarter/ Pabel: Europäische Menschenrechtskonvention, p. 99.

methods are used only rarely.[1670] The most severe sanction available concerns the *expulsion* of a Member State from the Council of Europe, namely the termination of its membership, however, this measure has never been implemented; therefore, it remains a means of last resort with a primarily theoretical dimension.[1671] In any case, before the Committee would decide on the expulsion of a Member State, it would first *suspend*[1672] the participating, speaking and voting rights of the state concerned and, in case of non-improvement, it would then ask the Member State to willingly *withdraw* from the Council[1673]. With regards to withdrawal, its effects take some time to materialise, in the sense that the *de facto* denouncing of the membership shall take effect *de iure* only after a couple of months have passed. In any case, a withdrawal would have negative political consequences for the state and as such, it is vigorously avoided and unlikely to happen under normal conditions.[1674] However, withdrawal has been used once,[1675] when dictatorship has taken over the power in Greece in the early seventies.[1676] As it becomes apparent, in the case of continuous non-compliance or of deterioration of a violating situation, the Committee of Ministers prefers to make use of its monitoring possibilities and to promote the medium- and long-term improvement of the state's performance.[1677] Besides, it is emphasised that, taking into consideration that the primary responsibility for the protection of human rights lies with the Member States, the Council's role is not to force actions and behaviours but rather, to be supportive of the processes that Member States decide to adopt.[1678] Another reasonable explanation why the current practice that almost resembles impunity is followed, is that, from the moment that a Member State is expelled from the Council, the Committee loses any control over the state; something that could lead to a further deterioration of human rights in the area.[1679] Overall, it can be observed that, the level of tolerance is generally high, something also evident in the fact that non-compliance has occasionally lasted a very long time; sometimes even a decade.[1680] Here again, a characteristic example has been the European stance towards Turkey in case *Loizidou*, reflected in the *interim resolutions* with which the Committee of Ministers expressed its disapproval, specifically using the words "deploring the fact" and later the words "deeply deploring the fact"[1681].[1682] In this

[1670] In order for Article 8 of the CoE Statute to be applied, a serious violation of the provisions of Article 3 of the CoE Statute has to occur. Article 3 reads as follows: "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I."

[1671] According to Article 20(d) of the CoE Statute, the CoM can decide on the exclusion with a 2/3 majority.

[1672] According to Article 8 of the CoE Statute.

[1673] According to Articles 58 ECHR and 7 of the CoE Statute.

[1674] Klein: Europäische Menschenrechtskonvention und UN-Pakt für Bürgerliche und Politische Rechte als Säulen des Internationalen Menschenrechtsschutzes, p. 44.

[1675] In 1969 the Assembly called on, with Recommendations 547 and 569, the Committee of Ministers to take action by making use of Article 8 of the Statute, but later that year the Greek government has withdrawn from the Convention by making use of Article 7 of the Statute, which took effect de iure at the end of 1970. Greece rejoined the Council of Europe in January 1975, after the military coop has ended in July 1974.

[1676] Brummer: Der Europarat, p. 82.

[1677] Ibid., p. 81.

[1678] Gilch: Die Reformen am Europäischen Gerichtshof für Menschenrechte unter Besonderer Berücksichtigung des 14. Zusatzprotokolls zur EMRK, p. 249.

[1679] Brummer: Der Europarat, p. 91.

[1680] Perrakis: European Law of Human Rights (translated from Greek), p. 77.

[1681] Interim resolutions adopted by the Committee concerning the judgment of the European Court of Human Rights of 28 July 1998 in the case of Loizidou against Turkey have been the following: Interim Resolution ResDH(99)680, Interim Resolution DH(2000)105, Interim Resolution ResDH(2001)80, Interim Resolution ResDH(2003)174. Their full text can be found in the collection of interim resolutions 1988-2008, prepared by the Department for the execution of judgments of the European Court of Human Rights, available under: https://rm.coe.int/168059ddae (15/11/2017), pp. 235-238.

[1682] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 365.

respect, it is no wonder that, the fact that 'punitive' measures are applied only as an exception and an ultima ratio, has raised concerns and has created legitimate doubts about their effectiveness.[1683]

3.4. Bringing the case before the Court

On their part, individuals have as well several instruments in their disposal against a state's failure to comply with a judgment of the Court. As mentioned previously, it is accepted that, in the case that a state does not comply with a judgment granting a just satisfaction under Article 41 ECHR, the victim can initiate new proceedings before the Court, on the grounds of a violation of the *right to property* which is protected by Protocol No. 1[1684].[1685] At the same time, the majority of legal theorists negate the legal validity of bringing a new claim before the Court on the basis of a violation of Article 46(1) ECHR, by underlying predominantly the arrangements of Article 34 ECHR, according to which, individual claims have to concern "the *rights* set forth in the Convention or the Protocols thereto"; thus, cannot be based on rights of rather *procedural* nature.[1686] Nevertheless, the particularly interesting case *Vermeire*[1687], having approached the ability of individuals to raise claims that are not based on the violation of specific *rights*, it has served as somewhat of an outlier.[1688] In particular, the Court has held in *Vermeire* that, the deficient execution of the previously delivered *Marckx*[1689] judgment which concerned another applicant yet the same state, was establishing a new violation of the Convention; however, still not a violation of Article 46(1) ECHR.[1690] A year later, in the context of *Olsson II*[1691], in replying to the applicants' complaints that, despite the findings in *Olsson I*[1692] national authorities continued to prevent them from enjoying their rights, the Court has implied that, an individual complaint may also be raised against a state's non-compliance.[1693] In this respect, the fact that the whole ECHR system is built upon the *principle of effectiveness*, is regarded by some as supportive of the notion that, state disobedience is indeed capable of establishing a right of appeal against it.[1694] Nonetheless, taking into consideration that, the Court has restrained from adopting a clear position and that, the Commission has in the past denied such an effect, it appears wiser to accept that it remains unclear whether a failure, complete or partial, of a state to abide by Article 46(1) ECHR constitutes enough reason for a new claim.[1695]

[1683] Karper: Reformen des Europäischen Gerichts- und Rechtsschutzsystems, p. 119.
[1684] Article 1 of Protocol No. 1.
[1685] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), pp. 68, 90.
[1686] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, pp. 271-272.
[1687] Vermeire v. Belgium (App. No. 12849/87, 29/11/1991).
[1688] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 277.
[1689] Marckx v. Belgium (App. No. 6833/74, 13/6/1979).
[1690] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, p. 277.
[1691] Olsson II (App. No. 13441/87, 27/11/1992).
[1692] Olsson I (App. No. 10465/83, 24/3/1988).
[1693] Olsson II para. 94 of cites as: "The Court further notes that the facts and circumstances underlying the applicants" complaint under Article 53 raised a new issue which was not determined by the Olsson I judgment (p. 29, para. 57) and are essentially the same as those which were considered above under Article 8, in respect of which no violation was found (see paragraphs 87-92 above)'. Former Article 53 referred to in Olsson II is current Article 46(1) ECHR.
[1694] Leeb: Die Innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im Entschiedenen Fall, p. 8.
[1695] Ibid., pp. 8, 46.

In any case, it seems that, if Articles 41 and 46 ECHR could be recognised as *substantive rights*, this would in itself provide enough justification for a new claim to be raised before the *Court* in case of their violation. Additionally, acknowledging these rights as having the characteristics of *direct applicability*, it would constitute enough legal basis for a relevant claim concerning their alleged violation to be raised before *national courts*.

The overall role of Member States in ensuring compliance also remains important, since states may as well take the legal path when they detect non-compliance with ECHR standards on the part of another Member State. A 'weapon' that states hold in their disposal under Article 33 ECHR is the possibility of referring to the Court "any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party", in the context of an *inter-State case*. In addition, it is underlined that, from the wording of Article 33 ECHR, it does not result that inter-State cases need to be based on the *rights* of Section I of the Convention and therefore, they may even be raised against a violation of the *provisions* relating to compliance, such as Articles 41 and 46 ECHR.[1696] Nevertheless, the experience of many decades has shown that, inter-State cases remain low in terms of numbers and they are still considered a relatively hostile behaviour and one incompatible with the advanced integration and the comprehensive human rights protection scheme present in Europe.[1697] Additionally, apart from the response measures made available to the states through the Convention, states may also make use of other means available in international law and therefore, at least theoretically, they can influence state policies and bring about significant changes.[1698]

3.5. The dark side of state non-compliance

It has by now acquired the status of a common truth, that human rights are extremely closely related to stability and democracy, so that, disregard towards them signifies an overall danger of insecurity not only within national borders, but also on an international level.[1699] In relation to the Convention specifically, it is argued that, disobedience even from the side of one single state, is able of causing imbalance to the whole system. [1700] More specifically, it is highlighted that, disobedience on the part of one state may set a bad example for other states too, who, concerned as to the preparedness of others to uphold their obligations, they could adopt similar behaviours and either avoid acceding the Convention or refrain from signing additional Protocols.[1701] Moreover, since execution constitutes a fundamental component and a prerequisite for the effectiveness of the European system of human rights protection, a defective performance of Member States inevitably leads, apart from to an increased workload, also to a reduction in the reliability of the Convention and its mechanisms.[1702] The Council itself

[1696] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, pp. 271-272. Article 33 on inter-State cases cites as: "Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party" as compared to Article 34 on individual applications includes that as: 'The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto'.
[1697] Villiger: The European Convention on Human Rights, p. 79.
[1698] Ulfstein/ Marauhn/ Zimmermann: Introduction, p. 4 ff.
[1699] Erler: Die Wahrung der Menschenrechte als Globale Präventionsstrategie, p. 17.
[1700] Ulfstein/ Marauhn/ Zimmermann: Introduction, p. 4.
[1701] Ulfstein/ Marauhn/ Zimmermann: Introduction, p. 4.
[1702] Kastanas: Compliance with the Judgments of the European Court of Human Rights and the Contribution of the Greek Judge (translated from Greek), p. 115.

constitutes an organisation based on values and as such, it could rapidly lose its credibility if Member States would disregard and devaluate the responsibilities they have undertaken under the Convention.[1703] Furthermore, if the sense of disbelief in the functionality and credibility of the Council increases, the number of available means of pressure to be exerted on Member States will, in inverse proportion, decline accordingly.[1704] In this vein, one should remain mindful of the fact that, the role of the Council is utterly important for Europe, as its overall efforts serve and promote security and unity in the entire region.[1705] Given the fact that the Council is a key player in the international arena, disrespect for its objectives could even contribute negatively to the confidence of the power of international relations in general. In this context, it is almost undisputed that, respect for the Convention and abidance with ECtHR rulings is fundamental for the relations of the state with the whole European family.[1706] In total, it is stressed that, a tolerant attitude towards non-compliant or even provocative behaviours which ignore the judgments of the Court could open the 'bags of Aeolus' and should be therefore highly avoided.[1707] Similarly, it is also necessary that the Committee of Ministers adopts a careful approach, since in the occasion that the Committee would completely disregard non-compliance and wash its hands of existing practical problems, this would have, in the long term, sad consequences for the credibility of the ECHR system.[1708] A positive element is that, as the ECHR system grows stronger, the understanding within the international community about the political dangers that come along with disobedience also grows stronger.[1709] In this vein, it is believed that, the ECHR has succeeded in acquiring a self-powered dynamic, so that it appears politically smarter for states to comply with their obligations than bear the political cost.[1710]

[1703] Brummer: Der Europarat, p. 73.
[1704] Bates: The Evolution of the European Convention on Human Rights, p. 494.
[1705] Huber: Ein Historisches Jahrzehnt, p. 251.
[1706] Matthias/ Ktistakis/ Stavriti/ Stefanaki: The Protection of Human Rights in Europe (translated from Greek), p. 32.
[1707] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 365.
[1708] Brummer: Der Europarat, p. 81.
[1709] Chrysogonos: The European Convention on Human Rights (translated from Greek), p. 58.
[1710] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 416; Chrysogonos: The European Convention on Human Rights (translated from Greek), pp. 58, 72.

Chapter Four

CASE-STUDY: FEDERAL REPUBLIC OF GERMANY

1. The domestic position of the Convention

1.1. The open stance towards international law

1.1.1. Early familiarity with international human rights standards

Germany is a country with an early presence in Europe, being one of the countries that have co-shaped the European Communities and also one of the first ECHR signatories.[1711] The reasons for the early ratification of the Convention by Germany are twofold.[1712] *Firstly*, with the adoption of the Basic Law[1713] in 1949, Germany already had an extensive list of fundamental rights and therefore, was already familiar with the content of the Convention and the scope of the rights enshrined in its text.[1714] In fact, the extensive list of fundamental rights provided by the German Constitution[1715] was overall regarded as a greater guarantee to extensive protection than the Convention itself.[1716] It is a fact that, a number of countries tend to rely on the Convention with the sole purpose of completing gaps of their national law in relation to the protection of fundamental rights.[1717] On the contrary, in Germany, the Convention acts more in the shadow of the comprehensive list of human rights enshrined in the national Constitution.[1718] *Secondly*, with the introduction of the constitutional appeal in 1951, the safeguards for the protection of fundamental rights were evidently more present in Germany than in the rest of Europe.[1719] Consequently, it is no wonder that the German Constitution has always been highly valued in Germany; a circumstance explaining why in the first years of the application of the Convention not too much emphasis was attached to the Convention from the part of Germany.[1720] Germany's overall introversion can in this context be explained by the fact that, German legal science was recognised globally already a couple of decades ago, at a time when other countries and their respective legal systems had not yet been sufficiently developed.[1721] Germany has adopted a quite distinctive attitude even in relation to the protection of fundamental rights, in the way that these are guaranteed by the European Union.[1722] More specifically, with its momentous *Solange II* judgment, in which it moderated its previous stance

[1711] Hoffmann: Die Europäische Menschenrechtskonvention und Nationales Recht, p. 93.
[1712] Lambert-Abdelgawad/ Weber: The Reception Process in France and Germany, p. 112.
[1713] The German Basic Law (German: Deutsches Grundgesetz or Grundgesetz für die Bundesrepublik Deutschland) is in this Chapter also referred to as Basic Law, German Constitution or Constitution.
[1714] Ibid.
[1715] In this Chapter referred to as German Constitution or Constitution.
[1716] Hoffmann: Die Europäische Menschenrechtskonvention und Nationales Recht, p. 93.
[1717] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, pp. 169-170.
[1718] Ibid., p. 170.
[1719] Lambert-Abdelgawad/ Weber: The Reception Process in France and Germany, p. 112.
[1720] Weiss: The Impact of the European Convention on Human Rights on German Jurisprudence, pp. 52-53.
[1721] Ibid., p. 60.
[1722] Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, p. 39.

under *Solange I,*[1723] the Federal Constitutional Court[1724] has ruled that, as long as the Community ensured a level of protection comparable to the protection of fundamental rights guaranteed by the German Basic Law, the FCC would no longer exercise its jurisdiction to decide on the application of secondary Community legislation.[1725] Nevertheless, it should be mentioned that the Constitution did not always experience the same level of recognition and that it was not until the introduction of the Basic Law in 1949 that it acquired the position it holds today.[1726] Prior to this event, the Constitution had only enjoyed the status of a simple law and unconstitutionality of legislative acts did not lead to their annulment.[1727] Gradually, the view has been developed that, the Parliament may vote as well unconstitutional laws, which could lead to its power transpiring into terrible outcomes such as those of the *Ermächtigungsgesetz* of 1933.[1728] In this vein, it has also started becoming clear that, the legislative power could be a potential enemy of the rights of the individual and, in order to protect the freedom of the individual effectively, individual rights had to be placed at the top of the legal order; that being the Constitution.[1729] Overall, comparing the rights enshrined in the Convention with those enshrined in the German Constitution, it is evident that, the German Constitution provides *substantial* guarantees that are not only wider in scope, but also, more adequately monitored and more effectively implemented.[1730] Au contraire, national *procedural* guarantees are greatly influenced by the Convention and by its interpretation by the European judicial organs, since the German Constitution is quite elliptical in this regard.[1731] A typical example can be seen in Articles 6 and 7 ECHR, from a combination of which with the *rule of law* the FCC has drawn up specific rights for the application and interpretation of constitutional rights.[1732] The guarantees of the German Constitution are, similarly to the guarantees of the Convention, mainly of a 'dissuasive' nature in the sense that they protect an area of private liberty from state interference; known as *status negativus*.[1733] Apart from this dissuasive dimension of the rights of the German Constitution, there is also an 'objective' dimension in them, something that the FCC has repeatedly highlighted.[1734] It is stressed that, in the context of their objective dimension, constitutional rights are freed from their individual identification, providing the FCC with the opportunity to extend their influence by promoting them towards achieving a *status libertatis*.[1735]

[1723] Solange I of 29/5/1974 (BVerfGE 37, 271); Solange II of 22/10/1986 (BVerfGE 73, 339). In Solange I the FCC ruled that incase of a conflict between fundamental rights under the German Constitution and Community law, the former shall prevail. By doing so, the FCC impliedly rejected the doctrine of the primacy of Community law, as previously expressed by the ECJ in cases Costa v. ENEL (1964) and Internationale Handelsgesellschaft v. Einfuhr (1970).
[1724] Hereinafter also referred to as Federal Court, Constitutional Court, Karlsruhe Court or FCC.
[1725] Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, p. 39.
[1726] Kleeberger: Die Stellung der Rechte der Europäischen Menschenrechtskonvention in der Rechtsordnung der Bundesrepublik Deutschland, p. 5.
[1727] Ibid.
[1728] Ibid., p. 7.
[1729] Ibid.
[1730] Weiss: The Impact of the European Convention on Human Rights on German Jurisprudence, pp. 52-53.
[1731] Grabenwarter/ Pabel: Europäische Menschenrechtskonvention, p. 18.
[1732] Ibid.
[1733] Klein: Europäische Menschenrechtskonvention und Deutsche Grundrechtsordnung, p. 17.
[1734] Ibid.
[1735] Ibid., p. 18.

1.1.2. International 'friendliness' of the Basic Law

Apart from the regulatory background that explains the affiliation of Germany with the international standards of human rights protection, the ratification of the Convention by Germany was considered to simultaneously constitute a political message, one aiming to show Germany's dissociation from its past as well as its commitment to democratisation and to the protection of basic rights.[1736] The German Constitution itself was already emphasising the value of the human, while the teachings of constitutional rights recognised that such rights are not limited territorially only within Germany, but rather, they extend to wherever German authority is exercised.[1737] Likewise, the second paragraph of the preamble of the Constitution stated that the German people, have adopted the Basic Law "inspired by the determination to promote global peace as an equal partner in a united Europe"[1738].[1739] However, probably aware of the traumatic experience of Germany's self-isolation, Germany has decided to prove its 'friendliness' towards international relations, by means of holding a generally open stance towards international law and towards the Convention.[1740] This open stance of the German Constitution has been justified by the FCC on the basis of the *international friendliness* of the Constitution, which is derived mainly from Articles 23-26 of the Basic Law, but also, from its preamble and from Articles 1(2), 32 and 59(2) of the Basic Law; under which, interpretative solutions should leave the effectiveness of the Convention unaffected and conflicts with the international obligations of Germany should be avoided.[1741] Germany currently still applies the rule of international friendliness, as it results from the overall character of the constitutional provisions referring to international law.[1742] Recently, in judgment *Sicherungsverwahrung*[1743], the FCC has held that, the international friendliness of the Basic Law is an expression of sovereignty, which not only does not oppose an integration into inter- and supranational contexts alongside a European dialogue between the courts, but instead, it even constitutes their normative basis.[1744] Although there exists no rule connecting the politically desired with a legal obligation, the rule of international friendliness, firstly invoked by the Constitutional Court in 1957, is thought to be also affecting the *self-executing* effect of the Convention as to its *objective element*, namely as to the clarity and precision of its provisions.[1745] More specifically, according to the rule of international friendliness, the wording of the Convention is only an indication and, therefore, decisive is the *substantive* and not the *formal* recipient of the provisions.[1746] Moreover, whilst the FCC accepts the international friendliness of the Constitution, it considers at the same time that, certain limits are present, since the German Constitution has not yet made

[1736] Lambert-Abdelgawad/ Weber: The Reception Process in France and Germany, p. 112.
[1737] Klein: Europäische Menschenrechtskonvention und Deutsche Grundrechtsordnung, p. 15.
[1738] The German text cites as: "von dem Willen beseelt, als gleichberechtigtes Glied in einem vereinten Europa dem Frieden der Welt zu dienen." The translation is provided by Professor Christian Tomuschat and Professor David P. Currie. The full translation of the German Basic Law is available under: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html (25/11/2017).
[1739] Paulus: Germany, p. 218.
[1740] Ibid., p. 209.
[1741] Hoffmann: Die Europäische Menschenrechtskonvention und Nationales Recht, p. 99; Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 44. See also Görgülü points 33-36.
[1742] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 116.
[1743] BVerfGE 128, 326.
[1744] See Sicherungsverwahrung pt. 89.
[1745] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 122.
[1746] Ibid., p. 123.

all the steps towards a complete opening towards international treaties; thus, the international friendliness unfolds only within the framework of the Basic Law.[1747]

1.2. Transposition of the Convention into national legislation

1.2.1. The dualistic nature of constitutional law and the instrument of ratification

In Germany, the dualistic theory on the relationship between national and international law prevails, which means that, an *act of incorporation* is required in order for an international treaty to become applicable at the national level.[1748] Consequently, the Federal Parliament has approved the incorporation of the Convention by way of formal enactment, in accordance with to the arrangements of Article 59(2) (1) of the German Constitution and specifically, by adopting the federal law of 7 August 1952.[1749] Following this action, Germany has ratified the Convention on 5 December 1952 and the Convention has come into force on 3 September 1953[1750].[1751] In the following years, Germany would also ratify all additional Protocols to the Convention, with the exception of Protocols No. 7 and No. 12, which it had only signed but not ratified and, Protocol No. 16, which it had neither signed nor ratified.[1752] In relation to the territorial application of the Convention in the once divided Germany, Article 56 ECHR was then viewed as a 'colonial clause', while it was suggested that a different solution was required for the particular political reality of Berlin, such as the one of including in the Ratification Law a phrase stating that the Convention applies wherever the Constitution applies and thus, *not* to West Berlin.[1753] Eventually, a declaration was included in the Ratification Law, according to which, the application scope of the Convention should extend to West Berlin too and as a result, from the day of its ratification, the Convention was also applying to West Berlin.[1754] In fact, from 1953 to 1990, Germany has been including a general declaration in each ratification tool of the subsequent Protocols, which stated that "the territory to which the Convention will apply extends also to Western Berlin".[1755] As of 3 October 1990, the application of the Convention was extended to the five new federal states, given that the German Democratic Republic acceded to the Federal Republic of Germany and the two German states united in one state.[1756]

According to Article 59 of the Basic Law, international treaties are concluded by the Federal President who represents the Federation under international law. However, the Federal President must in this context also obtain the countersignature of the Federal Chancellor or of

[1747] Grabenwarter/ Pabel: Europäische Menschenrechtskonvention, p. 18. Grabenwarter/ Pabel refer in this regard to Görgülü point 34: 'Das Grundgesetz ist jedoch nicht die weitesten Schritte der Öffnung für völkerrechtliche Bindungen gegangen.' and 'Die Völkerrechtsfreundlichkeit entfaltet Wirkung nur im Rahmen des demokratischen und rechtsstaatlichen Systems des Grundgesetzes'.
[1748] Lambert-Abdelgawad/ Weber: The Reception Process in France and Germany, p. 117.
[1749] Weiss: The Impact of the European Convention on Human Rights on German Jurisprudence, p. 49; Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, pp. 42-43.
[1750] The entry into force was announced in Germany on 15 December 1953.
[1751] Weiss: The Impact of the European Convention on Human Rights on German Jurisprudence, p. 49.
[1752] Lambert-Abdelgawad/ Weber: The Reception Process in France and Germany, p. 111.
[1753] Ernst: Die Haltung Deutschlands und Frankreichs zur EMRK unter Besonderer Berücksichtigung der Anwendung des Art. 6 Abs. 3 in den beiden Staaten, p. 77. Ernst does not refer to current Article 56 but to former Article 63. For further reading see Änderungsantrag sämtlicher Fraktionen Umdruck No. 569/49 of 10 June 1952.
[1754] Ibid., p. 78. The decaration was the following: 'Der Geltungsbereich der Konvention erstreckt sich auf Berlin (West)' ('The scope of the Convention extends to Berlin (West)').
[1755] Lambert-Abdelgawad/ Weber: The Reception Process in France and Germany, pp. 113-114.
[1756] Ibid., p. 114.

the competent Federal Minister.[1757] With regard to the Convention, the treaty has been ratified by the Federal President with the countersignature of the Federal Chancellor and the Minister for Foreign Affairs. Article 59(2) of the Basic Law, concerning the manner in which an agreement for the conclusion of a treaty is met, refers to *consent* and *participation*,[1758] however, not as two different modi operandi but as an indication of the different bodies responsible for the enactment of federal law, namely the Federal Parliament and the Federal Council.[1759] On its part, the legislative consent guarantees parliamentary scrutiny on matters of legislative nature while it also constitutes a sort of parliamentary commitment to pass on further measures related to the future implementation of the treaty.[1760] The fact that Article 59(2) (1) of the Basic Law states that "treaties that regulate the political relations of the Federation or relate to subjects of federal legislation" require a legislative act, is a reflection of the separation of powers and translates into the requirement that, even when only a single provision falls under this category, then the treaty as a whole shall be subject to legislative consent prior to its ratification.[1761] This becomes increasingly complex when the issues regulated by the treaty fall under the sphere of responsibility of the federal states.[1762] In this regard, theorists argue that Article 59(2) (1) of the Basic Law does not apply to such cases, since it expressly refers to *federal* legislation.[1763] However, the prevailing view argues that, in relation to international treaties, the federal legislature has the power to regulate matters which would normally fall within the competence of the legislatures of the federal states, since Article 32(1) of the Basic Law recognises relations with foreign states as a responsibility of the federation.[1764] A corresponding view, supportive of the federal character of human rights issues, suggests that, because human rights regulate the relations of the state with its citizens and, due to the position of the Constitution in the hierarchy of laws, human rights constitute an *a priori* case of the state and thus, cannot be conceived a provincial matter. [1765] At the same time, treaties that do not fall under the scope of Article 59(2)(1) of the Basic Law, are called *executive agreements* and can, as a result of their predominantly executive nature, be ratified and applied without prior legislative consent.[1766] More specifically, pursuant to Article 59(2)(2) of the Basic Law, the competence to implement such executive treaties internally, is the same that applies also for national provisions on administrative matters and therefore, Article 80 of the Basic Law regulating the issuance of statutory instruments, shall apply mutatis mutandis.[1767]

1.2.2. Incorporation theories of transformation and execution

The Ratification Law of 1952 has incorporated the Convention into national law by simply repeating the text of the Convention.[1768] In this context, supporters of the *directly applicable* character of the Convention underline that the extra issuance of detailed legislation was not necessary, however, in some cases, the legislator has decided to explicitly refer to the

[1757] Paulus: Germany, p. 214.
[1758] Freely translated from the German 'bedürfen der Zustimmung oder der Mitwirkung'.
[1759] Paulus: Germany, p. 215.
[1760] Ibid., p. 216.
[1761] Ibid., p. 215.
[1762] Ibid.
[1763] Ibid.
[1764] Ibid.
[1765] Kleeberger: Die Stellung der Rechte der Europäischen Menschenrechtskonvention in der Rechtsordnung der Bundesrepublik Deutschland, pp. 156-157.
[1766] Paulus: Germany, p. 216.
[1767] Ibid.
[1768] Hoffmann: Die Europäische Menschenrechtskonvention und Nationales Recht, p. 93.

Convention in national laws.[1769] It is furthermore argued that, the content of the Ratification Law is *dynamically* formulated, in the sense that, the German legislature has repeated its consent for the Convention through the several laws ratifying the subsequent Protocols and also in the sense that, crucial is the date that an ECtHR judgment freshly crystallises the content of the Convention.[1770] With regards to the incorporation theories, the Constitutional Court has initially followed the *transformation* theory but has then changed to the *execution* theory, which considers the act of incorporation as an order to abide by the treaty.[1771] On the other hand, according to the theory of transformation, which seems to be still applied by ordinary German courts,[1772] the 1952 Ratification Law has incorporated the provisions of the Convention into Germany by creating identical national rules[1773]. According to the prevailing view, the Constitution does not take a clear position with respect to which theory it considers applicable, however, it is argued that, the possibility for an effective relationship between the two legal orders, as offered by the execution theory, is more in line with the international friendliness of the Constitution.[1774] Additionally, it is emphasised that, the theory of execution is more in harmony with Article 59(2) of the Basic Law, since it specifies the subject matter of the law providing the consent.[1775] At the same time, supporters of a moderate transformation theory suggest that the theory of transformation does not differ much from the theory of execution.[1776] As a matter of fact, a decision between the theory of transformation and the theory of execution is not necessary, since the outcome is not any different with regards to the internal validity of the Convention.[1777]

1.3. The domestic rank of the Convention and theories of a higher rank

1.3.1. The hierarchical status of the Convention as federal law

The *official* status of ECHR rights in the national legal order is approached on the basis of the level of the Convention in the hierarchy of laws, however, their *practical* position and appreciation have yet not been clearly defined by either the FCC or the German legal theory.[1778] It is even argued that, the priority in the application of norms should not be sought in their hierarchical classification, but rather, in their systematic interpretation, which requires that provisions should be interpreted with coherence and in the context of the overall legislative framework surrounding them.[1779] Hereby, it is stressed that, the position of human rights cannot be approached differently than on the basis of the substantive legal system on which they are

[1769] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 57.
[1770] Schilling: Deutscher Grundrechtsschutz zwischen Staatlicher Souveränität und Menschenrechtlicher Europäisierung, pp. 163-164.
[1771] Paulus: Germany, p. 217.
[1772] Ibid., p. 218.
[1773] Ernst: Die Haltung Deutschlands und Frankreichs zur EMRK unter Besonderer Berücksichtigung der Anwendung des Art. 6 Abs. 3 in den beiden Staaten, p. 146.
[1774] Kleeberger: Die Stellung der Rechte der Europäischen Menschenrechtskonvention in der Rechtsordnung der Bundesrepublik Deutschland, p. 85.
[1775] Paulus: Germany, p. 218.
[1776] Ibid.
[1777] Pianka: Konkurrenzen und Konflikte beim Rechtsschutz im Europäischen Mehrebenensystem, p. 185.
[1778] Grabenwarter/ Pabel: Europäische Menschenrechtskonvention, p. 18.
[1779] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 179.

greatly dependent.[1780] Article 59(2) of the Basic Law does not regulate the rank that shall be enjoyed by treaties, despite the Constitutional Court having repeatedly stated that the legal form of consent determines also the legal rank of each treaty; supporting in this regard a view similar to the transformation theory.[1781] With this in mind, the legislative act has a dual function in that it provides the *consent* for the ratification of the treaty while at the same time, it determines its *position* in the national hierarchy of laws.[1782] Correspondingly, the fact that the Ratification Law of 1952 states that the Convention has acquired by virtue of its publication the power of law,[1783] is considered an indication of the classification of the Convention, at least *formally*, at the level of a simple federal law.[1784] In this respect, it is supported that, the force of the Convention as a federal law is not only in accordance with Article 59(2) of the Basic Law, but also, it corresponds to the will of the historic legislator and to the official rendition[1785] in the Federal Law Gazette.[1786] Consequently, the prevailing view which lies in accordance with the settled case-law of the FCC is that, the Convention, like every other international treaty, has in the hierarchy of norms the position of a federal law.[1787]

While there exists some clarity with regard to the hierarchical classification of the Convention, in German law, there are no clear rules as to the specifics of the *application* of the rights enshrined in the Convention.[1788] However, from the hierarchical classification of the Convention as a simple federal law, it concludes that, the Convention forms part of the law within the meaning of Article 20(3) of the Constitution.[1789] At the level of federal states, it is stressed that, in the case that a provincial law is opposed to the Convention, Article 31 of the Basic Law shall apply, which rules that federal law precedes over provincial law, regardless of whether it is a formal state law or a state constitutional law. By the same token, it can be accepted that, because of the force of the Convention as a federal law, the Convention cannot be violated by provincial courts, while it also constitutes sufficient criterion for the assessment of provincial rules.[1790] At the same time, it is expressed that, in the case of an opposition of provincial law to the Convention, a request to the FCC under Article 100(1) (2) of the Constitution shall be made as to the interpretation of the Convention.[1791] It is further observed that, Article 28(1) of the Basic Law requires from federal states to respect constitutional rights but does not require from them to proceed with regulating corresponding rights in provincial law.[1792] Similarly, the Convention neither affects the rights guaranteed by the federal states in the sense that it does not expect them to be supplemented or improved nor does it provide for

[1780] Kleeberger: Die Stellung der Rechte der Europäischen Menschenrechtskonvention in der Rechtsordnung der Bundesrepublik Deutschland, p. 22. The 'positive Rechtsordnung' used by Kleeberger has been translated into 'substantive legal system'.
[1781] Paulus: Germany, p. 216.
[1782] Ibid.
[1783] 'Mit Gesetzeskraft veröffentlicht'.
[1784] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 42.
[1785] I.e. Verkündungsformel im Bundesgesetzblatt.
[1786] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 92.
[1787] Grabenwarter/ Pabel: Europäische Menschenrechtskonvention, p. 17; Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, pp. 101, 102. See Görgülü pt. 30f.
[1788] Hoffmann: Die Europäische Menschenrechtskonvention und Nationales Recht, p. 94.
[1789] Ibid., p. 96.
[1790] Klein: Europäische Menschenrechtskonvention und Deutsche Grundrechtsordnung, p. 13.
[1791] Pianka: Konkurrenzen und Konflikte beim Rechtsschutz im Europäischen Mehrebenensystem, p. 64.
[1792] Kleeberger: Die Stellung der Rechte der Europäischen Menschenrechtskonvention in der Rechtsordnung der Bundesrepublik Deutschland, pp. 162-163.

its own implementation with priority over provincial law.[1793] It is furthermore emphasised that, even if we accept that the Convention itself implies a claim of priority, this fact alone is not sufficient to confer to its substantial provisions the necessary power in the national legal order.[1794] Additionally, according to the prevailing view, the fact that the Convention has been incorporated by Article 59 of the Basic Law does not mean that it has also become *directly applicable* on the national level.[1795] In particular, it is underlined that, the Ratification Law incorporates the provisions in the German legal order and makes them *directly applicable* on the national level, only to the extent that they already have a *self-executing* character themselves.[1796] However, it is also supported that, although there is no such regulation in the Convention or in the Ratification Law, the direct application of a provision in the national legal order results from an interaction between its self-executing character and the Ratification Law.[1797] In this vein, it is highlighted that, according to Article 31 of the Constitution, those provisions of the Convention which are considered as directly applicable, have gained priority in relation to the provincial legislation of the federal states, irrespective of whether the provincial law has been passed earlier or later than the entry of the Convention into force.[1798]

1.3.2. Arguments of a supra-legislative classification

Despite the fact that, the prevailing view in Germany recognises to the Convention only the classification of a federal law,[1799] there are several attempts to attribute to the Convention an internal status *superior* to that of federal law. In fact, a number of legal theorists are being severely critical of the hierarchical position of the Convention at the level of a simple federal law.[1800] Alongside the arguments trying to justify a *supra-legislative*, thus, a constitutional power of the Convention, there are also arguments attempting to establish its *supra-constitutional* power. Some of these arguments are even used in literature interchangeably, namely for both the justification of a classification of the Convention on a constitutional and a supra-constitutional level. Specifically in relation to the classification of the Convention at the same level as the Constitution, it is supported that, this does not constitute anymore a mere proposal, but instead, it has gained the character of a legal rule.[1801] Attempts to justify a higher classification of the Convention in this context underline that, the Convention is comparable to the Constitution in the sense that the Convention shares the same basic components that define the Constitution's primacy.[1802] The first of these elements is the *final* component, which concerns the power of the Constitution to decisively impose itself on state power and which safeguards its protection against constant legislative alterations.[1803] The second component is the *content* component, which indicates that the Constitution logically precedes over national

[1793] Ibid.
[1794] Ibid., p. 158.
[1795] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 112.
[1796] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 196.
[1797] Ibid.
[1798] Weiss: The Impact of the European Convention on Human Rights on German Jurisprudence, p. 50.
[1799] Kleeberger: Die Stellung der Rechte der Europäischen Menschenrechtskonvention in der Rechtsordnung der Bundesrepublik Deutschland, p. 12.
[1800] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 92.
[1801] Ibid., p. 99. Heckötter distinguishes in this regard between 'Programmsatz'and 'Rechtssatz'.
[1802] Kleeberger: Die Stellung der Rechte der Europäischen Menschenrechtskonvention in der Rechtsordnung der Bundesrepublik Deutschland, pp. 9-10.
[1803] Ibid. Kleeberger talks of 'finale Komponente', which has been translated into 'final component'.

law due to its fundamental content.[1804] Lastly, there is also the *timely* component, which suggests that the Constitution is a law created with the intention to have duration and shall therefore remain unaffected.[1805] With regards to the aforementioned, it is raised that, the rights contained in the Convention have all the necessary components in order for the precedence attributed to the Constitution to be recognised to them too.[1806] Further attempts for a justification of a higher status of the Convention than that of federal law are invoking the meaning and the purpose of the Convention as well as a strictly monistic approach.[1807]

Attempts to place the Convention at the same level with the Constitution also draw arguments from the use of the Convention in the process of the *constitutional appeal,* as known by Article 93(1)(4)(a) of the Basic Law. The historical retrospective includes a decision of the FCC in December 1958, whereby the Federal Court has left open the possibility of a constitutional appeal to be based on the provisions of the Convention.[1808] Although later, in January 1960, the Federal Court had precluded such a possibility, a position that has been further consolidated with subsequent case-law.[1809] In this vein, the FCC has repeatedly confirmed its position, by stating that, the Convention does not constitute a constitutional rule and as such, a constitutional appeal *cannot* be based on a breach of the rights enshrined in the Convention.[1810] As a result, it is being widely accepted that, because of the lack of an official classification of the Convention on the constitutional level, the ECHR guarantees cannot directly serve as a *review criterion* in the process of a constitutional appeal.[1811] However, what is accepted is that, it is possible to base a constitutional appeal not directly on the Convention, but instead, on Article 3(1) of the Basic Law by claiming that the provisions of the Convention have been interpreted arbitrarily by national courts.[1812] In other words, it is supported that, the *review for arbitrariness* exercised under the provisions of Article 3(1) of the Basic Law can serve as an *indirect* basis for the constitutional power of the Convention.[1813] The Federal Court has in this regard stated in *Görgülü*[1814] judgment that, it is itself called upon, within the scope of its jurisdiction, to prevent and to eliminate violations of international law, which result in the faulty application or the non-observation by the German courts of the obligations under international law and, which could cause the international responsibility of Germany. The Federal Court has continued its thought by declaring that, it is indirectly "in the service" of the enforcement of international law, in the context of which it may be necessary to check the application and interpretation of international treaties by ordinary courts, thereby reducing the risk of the non-observance of

[1804] Ibid., p. 10.
[1805] Ibid. Kleeberger talks of 'inhaltliche Komponente' and 'temporäre Komponente' which have been translated into 'content component' and 'timely component' respectively.
[1806] Ibid., p. 11.
[1807] Kleeberger: Die Stellung der Rechte der Europäischen Menschenrechtskonvention in der Rechtsordnung der Bundesrepublik Deutschland, pp. 20, 25.
[1808] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 96. Uerpmann refers to BVerfGE 9, 36 (39).
[1809] Ibid. Uerpmann refers to BVerGE 10, 271 (274).
[1810] Grabenwarter/ Pabel: Europäische Menschenrechtskonvention, p. 17. See also BVerfGE 10, 271 (274); 64, 135 (137); 74, 102 (128).
[1811] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 55.
[1812] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, pp. 268-270, 298. Polakiewicz refers in this regard to BVerfGE 64, 135 (157); BVerfGE 74, 102 (128).
[1813] Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, p. 12.
[1814] BVerfGE 111, 307 pt. 61.

international law.[1815] As alleged, a constitutional appeal may be furthermore based on a combination of the *right of personality* of Article 2(1) of the Basic Law with a right enshrined in the Convention, as long as the ECHR right does not fall within the scope of a right already included in the German Constitution.[1816] Additionally, constitutional judges authorise a constitutional appeal on the basis of a right enshrined in the Convention, under the condition that the respective ECHR right is linked to a corresponding national constitutional right and, always in combination with the *rule of law* of Article 20(3) of the Constitution.[1817] More specifically, with the *Görgülü* judgment the Constitutional Court has 're-opened' the possibility of a constitutional appeal to be lodged for cases of non-respect for the guarantees of the Convention, by means of linking a constitutional right to the rule of law.[1818] It has been highlighted that, with this judgment, the Federal Court has rendered the ECHR, despite its hierarchical classification as a simple federal law, a *criterion of constitutional scale*.[1819]

Further arguments in favour of a higher classification of the Convention in the German legal order, suggest that the *surpa-legislative* power of the Convention arises directly from Article 1(2) and indirectly from Article 2(1) of the Constitution.[1820] More specifically, it is debated that, the constitutional power of the Convention can be *directly* grounded in Article 1(2) of the Constitution in the sense that this provision constitutionally reinforces the existence of inviolable human rights as the foundation for a human society.[1821] In other words, it is supported that, Article 1(2) of the Basic Law, by recognising human rights as a basis for any human society, it also recognises the fundamental importance of the inalienable rights enshrined in the Convention.[1822] In this respect, by their very nature as basic rights, ECHR rights are thought to be ranked at the same level as the Constitution, however, their relationship with the rest of constitutional rights, in contrary to what applies for their relationship with the rest of national rights, is difficult to determine.[1823] Furthermore, from Article 1(2) of the Basic Law a differentiation of international human rights against the rest of international law cannot be inferred, since this results neither from the history of the creation of this provision, nor from its legal nature.[1824] It has also been expressed that, the notion of including the warranties of the Convention in the scope of the eternity clause of Article 79(3) of the Constitution, as a result of them falling within the scope of Article 1(2) of the Constitution, runs counter to the *telos* of Article 79(3), which ensures exclusively the preservation of the 'substance' of the German Constitution.[1825] As mentioned previously, the argument attempting to justify the constitutional power of the Convention may also be *indirectly* based on the position that, the rights of the

[1815] See Görgülü pt. 61.
[1816] Grabenwarter/ Pabel: Europäische Menschenrechtskonvention, p. 19.
[1817] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 55.
[1818] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 271.
[1819] Ibid., p. 279.
[1820] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 48.
[1821] Kleeberger: Die Stellung der Rechte der Europäischen Menschenrechtskonvention in der Rechtsordnung der Bundesrepublik Deutschland, p. 20; Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 99.
[1822] Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, p. 10.
[1823] Kleeberger: Die Stellung der Rechte der Europäischen Menschenrechtskonvention in der Rechtsordnung der Bundesrepublik Deutschland, p. 12.
[1824] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 49.
[1825] Ibid.

Convention are an integral part of Article 2(1) of the Basic Law in the sense that the freedoms guaranteed by the Convention constitute an essential content of the expression of the *right of personality*.[1826] Further arguments in favour of the constitutional force of the Convention are *indirectly* based on the use of the Convention as an ancillary tool for the interpretation of national legislation, national constitutional rights and the rule of law,[1827] as it is required by the *international friendliness* of the Constitution.[1828] The same is attempted on the basis of a combined reading of Article 1(2) with Articles 23 to 26 of the Constitution, since these provisions grant, under certain circumstances, priority to other legal orders.[1829] However, despite the multitude of arguments, it is accepted that, the opinions that seek to attribute to the Convention a level of constitutional rule, have not yet been convincing either on the basis of Article 1(2) or on the basis of the international friendliness of the Constitution.[1830]

Further arguments of a higher normative power of the Convention are invoking the arrangements of Article 25 of the Basic Law and, the recognition by it of the *general rules of international law* as federal law which precedes over national laws and which, *directly* creates rights and duties for individuals.[1831] However, this notion is contested, on the basis that, Article 25 comprises *customary* international law and not international *treaties* or general *principles* of law recognised by civilised nations; therefore, does not comprise the Convention.[1832] In this respect, the FCC has stated that, it is indeed possible for general *rules* of international law to stem from all three sources of international law and therefore, from treaties and general principles too,[1833] however, it later limited its position to include only *globally* valid customary law.[1834] In any case, the question as to whether the *general principles recognised by civilised nations* fall under Article 25 is not of major interest, if first the question is not addressed as to whether the Convention constitutes a set of such principles; a view which has actually not prevailed in literature.[1835] Moreover, it is stressed that, the general rules of international law to which Article 25 refers, are rules of *general* character and not rules of *special* international law valid between specific states.[1836] On this basis, arguments against the notion that the Convention is covered by Article 25, underline its *regional* character and the fact that it contains specific

[1826] Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, p. 11.
[1827] See Görgülü pt. 32.
[1828] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 48; Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, pp. 10-11.
[1829] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 100.
[1830] Grabenwarter/ Pabel: Europäische Menschenrechtskonvention, p. 19.
[1831] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, pp. 101-102; Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 65.
[1832] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 60.
[1833] Article 38(1) of the ICJ Stature recognises as sources of international law international conventions, international custom and the general principles of law recognised by civilised nations. According to Article 38(1)(d) judicial decisions and the teachings of the most highly qualified publicists are also recognised 'as subsidiary means for the determination of rules of law'.
[1834] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, pp. 61-62. Uerpmann refers in this regard to BVerfGE 23, 288 (317).
[1835] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, pp. 101-102; Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, pp. 61, 65.
[1836] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 60.

and clear guarantees; thus, lacks generality.[1837] Simultaneously, counter-arguments accepting the Convention as falling under Article 25, focus on the fact that, the Convention constitutes, besides regional European customary law, an *ordre public international*, since all catalogues of fundamental rights, whether it be national, international or regional, agree on their essential points.[1838] With regards to the character of the Convention as *regional customary* law, despite it being extensively recognised in literature,[1839] there are several arguments suggesting the opposite. More specifically, it is argued that, the notion of the recognition of the Convention as special customary law stands in contrast with the existing doubts about a *uniformly* compliant behaviour on the part of Member States.[1840] Furthermore, it is also stressed that, the notion of special customary law seems to be ignoring the fact that many of the rights contained in the Convention lack an *opinio juris*, which is a prerequisite for international customary law.[1841] Certain guarantees included in the Convention such as the prohibition of torture, seem to be actually able to be included in the concept of customary international law, however, here again, the opinio juris as a condition necessary for the creation of international custom, is missing.[1842] Hereby, it is underlined that, despite the fact that all members of the Council of Europe have by now ratified the Convention, the right of *denunciation* of the Convention regulated by Article 58 ECHR, clearly shows that there is a the lack of opinio juris between the Member States.[1843] As a result of the above, it is supported that, the Convention as a whole cannot be considered as falling within the scope of the term *customary law*, nevertheless, that the opposite can be accepted for certain provisions of the Convention; while again, conclusions accepting the customary character of even specific provisions should be based on a methodical analysis of state practice.[1844] A view that appears to be followed by the FCC suggests that, *only those* rights of the Convention which are also part of international customary law, enjoy a hierarchical rank higher than that of federal laws in the sense of their inclusion in Article 25 of the Constitution.[1845] Additionally, Article 100(2) of the Basic Law provides for the possibility to obtain a decision from the FCC in case a national court doubts about whether a general rule of international law is to be regarded an integral part of federal law, however, the Constitutional Court has repeatedly stated that this Article does not apply to treaties.[1846] In any case, the fact that the inclusion of the Convention in the meaning of Article 25 of the Basic Law has not prevailed, does not mean that the Convention or other international conventions remain completely irrelevant under Article 25.[1847] In fact, it can be observed that, conventions and customary law often apply either in parallel or, conventions promote the creation of customary law by means of constituting proof of long-standing practice, which is required for the creation of custom.[1848] Therefore, the discussion can take place on the basis of a *reliance* of the national

[1837] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 103.
[1838] Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, p. 12.
[1839] Ernst: Die Haltung Deutschlands und Frankreichs zur EMRK unter Besonderer Berücksichtigung der Anwendung des Art. 6 Abs. 3 in den beiden Staaten, p. 145.
[1840] Ibid.
[1841] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, pp. 47-48; Grabenwarter/ Pabel: Europäische Menschenrechtskonvention, p. 19.
[1842] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 66.
[1843] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, pp. 105, 145. Heckötter does not refer to current Article 58 but to former Article 64.
[1844] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 67.
[1845] Grabenwarter/ Pabel: Europäische Menschenrechtskonvention, p. 19.
[1846] Paulus: Germany, p. 219; Weiss: The Impact of the European Convention on Human Rights on German Jurisprudence, pp. 50-51.
[1847] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 62.
[1848] Ibid.

judge on the Convention, as an aid in the process of confirming the existence of customary international law which seeks its application under Article 25 of the Basic Law.[1849] Nevertheless, the role of the Convention in the process of verifying the existence of an international customary rule should not be overestimated, since the Convention constitutes only one indication among many.[1850]

1.3.3. Arguments of a supra-constitutional classification

Arguments of a *supra-constitutional* power of the Convention, namely of a force even greater than that of the Constitution itself, are derived from the *overpositivity* of the content of the Convention and from the character of its *essential functions*, which allegedly classify it as fundamental pre-state, pre-governmental law.[1851] In this vein, in the generic term of 'essential functions' are included the Convention's *guaranteeing*, *binding* and *integration* functions.[1852] Conversely, it is maintained that, if the overpositivity of the basic rights would in itself constitute enough guarantee of protection, their enshrinement in the text of the Convention would be superfluous.[1853] At the same time, the argument that ECHR provisions have the character of *jus cogens* is also raised, however, it is underlined that, the jus cogens argument is limited in the case of the Convention only to specific provisions that are recognised by all states.[1854] As to the argument of jus cogens, it is also expressed that, it appears wiser to accept that the Convention simply constitutes *positive* law stemming from *natural* law.[1855] Moreover, there are attempts to base the view of a supra-constitutional power of the Convention on the *pacta sunt servanda* principle of international law, however, this argument does not offer clear conclusions about the position of the Convention in the national hierarchy of rules.[1856]

1.4. Normalising conflict with national law

1.4.1. The threat of an ultra vires invalidation of the Convention

The hierarchical classification of the Convention and the date of its national ratification are crucial not only on a theoretical level but also in practice, since both a *higher-ranking* law and a *younger* law of the same hierarchical level can oust the application of the Convention.[1857]

[1849] Ibid.
[1850] Ibid, p. 63.
[1851] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 44; Kleeberger: Die Stellung der Rechte der Europäischen Menschenrechtskonvention in der Rechtsordnung der Bundesrepublik Deutschland, p. 20; Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 93.
[1852] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 93. Heckötter refers to 'Garantiefunktion', 'Bindungsfunktion' and 'Rechtsintegrationsfunktion'.
[1853] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 45.
[1854] Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, p. 9.
[1855] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 45; Kleeberger, die Stellung der EMRK, p. 24.
[1856] Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, p. 9.
[1857] Weiss: The Impact of the European Convention on Human Rights on German Jurisprudence, p. 50; Schilling: Deutscher Grundrechtsschutz zwischen Staatlicher Souveränität und Menschenrechtlicher

Mindful of the fact that the Ratification Law of the Convention dates back in 1952, the 'danger' of the Convention been overridden by younger federal legislation through the application of the principle *lex posterior derogat legi priori*, becomes even more evident.[1858] Hereby, despite the fact that, officially and according to the rules governing the conflict of laws, the Convention should be automatically ousted, however, several 'techniques' have been developed and are applied in case such a conflict arises; methods aiming to safeguard the application of the Convention. This practice appears quite sound, if one considers that the Convention has been incorporated into the German legal system by legislative act, a fact that per se requires the avoidance of conflicts, to the extent possible.[1859] As a result of the 'techniques' applied, cases where overcoming conflict is impossible, namely where national law can by no means be interpreted in a manner *consistent* with the Convention, are rather rare.[1860] In this context, some authors argue a differentiation between an interpretation *in conformity* with the Convention and a *friendly* towards the Convention interpretation.[1861] In particular, it is highlighted that, in the case of an interpretation in conformity with the Convention the judge shall choose the solution that is *in line* with the Convention, while in the case of a friendly towards the Convention interpretation all possible solutions are in line with the Convention and the judge simply gives priority to the one that *best* corresponds to the circumstances.[1862] Another important element before seeking a solution for the 'salvation' of the Convention is the need to carefully scrutinise the content of the relevant national provision in order to confirm whether there actually exists a *real* conflict or not.[1863] The possibility of a conflict existing between national and international law remains naturally present, since international law nowadays largely affects daily relations between the states and the individuals.[1864] Nonetheless, cases of conflict between the Convention and the Constitution are not as usual as conflicts between the Convention and the rest of national laws, given the fact that, the Constitution is more broadly formulated, a factor which contributes to reducing the likelihood of a conflict.[1865] Furthermore, a real conflict between national and *classical* international law occurs only rarely, whilst it is more likely for conflicts to arise between national law and the law of the European Union, since the latter is being constantly expanded and redefined.[1866]

1.4.2. Overlaps with constitutional provisions

As previously mentioned, avoidance of conflict is mainly attempted on the basis of an interpretation of national law, be it the Constitution or other national law, in a way that is compatible with the Convention.[1867] The process of an adjusted interpretation of national law as a means of normalising conflict between the Convention and national law has special

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Europäisierung, p. 163-164, 166. Conflict with provincial laws is not considered problematic, since the Convention as federal law clearly prevails. Similarly, in accordance with the lex posterior principle, the Convention has prevailed over any previous conflicting federal law.

[1858] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 152.

[1859] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 110.

[1860] Ibid., p. 134.

[1861] Ibid., p. 55.

[1862] Ibid.

[1863] Ibid., p. 89.

[1864] Paulus: Germany, p. 210.

[1865] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 172.

[1866] Paulus: Germany, pp. 111, 210-211. Paulus underlines that a reason that could increase the risk of conflict between international and national law is the changing nature of international financial obligations.

[1867] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 134.

importance, since it reveals the extent of the *indirect effect* that the Convention has on national legislation. Meanwhile, it can be observed that, the German Constitution is silent on the role of national courts in relation to the interpretation of international treaties.[1868] As previously mentioned, in the case that a conflict between the Convention and the Constitution arises, it is in principle almost always possible to interpret constitutional rights in a manner which conforms with the Convention and thus, it appears reasonably easier to overcome the 'problem' of the hierarchical superiority of the Constitution.[1869] With regards to the *indirect effect* of the Convention and especially to its *concretising* function, this usually becomes more evident in the field of constitutional law and in the interpretation of constitutional rights.[1870] Normally, in the interpretation of constitutional rights such as in the case of a constitutional appeal, criterion of assessment is the Constitution itself, whereas the ECHR, because of its hierarchical status as federal law, it cannot constitute a direct *constitutional review criterion*.[1871] Nevertheless, constitutional rules are to be interpreted *in the light of* the provisions of the Convention.[1872] In fact, the Federal Constitutional Court has repeatedly held the position that, the content of the Convention and its interpretation by the ECtHR are to be taken *into account* when interpreting and defining the scope of constitutional rights.[1873] In this way, the review criterion of the FCC is extended by taking *account of* the Convention and despite the fact that the Convention itself does not constitute a *direct* criterion.[1874] In this respect, by interpreting the rights contained in the Constitution *in the light of* the guarantees of the Convention and the case-law of the ECtHR, the Constitutional Court gives a clear sign that it accepts the ECtHR as an *equivalent*.[1875] The FCC has repeatedly highlighted the role of the Convention as a protector and as a model which can assist the interpretation of the Constitution.[1876] The FCC actually often refers to other international treaties too, such as the ICCPR, alone or in combination with the Convention, however, there is a certain tendency towards Strasbourg; possibly due to its local proximity with European countries.[1877] In this vein, in judgment *Görgülü*, the Constitutional Court has stated that, the combination of Articles 1(2) and 59(2) of the Basic Law provides the basis for the use of the Convention as an *aid* in the interpretation of the Constitution; a position which the Federal Court reconfirmed recently in judgment *Sicherungverwahrung*[1878]. From as early as 1962, the Federal Constitutional Court has occasionally been using the Convention to supplement the terms of the Constitution, thus, has been already interpreting the constitutional rights in the light of the Convention.[1879] A typical example can be drawn from Article 6(2) ECHR and from the definition of the *presumption of innocence*, which is missing in German

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[1868] Paulus: Germany, p. 219.
[1869] Schilling: Deutscher Grundrechtsschutz zwischen Staatlicher Souveränität und Menschenrechtlicher Europäisierung, pp. 167-168.
[1870] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 52.
[1871] Pianka: Konkurrenzen und Konflikte beim Rechtsschutz im Europäischen Mehrebenensystem, p. 185.
[1872] Klein: Europäische Menschenrechtskonvention und Deutsche Grundrechtsordnung, p. 12.
[1873] Grabenwarter/ Pabel: Europäische Menschenrechtskonvention, p. 17. See Unschuldvermutung judgment BVerfGE 74, 358 (370); 82, 126 (120).
[1874] Pianka: Konkurrenzen und Konflikte beim Rechtsschutz im Europäischen Mehrebenensystem, p. 60.
[1875] Paulus: Germany, p. 230.
[1876] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 139. See Unschuldvermutung judgment BVerfGE 74, 358 (370); 82, 106 (115); 111, 307 (317f).
[1877] Klein: Europäische Menschenrechtskonvention und Deutsche Grundrechtsordnung, p. 12.
[1878] Hoffmann: Die Europäische Menschenrechtskonvention und Nationales Recht, p. 99. See Görgülü pt. 62; Sicherungsverwahrung pt. 86f. Also earlier in Unschuldvermutung (pt. 35) the FCC has stated that the Convention may be pulled as an interpretation aid.
[1879] Ernst: Die Haltung Deutschlands und Frankreichs zur EMRK unter Besonderer Berücksichtigung der Anwendung des Art. 6 Abs. 3 in den beiden Staaten, p. 151. For the first time in BVerfGE 14,1 ff.(8); then BVerfGE 245 ff.(255); 19, 342 ff.(347); 20, 162 ff.(208); 35, 311 ff.(320); 71, 206 ff.(216f.); 31, 58 ff.(67).

law and for the approach of which the FCC resorts to references to the *rule of law*.[1880] Additionally, the Federal Court has stated in judgment *Sicherungsverwahrung* that, for an internationally *friendly* interpretation of the Basic Law, the human rights of the respective treaty must be "rethought" in the context of the constitutional order.[1881] Nevertheless, there have been undoubtedly also other cases, where the Convention has not been taken into account at all.[1882] Meanwhile, even in cases where the ECHR has been taken *into account*, the FCC has consciously avoided a direct relevant reference, given that the German Constitution already has an extensive list of rights itself which guarantee effective protection.[1883] In any case, the inclusion of the Convention in the interpretative process as an 'auxiliary tool' does not automatically mean the interpretation of constitutional rights consistently with the Convention, leaving a large margin which, depending on the judge's *friendliness* towards the Convention, will determine the effectiveness of this inclusion.[1884] Different from this general 'ease' in the adaptation between constitutional and ECHR law is the case of *unwritten* constitutional law, which primarily depends on the interpretations of the Constitutional Court and which, in case of a conflict with the Convention, renders finding a sound solution difficult .[1885]

1.4.3. Overlaps with federal lex posterior

It is highlighted in literature that, an interpretation of the *Constitution* in accordance with the Convention provides at the same time a solution in the case that a conflict between the Convention and younger *federal law* arises. More specifically, it is raised that, interpreting the Constitution in accordance with the Convention and the rule of *international friendliness* means that, a potential opposition of a national law towards the Convention would at the same time constitute an opposition of the national law towards the Constitution; thus, provides sufficient grounds for declaring this law invalid.[1886] Furthermore that, by interpreting both national law in accordance with the Constitution and the Constitution in accordance with the Convention, a federal lex posterior is not considered as coming into conflict with the Convention in the capacity of the latter as a federal law, but rather, in its capacity as a superior provision at the level of the Constitution.[1887] In other words, through the interpretation of constitutional rights, the rights of the Convention become even clearer and the Convention takes part in the constitutional order.[1888] In this vein, the lex posterior rule is normalised by the case-law of the FCC which, when interpreting constitutional rights, relies on the guarantees of the Convention and on the international friendliness of the Constitution; thus advocates a form of *indirect* constitutional classification of the Convention.[1889] A prevailing viewpoint suggests that, the internationally friendly interpretation of the Constitution constitutes a way in which

[1880] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 52.
[1881] See Sicherungsverwahrung pt. 92f.
[1882] Ernst: Die Haltung Deutschlands und Frankreichs zur EMRK unter Besonderer Berücksichtigung der Anwendung des Art. 6 Abs. 3 in den beiden Staaten, p. 151.
[1883] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, pp. 268-270, 298.
[1884] Schilling: Deutscher Grundrechtsschutz zwischen Staatlicher Souveränität und Menschenrechtlicher Europäisierung, p. 143.
[1885] Ibid., pp. 167-168.
[1886] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 181.
[1887] Hoffmann: Die Europäische Menschenrechtskonvention und Nationales Recht, pp. 97-98. Hoffmann refers in this regard to Görgülü BVerfGE 111, 307 (317).
[1888] Ibid., p. 98.
[1889] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, pp. 54-55.

constitutional judges can practically harmonise national law to the requirements of Strasbourg, without simultaneously delegating their power of having the last word in the judgment of the issue at hand.[1890] Consequently, it is noted that, the courts in Germany and particularly the FCC have developed certain techniques that have led to the practical deterrence of the lex posterior rule and to the establishment of a *de facto monism* in relation to the ECHR.[1891] Undoubtedly, the ECHR constitutes a unique case, however, the notion that the international friendliness of the Constitution denotes that a contradiction between national law and international treaties signifies the unconstitutionality of the former, has thus far not been established.[1892]

Furthermore, as expected, not only the interpretation of the *Constitution*, but also the interpretation of *national law* can provide a solution in the case that a conflict between the Convention and younger federal law is detected. In this respect, in judgment *Görgülü*, the FCC has stated that national law shall, where possible and regardless of the date of its entry into force, be interpreted in accordance with international law.[1893] A solution to the problem of the opposition of a lex posterior to the Convention can similarly be provided by an interpretation of national law under the rule of international friendliness.[1894] More specifically, the principle of international friendliness accepts that, the legislator could not have intended to violate the international obligations of the country.[1895] Moreover, in what regards compliance with the international obligations of the country, it is naturally expected that, the national legislator behaves in accordance with international law.[1896] National courts use this guideline in their attempt to interpret national provisions in line with the Convention, thus accept that, intention of the legislator was to adopt a regulation that is compatible with international law.[1897] However, an interpretation of national law based on the rule of international friendliness is possible only to the extent that is permitted by the wording of the respective national provision.[1898] Hereby, a friendly towards international law interpretation as a means of avoiding conflict can be applied only there where, even after a *systematic* interpretation, the national provision leads to ambiguous results.[1899] Therefore, it cannot be applied when the legislature has clearly stated its intention to depart from international law; a case which however occurs only rarely.[1900] It is evident that, the process applicable is paralleled by the process of the interpretation of national law in conformity with the Constitution in the sense that the interpreter shall choose between the various possible solutions the one that allows for a *consistent with the Convention* interpretation of the national rule.[1901] As a general rule, each court has within its defined by the Constitution powers and, in particularly under Constitutional Articles 1(3) and 20(3), the competence and the responsibility to verify whether the applicable law is valid and in harmony with the Constitution or not and to decide, in the event of a suspected confliction with the Constitution, for an interpretation that is *consistent with the Constitution*.[1902] When a

[1890] Ibid., p. 178.
[1891] Lambert-Abdelgawad/ Weber: The Reception Process in France and Germany, p. 121.
[1892] Klein: Europäische Menschenrechtskonvention und Deutsche Grundrechtsordnung, p. 13.
[1893] See Görgülü pt. 48.
[1894] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, pp. 268-270, 297.
[1895] Ibid.
[1896] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 112.
[1897] Ibid.
[1898] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 44.
[1899] Ibid., p. 99.
[1900] Ibid.
[1901] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, pp. 54, 112-113.
[1902] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, pp. 215, 220. Article 100 introduces exceptions to this competence of rejection

consistent with the Constitution interpretation is rendered practically impossible the result in the two above-mentioned cases will be different in the sense that, in the first case, the Convention will be ousted and the national lex posterior will precede, whereas in the second case, the Constitution will prevail and the national provision will be declared unconstitutional.[1903]

In the case that a conflict of the Convention with federal law cannot be solved on the basis of the rule of *international friendliness*, the 'rescue' of the Convention requires seeking alternative solutions.[1904] One solution to a possible conflict between the Convention and younger federal legislation is attempted to be reached by an approach of ECHR law as *lex specialis*. The Convention does indeed contain *some* provisions of specific character, such as Articles 5 and 6 ECHR, however, specific provisions in the text of the Convention constitute rather an exception than the rule.[1905] As a result, a generalised approach of the Convention as lex specialis does not appear in the *logical sense* acceptable, despite the fact that, in certain cases, the Convention has an evidently detailed character.[1906] A further argument that arises in opposition to the notion of recognising the Convention as lex specialis, is the generality of its wording.[1907] On the other hand, it is highlighted that, accepting the Convention as lex specialis in a *normative sense*, is actually possible by looking back at its character, for which it has been repeatedly emphasised that it reaches beyond traditional international law.[1908] In this vein, it is stressed that, the Convention has a distinctive character, inter alia because of being addressed to the individual, an attribute that shall be comprehended as affecting also its relationship with domestic law.[1909] Nevertheless, the priority of the Convention vis-à-vis national provisions can hardly be based on its distinctive character and, for such a priority it is necessary that the legislature has repeatedly emphasised the nature of the Convention as a lex specialis.[1910]

2. Compliance with ECtHR judgments

2.1. The legal effect of ECtHR judgments

2.1.1. Doctrinal bases for a binding effect of ECtHR case-law

It is a fact that, the German Constitution does not expressly regulate the internal validity of the judgments of international courts.[1911] As a result, the justification basis for a possible *binding*

(Verwerfungskompetenz) in cases where only the Constitutional Court has jurisdiction, but wherever these exceptions do not apply, the relevant jurisdiction remains with the lower courts.

[1903] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 113.

[1904] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 173.

[1905] Ibid., pp. 176-177.

[1906] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 89; Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, pp. 176-177.

[1907] Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, p. 18.

[1908] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, pp. 177-178.

[1909] Ibid.

[1910] Ibid., p. 178.

[1911] Unkel: Berücksichtigung der Europäischen Menschenrechtskonvention in der Neueren Rechtsprechung der Bundesdeutschen Verwaltungsgerichte, p. 44.

effect of the Court's judgments is usually sought in a combination of the provisions of the Convention alongside the provisions of the Constitution and elements from the Ratification Law. In this vein, it is argued that, Article 46 ECHR and the Ratification Law together they constitute already sufficient justification in order for the effects of an ECtHR judgment to be invoked before national authorities.[1912] On its turn, the FCC has taken a firm stance with its *Görgülü* judgment, by confirming the capacity of a failure to comply with a Court's judgment to generate a *constitutional appeal*,[1913] based on a violation of the corresponding constitutional right along with a violation of the principle of the *rule of law*.[1914] As a result, the *Görgülü* judgment has substantially increased the influence of the Convention in the German legal order since, next to the *indirect* influence of the Convention in the interpretation of constitutional rights, now the possibility of a *constitutional appeal* for a failure to comply with an ECtHR decision has been established.[1915] The dogmatic basis for the binding force of Strasbourg's case-law, is further sought in a historical interpretation.[1916] In this respect, besides a historical interpretation of the material to the *Convention*, which in fact does not analyse the binding effect of ECtHR judgments, important is to examine the material to the *Ratification Law*.[1917] When considering the history of the adoption of the Ratification Law, one comes across a clause in the report of the Parliamentary Committee on the Occupation Statute and Foreign Affairs, in which it is stated that "for the establishment of the Commission and the Court,[1918] sovereign rights and specific parts of *legal sovereignty* are transferred to international organisations, which is permitted under Article 24 of the Basic Law".[1919] However, it is doubtful whether the Committee with the *transfer of sovereign rights* has also thought of an internal application of ECtHR judgments and, consequently, no clear conclusions can be drawn from this historical material.[1920]

2.1.2. The case of Article 24(1) GG and the Court as an international organisation

Considering Article 24(1) of the Basic Law, this provision provides for the possibility of the federation to, by law, transfer sovereign powers to *international organisations*. The prevailing view here supports that, international organisations are in this context able to issue legal acts applicable in the national legal order or, to unilaterally impose rules which are binding on citizens.[1921] Accepting that the ECtHR falls under the term of *international organisations* of Article 24(1) of the Basic Law, this would justify, on a constitutional basis, the binding nature

[1912] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 213. Uerpmann does not refer to current Article 46 but to former Article 53.
[1913] See Görgülü pt. 30, 63.
[1914] Klein: Europäische Menschenrechtskonvention und Deutsche Grundrechtsordnung, p. 12; Walter: Die Europäische Menschenrechtskonvention als "Konventionsgemeinschaft", p. 58.
[1915] Walter: Die Europäische Menschenrechtskonvention als "Konventionsgemeinschaft", p. 65.
[1916] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 208.
[1917] Ibid.
[1918] The Ausschuss even set the Court and the Committee on a par with one another with regard to the application of Article 24, although the latter does not issue judgments.
[1919] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, pp. 208-209. The original text cites as: "Für die Errichtung der Kommission und des Gerichtshofs werden Hoheitsrechte, nämlich Teile der Justizhoheit der Bundesrepublik, auf internationale Einrichtungen übertragen. Das ist nach 24 GG zulässig." As it results from the text, the Committee even set the Court and the Commission on a par with one another with regard to the application of Article 24, although the latter does not issue judgments.
[1920] Ibid.
[1921] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 94; Walter: Die Europäische Menschenrechtskonvention als "Konventionsgemeinschaft", p. 64.

of ECtHR rulings.[1922] However, the recognition the ECtHR as an international organisation under Article 24(1) of the Basic Law is highly contested and along with it, also the recognition of the Convention's *supra-constitutional* effect.[1923] More specifically, part of the theory[1924] considers that, the rights protected by the Convention override the common German laws and that, the ECtHR constitutes an intergovernmental institution to which certain sovereign rights have been conferred.[1925] At the same time, another part advocates that, such a delegation of powers would require the European Court to have the power to issue decisions *directly applicable* at the national level, whereas, at the current stage, it has powers only at an international level.[1926] In the same vein, theorists also hold the position that, Article 24(1) of the Basic Law seems to require as a condition for the recognition of an institution as an international organisation, the *limitation* of the sovereign power of the state, something that has not the case occurred in the case of the application of the Convention.[1927] In this respect, it is specifically underlined that the Constitutional Article 24(1) explicitly regulates the case that the state *transfers*, *grants*, sovereign rights and not cases of individual *avoidance* of exercise of sovereign rights.[1928] In relation to this last notion, it is raised that, the fact that Article 24(2) of the Basic Law specifically regulates the case of the *restriction* of sovereign rights shows clearly that, the *avoidance* of the exercise of certain sovereign rights cannot be included in paragraph 1 of the same Article as a case of *minimum granting* of rights.[1929] On the other hand, it is supported that, Article 24 of the Basic Law should be redefined on a 'substantive-functional' basis in the sense that decisive should not be considered the *exercise* of sovereign power by an organisation, but instead, the ability of a *functional limitation* or *supplementation* of the sovereign power of the state.[1930] Attempts to include the Court in the provisions of Article 24(1) of the Basic Law stress that, such an approach is more consistent with the purpose and the history of the adoption of the constitutional provision.[1931] In particular, it is maintained that, Constitutional Article 24 reflects Germany's desire at that time, to show its European face by promoting European integration.[1932] In this context, the role that the Convention is playing in the process of European integration is serving the *telos* of Article 24 of the Basic Law.[1933] However, counter-arguments are also raised, highlighting that, despite the undoubted international friendliness of the German Constitution, the purpose of Article 24 was not the unconditional grant of rights to international organisations.[1934] Further attempts to justify the view that the Court shall be recognised as an intergovernmental body are often based on Article 32 ECHR, which regulates the power of the Strasbourg Court to apply and interpret the

[1922] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 187.
[1923] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, p. 41; Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 183.
[1924] Kleeberger: Die Stellung der Rechte der Europäischen Menschenrechtskonvention in der Rechtsordnung der Bundesrepublik Deutschland, pp. 145, 159. For example Kleeberger believes that priority should be granted to the Convention, in accordance with the provisions of Article 24.
[1925] Grabenwarter/ Pabel: Europäische Menschenrechtskonvention, p. 18.
[1926] Ibid., p. 19.
[1927] Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, p. 14.
[1928] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 185.
[1929] Ibid., p. 186.
[1930] Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, p. 13.
[1931] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, pp. 180-181.
[1932] Kleeberger: Die Stellung der Rechte der Europäischen Menschenrechtskonvention in der Rechtsordnung der Bundesrepublik Deutschland, p. 134.
[1933] Ibid., p. 144.
[1934] Paulus: Germany, p. 219.

Convention and the Protocols thereto.[1935] More specifically, it is alleged that, this power encompasses also the power of the Court for a *binding* determination of the content of the Convention.[1936] Moreover, that such a power is recognised to the Court by the FCC itself, since the latter uses the ECtHR case-law in the interpretation of Federal Constitutional Law.[1937] At the same time, potential efforts to justify such a power to the Court by invoking the character of the Council of Europe as an international organisation, would be futile, since the Court does not constitute an organ of the Council but an independent court of law;[1938] though, this matter has been subject to doctrinal argument. By the same token, basing the argument of the Court's character as an organisation under Constitutional Article 24(1) on the fact that the Convention constitutes an *ordre public européen*, would as well be fruitless, since the Court is a body independent from the Council of Europe.[1939] Efforts to establish a parallel between ECHR law and EU law emphasise that, by invoking Article 24(1) of the Basic Law - which permits the immediate application of secondary EU law - and by applying it to the ECHR system, the Convention would in this case stand as the primary law and ECtHR judgments as secondary law.[1940] Nevertheless, the EU is characterised by a unique institutional set-up and it is functioning under a *sui generis* law that prioritises over national law, thus, the aforementioned notion does not appear much grounded.[1941] Besides, in contrast to the European Union whose legal personality has been established by the Lisbon Treaty,[1942] the Court does not have an autonomous legal personality, which is, by some, considered a prerequisite in order for it to be recognised as an international organisation.[1943] In conclusion, an incorporation of the Convention into the law of the European Union would justify the *supra-constitutionality* of the Convention, however, this has yet not occurred.[1944] The described context demonstrates that, the recognition of the Court as an intergovernmental body under Article 24(1) of the Basic Law has not prevailed.[1945] In fact, despite such arguments having been raised already as early as in 1970, however, they have not succeeded either within the FCC or in theory, with main contra-argument remaining that, the Convention does not presuppose its priority in relation to national laws.[1946]

2.2. The orientation effect of ECtHR judgments

2.2.1. The situation before the Görgülü case

It can be observed that, in general, there is no unanimity either in German theory or in jurisprudence about the role and the influence of the Strasbourg judgments. Consequently, the

[1935] Walter: Die Europäische Menschenrechtskonvention als "Konventionsgemeinschaft", p. 65.
[1936] Ibid.
[1937] Ibid.
[1938] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 187.
[1939] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 95.
[1940] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, pp. 184-185.
[1941] Walter: Die Europäische Menschenrechtskonvention als "Konventionsgemeinschaft", p. 63; Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 185.
[1942] Article 47 of the Treaty on European Union (TEU) recognises the legal personality of the EU.
[1943] Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, p. 14.
[1944] Ibid., p. 9.
[1945] Walter: Die Europäische Menschenrechtskonvention als "Konventionsgemeinschaft", p. 53; Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, pp. 45-46.
[1946] Ibid., p. 63.

extent to which ECtHR decisions are to be considered as *binding* remains unclear.[1947] As previously outlined, in order to justify the internal effect of the Court's judgments, the constitutional principle of *friendliness* towards international law is often being invoked, according to which national law must be interpreted in a way that takes account of the European developments in the protection of human rights.[1948] However, supporters of this view tend to relativise their position by arguing that, the rule of international friendliness does not have such a legal effect which could can guarantee a direct extension of the *res judicata*.[1949] Furthermore, until the *Görgülü* judgment, a *general effect* of ECtHR case-law was denied by argumentum a contrario, namely on the basis that, the opposite notion could as well not be adequately proven.[1950] More specifically, it was emphasised that, since Article 41 ECHR provides for the possibility of a just satisfaction *only* in the case that reparation by the state is unsatisfactory and, since Article 46 ECHR provides for an *inter partes* and not an *erga omnes* effect, a *generally binding effect* of the judgments cannot be concluded.[1951] However, in judgment *Feuerwehrabgabe*[1952] the Constitutional Court had accepted that it is itself bound by ECtHR case-law and that it should, in its arguments, at least refer to ECtHR judgments, regardless of Germany having been a litigant party to them or not.[1953]

2.2.2. The legal landscape after the Görgülü case

Almost a decade later, in *Görgülü*, the FCC, in providing the basis for the establishment of a constitutional appeal against the failure of the state to comply, it did *not* distinguish between those judgments of the ECtHR where Germany has participated and those directed against other Member States.[1954] Nevertheless, currently, the appeal against a failure to comply seems to be applying mainly for judgments to which Germany has been a party to the proceedings, whilst it remains under examination whether it could apply for *all* ECtHR judgments.[1955] In the same judgment, the FCC has recognised the special significance of ECtHR judgments emphasising that these reflect the current development status of the Convention and the Protocols thereto.[1956] The Federal Court has further stated that, where judgments of the Court are relevant for the assessment of the case at issue, then, in principle, the aspects that have been taken into account by the Court and, in particular, the *proportionality test* applied should also be taken into consideration in the context of the constitutional assessment.[1957] The *Görgülü* judgment has also approached the *orientation effect* of ECtHR judgments with the term *normative leading function*; a term which has been first used by the Federal Administrative Court[1958] and which

[1947] Unkel: Berücksichtigung der Europäischen Menschenrechtskonvention in der Neueren Rechtsprechung der Bundesdeutschen Verwaltungsgerichte, p. 42; Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, p. 81.
[1948] Ibid., p. 44.
[1949] Ibid., pp. 44-45.
[1950] Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, pp. 22-23.
[1951] Ibid.
[1952] See BVerfGE 92, 91 ff. (109).
[1953] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 140.
[1954] Pianka: Konkurrenzen und Konflikte beim Rechtsschutz im Europäischen Mehrebenensystem, p. 129. Pianka refers in this regard to Görgülü BVerfGE 111, 307 (332).
[1955] Walter: Die Europäische Menschenrechtskonvention als "Konventionsgemeinschaft", p. 58.
[1956] See Görgülü pt. 38.
[1957] See Görgülü pt. 49; Sicherungsverwahrung pt. 94.
[1958] BVerwG, judgment of 30/7/2001. The Federal Administrative Court held that in regard to the interpretation of Article 6(1) of the Convention.

has since then been generalised.[1959] This position of the Federal Administrative Court has confirmed its earlier decision[1960] in which the court has held that, national courts have to give priority to the interpretations of ECHR provisions that best serve the purposes of *generalisation*.[1961] On its turn, in the recent judgment *Sicherungsverwahrung*, the FCC has cited its previously held position in the context of *Görgülü* and it has recognised the *factual* orientation and the *guiding function* of ECtHR judgments as extending beyond the case upon which it has been adjudicated.[1962] Overall, it can be noted that, the effect of ECtHR judgments beyond the specific case can be approached neither with the term *legally binding* nor with the term *legally non-binding*.[1963] It can in fact be observed that, the term *legal commitment* is avoided and instead, expressions such as that of a *normative leading function* are used, in a way that renders a sensu stricto discussion around a purely legal commitment towards ECtHR judgments rather unfounded.[1964]

2.3. Limitations on the effects of ECHR and ECtHR case-law

2.3.1. The possibility to refrain from a view adopted by the Court

As previously underlined, restrictions to the binding force of the Convention exist currently on the basis of the *official* ranking of the Convention in the hierarchy of laws, as a result of which the Convention may be ousted by conflicting *higher*-ranking law or by *younger* law of the same hierarchical level. Moreover, as highlighted, these conflicts are normalised through a number of 'techniques' which are applied in the process of an in-line-with-the-Convention interpretation of national law. Nevertheless, as accepted by the FCC, there are certain *limitations* to the practices been used for the normalisation of conflict, something that restricts the interpretation possibilities.[1965] In this vein, it is also raised that the term *normative leading function* does not imply in any case that ECtHR case-law is to be treated as a matter of priority.[1966] Instead, the term serves to transfer the burden of argumentation to national courts, which in this context may depart from the judgment of the Court only when decisive grounds justify an interpretation different to the one followed by the Court.[1967] As previously portrayed, the judgment *Görgülü* has made clear that German courts have a duty to *take into account* the provisions of the Convention and the judgments of the Court. However, certain limitations

[1959] Walter: Die Europäische Menschenrechtskonvention als "Konventionsgemeinschaft", p. 58; Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, p. 84. The German terms 'normative Leitfunktion' and 'Orientierungswirkung' have been freely translated into 'normative leading function' and 'orientation effect'respectively.
[1960] BVerwG, judgment of 16/12/1999. The original text oft he judgment cites: 'einer verallgemeinerungsfähigen und allgemeine Gültigkeit beanspruchenden Auslegung einer EMRK-Bestimmung vorrangig Rechnung zu tragen haben'.
[1961] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, pp. 83-84.
[1962] See Sicherungsverwahrung pt. 89: 'Im Rahmen der Heranziehung der Europäischen Menschenrechtskonvention als Auslegungshilfe berücksichtigt das Bundesverfassungsgericht Entscheidungen des Europäischen Gerichtshofs für Menschenrechte auch dann, wenn sie nicht denselben Streitgegenstand betreffen'.
[1963] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, p. 81.
[1964] Unkel: Berücksichtigung der Europäischen Menschenrechtskonvention in der Neueren Rechtsprechung der Bundesdeutschen Verwaltungsgerichte, pp. 45-46.
[1965] Paulus: Germany, p. 213.
[1966] Walter: Die Europäische Menschenrechtskonvention als "Konventionsgemeinschaft", p. 59.
[1967] Ibid.

apply in the sense that the consideration of the Convention and the Court's case-law does not take place in an *automatic* way.[1968] Hereby, it is accepted that, a national court may refrain from an ECtHR judgment if it sufficiently establishes its position, namely if it provides adequate reasons for its divergent position.[1969] Such a departure from a judgment previously delivered by the ECtHR does not necessarily mean a violation of the rule of international friendliness, since ECtHR decisions are not *directly enforceable*.[1970] In any case, when a national court decides to depart from ECtHR *settled* case-law, it must analyse even more thoroughly the reasons for the discrepancy.[1971] However, a problematic issue that arises here is that, the measure and the scale of the *decisive reasons* that are required in order for a national court to depart with just cause from an ECtHR judgment, are not clear.[1972] In this regard, a prevailing view suggests that, the reasons for the departure could be sought in the corresponding reasons that apply in the context of the *review for arbitrariness* by the Constitutional Court under Article 3(1) of the Constitution.[1973] In this respect, it should be noted that, when dealing with the incorrect interpretation of constitutional rights by national ordinary courts, the FCC applies a principle similar to the *margin of appreciation* that is applied by the Court, the so-called *Heck'sche Formel*, which serves the purpose of delimiting the competences between the FCC and the ordinary courts.[1974] At the same time, it is argued that, in the case that a national court departs from an *individual* ECtHR judgment, there is little chance of a constitutional appeal being successful, in comparison to a departure from *established* ECtHR case-law.[1975]

A typical situation in which national courts are allowed to depart from an ECtHR judgment is when there has been a change in the factual or the legal situation, as compared to the one that applied at the time of the issuance of the Court's judgment.[1976] This particular case is rendered relatively unproblematic, since, due to the change occurred in the meantime, the subject of the dispute that is discussed before the national court cannot be considered as having been already judged by the ECtHR.[1977] In this context, the national court can raise that, the binding force of an ECtHR judgment extends only to its *res judicata*, which does not cover the *newly* shaped factual or legal circumstances.[1978] Needless to mention that the same exceptions from the obligation of national courts to comply with ECtHR judgments apply also to cases in which the

[1968] Lambert-Abdelgawad/ Weber: The Reception Process in France and Germany, pp. 120, 132; Paulus: Germany, p. 213. See Görgülü pts. 46, 62. Lambert-Abdelgawad/ Weber underline that relevant was also the Waldschlösschen judgment, where the Constitutional Court held that a national referendum may precede over an international treaty, if the treaty was concluded by the administration and was not accepted by the legislature. Lambert-Abdelgawad/ Weber also refer to the Maastricht case, when the Federal Constitutional Court held that the European Union legislation that goes beyond the limits of the competence of the European Union (as perceived by the Federal Constitutional Court), may be nonbinding on Germany.
[1969] Hoffmann: Die Europäische Menschenrechtskonvention und Nationales Recht, p. 104. Hoffmann refers in this regard to Görgülü BVerfGE 111, 307 (324).
[1970] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 132.
[1971] Unkel: Berücksichtigung der Europäischen Menschenrechtskonvention in der Neueren Rechtsprechung der Bundesdeutschen Verwaltungsgerichte, p. 51.
[1972] Walter: Die Europäische Menschenrechtskonvention als "Konventionsgemeinschaft", p. 59.
[1973] Ibid., p. 60.
[1974] Klein: Europäische Menschenrechtskonvention und Deutsche Grundrechtsordnung, p. 20.
[1975] Pianka: Konkurrenzen und Konflikte beim Rechtsschutz im Europäischen Mehrebenensystem, p. 129.
[1976] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 103.
[1977] Ibid.
[1978] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 185.

new factual or legal basis has not just changed, but rather, appears completely different.[1979] Further reasons which could justify such a departure may be based on the fact that an interpretation given by the Court can by no means be supported.[1980] More specifically, the FCC restricts the obligation under which national courts are expected to interpret national provisions in accordance with the Convention to the extent that such an interpretation is *methodologically justifiable*.[1981] Another, although rare, case in which the non-application of the Convention and the relevant ECtHR case-law is considered justified, is when the national legislation *clearly* opposes the view undertaken by the Court.[1982] In the case that there is a clear contrast between national provisions and the ECHR, the *younger* or the more *specific* provision shall prevail; this usually being the national provision.[1983] The FCC has stated in this regard that, it takes the ECHR into account only as long as this does not contradict, restrict or weaken the protection provided by the Constitution.[1984] In the same vein, the unchanged *core* of constitutional rights, as protected by Article 19(2) of the Basic Law and by the Constitution in general, is considered a limitation to the friendliness towards international law.[1985] Furthermore, ECHR law may as well not be adhered to, when it opposes Article 79(3) of the Constitution, which contains the *eternity clause* and which sets an absolute limit that overrides the international friendliness of the Constitution; a limit from which not even the FCC is allowed to depart.[1986] However, it is hard to imagine how the eternity clause could be at risk from the case-law of the ECtHR and thus, it remains a concern only on the theoretical level.[1987]

2.3.2. The equilibrium between fundamental constitutional rights

Third party fundamental rights and *constitutional principles* can impose yet some additional limitations to the obligation of taking account of ECHR law and ECtHR judgments in the context when a conflict of the Convention with higher-ranking law arises.[1988] The FCC has confirmed this view in *Görgülü* judgment by holding that, national courts, in the application of ECtHR judgments, are not allowed to violate constitutional law and especially the rights of

[1979] Pianka: Konkurrenzen und Konflikte beim Rechtsschutz im Europäischen Mehrebenensystem, p. 55. Pianka refers in this regard to Görgülü BVerfGE 111, 307 (332).
[1980] Walter: Die Europäische Menschenrechtskonvention als "Konventionsgemeinschaft", p. 60.
[1981] Grabenwarter/ Pabel: Europäische Menschenrechtskonvention, p. 18; Schilling: Deutscher Grundrechtsschutz zwischen Staatlicher Souveränität und Menschenrechtlicher Europäisierung, p. 139. See Görgülü pt. 32: 'im Rahmen der methodisch vertretbaren Auslegung zu beachten'; pt. 47: 'Zur Bindung an Gesetz und Recht gehört aber auch die Berücksichtigung (...)'.
[1982] Pianka: Konkurrenzen und Konflikte beim Rechtsschutz im Europäischen Mehrebenensystem, p. 56.
[1983] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, pp. 188-189.
[1984] Pianka: Konkurrenzen und Konflikte beim Rechtsschutz im Europäischen Mehrebenensystem, p. 185. See Görgülü (pt. 62) where it was held that, when the judgment is in conflict with constitutional law, it may not be followed. Also in Unschuldvermutung (pt. 35) the FCC has stated that the content and the development status of the ECHR are to be taken into account as long as they do not restrict or mitigate the protection provided by the Basic Law.
[1985] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 104.
[1986] Schilling: Deutscher Grundrechtsschutz zwischen Staatlicher Souveränität und Menschenrechtlicher Europäisierung, p. 138; Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 104.
[1987] Ibid., p. 139.
[1988] Ibid., p. 140; Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 187. Schilling refers in this regard to Görgülü BVerfGE 111, 307 (319).

third parties.[1989] It is underlined that, with regard to the constitutional rights of third parties and the risk of multipolar collision, the FCC had in mind specific circumstances in which the German courts are required to weigh conflicting constitutional rights of different parties and, occasionally, constitutional principles.[1990] More specifically, it is noted that, the FCC was clearly referring to the so-called 'Caroline cases' in which the judge is called upon to decide in favour of one constitutional right over another, on the basis of a balancing of the interests of the parties.[1991] In such cases where the implementation of a judgment of the Court results in a complex balancing, the German courts are required to determine whether an enforcement of the ECtHR judgments in a 'schematic' way may affect third party rights.[1992] In such 'distinct fields of law' where the German courts have to bring in harmony conflicting fundamental rights, judges follow a rather established path, which is usually based on a settled interpretation of the Constitution and which is thus argued to have the *status of constitutional law*.[1993] In this sense, the problem of the so-called *multipolar private law relationships* between fundamental rights is resolved on the basis of *balanced distinct fields of law*.[1994] The term *balanced partial system of domestic law* refers to *regulatory subsystems* that have been shaped by the legislator in the form of case groups and on the basis of a combination of provisions, which aim to achieve an equilibrium conflicting positions of constitutional law and their legal consequences.[1995] From a general perspective, the term is difficult to approach because of the sensitive normative questions arising and due to the fact that the FCC has yet not provided for a definition, which consequently, means that, the exact parameters of these 'systems' remain unclear even to national judges.[1996] However, the FCC has provided for some examples as to when these multipolar relationships between fundamental rights may arise; such examples concern the field of family law, the law of aliens and the law of personality protection.[1997] In any case, it should be made clear that, these constellations concern only multipolar and not bipolar relations in the sense that they do not apply to citizen-to-state relationship and, they are usually to be found in civil judgments.[1998] Hereby, it has been highlighted by the FCC that, the nature of ECHR law and the Court's jurisdiction is bipolar to such a degree that it cannot be considered appropriate for multipolar conflict situations.[1999]

The aforementioned stance of the FCC in *Görgülü* judgment is considered a difficult one in its approach, as reflected by the fact that, it has thus far been comprehended by courts and theory

[1989] Schilling: Deutscher Grundrechtsschutz zwischen Staatlicher Souveränität und Menschenrechtlicher Europäisierung, p. 140. See Görgülü, pt. 62.
[1990] Ibid., p. 141.
[1991] Ibid. In case of Princess Caroline von Havnnover v. Germany (Case I App. No. 59320/00, 24/6/2004, Case II App. Nos. 40660/08 and 60641/08, 7/2/2012 and Case III App. No. 8772/10, 19/9/2013) there has been a balancing of the freedom of the press against the right of personality, in relation to the reporting on the private life of celebrities. For a further analysis, see below the Chapter 'Limitations'.
[1992] Ibid., p. 175. Schilling talks of a 'schematische Vollstreckung'.
[1993] Ibid., pp. 142-143. The German term 'Teilrechtsgebiete' has been here freely translated into 'distinct fields of law'.
[1994] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 103; Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, pp. 188-189. The German terms 'mehrpoliges Privatrechtsverhältnis' and 'ausbalancierte Teilrechtssystemen' have been freely translated into 'multipolar private law relationships' and 'balanced distinct fields of law'.
[1995] Ibid.
[1996] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, pp. 193, 195.
[1997] Pianka: Konkurrenzen und Konflikte beim Rechtsschutz im Europäischen Mehrebenensystem, p. 56.
[1998] Schilling: Deutscher Grundrechtsschutz zwischen Staatlicher Souveränität und Menschenrechtlicher Europäisierung, p. 142.
[1999] Ibid., p. 145.

in diverse ways.[2000] The risk of a conflict between national constitutional rights is furthermore difficult to comprehend because, on the one side, the *Görgülü* judgment states that the Convention constitutes an auxiliary tool for the interpretation of constitutional provisions and principles of law, while simultaneously, the *Convention* itself allows national provisions to apply with priority when these offer greater protection.[2001] In this regard, it is stressed that, whenever a third party is involved in the relationships between state and citizen with conflicting claims which arise from the Constitution, the one constitutional right shall, in principle, override the other *only if* the respective constitutional provision provides a protection greater than the one provided by the Convention.[2002] A different approach suggests that, in the case of multipolar constitutional relations, the outcome that shall be followed is the one that is in line with the position of the Strasbourg Court since the national legal order is unable of guaranteeing a better protection in such cases.[2003] In any case, the national court cannot, not even in the case of multipolar constitutional relationships, raise doubts on the correctness of the content of an ECtHR judgment.[2004] A further argument against the exception from the obligation *to take into account* argues that, the concept of protecting the rights of third parties is essentially intended to ensure the protection of third parties whose rights have not been adequately addressed before the ECtHR.[2005] More specifically, it is held that, the interests of *all* parties have *already* been represented through the positions of the respondent state which have been raised before the Court.[2006] Against the alleged violation of the right of third parties to be heard it is also emphasised that, it constitutes common practice for third parties to intervene in the proceedings before the ECtHR as *amicus curiae* on the basis of Article 36(2) ECHR and Article 61(3) of the Rules of Court.[2007] Nevertheless, this option of intervention constitutes a *possibility* that is provided to the Court and not an obligation, therefore, the ECtHR has a large margin of discretion in relation to accepting someone as amicus curiae.[2008] In any case, given the Court's own self-expectation to weigh all interests and its determination in protecting Article 6(1) ECHR and the right to be heard, it can be accepted that, in the case of multipolar relationships, this margin is limited to zero.[2009]

[2000] Ibid., p. 140.
[2001] Ibid., p. 158.
[2002] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 197.
[2003] Ibid., p. 196.
[2004] Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, p. 34.
[2005] Schilling: Deutscher Grundrechtsschutz zwischen Staatlicher Souveränität und Menschenrechtlicher Europäisierung, p. 142.
[2006] Pianka: Konkurrenzen und Konflikte beim Rechtsschutz im Europäischen Mehrebenensystem, p. 58.
[2007] Ibid.; Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, pp. 33-34.
[2008] Ibid.
[2008] Pianka: Konkurrenzen und Konflikte beim Rechtsschutz im Europäischen Mehrebenensystem, p. 58.
[2009] Ibid.; Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, pp. 33-34.

3. Execution of ECtHR judgments

3.1. Theoretical debate on the addressees

3.1.1. Article 46(1) ECHR as the basis for a strictly binding nature of ECtHR case-law on all national bodies

In relation to the addressees of the Court's judgments, the focus is placed on the *finality* of judgments and, on the effect of the *res judicata* produced, which is argued to be automatically binding for *all* national authorities.[2010] In this vein, it is supported that, Article 46(1) ECHR is binding on *all* national authorities, since the Convention has been incorporated into the national legal order as a whole and therefore, officially constitutes national law.[2011] It is also raised that, the binding nature of ECtHR decisions upon all national bodies results from the interaction between Article 46(1) ECHR, the Ratification Law that has incorporated the Convention and, the principle of international friendliness.[2012] Another view suggests that, the commitment of national authorities cannot be approached on the basis of Article 46(1) ECHR in combination with the Ratification Law and that, it instead requires further legal considerations such as an approach of Article 20(3) of the Basic Law, which regulates that the legislature shall be bound by the constitutional order while the executive and the judiciary by law and justice.[2013] In this context, it has also been highlighted that, a strict obligation to comply with the content of an ECtHR judgment could lead to a violation of the obligation of national authorities to comply with national law, as regulated by Article 20(3) of the German Constitution.[2014] The FCC has taken a clear position on the binding nature of the judgments of the ECtHR with the *Pakelli* judgment,[2015] whereby the Pre-Review Committee of the Second Senate has considered that, Articles 44(1) and 46(1) ECHR imply an obligation on states to respect the *supplementary protection* provided by ECtHR judgments; an obligation which, according to the Ratification Law under Article 59(2) of the Constitution, covers *all* German courts.[2016] Moreover, whilst the constitutional judges in the *Pakelli* case still referred to a limited legal force and to a lack of a penetrating effect of ECtHR judgments, they later did not hesitate to rely on the content and on the development level of the Convention for the interpretation of constitutional rights.[2017]

[2010] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, p. 61.
[2011] Schmalz: Die Rechtsfolgen eines Verstoßes gegen die Europäische Menschenrechtskonvention für die Bundesrepublik Deutschland, p. 23.
[2012] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 102.
[2013] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, p. 61.
[2014] Pianka: Konkurrenzen und Konflikte beim Rechtsschutz im Europäischen Mehrebenensystem, p. 53.
[2015] Judgment of 1985 is not available on the database of the Federal Constitutional Court. Beschluss des Zweiten Senats des Bundesverfassungsgerichts <Vorprüfungsausschuss> vom 11. Oktober 1985 - 2 BvR 336/85 - Pakelli, EuGRZ 1985, S. 654 <656>.
[2016] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 97. The judgment was talking of an 'ergänzende Schutzfunktion', which has been freely translated here into 'supplementary protection'. Mellech does not refer to current Articles 44(1) and 46(1) but to former Articles 52 and 53 respectively. The German Vorprüfungsausschuss has been translated into Pre-Review Committee.
[2017] Ibid., p. 101.

3.1.2. The obligation of national bodies within their field of competencies

Recently, in *Sicherungsverwahrung*[2018] judgment, the FCC has repeated the position it has previously held in *Görgülü* judgment,[2019] in which it had confirmed that, *all* national bodies are in principle obliged to comply with ECtHR case-law; an obligation resulting from a combination of the provisions of the Convention with the Ratification Law and the constitutional provisions of Articles 19(4), 20(3) and 59(2).[2020] More specifically, in *Görgülü* case, the Constitutional Court has stated that, in a democratic state governed under the principle of the separation of powers[2021], an effective implementation of the provisions of the Convention is only possible when *all* bodies of state authority are bound by the guarantees of the Convention.[2022] The obligation of national institutions to comply with the judgments of the Court, as the FCC has pointed out, is understood within the limits of their competences[2023] in the sense that recipients should, within the limits of their capacity, do everything to guarantee that the judgments are as effective as possible.[2024] In other words, the duty to comply can be approached as an obligation that binds Germany as a state in the way that is indicated by an ECtHR judgment.[2025] Meanwhile, because of the internal division of powers in Germany, this obligation extends to all the three branches of government.[2026] In this context, it is expressed that, the *general direct* obligation to comply is subsequently determined, on the basis of Article 20(3) of the Constitution, in a *specific* commitment of a national institution within its sphere of competence and only then does it become *directly* effective for the institution.[2027] It is furthermore emphasised that, the internal arrangement of the division of powers between national institutions is so multifaceted, that it could by no means be referred to within the text of the Convention.[2028] In any case, the prevailing view suggests that, ECtHR judgments are, at least in cases where Germany has been a litigant in the proceedings, binding on *all* German state authorities.[2029]

3.1.3. The duty to take account of ECtHR judgments

However, the FCC has at the same time carefully interpreted this *binding force* on national authorities of those ECtHR judgments to which Germany has been a litigant, namely as an

[2018] See Sicherungsverwahrung pt. 110.
[2019] See Görgülü pt. 45.
[2020] Pianka: Konkurrenzen und Konflikte beim Rechtsschutz im Europäischen Mehrebenensystem, p. 53; Hoffmann: Die Europäische Menschenrechtskonvention und Nationales Recht, pp. 100-101; Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 124.
[2021] Görgülü pt. 30f, 46.
[2022] Klein: Europäische Menschenrechtskonvention und Deutsche Grundrechtsordnung, p. 22.
[2023] Görgülü pt. 47.
[2024] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 125.
[2025] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, p. 63. Stanoeva refers in this regard to judgments Pakelli and Görgülü.
[2026] Ibid.
[2027] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 102.
[2028] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 124.
[2029] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, p. 61. Stanoeva refers in this regard to judgment Görgülü.

obligation to *take into account*; invoking in this regard a combination of the constitutional provisions of Articles 1(2), 20(3) and 59(2).[2030] The legitimate question arises as to what exactly the content of the obligation to *take into account* encompasses. According to the position taken by the FCC in *Görgülü*, the obligation of national courts to take the Convention and the ECtHR judgments into account comprises of the obligation to *take note of them* and to allow them to *flow into* the process of their decision-making.[2031] In this context, it can be supported that, the obligation to take into account is not limited to the operative part of the judgment, but rather extends further to its reasoning. The obligation to take into account could be seen positively, as a moderate solution provided by the FCC and one lying between strict and relaxed commitment, however, it has been criticised for being controversial and for wavering between openness and constitutional sovereignty and thus, for yielding a negative message, especially to new Member States.[2032] The uncertainty that the *Görgülü* judgment has left behind becomes evident in the different positions that have been subsequently adopted by the national courts and by the legal world generally.[2033] Simultaneously, it is stressed that, the Constitutional Court has most probably intentionally included such ambiguities in its statements, so as to be able to develop its case-law into a different direction in the future.[2034] In any case, despite its controversial points, the *Görgülü* judgment has definitely made clear that, the German courts must *take account of* international law and that, they should have a very strong basis of justification when they wish to oppose themselves to ECtHR rulings.[2035] It should at this point be noted that, the expression *to take into account* is widely used in literature to indicate the general *duty to respect*[2036] the Convention and the case-law of the Court. It is also important to mention that, the obligation of national courts to take ECtHR *case-law* into account and the obligation to take the *Convention* into account, as part of a methodologically justifiable interpretation of national law, are used in literature interchangeably or cumulatively, on the basis that, the ECtHR case-law constitutes in essence the interpretation and the crystallisation of the content of the Convention.

3.2. The role of national bodies

3.2.1. Judiciary

3.2.1.1. Implementing available judicial tools

The overall approach of the Convention by the German judicial system prior to the eighties has been characterised by hesitancy, a fact which was in no small measure due to the lack of relevant experience of national judges and due to the ambiguous nature of ECtHR case-law itself.[2037] However, before the late eighties, there had been an intensification in the consideration of the

[2030] Pianka: Konkurrenzen und Konflikte beim Rechtsschutz im Europäischen Mehrebenensystem, p. 53. The German 'Pflicht zur Berücksichtigung' and 'Berücksichtigungspflicht' have been freely translated into 'obligation to take into account'.
[2031] Ibid., p. 54. The German 'zur Kenntnis genommen werden'has been freely translated into 'to take not of them'. The word 'einfließen' from the original text of the Görgülü (pt. 48) has been translated into 'flow into'.
[2032] Lambert-Abdelgawad/ Weber: The Reception Process in France and Germany, p. 133.
[2033] Schilling: Deutscher Grundrechtsschutz zwischen Staatlicher Souveränität und Menschenrechtlicher Europäisierung, p. 134.
[2034] Ibid., p. 137.
[2035] Paulus: Germany, p. 233.
[2036] The 'Pflicht zur Beachtung', freely translated into 'duty to respect' shall not be confused with the Berücksichtigungspflicht' which is translated into 'obligation to take into account'.
[2037] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, p. 50.

Convention by the German courts.[2038] In fact, at the end of the decade, the Convention has started gaining in importance, a trend that emerged inter alia due to the extensive engagement of literature with issues that related to the Convention.[2039] One of the initial major decisions that marked the opening of the German law towards the Convention was the *Unschuldvermutung* judgment of 1987[2040], whereby a clear view on the position of the Convention in the German legal system has been expressed.[2041] In the same year, another FCC judgment had marked the new tendency of the Constitutional Court, to check on whether the judgment appealed before it by means of constitutional appeal raises questions of arbitrariness in the application of the Convention by national courts.[2042] In this context, it has eventually been established that, ignoring the Convention and the case-law of the Court may cause negative consequences in the process of a *constitutional appeal* alongside a *review for arbitrariness* under Article 3(1) of the Constitution.[2043] In fact, after the *Görgülü* judgment, the Constitutional Court has been exercising a far more vigilant control than a simple arbitrariness test making with this practice clear that, it constitutes part of the obligations of national courts, to observe international law.[2044] More precisely, the Constitutional Court may examine whether the application and the interpretation of an international treaty by national courts has been arbitrary, incompatible with other constitutional provisions or, based on a fundamentally erroneous view of constitutional rights.[2045] Simultaneously, the arbitrariness check does not allow for an extensive confrontation with the law of the Convention but only for an exceptional control and a correction of blatant errors, which means that, there remains a large margin of discretion on the part of national authorities.[2046] In other words, in the context of the arbitrariness control, national judgments are examined on the basis of their *objective* arbitrariness and thus, in practice, arbitrariness is confirmed only in rather rare cases of serious insufficiency and not in common cases of misinterpretation.[2047]

Neither the Convention nor the Ratification Law foresee an explicit obligation of the national courts to follow ECtHR judgments.[2048] The same applies for the obligation to respect the *substantive* provisions of the Convention, for which nothing is stipulated in the Convention or in the Ratification Law.[2049] As aforementioned, according to the position held in the *Görgülü* judgment, national bodies are bound only within their field of competence, which in the case of national courts means that, they are expected to *adapt* their case-law on the basis of ECtHR judgments and only by means of a methodologically acceptable interpretation.[2050] It is also argued that, part of the obligations of national courts should be considered the *cease* of the violation by means of the non-application of a provision that has been found by the Court to be

[2038] Ibid., p. 52.
[2039] Ibid., p. 58.
[2040] BVerfGE 74, 358.
[2041] Ibid., p. 53.
[2042] Ernst: Die Haltung Deutschlands und Frankreichs zur EMRK unter Besonderer Berücksichtigung der Anwendung des Art. 6 Abs. 3 in den beiden Staaten, p. 152. Ernst refers in this regard to judgment 13 January 1987, BVerfGE 74, 102 ff.
[2043] Pianka: Konkurrenzen und Konflikte beim Rechtsschutz im Europäischen Mehrebenensystem, p. 186; Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 232.
[2044] Hoffmann: Die Europäische Menschenrechtskonvention und Nationales Recht, p. 110.
[2045] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 105.
[2046] Ibid., p. 176.
[2047] Hoffmann: Die Europäische Menschenrechtskonvention und Nationales Recht, p. 106.
[2048] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 195.
[2049] Ibid.
[2050] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 104.

incompatible with the Convention.[2051] In what constitutes the possibility of the *reopening of proceedings,* until 1998, the German procedural law did not provide for a mechanism which would allow criminal proceedings to be reopened, however, the competent federal or land authority had the possibility to grant *pardon* or award *compensation*.[2052] With regards to the decision of the legislator to finally introduce the reopening of proceedings for *criminal* law cases, this has been regarded by the FCC as a harmless measure. [2053] However, the extension of this possibility in *civil* and *administrative* cases has been criticised by the theory for not being justified neither in terms of German law nor in terms of ECHR law.[2054] The possibility of reopening the criminal law proceedings has been introduced in December 2006 by the *Second Law on the Modernisation of Justice*[2055], and specifically with provision 359(6) of the German Code of Criminal Procedure[2056].[2057] In reference to the reopening of civil proceedings, this is regulated by Article 580(8) of the German Code of Civil Procedure[2058]. Article 580(8) CCiP applies at the same time to labour, social, administrative, financial and family cases under Articles 79 of the Labour Court Act[2059], 179(1) of the Social Court Act[2060], 153(1) of the Administrative Procedure Code[2061], 134 of the Fiscal Procedure Code[2062] and 48 of the *Law on the Procedure in Family Matters and in Matters of Voluntary Jurisdiction*[2063] respectively, which all refer to Article 580(8).[2064]

3.2.1.2. Commitment to the normative content of law

According to Article 20(3) of the Constitution, judges are only bound by *law* and *justice*. As a result, in resolving conflicts and delivering justice, judges interpret national law and the Convention, which has been incorporated and thus constitutes national law, as they deem appropriate.[2065] It is underlined that, the Federal Court of Justice[2066] makes often use of this right in the sense that, in its judgments, it wavers between brief references and detailed analyses of the judgments of the Strasbourg Court.[2067] Nevertheless, the freedom that judges enjoy cannot be translated as an ability to establish their own independent interpretive path, as they always remain bound under certain interpretative rules.[2068] At the same time, it often occurs that, the model of *subsumption* is not enough for the judge to shape a judgment and, as a result, the interpreter must resort to material outside the law in order to fill existing *gaps*.[2069] In this

[2051] Schilling: Deutscher Grundrechtsschutz zwischen Staatlicher Souveränität und Menschenrechtlicher Europäisierung, p. 167.
[2052] Weiss: The Impact of the European Convention on Human Rights on German Jurisprudence, p. 52.
[2053] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, p. 73.
[2054] Ibid.
[2055] Das zweite Justizmoderniseirungsgesetz.
[2056] German: StPO. Hereinafter also referred to as CCrP.
[2057] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, p. 75.
[2058] German: ZPO. Hereinafter also referred to as CCiP.
[2059] German: ArbGG.
[2060] German: SGG.
[2061] German: VwGO.
[2062] German: FGO.
[2063] German: FamFG.
[2064] Schilling: Deutscher Grundrechtsschutz zwischen Staatlicher Souveränität und Menschenrechtlicher Europäisierung, p. 175; Hoffmann: Die Europäische Menschenrechtskonvention und Nationales Recht, p. 103.
[2065] Weiss: The Impact of the European Convention on Human Rights on German Jurisprudence, pp. 58-59.
[2066] Bundesgerichsthof.
[2067] Weiss: The Impact of the European Convention on Human Rights on German Jurisprudence, pp. 58-59.
[2068] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 109.
[2069] Christensen: Was Heißt Gesetzesbindung? pp. 160, 165.

respect, it is stressed that, *legal* positivism has evolved into a type of *judicial* positivism, intending to transfer the problem of legislative loopholes to the judges by calling on them to confer justice that goes beyond the narrow limits of the interpretation of existing laws.[2070] From a methodological study of the jurisprudence it can be supported that, the judge is called upon to rely, in the context of his commitment to the *law* under Article 20(3) of the Basic Law, not only on the *text* of the law, but also, on the *order of justice* underlying this text.[2071] Meanwhile, the FCC understands the commitment to the law[2072] as a respect for the *normative* substance found in the *text* of the law[2073].[2074] Furthermore, in the view of the FCC, the objective regulatory content of the provision is not defined by the legislator or by the subjective views of the various actors involved in the law-making process, but rather, by the *text* of the provision itself.[2075] In this regard, the Constitutional Court has stated in its remarks about its role, that it requires from itself, to issue *real* judgments which reflect the content of the law and the intention of the legislator and in which there is nothing that is invented or that cannot be found in the Constitution.[2076] Furthermore, according to the practice of German courts, the *grammatical* and *systemic* element have a central role in determining the regulatory content of provisions.[2077] Overall, it can been observed that, German courts follow the model of *law enforcement*, according to which, commitment to the law means commitment to its normative content.[2078]

3.2.1.3. The dual obligation to comply with both FCC and ECtHR case-law

As mentioned previously, the Constitutional Court accepts that, apart from national law, also the Convention and the judgments of the Court fall within the scope of Article 20(3) of the German Constitution.[2079] German courts are in this context bound by law in two ways under Article 20(3), namely they are bound both by national law and by the Convention, which has been incorporated into the national legal order and which thus constitutes domestic law.[2080] Simultaneously, on the basis of Articles 20(3) of the Constitution and of Article 31 AFCC[2081], national courts have a dual obligation to comply on the one hand, with ECHR law, in the way that this is expressed through the jurisprudence of the ECtHR, and, on the other hand with the judgments of the FCC.[2082] In other words, the role of the national courts is twofold, since, they are obliged to apply international treaties, while at the same time, they are the gatekeepers of constitutional values against interventions of international actors that can prove detrimental to the rights guaranteed to the citizens.[2083] As a consequence of the ambiguities regarding their

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[2070] Ibid., pp. 166-167. As a result, the judge is often called upon to solve problems ex nihilo, which normally belong to the area of competence of the legislature.
[2071] Ibid., p. 27. The German 'Ordnung der Gerechtigkeit' has been freely translated into 'order of justice'.
[2072] German 'Gesetzesbindung'.
[2073] German 'Bindung an normativer Substanz'.
[2074] Christensen: Was Heißt Gesetzesbindung? p. 23.
[2075] Ibid., p. 25.
[2076] Ibid., p. 23. See Bemerkungen des Bundesverfassungsgerichts zu dem Rechtsgutachten vom Professor Richard Thoma, JöR NFG(1957), p. 194 ff.
[2077] Ibid., p. 28.
[2078] Ibid., p. 23. The German 'Rechtsanwendungsmodell' has been freely translated into 'model of law enforcement'.
[2079] Grabenwarter/ Pabel: Europäische Menschenrechtskonvention, p. 18. See Görgülü pt. 47 'Zur Bindung an Gesetz und Recht gehört aber auch die Berücksichtigung (...)'.
[2080] Pianka: Konkurrenzen und Konflikte beim Rechtsschutz im Europäischen Mehrebenensystem, p. 53.
[2081] AFCC stands here for Act on the Federal Constitutional Court (German BVerfGG).
[2082] Schilling: Deutscher Grundrechtsschutz zwischen Staatlicher Souveränität und Menschenrechtlicher Europäisierung, pp. 147-148.
[2083] Paulus: Germany, p. 242. Paulus refers in this regard especially to those treaties which have been ratified by parliamentary consent.

obligation, national courts find themselves in a dilemma and they practically stand each time before the option to decide for the one or the other solution. However, this decision runs the risk that, their judgments may either be set aside by the FCC or, cause the international conviction of Germany by the ECtHR.[2084] It is observed in practice that, national courts usually do not risk to follow an ECtHR decision, unless the national legislator has previously intervened to regulate the issue in question.[2085] On the other hand, courts that decide to follow an ECtHR judgment, emphasise the power of precedent that is drawn from ECtHR case-law.[2086] At the same time, part of the bibliography argues that, Article 31 AFCC leaves no room for interpretative discrepancies and proposes, as a solution to a possible conflict, that, lower courts should refer the case to the Constitutional Court by analogous application of Article 100(1) of the Constitution.[2087] It is further raised in this respect that, the obligation to follow ECtHR judgments is of a *tolerant* nature and therefore, national courts should primarily comply with the rulings of the Constitutional Court.[2088] The opposite view is however also being expressed, namely that, due to the international friendliness of the Constitution, the binding effect of the judgments of the FCC upon national courts under Article 31 AFCC, takes on the character of a *weak effect* when the national judgment is opposed to an ECtHR judgment.[2089] In this regard, it is additionally stressed that, when the Convention confirms the occurrence of a breach which has previously been rejected by the Constitutional Court, then the national judgment cannot serve as a basis for the state to deny the reparation of the damage.[2090] In other words, that the Court does indeed recognise a margin of appreciation to states, however, this margin does not extend also to cases where the Court has already found that a state has overcome this area of freedom; meaning that the state is not allowed to subsequently try and redefine this area 'by the back door' at the national level.[2091] It is further underlined that, the priority in the compliance with ECtHR's judgments is also advocated by the judges' *duty of care*, which is embodied in the constitutional principle of the *rule of law* and according to which, the judge is obliged to omit the acts that unnecessarily harm the parties.[2092] In this sense, when judges do not comply with ECtHR case-law, they leave no other means of protection to the claimants and therefore, push them to a trial before the Strasbourg Court.[2093] This perspective, despite touching crucial practical aspects, it nevertheless cannot be interpreted as allowing national courts to depart from valid national law.[2094] In general, it cannot be supported that the ECtHR case-law universally applies as a matter of priority, since the lower courts are predominantly following the case-law of the Karlsruhe Court.[2095]

[2084] Hoffmann: Die Europäische Menschenrechtskonvention und Nationales Recht, pp. 106-107; Schilling: Deutscher Grundrechtsschutz zwischen Staatlicher Souveränität und Menschenrechtlicher Europäisierung, pp. 147-148.
[2085] Polakiewicz: Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, pp. 268-270, 300.
[2086] Ibid.
[2087] Pianka: Konkurrenzen und Konflikte beim Rechtsschutz im Europäischen Mehrebenensystem, p. 63.
[2088] Hoffmann: Die Europäische Menschenrechtskonvention und Nationales Recht, pp. 106-107.
[2089] Pianka: Konkurrenzen und Konflikte beim Rechtsschutz im Europäischen Mehrebenensystem, p. 63. Pianka talks of a 'gelockerte Wirkung'.
[2090] Klein: Europäische Menschenrechtskonvention und Deutsche Grundrechtsordnung, p. 22.
[2091] Walter: Die Europäische Menschenrechtskonvention als "Konventionsgemeinschaft", p. 57.
[2092] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 229. Heckötter talks of a 'Fürsorgepflicht', which has been translated into 'duty of care'.
[2093] Ibid.
[2094] Ibid.
[2095] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, p. 72.

3.2.1.4. The issue of the independence of highest national courts

The question as to whether the relationship between the FCC and the ECtHR is a hierarchical one or one of parallel existence, has been thoroughly discussed in literature.[2096] In particular, it has been expressed that, the requirement of the exhaustion of national remedies in order to lodge an application with the Court constitutes itself an indicator of a relationship of horizontal arrangement.[2097] In this context, there even exists a discussion as to whether the FCC is *at all* bound by the judgments of the ECtHR.[2098] More specifically, it is debated that, placing the Karlsruhe Court under the scrutiny of the Strasbourg Court could prove harmful to the prestige of the former.[2099] Nevertheless, it appears wiser to accept that, the Constitutional Court, despite its nature as a constitutional body, still forms part of the judiciary and therefore, cannot be excluded from what applies for the rest of the judicial bodies.[2100] In any case, under the current structure, the FCC continues being the institution that monitors the implementation of the Constitution, while the ECHR and the ECtHR case-law constitute sources that help the concretisation of the Constitution only to the extent permitted by the wording of the respective constitutional provision.[2101] The problem extends to the rest of the highest national courts who seem to be losing influence through the constant extension of the protection granted and of the control imposed by the international judicial entities.[2102] It can be observed that, national courts, in principle, do not resort to the case-law of other jurisdictions and they show a hesitancy towards taking into account decisions of both foreign and international courts.[2103] Nevertheless, what can also be observed is that, the recognition of international substantive provisions seems to be easier than that of procedural provisions, a result of German judges not listening pleasantly to criticism against procedural law and not welcoming external interventions in the judicial process, which after all, constitutes the expression of their independence.[2104] In particular, concerns against the binding nature of ECtHR decisions are based on the argument of the independence of national judges under Article 97(1) of the Constitution, which is allegedly subject to impairment, due to the reduction in the power concentrated in the hands of national judges.[2105] Specifically in what regards the obligation to provide reasons for a departure from ECtHR case-law, voices in literature highlight that, this is an obligation for transparency and in no case one that is detrimental to the independence of the national judiciary.[2106] The same position was adopted by the Constitutional Court, which has stated that, the binding effect of ECtHR judgments is irrelevant to the independence of justice under 97(1) of the Basic Law, as the latter remains unaffected by the Court's judgments.[2107] Further arguments against the

[2096] Pianka: Konkurrenzen und Konflikte beim Rechtsschutz im Europäischen Mehrebenensystem, pp. 78-79.
[2097] Ibid.
[2098] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, pp. 135, 137, 140.
[2099] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 107; Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, pp. 135, 137, 140.
[2100] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, pp. 135, 137-138, 140.
[2101] Ibid., p. 287.
[2102] Ibid.
[2103] Weiss: The Impact of the European Convention on Human Rights on German Jurisprudence, p. 60. Weiss underlines the exception of cases where the examined matter can really be subject of comparison and the court considers itself sufficiently informed about the foreign legal order.
[2104] Schmalz: Das Verhältnis zwischen Europäischer und Nationaler Rechtsprechung, pp. 19, 23.
[2105] Unkel: Berücksichtigung der Europäischen Menschenrechtskonvention in der Neueren Rechtsprechung der Bundesdeutschen Verwaltungsgerichte, p. 48.
[2106] Ibid., p. 51.
[2107] See Görgülü, pt. 22: 'Es gehe nicht um die Unabhängigkeit des Gerichts, sondern um eine konkrete Bindungswirkung der Entscheidung des Gerichtshofs.'

alleged impairment of the independence of justice place the focus on the fact that, the practice of avoiding and occasionally even 'demonising' external control, is incorrect and anachronistic since such control rather triggers the extensive cooperation towards commonly shared values.[2108] In the same vein, it is highlighted that, an 'open ear' towards Strasbourg will not only strengthen the authority of German courts but it will also contribute significantly to the formation of a coherent human rights culture.[2109] It seems as though keeping an open dialogue with Strasbourg can have only positive effects for the relationship between the ECtHR and the FCC, by creating a line of communication, the fruits of which will be enjoyed by the German legal order in the future.[2110] As a matter of fact, the need is still present for national courts to concern themselves more systematically with human rights issues, when such issues arise in the cases they deal with. [2111]

3.2.1.5. Discrepancies between the two jurisdictions and among national courts

As a consequence of the complex relationship between the international and the national jurisdiction and, of the multiple legal commitments imposed on national courts, discrepancies are inevitable. In fact, discrepancies can occur not only between ECtHR judgments and national judgments, but also, among national courts. A widely discussed case of disagreement between the European and the national legal order has been the *Caroline* case in which, the *right to privacy* of an individual - this being a Princess -, was in conflict with the *freedom of expression* of publishing companies.[2112] In fact, the case *Caroline* has been characterised in literature as a particularly problematic one and as a 'ping-pong' type of relationship between the two jurisdictions.[2113] What has happened in this case is that, the FCC has 'relaxed' the right to privacy, whereas the ECtHR has later ruled in the opposite direction, namely has held that the publishing of photographs of public persons is permissible only when linked to important political or social events.[2114] The case has known three proceedings before the German courts, and three more before the European Court, while all proceedings, apart from the first European one, have dismissed the claims of the Princess. An interesting aspect of this case has been that, the FCC has firmly stuck to its initial position after the ECtHR has adjudicated on the matter, and has even argued that, only the *state* is bound by ECtHR case-law and not the national *authorities* who are in this context required to take ECtHR judgments *into account*, however, they are not necessarily obliged to follow them.[2115] The very few cases where the German

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[2108] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, pp. 135, 137, 140.
[2109] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, p. 59.
[2110] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 186.
[2111] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, p. 59.
[2112] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 179.
[2113] Paulus: Germany, p. 230.
[2114] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, p. 69.
[2115] Heckötter: Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die Deutschen Gerichte, p. 111. The first judgment of the Court has found a violation of Article 8 ECHR (right to respect for private life) and the Federal Court of Justice had subsequently changed its approach following the first judgment of the Court. The Princess has reapplied to the Court together with her husband, alleging that national courts have not taken the Court's decision sufficiently into account, and particularly condemning their to grant an injunction prohibiting any further publication of photographs of the couple, however the ECtHR ahs not found a violation in the next two judgments. See cases Caroline von Hannover v.

Constitutional Court has not harmonised its case-law with Strasbourg, include the cases where Germany is convicted for the *excessive length of proceedings*.[2116] A reason for this discrepancy is that, Germany, does not count the *constitutional appeal* to the total time of proceedings, since it considers the constitutional appeal to be an *extraordinary appeal* rather than a part of one single legal action.[2117] Meanwhile, an example of discrepancy among German courts can be drawn from a judgment issued by the Berlin Court of Appeal,[2118] in a case which parallels the *Caroline* judgment and which has been issued only fifteen days after the *Görgülü* judgment.[2119] Here, the Berlin Court has decided to depart from the earlier judgment of the FCC and has prohibited the publication of photographs based on the reasoning that, the commitment to the decisions of the FCC is 'relaxed' on the basis of the international friendliness of the Constitution.[2120] A further example where the German courts were divided in their jurisprudence can be seen in the situation which has followed the judgment *M.* of the ECtHR[2121], whereby the ECtHR has found a violation of the Convention due to the abolition on the maximum duration of preventive detention while the Constitutional Court has previously decided in the different direction.[2122] Nevertheless, at least in practice, the application of the (abolished) time limitation of preventive detention has continued to a great extent, resulting in the Constitutional Court taking a position in 2011 by revising its previous case-law and by aligning itself with the case-law of the ECtHR.[2123] A case of exemplary cooperation between the German Supreme Courts and the ECtHR has been the *Görgülü* case, whereby, after the Constitutional Court has sent the case back to the lower court for review and after the latter did not comply, the former has proceeded with issuing a provisional measure that has put the ECtHR judgment into effect.[2124] The *Görgülü* judgment of the FCC has had multiple effects on the application of the Convention in Germany in the sense that it has confirmed, on the one hand, the already existing case-law, while also setting, on the other hand, certain new limits.[2125] In fact, with *Görgülü* case, the FCC has for the first time directly addressed the question of the consequences of ECtHR rulings in the German legal order and has, as it is argued, proven that it has become more open towards the Convention over the years.[2126] The *Görgülü* judgment has also been regarded as a reaction of the Constitutional Court to the *Caroline* judgment, aiming to demonstrate the serious intention of the domestic jurisdiction to pursue a new path towards the international obligations of Germany.[2127]

Germany (Case I App. No. 59320/00, 24/6/2004, Case II App. Nos. 40660/08 and 60641/08, 7/2/2012 and Case III App. No. 8772/10, 19/9/2013) and the relevant landmark judgments of the Federal Court of Justice in 1995 and the Federal Constitutional Court 1999 accordingly.

[2116] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 179.

[2117] Ibid.

[2118] German: Berliner Kammergericht.

[2119] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, p. 70.

[2120] Ibid.

[2121] M. v. Germany (App. No. 19359/04, 17/12/2009).

[2122] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, pp. 71, 86.

[2123] Ibid., p. 72.

[2124] Paulus: Germany, pp. 231, 233.

[2125] Walter: Die Europäische Menschenrechtskonvention als "Konventionsgemeinschaft", p. 57. Walter underlines that one of the new limits set by this decision was the requirement for a detailed explanation in the case that of a decision of a national court to not follow a judgment of the Court decision.

[2126] Lambert-Abdelgawad/ Weber: The Reception Process in France and Germany, pp. 119, 131.

[2127] Ibid., p. 137.

3.2.1.6. Further practical impediments for an extended reception of the Convention

A further key reason for the discrepancies between national judgments and ECtHR judgments is the lack of consistent and coherent translations of ECtHR judgments into the German language, along with a lack of relevant judicial training.[2128] In this vein, it is highlighted that, German judges violate the Convention principally due to the excessive burden put on national courts in terms of workload and due to the inadequate presence and acceptance of the Convention and the Court's case-law on the domestic level.[2129] In fact, only a few foreign and international judgments are translated into German and, the education provided to German judges covers only the basic points of international law, while emphasis is mainly put on the European Union law.[2130] Hereby and, given the linguistic difficulties, the German courts cannot directly benefit from the English and the French collection of ECtHR case-law, while they also restrict themselves to the application of the German version of the Convention, which is not even an authentic one.[2131] Training German judges on matters that concern the application and the interpretation of the Convention would undoubtedly be a beneficial measure, however, as it appears, neither the Council nor the state currently have the resources to support such an effort.[2132] It cannot be rejected that, national judges are evidently more familiar with the directly applicable national law, a fact resulting in the influence of the Convention on them being only rarely visible.[2133] Meanwhile, the perception has been long widespread, that the national legal system is 'better' and more effectively controlled than its counterpart in Europe.[2134] However, this view has begun to change slightly in the eighties, where Germany was found by the ECtHR to have repeatedly violated the Convention, notably in regard to the *right to a fair trial* and to *habeas corpus rights*.[2135]

3.2.2. Executive

According to Article 20(3) of the German Constitution, the executive, similarly to the judiciary, is bound by law and justice.[2136] As a result, likewise the German courts, the national executive authorities are bound by Article 20(3) of the Basic Law in two ways, namely by both national law and international law that has been incorporated in the domestic legal order. By virtue of being bound by the Convention and ECtHR case-law and regarding their field of competence, national administrative authorities are naturally expected to terminate the legal effects of an administrative act which has been found in violation with the Convention. Furthermore, even the law of the European Union has recognised in Article 41 of the *Charter of Fundamental Rights* the *right to good administration*, which includes the right to "make good any damage caused by its institutions or by its servants in the performance of their duties".[2137] It is clearly evident that, there is a special interest to protect the rights of individuals and to subject the administration to certain obligations. In what regards the ECHR, in cases where a breach has

[2128] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 206.
[2129] Schmalz: Das Verhältnis zwischen Europäischer und Nationaler Rechtsprechung, p. 17.
[2130] Weiss: The Impact of the European Convention on Human Rights on German Jurisprudence, pp. 60-61.
[2131] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 171. Much of the case-law of the Court is published, besides in the database of the ECtHR (HUDOC), also in the NJW.
[2132] Schmalz: Das Verhältnis zwischen Europäischer und Nationaler Rechtsprechung, p. 18.
[2133] Lambert-Abdelgawad/ Weber: The Reception Process in France and Germany, p. 136.
[2134] Ibid.
[2135] Ibid., p. 137. Habeas corpus rights are related to the legality of arrest or detention.
[2136] Klein: Europäische Menschenrechtskonvention und Deutsche Grundrechtsordnung, p. 11.
[2137] The right to good administration has also been promulgated in the European Code of Good Administrative Behaviour.

been found to stem from an administrative act, it is expected that, this act will be revoked, under the conditions laid down in Article 51 of the Administrative Procedure Act[2138]. More specifically, Article 51 of the Administrative Procedure Act renders a *resuming* of the procedure possible only when the reasons of Article 580 of the Code of Civil Procedure[2139] have been established.[2140] Additionally, it is also possible to abrogate an administrative act by means of a *withdrawal* in the case of illegal acts or, by means of a *revocation* in the case of valid acts, under the general provisions of Articles 48 and 49 of the Administrative Procedure Act respectively; thus, in the context of the self-control exercised by the administration itself.[2141] At the same time, withdrawal and revocation constitute themselves further administrative acts and therefore, they can as well suffer illegality or voidance. On their part, Higher Administrative Regional Courts can also control acts with sub-legislative power, when a relevant application has been issued by a natural or legal person, or even by an authority; a power regulated by Article 47 of the Rules of the Administrative Courts[2142].[2143] However, Article 47 of the Rules of the Administrative Courts sets certain limits to this competence such as time restraints, while the possibility as such is not even provided by all federal states.[2144] In any case, it always remains an option for the person concerned, to bring an action against the contested act through the judicial route, whereby the court seized will have to decide both on the compatibility of the sub-statutory provision with the Convention and, on the constitutionality of its legal basis.[2145]

It can be observed that, since the introduction of the possibility of the *reopening of proceedings*, the importance of the role of ECtHR judgments as deterrents against the enforcement of judgments of national courts has diminished significantly.[2146] In fact, ECtHR judgments are in this respect of relevance only during the period that a request for a re-examination has yet not been filed.[2147] In this regard, it is suggested that, where a judgment of a national court which has been found to be opposing the Convention has not yet been enforced in its entirety, the Convention requires the cessation of its execution.[2148] Moreover, it is stressed that, an execution would cause an intensification of the violation and thus, would contradict the principle of the international friendliness of the Constitution.[2149] It is also raised that, Article 79(2) (b) AFFC[2150] actually reinforces this argument by providing for the cessation of the execution of judgments which are based on nullified norms.[2151] In practice, the non-execution of a national judgment that has been found in conflict with the ECHR could also be based on an *interpleader challenging execution* pursuant to Article 767 of the German CCiP or, on the protection granted

[2138] German: VwVfG.
[2139] German: ZPO.
[2140] Schilling: Deutscher Grundrechtsschutz zwischen Staatlicher Souveränität und Menschenrechtlicher Europäisierung, p. 174; Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, p. 78.
[2141] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, pp. 78-79. Withdrawal (Rücknahme) applies, in principle, for illegal acts, while revocation (Widerruf) for valid acts. Self-control in the sense of an ex officio control, which does not depend on a relevant request of the offended.
[2142] German: VwGO.
[2143] Schilling: Deutscher Grundrechtsschutz zwischen Staatlicher Souveränität und Menschenrechtlicher Europäisierung, p. 161.
[2144] Ibid. There is a one-year time limit set and the possibility is not provided for in the federal states of Berlin, Hamburg and Nordrhein-Westfalen.
[2145] Ibid., p. 162.
[2146] Ibid., p. 256.
[2147] Ibid.
[2148] Ibid.
[2149] Ibid.
[2150] German: BVerfGG.
[2151] Ibid., p. 257.

against execution pursuant to Article 765a(1)(1) CCiP.[2152] Precondition to make use of the possibility set out in Article 765a(1)(1) CCiP so as to prohibit or to temporarily cease to apply a measure of enforcement, is the recognition of ECtHR judgments as a *special condition* that renders the execution of the national judgment incompatible with good morals.[2153]

3.2.3. Legislature

3.2.3.1. The discretional intervention of the legislator

Differently from what applies for the judiciary and the executive, according to Article 20(3) of the German Constitution, the legislature shall be bound only by the constitutional order. In this context, by virtue of the legislature not being constitutionally bound by law and, by virtue of the power of the Convention as federal law, the Court of Appeal in Berlin[2154] has argued that, it is inappropriate for the Convention to create obligations for the legislator.[2155] On its turn, the FCC has made in *Görgülü* judgment some controversial statements in relation to sovereignty issues by stating that, whenever Germany undertakes international obligations, it does not lose its sovereignty and therefore, the legislature may exceptionally resign from the obligations that arise from international law if there is no other way to avoid a violation of the fundamental principles of the German Constitution.[2156] On the other hand, it is raised that, the restriction of the sovereign power of the legislator is a direct *result* of the international commitment to ECtHR judgments, and as such, it cannot simultaneously constitute also the *criterion* for the existence of such a commitment.[2157] Moreover, it is highlighted that, despite the freedom of the national legislator, the principle of the international friendliness of the Constitution necessitates that national provisions contrary to the Convention should be amended, whereby the legislator is expected to check, where necessary, whether this incompatibility with the Convention conceals at the same time an unconstitutionality of the respective provision.[2158] In both theory and practice, it has prevailed that, the federal legislature is not exempted from the *obligation to respect* the Convention and that, the legislature is expected to approach constitutional rights *in the light of* the Convention and specifically, in the manner in which the Convention is interpreted by the Strasbourg Court.[2159] Furthermore, a breach of the Convention by the federal legislature can, similarly to violations stemming from the rest of national authorities, establish an international violation and consequently, place Germany in an undesirable position at the international level.[2160] In practice, the lawmaker usually ultimately proceeds with undertaking the necessary actions that will end the violation and restore the national legal order. Nevertheless, in the case of a delay or an omission, the legislator cannot be directly attributed responsibilities.[2161] In this context, it is expressed that, a constitutional appeal for such an

[2152] Ibid., pp. 257-258. The 'Vollstreckungsabwehrklage' has been freely translated into 'interpleader challenging execution'.
[2153] Ibid.
[2154] German: Kammergericht.
[2155] Klein: Europäische Menschenrechtskonvention und Deutsche Grundrechtsordnung, p. 13.
[2156] Lambert-Abdelgawad/ Weber: The Reception Process in France and Germany, p. 119.
[2157] Unkel: Berücksichtigung der Europäischen Menschenrechtskonvention in der Neueren Rechtsprechung der Bundesdeutschen Verwaltungsgerichte, p. 48. See Görgülü pt. 35.
[2158] Schilling: Deutscher Grundrechtsschutz zwischen Staatlicher Souveränität und Menschenrechtlicher Europäisierung, pp. 165-166.
[2159] Klein: Europäische Menschenrechtskonvention und Deutsche Grundrechtsordnung, p. 13. The German 'Respektierungspflicht' has been translated into 'obligation to respect'.
[2160] Ibid.
[2161] Ibid.

omission of the legislator is not considered entirely rejected, however, it presupposes activating the rights of the Convention through their corresponding constitutional rights.[2162]

3.2.3.2. Alternative means to a legislative intervention

The previously discussed concern according to which judges are often called upon to fill legislative gaps and supplement the legislature in its competences, is found on its opposite expression too, namely as a concern of shifting the gap burden to the legislator instead of seeking for a sound interpretive solution.[2163] Indeed, a solution can often be provided by an in-line-with-the-Convention interpretation of the incompatible national law, whereby national courts redefine the limits of the law by 'intervening' in the work of the legislature.[2164] Herewith, it is argued that, obligation of the legislator is to take measures by annulling or amending provisions which are contrary to the Convention, but only there where an internationally friendly interpretation of the provision does not offer an adequate solution.[2165] In other words, where a breach stems from national law, the obligation to comply primarily refers to a *future* interpretation of the national provision in accordance with the Convention; and only secondarily and when such an interpretation is rendered impossible, does it refer to the intervention of the legislature.[2166] Moreover, the non-application of a legislative provision that is contrary to the Convention is not considered a permanent solution and can be applied only during the transitional period, that is until the legislator has duly and permanently dealt with the subject.[2167] As previously mentioned, during the period between the issuance of the ECtHR judgment and the intervention of the legislator, the case-law of national courts is usually divided, and discrepancies between judgments of national courts can easily occur.[2168] In fact, a federal law may still be applied domestically despite it establishing an international violation, as long as the Convention does not constitute *specific* law which, by application of the principle of *lex specialis*, could override the application of federal law and, since the Court's judgments do not have the power to annul legislative or other domestic acts.[2169] In the case that the legislator does not intervene, the option of a decision of the FCC on the constitutionality of the provision remains as a solution.[2170] In this regard, it is suggested that, in the context of similar cases and for as long as the law remains valid, national judges finding themselves in a dilemma, should freeze relevant proceedings and refer the case to the FCC with regard to the constitutionality of the provision at issue.[2171] In the process of checking the constitutionality of a provision, the FCC is obliged to interpret the Constitution in a manner that is compatible with the Convention.[2172] Thus, if the FCC finds that, an interpretation compatible with the Convention is impossible and that, national law inevitably conflicts with the Convention, it shall declare the

[2162] Ibid.
[2163] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 105.
[2164] Hoffmann: Die Europäische Menschenrechtskonvention und Nationales Recht, p. 108.
[2165] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 105.
[2166] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, pp. 64-66.
[2167] Ibid., p. 65.
[2168] Ibid., p. 68.
[2169] Klein: Europäische Menschenrechtskonvention und Deutsche Grundrechtsordnung, p. 13.
[2170] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, pp. 64-66.
[2171] Ibid., p. 65.
[2172] Ibid., pp. 64-66.

national law null.[2173] Furthermore, on the basis of an alleged opposition of a national law to the Convention, the Federal or Land Government or one fourth of the Members of the Parliament, can call the Constitutional Court pursuant to the powers granted to them under Articles 93(1) (2) of the Constitution and 13(6) and 76 of the AFCC[2174], to abstractly control whether a national law is opposed to the Constitution.[2175] A means of last resort for the case that an interpretation of the Constitution in line with the Convention is rendered impossible, is the revision of the Constitution.[2176] In practice, it is preferable that the legislator intervenes, as it is only through this path that an erga omnes solution can be provided, however, as previously noted, the legislator usually acts with a time lag from the point that the judgment of the ECtHR has been issued.[2177]

3.3. Practical examples on the execution of judgments on the national level[2178]

Different to what applies for *individual measures* which focus on the isolated case and on the applicant's benefit, *general measures* are able of bringing about significant changes in the national legal order and thus, are of major general interest. From the range of general measures that may be deemed necessary in order to prevent repetitive cases from occurring in the future, changes in the German *jurisprudence* are predominantly undetectable, since the judiciary usually avoids direct references to the ECHR and to ECtHR case-law.[2179] It should also be highlighted that, in certain cases, Germany has proceeded with the adoption of changes even when it has not itself been party to the ECtHR proceedings, thus, it has complied with judgments which have been issued against other Member States.[2180] Examples of such changes have been the legislative changes of the *right to be heard* and the *right to compensation* as well as the establishment of a legal remedy for the *excessive length of the proceedings*.[2181]

[2173] Hoffmann: Die Europäische Menschenrechtskonvention und Nationales Recht, p. 109.
[2174] German: BVerfGG.
[2175] Schilling: Deutscher Grundrechtsschutz zwischen Staatlicher Souveränität und Menschenrechtlicher Europäisierung, p. 167.
[2176] Stanoeva: Das Verhältnis von Internationalen Menschenrechtsgewährleistungen und Nationalen Grundrechten in der BRD und der Republik Bulgarien, pp. 64-66.
[2177] Ibid., p. 67.
[2178] Information about the execution of judgments in a certain Member State can be drawn from several sources. The Department for the Execution of Judgments of the ECtHR, has published in 2016 an information document including selected examples of the positive impact of the Convention within the states parties over the years.(Published on 8 January 2016, by the Legal Affairs and Human Rights Department of the Parliamentary Assembly of the CoE, upon request by the Rapporteur on the implementation of judgments of the ECtHR (Mr. Pierre-Yves Le Borgn'), and in collaboration with the Human Rights Centre of the University of Essex UK.) Furthemore, the Committee of Ministers publishes an annual report presenting the status of execution of judgments of the ECtHR, which provides information on several Member States and on the main recent ECtHR judgments. In Germany, country-specific information is made available also by the Federal Ministry of Justice, which has been publishing since 2009 an annual report on the case-law of the ECtHR and on the implementation of ECtHR judgments issued against the Federal Republic (Bericht über die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte und die Umsetzung seiner Urteile in Verfahren gegen die Bundesrepublik Deutschland, available under: http://www.bmjv.de/DE/Themen/Menschenrechte/EntscheidungenEGMR/EntscheidungenEGMR_node.html (20/11/2017).
[2179] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 178.
[2180] Lambert-Abdelgawad/ Weber: The Reception Process in France and Germany, p. 136.
[2181] Ibid. Lambert-Abdelgawad/ Weber mention that the legal remedy for the excessive length of the proceedings has been established following judgment Kudla v. Poland (App. No. 30210/96, 26/10/2000).

A list of notable changes in the last years includes changes that have been adopted in the context of judgment *Mooren*[2182] of 2009, as a result of which, Articles 147(2) and (7) of the CCrP have been supplemented by a legislative act[2183] amending *custody rights* and regulating the access of the person accused to the information necessary for the assessment of the legality of the detention.[2184] With regards to the *length of proceedings*, the Federal Ministry of Justice has, following a number of ECtHR judgments on the same issue, drawn up a draft law, which concerned the legal protection in the case of overlong judicial proceedings or criminal investigations and which, was passed on to the President of the German Bundestag in 2010. However, the draft law still required the consent of the Federal Council, which, under the conditions laid down by the court, was expected to occur within a certain deadline. Finally, the *Law on Legal Protection in Case of Overlong Court Proceedings and Criminal Investigations* has come into force on 2 December 2011,[2185] bringing the national legal order in line with the requirements of the Convention. Following judgment *Ballhausen*[2186], a draft report by the Federal Ministry of Justice has specified that all *children born in a non-marital partnership* before 1 July 1949 were to be considered legal heirs of their fathers, while an amendment of the relevant, incompatible with the Convention, national law has also been planned. With the entry into force of the *Second Law on the Succession Equality of Illegitimate Children, on the Alteration of the Code of Civil Procedure and the Tax Regulations*[2187] of 16 April 2011, the equality of non-marital children with children born within marriage, in terms of inheritance and succession, has been finally completed. In 2010, following judgment *M.*[2188], the FCC has obliged the legislature to elaborate a new, freedom- and therapy-oriented concept of *preventive*

[2182] Mooren (App. No. 11364/03, 9/7/2009). This amendment became effective on 1/1/2010.
[2183] Gesetz zur Änderung des Untersuchungshaftrechts of 29/7/2009, Federal Law Gazette I, p. 2274. This amendment became effective on 1/1/2010.
[2184] Older changes include for example a change that has occurred in national case-law and legislation as a consequence of the ECtHR *Feuerwehrabgabe* judgment (Karlheinz Schmidt App. No. 13580/88, 18/7/1994), whereby the ECtHR has held that there has been a violation of the prohibition of discrimination under Article 14 ECHR. The judgment concerned the fact that several federal states had been applying regulations that requested the payment of outstanding fire service levies and by which, men in Germany were called upon to pay, in the event that they did not complete the fire service, a service which women were not obliged to pay. The FCC, as a reaction to the ECtHR judgment, has declared the relevant provisions void, however not based on the Convention but rather, on the Constitution itself (i.e. Article 3(3) of the Basic Law). Subsequently, changes also in the legislation of some federal states (Baden-Württemberg, Bavaria and Saxony) that previously requested the payment of outstanding fire services levies have occurred. A further legislative change that has taken place, however, with some delay (legislative changes have followed two years after the judgment *Luedicke, Balkacem and Koç* later, and five years in the case of judgment *Öztürk*) followed the Court's *Ortürk* (App. No. 8544/79, 21/2/1984) and *Luedicke, Belkacem and Koç* (App. Nos. 6210/73, 6877/75 and 7132/75, 28/11/1978) judgments, has been the revision of the Fee Regulation for Lawyers (Fünftes Gesetz zur Änderung der Bundesgebührenordnung für Rechtsanwälte of 18/8/1980, Federal Law Gazette I, p. 1503) in respect to interpretation costs. Legislative changes following ECtHR decisions include also the change in the Law on Family Matter (Reform zum Kindschaftsrecht of 16/12/1997, Federal Law Gazette I, p. 2942) that followed the *Esholz* (App. No. 25735/94, 13/7/2000) judgment and the change in the Child Benefits Act (Bundeskindergeldgesetz (BKGG) of 1/1/2006, Federal Law Gazette I, p. 2915) that followed the *Niedzwiecki* (App. No. 58453/00, 25/10/2005) and the *Okpisz* (App. No. 59140/00, 25/10/2005) judgments. A change in the acceleration of proceedings before the FCC has also occurred after the *Pammel* (App. No. 17820/91, 1/7/1997) and the *Probstmeier* (App. No. 20950/92, 1/7/1997) judgments, in that the staff of the FCC incerased. In this last case the Ministry of Justice has sent letters to the FCC informing it about these ECtHR judgments and about the Government being of the view that the FCC will have to adapt its tactics to avoid undue delays.
[2185] Gesetz über den Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren of 24/11/2011, Federal Law Gazette I, p. 2302.
[2186] Ballhausen (App. No. 1479/08, 28/05/2009).
[2187] Zweites Gesetz zur erbrechtlichen Gleichstellung nichtehelicher Kinder, zur Änderung der Zivilprozessordnung und der Abgabenordnung, Federal Law Gazette I, p. 615. The law has largely come into effect with a retroactive effect from 29/5/2009, otherwise with effect from 16/4/2011.
[2188] M. (App. No. 19359/04, 17/12/2009).

detention which, was to be adopted at the latest by the end of May 2013. The legislature has subsequently passed the *Act on the Therapy and Housing of Mentally Disturbed Violent Persons*[2189], which entered into force on 1 January 2011. In May 2011, the FCC has announced its position on the issue of preventive detention, by which, national courts were obliged, pending the legislative regulation of the matter, to ensure the creation of conditions that would be in accordance with the provisions of the Convention. On 1 June 2013, the law of 5 December 2012 on preventive detention has finally entered into force. Following judgment *Zaunegger*[2190], the FCC had ruled in the context of a constitutional complaint on 21 July 2010 that, the scheme to *parental care* of non-married parents was incompatible with Article 6(2) of the Basic Law. The FCC has in this vein also provisionally ordered that, until the entry into force of a new statutory regulation, in the case of a request of a parent, the family court should transfer the parental care, jointly or partially, to the parents, as long as this would correspond to the welfare of the child; a transitional arrangement that helped overcome the non-compatible with the Convention situation, at least in judicial practice. Subsequently, a relevant draft was distributed to the federal states and to associations on 2 April 2012 and the new law has entered into force on 19 May 2013[2191]. After the issuance of judgment *Hellig*,[2192] the judgment became immediately applicable by all enforcement authorities, while law enforcement institutions were asked on 17 October 2011 to act accordingly and to provide *prisoners*, besides a blanket, with an underskirt and a paper shirt. Following judgments *Schneider*[2193], and *Anayo*[2194], a corresponding draft report was sent to the federal states and to associations on 29 May 2012, according to which, *biological fathers* should also have the right to demand information about the personal conditions of the child, insofar as this would not contradict the child's well-being. Finally, in order to implement the ECtHR ruling, the German Bundestag has passed on 25 April 2013 the relevant law, which, after being passed by the Federal Council[2195], has come into force on 12 July 2013[2196], strengthening in this way the rights of the physical, non-legal father. Judgment *Herrmann*[2197] has led to the amendment of the *Federal Hunting Law* by the *Law on the Change of the Hunting Regulations* of 29 May 2013[2198], which entered into force on 6 December 2013 and which enabled landowners who belonged to a *hunting cooperative* that rejected the hunting of their land for ethical reasons, to leave the hunting cooperative on request. Another example has been the judgment *Nezirai*[2199], after the issuance of which, the Ministry of Justice has declared the intention of Germany to amend Article 329 CCrP, so that a *rejection of the appeal* of the accused could no longer occur when, instead of the accused, a representative appeared before the court. Eventually, the *Act on the Strengthening of the Defendant's Right to be represented in an Appeal and on the Recognition of Absences in Legal Assistance* has entered into force on 17 July 2015[2200], by which the Federal Government has fully adhered to its obligation to implement the judgment. Yet another example can be drawn by the judgment

[2189] Gesetz zur Therapierung und Unterbringung psychisch gestörter Gewalttäter (ThUG) of 22/12/2011, Federal Law Gazette I, p. 2300.
[2190] Zaunegger (App. No. 22028/04, 3/12/2009).
[2191] Gesetz zur Reform der elterlichen Sorge nicht miteinander verheirateter Eltern (NEheSorgeRG) of 16/4/2013, Federal Law Gazette I, p. 795.
[2192] Hellig (App. No. 20999/05, 7/7/2011).
[2193] Schneider (App. No. 17080/07, 15/9/2011).
[2194] Anayo (App. No. 20578/07, 21/12/2010).
[2195] As of 7/6/2013.
[2196] Gesetz zur Stärkung der Rechte des leiblichen, nicht rechtlichen Vaters (VätRStG) of 4/7/2013, Federal Law Gazette I, p. 2176.
[2197] Herrmann (App. No. 9300/07, 26/6/2012).
[2198] Gesetz zur Änderung jagdrechtlicher Vorschriften, Federal Law Gazette I, p. 1386.
[2199] Nezirai (App. No. 30804/07, 8/11/2012).
[2200] Gesetz zur Stärkung des Rechts des Angeklagten auf Vertretung in der Berufungsverhandlung und über die Anerkennung von Abwesenheitsentscheidungen in der Rechtshilfe, Federal Law Gazette I, p. 1332.

Schatschaschwili[2201], which has found a violation of the right to ask questions to *prosecution witnesses* and, due to which, the Federal Ministry of Justice and Consumer Protection[2202] has joined forces in drafting a bill to increase the *effectiveness of criminal proceedings* and to safeguard the right of confrontation of the defence; considering an amendment of Article 141 of the CCrP and, an obligation of the court to compulsorily appoint a defendant in the case of essential judicial interrogations.[2203] Furthermore, there is a new tendency of the FCC for an ever-increasing *justification* of its judgments by which it declares constitutional appeals inadmissible.[2204] In particular, the Constitutional Court, for reasons of procedural economy has often avoided, under the provisions of Article 93d (1) (3) AFC[2205], to justify the inadmissibility of a constitutional appeal, however, it has presently changed this practice by increasingly referring to the grounds of inadmissibility; helping in this manner both the applicant, but also, itself in the sense that it reduces the possibility of being subject to the review of the ECtHR.[2206]

[2201] Schatschaschwili (App. No. 9154/10, 15/12/2015).
[2202] German: BMJV.
[2203] The draft law, which has already been published in the Ministry's website is currently being voted on within the Federal Government.
[2204] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 178.
[2205] German: BVerfGG.
[2206] Mellech: Die Rezeption der EMRK sowie der Urteile des EGMR in der Französischen und Deutschen Rechtsprechung, p. 178.

Chapter Five

CASE-STUDY: HELLENIC REPUBLIC

1. The domestic position of the Convention

1.1. The obstacle of inadequate resources

1.1.1. The dictatorial coup of 1967 as a benchmark to the democratic system

Greece has an early presence in Europe, counting among the twenty six original signatories of the UN Declaration of Human Rights and, having acceded the EEC as its tenth Member State and the Council of Europe as its eleventh Member State.[2207] Nevertheless, despite its early presence in Europe, Greece counts today, amongst the states with the most ECtHR judgments having been delivered against them. In addition, given the rarity in the lodging of inter-State cases, the fact that Greece has been already involved in four such cases, demonstrates yet another interesting aspect of the country's profile.[2208] In total, what can be observed is that, Greece suffers inadequate resources and decision processes, combined with a limited human rights expertise and a limited human rights awareness. The root causes for the Greek non-compliance can be traced back in a number of factors such as in the country's social and historical background, which is characterised by the predominant influence of the church and a traditional scepticism towards minorities; albeit now at a reduced level.[2209] Further reasons are to be sought in the legislative, administrative and judicial practices and in the entrenched resistance on sensitive issues, which constitute what has been called the "Greek rule of law deficit".[2210] Moreover, the economic difficulties the country has confronted with, have shaped an important impediment to a more affective engagement towards the creation of the necessary organisational capacities.[2211] The recent re-emergence of financial problems[2212] has led to an escalation of the desolate political and socio-economic situation and subsequently, also to an increase of the inefficiencies in the protection of human rights. With regards to the reception of international law and to the application of the Convention in Greece, the literature recognises two different periods. These periods are demarcated by the events of 1967, when the legally elected government of Greece has been overthrown and the authoritarian regime has been established; a situation which would not change until 1974. Although the 'international face' of Greece has improved in the period after the fall of the dictatorial regime, the new Constitution[2213] was co-existing with a set of rules contained in acts of 'anti-constitutional' character and which have been issued during and after the civil war of 1946-1949.[2214] At the

[2207] Greece has acceded the CoE on 9 August 1949 and the EU on 1 January 1981.
[2208] See Greece v. UK (App. Nos. 176/56 and 299/57) on the situation in Cyprus during the period of colonial struggle; Denmark, Norway, Sweden and the Netherlands v. Greece (App. Nos. 3321/67, 3322/67, 3323/67 and 3344/67) and Denmark, Norway and Sweden v. Greece (App. No 4448/70) on the situation after the imposition of the military coup in Greece.
[2209] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 413.
[2210] Ibid., p. 26.
[2211] Ibid., p. 413.
[2212] Here it is meant with regards to the economic crisis of the last decade.
[2213] In this Chapter referred to as Greek Constitution or Constitution.
[2214] Perrakis: Dimensions of the International Protection of Human Rights (translated from Greek), p. 241. After the collapse of the military junta of 1967-1975 and after the referendum of 8 December 1974, which rejected the

same time, the position that the Constitution has adopted in the Greek legal system has always been characterised by an undisputed authority; a manifestation of which can be found in the fact that, the Greek Constitution adheres to a strict procedure in terms of its revision, a quality that has led to the Constitution been termed a *strict text*.[2215] More specifically, the Constitution can be reviewed under a very specific process, different than the one followed for ordinary laws and, one that prohibits a review unless five years have passed since the last review;[2216] as a result, the 1975 Constitution has been by now reviewed only three times.[2217]

1.1.2. References of affiliation between national constitutional and international law

It is maintained that, the Greek Constitution is capable of providing a protection comparably adequate to the protection that is provided by the ECHR.[2218] It can be observed that, a number of constitutional provisions refer to international law either directly or indirectly; a fact revealing that the two legal orders share a lot in common. Nevertheless, it can also be observed that, Greek constitutional provisions referring to international law, often lack with regard to their legal editing and to the harmony established between them; thus, lead to controversial results.[2219] At the same time, all Greek constitutional provisions establishing civil, political, social and economic rights, contain principles recognised in international law.[2220] It is furthermore noted that, the osmosis of the ECHR provisions with the constitutional provisions is inevitable, as Article 25(1) of the Constitution provides for the conceptual unity in the protection of the "rights of man as a human and as a member of the society", therefore, regardless of their constitutional or international origin.[2221] In this context, it is also raised that, Articles 25(1) (2) and 28(3) of the Constitution reveal that the constitutional legislator approaches human rights as a single concept, without persisting in a hierarchical approach of the relationship between the Constitution and international treaties.[2222] It is even emphasised that, constitutional Article 25(1) actually supports both the interpretation of the Constitution according to international treaties and the respect for human rights, in a spirit that encompasses the obligation of *positive* action.[2223] However, the use of Article 25(1) of the Constitution has thus far been only marginal, usually cited along other provisions, while claims of its alleged violation tend to be rejected by judges with ease.[2224] Furthermore, Greek case-law and legal theory have been too little concerned with the question of the addressees of constitutional rights, in relation to which they have been effected mainly by the German theory of the *third party effect*, so-called theory of *horizontal effect*, which refers to the ability of the legal requirements

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monarchy, democracy was restored in Greece, and the Constitution of Greece was passed on 1 June 1975. This Constitution defined parliamentary democracy as the political system of the country, while Article 110 (1) of the Constitution provided that the type of the political system could not be subject to review.

[2215] See Article 110(2), (5) of the Constitution for the procedure.

[2216] See Article 110(6) of the Constitution.

[2217] Constitutional reviews have taken place on 1 May 1986, 1 April 2001 and 27 May 2008.

[2218] Trekli: Binding Force and Execution of Judgments (translated from Greek), p. 623.

[2219] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 54.

[2220] Roukounas: International Law (translated from Greek), p. 83.

[2221] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 201, 411.

[2222] Ibid., p. 201.

[2223] Ibid. It shall be mentioned that Article 25 of the Constitution does not make the obligation of the Greek state to ensure the unhindered exercise of human rights dependent on any condition, therefore the conditions required by the principle of reciprocity do not seem to find application in the case of international treaties which concern the protection of human rights. At the same time, Article 28(1)(b) of the Constitution cites as: "The application of the rules of international law and international conventions to foreigners is always subject to reciprocity."

[2224] Ibid., p. 199.

applicable to public bodies, to apply also on private relationships.[2225] Eventually, with the constitutional revision of 2001 subparagraph c was added to Article 25(1), citing that, rights apply also in relations between individuals, however, leaving open the possibility of specific rights not being applicable to certain private relations.[2226] At the same time, Greek civil and criminal courts have occasionally recognised the ability of international agreements to create *directly claimable* rights and obligations, under certain conditions; despite there being only few examples.[2227] The *direct application* of the Convention means, in a practical sense, the assessment of the contested issue with a direct reference to the provisions of the Convention, alone or in combination with the provisions of national law and without a parallel control of the compatibility of national provisions with the Convention.[2228] However, the jurisprudential practice of combining national and international provisions makes it difficult to distinguish whether it is a case of *direct* application or simply an interpretation *consistent* with the respective international provision(s).[2229] In this vein, the translated versions of the English terms *directly applicable* and *self-executing* in Greek vary greatly among authors and, despite their richness, the debate on the difference between self-executing and non-self-executing norms has yet to prove productive.[2230]

1.2. Incorporation of the Convention

1.2.1. The dualistic nature of constitutional law and the instrument of ratification

Greece has signed the ECHR the first month that the treaty opened for signature, on 28 November 1950 and has ratified it on 21 March 1953.[2231] As aforementioned, in the year 1967, the authoritarian regime has been established, which subsequently withdrew from the Council and denounced the Convention by *note verbale* in December 1969, coming into full effect in February 1970.[2232] It should be underlined here that, this has been the one and only time in the Council's history that a Contracting State has cancelled its membership. As expected, only a few months after the fall of the dictatorship and the restoration of democracy, Greece has re-joined the Council and has re-ratified the Convention, domestically by Legislative Decree in September 1974 and, internationally in November 1974.[2233] Nevertheless, it took Greece a year until it acknowledged, by lodging a statement to the then Secretary General of the Council in

[2225] Ibid., p. 216. Known in German theory as 'Dritteffekt'.
[2226] Ibid., p. 217. The provision introduced a general principle without touching upon sensitive issues such as the direct (in the sense that the constitutional right may be directly applicable in private relations creating erga omnes claims) or indirect (in the more moderate sense that constitutional rights affect private relations through channels) application of the principle
[2227] Ibid., pp. 307, 310. The author refers in this regard to CoS 632/78, 1074/79, 727/30, 796/31, 237/56, 561/30, 401/53 and SCC 626/80 and 228/82.
[2228] Ibid.
[2229] Ibid., p. 311.
[2230] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 186.
[2231] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 175. Greece has signed the Convention on 28 November 1950, only few weeks after the initial signing of the Convention by its founding Members on 4/11/1950. The Convention has been ratified by Law No. 2329/1953, Government Gazette A 68.
[2232] Note verbale of 12/12/1969 and effect of 13/2/1970, Government Gazette A 38.
[2233] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 175; Matthias/ Ktistakis/ Stavriti/ Stefanaki: The Protection of Human Rights in Europe (translated from Greek), p. 26. The Dictatorship fell in July 1974, Greece has re-ratified the Convention nationally on 19/9/1974 by Legislative Decree No. 53 of 1974 (Government Gazette A 256) and internationally on 28/11/1974.

December 1985, the right of individual petition for a period of three years.[2234] In 1991, the first case against Greece has been delivered, while, up until that point, the ECHR system was mainly an unknown entity to the country.[2235] In the successive years, Greece would sign and ratify all additional Protocols to the Convention, except for Protocols No. 4, 12, 15 and 16.[2236]

Concerning the incorporation methods of international law which apply in the Greek legal order, Article 36(2) of the Constitution lays down categories of international agreements which do not become valid unless they are ratified by a *statute* voted in the Parliament. In this regard, it is debated that, constitutional Article 36(2) is a reflection of the incompatibility between, on the one hand, the once applicable[2237] authoritarian potential of the Head of State to independently conclude some important treaties and, on the other hand, the general requirement for the limitation of the omnipotence of the executive in a democratic state.[2238] In particular, Article 36(2) of the Constitution comprises of conventions relating to trade, taxation, economic cooperation, participation in international organisations and unions, as well as conventions containing concessions which may burden Greeks individually or for which, according to other provisions of the Constitution, no provision can be made without a statute.[2239] Furthermore, constitutional Article 36(4) explicitly regulates that, the ratification of international treaties may occur only by parliamentary *statute* and that, it may not be subject to delegation of legislative power under Article 43(2), (4) of the Constitution; thus, excluding the possibility of ratification by administrative act. This regulation has been characterised as somewhat paradoxical, in that, whilst international treaties can be ratified, as laid down in the VCLT, by a large variety of means, the delegation of legislative power for the issuance of *general regulatory decrees* is herewith denied.[2240] Legal theory has suggested that, the consensus for the ratification of treaties should be able to be provided by simple decision and not exclusively by formal law; however, this position has yet not prevailed.[2241] Another important provision in this regard is that of Article 28(1) of the Constitution, which regulates that, *generally recognised rules of international law* and international *conventions* which have been ratified by statute, are

[2234] Declaration of the ministry of foreign affairs of 31 December 1985 (Government Gazette A 231). Greece reaffirmed its commitment with its ministry of foreign affairs communication from 1 September 1989, by accepting the competence of the European Commission of Human Rights to hear individual applications for a further period of three years, starting on 20 November 1988 (Government Gazette A 9).
[2235] Sisilianos: Introduction (translated from Greek), p. 11.
[2236] Matthias/ Ktistakis/ Stavriti/ Stefanaki: The Protection of Human Rights in Europe (translated from Greek), p. 26. Greece has ratified Protocol No. 1 together with the ECHR by Legislative Decree No. 53 of 1974 (Government Gazette A 256); Protocols No. 2, No. 3 and No. 5 by Legislative Decree No. 215/1974 (Government Gazette A 365); Protocol No. 6 by Law No. 2610/1998 (Government Gazette A 110); Protocol No. 7 by Law No. 1705/1987 (Government Gazette A 89); Protocol No. 8 by Law No. 1841/1989 (Government Gazette A 94); Protocol No. 11 by Law No. 2400/1996 (Government Gazette A 96); Protocol No. 13 by Law No. 3289/2004 (Government Gazette A 227) and Protocol No. 14 by Law No. 3344/2005 (Government Gazette A 133). Greece has yet to sign Protocol No. 4 to the Convention, securing certain rights and freedoms not included in the previous texts, to ratify Protocol No. 12 to the Convention, which provides for a general prohibition of discrimination and to sign Protocols No. 15 and 16 to the Convention. It shall be mentioned that the provision of non-imprisonment for contractual obligations included in Protocol No. 4 is however guaranteed by Article 11 of the ICCPR, which Greece ratified with Law No. 2462/1997 (Government Gazette A 25).
[2237] This practice dates back in the 19th century.
[2238] Roukounas: International Law (translated from Greek), pp. 141-142. Article 36(2) shall be read together with Article 35(1), which provides that no act of the President of the Republic shall be valid nor be executed unless it has been countersigned by the competent Minister and unless it has been published in the Government Gazette.
[2239] Ibid., p. 140. Roukounas underlines that the reference in Article 36(2) 'burden the Greeks individually' has been interpreted by the CoS as referring to treaties involving credits, costs or individual weights, and therefore, not to all treaties that may by reflection have some impact on some citizens.
[2240] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 173.
[2241] Roukounas: International Law (translated from Greek), p. 165.

considered operative in the national legal order. It is stressed that, the wording of constitutional Article 28(1) leaves the impression that it provides for a more favourable treatment for generally recognised rules, namely for non-convention rules, as these seem to apply automatically and without any further process, while treaties are subject to statutory ratification thus, to procedural conditions in order to be applied domestically.[2242] However, one should not disregard the fact that, the application of unwritten rules requires a specific cognitive process with which most national judges are not familiar and therefore, practically tends to generate more complex implications.[2243] In this respect, it is also highlighted that, conflicts between generally recognised rules of international law and national law in relation to the protection of the rights of individuals, can hardly be established, since the Greek Constitution is already providing for a greater protection.[2244]

According to Article 28(1) of the Constitution, generally recognised rules of international law as well as international conventions "as of the time of their *ratification* by law and their entry into force according to their respective terms", become an integral part of Greek domestic law. The use of the term *ratification* in this context should not be confused with ratification as it is known in international law.[2245] Ratification as an act of *international* law, is an essential part of the procedure of establishing a state's consent to be bound by a treaty and it is either foreseen by the treaty itself or, pre-contractually agreed so by the parties and as such, constitutes part of the competence of the executive; particularly of the Head of State.[2246] Conversely, ratification as a *national* matter, is a competence of the Parliament and adopts the form of a formal law in Greece.[2247] The logical sequence of events starts with the international ratification of the treaty, as followed by its national ratification and the subsequent publication in the Official Gazette; however still, international and national ratification are often confused as procedures.[2248] In countries such as Greece, where the practice of national ratification continues to apply, it is taught that the two actions, namely the authorisation to the Head of the State and the order to enforce the treaty in domestic law, occur *uno actu*.[2249] The use of the term *ratification* in constitutional Article 28(1) has been repeatedly referred to in literature as an example of unfortunate wording and inadequate technique in terms of technical vocabulary and of the approach of issues that touch upon international law.[2250] In this respect, the term international *conventions* is also characterised as misguided, at least to a certain extent, as it is highlighted that, the constitutional legislator actually meant to include *all agreements* that fall under the generic term *treaty*.[2251] According to Article 2(1)(a) VCLT, "treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". In any case, it can be observed that, in modern international law the two terms, convention and treaty, are used almost synonymously and refer to formally

[2242] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 63.
[2243] Ibid.
[2244] Ibid., p. 139.
[2245] Krateros: Problems of Interpretation of Article 28 para. 1 of the Constitution (translated from Greek), pp. 99-100.
[2246] Roukounas: International Law (translated from Greek), p. 139. International ratification occurs according to 36(1) and 35(1). More specifically, Article 36(1) provides that the President of the Republic represents the state internationally, under the conditions of Article 35(1), namely given than an act is countersigned by the competent Minister and published in the Official Gazette.
[2247] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 169.
[2248] Roukounas: International Law (translated from Greek), p. 161.
[2249] Ibid.
[2250] Krateros: Problems of Interpretation of Article 28 para. 1 of the Constitution (translated from Greek), p. 99; Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), pp. 54, 57.
[2251] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 163.

concluded instruments between states which are binding in international law. In fact, it can be observed in relevant literature that, the word convention is used interchangeably with a number of other words such as contract, agreement, protocol, pact, statute, chart and many more, while all of them essentially express the same content.[2252]

1.2.2. Procedural specifics of becoming integral part of domestic law

According to Article 112(1) of the Regulation of the Parliament, the Parliament may merely *approve* or *reject* bills and law proposals which ratify international treaties, meaning that it cannot *change* the content of the respective treaties. In other words, the Parliament cannot modify points that it deems should be amended, although it may suggest amendments to the government.[2253] Moreover, whilst a law is normally voted on *by Article* and as a *whole*, after a draft or a proposal has been submitted to the Parliament, this, however, cannot happen in the case of treaties, since the Parliament approves or rejects them *in globo*.[2254] Consequently, the ratification mentioned in Article 28(1) of the Constitution is practically a legislative act, merely transposing the full text of the treaty into national law and reiterating the text in both its original and a Greek version; containing furthermore a ratification clause.[2255] The Ratification Law as such, follows the procedure for the *promulgation* and *publication* of statutes, which is laid down in Article 42(1) of the Constitution and according to which, the President of the Republic promulgates and publishes the statutes passed within one month of the Parliament's vote.[2256] The problem in this case is that, with its national ratification and publication, the treaty is incorporated with two or even more texts, since the foreign authentic text is published alongside a Greek one.[2257] In regard to this, the opinion has been held in jurisprudence that, the Greek version of international treaties simply constitutes a translation of the foreign text and that one should recourse to the foreign text as an authentic; however, there exists no unity in case -law on this subject and, in practice, the majority of judges tend to apply the Greek text.[2258] A further interesting aspect of the wording of constitutional Article 28(1) is that, the generally recognised rules of international law and the international conventions by the time of their ratification by law and their entry into force, are considered an *integral part* of Greek domestic law. Hereby, it is emphasised that, the rather unfortunate wording of constitutional Article 28 is once again revealed, since international law actually does not become an *integral part* of domestic law, but rather, it is simply being *applied* in the Greek legal order.[2259] It is supported in this regard that, through this wording, the constitutional legislator wanted to emphasise on a strongly monistic perception of the relationship between domestic and international law.[2260] In this vein, it is also expressed that, Article 28(1) of the Constitution should be understood as allowing the ECHR to become *part* of the national law, but again, only to the extent in which it forms part of

[2252] Roukounas: International Law (translated from Greek), p. 120. Roukounas argues that there are almost twenty such terms.
[2253] Ibid., p. 165.
[2254] Ibid.
[2255] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 169.
[2256] An exception where the application of a non-promulgated convention or provision of a convention could be established, is when private parties agree on its application or when relevant explicit reference is made in an internal legislative or administrative act.
[2257] Roukounas: International Law (translated from Greek), p. 205. Roukounas underlines the fact that, most translations of international treaties have been extensively criticised by the legal world, for containing blatant mistakes.
[2258] Ibid., p. 206.
[2259] Krateros: Problems of Interpretation of Article 28 para. 1 of the Constitution (translated from Greek), pp. 99, 101.
[2260] Ibid., p. 101.

international law.[2261] Conversely, it is being raised that, while such a monistic approach could possibly be accepted in the case of the general rules of international law, it certainly could not be supported for the case of international treaties too, as these become valid and applicable only as long as they are ratified by law.[2262]

1.3. The domestic rank of the Convention and theories of a higher rank

1.3.1 The supra-legislative status of the Convention

A further arrangement of Article 28(1) of the Constitution is that, generally recognised rules of international law and international conventions ratified by statute, "shall *prevail* over any contrary provision of the law". It should be underlined that, in the Constitution of 1952, there was no corresponding provision establishing the precedence of rules, other than the constitutional ones, over national provisions, meaning that, under the previous Constitution, international law and therefore, the Convention, had the force of a simple law.[2263] From its current prevalence, it is made obvious that, the Convention is not threatened to be ousted by a conflicting younger national law under the application of the principle *lex posterior derogat legi priori*. In practice, upon ratification of international treaties by law, judges apply the international treaty directly and not its ratifying statute, as the latter can be subject to amendment or annulment by subsequent legislation.[2264] Meanwhile, it is even supported by the Greek legal theory that, the doctrine lex posterior does not apply at all in the field of human rights, whereby national judges should apply the provision that is most favourable for the protection of human rights in the context of the specific case.[2265] It should be further noted that, the *precedence* of international law, as provided by constitutional Article 28(1), is different from the *increased legal force* which is provided to specific national laws by Article 107 of the Constitution and which aims to safeguard them by limiting the possibilities of their amendment.[2266] What the constitutional legislator has aimed with the precedence of international law under Article 28(1) of the Constitution, was to recognise that, the national legislator does not have the power to intervene and annul the application of international law.[2267] With regard to precedence, it is also supported that, besides resulting in the prevailing force of international law over any *subsequent* national law, it also encompasses the precedence of international law over *previous* national law.[2268] Nevertheless, accepting that international law enjoys supremacy over even *previous* national law means that, the date of the national Ratification Law is practically irrelevant for the starting point of its prevailing force.[2269]

A combined reading of Articles 28(1) and 36(2) of the Constitution yields paradoxical results in that, on the one hand, Article 28(1) provides for a *general* ratification requirement of international treaties, whilst Article 36(2) provides for the requirement of ratification of *certain* categories of international treaties.[2270] According to an opinion expressed in literature, the

[2261] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), p. 59.
[2262] Krateros: Problems of Interpretation of Article 28 para. 1 of the Constitution (translated from Greek), p. 101.
[2263] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), pp. 133, 155.
[2264] Ibid., p. 169.
[2265] Roukounas: International Protection of Human Rights (translated from Greek), p. 48.
[2266] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 135.
[2267] Ibid., p. 136.
[2268] Roukounas: International Law (translated from Greek), p. 76.
[2269] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 93.
[2270] Ibid., p. 165.

specifics of the relationship between constitutional Articles 28(1) and 36(2) are effectively regulated and highlighted by Article 28(1) alone in the sense that this provision contains all requirements necessary.[2271] Nevertheless, while the wording of Article 28(1) of the Constitution seems to be indeed supporting this view, however, this opinion removes any regulatory meaning from Article 36(2) of the Constitution while it also seems to be contradicting the interpretative maxim *ut res magis vallat quam pereat*, which requires that, an interpretation must grant an as much as possible efficient meaning to a provision and not abolish it.[2272] According to another view, constitutional Article 28 regulates the *internal* legal force and Article 36 the *international* legal force, while the relationship between the two Articles is one of *general* versus *specific*, meaning that, *all* treaties need to be ratified by law in order to become valid domestically but, *some* treaties require their ratification even in order to stand in the international field.[2273] However, this view does not appear justified, since the international validity of a treaty is governed by international law and not by national law.[2274] Yet another view suggests that, Article 28(1) of the Constitution necessitates ratification in order for the international law to *prevail* over national law, whereas Article 36(2) of the Constitution requires ratification only as a *formal condition* for the application of international law within the domestic legal order.[2275] More specifically, it is supported that, the ratification statute of Article 28(1) is required exclusively for the *supremacy* of international law, which is the crucial regulatory element of this constitutional article; namely the hierarchy of international law in connection with the internal rules.[2276] As a result, in this regard, a treaty that has not been ratified by law will not benefit from the supremacy of Article 28(1) of the Constitution.[2277] This view seems to be more successful in solving the problem of the interpretative correlation of Articles 28 and Article 36, while it is argued to be embodying an almost *obvious* character for those who took part in the debate around Article 28 during the preparative works of the drafting of the Constitution.[2278]

1.3.2. Arguments of a supra-constitutional classification

As highlighted, constitutional Article 28(1) provides that, generally recognised rules of international law and international conventions ratified by statute shall prevail over any contrary provision of the law. In this context, the prevailing sentiment is that, by regulating that, incorporated international treaties shall prevail over *national law*, the constitutional legislator did not intend to include the constitutional provisions but instead, only the rules resulting from common legislation.[2279] In fact, it is widely accepted, both by the Greek theory and jurisprudence, that, international law does not prevail over the Constitution but rather, constitutes an 'intermediate level', interfering in the hierarchical relationship between Constitution, laws and normative acts.[2280] Conversely, constitutionalists almost unanimously

[2271] Krateros: Problems of Interpretation of Article 28 para. 1 of the Constitution (translated from Greek), p. 114.
[2272] Ibid., p. 115.
[2273] Ibid., pp. 115-116.
[2274] Ibid., p. 117. Krateros explains that in order for an international treaty to be declared invalid for not respecting domestic law, specific requirements in accordance with Article 46 of the Vienna Treaty should be satisfied, such as that the relevant rule of national law is fundamental. Krateros also mentions in this regard that the fundamental nature of a rule does not necessarily coincide with its constitutional nature.
[2275] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 167.
[2276] Krateros: Problems of Interpretation of Article 28 para. 1 of the Constitution (translated from Greek), pp. 119-120.
[2277] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 173.
[2278] Krateros: Problems of Interpretation of Article 28 para. 1 of the Constitution (translated from Greek), pp. 120-121.
[2279] Roukounas: International Law (translated from Greek), p. 76.
[2280] Ibid. Roukounas refers in this regard to CoS 2960/83 and SHC 69/92.

take the view that, the notion of treating international law as an intermediate category is lacking qualitatively sound arguments.[2281] At the same time, there exists a theoretical discussion in contemporary legal science concerning the superiority of international rules over constitutional rules, with a number of scientists arguing that, international law prevails over the Constitution.[2282] In fact, already during the preparatory works of the Constitution of 1975, several speakers have expressed their views of a *supra-constitutional* power of certain rules of international law, but these views were not included in the finally adopted text.[2283] The Council of State in a judgment of 1997 has also expressed its view with regards to a supra-constitutional power of the ECHR, but this view was not further followed, neither in the seven-membered compositions nor in the plenary.[2284] In total, the notion of a supra-constitutional power of the Convention is declarative of the effort to upgrade the role of the Convention in the Greek legal system and, to enhance the openness of the Constitution towards international law.[2285] In this vein, it is argued in Greek legal theory that, the ECHR has, at least partly, replaced the Constitution on a number of levels and especially in terms of its *guaranteeing*, its *organisational* and its *legitimating* functions.[2286] Specifically in relation to the legitimating function of the Constitution, it is supported that, the frequent convictions of a Member State constitute an irrefutable proof of the delegitimisation of this state, both on a national and an international level.[2287] More moderate views suggest that, the issue of supremacy between constitutional law and ECHR law becomes a matter of perspective, depending on whether the observer is a judicial organ of national or international origin.[2288] The view that the issue of priority between the Convention and the Constitution is a matter of perspective is also justified on the basis that, international human rights law constitutes a special category in itself, which cannot be approached by classical means of national or international law.[2289] At the same time, the attempt itself to place international law on some level of the national pyramid of laws is considered futile because, by definition, international law is a separate and autonomous legal order that requires a different perception of hierarchical relations.[2290] Furthermore, it is argued that, the relationship between Constitution and Convention should not be approached as a purely hierarchical relationship in the context of Article 28 of the Constitution, but instead, as a meaningful relationship in the context of constitutional Article 25, which rules that, human rights and the principle of the *social rule of law* are guaranteed by the state. [2291] It becomes obvious that, Article 28(1) of the Constitution suffers a lack of clarity and legal certainty as to whether the supremacy of international law covers the entire body of the national legislation or it excludes constitutional law; thus, leaves the last word to the courts. In what regards the *practical* reality that the Convention is facing in Greece, this has been reflected in literature with the words "in Greece, the ECHR is living under the shadow of the Constitution".[2292]

[2281] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 134.
[2282] Roukounas: International Law (translated from Greek), p. 76.
[2283] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), pp. 132, 139.
[2284] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 413. Chrysogonos refers in this regard to CoS 249/97.
[2285] Kastanas: Compliance with the Judgments of the European Court of Human Rights and the Contribution of the Greek Judge (translated from Greek), pp. 124-125.
[2286] Chrysogonos: The European Convention on Human Rights (translated from Greek), p. 57.
[2287] Ibid., p. 58.
[2288] Ibid., p. 52.
[2289] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 194.
[2290] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 136.
[2291] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 177.
[2292] Ibid., p. 228. Chrysogonos cites in this regard BRIOLAS: L' application de la Convention Européenne des Droits de l' Homme dans l' ordre juridique des Etats contractants: Théorie et pratique helléniques, in: ILIOPOULOS - STRANGAS: Grundrechtsschutz im europäischen Raum - La protection des droits de l' homme dans le cadre européen, p. 83.

Another approach supports the view that, those *generally recognised rules of international law* which possess a *universal* character shall prevail over constitutional rules.[2293] Article 2(2) of the Constitution specifically regulates that "Greece, adhering to the generally recognised rules of international law, pursues the strengthening of peace and of justice and the fostering of friendly relations between peoples and states". It is noted that, this Article constitutes a clear statement that the respect for international law is a basic guideline of foreign policy and a prerequisite for accomplishing the purposes of mutual international understanding and co-operation, in the interests of human welfare.[2294] It is further highlighted that, the word *recognised*, as used by constitutional Article 2(2), has a broader meaning than it has in the context of constitutional Article 28(1); otherwise it would be covered by the content of Article 28 and would have no reason for existence.[2295] Furthermore, the Greek version of the Constitution actually uses different terms in both Articles, whereby Article 2(2) refers to generally *recognised* rules and Article 28(1) to generally *acknowledged* rules; however, this differentiation has not been adopted in the official translation, as it is widely accepted that, the constitutional legislator basically intended to express the same meaning.[2296] It is further stressed that, the constitutional Articles 2(2) and 28(1) shall not be understood as including the *general principles of law recognised by civilised nations*, since such an extension would complicate matters and add a heavy burden to Greek judges.[2297] Meanwhile, the term *generally recognised rules of international law* is considered misleading with respect to the implementation of rules and on the basis that it does not succeed in demarcating neither *convention* from *non-convention rules* nor *general* from *specific* international law.[2298] In this regard, Article 100(1)(f) of the Constitution regulates that, within the jurisdiction of the Special Highest Court, shall fall "the settlement of controversies related to the designation of international law as *generally acknowledged* in accordance with Article 28(1)"; its rulings shall furthermore have an *erga omnes* effect.[2299] In any case, the notion of recognising the Convention as a set of generally recognised rules of international law is, similarly to what applies for Article 25 of the German Basic Law, widely contested in theory and, the prospects of accepting its supremacy based on this argument are rendered limited.

There are also attempts to establish the supra-constitutional power to the Convention on the basis of its connection to Community law.[2300] In this vein, a referral decision of the Council of State in 1994 has welcomed the possibility for the incorporation of the ECHR into primary Community law.[2301] In another referral decision of the Council of State in 1997, the majority has held that, the provisions of the Convention had become primary Community law through the *direct* reference to them in the Treaty of Maastricht.[2302] The following year, a similar

[2293] Aravantinos: Introduction to the Science of Law, p. 99.
[2294] Roukounas: International Law (translated from Greek), p. 74.
[2295] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 116.
[2296] Ibid., pp. 114-115; Roukounas: International Law (translated from Greek), p. 241.
[2297] Roukounas: International Law (translated from Greek), p. 246.
[2298] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), pp. 64-66.
[2299] The erga omnes effect is recognised in Articles 21(1) and 54(1) of the Code of the Special Highest Court (Law No. 345/1976, Government Gazette A 141).
[2300] Kastanas: Compliance with the Judgments of the European Court of Human Rights and the Contribution of the Greek Judge (translated from Greek), p. 124.
[2301] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 185. Chrysogonos refers in this regard to CoS 3502/1994 and 249/1997.
[2302] Kastanas: Compliance with the Judgments of the European Court of Human Rights and the Contribution of the Greek Judge (translated from Greek), p. 124. Kastanas refers in this regard to CoS 3502/1994, 249/1997. According to Article 6(2) of the Treaty on European Union (TEU): 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms

approach of the Convention, namely as an integral part of primary Community law, has been followed by the minority of a Council of State judgment.[2303] However there has not been consistent follow-up in national case-law in this respect and the trend of 'innovative' approaches did not prevail.[2304] Counterarguments to the argument of the supremacy of ECHR law as based on its relation to EU law, underline the fact that, several Greek courts have denied even the prevalence of EU Law over national law, despite the ECJ having repeatedly emphasised its prevalence.[2305]

1.4. Normalising conflict with national law

1.4.1. Overlaps with constitutional provisions

Before seeking for the measures to normalise conflict, attention should be paid in detecting whether a conflict actually exists. In order to come to a conclusion as to whether a conflict is actual and not merely hypothetical, the purpose served by the treaty and by the respective national provision has to be firstly detected.[2306] In this context, it is stressed that, conflicts mainly arise due to the fact that, the Parliament, prior to ratifying a treaty, does not carry out a detailed examination of its content and proceeds with the adoption of laws in the future which contradict this content.[2307] Furthermore, as previously mentioned, wherever national legislation provides broader or more specific protection of aspects not covered by international law, such a conflict cannot be established and, national law shall in this case, according to Article 53 ECHR, apply with primacy.[2308] In this regard, it should be noted that, not only should *national law* not limit the minimum protection granted by the ECHR, but also, the *Convention* should not limit the protection provided by national law.[2309] Nonetheless, in the case of Greece, such a reduction in the protection of constitutional rights on the basis of the guarantees of the Convention has started being observed shortly after the adoption of the Constitution in 1975.[2310] More specifically, the Supreme Court of Cassation[2311] had justified restrictions on the *freedom of opinion* and on the *press freedom*, on the basis of Article 10 ECHR; an unfounded and also impermissible under Article 53 ECHR reasoning that has unfortunately been further adopted in a number of subsequent decisions.[2312] In this context, the practice of Greek courts to invoke the ECHR not in order to utilise its content, but instead, in order to justify a reduction in the protection granted by constitutional provisions, is considered directly contrary to Article 53 ECHR and reversing of the actual *ratio* of the Convention.[2313] With regard to the restrictions introduced by the Constitution itself, these mostly have the character of tolerance and do not constitute 'genuine' restrictions; at the same time, *liberty* remains the general rule and the

signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

[2303] Ibid. See CoS 1930/1998.

[2304] Ibid.

[2305] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 142.

[2306] Ibid., p. 189.

[2307] Ibid.

[2308] Roukounas: International Protection of Human Rights (translated from Greek), p. 48; Matthias: European Convention on Human Rights (translated from Greek), p. 17.

[2309] Grabenwarter/ Pabel: Europäische Menschenrechtskonvention, p. 13.

[2310] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 209.

[2311] The Supreme Court of Cassation, i.e. the Supreme Civil and Criminal Court is hereinafter also referred to as Supreme Court, SCC or Areopagus.

[2312] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 209. Chrysogonos refers in this regard to SCC 794/1976.

[2313] Ibid., pp. 209, 213.

principle *in dubio pro libertate* continues to apply.[2314] Moreover, the Constitution allows, through the reservations in the favour of law, for certain legislative interventions, however, it does not render these legislative choices obligatory and thus, they can be blocked by provisions included in international conventions.[2315] Consequently, it is expressed that, the role of the Constitution is to serve as a limit to the freedom of the legislator, without excluding tighter limits to be imposed by international conventions.[2316]

The prevalence of international conventions that have been promulgated by law and of generally recognised rules of international law, as provided by Article 28(1) of the Constitution, subsequently leads to the non-application of contrary ordinary national legislation; by virtue of the national legislation being positioned lower in the hierarchy of rules. Hereby, it becomes obvious that, the problem of conflict between ECHR law and national law may only threaten the application of the Convention in the case of an incompatibility between the Constitution and the Convention. A hierarchically soundly structured national legal order undoubtedly requires the interpretation of each category of rules in the light of their *higher-ranking* legal rules; such as the interpretation of ordinary legislation in the light of constitutional provisions.[2317] However, international law constitutes a particular case and, accepting the notion that, human rights treaties can only be given absolute respect if their hierarchical status corresponds to that of constitutional provisions, would invalidate their meaning.[2318] Additionally, accepting with automaticity that, the Constitution prevails over ratified international conventions, makes a constitutional interpretation in accordance with international law sound somewhat paradoxical.[2319] In this vein, the rush of national judges to resort to the argument of hierarchical relationship, has been criticised for being a manifestation of their personal weakness or unwillingness to interpretively approach the Convention by utilising the extensive case-law of the Court.[2320] In fact, the practice of Greek judges to invoke the precedence of the Constitution over the Convention is, in most cases, unnecessary for the foundation of the conclusion of the legal reasoning, since there usually exists no insurmountable contradiction between the two texts.[2321] Consequently, it is suggested to invoke the higher ranking of the Constitution only as a means of last resort and only after all efforts for the harmonisation of the respective provisions have been exhausted.[2322] The Constitution itself does not deny the broadening of the scope of the protection it provides, since such a broadening would only serve to complement its functions and its overall purpose.[2323] It has been further supported that, the obligation for an interpretation in accordance with international law actually *results* from the Constitution as such, and especially from those constitutional Articles referring to international law.[2324] Moreover, it is expressed that, Article 2(2) of the Constitution, which rules that Greece seeks to consolidate peace, justice and the development of friendly relations between peoples and states, also encompasses the respect for the true content of agreements; in

[2314] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 191.
[2315] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 179.
[2316] Ibid., p. 178.
[2317] Ibid., p. 194.
[2318] Ibid., p. 179.
[2319] Ibid., p. 194.
[2320] Ibid., p. 184.
[2321] Ibid.
[2322] Kastanas: Compliance with the Judgments of the European Court of Human Rights and the Contribution of the Greek Judge (translated from Greek), p. 120.
[2323] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), pp. 190-191.
[2324] Ibid., pp. 54, 140, 189-190; Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 193.

this case for the content of the Convention, in the way that this is crystallised by the Court.[2325] In practical terms, an interpretation of the Constitution consistent with the international obligations of the state, carries with it a *negative* component, which means that, the judge, must reject interpretative approaches of the Constitution that lead to contradictions with the Convention; this, only if the judge can support another coherent interpretive version.[2326] In particular cases in which the interpretative harmonisation of the Constitution and the Convention proves futile, the only remaining solution is to amend the relevant constitutional provision.[2327] However, given the difficulty thereof and the time required for the process of a constitutional revision in Greece, the jurisprudential harmonisation becomes a necessity.[2328] With regard to its *positive* dimension, the interpretation of the Constitution in accordance with international law means that, the interpreter shall benefit from the interpretive lines drawn by the judicial organs of the Convention in the interpretation of the relevant provisions of the Constitution.[2329]

It is underlined that, the *recognition* by the states of the rights enshrined in the Convention does not indicate at the same time that states can also determine how these rights are to be interpreted.[2330] In contrast, states are expected to respect the very content of these provisions, in the way that this is determined by the judicial organs of the Convention.[2331] It remains an option for a government to make a *declaration*, by which it can clarify its position on whether it will or not interpret an article, a paragraph or a sentence with a certain sense.[2332]. On its part, Greece has not made any relevant declaration as to a part of the ECHR and therefore, no such interpretive particularities have been communicated. It can be observed that, in some cases, the Greek judge takes advanced positions, demonstrating a great zeal for the sound implementation of the Convention.[2333] Nevertheless, unfortunately, the Greek judiciary, for its most part, seems to be facing difficulties in properly interpreting the Convention and in fully utilising the European jurisprudence of the Court.[2334] what occurs is that, the Greek courts tend to easily come to the conclusion that a violation of the ECHR is not established, and that, even when they do confirm an inconsistency with the ECHR, this reference usually takes the form of a standard position without any further analysis.[2335] In this vein, it has been stressed that, even those enlightened judges that seem to be aware of the ECtHR case-law, deliberately avoid to explicitly refer to ECtHR judgments as if such reference would be derogatory for their own authority.[2336] What is further observed in practice is, a recourse to the Convention so as to ascertain the absence of the required conditions for its implementation, in the context of which,

[2325] Roukounas: International Law (translated from Greek), p. 206.
[2326] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 202.
[2327] Chrysogonos: The European Convention on Human Rights (translated from Greek), p. 56; Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 196.
[2328] Ibid., p. 200.
[2329] Ibid., p. 204.
[2330] Chrysogonos: The (non-) Application of the European Convention on Human Rights by the Greek Courts (translated from Greek), p. 203.
[2331] Ibid.
[2332] A declaration, unlike a reservation (Articles 19-23 VCLT), does not limit the legal effect of a treaty, but rather, constitutes a statement on the country's understanding of certain parts of the treaty. This statement is usually contained in a letter, in the instrument of ratification, or in a note verbale (i.e. in a diplomatic note).
[2333] Kastanas: Compliance with the Judgments of the European Court of Human Rights and the Contribution of the Greek Judge (translated from Greek), p. 123.
[2334] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 327.
[2335] Perrakis: Dimensions of the International Protection of Human Rights (translated from Greek), p. 244.
[2336] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 284.

the court dealing with the matter, considers either the disputed issue as irrelevant to the Convention or the Convention as inapplicable due to procedural or other reasons.[2337]

1.4.2. The problem of automaticity in the control of conventionality

Apart from the interpretation of national law in accordance with the Convention, another form of recourse of the Greek courts to the Convention is the *control of conventionality*.[2338] It is argued that, since the ECHR has been incorporated with an increased formal power, a control on the 'conventionality' of national laws, initiated ex officio and pursuant to the general principle *iura novit curia*, is required.[2339] More specifically, it is debated that, Article 28 of the Constitution, in stating that the Convention becomes integral part of domestic law, it uses the word *law* with a broad meaning, namely one similar to that of Article 93(4) of the Constitution, which provides that courts are required to not apply law that is contrary to the Constitution.[2340] In this vein, the 'conventionality control' should be diffused and incidental and it should occur despite the lack of an explicit relevant provision; similarly to the constitutionality control, which has applied since 1864 without the formal existence of a relevant competence, simply by invoking the nature of the Constitution as fundamental law.[2341] In terms of its logical structure and reasoning, the check on the compatibility of national laws with international law assimilates the check on their constitutionality as well as the review by way of *interlocutory procedure*.[2342] In this regard, it often occurs that, national judgments finding a provision as unconstitutional, they complement their reasoning by declaring with great ease a parallel incompatibility of the provision with the Convention.[2343] As a result, whenever unconstitutionality is detected, the judge will usually add the unconventionality of the provision, in a way that the ECHR is degraded to being cited only so as to confirm the meaning of the constitutional provision; thus, its independent regulatory content is diminished, if not extinguished.[2344] Even when Greek courts detect an infringement of the Convention, they do not refer to it exclusively, but rather, cumulatively and parallelly with the infringement of the Constitution; thus, without drawing a clear line between the two legal documents.[2345] The problem occurs also vice versa, namely in the sense that, laws which have passed the test of constitutionality are automatically and *ipso facto* considered to have also passed the test of their compatibility with the Convention.[2346] As a result, a control of conventionality without a parallel control of constitutionality, constitutes the exception rather than the rule.[2347] Such conduct, however, causes concerns about not only the structure of the relevant judgment issued, but also, about whether there remains any purpose for a conventionality control and any influence of it on the legal reasoning, after the control of

[2337] Ibid., p. 333.
[2338] Control of conventionality is used by the author to indicate the control of compatibility with the Convention.
[2339] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 200-201, 225. The Latin legal maxim iura novit curia (=the court knows the law) means that the court has the duty to seek and determine the applicable law, and to apply it ex officio, without being limited to the legal arguments of the parties (different is the matter that the court is normally bound by the amount of relief sought by the parties).
[2340] Ibid., p. 223. Under Article 93(4) of the Greek Constitution the courts are checking the constitutionality of statutes and are bound to not apply those who they find as contrary to the Constitution.
[2341] Ibid., pp. 201, 225.
[2342] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 137.
[2343] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 270, 278, 284.
[2344] Ibid., pp. 201-202, 313-314.
[2345] Trekli: Binding Force and Execution of Judgments (translated from Greek), pp. 622-623.
[2346] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 412.
[2347] Ibid., p. 284.

constitutionality has already been completed.[2348] Characteristic of a jurisprudential epidermal deal with the Convention are the common references to Article 6(1) ECHR after the reasoning of the judgment has been already established on Article 20(1) of the Constitution, which in this case do not bring any further results than those already arising from the application of Article 20(1).[2349] In total, the recourse to the Convention in the context of the interpretation of laws according to the Constitution, appears superfluous and both methodologically and substantially misplaced, since it attributes to the ECHR provisions, meanings that have not been given to them by the ECtHR; therefore, it confirms once again that, the Convention is treated as a corollary of the Constitution.[2350] The superfluous reference to the Convention is occasionally accompanied by a reference to the UN Declaration of Human Rights, which, in turn, neither leads to consistent results nor serves the legal reasoning in any way.[2351] In total, it can be supported that, the Convention is treated by Greek courts as a mere component of the Constitution without its own distinct regulatory content, a practice demonstrating an obstruction in the process of a potential full implementation of the Convention at the national level.[2352] An older appellate decision of the eighties concerning the prohibition of the participation of foreigners in the administration of an association had even accepted that, it is unnecessary to consider a conventionality control, because the Convention has been indirectly repealed with regard to professional associations.[2353] On the contrary, a more recent appellate decision of the late nineties has had a remarkable reasoning, whereby it accepted that, the unconstitutionality control is rather secondary in comparison to the unconventionality control, which is be held out with primacy.[2354] Furthermore, it has even occurred that, the reference to the provisions of the Convention has served as the main foundation of the legal reasoning, outweighing the traditional understanding of the regulatory scope of their corresponding constitutional provisions.[2355] At the same time, it should be noted that, even an independent recourse to the Convention without a parallel reference to the corresponding constitutional provisions, does not guarantee the proper implementation of the former.[2356]

2. Compliance with ECtHR judgments

2.1. The legal effect of ECtHR judgments and Article 28(2) of the Constitution

Whilst arguments on the supremacy of international law over the Constitution might, at first glance, seem to be neglecting the regulatory significance of the Constitution, however, under the arrangements of Article 28(2) of the Constitution, such a supremacy may indeed be recognised under certain conditions.[2357] More specifically, constitutional Article 28(2) cites that, whenever necessary, and, so as to serve a great national interest and to promote cooperation

[2348] Ibid., pp. 270, 278, 313-314.
[2349] Ibid., pp. 277, 318.
[2350] Ibid., p. 318.
[2351] Ibid., p. 332.
[2352] Ibid., p. 284.
[2353] Ibid., p. 295. Chrysogonos refers in this regard to the decision of the Court of Appeal of Athens 9279/1980.
[2354] Ibid., p. 300. Chrysogonos refers in this regard to the decision of the Court of Appeal of Piraeus 1941/1997.
[2355] Ibid., p. 318. Chrysogonos underlines that Article 6 of the Convention has served as the foundation of the legal reasoning, outweighing the traditional understanding of the regulatory scope of Article 20(1) of the Constitution.
[2356] Ibid., p. 322.
[2357] Roukounas: International Law (translated from Greek), p. 76.

with other states, competencies normally provided for by the Constitution may be provided, by a treaty or an agreement, to agencies of *international organisations*.[2358] The terminology of paragraph 2 of Article 28 of the Constitution, similarly to paragraph 1, has been criticised for being rather limiting in the use of the terms *treaty* and *agreement*, since the delegation of powers to an international organisation may occur by other forms of international commitment too.[2359] As to the relationship between the two paragraphs of constitutional Article 28, it has been highlighted that, paragraph 1 derives from a different background than paragraphs 2 and 3, a fact which results in two different regulatory systems within the same Article.[2360] In light of such regulatory deficits, it is argued that, the need for the establishment of a systematic *law of international relations* in Greece gradually begins to mature.[2361] In any case, similarly to what applies for Article 24 of the German Basic Law, the difficulties in recognising the ECtHR as an international organisation to which such competencies have been granted apply also here, and, render the argument of prevalence rather weak.

2.2. Orientation effect

It is expressed that, an indirect recognition of the importance of judicial precedents is implied by Article 88(2) (b) of the Constitution, which refers to the submission of certain categories of disputes to a Special Court, when these affect a "wider circle of persons".[2362] At the same time, it is underlined that, in the context of the constitutional requirement for a specific and detailed justification of judicial decisions and, alongside with the provisions of Articles 1, 32(1) and 52 ECHR, Greek courts are expected to take ECtHR case-law into account and to refer to it equally and with the same way they do for their own case-law.[2363] It is expected that, a consistent with the Convention interpretation of the Constitution does not only encompass a *negative* facet in the sense of avoiding interpretations which contradict the Convention, but also, a *positive* one, in the sense of deriving inspiration from the Court's case-law to enrich the national case-law.[2364] The truth is that, drawing inspiration from the evolutive interpretation of the Convention for the interpretation of the Constitution, renders a conflict between the two texts less possible and contributes to the better protection of human rights.[2365] Moreover, whilst respect for judicial precedents helps create a uniform judicial practice, in Greece, changes in case-law occur frequently, even within short time and, are not necessarily accompanied by a substantial change

[2358] The paragraph further provides that a majority of three-fifths of the full number of Members is required in order to pass a law ratifying this treaty or agreement. In other cases, in order for a parliamentary law to be valid, the simple majority of the members present and voting is required. Furthermore, Article 28(3) states that Greece shall pass a law by absolute majority of the Parliament members to limit the exercise of national sovereignty, in cases where this is dictated by an important national interest, and given that such a conduct does not affect human rights and the foundations of democratic government and is performed in respect for the principles of equality and the condition of reciprocity.
[2359] Krateros: Problems of Interpretation of Article 28 para. 1 of the Constitution (translated from Greek), pp. 99-100.
[2360] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), pp. 54, 57.
[2361] Krateros: Problems of Interpretation of Article 28 para. 1 of the Constitution (translated from Greek), p. 123.
[2362] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 398. The Article refers to disputes concerning all types of remuneration and the pensions of judges and where the resolution of the relevant legal issues may affect the wage, pension or tax situation of a wider circle of persons.
[2363] Chrysogonos: The (non-) Application of the European Convention on Human Rights by the Greek Courts (translated from Greek), pp. 201-202; Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 399. Justification is required by Article 93(3)(a) of the Constitution.
[2364] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 411.
[2365] Trekli: Binding Force and Execution of Judgments (translated from Greek), p. 623.

in the social or legal reality.[2366] Formalism is in fact widespread in the Greek case-law, while the contested issue is usually not addressed within the context of reality, but rather, by resorting to complex and multifaceted analyses, often based on outdated legal provisions.[2367] In this respect, it is expressed that, formalism and similar attitudes can lead to the denial of justice and may even become dangerous especially in the field of criminal justice, which concerns basic human goods such as that of individual freedom.[2368] On the contrary, the ECtHR comes to mitigate formalism with judgments that offer simple solutions and which teach that, task of the law and the judiciary, is to truly deal with the substance of the case.[2369] Under these circumstances, Greek judges must come to understand that they can find in Strasbourg a very valuable ally in their attempt to, overcome preconceptions and entrenched attitudes and to, cover certain deficits that the legal theory alone cannot directly affect.[2370] In this context, it constitutes an encouraging occurrence that Greek courts are occasionally willingly implementing ECtHR judgments which have not been issued against Greece but against other Member States.[2371] For instance, the Supreme Court has actioned this, by implementing relevant ECtHR case-law arising mainly from French cases.[2372] It is also argued that, modifications in Greek procedural law have helped judges to become more conscious of the role of the ECtHR and to take in advance account of its case-law in order to reduce the possibility of an application against Greece being brought before it.[2373]

3. Execution of ECtHR judgments

3.1. Theoretical debate on the addressees

3.1.1. Article 28(1) of the Constitution and the formal prevalence of the Convention as a basis for a strictly binding nature of ECtHR case-law on all national bodies

It is raised that, the formal prevalence of the Convention under Article 28(1) of the Constitution entails that, *all* national institutions must guarantee the protection level required by the Convention and the Court.[2374] Nevertheless, how exactly this shall occur is a matter of interpretation, since neither Article 28(1) nor another constitutional provision give any further direction with regard to the application of the decisions of international organs, of what is else

[2366] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 397-398.
[2367] Karelos: The Influence of the Case-law of the European Court of Human Rights on Greek Jurisprudence, pp. 1929-1930.
[2368] Ibid., p. 1930.
[2369] Ibid., p. 1931.
[2370] Kastanas: Compliance with the Judgments of the European Court of Human Rights and the Contribution of the Greek Judge (translated from Greek), p. 122.
[2371] Ibid., p. 124. Kastanas refers in this regard to case SCC 14/2001. The SC held that the requirement of serving the sentence in order for the appeal to be admissible, is particularly burdensome when it comes to minor offences carried out before long time and without special demerit; the CoS has in this regard been significantly influenced by the French case-law.
[2372] Ibid. Kastanas refers in this regard to case SCC 14/2001. The SC held that the requirement of serving the sentence in order for the appeal to be admissible, is particularly burdensome when it comes to minor offences carried out before long time and without special demerit; the CoS has in this regard been significantly influenced by the French case-law.
[2373] Chrysogonos: The (non-) Application of the European Convention on Human Rights by the Greek Courts (translated from Greek), p. 205.
[2374] Matthias: European Convention on Human Rights (translated from Greek), p. 17.

known as *international institutional law*.[2375] It has been argued that, an amendment of the Constitution and specifically of Article 28(1) should be considered, in order to provide a solution to the problem of the execution of decisions which have been taken under the provisions of a treaty that has been ratified by parliamentary statute and incorporated with prevailing force.[2376] Furthermore, in absence of relevant constitutional provisions, national legislation could also define in a direct manner the specifics for the application of international institutional law, without precluding a cumulative use of solutions provided by other legal sources too.[2377] Although rare, international law itself, such as the treaty establishing an institution or another additional treaty specifically conducted for this purpose, can as well provide for solutions on the matter of the execution of institutional acts.[2378] If none of the sources mentioned are able to offer an answer, the adoption of *ad hoc* solutions is also permitted, which in fact constitute standard practice in Greece and which could be extended so as to cover the execution of ECtHR judgments too.[2379] Such an ad hoc solution could be provided by enabling those provisions which delegate legislative power to the executive under Article 43(2) and (4) of the Constitution and on the basis of which the executive acts to accomplish the objectives of the legislation.[2380]

3.1.2. Analogous application of the domestic applicability of foreign decisions

Article 905 of the Code of Civil Procedure determines the preconditions and the procedure relating to the request for a *declaration of enforceability*, providing in paragraph 3 that, when the declaration concerns foreign judgments, the requirements of Article 323 lit. (2) - (5) Code of Civil Procedure[2381] have to be as well fulfilled. Article 323 CCiP in turn rules that, when certain conditions are met, a foreign civil court decision is considered valid and its res judicata is *recognised* within Greece without any further action.[2382] In this vein, under Greek law, *enforcement* is different to the *recognition* of a foreign judgment, while the latter takes place almost automatically.[2383] In this context, it is supported that, since the judgments of the Court

[2375] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), pp. 199-200. Krateros/ Oikonomidis/ Rozakis/ Fatourou mention that international institutional law includes all decisions issued by institutions of public international organisations, regardless of the administrative, juridical or other character of their issuing institutions. For a further analysis on international institutional law. For further reading: SCHERMERS/ BLOKKER: International Institutional Law.
[2376] Ibid., p. 214.
[2377] Ibid., pp. 202, 205-206. A legislative act takes in this case the form of a framework law.
[2378] Ibid., pp. 202-204, 208. Krateros/ Oikonomidis/ Rozakis/ Fatourou mention that, in the case of an additional treaty specifically conducted for this purpose, the additional treaty would specifically regulate points of application and execution and would, because of its importance, have to be ratified according to the procedure of Article 36(2) of the Constitution.
[2379] Ibid., pp. 209-211. Krateros/ Oikonomidis/ Rozakis/ Fatourou underline that ad hoc solutions may be applied for binding as well as for nonbinding acts. Non-binding institutional acts, such as opinions, proposals or Recommendations, usually become valid in the domestic legal order by a national instrument of approval or acceptance, which can, depending on the content of the institutional act, take the form either of a legislative or an administrative act. Krateros/ Oikonomidis/ Rozakis/ Fatourou continue by explaining that binding acts on the other hand, do not require approval in order to become valid, as they are by definition, or more precisely by ratification of the Treaty establishing the organisation that issued the act, binding upon Member States.
[2380] Ibid., p. 214.
[2381] Hereinafter also referred to as CCiP.
[2382] Article 323 CCiP, sets as a precondition for the recognition of a foreign judgment that the foreign judgment is not contrary to the res judicata resulting from a judgment of a Greek court.
[2383] Besides Article 905, which according to its para. 4 also applies for the recognition of foreign judgments, relevant are the Articles 323 and 780 of the Greek CCiP.

are already binding for the parties, an analogous application of Article 905 CCiP for their execution, at least in the case of *just satisfaction* judgments, should also be regarded as legitimate.[2384] It could be also maintained that, Article 323(4) CCiP, in providing that, a foreign judgment should not be contrary to a previous judgment of a Greek court on the same case in order for it to produce its res judicata, it is allowing the possibility of such a recognition of enforceability only for the case of *just satisfaction* judgments who are firstly dealt with by the Court and not the national courts. In this respect, it is expressed that, the mandatory Law No. 1846/1989[2385] on the *Regulations for the defence of Greece against individual applications filed under Article 25 ECHR*, could be interpreted, although with certain difficulties, as a tacit recognition of the res judicata of ECtHR judgments awarding just satisfaction.[2386] This notion is based on Article 6(2) of the same legislation, which regulates the earmarking of a special budget in the Ministry of Finances in order to cover the required amounts in the case of a friendly settlement or a conviction.[2387] Although, in general, the Greek legislator has evidently failed to provide for ways which will ensure the enforceability of judgments that award just satisfaction; the question arises as to whether this omission entails a violation of both the *right to property* and the *right to effective judicial protection*, or even, of the *right of personality*.[2388] However, since a constitutional obligation to protect the property that results from the enjoyment of internationally awarded compensations does not exist, it is considered that, the inclusion of a relevant heading in the general budget already constitutes a satisfactory protection of *property rights*.[2389] At the same time, further concerns as to a mutatis mutandis application of Articles 905 and 323 CCiP are raised.[2390] More specifically, it is stressed that, civil procedure provisions concern judgments of foreign *civil* courts, whereas human rights claims are more similar to claims of public law.[2391] Moreover, it is voiced that, because Article 905(2) CCiP provides that the foreign judgment shall be enforced only "if it is enforceable under the law of the *place* where it was issued" and, because the ECHR does not have a certain place of issue, an analogous application can hardly be supported.[2392]

[2384] Rozakis: Prologue (translated from Greek), p. 15.
[2385] Government Gazette A 108.
[2386] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), p. 67. Law No. 1846/1989 (Government Gazette A 108) sets, inter alia, the course of the investigation of such cases and the basics for the procedure to be followed in cases of an individual application filed against Greece. Law No. 1846/1989 refers to former Article 25 ECHR, which is the current Article 34. It shall be mentioned that, mandatory laws are issued by the government in exceptional circumstances without legislative authorisation.
[2387] Voulgaris: Implementation and Outcome of the judgments of the European Court of Human Rights in the Greek Legal Order (translated from Greek), p. 104. Stavropoulos: The Judgments of the European Court of Human Rights and the National Judge (translated from Greek), p. 77. Voulgaris refers in this regard to Article 29 of Law No. 2515/1997 (Government Gazette A 154) which has added indent (g) to Article 52 of Law No. 2362/1995 (Government Gazette A 247) and by which the rapid repayment of pecuniary obligations of the state to third parties arising from judgments of International Courts has been further facilitated. However, this legislation was later repealed by Article 177 of Law No. 4270/2014 (Government Gazette A 143).
[2388] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), pp. 74, 76.
[2389] Ibid., p. 76.
[2390] Ibid., p. 62.
[2391] Ibid., pp. 61-62.
[2392] Ibid., p. 63. The Article furthermore provides that, the foreign judgment shall not be contrary to good manners or to public policy. Iliopoulos-Strangas stresses that the wording should have been 'according to the law on the basis of which was issued' (and not according to the law of the place) in order to support an analogous application.

3.2. The role of national bodies

3.2.1. Judiciary

3.2.1.1. The shift in the judicial attitude

The attitude of Greek judges towards the ECHR system can be divided, as previously mentioned, into two periods, with the dictatorial regime as their dividing point.[2393] The first period was characterised by the incompleteness of the constitutional order and by the restrictive character of the legislation, resulting in a hesitancy alongside an infrequent implementation of the Convention and a lack of legal reasoning.[2394] In this context, the application of the Convention by the Greek courts, both prior to the dictatorial regime but also during its rise, has been described as minimal and deficient.[2395] In the second period, Greek courts have started to adapt to the complex demands of the *European order of human rights*, by providing adequate responses to the issues arising.[2396] The change in the previous trend was marked by a plenitude of jurisprudential references to the Convention, following the re-ratification of the Convention, however, this change did not necessarily also indicate a substantial qualitative improvement.[2397] In this vein, the prevailing perception of some decades ago, according to which, national courts could resolve differences by relying only on domestic law has become outdated and the Greek judges have come to realise that they did not have the final say and thus, had to re-approach their role in a way that would comply with international case-law.[2398] Nevertheless, a relative reluctance towards international case-law can still nowadays be observed, alongside with a lack of enthusiasm to directly refer to ECtHR judgments, what has been characterised as a "communication gap" between national judges and ECtHR judges.[2399]

3.2.1.2. Refusal of a stricto sensu binding force on national judges

On the basis of the incorporation of the Convention in Greece with *increased* normative force, it is argued that, national judges should give way to the application of Articles 41 and 46(1) ECHR, and subsequently, to ECtHR judgments which, in this context, have an *increased* formal power in comparison to the corresponding national procedural provisions.[2400] Moreover, as aforementioned, especially in what regards just satisfaction judgments, it is noted that, a conflict

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[2393] Perrakis: European Law of Human Rights (translated from Greek), p. 81.
[2394] Perrakis: Dimensions of the International Protection of Human Rights (translated from Greek), p. 243, Perrakis: European Law of Human Rights (translated from Greek), p. 82. As important decisions of the first period Perrakis refers (pp. 82-86) to cases Hadjianastassiou (App. No. 12945/87, 16/12/1992); Kokkinakis (App. No. 14307/88, 25.5.1993); Papamichalopoulos a.o. (App. No 14556/89, 26/6/1993); Holy Monasteries (App. No. 13092/87, 21/11/1994); Stratis Andreadis (App. No. 13427/87, 9/12/1194); Manousakis a.o. (App. No. 18748/91, 26/9/1996); Katikaridis (App. No. 19385/ 92, 15/11/1996); Bizzotto (App. No. 22126/93, 15/11/1996); Ahmed Sadik (App. No. 18877/91 15/11/1996); Valsamis (App. No. 21787/93, 18/12/1996); Hornsby (App. No. 18357/91, 19/3/1997); Tsirlis and Kouloumpas (App. No. 19233/91, 29/5/1997); Philis (No.2, App. No. 19773/92, 27/6/1997); Gitonas (App Nos. 18747/91, 19376/92, 19379/92, 28208/95 and 27755/95, 1/7/1997); Grigoriades (24348/94, 25/11/1997) and Canea Catholic Church (App. No. 25528/94, 16/12/1997).
[2395] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 228.
[2396] Perrakis: Dimensions of the International Protection of Human Rights (translated from Greek), p. 243; Perrakis: European Law of Human Rights (translated from Greek), p. 82.
[2397] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 228.
[2398] Rantos: The Impact of the Case-law of the European Court of Human Rights on the Right to Legal Protection in the Case-law of the Greek Courts, p. 1845.
[2399] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 412-413.
[2400] Ibid., p. 370.

between the res judicata of a final ECtHR judgment and that of an irrevocable Greek judgment can hardly be established, since just satisfaction claims are normally examined for the *first* time by the ECtHR.[2401] However, the prevailing opinion in Greek legal theory refuses that case-law can have the character of a legal source.[2402] Supporters of this opinion underline the fact that, Article 87(2) of the Constitution provides that, judges are subject only to the Constitution and the laws and thus, not to previous judgments, and the fact that, the constitutional legislator has expressly provided for only certain exceptions to this principle.[2403] In particular, these exceptions refer to the ability of the judgments of the Special Highest Court on the unconstitutionality of law and, of judgments of the Council of State, to repeal regulatory acts.[2404] In this light, on the basis of constitutional Article 87(2) and of the independence of national judges, it is expressed that, neither the case-law of national courts nor that of the ECtHR can be recognised as a precedent *stricto sensu binding* on Greek judges, however, that they must be taken into account.[2405] In this respect, following case *Twalib*[2406] which concerned the legal aid in the context of an appeal and, despite the fact that, the Court and the Commission had already held that Article 6 ECHR applies to appeals too, the Greek court subsequently ignored the relevant settled case-law.[2407] On the contrary, following case *Philis*[2408], the competent Greek court has considered that the ECtHR judgment was compulsory for the state, however, the Court of Appeal has later found that there was no possibility of applying the res judicata stemming from the Court's judgment.[2409] Meanwhile, in the case that a national court decides to depart from previous ECtHR case-law, it must make specific reference to the relevant ECtHR judgment and it must justify the reasons for its deviation.[2410] In principle, as long as the relevant ECtHR decision is mentioned, the national decision is considered specifically and thoroughly reasoned and, compliant with the constitutional requirement for specific and detailed judicial decisions.[2411] At the same time, it is underlined that, even in the case of a reasoned departure from an ECtHR judgment, the *interpretative precedent* resulting from the decision of the Court still remains violated and thus, compliance has still to be achieved.[2412] Conversely, where national judges simply ignore the case-law of the ECtHR, the decision is considered inadequately reasoned, a fact that, as suggested, shall be taken into account when evaluating judges for the quality in the exercise of their functions.[2413]

[2401] Ibid.
[2402] Ibid., p. 396.
[2403] Ibid.
[2404] At the same time, a huge discussion takes place in literature as to the fact that, with Law No. 3900/2010, the case-law of the CoS has indirectly been recognised as a source of law, since this legislation has rendered the admissibility of an appeal before the CoS dependant on the existence or not of relevant previous jurisprudence of the CoS.
[2405] Chrysogonos: The (non-) Application of the European Convention on Human Rights by the Greek Courts (translated from Greek), p. 204.
[2406] Twalib (App. No. 24294/94, 9/6/1998).
[2407] Kastanas: Compliance with the Judgments of the European Court of Human Rights and the Contribution of the Greek Judge (translated from Greek), pp. 119-120.
[2408] Philis (No.2, App. No. 19773/92, 27/6/1997).
[2409] Perrakis: Dimensions of the International Protection of Human Rights (translated from Greek), p. 242. The subsequent judgment to which Perrakis refers in this regard is the No. 5361/1993 of the Appellate Court of Athens.
[2410] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 399.
[2411] Ibid. See Article 93(3) of the Constitution.
[2412] Ibid.
[2413] Ibid. See Article 85(2)(b) of Law No. 1756/1988 (Government Gazette A 35).

3.2.1.3. De lege ferenda judicial tools

Possible reactions at the national level, following an ECtHR judgment that has found a violation of the Convention stemming from a national judgment, include filing an *appeal in favour of the law*.[2414] Such an appeal could be submitted to the Prosecutor of the Supreme Court on the basis of Articles 557 CCiP and 505(2) Code of Criminal Procedure[2415], while it would also presuppose the possibility to interpretively include the Convention in what is regarded as *law*, in the favour of which (law) it can be appealed under these provisions.[2416] In any case, it should be emphasised that, such an appeal does not produce any effects for the parties as such, however, it can still mark a change in future judicial practice.[2417] Another *de lege ferenda* solution suggests the *judicial review* of the relevant national civil court decision by analogous application of Article 544(1) CCiP, however, the requirement set out in this Article concerning the existence of two contradicting decisions, does not seem to be fulfilled here.[2418] In an effort to make this argument legally sound, it is expressed that, the relationship between the ECtHR judgment and the national judgment should be approached as if the national judgment is constituting an erroneous incidental diagnosis of a preliminary issue relating to the interpretation of the Convention.[2419] In what constitutes the solution of a *payment order* based on Article 623 CCiP on the execution of *just satisfaction* judgments, this has been considered inappropriate, since, besides the practical complications of this process, the ECtHR decision would in this way be relegated to a mere acknowledgment of debt, formalised on paper.[2420] In this respect, it is also underlined that, a payment order is a special procedure which is designed to satisfy the claims of creditors and which requires that, the pecuniary claim is claimable also through a regular procedure under the Code of Civil Procedure; thus a procedure different to the awarding of a *just satisfaction* that resembles closely an administrative appeal.[2421]

3.2.1.4. Implementing available judicial tools

The *reopening of proceedings* has been introduced as an option in the Greek legal order through the amendment of Article 525 CCrP, after the failed efforts to include the option of reopening the proceedings without legislative intervention, namely by means of a broad interpretation of the reasons that could establish the right to a retrial and by a publication of an explanatory circular on the deletion of convictions from criminal records.[2422] More specifically, Article

[2414] Voulgaris: Implementation and Outcome of the judgments of the European Court of Human Rights in the Greek Legal Order (translated from Greek), p. 100.
[2415] Hereinafter also referred to as CCrP.
[2416] Ibid.
[2417] Ibid. With the exception of matters concerning excess of jurisdiction or lack of material competence, cases in which such an appeal produces effects.
[2418] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 387-388. The judicial review indicates the remedy of overturning a judicial decision due to the reversal of another decision to which it is closely linked.
[2419] Ibid.
[2420] Voulgaris: Implementation and Outcome of the judgments of the European Court of Human Rights in the Greek Legal Order (translated from Greek), pp. 105-106.
[2421] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), p. 65.
[2422] Kastanas: Compliance with the Judgments of the European Court of Human Rights and the Contribution of the Greek Judge (translated from Greek), p. 132; Voulgaris: Implementation and Outcome of the judgments of the European Court of Human Rights in the Greek Legal Order (translated from Greek), p. 101. Article 11 of Law No. 2865/2000 (Government Gazette A 271) added indent (5) to para.1 of Article 525, however, the new provision did not make clear whether it shall apply also to old cases that have occurred before its entry into force. Voulgaris argues that the Article shall be thought as applicable to ECtHR judgments issued before that

525(1) (5) CCrP provided for the possibility of reopening the *criminal* proceedings where an ECtHR judgment has found a violation that was relating to the *fairness* of the procedure or to the *substantive* provision applied. At the same time, where the irregularities of the national judgment have not been decisive for the operative part, then the right to apply for retrial is not established.[2423] In this respect, criticism has stressed that, attempts to limit the scope of Article 525 CCrP to only *certain* categories of violations are misplaced and that instead, the Article should be interpreted in a way that includes *all* rights and freedoms enshrined in Section I of the Convention and in the substantive Protocols thereto.[2424] As the wording of Article 525 CCrP does not explicitly require that an application is issued by the *party* to the ECtHR proceedings, a request for retrial may theoretically be lodged even by a *third person* whose case has been as well reviewed by the ECtHR and which concerns the same substantive provision or, which presents the same procedural errors.[2425] By the same token, it can even be supported that, such an application for retrial can also be submitted on the basis of an ECtHR judgment which has been delivered against another country, thus not Greece, but which concerned provisions or procedures identical or similar to those applying in the Greek legal order.[2426] It becomes obvious that, by accepting such a regulatory scope of Article 525 CCrP, this provision could serve as a "vehicle of direct compliance" with the interpretative precedents arising from ECtHR judgments.[2427] On the other hand, in Greece there still exists no provision for the re-examination of *civil* or *administrative* procedures.[2428] It has also been expressed that, the option of retrial, that is provided for the decisions issued within a period covered by the retroactive effect of a *declaration of unconstitutionality of the law* pursuant to Article 51(1), (4) of the Code of the Special Highest Court, should be analogously applied in cases where the ECtHR has found the national law being inconsistent with the Convention.[2429] It is even discussed that, the possibility to reopen the proceedings could be established on the basis of the competence of the Highest Special Court to settle controversies concerning the classification of rules of international law as *generally accepted*, by accepting the *binding character* of ECtHR judgments as a rule of international law.[2430] In particular, it is debated that, the applicant should, following an ECtHR judgment, apply for *judicial review* to the national court that has issued the last decision, which should then refer the case to the Special Highest Court pursuant to Article 52(1) of the Code of the Special Highest Court; the SHC would in turn have to decide whether there is a need for a revision, arising from the *binding force* of ECtHR judgments as a *generally accepted rule of international law*.[2431]

3.2.1.5. Situational picture of compliance among national courts

Overall, the effect of ECHR law in Greece remains low compared to other Contracting Parties and the ignorance of the case-law even by the Greek Supreme Court of Cassation is an

date, where these concerned the same case. See also Article 525a, which has been added with Article 12 of Law No. 3060/2002 (Government Gazette A 242).

[2423] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 391.

[2424] Ibid., pp. 389-390.

[2425] Ibid., p. 392.

[2426] Ibid.

[2427] Ibid.

[2428] Voulgaris: Implementation and Outcome of the judgments of the European Court of Human Rights in the Greek Legal Order (translated from Greek), pp. 102-103.

[2429] Ibid., p. 103. According to Article 100(4)(b) of the Constitution, the Special Highest Court may give to its decision retroactive effect. Code of the Special Highest Court is Law No. 345/1976 (Government Gazette A 141).

[2430] Ibid., p. 104.

[2431] Ibid.

unfortunate reality.[2432] In particular, judges of the SCC tend to act *favour legis* and avoid taking an effective account of the jurisprudence of the ECtHR and of the suggestions of the Greek legal theory for a bolder confrontation with those national laws whose constitutionality is highly dubious.[2433] It can been observed that, the Supreme Court remains predominantly attached to outdated stereotypes of its own case-law, easily declaring the non-establishment of an incompatibility of the national legislation with the Convention, a practice which, particularly for criminal procedure matters, contrasts the current human rights protection level in Europe.[2434] The SCC sometimes even defiantly ignores the Convention and its interpretation by the ECtHR, despite the fact that an omission of the exercise of the *conventionality control* could infringe Article 28(1) of the Constitution.[2435] At the same time, in a relevant judgment, the Supreme Court had stated that, the obligation of the state to comply with the final judgments of the ECtHR has the same content as the legal effect of *res judicata*.[2436] Continuing its thought, Areopagus[2437] has held in this decision that, the applicant may rely on the ECtHR judgment before any national court and that, when the situation considered by the ECtHR as contrary to the Convention still applies, the national judge shall, upon request, repeal the validity of the national judgment for the future.[2438] The SCC however seemed more hesitant in a more recent decision, whereby it ruled that, the judgments of the ECtHR cannot be considered *a change of circumstances*, and therefore, they do not justify a *revocation* or *reform* of the national judgment under the provisions of Article 758 CCiP.[2439] It is held that, the overall picture of the Council of State is better than that of the Supreme Court and that, in numerous cases, the CoS was harmonised with the jurisprudence of the ECHR judicial organs.[2440] Nevertheless, the Council of State has as well often demonstrated an unwillingness towards a sound interpretative approach of international treaties.[2441] At the same time, the Court of Auditors provides justifications that carry out a thorough analysis of the provisions of the Constitution and the Convention, proving in this way its commitment to a more enhanced protection of human rights.[2442] It should be also noted that, in the case of contradictory rulings of two of the highest national courts, namely of the Council of State, the Supreme Court and the Court of Audit, as to the meaning of a provision, it is the role of the Special Highest Court to settle the controversy, by providing for an *erga omnes* interpretation of the provision at issue.[2443] In what regards the picture of the rest of national courts, this is quite complex, with judgments either occasionally containing a thorough analysis of the Convention or, in other instances, treating the *control of conventionality* as a *control of constitutionality*.[2444] In any case, it can be observed that, ordinary courts often proceed to interpreting and implementing international treaties with simplicity.[2445] It is in fact argued that, in Greece, it is typical that the courts dealing with the *substance* of the matter, and not the supreme courts, are usually detecting violations of the Convention in the

[2432] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 412.
[2433] Ibid., p. 247.
[2434] Ibid., p. 292.
[2435] Ibid., p. 303. Chrysogonos refers in regard to cases of ignorance to SCC 577/1998 and 36/1999.
[2436] Trekli: Binding Force and Execution of Judgments (translated from Greek), p. 625. Trekli refers in this regard to case SCC 818/2008.
[2437] Areopagus is the name of the Supreme Court of Cassation.
[2438] Trekli: Binding Force and Execution of Judgments (translated from Greek), p. 625.
[2439] Ibid.
[2440] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 262.
[2441] Roukounas: International Law (translated from Greek), p. 189.
[2442] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 277.
[2443] Krateros/ Oikonomidis/ Rozakis/ Fatourou: Public International Law (translated from Greek), p. 138. The HSC shall settle the controversy according to Article 100(1)(e) of the Constitution with an erga omnes effect.
[2444] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 269-270.
[2445] Roukounas: International Law (translated from Greek), p. 189.

context of the *conventionality control*; thus they are using the Convention as the *ratio decidendi* of their decision.[2446] Despite such instances being few and, predominantly originating from first- and second-instance courts, these examples however seem to aptly interpret and utilise the content of ECHR provisions.[2447]

3.2.1.6. The need for detachment from the narrow national borders

Thus far, it can be observed that, Greek judges are mainly characterised by uncertainty towards the 'unknown' international law, seeking shelter in the 'well-known' Constitution and in relevant national legislation.[2448] An exchange of views with Strasbourg remains at the time only a theoretical discussion and Greek judges persist in avoiding such openings, by applying practices which have be characterised even as ethnocentrism.[2449] Such practices are unfortunately indicative of the rather unfounded belief of the Greek judges that, the protection provided at the national level actually meets the modern European standards and requirements.[2450] However, this 'blind' commitment of judges to domestic law instead reflects an outdated practice which is not consistent with the modern protection of human rights.[2451] In this respect, it is underlined that, an interpretation of the Constitution in conformity with the Convention and in light of the ECtHR case-law, one promoting the interpretative harmonisation of the two texts, actually constitutes the most appropriate solution for a modern democratic society.[2452] In this vein, the persistence of the Greek judges to interpret the Convention in a way that differs from the line taken by the Court is in the long term incompatible with the state's effort to participate in the European integration process that is based on common understanding and also, with the need of the country to adapt to an ever changing international environment.[2453] As a result, it appears necessary for Greek judges to demonstrate greater interpretative courage in order to prevent the paradox of ECtHR judgments influencing, through the power of precedence, states that have not been *directly* involved in the proceedings, and not those in favour of which the Strasbourg decision has been actually issued. It is argued that, the limited influence of the Convention on the Greek legal order, in comparison to other legal orders, is a derivative of the unawareness of national judges towards the European standards of protection.[2454] A main obstacle is directly linked to the practicalities and in particular, to the inaccessibility of sources and to the absence of an adequate training of judges. Although in recent years more ECtHR judgments have been translated into Greek, the largest part of them remains unavailable in Greek language while existing translations principally concern cases in which Greece has been a litigant party; thus, not cases of other Member States which may be

[2446] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 296.
[2447] Ibid., p. 302.
[2448] Ibid., p. 291.
[2449] Ibid., p. 193.
[2450] Ibid., p. 322.
[2451] Chrysogonos: The (non-) Application of the European Convention on Human Rights by the Greek Courts (translated from Greek), p. 205.
[2452] Trekli: Binding Force and Execution of Judgments (translated from Greek), p. 623.
[2453] Chrysogonos: The (non-) Application of the European Convention on Human Rights by the Greek Courts (translated from Greek), p. 206.
[2454] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 412.

of great interest.[2455] To add to the difficulties, the official collection of ECtHR case-law in English and French language reaches only few libraries in Greece.[2456]

3.2.2. Executive

As aforementioned, administrative reaction to ECtHR judgments is considerably less complex, if compared to the judicial or the legislative responses. However, whilst administrative responses are easier to achieve, Greece suffers the incrimination of many infringements, which are administrative in their substance but for which, rather paradoxically, the criminal justice system is activated.[2457] This inconsistency is mainly the consequence of the organisational and financial inability of the state to establish effective mechanisms that could guarantee the implementation of the legislation without having to use the threat of criminal sanctions.[2458] As a result, the Court will usually find a violation originating from a judicial decision, despite the rather administrative nature of that violation. In any case, in those few cases where the Court finds that a violation of the Convention has arisen from a national administrative act, the administrative authorities are expected to act and redress the situation. Practically, in such a case, the administration is expected to act by either *revoking* the act issued or, in case the violation has resulted from an omission, by *issuing* the act required.[2459] Simultaneously, as a general principle of Greek administrative law, the revoking of an unlawful administrative act lies within the discretion of the administration, except for those cases where the law explicitly or implicitly foresees an obligation to revoke.[2460] In this regard, it is expressed that, such an obligation is indeed implied by the arrangements of Article 28(1) of the Constitution, in the sense that the act should not continue to produce its legal effects after the Court has found it unlawful.[2461] At the same time, it is underlined that, neither the Ratification Law nor another national legislation provides, or could theoretically provide, mandatory and timely unlimited general authorisation to the administrative authorities to issue regulatory acts in order to comply with ECtHR judgments.[2462] Furthermore, according to another administrative principle of Greek law, an administrative act shall be revoked within reasonable time.[2463] However, the opposite is supported for the case of the compliance with an ECtHR judgment, namely that,

[2455] Ibid., p. 413; Kastanas: Compliance with the Judgments of the European Court of Human Rights and the Contribution of the Greek Judge (translated from Greek), p. 126. ECtHR judgments are translated by the Translations Office of the Foreign Ministry, under the care of the State Legal Council of the. The publication of ECtHR occurs online, on the website of the State Legal Council. Judgments of the Court relating to Greece, after having been translated they are available online and distributed by the Ministry of Justice, Transparency and Human Rights to the competent judicial, where appropriate also administrative, authorities for their information. As long as there exists a translation that funded by the Greek government, this document has to be made available for further use through accessible electronic catalogues, according to Law No. 3448/2006 (Government Gazette A 57), which incorporated the Directive 2003/98/EC. The publication of translations of judgments concerning Greece results furthermore from the fundamental obligation of transparency and accountability of the state.

[2456] Chrysogonos: The (non-) Application of the European Convention on Human Rights by the Greek Courts (translated from Greek), p. 204.

[2457] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 413.

[2458] Ibid.

[2459] Ibid., p. 381.

[2460] Ibid.

[2461] Ibid.

[2462] Ibid., p. 406.

[2463] Voulgaris: Implementation and Outcome of the judgments of the European Court of Human Rights in the Greek Legal Order (translated from Greek), p. 102. Case-law sets 'reasonable time' at almost ten years.

revocation is in this case not subject to time limits and therefore, it can occur at any time, regardless of whether the act is beneficial for third parties.[2464]

In the case of an award of a *just satisfaction*, the executive is expected to include the relevant amount in the special heading of the Ministry, or otherwise it will render the country liable under international law.[2465] Nevertheless, on the basis of the case-law of the Council of State, it is doubtful whether there is a possibility of appealing before the Council of State against the refusal of the executive to comply with an ECtHR judgment that has awarded a just satisfaction.[2466] At the same time, refusal of the state to pay the just satisfaction could, under certain conditions, lead to the *civil liability* of the state on the basis of Article 105 of the Introductory Law of the Civil Code, which stipulates that, the civil liability of the state for unlawful damage must be direct, principal and objective.[2467] *Objective* liability means that, the subjective fault of the state is not required in order for the state's responsibility to be established.[2468] However, it is argued that, the precondition of *unlawfulness* in the cause of damage, as set out in Article 105 of the Introductory Law of the Civil Code, cannot be established in the case of a damage that has been caused by the execution of international treaties or international judgments.[2469] It is further stressed that, the mandatory Law No. 202/1936[2470] on *The Res Judicata from Decisions of International Organisations or International Arbitration* goes in the same direction, since it concerns only disputes between the Greek state and foreign states and not differences between the state and individuals.[2471] However, it is also underlined that, Law No. 202/1936 was introduced at a time when neither the concept of the individual as a subject of international law had its present scope, nor the international convention law has been yet recognised as an integral part of domestic law on the basis of an explicit constitutional requirement.[2472] Furthermore, according to Article 8 of Law No. 2097/1952[2473], the enforcement of *judgments* against the state for pecuniary debts and the enforcement of any *executive recognition* of such debts, is impermissible.[2474] Although, the unconstitutionality of this provision has been raised by a great part of theory and of jurisprudence as well, as it is considered to be restricting, at the stage of the enforcement procedure, the *right to effective judicial protection*, without being at the same time imposed or justified by a constitutionally protected, specific public interest.[2475] Furthermore, the provision is strongly disputed by theory for its survival after the introduction of the new Code of Civil Procedure.[2476] Besides, this legislation is considered as indirectly abolished by the ratification of the ICCPR in 1997 and by Article 94(3)(c) of the Constitution, which, with the constitutional

[2464] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 382.
[2465] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), p. 68 ff.
[2466] Ibid., p. 68.
[2467] Ibid.
[2468] Ibid., p. 69.
[2469] Ibid., p. 80.
[2470] Government Gazette A 1.
[2471] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), p. 80.
[2472] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), p. 81.
[2473] Government Gazette A 113.
[2474] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), p. 82.
[2475] Ibid., p. 83. The Plenary Assembly of the SCC has found the provision unconstitutional, as opposed to a series of instruments. It was based, however, mainly on the ICCPR and, secondly, on Articles 6 ECHR and 20(1) of the Constitution.
[2476] Ibid., p. 82.

revision of 2001, has explicitly provided for the possibility of an execution against public authorities, local authorities and legal persons governed by public law.[2477]

3.2.3. Legislature

It is argued that, when conditions are met, the civil liability of the state under Article 105 of the Introductory Law of the Civil Code can also result from unconstitutional *legislative* acts or omissions.[2478] Specifically in what regards the notion of legislative illegality as a result of an *omission*, it is expressed that, this is actually reinforced by the wording of Article 105 of the Introductory Law of the Civil Code, which rules that, the public owes compensation for unlawful acts or omissions of public bodies which have occurred during the exercise of the public authority entrusted to them.[2479] Meanwhile, in awaiting for the legislature to take action by *amending* or *abolishing* the national law that conflicts with the Convention, there are not many alternative options available. More specifically, as Greece does not have a Constitutional Court which in the context of a constitutional appeal could declare the contested provision as invalid, the only remaining option for a provision to be declared as *erga omnes* invalid, is by the procedure followed before the Special Highest Court.[2480] However, in order for this procedure to be activated, a conflict between the decisions of the supreme courts on the issue of the constitutionality of the respective provision must have preceded, which itself is a rare case; the Special Highest Court actually deals with such cases only extremely few times per year.

3.2. Practical examples on the execution of judgments on the national level

Examples of an *interpretation* favourably disposed towards and, consistent with the spirit of the ECHR, include the jurisprudential recognition of contractual claims, besides the *rights in rem*, as falling under the umbrella of the protection of *property*.[2481] In this regard, the decision of the SCC 40/1998 had found that, claims for damages and for contractual harm are protected by both Article 17 of the Constitution and Article 1 of the Protocol No. 1 to the Convention.[2482] A similar shift in the case-law, this time on the part of the CoS, has been signified by judgment 2152/2000, which has included in the concept of the *accused* also defendants of disciplinary proceedings and which thus, has recognised their *right to be heard*.[2483] With *Tsomtsos* and *Katikaridis* judgments,[2484] the SCC has found as contrary to Article 1 of Protocol No. 1, its original interpretive position, according to which, the presumption of *benefit* that has been

[2477] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 370; Voulgaris: Implementation and Outcome of the judgments of the European Court of Human Rights in the Greek Legal Order (translated from Greek), p. 105.
[2478] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), p. 70.
[2479] Ibid.
[2480] See Article 100(1)(e) of the Constitution.
[2481] Kastanas: Compliance with the Judgments of the European Court of Human Rights and the Contribution of the Greek Judge (translated from Greek), p. 123. In rem rights include also contractual (and not only proprietary) rights.
[2482] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 275. Chrysogonos underlines that this position of the SCC had created hope for a future different approach of the issue by the Supreme Court of Cassation.
[2483] Ibid., p. 209.
[2484] Tsomtsos a.o. (App. No. 20680/92, 15/11/1996) and Katikaridis (App. No. 19385/ 92, 15/11/1996).

established by Law No. 653/1977[2485] was irrefutable and not subject to judicial examination.[2486] In judgments *Liakopoulou*,[2487] *Efstathiou*,[2488] *Lionarakis*[2489]*, Zouboulidis*[2490] *and Koskina*[2491] the ECtHR has found that, the settled practice of the Supreme Court to reject pleas based on Article 559(1) (a) CCiP for their vagueness, was excessively formalistic and that it was posing a disproportionate constraint on the applicants' right of access to a court.[2492] Subsequently, due to these judgments, apart from the individual measures adopted, a huge discussion has opened, concerning the right of access to appeals which has led to a general meeting of the Supreme Court and to the adoption of the relevant Minutes, slowly signifying a change in the case-law.[2493] A further significant change can be seen in the turnaround in the case-law of the Supreme Administrative Court after the *Sotiris and Nikos Koutras ATTEE*[2494] judgment, which has declared a violation of Article 6(1) ECHR.[2495] More specifically, the violation was based on the strict stance of the Administrative Court in declaring claims inadmissible on the basis that, they have been lodged with authorities other than the court and on that, they have not met all formal requirements which, however, could be easily complemented.[2496]

With regards to notable *legislative* measures, case *Hornsby*[2497], after ruling that Article 6(1) ECHR would be illusory if the legal system allowed for a final court order directed against the state to remain unexecuted, has led to the introduction of constitutional Article 94(3) (c) during the constitutional revision of 2001, which explicitly provided for the possibility to execute against the state.[2498] Case *Lykourezos*[2499] has led to a further constitutional amendment, namely one of Article 57, in the sense that paragraph (1) (e) prohibiting the exercise of other professional activities by the members of Parliament has been abrogated.[2500] Case *Thlimmenos*[2501] has led to both the enactment of Article 27(1) of Law No. 2915/2001[2502], which provided for the immediate and automatic deletion from the criminal record of a conviction for disobedience or insubordination of conscientious objectors and, to the enshrinement in the

[2485] Government Gazette A 214.
[2486] Kastanas: Compliance with the Judgments of the European Court of Human Rights and the Contribution of the Greek Judge (translated from Greek), p. 130. However, the ECtHR in case Azas v. Greece (App. No. 50824/99, 19/9/2002), held that the case-law of the SCC does not fully meet the requirements of Article 1 of the Protocol No. 1. See now Article 33(1) Law No. 2971/2001 (Government Gazette A 285), which has established that the presumption of the benefit of the owners according to the provisions of Law 653/1977 (Government Gazette 214 A) is militant.
[2487] Liakopoulou (App. No. 20627/04, 24/5/2006).
[2488] Efstathiou a.o. (App. No. 36998/02, 27/7/2006).
[2489] Lionarakis (App. No. 1131/05, 5/7/2007).
[2490] Zouboulidis (No. 2, App. No. 36963/06, 25/6/2009).
[2491] Koskinas (App. No. 47760/99, 20/6/2002).
[2492] The SCC, has been applying a principle of its own case-law, under which appeals have been traditionally dismissed for being vague, on the ground that they had not specified the facts on which the courts of appeal had based their judgments.
[2493] Minutes of 14/5/2010.
[2494] Sotiris and Nikos Koutras ATTEE (App. No. 39442/98, 16/11/2000).
[2495] Stavropoulos: The Judgments of the European Court of Human Rights and the National Judge (translated from Greek), p. 81.
[2496] Ibid.
[2497] Hornsby (App. No. 18357/91, 19/3/1997).
[2498] Trekli: Binding Force and Execution of Judgments (translated from Greek), pp. 617-618; Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 235. In this way, it was established that the right to a court includes the right of enforcement to meet monetary claims against the private property of the state and of public entities and bodies.
[2499] Lykourezos (App. No. 33554/03, 15/6/2006).
[2500] Trekli: Binding Force and Execution of Judgments (translated from Greek), pp. 617-618.
[2501] Thlimmenos (App. No. 34369/97, 6/4/2000).
[2502] Government Gazette A 109.

Constitution of the right to an alternative service.[2503] Further judgments that have led to legislative changes have been judgment *Kampanis*[2504], concerning the equality of arms before the indictments chamber of the Court of Appeal and on the occasion of which, Article 287 of the CCrP has been amended.[2505] More specifically, the amendment has ordered that, the accused must be informed of the deliberation of the indictments chamber at least five whole days before the deliberation is to be held.[2506] Furthermore, judgment *Hadjianastasiou*[2507] regarding the shortness of the time-limit provided for lodging an appeal before the Martial Appeal Court, has led to the modification of Article 212(1) of the Military Criminal Code.[2508] Another noteworthy judgment is the *Holy Monasteries*[2509] judgment, concerning the unlawful transfer to the state of the property of a large part of the agricultural and forest lands of the monasteries, which led to the enactment of Article 55 Law No. 2413/1996[2510].[2511] Moreover, after judgment *Twalib*,[2512] Article 96A was added to the CCrP, expanding the criminal courts' obligation to provide free legal assistance.[2513] A further judgment in this respect has been the *Canea Catholic Church*[2514] judgment that has led to the amendment of Article 33 of Law No. 2731/1999[2515], by which it was ruled that, establishments of the Canea Catholic Church in Greece set up prior to the entry into force of the Civil Code *did* have legal personality and therefore, *could* take legal proceedings.[2516] In what regards the excess of the reasonable time of proceedings, an occurrence that affects all courts and one that has been repeatedly stigmatised by the ECtHR, the legislator has finally intervened with Law No. 2915/2001[2517], which sought to speed up the administration of justice by the civil courts, inter alia by limiting the possibility to postpone the trial.[2518] In

[2503] Kastanas: Compliance with the Judgments of the European Court of Human Rights and the Contribution of the Greek Judge (translated from Greek), p. 128; Trekli: Binding Force and Execution of Judgments (translated from Greek), pp. 617-618. Introduction of Article 4(6) by the constitutional revision of 2001.
[2504] Kampanis (App. No. 17997/91, 13/7/1995).
[2505] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 241; Voulgaris: Implementation and Outcome of the judgments of the European Court of Human Rights in the Greek Legal Order (translated from Greek), p. 99. The amendment of Article 287 of the CCrP has occurred with Law No. 2298/1995 (Government Gazette A 62).
[2506] Ibid. The amendment of Article 287 of the CCrP has occurred with Law No. 2298/1995 (Government Gazette A 62).
[2507] Hadjianastasiou (App. No. 12945/87, 16/12/1992).
[2508] Voulgaris: Implementation and Outcome of the judgments of the European Court of Human Rights in the Greek Legal Order (translated from Greek), p. 99. The amendment has occurred with Law No. 2287/95 (Government Gazette A 20). According to the new Military Criminal Code, the time limit for filing an appeal to the Court of Cassation is no longer five days but twenty days.
[2509] Holy Monasteries (App. No. 13092/87, 21/11/1994).
[2510] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 250; Voulgaris: Implementation and Outcome of the judgments of the European Court of Human Rights in the Greek Legal Order (translated from Greek), p. 99. Law No. 2413/1996 (Government Gazette A 124) has brought amendments to Laws Nos. 1811/1988 (Government Gazette A 231) and 1700/1987 (Government Gazette A 61) and was recognised that Monasteries have the right to protect their rights and interests with respect to all their real property.
[2511] Kastanas: Compliance with the Judgments of the European Court of Human Rights and the Contribution of the Greek Judge (translated from Greek), p. 127.
[2512] Twalib (App. No. 24294/94, 9/6/1998).
[2513] By enactment of Article 17 of Law No. 2721/1999 (Government Gazette A 112).
[2514] Canea Catholic Church (App. No. 25528/94, 16/12/1997).
[2515] Government Gazette A 138.
[2516] The SCC ruling concerned that the applicant church had no capacity to take legal proceedings, thus preventing it from bringing any dispute relating to its property rights before the courts.
[2517] Government Gazette A 109.
[2518] Kastanas: Compliance with the Judgments of the European Court of Human Rights and the Contribution of the Greek Judge (translated from Greek), p. 132; Sisilianos: The Human Dimension of International Law (translated from Greek), p. 93. Law No. 2915/2001 (Government Gazette A 109) on the acceleration of civil proceedings was a structural measure and the explanatory statement explicitly referred to the repeated

order to address specifically the delays in the administrative judicial proceedings, a legal remedy has been instituted by the provisions of Articles 53 to 58 of Law No. 4055/2012[2519], providing for the possibility to request a *just satisfaction* in cases where the reasonable duration of the administrative proceedings has been exceeded.[2520] The compliance of the country with regard to the serious dysfunction of the long duration in the administration of justice, has been also attempted through Law No. 3160/2003[2521] on the acceleration of criminal proceedings, as well as by means of other instruments with limited practical results thus far.[2522] Furthermore, Article 1 of Law No. 3900/2010[2523] has introduced the institution of "pilot proceedings", which, to some extent, has already been introduced by Article 39 of Law No. 3659/2008[2524].[2525] Yet another example can be seen in the amendment of Articles 533-545 CCrP, which has put an end to the practice of the courts to negate the need for the compensation of the acquitted persons for the time of their illegal detention; a practice which has long been incompatible with the protection standards provided by the ECtHR.[2526]

condemnations of the country from the ECtHR due to the excessive duration of procedures in certain civil matters. It shall be mentioned that trial postponing is very typical in Greek judicial proceedings and has been strongly criticised by the ECtHR.

[2519] Government Gazette A 51.

[2520] As stated in the explanatory memorandum of Law No. 4055/2012 (Government Gazette A 51), these provisions were introduced to align the country with the requirements of international human rights law and to comply with Articles 6(1) and 13 of the ECHR as interpreted by the ECtHR judgment Athanasiou v. Greece (App. No. 50973/08, 21/12/2010). Further instruments for the acceleration of civil and criminal proceedings have been introduced with Laws No. 3327/2005 (Government Gazette A 70) and 3346/2005 (Government Gazette A 140). For the acceleration of administrative proceedings amendments have been introduced by means of Laws No. 2721/1999 (Government Gazette A 112); 2944/2001 (Government Gazette A 222); 3160/2003 (Government Gazette A 165); 3258/2004 (Government Gazette A 144) and 3658/2008 (Government Gazette A 70).

[2521] Government Gazette A 165.

[2522] Sisilianos: The Human Dimension of International Law (translated from Greek), p. 93.

[2523] Government Gazette A 213.

[2524] Government Gazette A 77.

[2525] Which amended Article 29 of the Code of Courts' and Judges' Organisation (Government Gazette A 35).

[2526] Kastanas: Compliance with the Judgments of the European Court of Human Rights and the Contribution of the Greek Judge (translated from Greek), p. 132. Kastanas underlines that for the illegal detention courts were usually citing the gross negligence of the person detained. Amendment occurred with Article 26 of Law No. 2915/2001 (Government Gazette A 109).

Concluding remarks

The European Convention on Human Rights, a document distinctive already at its conception stage in the early 1950's, has signified a turning point in the protection of human rights, marking the beginning of a new era for Europe and its people. Favoured by the state of euphoria at the end of the Second World War, and for the purpose of ensuring its implementation, the Convention was equipped with institutions such as the Court and the Commission, which have produced valuable case-law that has signalled the start of a uniform human rights interpretation at international and national level. The chronological and evolutionary structure of the first Chapter has presented that, in the years to come and in response to the constantly changing human rights needs, the scope of the Convention has been amended multiple times and the obligations imposed on states have been gradually expanded and intensified, shaping a new physiognomy, with characteristics essentially different from those originally attributed to the Convention. Not only the initially rather elliptical text has been enriched with subsequent Protocols, but its interpretation has been adapted to fit current standards, something that has been made possible through the so-called evolutive model, which approaches the Convention as a living instrument and which the Court itself enthusiastically follows. The Convention, with its unique properties and by virtue of not being subject to traditional doctrines such as that of reciprocity, has gained an unparalleled significance in the European constitutional landscape and has evolved into a set of rights from which even positive obligations for the states arise. The first chapter further outlines the development of the Court from its genesis to a permanent Court. More specifically, the Court was originally constrained by its optional jurisdiction and by functioning as part of a two-tier system comprising the Commission and the Court, and it was not until 1998 that Protocol No. 11 has replaced the original structure, putting an end to the Commission's filtering function and creating a single full-time Court before which applicants could directly bring their cases. Unlike the foreseen, the Court has evolved into one of the most widely acclaimed international judicial institutions, capable of determining the behaviour of states in order to ensure the effectiveness and continuity of the implementation of its decisions at national level. In the same chapter, the reader can benefit from a closely observation of the interpretive principles governing the function of the Court. What results from this observation is that, despite the lack of defined interpretation rules and the plurality of interpretation methods applied in approaching a document so distanced from classical international law, the Court, with its unique interpretation line and stable course, has managed to enjoy special authority and to shape what is called the European public order of human rights.

Nevertheless, despite all positive developments, the Convention and the Court are still nowadays facing vital challenges, an issue that the first chapter also addresses. Experience has so far shown that, providing human rights protection for about eight hundred million people from forty-seven different countries is a heavily manageable task, linked with an ever-increasing workload. The immense number of incoming cases is a testimony of the particular success of the ECHR regime, yet at the same time, it is so excessive that it can no longer be treated as a pleasant challenge but rather as posing a serious threat to the effectiveness of the ECHR. Alongside this reality, the vast majority of applications submitted to the Court are declared inadmissible, failing to fulfil one or more of the admissibility requirements, thus do not end up being examined on their merits. Significant attempts to address this situation have taken place mainly through the procedural Protocols to the Convention, and the introduction of measures such as the improvement of the existing filtering mechanism and the pilot-judgment

procedure, which is a means of dealing with large groups of repetitive cases that derive from the same systemic problem. Although progress has been made, weaknesses in the application of the Convention by the Member States have as well persisted, with the result that the crisis has not yet been overcome and the Court's relief has not yet materialized. Another challenge the ECHR system is confronting with, is the criticism originating from Member States and predominantly from domestic courts, the main aspects of which emphasise the growing influence of the Court on national policies and procedures and on the formation of legal relationships. The increased reluctance of the Member States towards the progressive and far-reaching interpretations of the Court, leads to a retreat to sovereignty that is expressed in a denial of the supremacy of the Convention and in a delay in ratifying additional Protocols. The introvert attitude of the Member States is not entirely unjustified, since the Convention has indeed gradually evolved into an ever-expanding corpus of legislation and the Court into a sort of an autonomous source of supranational authority, which with its sophisticated jurisprudence and in parallel with the administration of justice in individual cases, is working on the establishment of universal standards. This new face of the Court, which obviously deviates from the originally agreed and envisioned by the Contracting States, has even been criticised for a democratic deficit as there exists no 'response', that is, no authority to review its rulings for their correctness.[2527] At the same time, while the Court devotes its actions to ensuring greater uniformity and harmonisation, which will eventually relieve it from its current backlog of cases, the ECHR system is still a complex legal framework that does not promote the anticipated relief at all. The situation could not be very different since the European reality is particularly diverse in terms of its legal systems, being described a "hybrid" legal system in which different standards are developed.[2528] Moreover, given that the protection of human rights is at the crossroads between the European and national levels, the forthcoming EU accession to the ECHR should lead to more complications as to the articulation between ECHR and EU law and the allocation of competences between the Union and the Member States.[2529] The new architecture is expected to create a fresh impetus in terms of interaction, overlaps and convergences between the national legal orders, Strasbourg, Luxembourg and Brussels.

Chapter two is is devoted to the actual reception of the Convention in the national legal orders, pointing out that the utilisation of the Convention varies greatly among Member States, with statistics indicating different levels of state compliance with ECHR standards.[2530] At least in terms of the official integration of the Convention into national law, there exist two main, though somewhat outdated, theorisations as to the relationship between international law and domestic law; monism and dualism. With monism treating international and domestic law as part of a single universal legal system and advocating the superiority of the former, dualism faces them as two separate systems, in the sense that the international norm is validated only after a domestic rule has authorized its application. As to the formal incorporation process, it is observed that, national ratification by legislative act still applies as an official procedure, though it has been largely phased out. Where national ratification has remained, it is mainly determining the ranking of the treaty in the national hierarchy of laws, however again, usually the Constitution already provides for a general provision that determines the hierarchical classification of treaties. The Convention is completely silent on both the obligation of Member

[2527] Wildhaber: Recent Criticism of the European Court of Human Rights, p. 161.
[2528] Birkinshaw: European Public Law. The Achievement and the Challenge, p. 10. Birkinshaw cites BELL in: BEATSON: New Directions in European Public Law, p. 147.
[2529] After the entry into force of the Treaty of Lisbon in 2009, which provided the necessary legal basis and of Protocol No. 14 in 2010, which altered prior rigid requirements, the way to an EU accession has been paved.
[2530] Monthly, annual, thematical and more statistical reports published by the CoE are available under: https://echr.coe.int/Pages/home.aspx?p=reports&c= (13.06.2019).

States to incorporate the Convention into their national law and to the ranking it shall enjoy in the national hierarchy of laws. And although incorporation has become, through practice, an indispensable obligation for newly acceding Member States and the hierarchical superiority of the Convention is by some considered a de facto obligation for Member States, in fact, the ECHR regime has deliberately left the issue to the discretion of the states, avoiding explicit references to the means that shall be used for its effective implementation and being instead concerned only about states brining certain results; what has been called obligation de résultat. In practice, it can be observed that, neither the classification of the constitutional system as monist or dualist, nor the method of incorporation or the hierarchical rank granted to the Convention by the state are decisive for the respect that the Convention will eventually enjoy at national level. In other words, although it would be reasonable to expect the ability to avoid violations to be greater for states where national authorities may disapply national primary legislation in favour of the Convention in the event of a conflict between the two, however, satisfactory compliance is mainly reflected in the willingness and the readiness of national authorities, notably the courts, to align with European standards.[2531] Indeed, irrespective of the officially available possibilities, national courts have the flexibility to develop techniques and instruments that allow the indirect factual superiority of the Convention, contributing in this way to the realisation and mitigation of its potential effects.

The existing variation as to the extent that states resist or adapt to ECHR standards and to the case-law of the Court is not surprising at all. The second chapter subsequently explains that deviations are inevitable given that the Convention does not specifically address the issue of its domestic effect, resulting in the ECHR system being characterised by limitations in terms of its normativity and legitimacy. Contrary to the view of positivists, who support that justice is limited only to the application of written law, in the field of international law, states tend to recognise the role of complementary legal sources in settling disputes. Indeed, despite the partial incompleteness of international law in comparison to national law, the predominant legal principle behind it, upholds that there are legitimate expectations for lawful conduct in the international arena too. Considering the fact that the Convention is a rather broadly formulated text characterised by unavoidable ambiguities, the role of additional sources in filling existing gaps and eliminating inadequacies becomes essential. Chapter two highlights the primary legal sources that play a vital role when it comes to offering a legitimising basis for a binding effect of the Convention, that being the general principles of international law such as the principle of consensus, the pacta sunt servanda principle, the principle of good faith, the rule of law and the international responsibility of states, while subsidiary sources include international judicial decisions and the teachings of prominent publicists. With regard to the binding effect of the Court's case-law in particular, as is well known, final judgments have the effect of res judicata for the respondent state. However, ECtHR judgments lack a cassatory nature, meaning that they simply identify whether or not a violation has occurred, without affecting the validity of those national acts, laws or judgments that have been found in violation of the Convention. By virtue of their essentially declaratory character and of leaving to the states the choice of the means for complying with their obligations under Article 46(1), a res judicata effect of ECtHR judgments is by some even completely rejected. It seems that, within the ECHR scheme, the res judicata mainly comprises the lack of competence of the national courts or any other authority to review the Court's judgments on the basis of their correctness or lawfulness. Theoretical approaches provided in chapter three, try to base the binding effect of the Court's judgments on a teleological approach of the Convention and on its overall aim and purpose as articulated in its

[2531] Schilling: Deutscher Grundrechtsschutz zwischen Staatlicher Souveränität und Menschenrechtlicher Europäisierung, p. 143.

preamble, this being the achievement of greater unity and the safeguarding of common ideals and, stress the role of the Convention in the process of the European integration. Similar efforts underline the obligation of Member States under Article 1 to ensure the protection of the rights and freedoms enshrined in the Convention and the exclusive authority of the Court to interpret the Convention as derived from Articles 19 and 32. However neither the special authority of the Court nor any of these approaches have so far been convincing and, given that the Convention does not contain a relevant provision, the Court still struggles to legitimise a binding effect of its judgments, which at the moment, at least de lege lata, is missing. In this context, it is supported that a binding effect of the judgments of the Court will only be established when the Court will have the power to annul national acts, laws and judgments that it has found to be incompatible with the Convention.[2532]

In parallel with the intense debate around the binding force of the Convention and Court's case-law, the second chapter further outlines the arguments on the direct effect of ECHR provisions and ECtHR judgments. And while a self-executing norm seems to be mostly referring to the ability to directly invoke a provision at the national level, or at least an equivalent Article of national law which protects the right at stake in a similar manner, the term is not uniformly approached in literature. Different theoretical approaches raise that, decisive for the directly applicable character is whether or not the treaty creates subjective rights which can be protected by domestic courts,[2533] otherwise, whether or not all national organs are automatically bound by it without the need of additional transposition measures and others even support that, it is not the direct effect of the treaty as a whole but that of each provision separately that should be studied[2534]. There are attempts to base the direct applicability of the Convention's substantive rights on Article 1 and on Articles 6, 13 and 34, as guarantees of the right to a fair trial, to an effective remedy and to individual petition, which, if their direct application in the domestic legal order wasn't recognised, would be a dead letter.[2535] It has prevailed that an objective and a subjective criterion have to be fulfilled before attributing a directly applicable character to a norm.[2536] The objective criterion concerns the content of the rule, that is the rule has to be sufficiently complete and accurate and not in need of an enforcement act in order to be applied and the subjective criterion concerns refers to the will of the parties, that is, their desire to attribute such a character to that rule. However, nowadays, a sterile grammatical interpretation of legal instruments is avoided, so that the letter of the provision is regarded as only one indication out of many, while the will of states criterion is also slowly losing its significance. Chapter two describes in this regard that, in what concerns Article 46(1) in particular, the wording of the provision is precise enough to be considered as able to be applied independently while at the same time, a systematic consideration of Articles 41 and 46(1) underscores the directly applicable character of Article 46(1), in the sense that, Article 41 would be deprived of any scope if the obligation of states to comply with the Court's judgments was not directly applicable.[2537] With international law and jurisprudence not openly addressing the direct effect of judgments and with Member States not having expressly committed themselves to execute ECtHR judgments but only to respect the provisions enshrined in the Convention, the issue of the enforceability of the Court's case-law remains rather untouched. The concluding result of

[2532] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, pp. 216-217.
[2533] Roukounas: International Law (translated from Greek), p. 190.
[2534] Dijk/ Hoof: Theory and Practice of the European Convention on Human Rights, p. 17.
[2535] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, pp. 45-46; Matthias/ Ktistakis/ Stavriti/ Stefanaki: The Protection of Human Rights in Europe (translated from Greek), pp. 27-28.
[2536] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, p. 44.
[2537] Ress: Wirkung und Beachtung der Urteile und Entscheidungen der Straßburger Konventionsorgane, p. 352.

chapters two and three is that, at least de lege lata, a direct effect of ECtHR judgments is missing,[2538] thus a unilateral state enforcement action appears necessary in order for them to find application, however, judgments that are specific to their facts and legal consequences as well as just satisfaction judgments, due to their ordering nature, could possibly be considered as appropriate for a direct domestic application[2539].

Another effect of the Convention and the Court's case-law that is not of purely legal nature, but rather explores the overall influences of the ECHR regime on the national legal order, is the so-called indirect effect. The indirect effect concerns in the case of the Convention, mainly its utilisation by national courts in the interpretation process, in other words, the adaptation of national law to ECHR law by means of judicial interpretation. As highlighted in chapter two, the trend of the interpretive harmonisation between the Convention and national human rights law extends even to constitutional provisions, whereby constitutional rights are interpreted in the light of ECHR law and, if necessary, amended accordingly. In chapter three the reader becomes familiar with the indirect effect of ECtHR judgments, a concept that embraces their interpretive authority, in other words their ability to produce an effect that extends beyond the context of the specific case judged, also known as res interpretata. While international courts traditionally accept that, the effect of res judicata is limited to the operative part of a judgment, with the exception of those cases where the reasoning is absolutely decisive for the findings of the ruling, the Court regularly refers to its previous case-law, having even accepted that its judgments inevitably have effects that extend beyond the confines of the particular case[2540]. The Court's intention to for its judgments to be recognised as interpretive precedents and for itself to gain a law-making character, is diffused in its case-law. Theoretical attempts to justify the interpretive power of the Court's judgments are often based on Articles 1, 32(1) and 52 of the Convention, arguing that, these provisions demonstrate that Member States have signed the Convention being fully aware of its effects on their sovereign powers and, of the consequences of a failure to fulfil the undertaken responsibilities.[2541] The fact that national courts have to fully justify their judgments when they seek to deviate from ECtHR case-law speaks for the power of the Court's established interpretive path. However, with explicit references to the Convention or to the Court's case-law being rare, their overall effects on the national legal orders of Member States are rather hard to detect. Furthermore, not being of a purely legal nature, the concept of an indirect application has raised concerns as to its legitimacy. Nevertheless, despite the non-existence of a formal commitment to abide by the Court's case-law in cases where they have not been litigants, Member States do orientate towards the Court's judgments, a result of the Court's high esteem and the legal bond established between the states and the Court.[2542]

The effects of the ECHR system at national level take on a special meaning after a judgment has been delivered and become final. In this context, the addresses of the judgment must be identified, in order to allocate the responsibilities for the realisation of its effects. And while determining the addressees of a national judgment entails no complications, in the field of international law it constitutes a grey area. More specifically, it is commonly raised that only states are subjects of international law, and therefore its single addressees, while the capacity of national authorities to be considered as addressees of ECtHR judgments is disputed. As

[2538] Uerpmann: Die Europäische Menschenrechtskonvention und die Deutsche Rechtsprechung, pp. 216-217.
[2539] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 414; Lambert-Abdelgawad: The Execution of Judgments of the European Court of Human Rights, p. 13.
[2540] Marckx v. Belgium (App. No. 6833/74, 13/6/1979) para. 58.
[2541] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), pp. 401-402, 415.
[2542] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 165.

outlined in chapter three, the absence of a regulation on the direct effect of the Court's judgments is seen as indicative of the fact that the national authorities cannot be held liable when they do not proceed with the execution of these judgments. And while at the time of the drafting of the Convention, the notion that international court rulings would not be binding exclusively on states was utterly utopian, today the level of the development of the international community does no longer allow it to be regarded as merely a construct of states. In addition, general international law considers that states can be held internationally liable for a wide range of acts and omissions of their organs, even those committed or having effects outside the national territory. It is also supported that, the obligation of the national legal order to adapt national laws and practices to the case-law of the Court. although not officially recognised, has by now become an acquis.[2543] In European countries, the governance model is based on the political doctrine of separation of powers, the so-called trias politica principle, however the effective protection of human rights requires that all governmental branches both individually and collectively help, within their field of competence, to realise the full legal and political effect of the Court's judicial rulings, or the rule of law could be seriously endangered. Of course the most effective means for a state to comply with its international obligations as these are reflected in international case-law is through the intervention of the legislature, which provides for erga omnes solutions, however, as the legislative procedure is a time-consuming process and one that lies in the discretion of the legislator, the role of the judiciary in providing a temporary response becomes very relevant. In their quest to overcome gaps and overlaps, national judges are often called upon to exercise some sort of judicial activism, that is to move beyond a sterile application of the letter of the law. However, the tendency of the judiciary to act favour legis and its sensitivity, mostly that of the highest national courts, on issues that interfere with their prestige and independence, makes it rare for the courts to disapply primary national legislation in favour of the Convention. With the responsibility for the protection of human rights being shared between the national and international structures and shaped by a plethora of legal texts and commitments, the role of national authorities is twofold and discrepancies among Member States but also within the same country are inevitable. However, the reluctance for the pervasive effect of the Convention is slowly declining and, although inconsistencies have not completely disappeared, there are examples of exemplary cooperation between the European and the national competent organs that provide a promising note.

Apart from the difficulties in defining the addressees of the judgements, the exact content of the state's obligation following an ECtHR decision is also unclear. The Court's standard practice of not providing any relevant guidance in its rulings sheds only little light on the practicalities of the execution of its judgments. In chapter three the reader becomes familiar with these issues, the practical aspects of which are extensively illuminated. As set out there, with the exception of pilot-judgments where the Court issues instructions as to the desirable actions and, of just satisfaction judgments, whereby the Court orders a specific performance, namely the payment of a certain amount of monetary compensation to the applicant, the Court prefers to remain uninvolved and it does not proceed with proposing concrete measures. The first step in implementing a Court's judgment at national level is the restitutio in integrum, interpreted as re-establishing the situation which existed before the wrongful act was committed and based on the general concept of the international responsibility of states. Appropriate restoration of the status quo ante is achieved through the adoption of general or individual measures, chosen at the discretion of the Member States. General measures comprise legislative amendments or changes in administrative and judicial practice, and thus affect a large amount

[2543] Perrakis: Dimensions of the International Protection of Human Rights (translated from Greek), p. 242.

of people, while individual measures concern only the specific case and focus on the satisfaction of the individual seeking justice, being therefore usually of administrative or judicial nature. Of the procedures without great practical difficulties is when the Court has found a violation to have occurred through an administrative act, whereby the executive is expected to recall the unlawful act or, in the case of an omission, to issue the required act. More demanding are the processes of repealing provisions of national law which have been found to be incompatible with the Convention and of reopening judicial proceedings where the Court has found a judgment to have caused the violation, since they both affect the rights of third persons. In fact, due to the admissibility requirement of exhaustion of all domestic remedies prior to the application to the Court, the ECtHR decision will usually target a national judgment since this is the last stage of the national procedures. By doing this, the most appropriate way of restitution is usually thought to be the reopening of the case at the domestic level, despite the fact that operative event of the violation may have been a law or an administrative act. There where due to legal or physical impracticability, restitution cannot be performed effectively, a second option comes into play, that of just satisfaction, although the Court has so far held a rather reserved position in this regard, demonstrating that its role lies predominantly in declaring violations of ECHR law. Nevertheless, since just satisfaction does not automatically eliminate the consequences of a violation, a combination of redress forms cannot be excluded and where the nature of the violation requires it, the applicant must be restored to the state in which he was finding himself prior to the occurrence of the breach. Furthermore, award of just satisfaction does not reject the establishment of the civil liability of the state or the right of the individual to obtain a further compensation under national law. Chapter three further illuminates that, except in those cases where Member States intentionally fail or grossly deny to comply with the Convention standards, the extent to which a state will eventually comply with ECtHR judgments varies depending on the type of the violation, the complexity of the case and on the domestic capacities available. And although the Court has been gradually developing more specific guidelines in order to minimise the difficulties arising from ambiguities in its judgments, it seems difficult to overcome current challenges that prevent the Convention from developing its potential effectiveness, without a parallel improvement in the national legal system and administrative capacities. Adding to the difficulties that make up the grid of barriers to the sound implementation of the Convention and as a result of the Convention confronting Member States over their most sensitive issues, a margin of appreciation is recognised to the states, in other words, a degree of discretion in defining the means for their compliance. However, the task of defining the appropriate means of compliance and the lack of national legal and regulatory infrastructures do not constitute the only problematic elements in the effectiveness of the enforcement of ECtHR judgments, since implementation is a matter largely linked to their binding effect, which, as demonstrated, remains a grey area and an issue that needs to be openly approached by the ECHR system itself.[2544] In this context, as long as the Court, the Committee of Ministers and the other institutions involved do not exhaust their powers, and as long as the Member States continue to be guided by a narrow conception of national sovereignty and to pursue their personal interests, the application of the Convention and the Court's case-law will continue to suffer delays and shortcomings.

When non-compliance takes the face of the non-implementation of the Court's judgments and for the purposes of the supervision of the execution of ECtHR judgments, a special body of the Council comes into play, that is the Committee of Ministers. Chapter three describes this distinguishing and at the same time symbolic organ, which is responsible, to a great extent, for the effectiveness of the ECHR system, having added significantly to its credibility. Nonetheless, because of consisting of the Foreign Affairs Ministers and having a manifestly political

[2544] Haß: Die Urteile des Europäischen Gerichtshofs für Menschenrechte, p. 103.

character, the Committee has been criticised for lack of knowledge for procedures which are of a purely legal character such as the execution of judicial decisions. In realising its functions, the Committee of Ministers is facilitated by the Parliamentary Assembly, which by virtue of consisting of representatives of the Member State, guarantees a direct bond to them and continuing access to valuable information. Task of the Committee is to establish a dialogue with the respondent state, aiming to tackle deficiencies in the execution process. Pending state compliance, the Committee may issue interim resolutions or recommendations, which despite their non-binding nature however constitute effective means of assisting the execution process. The Committee can also launch an infringement procedure against a state, that is, refer a case to the Court when the authorities refuse to abide by a final judgment. The Committee actually lacks a stricto sensu enforcement mechanism and the ECHR system suffers the non-existence of sanctions, so that the only means available against a Member State's failure to comply is political peer pressure, the most severe expression of which takes the form of the expulsion of a Member State from the Council of Europe, so far never used. The good news is that, as the ECHR system grows stronger, the understanding within the international community about the political cost that comes along with disobedience also grows stronger. In case of a non-execution of an ECtHR judgment, the victim itself as well does not have a lot of 'weapons' in its hands, since prerequisite for an individual application to the Court is, according to Article 34, a violation of the rights set forth in the Convention, whereby the responsibility to abide by final judgments as set out in Article 46(1) does not constitute a right in this sense. Particularly in the case of a non-execution of a judgment that has awarded a just satisfaction according to Article 41, the victim's option to initiate new proceedings before the Court, on the grounds of a violation of the right to property as set forth in Protocol No. 1 is not completely negated. In this context it becomes clear that, the recognition of the direct applicability of Articles 41 and 46 would constitute sufficient legal basis for a claim against the non-execution of an ECtHR judgment to be raised domestically, while the recognition of these Articles as substantive rights would justify the submission of a new application to the Court. On their part, states may as well pursue the legal path when they witness the non-compliance of another Member State with ECHR standards, referring to the Court "any alleged breach of the provisions of the Convention and the Protocols thereto" in the context of an inter-State case under Article 33. However, interstate applications are rare and considered a sensitive issue, so that this practice is practically only extremely rarely followed.

As already mentioned, despite the overall broad and wide-ranging impact of the ECHR regime on the national legal orders, effectiveness diverges from one Member State to another, with state responses ranging from wilful compliance to principled resistance. From the case-studies examined in chapters four and five this dissertation, it should be noted for the case of Germany that there have been already before the ratification of the Convention positive preconditions for a sound application of the doctrines of the Convention in national law. Reason for the smooth reception of ECHR law in Germany has been that the German Constitution was already providing a complete and accurate list of fundamental rights and a level of protection which, to its biggest part, has been more extensive than the one provided by the Convention itself. Furthermore, Germany has already been familiar with the institution of constitutional appeal, while its legal science was, as compared to the rest of the European countries, enjoying international recognition and reputation. Having a comprehensively regulated human rights system, the Convention has not been seen as a chance to compensate the deficiencies in the national legal system, but rather as a lever encouraging the further development of the national system. At the same time, Germany was determined to show to the international community a face different than the one known from the recent unfortunate past, by holding an open stance towards international law, something that has been expressed in the international friendliness

of its Constitution. The Basic Law of Germany states clearly that it aims at integrating Germany as an equal partner into the legal community of peaceful and united European states while according to jurisprudence, this is not seen as a waiver of sovereignty, but rather as an expression of it. As depicted in chapter four, the nature of the constitutional system in Germany is dualistic, meaning that a formal act of incorporation is needed in order for an international treaty to become applicable on national level. In the case of the Convention, it has been incorporated into the German law by the federal legislature in a formal statute, having acquired, at least officially, the status of federal German statute. The classification of the Convention at the hierarchical level of federal law means that it precedes over provincial law, while it shall be ousted in the case of a conflict with higher-ranking law or even, as the principle lex posterior derogat legi priori requires, in the case of a conflict with younger federal law. At the same time, both in theory and practice, significant attempts have been made to justify a higher status of the Convention. Nevertheless, until now, theoretical approaches seeking to attribute to the Convention a supra-legislative or even a supra-constitutional status, have not yet been very convincing. Despite enthusiastically pursued, neither a dogmatic basis for a higher classification of the Convention nor one for the binding force of the Court's judgments have so far been found. In any case, as a result of the status given to international treaties by the Basic Law, the Convention and its Protocols must be properly applied and observed when interpreting national law. Still, by virtue of its hierarchical classification, the Convention cannot constitute direct constitutional criterion of review, despite its provisions serving as an aid in determining the scope and the content of the fundamental rights and principles of the Constitution. On the other hand, the practice of interpreting the Constitution in the light of the Convention and according to the rule of international friendliness, can translate into a violation of constitutional law in conjunction with the principle of the rule of law, in case that a national authority fails to duly consider the effects of the guarantees of the Convention and the decisions of the Court. In this context, the Görgülü judgment, has provided the basis for the establishment of a constitutional appeal against the failure to comply with a previous ECtHR judgment, while the competent court did not distinguish between cases where the appeal has been directed against Germany or another Member State. Despite the undoubted efforts to interpret the Constitution so that no conflict with the international obligations of Germany arises, and despite the recognised orientation effect of ECtHR judgments, so-called normative leading function, the commitment to international law and, as a result, the effects of the Convention, remain restricted only to what is permitted within the democratic and constitutional system of the Basic Law. As a result, there is no contradiction to Germany's international obligations, if national legislature does not comply with ECHR law, when the view supported by the Court clearly opposes national legislation. Similarly, when an interpretation is not methodologically justifiable, or when a national court presents adequate reasons, it may refrain form a position previously adopted by the Court. Another particularity in this regard that may pose some limitations as to the obligation to give precedence to an interpretation in accordance with the Convention, is the balanced partial systems of the domestic law, whereby the judge must achieve a balance between conflicting fundamental rights and carefully integrate an ECtHR decision into national law, which, occasionally, might turn out to be a very tricky task. With respect to the addresses of ECtHR judgments, there exists a rich theoretical debate with the prevailing view advising that all national bodies are in principle bound by the case-law of the Court, within their field of competences. And while a strictly binding nature of ECtHR judgments can hardly be justified, however, administrative authorities and courts, by virtue of being bound by law and justice, they have an obligation to take into account the case-law of the Court. Nevertheless, the Supreme Court has, apparently deliberately, left ambiguities as to what this obligation exactly comprises, leading to discrepancies between the two jurisdictions and between national authorities, most gravely amongst courts. Different is the case of the legislature, which is bound

only by the constitutional order and which is, in case that a violation of constitutional principles cannot otherwise be averted, not obliged to comply with international law. In the rest of the cases, the lawmaker usually intervenes to restore the balance between national and international legal order, but again, he cannot be urged to do so, and thus, in the meantime, alternative temporary measures to end the violation have to be taken.

Chapter five deals with the case of Greece, a country that has been traditionally facing economic difficulties leading to a poor performance of its international commitments. Insufficient resources together with structural deficits have exploded in terms of severity during the dictatorial regime of the early 1970's, a political shift that would mark the single case in the Council's history where a country has cancelled its membership. Luckily, the country has slowly recovered from the unfortunate political events and, along with re-ratifying the Convention, has put great effort in shaping the new characteristics of its international profile. The return to the constitutional order, the classification of the Constitution as prior-ranking law and the fortification of the latter with the constitutional safeguards of an extremely difficult review procedure, have gradually led to a comprehensive set of fundamental rights and to the establishment of constitutional principles that could offer a protection comparable to that of international standards. Greece is, similarly to Germany, a dualist state, meaning that it favours a distinction of domestic from international law, having thus incorporated the Convention into national law by legislative decree. Upon incorporation, the Convention has become enforceable, enjoying priority over both previous and subsequent national parliamentary acts. This supra-legislative classification of international law has a particularly useful practical connotation, in the sense that, in the event of a conflict with national law the Convention precedes. However, the constitutionally recognised increased formal power of the Convention has not been able to guarantee its regulatory significance, since the Convention is often being treated as a mere component of the Constitution. This is mostly evident in the process of the control of the conventionality of national laws, which currently lives in the shadow of their control of constitutionality, since the conventionality check is drawn automatically as a superfluous argument that merely reinforces a result which has been already highlighted by the constitutional control. Another unfortunate use of the Convention in the process of the constitutional interpretation has been the reliance on the Convention in order to justify a reduction in the protection provided by national constitutional provisions, a practice directly contrary to Article 53 and one which has luckily gradually diminished. At the same time, arguments trying to justify a constitutional or even a supra-constitutional hierarchical status of the Convention have yet found only insufficient resonance. Still, the special nature of international human rights law requires that it be respected at all times and a constitutional interpretation that renders ECHR provisions effective. It is furthermore considered that a harmonisation of the two texts, the Convention and the Constitution, is almost always possible so that invoking the hierarchical relationship between the two shall remain a means of last resort. After all, the Constitution does not deny the broadening of the scope it itself provides. It is widely accepted that, by virtue of its formal prevalence, the protection level guaranteed by the Convention and the Court should also be ensured in the domestic realm and by all national bodies. Still, the prevailing opinion in Greek legal theory refuses that case-law can have the character of a legal source, while excessive formalism and complexity in court procedures and in the language of verdicts do not permit the full utilisation of the Court' case-law and of its valuable orientation effect. As a result of the lack of a stricto sensu binding force of ECtHR case-law on national judges, a departure from a jurisprudential position of the Court is acceptable when a special reference to the particular ECtHR judgment has been made and detailed reasons provided. Here again, national judges maintain the possibility to not endorse an interpretive line that has been drawn by the Court when an interpretation genuinely cannot

fit in national law and of course, given that another coherent interpretive solution can be supported. A paradox of the Greek legal reality is the incrimination of administrative infringements as a result of which the judicial pathway is almost always activated. In this context, the Court will usually find that a violation results from a judgment and not from an administrative act, case in which a less complex state response would solve the issue. Lastly, when legislative intervention is required, a process that lies at the discretion of the legislator and, taking into account the fact that Greece lacks a constitutional court, temporary alternatives are hardly provided. Still, although legislative intervention cannot be urged, the civil liability of the state in case of inaction is not completely rejected by theory.

What has been observed by examining the impact of the ECHR in Germany and Greece, is that both countries are devoted to the promotion of democratic principles such as the strict adherence to international law and the respect for human rights. Notwithstanding existing difficulties, both Germany and Greece are enforcing the minimum human rights standards in the way that these are being defined by the legally binding framework of the Convention and, both countries are strong supporters of enhancing and strengthening the ECHR system, having signed and ratified almost all additional protocols. Being dualist states, they have incorporated the Convention by legislative act, while the official rank that the Convention enjoys in their respective national hierarchy of laws and the mechanisms established for the enforcement of ECtHR judgments, differs. And while one would expect a more far-reaching compliance level in Greece because of the classification of the Convention at a hierarchical level over the parliamentary legislation, however, it appears that the human rights situation in Germany is significantly better, at least in terms of incoming applications. Moreover, in both countries the legal theory has stepped up its efforts to establish an unofficial primacy of the Convention, arguing its constitutional or even its supra-constitutional power. Common attempts in this context, which however have not prevailed, encompass the inclusion of the Convention in the concept of the generally recognised rules of international law and of the Court in that of international organisations to which sovereign powers have been transferred. Moreover, regardless of the official ranking of the Convention, both countries give precedence to an interpretation in accordance with the Convention and it is no exaggeration to say that the Convention is functioning as a 'shadow constitution' since with its catalogue of fundamental rights and freedoms, it intrudes into an area that traditionally belongs to the exclusive influence of constitutional law.

With the uniform regulation of the primacy of the Convention and of the enforceability of ECtHR judgments by all Member States remaining merely wishful thinking, a review of the Convention towards a stricter text seems to be the only way to ensure a lasting solution in terms of a sound interpretation of the Convention and a coherent implementation of ECtHR judgments. However, currently, the likelihood of reaching a common agreement among Member States and of remodelling the Convention towards a strictly binding system is highly doubted. It is clear that, despite the massive internationalisation of human rights in recent decades, Member States still play a decisive role in ensuring consistency in the protection of human rights; in fact, the principle of subsidiarity presupposes that the role of the international scheme is only supplementary while states remain the principal defenders of the rights of their citizens. Leaving behind a strict separation between law and politics, it should be acknowledged that, without the states' goodwill and a genuine intention to comply, the whole European system of human rights protection is powerless and the rights enshrined in the Convention are at stake.[2545] In recent years, in the light of the political dangers that are associated with state non-compliance, it seems that policy-makers and decision-takers have come to comprehend the

[2545] Chrysogonos: The European Convention on Human Rights (translated from Greek), p. 69.

overall impact of international law and to re-establish the centrality of human rights by elevating them up in the political agenda.[2546] On the one hand, sound state practice requires that the political reluctance towards upholding international standards be replaced by a cultivation of an authentic culture of human rights.[2547] On the other hand, political initiatives should not be blackmailed by the international community and state consent should not be violated by unilateral enforcement, as this could reduce the participation of states in common human rights policies.[2548] Despite some theorists urging the need to change the course of 'politicisation' of rights and stressing the Court's role as an institution of legal and not of political nature, however, it is difficult to reject that international law is a versatile combination of international legal rules and international relations.[2549] In any case, in order for a genuine human rights culture to grow and flourish, apart from the political commitment, the engagement of all actors involved is also necessary. Cooperation between national and international actors is an essential parameter in this regard, however, the conditions fro a genuine dialogue are currently still lacking in the international political climate.[2550] National authorities, and especially courts, must abandon traditional and bureaucratic approaches and modify their established theoretical perceptions towards an enhanced protection of human rights.[2551] In addition, it is vital to engage with non-state actors and civil society, who play a multifaceted role by substantiating human rights violations, providing expertise, offering constructive criticism and raising public awareness. Ensuring that the European mechanism actually works for the public good, also requires active citizen participation, who, on their part, need to become aware of their own responsibilities in the process of experiencing the breadth of their European identity. Relating thereto, it is believed that nowadays European citizens are experiencing their rights with an awareness that has never been demonstrated before on a European level.[2552] The presence of human rights outside the courtrooms is also essential in order to move away from the model of repression towards a model of prevention.[2553] An integral aspect of prevention is compliance with the case-law of the Court in all cases, regardless of whether another Member State has been convicted; thus, recognising the power of judicial precedents.[2554] Furthermore, it should become common knowledge that, human rights are not just privileges but rather essential elements of democracy. The triangle of human rights, democracy and the rule of law is consisting of mutually reinforced elements with both a national and an international dimension. On its part, the Court, by guaranteeing to millions of European their status as equals, is strengthening the democratic process across Europe and creates a culture of democracy, which constitutes the cornerstone of democratic governance. In this sense, effective compliance with ECHR law serves the conditions of a genuine democracy and promotes security and unity in the entire region.[2555] Furthermore, the good standing of the CoE is directly beneficial to European citizens and the organisation's flawless performance is the best way to ensure that it

[2546] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), p. 89.
[2547] Brummer: Der Europarat, p. 262.
[2548] Iliopoulos-Strangas: The Enforcement of the Judgments of the European Court of Human Rights (translated from Greek), p. 89.
[2549] Janis/ Kay/ Bradley: European Human Rights Law, p. 113.
[2550] Lester: The European Court of Human Rights after 50 years, p. 113.
[2551] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 416. The view is expressed by Chrysogonos with regards to the Greek reality but has been generalised here, due to similar needs being relevant for other Member States too.
[2552] Paraskeva: The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights, p. 33.
[2553] Paulus: Germany, p. 360.
[2554] Chrysogonos: The European Convention on Human Rights (translated from Greek), p. 60.
[2555] Ambos: Straflosigkeit von Menschenrechtsverletzungen, p. 347.

will continue to realise its full potential for the common good.[2556] In addition, national laws protecting freedom, justice and security are highly dependent on the developments in the international legal order, so that international treaties and institutions, including those of human rights, are essential to building a stable future for the states.[2557] What is more, respect for the European human rights system directly affects the vital relations of each state with the European family, thus constitutes an absolute precondition for the harmonious co-existence in the European continent.[2558] In this context, the future of the ECHR regime is inextricably linked to the future of Europe.[2559] In fact, the cooperation between the states and the CoE, which has led to the creation of a true European judicial area, has been based on the conception that the unification process in Europe can be promoted through the path of legal harmonisation.[2560] It therefore constitutes an absolute necessity for every country that recognises its obligation to contribute to the European integration process, to comply with the basic democratic principles, in the way that these are reflected in the jurisprudence of the Court.[2561] At present, it appears as if the European vision and the European reality are two sides of the same coin, balancing on thin edges and seeking for a common ground which still seems to be hampered by practical constraints.[2562] Nevertheless, despite previous failures and present challenges, the experience gained so far serves as an opportunity for resolving long-standing common European problems and provides a sense of optimism for the future of the ECHR.

The dissertation in hand provides a critical analysis of both the historical evolution and the current standing of one of the most advanced international human rights systems, and presents the rules governing and the complications characterising its functioning. The research focuses largely on the issue of the effectiveness of the Convention, approaching it as the Achilles' heel of the European human rights regime. In doing so, the study points out the normative gaps that the system confronts with and treats them as an existential threat to the ECHR system. In this context, the effectiveness and credibility of the Convention and the Court are approached as highly political issues, acknowledging that, only good faith and real political will on the part of respondent states can ultimately ensure compliance with the judgments of the Court. With positivism prevailing in the legal arena, a holistic understanding of international human rights has only little chance of success if examined only under the prism of traditional legal methodology. This dissertation is moving beyond these narrow borders in summarizing a plethora of de lege ferenda arguments and presenting in this way a rather teleological note. Although the broad topic of the functioning of the system of the Convention has received considerable attention, however, 'exogenous' legitimizing sources are underrepresented in research. In what concerns Greek literature in particular, either it studies the ECHR from a general point of view with an interest in the broader dimensions of the international protection of human rights and in the relations of international and internal law, or often, it analyses the impact of the jurisprudence of the Court on Greek jurisprudence, an expression of the inexorable interest in judiciary tendencies. The binding force and the enforceability of the Court's judgments are approached only as secondary issues, if at all, so that the number of papers that are geared to these issues remains extremely low. A different situation occurs in the case of Germany, with a considerable number of legal scholars having addressed the discussed issues,

[2556] Huber: Ein Historisches Jahrzehnt, p. 252.
[2557] Kunig: Das Rechtsstaatsprinzip, pp. 485-486. The view is expressed by Kunig with regards to the German reality but has been generalised here, due to similar situations being relevant for other Member States too.
[2558] Matthias: European Convention on Human Rights (translated from Greek), p. 16.
[2559] Huber: Ein Historisches Jahrzehnt, p. 252.
[2560] Perrakis: European Law of Human Rights (translated from Greek), p. 33.
[2561] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 416.
[2562] Brummer: Der Europarat, p. 88.

a differentiation that can be explained if one considers the history and the level of development of the German legal science and the current wealth of German literature in the legal domain. Overall, the author considers that the topics discussed have yet not been adequately studied in literature, or at least, in proportion to their importance, so that this research area is far from exhausted. In any case, with international law itself being a dynamic process and with the ever-changing international environment, the need for an up-to-date and fresh insight to the developments in the European human rights protection system, appears always current. The author further believes that, in view of the special nature and distinctive legal dimension of human rights, their violations cannot be experienced as a mechanical process, but shall rather be examined under an interdisciplinary prism, including but not limited to the fields of law, philosophy, politics, international relations, sociology, anthropology and ethics. Approaching human rights from a less dogmatic perspective that moves beyond the narrow borders of the legalistic discourse and scholarship could possibly provide a more balanced and realistic response to the problems surrounding their protection. What has also been revealed through the example of the case studies examined is that, violation and compliance rates cannot be approached with quantitative criteria and that, the number of incoming applications is only one indicator out of many, while the overall compliance level is the result of the coupling of a number of factors.[2563] In this vein, a sound approach to the overall position of the ECHR in the domestic realm requires a comparative research and a qualitative assessment of mutual achievements, bearing in mind that, ultimate aim of the Convention is to provide a common denominator for the protection of human rights in Europe.[2564] In this process, both the analytic and the systemic approach are essential, since the first one emphasises the elements of interaction between actors, while the second focuses on the common objective that drives this interaction.[2565]

[2563] Incoming applications can be the consequence of higher levels of reporting in certain states due to increased awareness of citizens, financial means available for access to the European protection system or even familiarity of legal practitioners with the specifics of the ECHR system.
[2564] Chrysogonos: The Incorporation of the ECHR in the National Legal Order (translated from Greek), p. 31.
[2565] Harmsen: The Reform of the Convention System, pp. 142-143. Harmsen argues that the current perception of the systemic approach is not adequate and that soon an environmental approach that considers all interactions within the multifaceted geopolitical climate will be needed.

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ANNEX

German legislation

BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY[2566]

Article 1
[Human dignity – Human rights – Legally binding force of basic rights]
1. Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
2. The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
3. The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

Article 2
[Personal freedoms]
1. Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.
2. Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

Article 3
[Equality before the law]
1. All persons shall be equal before the law.
2. Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.
3. No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability.

Article 6
[Marriage – Family – Children]
1. Marriage and the family shall enjoy the special protection of the state.
2. The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.
3. Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect.
4. Every mother shall be entitled to the protection and care of the community.
5. Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage.

Article 19
[Restriction of basic rights – Legal remedies]
1. Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears.
2. In no case may the essence of a basic right be affected.
3. The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits.
4. Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by this paragraph.

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Article 20
[Constitutional principles – Right of resistance]
1. The Federal Republic of Germany is a democratic and social federal state.
2. All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.
3. The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.
4. All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.
Article 23
[European Union – Protection of basic rights – Principle of subsidiarity]
1. With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.
1a. The Bundestag and the Bundesrat shall have the right to bring an action before the Court of Justice of the European Union to challenge a legislative act of the European Union for infringing the principle of subsidiarity. The Bundestag is obliged to initiate such an action at the request of one fourth of its Members. By a statute requiring the consent of the Bundesrat, exceptions from the first sentence of paragraph (2) of Article 42, and the first sentence of paragraph (3) of Article 52, may be authorised for the exercise of the rights granted to the Bundestag and the Bundesrat under the contractual foundations of the European Union.
2. The Bundestag and, through the Bundesrat, the *Länder* shall participate in matters concerning the European Union. The Federal Government shall keep the Bundestag and the Bundesrat informed, comprehensively and at the earliest possible time.
3. Before participating in legislative acts of the European Union, the Federal Government shall provide the Bundestag with an opportunity to state its position. The Federal Government shall take the position of the Bundestag into account during the negotiations. Details shall be regulated by a law.
4. The Bundesrat shall participate in the decision-making process of the Federation insofar as it would have been competent to do so in a comparable domestic matter, or insofar as the subject falls within the domestic competence of the *Länder*.
5. Insofar as, in an area within the exclusive competence of the Federation, interests of the *Länder* are affected, and in other matters, insofar as the Federation has legislative power, the Federal Government shall take the position of the Bundesrat into account. To the extent that the legislative powers of the *Länder*, the structure of *Land* authorities, or *Land* administrative procedures are primarily affected, the position of the Bundesrat shall be given the greatest possible respect in determining the Federation's position consistent with the responsibility of the Federation for the nation as a whole. In matters that may result in increased expenditures or reduced revenues for the Federation, the consent of the Federal Government shall be required.
6. When legislative powers exclusive to the *Länder* concerning matters of school education, culture or broadcasting are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a member state of the European Union shall be delegated by the Federation to a representative of the *Länder* designated by the Bundesrat. These rights shall be exercised with the participation of, and in coordination with, the Federal Government; their exercise shall be consistent with the responsibility of the Federation for the nation as a whole.
7. Details regarding paragraphs (4) to (6) of this Article shall be regulated by a law requiring the consent of the Bundesrat.
Article 24
[Transfer of sovereign powers – System of collective security]
1. The Federation may by a law transfer sovereign powers to international organisations.
1a. Insofar as the *Länder* are competent to exercise state powers and to perform state functions, they may, with the consent of the Federal Government, transfer sovereign powers to transfrontier institutions in neighbouring regions.
2. With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world.
3. For the settlement of disputes between states, the Federation shall accede to agreements providing for general, comprehensive and compulsory international arbitration.
Article 25
[Primacy of international law]

The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.

Article 26

[Securing international peace]

1. Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional. They shall be made a criminal offence.
2. Weapons designed for warfare may be manufactured, transported or marketed only with the permission of the Federal Government. Details shall be regulated by a federal law.

Article 28

[*Land* constitutions – Autonomy of municipalities]

1. The constitutional order in the *Länder* must conform to the principles of a republican, democratic and social state governed by the rule of law, within the meaning of this Basic Law. In each *Land*, county and municipality the people shall be represented by a body chosen in general, direct, free, equal and secret elections. In county and municipal elections, persons who possess citizenship in any member state of the European Community are also eligible to vote and to be elected in accord with European Community law. In municipalities a local assembly may take the place of an elected body.
2. Municipalities must be guaranteed the right to regulate all local affairs on their own responsibility, within the limits prescribed by the laws. Within the limits of their functions designated by a law, associations of municipalities shall also have the right of self-government according to the laws. The guarantee of self-government shall extend to the bases of financial autonomy; these bases shall include the right of municipalities to a source of tax revenues based upon economic ability and the right to establish the rates at which these sources shall be taxed.
3. The Federation shall guarantee that the constitutional order of the *Länder* conforms to the basic rights and to the provisions of paragraphs (1) and (2) of this Article.

Article 31

[Supremacy of federal law]

Federal law shall take precedence over *Land* law.

Article 32

[Foreign relations]

1. Relations with foreign states shall be conducted by the Federation.
2. Before the conclusion of a treaty affecting the special circumstances of a *Land*, that *Land* shall be consulted in timely fashion.
3. Insofar as the *Länder* have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government.

Article 59

[Representation of the Federation for the purposes of international law]

1. The Federal President shall represent the Federation for the purposes of international law. He shall conclude treaties with foreign states on behalf of the Federation. He shall accredit and receive envoys.
2. Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply mutatis mutandis.

Article 79

[Amendment of the Basic Law]

1. This Basic Law may be amended only by a law expressly amending or supplementing its text. In the case of an international treaty regarding a peace settlement, the preparation of a peace settlement, or the phasing out of an occupation regime, or designed to promote the defence of the Federal Republic, it shall be sufficient, for the purpose of making clear that the provisions of this Basic Law do not preclude the conclusion and entry into force of the treaty, to add language to the Basic Law that merely makes this clarification.
2. Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat.
3. Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

Article 80

[Issuance of statutory instruments]

1. The Federal Government, a Federal Minister or the *Land* governments may be authorised by a law to issue statutory instruments. The content, purpose and scope of the authority conferred shall be specified in the law. Each statutory instrument shall contain a statement of its legal basis. If the law provides that such authority may be further delegated, such subdelegation shall be effected by statutory instrument.

2. Unless a federal law otherwise provides, the consent of the Bundesrat shall be required for statutory instruments issued by the Federal Government or a Federal Minister regarding fees or basic principles for the use of postal and telecommunication facilities, basic principles for levying of charges for the use of facilities of federal railways, or the construction and operation of railways, as well as for statutory instruments issued pursuant to federal laws that require the consent of the Bundesrat or that are executed by the *Länder* on federal commission or in their own right.
3. The Bundesrat may submit to the Federal Government drafts of statutory instruments that require its consent.
4. Insofar as *Land* governments are authorised by or pursuant to federal laws to issue statutory instruments, the *Länder* shall also be entitled to regulate the matter by a law.

Article 93
[Jurisdiction of the Federal Constitutional Court]

(1). The Federal Constitutional Court shall rule:
1. on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal body;
2. in the event of disagreements or doubts concerning the formal or substantive compatibility of federal law or *Land* law with this Basic Law, or the compatibility of *Land* law with other federal law, on application of the Federal Government, of a *Land* government, or of one fourth of the Members of the Bundestag;
2a. in the event of disagreements whether a law meets the requirements of paragraph (2) of Article 72, on application of the Bundesrat or of the government or legislature of a *Land*;
3. in the event of disagreements concerning the rights and duties of the Federation and the *Länder*, especially in the execution of federal law by the *Länder* and in the exercise of federal oversight;
4. on other disputes involving public law between the Federation and the *Länder*, between different *Länder*, or within a *Land*, unless there is recourse to another court;
4a. on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103 or 104 has been infringed by public authority;
4b. on constitutional complaints filed by municipalities or associations of municipalities on the ground that their right to self-government under Article 28 has been infringed by a law; in the case of infringement by a *Land* law, however, only if the law cannot be challenged in the constitutional court of the *Land*;
4c. on constitutional complaints filed by associations concerning their non-recognition as political parties for an election to the Bundestag;
5. in the other instances provided for in this Basic Law.

(2) At the request of the Bundesrat, a *Land* government or the parliamentary assembly of a *Land*, the Federal Constitutional Court shall also rule whether in cases falling under para
graph (4) of Article 72 the need for a regulation by federal law does not exist any longer or whether in the cases referred to in clause 1 of paragraph (2) of Article 125a federal law could not be enacted any longer. The Court's determination that the need has ceased to exist or that federal law could no longer be enacted substitutes a federal law according to paragraph (4) of Article 72 or clause 2 of paragraph (2) of Article 125a. A request under the first sentence is admissible only if a bill falling under paragraph (4) of Article 72 or the second sentence of paragraph (2) of Article 125a has been rejected by the German Bundestag or if it has not been considered and determined upon within one year, or if a similar bill has been rejected by the Bundesrat.

(3) The Federal Constitutional Court shall also rule on such other matters as shall be assigned to it by a federal law.

Article 97
[Judicial independence]

1. Judges shall be independent and subject only to the law.
2. Judges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.

Article 100
[Concrete judicial review]

1. If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the *Land* court with jurisdiction over constitutional disputes where the constitution of a *Land* is held to be violated, or from the Federal Constitutional Court where this Basic Law is held to be violated. This provision shall also apply where the Basic Law is held to be violated by *Land* law and where a *Land* law is held to be incompatible with a federal law.

2. If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court.
3. If the constitutional court of a *Land*, in interpreting this Basic Law, proposes to deviate from a decision of the Federal Constitutional Court or of the constitutional court of another *Land*, it shall obtain a decision from the Federal Constitutional Court.

ACT ON THE FEDERAL CONSTITUTIONAL COURT[2567]

Section 13
The Federal Constitutional Court shall decide
1. on the forfeiture of fundamental rights (Article 18 of the Basic Law),
2. on the unconstitutionality of political parties (Article 21 para. 2 of the Basic Law),
3. on complaints against decisions of the Bundestag regarding the validity of an election or the gain or loss of a seat in the Bundestag (Article 41 para. 2 of the Basic Law),
3a. on complaints by associations regarding their non-recognition as a political party for an election to the Bundestag (Article 93 para. 1 no. 4c of the Basic Law),
4. on motions for the impeachment of the Federal President by the Bundestag or the Bundesrat (Article 61 of the Basic Law),
5. on the interpretation of the Basic Law in the event of disputes concerning the extent of the rights and obligations of one of the highest federal organs or of other parties who have been vested with own rights under the Basic Law or under the rules of procedure of one of the highest federal organs (Article 93 para. 1 no. 1 of the Basic Law),
6. in cases of disagreement or doubt concerning the formal or substantive compatibility of federal or *Land* law with the Basic Law or the compatibility of *Land* law with other federal law, upon request by the Federal Government, a *Land* government or one quarter of the Members of the Bundestag (Article 93 para. 1 no. 2 of the Basic Law),
6a. in cases of disagreement as to whether a law complies with the requirements of Article 72 para. 2 of the Basic Law, upon request by the Bundesrat, a *Land* government or a *Land* parliament (Article 93 para. 1 no. 2a of the Basic Law),
6b. on whether, in the case referred to in Article 72 para. 4 of the Basic Law, federal regulation pursuant to Article 72 para. 2 is no longer necessary or whether, in the cases referred to in Article 125a para. 2, first sentence, of the Basic Law, it could no longer be passed as federal law, upon request by the Bundesrat, a *Land* government or a *Land* parliament (Article 93 para. 2 of the Basic Law),
7. in cases of disagreement concerning the rights and obligations of the Federation and the *Länder*, in particular with regard to implementation of federal law by the *Länder* and the exercise of federal supervision (Article 93 para. 1 no. 3 and Article 84 para. 4, second sentence, of the Basic Law),
8. in other public-law disputes between the Federation and the *Länder*, between different *Länder* or within a *Land*, unless there is recourse to other courts (Article 93 para. 1 no. 4 of the Basic Law),
8a. on constitutional complaints (Article 93 para. 1 nos 4a and 4b of the Basic Law),
9. on motions for the impeachment of federal and *Land* judges (Article 98 paras 2 and 5 of the Basic Law),
10. on constitutional disputes within a *Land* if the decision is assigned to the Federal Constitutional Court under *Land* legislation (Article 99 of the Basic Law),
11. on the compatibility of a federal or *Land* statute with the Basic Law or the compatibility of a *Land* statute or other *Land* law with a federal statute, at the request of a court (Article 100 para. 1 of the Basic Law),
11a. on whether a decision of the Bundestag to establish a committee of inquiry is compatible with the Basic Law, upon referral pursuant to section 36 (2) of the Committees of Inquiry Act,
12. in cases of doubt regarding whether a rule of public international law is part of federal law and whether it directly creates rights and obligations for individuals, upon request by the court (Article 100 para. 2 of the Basic Law),
13. if the constitutional court of a *Land*, when interpreting the Basic Law, intends to deviate from a decision of the Federal Constitutional Court or of the constitutional court of another *Land*, upon request by that constitutional court (Article 100 para. 3 of the Basic Law),

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[2567] Act on the Federal Constitutioal Court in the version of the promulgation of 11 August 1993 (Federal Law Gazette I p. 1473), as last amended by Article 2 of the Act of 8 Oktober 2017 (Federal Law Gazette I, p. 3546). Translation in the context of this dissertation provided by Anastasia Kallidou. The German version is available under https://www.gesetze-im-internet.de/bverfgg/BJNR002430951.html#BJNR002430951BJNG000102305 (1.12.2017).

14. in cases of disagreement concerning whether law continues to apply as federal law (Article 126 of the Basic Law),
15. on such other cases as are assigned to it by a federal law (Article 93 para. 3 of the Basic Law).

Section 31

(1) The decisions of the Federal Constitutional Court shall be binding upon the constitutional organs of the Federation and of the *Länder*, as well as on all courts and those with public authority.
(2) In the cases referred to in section 13 nos 6, 6a, 11, 12 and 14, the decision of the Federal Constitutional Court shall have the force of law. The same shall apply in the cases referred to in section 13 no. 8a if the Federal Constitutional Court declares a law to be compatible or incompatible with the Basic Law, or if it voids a law. If a law is declared to be compatible or incompatible with the Basic Law or other federal law, or if it is voided, the operative part of the decision shall be published in the Federal Law Gazette by the Federal Ministry of Justice and Consumer Protection. This shall apply accordingly to the operative part of the decision in the cases referred to in section 13 nos 12 and 14.

Section 76

(1) Applications pursuant to Article 93 para. 1 no. 2 of the Basic Law which are filed by the Federal Government, a *Land* government or one quarter of the Members of the Bundestag shall only be admissible if the applicant considers federal or *Land* law to be
1. void due to being formally or substantively incompatible with the Basic Law or other federal law or
2. valid after a court, an administrative authority, or a federal or *Land* organ did not apply a legal provision because it deemed it to be incompatible with the Basic Law or other federal law.

(2) Applications pursuant to Article 93 para. 1 no. 2a of the Basic Law which are filed by the Bundesrat, a *Land* government or a *Land* parliament shall only be admissible if the applicant considers a federal law to be void for failing to meet the requirements of Article 72 para. 2 of the Basic Law; applications may also be filed if the applicant considers the federal law to be void for failing to meet the requirements of Article 75 para. 2 of the Basic Law.

CODE OF CIVIL PROCEDURE[2568]

Section 580

[Action for retrial of the case]

An action for retrial of the case may be brought:
1. Where the opponent, by swearing an oath regarding his testimony, on which latter the judgment had been based, has intentionally or negligently committed perjury;
2. Where a record or document on which the judgment was based had been prepared based on misrepresentations of fact or had been falsified;
3. Where, in a testimony or report on which the judgment was based, the witness or experts violated their obligation to tell the truth, such violation being liable to prosecution;
4. Where the judgment was obtained by the representative of the party or its opponent or the opponent's representative by a criminal offence committed in connection with the legal dispute;
5. Where a judge contributed to the judgment who, in connection with the legal dispute, violated his official duties vis-à-vis the party, such violation being liable to prosecution;
6. Where judgment by a court of general jurisdiction, by a former special court, or by an administrative court, on which the judgment had been based, is reversed by another judgment that has entered into force;
7. Where the party

a) Finds, or is put in the position to avail itself of, a judgment that was handed down in the same matter and that has become final and binding earlier, or where it
b) Finds, or is put in the position to avail itself of, another record or document that would have resulted in a decision more favourable to that party's interests;

8. Where the European Court of Human Rights has established that the European Convention for the Protection of Human Rights and Fundamental Freedoms or its protocols have been violated, and where the judgment is based on this violation.

Section 765a

[Protection from execution]

(1) Upon a corresponding petition being filed by the debtor, the court responsible for execution may reverse a measure of compulsory enforcement in its entirety or in part, may prohibit it, or may temporarily stay such

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[2568] Code of Civil Procedure as promulgated on 5 December 2005 (Federal Law Gazette I p. 3202; 2006 I p. 431; 2007 I p. 1781), last amended by Article 1 of the Act dated 10 October 2013 (Federal Law Gazette I p. 3786). Translation provided by Samson-Übersetzungen GmbH, Dr. Carmen von Schöning. The German version is available under http://www.gesetze-im-internet.de/zpo/BJNR005330950.html (1.12.2017).

measure if, upon comprehensively assessing the creditor's justified interest in protection, the court finds that the measure entails a hardship that due to very special circumstances is immoral (contra bonos mores). The execution court is authorised to deliver the orders designated in section 732 (2). Should the measure concern an animal, the execution court is to consider, in weighing the matter, the responsibility that the person has for the animal.
(2) The court-appointed enforcement officer may delay a measure serving to obtain the surrender of objects until the court responsible for execution delivers a decision, but may not so delay it for longer than one (1) week, if the prerequisites set out in subsection (1), first sentence, are demonstrated to his satisfaction and if it was not possible for the debtor to refer the matter to the execution court.
(3) In matters pertaining to the vacation of premises, the petition pursuant to subsection (1) is to be filed at the latest within two (2) weeks prior to the date set for the vacation of the premises, unless the grounds on which the petition is based came about only after this time or the debtor was prevented from filing the petition in due time through no fault of his own.
(4) The execution court shall reverse its order, upon a corresponding petition being filed, or shall modify it, if this is mandated with a view to the change of the overall factual situation.
(5) Enforcement activities may be abrogated in the cases provided for by subsection (1), first sentence, and subsection (4) only once the order has become final and binding.

Section 767

[Action raising an objection to the claim being enforced]

(1) Debtors are to assert objections that concern the claim itself as established by the judgment by filing a corresponding action with the court of first instance hearing the case.
(2) Such objections by way of an action may admissibly be asserted only insofar as the grounds on which they are based arose only after the close of the hearing that was the last opportunity, pursuant to the stipulations of the present Code, for objections to be asserted, and thus can no longer be asserted by entering a protest.
(3) In the action that he is to file, the debtor must assert all objections that he was able to assert at the time at which he filed the action.

CODE OF CRIMINAL PROCEDURE[2569]

Section 141

[Appointment of Defence Counsel]

(1) In the cases referred to in Section 140 subsection (1), numbers 1 to 3 and 5 to 9, and subsection (2), as soon as an indicted accused who has no defence counsel has been requested according to Section 201 to reply to the bill of indictment, defence counsel shall be appointed.
(2) If it only subsequently appears that defence counsel is needed, he shall be appointed immediately.
(3) Defence counsel may also be appointed during the preliminary proceedings. The public prosecution office shall request such appointment if in its opinion the assistance of defence counsel will be necessary pursuant to Section 140 subsection (1) or (2). Upon conclusion of the investigations (Section 169a) he shall be appointed upon application by the public prosecution office. In the case of Section 140 subsection (1), number 4, defence counsel shall be appointed without delay after the commencement of execution.
(4) The judge presiding over the court competent for the main proceedings or over the court seized of the case shall decide on the appointment, or the court competent for a judicial examination applied for by the public prosecution office pursuant to Section 162 subsection (1), first or third sentences, if the public prosecution office considers this necessary in order to speed up the proceedings; in the case referred to in Section 140 subsection (1), number 4, the court competent pursuant to Section 126 or Section 275a subsection (6) shall decide.

Section 147

[Inspection of the Files]

(1) Defence counsel shall have authority to inspect those files which are available to the court or which will have to be submitted to the court if charges are preferred, as well as to inspect officially impounded pieces of evidence.
(2) If investigations have not yet been designated as concluded on the file, defence counsel may be refused inspection of the files or of individual parts of the files, as well as inspection of officially impounded pieces of evidence, insofar as this may endanger the purpose of the investigation. If the prerequisites of the first sentence

[2569] Code of Criminal Procedure in the version published on 7 April 1987 (Federal Law Gazette I p. 1074, 1319), as most recently amended by Article 3 of the Act of 23 April 2014 (Federal Law Gazette I p. 410). Original translation by Brian Duffett and Monika Ebinger;
Translation updated by Kathleen Müller-Rostin and Iyamide Mahdi. The German version is available under http://www.gesetze-im-internet.de/stpo/BJNR006290950.html (1.12.2017).

have been fulfilled, and if the accused is in remand detention or if, in the case of provisional arrest, this has been requested, information of relevance for the assessment of the lawfulness of such deprivation of liberty shall be made available to defence counsel in suitable form; to this extent, as a rule, inspection of the files shall be granted.
(3) At no stage of the proceedings may defence counsel be refused inspection of records concerning the examination of the accused or concerning such judicial acts of investigation to which defence counsel was or should have been admitted, nor may he be refused inspection of expert opinions.
(4) Upon application, defence counsel shall be permitted to take the files, with the exception of pieces of evidence, to his office or to his private premises for inspection, unless significant grounds present an obstacle thereto. The decision shall not be contestable.
(5) The public prosecution office shall decide whether to grant inspection of the files in preparatory proceedings and after final conclusion of the proceedings; in other cases the presiding judge of the court seized of the case shall be competent to decide. If the public prosecution office refuses inspection of the files after noting the termination of the investigations in the file, or if it refuses inspection pursuant to subsection (3), or if the accused is not at liberty, a decision by the court competent pursuant to Section 162 may be applied for. Sections 297 to 300, 302, 306 to 309, 311a and 473a shall apply *mutatis mutandis*. These decisions shall be given without reasons if their disclosure might endanger the purpose of the investigation.
(6) If the reason for refusing the inspection of the files has not already ceased to exist, the public prosecution office shall revoke the order no later than upon conclusion of the investigation. Defence counsel shall be notified as soon as he once again has the unrestricted right to inspect the files.
(7) Where an accused has no defence counsel, information and copies from the files shall be given to the accused upon his application, provided that this is necessary for an adequate defence, cannot endanger the purpose of the investigation, also in another criminal proceeding, and that overriding interests of third persons meriting protection do not present an obstacle thereto. Subsection (2), first part of the second sentence, subsection (5) and Section 477 subsection (5) shall apply *mutatis mutandis*.

Section 329

[Defendant's Non-Appearance]

(1) If at the beginning of a main hearing neither the defendant nor, in cases where this is admissible a representative of the defendant, has appeared, and if there is no sufficient excuse for their failure to appear, the court shall dismiss an appeal by the defendant on fact and law without hearing the merits. This shall not apply if the court hearing the appeal on fact and law holds a new hearing after the case has been referred back to it by the court hearing the appeal on law. If a conviction for individual offences has been overturned, the content of that part of the judgment that has been upheld shall be clearly identified when the appeal on fact and law is dismissed; the penalties imposed may be combined into a new aggregate sentence by the court hearing the appeal on fact and law.
(2) Subject to the requirements of subsection (1), first sentence, an appeal on fact and law filed by the public prosecution office may also be heard in the absence of the defendant. An appeal on fact and law filed by the public prosecution office may also be withdrawn in such cases without the defendant's consent unless the conditions in subsection (1), second sentence, prevail.
(3) Within one week after service of the judgment, the defendant may request restoration of the *status quo ante* under the conditions specified in Sections 44 and 45.
(4) If the procedure pursuant to subsection (1) or (2) is not followed, an order shall be made for the defendant to be brought before the court or to be arrested. This shall be dispensed with if it is to be expected that he will appear at the new main hearing without the need for coercive measures.

CODE OF ADMINISTRATIVE COURT PROCEDURE[2570]

Section 47

(1) The Higher Administrative Court shall adjudicate on application within the bounds of its jurisdiction on the validity of
1. by-laws issued under the provisions of the Federal Building Code (*Baugesetzbuch*) and of statutory orders issued on the basis of section 246, subsection 2, of the Federal Building Code,
2. other legal provisions ranking below the statutes of a *Land*, to the extent that this is provided in *Land* law.

(2) Applications may be made by any natural person or body corporate claiming to have been aggrieved by the legal provision or its application, or that he/she will be aggrieved within the foreseeable future, or by any public authority within one year of announcement of the legal provision. It shall be directed against the corporation,

[2570] Code of Administrative Court Procedure in the version of the promulgation of 19 March 1991 (Federal Law Gazette I, p. 686), most recently amended by Article 5 of the Act of 10 October 2013 (Federal Law Gazette I, p. 3786). Translation provided by Neil Mussett.

institution or foundation which issued the legal provision. The Higher Administrative Court may grant to the *Land* and other bodies corporate under public law whose competence is touched by the legal provision an opportunity to be heard on the matter within a specified period of time. Section 65, subsections 1 and 4, and section 66 shall apply *mutatis mutandis*.
(2a) The application by a natural person or body corporate relating to a land-use plan or to statutes in accordance with section 34, subsection 4, first sentence, Nos. 2 and 3 or section 35, subsection 6, of the Federal Building Code shall be inadmissible if the person lodging the application has only made objections which he/she did not make when publicly available for inspection (section 3, subsection 2, of the Federal Building Code) or in the consultation of the interested public (section 13, subsection 2, No. 2 and section 13a, subsection 2, No. 1 of the Federal Building Code) or made late, but could have made, and if notice has been drawn to this legal consequence in the consultation.
(3) The Higher Administrative Court shall not examine the compatibility of a legal provision with *Land* law where it is provided in law that the legal provision is subject to review exclusively by the constitutional court of a *Land*.
(4) Where proceedings to review the validity of a legal provision are pending at a constitutional court, the Higher Administrative Court may order the suspension of the proceedings until such time as the case has been concluded by the constitutional court.
(5) The Higher Administrative Court shall adjudicate by handing down a judgment or, if it does not consider oral proceedings to be necessary, shall hand down an order. Should the Higher Administrative Court come to the conclusion that the legal provision is invalid, it shall declare it to be null and void; in this case, the ruling shall be generally binding, and the respondent shall be required to publish the ruling in exactly the same manner as the legal provision would be required to be made public. Section 183 shall apply *mutatis mutandis* in respect of the effect of the decision.
(6) On application the court may issue a temporary injunction where this is urgently required in order to avert the creation of serious disadvantages or for other compelling reasons.

ADMINISTRATIVE PROCEDURE ACT[2571]

Section 48
[Withdrawal of an unlawful administrative act]
(1) An unlawful administrative act, even after it has become non-appealable, may be wholly or partially withdrawn with effect for the future or retrospectively. An administrative act which has established or confirmed a right or a legally significant advantage (beneficial administrative act) may be withdrawn only subject to the limitations of paragraphs 2 to 4.
(2) An unlawful administrative act which grants or is a prerequisite for a one-off or continuing cash payment or divisible contribution in kind may not be withdrawn if the beneficiary has relied on the existence of the administrative act and his trust is worthy of protection, taking into consideration the public interest in a withdrawal. Trust is usually worthy of protection if the beneficiary has utilised the services provided or has made a financial disposition which he can no longer or only with undue disadvantage undo. The beneficiary cannot claim trust if he
1. has obtained the act of administration by fraud, threat or bribery;
2. has obtained the administrative act by providing information that was substantially incorrect or incomplete;
3. was aware the unlawfulness of the administrative act or was unaware of because of gross negligence.
In the cases of sentence 3, the administrative act is normally withdrawn with retroactive effect.
(3) If an unlawful administrative act not falling under paragraph 2 is withdrawn, the authority shall, upon application, compensate the person concerned for the financial disadvantage suffered as a result of having relied on the existence of the administrative act, in so far as his trust is worthy of protection, taking into consideration the public interest. Paragraph 2 sentence 3 applies. However, the financial disadvantage must not be exceeded beyond the amount of interest that the person concerned has in the continuance of the administrative act. The financial disadvantage to be compensated is determined by the authority. The claim can only be asserted within one year; the period begins as soon as the authority has informed the person concerned thereof.
(4) If the authority becomes aware of facts which justify the withdrawal of an unlawful administrative act, the withdrawal is only permissible within one year from the date of the notification. This does not apply in the case of paragraph 2 sentence 3 no. 1.
(5) The withdrawal shall be decided by the competent authority according to paragraph 3 after the administrative

[2571] Administrative Procedure Act in the version of the promulgation of 23 January 2003 (Federal Law Gazette I, p. 102), last amended by Article 11 (2) of the Act of 18 July 2017 (Federal Law Gazette I, p. 2745). Translation in the context of this dissertation provided by Anastasia Kallidou.

act has become non-appealable; this also applies if the administrative act to be withdrawn has been issued by another authority.

Section 49

[Revocation of a lawful administrative act]

(1) A lawful non-beneficial administrative act may, even after it has become non-appealable, be revoked, in whole or in part, with effect for the future, except when an administrative act of the same content would have to be issued or when revocation is inadmissible for other reasons.

(2) A lawful beneficial administrative act may, even after it has become non-appealable, may only be revoked, in whole or in part, with effect for the future,

1. if revocation is permitted by law or reserved in the administrative act itself;
2. if the administrative act is conditional and the beneficiary fails to comply with it or fails to do so within the time limit set;
3. if on the basis of facts subsequently acquired, the authority would be entitled not to issue the administrative act and if the public interest would be jeopardized without the revocation;
4. if on the basis of a change in legislation, the authority would be entitled not to issue the administrative act in so far as the beneficiary has not yet made use of the advantage or has not yet received benefits under the administrative act and if the public interest would be jeopardized without the revocation;
5. to prevent or eliminate serious disadvantages for the common good.

Section 48(4) applies mutatis mutandis.

(3) A lawful administrative act granting or requiring a one-off or a continuing cash payment or a divisible contribution in kind to fulfill a specific purpose may, even after it has become non-appealable, be revoked, in whole or in part, with retroactive effect,

1. if the benefit is not used, not immediately after the provision or no longer for the purpose intended in the administrative act;
2. if the administrative act is conditional and the beneficiary fails to comply with it or fails to do so within the time limit set.

Section 48(4) applies mutatis mutandis.

(4) The revoked administrative act shall become ineffective upon the revocation taking effect, unless the authority determines otherwise.

(5) The revocation shall be decided by the competent authority according to paragraph 3 after the administrative act has become non-appealable; this also applies if the administrative act to be revoked has been issued by another authority.

(6) If a beneficial administrative act is revoked in the cases referred to in paragraph (2) nos. 3 to 5, the authority shall, upon application, compensate the person concerned for the financial disadvantage suffered as a result of having relied on the on the existence of the administrative act, in so far as his trust is worthy of protection, taking into consideration the public interest. Section 48(3) sentences 3 to 5 shall apply mutatis mutandis. For disputes over the compensation the ordinary legal procedure is given.

Section 51

[Resumption of proceedings]

(1) The authority shall, upon application of the person concerned, decide on the annulment or amendment of an non-appealable administrative act, when:

1. the factual or legal situation underlying the administrative act has subsequently changed in favor of the person concerned;
2. new evidence exists which would have brought about a more favorable decision for the person concerned;
3. resumption reasons are given in accordance with Section 580 of the Code of Civil Procedure.

(2) The application shall be admissible only if the person concerned has been unable, without gross negligence, to invoke the reasons for the resumption in earlier proceedings, in particular by means of a legal remedy.

(3) The application must be submitted within three months. The period begins with the day on which the person concerned has learned of the reasons for the resumption of proceedings.

(4) The application shall be decided by the competent authority according to paragraph 3; this also applies if the administrative act whose annulment or amendment is requested has been issued by another authority.

(5) The provisions of Section 48(1) sentence 1 and Section 49(1) shall remain unaffected.

THE CONSTITUTION OF GREECE[2572]

Article 2
[Principal obligations of the State]
1. Respect and protection of the value of the human being constitute the primary obligations of the State.
2. Greece, adhering to the generally recognised rules of international law, pursues the strengthening of peace and of justice, and the fostering of friendly relations between peoples and States.

Article 4
[Equality of Greeks]
1. All Greeks are equal before the law.
2. Greek men and women have equal rights and equal obligations.
3. All persons possessing the qualifications for citizenship as specified by law are Greek citizens. Withdrawal of Greek citizenship shall be permitted only in case of voluntary acquisition of another citizenship or of undertaking service contrary to national interests in a foreign country, under the conditions and procedures more specifically provided by law.
4. Only Greek citizens shall be eligible for public service, except as otherwise provided by special laws.
5. Greek citizens contribute without distinction to public charges in proportion to their means.
6. Every Greek capable of bearing arms is obliged to contribute to the defence of the Fatherland as provided by law.
7. Titles of nobility or distinction are neither conferred upon nor recognized in Greek citizens.

Article 17
[Protection of private property; expropriation]
1. Property is under the protection of the State; rights deriving there from, however, may not be exercised contrary to the public interest.
2. No one shall be deprived of his property except for public benefit which must be duly proven, when and as specified by statute and always following full compensation corresponding to the value of the expropriated property at the time of the court hearing on the provisional determination of compensation. Incises in which a request for the final determination of compensation is made, the value at the time of the court hearing of the request shall be considered. If the court hearing for the final determination of compensation takes place after one year has elapsed from the court hearing for the provisional determination, then, for the determination of the compensation the value at the time of the court hearing for the final determination shall be taken into account. In the decision declaring an expropriation, specific justification must be made of the possibility to cover the compensation expenditure. Provided that the beneficiary consents thereto, the compensation may be also paid in kind, especially in the form of granting ownership over other property or of granting rights over other property.
3. Any change in the value of expropriated property occurring after publication of the actor expropriation and resulting exclusively therefrom shall not be taken into account.
4. Compensation is determined by the competent courts. Such compensation may also be determined provisionally by the court after hearing or summoning the beneficiary, who maybe obliged, at the discretion of the court, to furnish a commensurate guarantee in order to collect the compensation, as provided by the law. Notwithstanding article 94, a law may provide for the establishment of a uniform jurisdiction, for all disputes and cases relating to expropriation, as well as for conducting the relevant trials as a matter of priority. The manner in which pending trials are continued, may be regulated by the same law. Prior to payment of the final or provisional compensation, all rights of the owner shall remain intact and occupation of the property shall not be allowed. In order for works of a general importance for the economy of the country to be carried out, it is possible that, by special decision of the court which is competent for the final or the provisional determination of the compensation, the execution of works even prior to the determination and payment of the compensation is allowed, provided that a reasonable part of the compensation is paid and that full guarantees provided in favour of the beneficiary of the compensation, as provided by law. The second period of the first section applies accordingly also to these cases. Compensation in the amount determined by the court must in all cases be paid

[2572] The Constitution of Greece as revised by the parliamentary resolution of April 6th 2001 of the VIIth Revisionary Parliament. Editorial Committee: Kostas Mavrias, Epaminondas Spiliotopoulos; Translated by: Xenophon Paparrigopoulos, Stavroula Vassilouni; Government Gazette A 85/2001. The Articles translated here have remained unaltered after the constitutional revision of 2008 (Government Gazette A 102/2008).

within one and one half years at the latest from the date of publication of the decision regarding provisional determination of compensation payable, and in cases of a direct request for the final determination of compensation, from the date of publication of the court ruling, otherwise the expropriation shall be revoked ipso jure. The compensation as such is exempt from any taxes, deductions or fees.
5. The cases in which compulsory compensation shall be paid to the beneficiaries for lost income from expropriated property until the time of payment of the compensation shall be specified by law.
6. In the case of execution of works serving the public benefit or being of a general importance to the economy of the country, a law may allow the expropriation in favour of the State of wider zones beyond the areas necessary forth execution of the works. The said law shall specify the conditions and terms of such expropriation, as well as the matters pertaining to the disposal for public or public utility purposes in general, of areas expropriated in excess of those required.
7. The digging of underground tunnels at the appropriate depth without compensation, may be allowed by law for the execution of works of evident public utility for the State, public law legal persons, local government agencies, public utility agencies and public enterprises, on condition that the normal exploitation of the property situated above shall not be hindered.

Article 20

[The right to legal protection]

1. Every person shall be entitled to receive legal protection by the courts and may plead before them his views concerning his rights or interests, as specified by law.
2. The right of a person to a prior hearing also applies in any administrative action or measure adopted at the expense of his rights or interests.

Article 25

[Protection and exercise of the fundamental rights]

1. The rights of the human being as an individual and as a member of the society and the principle of the welfare state rule of law are guaranteed by the State. All agents of the State shall be obliged to ensure the unhindered and effective exercise thereof. These rights also apply to the relations between individuals to which they are appropriate. Restrictions of any kind which, according to the Constitution, maybe imposed upon these rights, should be provided either directly by the Constitution or by statute, should a reservation exist in the latter's favour, and should respect the principle of proportionality.
2. The recognition and protection of the fundamental and inalienable rights of man by the State aims at the achievement of social progress in freedom and justice.
3. The abusive exercise of rights is not permitted.
4. The State has the right to claim of all citizens to fulfil the duty of social and national solidarity.

Article 28

[Rules of international law. International organisations]

1. The generally recognised rules of international law, as well as international conventions as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law. The rules of international law and of international conventions shall be applicable to aliens only under the condition of reciprocity.
2. Authorities provided by the Constitution may by treaty or agreement be vested in agencies of international organisations, when this serves an important national interest and promotes cooperation with other States. A majority of three-fifths of the total number of Members of Parliament shall be necessary to vote the law ratifying the treaty or agreement.
3. Greece shall freely proceed by law passed by an absolute majority of the total number of Members of Parliament to limit the exercise of national sovereignty, insofar as this is dictated by an important national interest, does not infringe upon the rights of man and the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity.

Article 35

[Validity of the President's acts. Countersignature]

1. No act of the President of the Republic shall be valid nor be executed unless it has been countersigned by the competent Minister who, by his signature alone shall be rendered responsible, and unless it has been published in the Government Gazette. If the Cabinet has been relieved of its duties as provided by article 38 paragraph 1, and the Prime Minister fails to countersign the relative decree, this shall be signed by the President of the Republic alone.
2. By exception, the following acts shall not require countersignature:
a) The appointment of the Prime Minister,
b) The assignment of an exploratory mandate in accordance with article 37, paragraphs2, 3 and 4,
c) The dissolution of the Parliament in accordance with articles 32 paragraph 4, and 41paragraph 1, if the Prime Minister fails to countersign, and in accordance with article 53 paragraph1 if the Cabinet fails to countersign,
d) The return to Parliament of a voted Bill or law proposal in accordance with article 42 paragraph 1,

e) The staff appointments to the administrative services of the Presidency of the Republic.
3. The decree to proclaim a referendum on a Bill, as provided by article 44 paragraph2, shall be countersigned by the Speaker of the Parliament.

Article 42

[Promulgation and publication of statutes]

1. The President of the Republic shall promulgate and publish the statutes passed by the Parliament within one month of the vote. The President of the Republic may, within the time-limit provided for in the preceding sentence, send back a Bill passed by Parliament, stating his reasons for this return.
2. A Bill sent back to Parliament by the President of the Republic shall be introduced to the Plenum and, if it is passed again by an absolute majority of the total number of members, following the procedure provided in article 76 paragraph 2, the President of the Republic is bound to promulgate and publish it within ten days of the second vote.
3. [Paragraph 3 repealed by the 1986 Amendment].

Article 43

[Issuance of decrees]

1. The President of the Republic shall issue the decrees necessary for the execution of statutes; he may never suspend the application of laws nor exempt anyone from their execution.
2. The issuance of general regulatory decrees, by virtue of special delegation granted by statute and within the limits of such delegation, shall be permitted on the proposal of the competent Minister. Delegation for the purpose of issuing regulatory acts by other administrative organs shall be permitted in cases concerning the regulation of more specific matters or matters of local interest or of a technical and detailednature.
3. [Paragraph 3 repealed by the 1986Amendment].
4. By virtue of statutes passed by the Plenum of the Parliament, delegation may be given forth issuance of general regulatory decrees forth regulation of matters specified by such statutes in a broad framework. These statutes shall set out the general principles and directives of the regulation to be followed and shall set time-limits within which the delegation must be used.
5. Matters which, as specified in article 72 paragraph 1, belong to the competence of the plenary session of the Parliament, cannot bathe object of delegation as specified in the preceding paragraph.

Article 87

[Judicial independence]

1. Justice shall be administered by courts composed of regular judges who shall enjoy functional and personal independence.
2. In the discharge of their duties, judges shall be subject only to the Constitution and the laws; in no case whatsoever shall they be obliged to comply with provisions enacted in violation of the Constitution.
3. Regular judges shall be inspected by judges of a superior rank, as well as by the Public Prosecutor and the Deputy Prosecutor of the Supreme Civil and Criminal Court; Public Prosecutors shall be inspected by the Supreme Civil and Criminal Court judges and Public Prosecutors of a superior rank, as specified by law.

Article 88

[Guarantees of the independence of justice]

1. Judicial functionaries shall be appointed by presidential decree in compliance with a law specifying the qualifications and the procedure for their selection and are appointed for life.
2. The remuneration of judicial functionaries shall be commensurate with their office. Matters concerning their rank, remuneration and their general status shall be regulated by special statutes. Notwithstanding articles 94, 95 and 98, disputes concerning all kinds of remunerations and pensions of judicial functionaries, and provided that the resolution of the relevant legal issues may affect the salary, pension or fiscal status of a wider circle of persons, shall be tried by the special court of article 99. In such cases, the composition of the court includes the participation of one additional full professor and one additional barrister, as specified by law. Matters relating to the continuation of pending processes before the courts shall be specified by law.
3. A training and trial period for judicial functionaries of up to three years prior to their appointment as regular judges may be provided for by law. During this period they may also act as regular judges, as specified by law.
4. Judicial functionaries may be dismissed only pursuant a court judgment resulting from a criminal conviction or a grave disciplinary breach or illness or disability or professional incompetence, confirmed as specified by law and in compliance with the provisions of article 93 paragraphs 2 and 3.
5. Retirement from the service of the judicial functionaries shall be compulsory upon attainment of the age of sixty five years for all functionaries up to and including the rank of Court of Appeal judge or Deputy Prosecutor of the Court of Appeals, or a rank corresponding thereto. In the case of judicial functionaries of a rank higher than the one stated, or of a corresponding rank, retirement shall be compulsory upon attainment of the age of sixty seven years. In the application of this provision, the 30th of June of the year of retirement shall in all cases be taken as the date of attainment of the above age limit.

6. Transfer of judicial functionaries into another branch is prohibited. Exceptionally, the transfer of associate judges to courts of first instance or of associate prosecutors to public prosecutors offices, shall be permitted, upon request of the persons concerned, as specified by law. Judges of ordinary administrative courts shall be promoted to the rank of Councillor of the Supreme Administrative Court and to one fifth of the posts, as specified by law.
7. Courts or councils especially provided by the Constitution and composed of members of the Supreme Administrative Court and the Supreme Civil and Criminal Court shall be presided over by the senior in rank member.

Article 93

[Courts]

1. Courts are distinguished into administrative and civil and criminal courts, and they are organized by special statutes.
2. The sittings of all courts shall be public, except when the court decides that publicity would be detrimental to the good usages or that special reasons call for the protection of the private or family life of the litigants.
3. Every court judgment must be specifically and thoroughly reasoned and must be pronounced in a public sitting. In case of violation of the preceding section, law shall specify the ensuing legal consequences as well as the imposed sanctions. Publication of the dissenting opinion shall be compulsory. Law shall specify matters concerning the entry of any dissenting opinion into the minutes as well as the conditions and prerequisites for the publicity thereof.
4. The courts shall be bound not to apply a statute whose content is contrary to the Constitution.

Article 94

[Jurisdiction of civil and administrative courts]

1. The Supreme Administrative Court and ordinary administrative courts shall have jurisdiction on administrative disputes, as specified by law, without prejudice to the competence of the Court of Audit.
2. Civil courts shall have jurisdiction on private disputes, as well as on cases of non-contentious jurisdiction, as specified by law.
3. In special cases and in order to achieve unified application of the same legislation, law may assign the hearing of categories of private disputes to administrative courts or the hearing of categories of substantive administrative disputes to civil courts.
4. Any other competence of an administrative nature may be assigned to civil or administrative courts, as specified by law. These competences include the adoption of measures for compliance of the Public Administration with judicial decisions. Judicial decisions are subject to compulsory enforcement also against the Public Sector, local government agencies and public law legal persons, as specified by law. **Article 95**

[Supreme Administrative Court]

1. The jurisdiction of the Supreme Administrative Court pertains mainly to:
a) The annulment upon petition of enforceable acts of the administrative authorities for excess of power or violation of the law.
b) The reversal upon petition of final judgments of ordinary administrative courts, as specified by law. c) The trial of substantive administrative disputes submitted thereto as provided by the Constitution and the statutes.
d) The elaboration of all decrees of a general regulatory nature.
2. The provisions of article 93 paragraphs 2and 3 shall not be applicable in the exercise of the competence specified under subparagraph(d) of the preceding paragraph.
3. The trial of categories of cases that come under the Supreme Administrative Court's jurisdiction for annulment may by law come under ordinary administrative courts, depending on their nature or importance. The Supreme Administrative Court has the second instance jurisdiction, as specified by law.
4. The jurisdiction of the Supreme Administrative Court shall be regulated and exercised as specifically provided by law.
5. The Public Administration shall be bound to comply with judicial decisions. The breach of this obligation shall render liable any competent agent, as specified by law. Law shall specify the measures necessary for ensuring the compliance of the Public Administration.

Article 100

[Special Highest Court]

1. A Special Highest Court shall be established, the jurisdiction of which shall comprise:
a) The trial of objections in accordance with article 58.
b) Verification of the validity and returns of a referendum held in accordance with article 44 paragraph 2.
c) Judgment in cases involving the incompatibility or the forfeiture of office by a Member of Parliament, in accordance with article 55 paragraph 2 and article 57.
d) Settlement of any conflict between the courts and the administrative authorities, or between the Supreme Administrative Court and the ordinary administrative courts on one hand and the civil and criminal courts on the other, or between the Court of Audit and any other court.

e) Settlement of controversies on whether the content of a statute enacted by Parliament is contrary to the Constitution, or on the interpretation of provisions of such statute when conflicting judgments have been pronounced by the Supreme Administrative Court, the Supreme Civil and Criminal Court or the Court of Audit.
f) The settlement of controversies related to the designation of rules of international law as generally acknowledged in accordance with article 28 paragraph 1.
2. The Court specified in paragraph 1 shall be composed of the President of the Supreme Administrative Court, the President of the Supreme Civil and Criminal Court and the President of the Court of Audit, four Councillors of the Supreme Administrative Court and four members of the Supreme Civil and Criminal Court chosen by lot for a two-year term. The Court shall be presided over by the President of the Supreme Administrative Court or the President of the Supreme Civil and Criminal Court, according to seniority. In the cases specified under sections (d) and (e) of the preceding paragraph, the composition of the Court shall be expanded to include two law professors of the law schools of the country's universities, chosen by lot.
3. The organisation and functioning of the Court, the appointment, replacement of and assistance to its members, as well as the procedure to be followed shall be determined by special statute.
4. The judgments of this Court shall be irrevocable. Provisions of a statute declared unconstitutional shall be invalid as of the date of publication of the respective judgment, or as of the date specified by the ruling.
5. When a section of the Supreme Administrative Court or chamber of the Supreme Civil and Criminal Court or of the Court of Audit judges a provision of a statute to be contrary to the Constitution, it is bound to refer the question to the respective plenum, unless this has been judged by a previous decision of the plenum or of the Special Highest Court of this article. The plenum shall be assembled into judicial formation and shall decide definitively, as specified by law. This regulation shall also apply accordingly to the elaboration of regulatory decrees by the Supreme Administrative Court.

Article 107

[Protection of foreign capital and special economic legislation]

1. Legislation enjoying legal force higher than that of statutes, enacted before April 21, 1967, pertaining to the protection of foreign capital shall continue to enjoy such legal force and shall be applicable to capital imported hence forth. The same legal force is enjoyed by the provisions of Chapters A through D of Section A of Statute 27/1975 «on the taxation of ships, compulsory contributions for the development of the merchant marine, establishment of foreign shipping companies and regulation of related matters».
2. A statute, to be promulgated once and for all within three months of the date of entry into force of this Constitution, shall specify the terms and the procedure for the revision or cancellation of administrative acts approving investments in application of legislative decree 2687/1953 and issued in any form whatsoever, or agreements contracted on investment of foreign capital between April 21, 1967 and July 23, 1974,with the exception of those pertaining to the registration of ships under the Greek flag.

Article 110

[Revision of the Constitution]

1. The provisions of the Constitution shall be subject to revision with the exception of those which determine the form of government as a Parliamentary Republic and those of articles 2 paragraph 1, 4 paragraphs 1, 4 and 7 , 5paragraphs 1 and 3, 13 paragraph 1, and 26.
2. The need for revision of the Constitution shall be ascertained by a resolution of Parliament adopted, on the proposal of not less than fifty Members of Parliament, by a three-fifths majority of the total number of its members in two ballots, held at least one month apart. This resolution shall define specifically the provisions to be revised.
3. Upon a resolution by Parliament on the revision of the Constitution, the next Parliament shall, in the course of its opening session, decide on the provisions to be revised by an absolute majority of the total number of its members.
4. Should a proposal for revision of the Constitution receive the majority of the votes of the total number of members but not the three fifths majority specified in paragraph 2, the next Parliament may, in its opening session, decide on the provisions to be revised by a three-fifths majority of the total number of its members.
5. Every duly voted revision of provisions of the Constitution shall be published in the Government Gazette within ten days of its adoption by Parliament and shall come into force through a special parliamentary resolution.
6. Revision of the Constitution is not permitted before the lapse of five years from the completion of a previous revision.

REGULATION OF THE PARLIAMENT[2573]

Article 112

[Bills and law proposals for the ratification of international treaties or conventions]

1. The Parliament approves or rejects bills and law proposals that ratify international treaties or international conventions without changing the content of the treaties and conventions.
2. The ratification of bills and law proposals of the previous paragraph shall be carried out in accordance with the procedure laid down in Article 108.
3. The previous paragraph shall not apply to bills and law proposals relating to the ratification of conventions in accordance with Articles 27 and 28 (2) and (3) of the Constitution.

CODE OF CIVIL PROCEDURE[2574]

Article 323

[Res judicata from a foreign decision]

Subject to the provisions of international conventions, a judgment of a foreign civil court is valid and constitutes res judicata in Greece without any further procedure since1) it constitutes res judicata in accordance with the law of the place where it was delivered, 2) the case was under the provisions under Greek law subject to the jurisdiction of the courts of the State which delivered the judgment, 3) the party to the proceedings who was defeated was not deprived of the right to defence and in general of participation in the trial, unless the deprivation was made in accordance with a provision that applies to nationals of the State to which the court which issued the decision belongs, 4) is not contrary to a Greek judicial decision in the same case and which constitutes res judicata for the parties between which the foreign judgment has been issued and 5) is not contrary to the principles of morality or to public policy.

Article 557

[Appeal in favor of the law]

The Prosecutor of the Highest Supreme Court has the right to request the legal appeal of any decision, even if the parties can not appeal against that decision, for any reason and without a time limit. A judgment given in respect of that appeal shall not have effect for the parties unless it is based on an overriding of jurisdiction or a lack of substantive jurisdiction.

Article 559

[Grounds for appeal]

Appeal is allowed only

1. if a rule of substantive law, including the rules of interpretation of acts, has been violated, irrespective of whether it is a law or custom, Greek or foreign, of domestic or international law. Breach of rules of common experience is a ground for appeal only if these rules relate to the interpretation of legal rules or to the submission of facts to them,
2. if the court did not have the legal composition or a judge participated, whose exclusion had been admitted or a lawsuit against him has been brought,
3. if the court refused the request for an exclusion of a judge, although that judge, in accordance with the facts of the case, ought to have been excluded by law,
4. if the court has exceeded the jurisdiction of the civil courts,
5. if the court has wrongly held, in matters of substantive jurisdiction, that it is competent or incompetent, subject to the provisions of Article 47, or if the court to which the case was referred has infringed the provisions of Article 46
6. if, despite the law, and in particular the provisions on the service of judgments, the party has been judged in absentia,
7. if the publicity of the proceeding was unlawfully prohibited,
8. if the court, despite the law, has taken into account things that have not been proposed or have not taken into account things proposed and have a significant effect on the outcome of the trial,
9. if the court awarded something that has not been sought or has awarded more than what has been requested or has left a claim unjudged,
10. if the court, despite the law, has accepted things that have a significant effect on the outcome of the trial as true without proof or without ordering proof of them,
11. if the court has taken into account evidence which the law does not allow or has in fact taken into account evidence which has not been proposed or has not been taken into account evidence that has been invoked or

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[2573] Government Gazette A 51/97. Translation in the context of this dissertation provided by Anastasia Kallidou.
[2574] Government Gazette A 182/1983. Translation in the context of this dissertation provided by Anastasia Kallidou.

proposed by the parties,
12. if the court violated the definitions of the law on the force of evidence,
13. if the court misapplied the law's definition of the burden of proof,
14. if the court, despite the law, has declared or not declared invalidity, disqualification or inadmissibility,
15. if despite the law, a final decision was revoked,
16. if the court has, in violation of the law, accepted that there is, or is not, a res judicata or that there is res judicata on the basis of a judgment which has disappeared after a legal remedy or has been recognized as non-existent,
17. if the same decision contains contradictory provisions,
18. if the referral court did not comply with the appeal,
19. if the decision does not have a legal basis, and in particular if it has no justification or has reasoning contradictory or inadequate to a matter having a significant effect on the outcome of the trial,
20. if the court distorted the content of a document by accepting facts which were manifestly different from those referred to in that document.

Article 623
[Payment order]
Under the special procedure of the provisions of Articles 624 to 636, an order for payment of pecuniary claims or debt securities may be requested, if it is a matter of private law and the claim and the amount due are established by public or private document or by an interim order , which was issued following confession or acceptance of the debtor's application.

Article 758
[Judgment-revocation-reform-minutes-res judicata-service of a judgment]
1. Unless otherwise specified, decisions which are final, may, upon their publication, be revoked or reformed by the court which issued them, if new circumstances arise or the circumstances under which they were adopted have changed. The revocation or reform shall be made in accordance with the procedure laid down in Articles 741 to 781, after the parties to the original proceedings have been summoned and the persons who were appointed, replaced or terminated by the decision to perform the duties.
2. The revocation or reform decision shall not have retroactive effect, unless specifically determined by the court.
3. The revocation or reform decision shall be taken without undue delay in the book kept in accordance with Article 776 and in the margin of the decision revoked or reformed, with care of the registry of the court.

Article 905
[Enforceable foreign titles]
1. Subject to the provisions of international conventions and regulations of the European Union, execution based on a foreign title may take place in Greece once the judgment is declared enforceable by a decision of the district court of the place where the debtor is domiciled and, if not domiciled, habitually resident and, if he has no residence, of the single-member court of first instance of the capital of the State. The single-member court of first instance shall rule in accordance with the procedure laid down in Articles 740 to 781.

2. A single-member court of first instance shall declare the foreign title enforceable if it is enforceable under the law of the place where it was issued and is not contrary to principles of morality or to public policy.
3. If the foreign title is a judicial decision, in order for it to be declared enforceable, the conditions of Article 323, 2 to 5 have to be also met.
4. The provisions of paragraphs 1 to 3 shall also apply to the recognition of the force of res judicata of a judgment of a foreign court on the personal situation.

CODE OF CRIMINAL PROCEDURE[2575]

Article 525
[Reopening of proceedings]
(1). Criminal proceedings which have been terminated by an irrevocable judgment shall be repeated, in the interests of the convicted person for a misdemeanor or felony, only in the following cases:
1. if two persons have been convicted of the same act in two separate judgments, and it is undeniably clear from their comparison that one of them is innocent;
2. if after the final conviction of a person, new - unknown to the judges who condemned him - facts or evidence, which alone or in combination with those previously presented make it obvious that he who

[2575] Government Gazette A 228/1986. Translation in the context of this dissertation provided by Anastasia Kallidou.

has been convicted is innocent or has been unjustly convicted for a crime heavier than that he has actually committed;
3. if it is ascertained that the false accusations of witnesses or experts' opinions or forged documents or evidence, which had been brought or taken into account in the hearing or bribery or other intentionally violation of the duty of the judge or juror who participated in the court that commenced the conviction;
4. if after the final conviction it was proved that the convicted person was acquitted in another irrevocable judgment or decree, and
5. if by a judgment of the European Court of Human Rights, it has been found that there is a breach of a right relating to the fairness of the procedure followed or the substantive provision applied.
(2). The under paragraph 1 no. 3 criminal offenses of perjury, forgery, bribery or offense must be proven by irrevocable judicial decision, unless such a decision has not been issued, because there were legitimate reasons for impeding the trial of the case on its merits or suspending the prosecution.

INTRODUCTORY LAW OF THE CIVIL CODE[2576]

Article 105
For unlawful acts or omissions of public bodies in the exercise of public authority entrusted to them the public is liable to compensation unless the act or omission has been committed in contravention of a provision which exists for the sake of the public interest. Together with the public, the liable person is jointly and severally liable, subject to the specific provisions on the responsibility of ministers.

CODE OF THE SPECIAL HIGHEST COURT[2577]

Article 21
1. The judgments of the Special Court are irrevocable under Article 100 of the Constitution, excluding third-party proceedings, and they are applicable erga omnes from the time of their hearing, unless otherwise specified by a special provision.
2. Under order of the President of the Special Court and without any other formality, final decisions on the cases of cases (b), (d), (e) and (f) of Article 6 hereof, shall be recorded without delay in the Government Gazette in the same issue.
Article 51
1. The decision of the Special Court, which lifted the dispute on the substantive unconstitutionality or the content of a (formal) law, shall apply erga omnes from the time of its public deliberation, subject to the provision of paragraph 4 of this article.
2. Judgments and administrative acts issued after the publication of the above-mentioned judgment of the Special Court, which rule in breach of what has been judged by the above-mentioned judgment, shall be subject to the prescribed remedies. In particular, if such a decision has been taken by the Council of State, the Supreme Court and the Court of Auditors, an application for the reopening of the proceedings may be filed within ten days of the publication of the judgment, heard by all the parties, and in accordance with the procedure applicable to each court.
3. The provisions of the preceding paragraph shall also apply to judgments which were issued before the judgment of the Special Court was published, in breach of the provisions of Articles 48(2) and 50(3). In such a case, the request for reopening of proceedings shall be filed within ten days from the publication of the judgment of the Special Court.
4. The Special Court may, with a specifically reasoned opinion of its judgment erga omnes, declare the invalidity of declared as unconstitutional provision also for the time prior to its publication.
5. In case the unconstitutionality of the law is declared with a retroactive effect, under the previous paragraph 4, if within the time-limit of the retroactive effect a judicial decision has been issued within with recourse to the unconstitutional provision, a request for resumption of the decision may be filed, by any party within a period of six months from the date of publication of the Special Court ruling. The procedure prescribed for the tribunal shall be complied with, and the tribunal is obliged not to apply the law declared unconstitutional.
6. Administrative acts issued in the course of the period referred to in paragraph 4 of this Article, on the basis of

[2576] Government Gazette A 164/1984. Translation in the context of this dissertation provided by Anastasia Kallidou.
[2577] Government Gazette A 141/1976. Translation in the context of this dissertation provided by Anastasia Kallidou; the original text is in *katharevousa (purist Greek)*, a form of the Modern Greek language conceived in the early nineteenth century.

the law declared unconstitutional, shall be compulsorily revoked within a period of not more than six months from the date of publication of the judgment declaring the unconstitutionality.

Article 52

Disagreements on the designation of rules of international law as generally accepted.

1. Pending a case before any court or administrative authority which gives rise to doubt as to the classification of rules of international law as generally accepted, the Special Court shall undertake to settle the dispute:

(a) with regard to a case of a pending court case, following a referral.

(b) with regard to a case pending before an administrative authority, at the request of the competent Minister, after expression of his personally supported view.

In such cases, the proceedings before the court remain pending and the administrative proceedings shall be interrupted pending the decision of the Special Court.

2. Pending a case before any court or body of the administrative authority competent to resolve disputes following an informal appeal, the settling of the dispute according to the previous paragraph or paragraph may be requested by the parties or interested parties in the administrative case, by means of application to the Special Court. In such a case, the progress of the proceedings or the administrative procedure shall be suspended only if so ordered by the Special Court in an interlocutory judgment.

3. In the case of contrary judgments of the Council of State, the Supreme Court or the Court of Auditors concerning the classification of a rule of international law as generally acknowledged, the provisions of Articles 48 to 51 are applying shall apply mutatis mutandis.

Article 54

1. The ruling of the Special Court is valid erga omnes.

2. In the case of Article 52(2), if the Special Court has not ordered suspension of the proceedings and the subsequent decision is inconsistent with the judgment of the Special Court, an application for the resumption of the proceedings in accordance with paragraphs 2 and 3 of Article 51 may be filed. The administrative act adopted in the same way, which is contrary to the decision of the Special Court, shall be compulsorily revoked in accordance with paragraph 6 of Article 51.