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Venera Kabashi

**The ECHR and the Western Balkans:
Bringing the Convention Home**

The ECHR and the Western Balkans

Bringing the Convention Home

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der Rechtswissenschaftlichen Fakultät
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Venera Kabashi
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Prof. Dr. Helen Keller
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Preface

This PhD thesis analyses the impact and effects of the European Convention on Human Rights (ECHR/Convention) and the case-law of the European Court of Human Rights (ECtHR) in six Western Balkan States (Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia, and Serbia).

The research conducted for the purposes of this study includes: (i) an analysis of the key notions, principles and doctrines which impact the process of reception and embeddedness of the Convention and the ECtHR's case-law in domestic legal orders; (ii) an overview of the status of the Convention and the case-law of the ECtHR in the selected States; (iii) an in-depth analysis of the national case-law of the highest domestic courts (supreme and constitutional courts) in the selected States related to the (non)application of the Convention and the ECtHR case-law, as a means of assessing their utilisation of ECHR standards and the level of 'Convention talk' between them; (iv) an in-depth analysis of more than 650 cases of the ECtHR rendered against the selected States (and other States as necessary), as a means of assessing the reaction of the domestic courts and other 'first-line defenders' following violations found at the Strasbourg level; (v) an overall assessment and a comparative analysis of the impact and effects of the ECHR and the ECtHR case-law in the selected States; and (vi) some final conclusions, remarks and recommendations that aim to contribute to better reception and embeddedness of the ECHR in the selected States. The research presented in this PhD thesis covers analysis of the domestic case-law and the case-law of the ECtHR against the selected States that was available/published on or before 1 January 2022.

I was exceptionally fortunate to have had as my mentor and supervisor, Prof. Dr. Helen Keller. I will be forever grateful to her for agreeing to oversee my PhD journey while serving as a Judge at the ECtHR and for guiding my research every step of the way until my PhD monograph was complete and accepted by the University of Zurich. I am also profoundly grateful to my co-supervisor, Prof. Dr. Regina Kiener, for her significant support and insightful comments.

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Finally, I wish to thank the Swiss National Science Foundation for financing the open-access publication of this PhD monograph which I hope will make a small contribution towards a better and more comprehensive application of ECHR standards across the Western Balkans.

Strasbourg, autumn 2023

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Supreme Court of North Macedonia, Decision Rev3.no. 51/2018, 5 December 2018
Supreme Court of North Macedonia, Decision Rev3.no. 94/2020, 13 May 2020
Supreme Court of North Macedonia, Decision Vkž2.no. 19/2019, 9 July 2020
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Supreme Court of North Macedonia, Legal Position of the Department of Criminal Offences of 29 June 2007

Abbreviations

BiH	Bosnia and Herzegovina
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECHR, the Convention	The European Convention on Human Rights
ECtHR, Strasbourg Court, the Court	European Court of Human Rights
EU	European Union
EURALIUS	European Union funded project for the Consolidation of the Justice System in Albania
ICTY	International Criminal Tribunal for the Former Yugoslavia
KFOR	NATO led Kosovo Force
NATO	North Atlantic Treaty Organization
UNMIK	United Nations Mission in Kosovo
UNSC	United Nations Security Council
UN	United Nations
UNSCR	United Nations Security Council Resolution
Venice Commission	European Commission for Democracy through Law

Chapter 1 Introduction

I. Reception and Embeddedness of the ECHR within a Domestic Legal Order

The ECHR is the most effective “human rights regime”¹ and the ECtHR is the “crown jewel” of the world’s “most advanced system” for protecting fundamental rights and freedoms.² The impact and effects of the Convention protection mechanism and its implementation in various domestic legal orders have produced a considerable amount of academic work as well as other forms of practical analyses over the years.³ To mention only a few, the impact and effects of the Convention protection machinery have led to domestic laws and the practices of domestic courts being amended, new laws and new judicial practices being created, new remedies enacted, criminal proceedings reopened, police brutality addressed, victims’ rights recognised, greater protection of minority groups, journalists being released from prison, individuals being released from pre-trial detention, children being reunited with their parents, property owners finally enjoying the fruits of their property, etc.⁴

¹ Keller and Stone Sweet (2008), 3. For more on the evolution of the ECHR through time, see Bates (2010).

² Helfer (2008), 125.

³ Keller and Stone Sweet (2008), Gerards (2014), Motoc and Ziemele (2016), Hammer and Emmert (2012).

⁴ Council of Europe (2020), ‘The European Convention on Human Rights: A living instrument’ <<https://edoc.coe.int/fr/convention-europenne-des-droits-de-l-homme/8528-the-european-convention-on-human-rights-a-living-instrument.html>> (accessed 25 December 2021); Council of Europe, country factsheets on the impact of the Convention and the Court’s case-law in all 47 member States. More specifically, see the specific section entitled ‘Main Achievements’ for each State Party to the Convention <<https://www.coe.int/en/web/execution/country-factsheets>> (accessed 25 December 2021). See Anagnostou (2014), Seibert-Fohr and Viliger (2014) for more on the impact and effects of the ECtHR judgments in national laws, policies and institutions.

The magnitude of this impact was not foreseen by the founding fathers who had fairly basic expectations in respect of what the Convention was projected to achieve.⁵ The immense impact that is evident today would not have been possible without the Court's remarkable work and creativity in interpreting the Convention in the light of present day conditions;⁶ nor would it have been possible if reception mechanisms had not been established at the domestic level to back up the embeddedness of the Convention and the Court's case-law. These two crucial notions, "reception" and "embeddedness", were both utilised in 2008 by different authors in order to describe, albeit in diverse ways and for different purposes, the existing or potential impact and effects of the Convention standards and the Court's case-law within domestic legal orders.⁷ Considering that the overarching aim of this study is to analyse the impact and effects of the ECHR and the ECtHR's case-law in six Western Balkan States, these two terms are of fundamental importance in laying the foundation for the analysis that follows in the chapters structured as National Reports.

The notion of "reception" was used by Keller and Stone Sweet to describe the "mechanisms" that are utilised by "national officials" to "confront, make use of, and resist or give agency to Convention rights".⁸ In other words, reception was described as a "complex social process" which underpins the "impact" of the ECHR in a domestic legal order.⁹ In practical terms, at one end of the spectrum, reception may involve decisions of domestic authorities that "serve to enhance the effectiveness of the ECHR", for example by amending laws or the existing judicial practice to comply with the ECtHR case-law while, at the other end, reception may also entail "resistance to the Convention", for example when domestic authorities "seek to limit" the scope and reach of the Convention at the domestic level.¹⁰

There are several determinants and a range of diverse reception mechanisms which are important for an impact analysis of the Convention and the ECtHR's case-law at the national level. Firstly, as far as determinants are concerned, notwithstanding the presumption that the ECtHR "is well-positioned to exert influence on national legal systems", authors have nevertheless pinpointed

⁵ See Council of Europe, 'Founding Fathers' otherwise known as the "builders of Europe" <<https://www.coe.int/en/web/about-us/founding-fathers>> (accessed 26 December 2021).

⁶ Serghides (2020), 537-545.

⁷ Keller and Stone Sweet (2008), Helfer (2008).

⁸ Keller and Stone Sweet (2008), 4.

⁹ *Ibid.*, 677.

¹⁰ *Ibid.*, 17.

three specific determinants which prove that the ECtHR is an institution capable of accreting influence within national systems, namely: (i) “the institutional competence to determine the law in an authoritative manner”; (ii) “a regular case-load”; and, lastly, (iii) “a minimally robust conception of precedent”.¹¹ The Strasbourg Court is considered to have all these elements and hence is able to exert its influence domestically. Secondly, as far as mechanisms of reception are concerned and their “relative capacity to enhance the ECHR’s status” in a domestic legal order, authors have pinpointed three sets of practices, namely: (i) constitutional level mechanisms which determine the monist versus dualist approaches to incorporating the ECHR nationally, which “serve to coordinate the national legal order, as a whole, on an ongoing basis, with the Convention”; (ii) mechanisms which operate in more “discrete institutional settings”, including here domestic procedures which oblige “legislative and judicial officials to take account of the ECHR in their decision-making”; and lastly, (iii) the more “informal” mechanisms which are related to Convention know-how, knowledge sharing and its production.¹²

As a result, at the domestic level, the Convention can be considered as effective “to the extent that national officials recognise, enforce and give full effect to Convention rights and the interpretative authority of the Court, in their decisions”.¹³ More concretely, the ECHR is most effective in those jurisdictions where Convention rights *de jure* and *de facto*, “bind all national officials in the exercise of public authority”; “possess at least supra-legislative status”; and, last but not least, “can be pleaded directly by individuals before judges who may directly enforce [Convention rights], while disapplying conflicting norms”.¹⁴ The more the domestic authorities take decisions to strengthen the effectiveness of the Convention domestically, the more difference the Convention will make in protecting human rights at the national level,¹⁵ resulting in better domestic filtering of potential Convention violations and a reduction in the need to approach the Strasbourg Court.

The notion of “embeddedness” as a “deep structural principle” of the Convention protection machinery has been used to describe the function of the embeddedness principle “as a necessary counterpoint to the subsidiary doctrine” of the Court and not as an act which would substitute ECtHR decisions for

¹¹ Ibid., 8.

¹² Ibid., 682.

¹³ Ibid., 683.

¹⁴ Ibid.

¹⁵ Ibid., 8.

decisions of domestic authorities.¹⁶ Rather, Helfer argued, the implementation of the embeddedness principle required “the Council of Europe and the Court to bolster mechanisms for governments to remedy human rights violations at home” thus “obviating the need for individuals to seek supranational relief”, which would consequently result in restoring States Parties “to a position in which the ECtHR’s deference” to them is appropriate.¹⁷

Three main arguments were made by Helfer in support of the call to recognise the embeddedness principle as a “deep structural principle” of the Convention, notably: (i) the need for concrete actions from the Council of Europe and the Court to “bolster mechanisms” which would enable national authorities to provide effective remedies domestically; (ii) following successful implementation of such bolstering actions, the individuals seeking protection of their Convention rights would have appropriate domestic authorities to whom they could complain without the need to seek the supranational protection of the Strasbourg Court; and (iii) the successful implementation of these “bolstering mechanisms” would enable the Court to defer, more comfortably, to the *ratio decidendi* utilised by the domestic authorities when applying the Convention at home.¹⁸ When these calls were made, two years before the so-called “Interlaken process” began, there were ongoing reform discussions on “how to ensure survival of the ECtHR” in view of “the looming docket crisis” which the Court was facing at the time.¹⁹ In light of that crisis, embeddedness was proposed as a “touchstone for evaluating the diverse array of proposals to redesign and restructure the Court to ensure its future success”.²⁰

There are several values (practical and normative) of embeddedness as a principle for guaranteeing and protecting Convention rights. From the practical point of view, “embedding” a human rights regime in a domestic system is considered to protect a “larger number of individuals in a more expeditious fashion”.²¹ Embeddedness “significantly improves the prospects for compliance” with the ECHR by enabling national courts to protect Convention rights as incorporated into the domestic legal system and when such norms are fully domesticated “compliance with international law and national law approaches convergence”.²² From a normative point of view, embeddedness is “desirable”

¹⁶ Ibid., 126.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid., 127–128.

²⁰ Ibid., 128.

²¹ Ibid., 133.

²² Ibid.

because the Convention was envisaged not as a “rigid” treaty but rather as an instrument which “allows some scope, albeit not unlimited, for properly functioning democracies to choose different solutions adapted to their different and evolving societies”, which may “develop divergent but not necessarily incompatible approaches to common legal problems”.²³ In this way, embeddedness assists in promoting “a shared responsibility for protecting human rights” and “create[s] a European community of law by giving room to national institutions to appropriate the Convention and make it their own”.²⁴

Even though the ECtHR may not be directly embedded in domestic systems, the so-called “diffuse” embeddedness as opposed to “direct” embeddedness is considered to provide the Strasbourg Court with several avenues “to influence the decision-making of judges, legislators, and executive officials”.²⁵ Despite the lack of direct embeddedness of the ECtHR as an institution, as Helfer argues, there are several “diffuse” embeddedness capabilities that the ECtHR has which enabled it to permeate domestic legal orders and influence national decision-makers across Europe.²⁶

The intriguing approach to the embeddedness principle used by Helfer produced interesting follow-up academic work which saw this “deep structural principle” in different forms and from other angles.²⁷ For instance, differently from Helfer, the former President of the ECtHR, Robert Spano, used the concept “to describe a process in which an international court, entrusted by sovereign states with the role of supervising the observation of a collective set of norms” gives substance to such norms “for the primordial purpose of infusing them into the domestic legal systems”.²⁸ According to Spano, the Strasbourg Court has been engaged in embedding the Convention principles into domestic systems in two different phases.²⁹ While the last 40 years or so have been considered to constitute the “substantive embedding phase”, the current phase has been termed as the “procedural embedding phase”.³⁰ It is highly

²³ Ibid. In this context, see also, Mahoney (1997), 369.

²⁴ Helfer (2008), 144.

²⁵ Ibid., 134.

²⁶ Ibid., 135-136, referring to three “diffuse” embeddedness capabilities of the ECtHR, namely: (1) reviewing decisions of the highest domestic courts; (2) influencing parliamentarians across Europe to consult the Court’s case-law despite it not having an *erga omnes* effect; and (3) integrating the Convention nationally thus enabling the courts to apply it directly as embodied in domestic law.

²⁷ Spano (2018), 475.

²⁸ Ibid.

²⁹ Ibid., 474.

³⁰ Ibid., 474-475.

important for the foundations of this study to explain what each of these phases entails in order to later assess where the Western Balkan States stand in respect of the level of embeddedness of the Convention principles and the Court's case-law.

Firstly, the substantive embedding phase was described as “a functional process aimed at progressively creating the necessary foundations for realisation of the Convention's overarching institutional structure” which would “trigger the full engagement” of States Parties as the primary protectors of Convention rights.³¹ In this respect, the procedural embedding phase is to be considered as a “function and purpose” of the embeddedness as a process rather than its “end result” which would practically signify “the actual and full domestication of Convention principles” within domestic legal orders.³² It is worth highlighting that the Court has not been equally successful in its endeavour to embed the Convention throughout all member States, being more successful in domestic environments that were more receptive “to the idea of an integrationist and internationalist framework of human rights protection”.³³ However, despite varying results across the continent, the Court's attempts to create an elaborate “edifice of human rights, both at the substantive as well as the methodological level” and to “substantially embed the Convention” within all domestic legal orders was “an inevitable historical trajectory for the Court if the Convention was to fulfil its true potential”.³⁴

Secondly, the procedural embedding phase, in contrast to the substantive embedding phase, amounts to a “process-based review” approach which “manifests itself in the Court taking on a more framework oriented role when reviewing domestic decision-making”.³⁵ The current era revolves around the so-called “process-based review” method “in the sense that the Court is increasingly examining whether the Convention principles have, in fact, been adequately embedded in the domestic legal order” and if that is the case, ascertaining “whether certain material elements allow it to grant deference to national authorities” so that they are able to fulfil their obligations as the primary defenders of Convention rights at home.³⁶ The significance of this re-

³¹ *Ibid.*, 475.

³² *Ibid.*

³³ *Ibid.*, 476.

³⁴ *Ibid.* See also, Spano (2019), 112. For a more recent overview of the ECtHR's historical trajectory over more than sixty years, see Nussberger (2020), 1-34. See also, Aust and Demir-Gürsel (2021) for the ECtHR's challenges in historical perspective.

³⁵ Spano (2018), 480.

³⁶ *Ibid.*

financed approach of supranational judicial review lies in the jurisprudential shift of the Court whereby the primary methodological focus is whether the issue has been adequately analysed at the domestic level in line with the Convention standards rather than the Court engaging itself directly in an independent assessment of the “conventionality” of a domestic decision.³⁷ In other words, the process-based review is a mechanism that is increasingly used by the Court in order to implement in practice a more “robust” principle of subsidiarity.³⁸

The analysis above reflects the most important aspects of reception and embeddedness of the Convention and the case-law of the ECtHR within domestic legal orders. These two concepts will be used throughout this study, and mostly for the substantive analysis of the national reports, with a view to assessing the impact and effects of the Convention and the ECtHR’s case-law in the Western Balkan States. Bringing the Convention home and embedding it, thereby making it a truly domestic instrument, is the ultimate tool for reaching effective domestic protection of fundamental rights and freedoms across the Western Balkans. This study argues that this should be the ultimate purpose of all reception and embeddedness processes combined.

³⁷ Ibid.

³⁸ Ibid., 481.

II. Empowering Reception and Embeddedness Efforts at the Domestic Level: Principles of Effectiveness, Subsidiarity and the Margin of Appreciation

The impact and effects analysis that follows in the National Reports for the six Western Balkan States calls for a prior outlining of the most relevant principles and doctrines for this study, namely: (1) the principle of effective protection of Convention rights; (2) the principle of subsidiarity; and, (3) the margin of appreciation doctrine. This study argues that these three principles are interconnected and together contribute to empowering reception and embeddedness efforts at the domestic level. The academic literature on these three foundational principles is vast, diverse and highly developed, as is the case-law of the ECtHR.³⁹ As a result, the following exposé will focus solely on three specific aspects of these principles and doctrines, namely: (i) the legal basis from which they derive; (ii) the most important case-law of the ECtHR reflecting these principles and doctrines; and (iii) the academic observations in relation to them that are most relevant to the aim of this study.

1. The Principle of Effectiveness

The Preamble of the ECHR refers to the word “effective” twice as a means of proclaiming the overarching aim of the Convention protection machinery which was established with a view to guaranteeing fundamental rights and freedoms and thus achieving a “greater unity between its members”.⁴⁰ Firstly, the Preamble stipulates that the Convention aims to secure the “effective recognition and observance” of the rights proclaimed by the ECHR; and, secondly, that the fundamental freedoms are best maintained through an “effective political democracy” and by a “common understanding and observance of the Human Rights”.⁴¹ Additionally, Article 13 of the Convention provides that

³⁹ See references below under each of the following three headings with respect to academic work and ECtHR case-law.

⁴⁰ See the Preamble to the ECHR.

⁴¹ Ibid.

everyone whose Convention rights and freedoms are violated “shall have an effective remedy before a national authority ...”⁴² Moreover, Article 35 § 1 of the Convention is also closely related to the effectiveness principle considering that it requires applicants to exhaust domestic remedies, which according to the Court must be “effective in practice”,⁴³ before filing an application with the Strasbourg Court – thus strongly calling for effective protection of Convention rights at the domestic level.

In two of its foundational jurisprudential cases, respectively in *Airey v. Ireland* and *Soering v. the United Kingdom*, the Court phrased the principle of effectiveness in a formula that is widely used even today, specifying that the ECHR “is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”,⁴⁴ while later on linking the principle of effectiveness “to the nature and objectives of the Convention” and its own interpretative work with the following stance:

“In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms ... Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective ...”⁴⁵

The principle of effectiveness has elsewhere been termed as “the norm of all norms and the method of all methods”, meaning that it is a principle of primordial importance whose purpose is to make Convention rights effective and that, consequently, without it, the Convention provisions would merely be “empty shells”.⁴⁶ The primary aim and *raison d'être* of the Convention and the principle of effectiveness are claimed to be “one and the same”.⁴⁷ Due to its high importance and the fact that it underpins all human rights and freedoms guaranteed by the Convention, the principle of effectiveness has also been described as “the root” and “the linchpin of the Convention”, “the fuel” and “the driving force” of the “Convention engine”, “the only Convention principle which is on the frontline of defence against human rights violations”, the only Convention principle which must continuously follow the journey of an appli-

⁴² Article 13 of the ECHR.

⁴³ ECtHR, *İlhan v. Turkey* [GC], no. 22277/93, Judgment (2000), § 97.

⁴⁴ ECtHR, *Airey v. Ireland*, no. 6289/73, Judgment (1979), § 24. See also, Gerards (2019), 3-4.

⁴⁵ ECtHR, *Soering v. the United Kingdom* [Plenary], no. 14038/88, Judgment (1989), § 87. See also, Gerards (2019), 3-4.

⁴⁶ Serghides (2021), 4-5.

⁴⁷ *Ibid.*, 4.

cation “from the admissibility stage to the implementation stage”, the navigating principle which “guides the Convention on its journey towards its noble destination”, i.e. effective protection of Convention rights.⁴⁸

The principle of effectiveness is regarded to have two essential capacities, namely as a method and tool of interpretation utilised by the ECtHR⁴⁹ and as a norm of international law which is inherent in every international Convention provision securing a human right.⁵⁰ While the latter capacity is less essential for the overall purpose of this study and has been extensively elaborated elsewhere,⁵¹ the former capacity of the principle of effectiveness is of direct importance. As an interpretative tool, this principle assists the Court in interpreting the Convention “so as to give it the fullest weight and effect” which is consistent with its object and purpose, i.e. the primary aim of ensuring effective protection of Convention rights.⁵²

The case-law of the ECtHR in applying Article 13 of the Convention, which has at its core the principle of effectiveness, is abundant and well-established in many interconnected areas of Convention law.⁵³ For the purposes of this study, it is important to focus on four aspects, namely: (i) the requirement that domestic authorities must guarantee effective legal remedies at home so as to enable potential victims to find redress domestically for their arguable Convention claims; (ii) the link between Article 13 and Article 35 § 1 in respect of exhaustion of domestic remedies; (iii) the link between the principle of effectiveness and States’ positive obligations; and (iv) the link between the principle of effectiveness and Article 46 of the Convention.

1.1. Domestic Courts’ Duty to Guarantee Effective Legal Remedies and Redress

The Strasbourg Court has consistently interpreted Article 13 as a norm that “guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might

⁴⁸ Ibid., 4-5.

⁴⁹ Ibid. See also Gerards (2019), 4.

⁵⁰ Serghides (2021), 4-5.

⁵¹ Ibid., 118-126.

⁵² Ibid., 6.

⁵³ For an overview of the jurisprudence of the ECtHR on Article 13, see ECtHR (2021), ‘Guide on Article 13 of the European Convention on Human Rights’ <https://www.echr.coe.int/Documents/Guide_Art_13_ENG.pdf> (accessed 25 December 2021).

happen to be secured in the domestic legal order”.⁵⁴ If Article 13 guarantees are not secured at the domestic level, “individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise, and in the Court’s opinion more appropriately, have to be addressed in the first place within the national legal system”.⁵⁵ The risk of such malfunctioning at the domestic level will, in the long term, weaken “the scheme of human rights protection set up by the Convention”, both at the national and international level.⁵⁶ The availability of Article 13 remedies at the national level should thus enable the competent national authority both to deal with “the substance” of the Convention complaints and “to grant appropriate relief” in that respect, bearing in mind here that Contracting States are indeed afforded some leeway as to the manner in which they comply with this obligation.⁵⁷ This means that Article 13 “has no independent existence” as it can only find application in combination with, or in the light of, other substantive clauses of the Convention and its Protocols of which a violation had been argued.⁵⁸

When dealing with a complaint at the national level, the domestic ruling “must” examine the merits of the Convention allegation⁵⁹ and the remedy will be deemed insufficient when the domestic authorities either reformulate the complaint or fail to take into account “an essential element” of the alleged violation of the Convention.⁶⁰ In turn, this means that the “scope of judicial scrutiny by a domestic court must be sufficient” to effectively guarantee protection under Article 13 and an insufficient judicial review by the domestic courts may lead to a violation of this provision in connection with other substantial clauses of the Convention.⁶¹ Even if a sole remedy may not in itself be sufficient to be considered as an effective remedy at the national level, the “aggregate of remedies” provided in the domestic legal order may meet Article 13 requirements,⁶² and such scenarios usually happen when there are a number

⁵⁴ ECtHR, *Rotaru v. Romania* [GC], no. 28341/95, Judgment (2000), § 67.

⁵⁵ ECtHR, *Kudła v. Poland* [GC], no. 30210/96, Judgment (2000), § 155.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ ECtHR, *Zavoloka v. Latvia*, no. 58447/00, Judgment (2009), § 35.

⁵⁹ ECtHR, *Boychev and Others v. Bulgaria*, no. 77185/01, Judgment (2011), § 56.

⁶⁰ ECtHR, *Glas Nadezhda EOOD and Elenkov v. Bulgaria*, no. 14134/02, Judgment (2007), § 69.

⁶¹ ECtHR, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, Judgment (2003), §§ 141-142; ECtHR, *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, Judgment (1999), §§ 136-139. See also more generally, ECtHR (2021), ‘Guide on Article 13 of the European Convention on Human Rights’, page 19.

⁶² ECtHR, *De Souza Ribeiro v. France* [GC], no. 22689/07, Judgment (2012), § 79.

of different remedies that can be used in parallel or one after another.⁶³ In this context, the Court has consistently insisted that a remedy provided at the domestic level must be “effective” in practice as well as in law.⁶⁴ In cases where an applicant argues before the ECtHR that he or she could not derive benefits from an existing remedy at the domestic level – even after following its course – it is incumbent on the State “to adduce evidence of the implementation and practical effectiveness of the remedy” by providing concrete examples of the judicial practice of the domestic courts showing the practical effectiveness of the remedy.⁶⁵

In the National Reports that follow, this study will elaborate each violation found under Article 13 for all six Western Balkan States as one of the most important areas of Convention law contributing to the embeddedness of the Convention principles and the Court’s case-law at the domestic level. Hence, the general principles of the ECtHR referred to above will serve as a primary basis for the analysis that follows.

1.2. The Link between Articles 13 and 35 § 1 of the Convention: Exhaustion of Domestic Remedies

The link between Articles 13 and 35 § 1 in respect of exhaustion of domestic remedies is of particular importance. The purpose of the requirement to exhaust domestic remedies before filing an application with the Strasbourg Court “is to afford the national authorities, primarily courts, the opportunity to prevent or put right the alleged violations of the Convention”.⁶⁶ The rule of exhaustion is based on the assumption reflected in Article 13 that a domestic legal order is to offer an effective remedy to everyone whose rights and freedoms guaranteed by the Convention are violated.⁶⁷ According to the *travaux préparatoires*, the overarching aim of Article 13 is to provide a means by which individuals are able to obtain relief at the domestic level for violations of their ECHR rights without the need to seek supranational relief at the Strasbourg

⁶³ ECtHR, *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, Judgment (2011), § 338.

⁶⁴ ECtHR, *İlhan v. Turkey* [GC], no. 22277/93, Judgment (2000), § 97.

⁶⁵ ECtHR, *Stanev v. Bulgaria* [GC], no. 36760/06, Judgment (2012), § 219; ECtHR, *Segerstedt-Wiberg and Others v. Sweden*, no. 62332/00, Judgment (2006), § 120.

⁶⁶ ECtHR, *Ghergina v. Romania* [GC], no. 42219/07, Decision (2015), §§ 84–89; ECtHR, *Vučković and Others v. Serbia* [GC], nos. 17153/11 and 29 others, §§ 69–77. See also, ECtHR (2021), ‘Practical Guide on Admissibility Criteria’, page 26, <https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf> (accessed 25 December 2021).

⁶⁷ ECtHR, *Selmouni v. France* [GC], no. 25803/94, Judgment (1999), § 74.

level by putting in motion the international complaint machinery.⁶⁸ As such, Article 13 gives a “direct expression” to the obligation of States to secure and protect Convention rights first and foremost within their own domestic systems,⁶⁹ and is an indispensable part of the functioning of the Convention system.⁷⁰

As a basic principle of the Convention system, the Court is merely concerned with the supervision of the implementation of their obligations by States Parties but in this process, the Court “cannot, and must not, usurp the role of Contracting States whose responsibility is to ensure the fundamental rights and freedoms ... on a domestic level”.⁷¹ Quite naturally, this makes the ECtHR “subsidiary” to the domestic systems safeguarding Convention rights and as a result it is only appropriate that the domestic courts are provided with the opportunity to initially determine whether there is an issue of incompatibility between the domestic law and the Convention.⁷² This is connected to the fact that, in cases when an application is brought to Strasbourg after being dealt with by the domestic courts, the ECtHR will have the benefit of the views of the domestic courts, an important fact considering that the national courts are in more direct and close contact with the vital forces in their respective States.⁷³ The determination as to whether a domestic procedure may be regarded as effective and one which the applicant must exhaust, depends on a number of factors, namely: the applicant’s complaint, the scope of the State’s obligation under that particular provision of the Convention, the remedies available in the State in question and the specific circumstances of the case.⁷⁴

⁶⁸ ECtHR (undated), *Travaux Préparatoires* on the ECHR <https://www.echr.coe.int/documents/library_travPrep_table_eng.pdf> (accessed 8 January 2022). See also, ECtHR, *Kudła v. Poland* [GC], no. 30210/96, Judgment (2000), § 152.

⁶⁹ *Ibid.*

⁷⁰ ECtHR, *Demopoulos and Others v. Turkey* [GC], nos. 46113/99 and 7 others, Decision (2010), §§ 69 and 97.

⁷¹ *Ibid.*, § 69.

⁷² ECtHR, *A, B and C v. Ireland* [GC], no. 25579/05, Judgment (2010), § 142.

⁷³ ECtHR, *Burden v. the United Kingdom* [GC], no. 13378/05, Judgment (2008), § 42.

⁷⁴ ECtHR, *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, Judgment (2017), § 134. See also, ECtHR (2021), ‘Practical Guide on Admissibility Criteria’, page 26 and pages 26–37 for further insight into the purpose of the exhaustion rule, application of the rule, limits on the application of the rule, distribution of the burden of proof, procedural aspects and creation of new remedies.

In a recent case, labelled as the “Gay-marriage-cake case” by the ECtHR,⁷⁵ the Strasbourg Court seems to have elevated even higher the requirement of exhaustion of domestic remedies. After highlighting that a specific Convention complaint must be aired “explicitly or in substance, before the national courts”,⁷⁶ the Court applied a more stringent analysis of whether the applicant had in fact raised his Convention complaints domestically. Specifically, the Court noted that the applicant “did not invoke his Convention rights expressly at any point in the domestic proceedings” and that in “choosing not to rely on his Convention rights, the applicant deprived the domestic courts of the opportunity to consider both the applicability of Article 14 to his case and the substantive merits of the Convention complaints on which he now relies”.⁷⁷ The fact that the applicant is “now invit[ing] the Court to *usurp* [emphasis added] the role of the domestic courts” is an approach which “is contrary to the subsidiary character of the Convention machinery”.⁷⁸ As a result, the Court declared the case inadmissible by considering that the applicant had “failed to exhaust domestic remedies” with respect to his complaints under Articles 8, 9, 10, read alone and together with Article 14 ECHR.⁷⁹

In the National Reports that follow, this study will reflect in all of the chapters the most important cases where issues of exhaustion of domestic remedies have arisen, while focusing on arguments of the governments that were refuted by the Court due to the ineffectiveness of the proposed remedies, as well as cases where the Court maintained that the domestic systems provided

⁷⁵ See ECtHR (2022), Press Release of the Strasbourg Court regarding the ECtHR case of *Lee v. the United Kingdom*, no. 18860/19, Decision (2021) <<https://hudoc.echr.coe.int/?i=003-7221182-9819040>> (accessed 9 January 2022).

⁷⁶ ECtHR, *Lee v. the United Kingdom*, no. 18860/19, Decision (2021), § 68.

⁷⁷ *Ibid.*, §§ 69 and 77.

⁷⁸ *Ibid.*, § 77.

⁷⁹ *Ibid.*, § 78. See also, two cases cited by the ECtHR as providing similar reasoning with regard to the rule of exhaustion of domestic remedies: ECtHR, *Azinas v. Cyprus*, no. 56679/00, Judgment (2004), § 38 and ECtHR, *Peacock v. the United Kingdom*, no. 52335/12, Decision (2016), § 33. However, it is important to note that in these two cases the word “usurp” is not used by the ECtHR with regard to the role of domestic courts. If the wording between these three cases is to be compared, the Court’s stance in ECtHR, *Lee v. the United Kingdom*, may be easily regarded as significantly more stringent and more demanding on the applicants, which serves to further confirm the claims that the Strasbourg Court is becoming increasingly more focused on a rigorous application of the principle of subsidiarity and more interested in giving the domestic authorities sufficient space to apply the Convention at home.

remedies which the applicants should have exhausted before approaching the Strasbourg Court. Hence, the general principles of the ECtHR referred to above will serve as a basis for this analysis.

1.3. The Link between the Principle of Effectiveness and States' Positive Obligations

With regard to the link between Article 13 and the positive obligations of the State, it ought to be noted that the principle of effectiveness “forms an important basis for the development and recognition of so-called ‘positive’ obligations of the States” in securing Convention rights.⁸⁰ In addition to the classic “negative obligation” of the States to refrain from interfering with the free exercise of Convention rights, it is not always possible to reach a truly “effective protection” at the domestic level simply by abstaining from interfering with ECHR rights.⁸¹ Since the 1970s, the Court has recognised the doctrine of positive obligations as an inherent part of certain Convention rights⁸² while later on it connected it to Article 1 and to the principle of effectiveness by reasoning that: “in assessing the scope of ... positive obligations ... the obligation of Contracting States under Article 1 of the Convention to secure practical and effective protection of the rights and freedoms” stipulated in the Convention “should be taken into account”.⁸³ In many cases, other than relying on the “fair balance test” and the “reasonable knowledge test” to define positive obligations, the Court frequently relies on the principle of effectiveness as an interpretative tool “to underpin the acceptance of a new positive obligation”.⁸⁴ For example, in the case of *McCann v. the United Kingdom*, the Court intertwined the doctrine of positive obligations with the State’s general duty to secure Convention rights and, after conducting an “effectiveness-based test”, concluded that the obligation of the United Kingdom to protect the right to life in that particular case “requires by implication that there should be some form of effective official investigation when individuals” are killed either as a result of or through the use of force by State agents.⁸⁵

⁸⁰ Gerards (2019), 4–5.

⁸¹ *Ibid.*, 108. For more on negative and positive obligations of the States Parties, see Xenos (2012), Lavrysen (2016) and Harris, O’Boyle, Bates and Buckley (2018).

⁸² ECtHR, *Marckx v. Belgium* [Plenary], no. 6833/74, Judgment (1979) § 31; ECtHR, *Airey v. Ireland*, no. 6289/73, Judgment (1979), § 33. See also, Gerards (2019), 109.

⁸³ ECtHR, *Kontrová v. Slovakia*, no. 7510/04, Judgment (2007), § 51. See also, Gerards (2019), 109.

⁸⁴ Gerards (2019), 119.

⁸⁵ ECtHR, *McCann and Others v. the United Kingdom* [GC], no. 18984/91, Judgment (1995), § 161. See also, Gerards (2019), 120.

In the National Reports that follow, this study will reflect in all of the chapters the most important cases where the Court connected the principle of effectiveness with the doctrine of positive obligations when finding a violation of Convention rights by the domestic authorities. Hence, the general principles of the ECtHR referred to above will serve as a basis for the analysis that follows.⁸⁶

1.4. The Link between the Principle of Effectiveness and Article 46 of the Convention

With regard to the link between the principle of effectiveness and Article 46 of the Convention, three aspects are of particular importance, namely: (i) the indication of individual and/or general measures by the ECtHR without necessarily declaring a systemic/structural problem; (ii) the pilot-judgment procedure initiated with a view to addressing a systemic/structural problem or some other dysfunction at the domestic level; and, (iii) the enforcement of the Court's judgments by States at the domestic level.

Firstly, according to Article 46, States are not merely required to pay the just satisfaction award indicated by the Court following the finding of a violation, but also to undertake individual and/or general measures to put an end to the violation and redress it in an effective manner.⁸⁷ In this respect, the Court has highlighted that “one of the most significant features of the Convention system is that it includes a mechanism for reviewing compliance with the provisions of the Convention” not just by requiring States to secure Convention rights domestically but also by establishing a supranational body empowered “to find violations of the Convention in final judgments by which the States Parties have undertaken to abide”.⁸⁸ Moreover, the Convention system has also set up a mechanism, under the responsibility of the Committee of Ministers, to supervise the execution of judgments.⁸⁹ And, in its totality, this mechanism “demonstrates the importance of effective implementation of judgments”.⁹⁰

⁸⁶ For more on the general principles of the ECtHR and the application of Article 13 in relation to other substantive provisions of the Convention, see ECtHR (2021), ‘Guide on Article 13 of the European Convention on Human Rights’, pages 25-71.

⁸⁷ Article 46 of the ECHR; ECtHR, *Ilgar Mammadov v. Azerbaijan* [GC], no. 15172/13, Judgment (2019), § 147.

⁸⁸ ECtHR, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, Judgment (2009), § 84.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

With a view to assisting States to fulfil their obligations under Article 46, the Court is authorised to indicate the type of individual and/or general measure that might be necessary to put an end to the situation that resulted in a violation of the Convention.⁹¹ Individual measures are called for when a State is found to be responsible for a wrongful act which led to the Convention being violated, and on all such occasions the State is under the obligation to make restitution, provided that such restitution is not “materially impossible” and that it “does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation”.⁹² The aim of *restitutio in integrum* in respect of individual measures is to put the applicant in the position prior to the violation having occurred, to the extent that that is possible. If, for various reasons, that is not possible – as is often the case – the Court is empowered with the authority to accord appropriate just satisfaction to the injured parties.⁹³ In certain instances, the Court might find it not just useful but necessary to indicate precisely to the respondent State the type of individual measure that should be taken to remedy the situation that gave rise to the violation; at other times, the nature of the violation as such may leave no real choice for the respondent State except the measure indicated by the Court.⁹⁴ General measures, on the other hand, are called for in order to prevent similar violations from occurring in the future and are based on the States’ general obligation to solve domestically the problems underlying the violation found at the Strasbourg level.⁹⁵ In cases in which the Court finds that a violation is occurring or is likely to continue occurring in the future, it observes that general measures are indispensably called for in order to address and remedy the situation leading to a large number of repetitive applications.⁹⁶

⁹¹ ECtHR, *Suso Musa v. Malta*, no. 42337/12, Judgment (2013), § 120.

⁹² ECtHR, *Ilgar Mammadov v. Azerbaijan* [GC], no. 15172/13, Judgment (2019), § 151.

⁹³ ECtHR, *Brumărescu v. Romania* [GC], no. 28342/95, Judgment (just satisfaction) (2001), § 20. See also, Article 41 of the Convention.

⁹⁴ See in this respect, ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, Judgment (2012), §§ 209–211; *Assanidze v. Georgia* [GC], no. 71503/01, Judgment (2004), § 202; *Savridin Dzhurayev v. Russia*, no. 71386/10, Judgment (2013), §§ 252–254.

⁹⁵ ECtHR (2021), ‘Guide on Article 46 of the European Convention on Human Rights’, page 8, <https://www.echr.coe.int/Documents/Guide_Art_46_ENG.pdf> (accessed 25 December 2021). ECtHR, *Scordino v. Italy* (no. 1) [GC], no. 3613/97, Judgment (2006), §§ 232–234. See also, Committee of Ministers, Recommendation Rec(2004)6 ‘On the Improvement of Domestic Remedies’, 12 May 2004.

⁹⁶ ECtHR, *Baybaşın v. the Netherlands*, no. 13600/02, Judgment (2006), § 79.

Secondly, the pilot-judgment procedure in substance means that the Court is authorised to “initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction” which gives rise to other similar applications before the Strasbourg Court.⁹⁷ A lot has been written with respect to this procedure and its impact on the overall protection of Convention rights at the domestic level since its introduction in 2004.⁹⁸ As a means of addressing the high number of repetitive applications, the pilot-judgment procedure has two main aims. The first aim is to prevent the Convention system from being compromised by a large number of repetitive complaints arising from the same malfunction within the domestic legal order.⁹⁹ The second aim is to induce States to resolve, at the domestic level, the large number of repetitive cases stemming from the same structural or systemic problem thereby implementing subsidiarity as a core principle which underpins the Convention system.¹⁰⁰ In *Broniowski v. Poland*, the first judgment ever to apply this procedure following a call from the Committee of Ministers for the Court to identify in its judgments the underlying systemic problem and its source,¹⁰¹ the Strasbourg Court meticulously interpreted Article 46 of the Convention in respect of systemic problems and, based on such reasoning, has continued to issue many pilot-judgment cases from 2004 onwards, including for some of the Western Balkan States.¹⁰²

The decision as to whether the time has come for the Court to initiate a pilot-judgment procedure is dictated by two main factors. Firstly, when the situation affects a large number of people and therefore there is a need to grant them appropriate and speedy redress domestically; and secondly, when the continuing presence of a major systemic deficiency causing recurrent Convention violations also represents a “threat for the future effectiveness of the supervisory system put in place by the Convention”.¹⁰³ When these two factors are

⁹⁷ ECtHR (2022), Rules of Court, Rule 61 inserted on 21 February 2011 <https://www.echr.coe.int/documents/rules_court_eng.pdf> (accessed on 25 December 2021).

⁹⁸ See e.g. Gerards (2012), Haider (2013), Glas (2016) and Buyse (2009).

⁹⁹ ECtHR, *Baybaşın v. the Netherlands*, no. 13600/02, Judgment (2006), § 79.

¹⁰⁰ ECtHR, *Varga and Others v. Hungary*, nos. 14097/12 and 5 others, Judgment (2015), § 96.

¹⁰¹ ECtHR, *Broniowski v. Poland* [GC], no. 31443/96, Judgment (2004), §§ 188-194. See also, Committee of Ministers, Resolution Res(2004)3 ‘On judgments revealing an underlying systemic problem’ of 12 May 2004.

¹⁰² ECtHR, *Broniowski v. Poland* [GC], no. 31443/96, Judgment (2004), §§ 188-194.

¹⁰³ ECtHR, *Rezmiveş and Others v. Romania*, nos. 61467/12 and 3 others, Judgment (2017), §§ 106-111. See also, ECtHR (2021), ‘Guide on Article 46 of the European Convention on Human Rights’.

present and the Court decides to render a pilot judgment, it must identify “the nature” of the structural or systemic problem or any other dysfunction and then proceed by identifying the “type of remedial measures” which are to be taken by the State concerned with a view to remedying the situation at the domestic level.¹⁰⁴ There are many cases where the ECtHR asked respondent States to set up effective protection mechanisms in order to ensure effective protection of Convention rights at home. For instance, the Court has asked: Russia to set up an effective preventive and compensatory scheme to address complaints regarding conditions in remand prisons;¹⁰⁵ Bulgaria to establish a preventive remedy to provide swift redress to prisoners kept in unsatisfactory conditions;¹⁰⁶ Hungary to provide an effective remedy to redress the issue of prison overcrowding;¹⁰⁷ Ukraine to put in place effective remedies, both preventive and compensatory, with a view to addressing detention conditions and prison overcrowding;¹⁰⁸ Poland to provide an effective remedy for length of proceedings;¹⁰⁹ and it has required various Western Balkan States to address several systemic problems domestically.¹¹⁰ The analysis in the National Reports that follow will show in concrete terms the application of this procedure in respect of several States in the Western Balkans.¹¹¹

Thirdly, as far as enforcement of judgments by the domestic authorities is concerned, the Court’s jurisdiction with respect to questions of compliance with its judgments by the respondent States is limited only to the “infringement procedure” foreseen by Article 45 §§ 4 and 5 of the Convention.¹¹² The crucial role of supervising the execution of judgments falls to the Committee of Min-

¹⁰⁴ ECtHR, Rules of Court, Rule 61.3.

¹⁰⁵ ECtHR, *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, Judgment (2012) §§ 210-231.

¹⁰⁶ ECtHR, *Neshkov and Others v. Bulgaria*, nos. 36925/10 and 5 others, Judgment (2015), §§ 282-283.

¹⁰⁷ ECtHR, *Varga and Others v. Hungary*, nos. 14097/12 and 5 others, Judgment (2015), §§ 106-113.

¹⁰⁸ ECtHR, *Sukachov v. Ukraine*, no. 14057/17, Judgment (2020), §§ 153-160.

¹⁰⁹ ECtHR, *Rutkowski and Others v. Poland*, no. 72287/10, Judgment (2015) §§ 211-222; ECtHR, *Scordino v. Italy (no. 1) [GC]*, no. 3613/97, Judgment (2006), §§ 203-204.

¹¹⁰ ECtHR, *Manushaqe Puto and Others v. Albania*, no. 604/07 and 3 others, Judgment (2012), §§ 110-118; *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia [GC]*, no. 60642/08, Judgment (2014), §§ 139-150; *Suljagić v. Bosnia and Herzegovina*, no. 27912/02, Judgment (2009), §§ 59-65.

¹¹¹ See Part IV of the chapters on National Reports (except Kosovo) under the heading ‘Cases under Article 46: General and/or Individual Measures Required’.

¹¹² Article 46 § 4 and § 5 of the ECHR. See also, *Moreira Ferreira v. Portugal (no. 2) [GC]*, no. 19867/12, Judgment (2017), § 102.

isters,¹¹³ which is considered to be better placed to assess the compatibility of the specific measures undertaken to implement a Court's decision based on the information it receives from the respondent States.¹¹⁴ Accordingly, the framework of execution supervision has generated a consolidated practice of the Committee of Ministers and a "corpus of public documents" entailing information, in the form of Action Reports produced by the respondent States and other relevant information with respect to the execution process.¹¹⁵

In many instances with respect to the Western Balkan States, the ECtHR has called for individual and/or general measures to be taken with a view to redressing the violation found at the domestic level. On some occasions, the pilot-judgment procedure has also been invoked. The analysis in the National Reports that follow will show that some States have been reluctant to follow up on the indications provided by the Court whilst other States have been more proactive in addressing issues of general concern without the Court having to indicate them through Article 46 of the Convention.¹¹⁶ Some Western Balkan States have been found in violation of Article 13 and Article 46 on several occasions, with some States having a concerning high number of violations due to persistent systemic problems, and with some other States having a low number of violations which do not necessarily derive from systemic problems but from issues in the particular circumstances of a case.¹¹⁷

¹¹³ Article 46 § 2 of the ECHR. See also, Committee of Ministers, Recommendation CM/Rec(2008)2 on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights, 6 February 2008.

¹¹⁴ ECtHR, *Ilgar Mammadov v. Azerbaijan* [GC], no. 15172/13, Judgment (2019), § 155. See also, ECtHR, *Broniowski v. Poland* [GC], no. 31443/96, Judgment (2004).

¹¹⁵ See e.g. Council of Europe (undated), general recommendations and resolutions produced by the Committee of Ministers, <<https://www.coe.int/en/web/execution/recommendations>> (accessed 25 December 2021). See also, the HUDOC EXEC database, published by the Department for the Execution of Judgments of the ECHR <<https://hudoc.exec.coe.int/eng>> (accessed 25 December 2021).

¹¹⁶ See Part IV of the chapters on National Reports (except Kosovo) under the heading 'Cases under Article 46: General and/or Individual Measures Required'.

¹¹⁷ See Part IV of the chapters on National Reports (except Kosovo) under the heading 'Cases under Article 13: Lack of Effective Domestic Remedies'.

2. The Principle of Subsidiarity

Article 1 of the ECHR places the duty of securing rights and freedoms within their domestic jurisdiction on the Contracting Parties as the primary guardians of those rights.¹¹⁸ Article 19 of the ECHR places on the Strasbourg Court the duty of ensuring and observing that the engagements undertaken by the Contracting Parties to secure Convention rights are indeed being respected.¹¹⁹ A simple reading of these two provisions leads straightforwardly to the conclusion that the domestic authorities have the “primary” duty to ensure Convention rights, while the Court’s role is supervisory and comes into play only when it is needed to examine whether the domestic authorities have indeed complied with their obligations to ensure Convention rights at the national level. Since 1 August 2021, when Protocol No. 15 entered into force, the sixth paragraph of the Convention’s Preamble specifically affirms that the Contracting Parties “have the primary responsibility to secure the rights and freedoms” defined in the Convention and its Protocols “in accordance with the principle of subsidiarity” and in so doing “they enjoy a margin of appreciation which is subject to the supervisory jurisdiction” of the ECtHR.¹²⁰ The insertion of the principle of subsidiarity and the margin of appreciation doctrine in the text of the Convention was prompted by developments in High Level Conferences where the future of the system was extensively discussed, with harsh undertones at times.¹²¹ The former President of the ECtHR, Dean Spielmann, did not consider the insertion of the principle of subsidiarity into the Preamble as “a mere rhetorical flourish” or a “form of window-dressing”.¹²² In fact, he considered this measure to be in line with the “Interlaken process” of reform which sought for sustainable ways to “alleviate the huge pressure on the European mechanism, which ... is subsidiary to the national mechanism, by original design and by practical necessity”.¹²³

However, in 1968, when subsidiarity as a principle did not appear in the text of the Convention, the ECtHR announced it in its foundational case-law by linking it closely with the State’s “primary” responsibility to secure effective pro-

¹¹⁸ Article 1 of the ECHR.

¹¹⁹ Article 19 of the ECHR.

¹²⁰ Preamble to the ECHR. See also, Protocol No. 15 to the ECHR.

¹²¹ See High-Level Conference held in Interlaken, more specifically, Interlaken Declaration, 19 February 2010, <https://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf> (accessed 25 December 2021).

¹²² Spielmann (2013).

¹²³ Ibid.

tection of Convention rights.¹²⁴ The well-known *Belgian Linguistics* case referred to the “subsidiary nature” of the Convention machinery by stipulating, *inter alia*, that:

“The Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it cannot assume the role of the competent national authorities, for it would thereby *lose sight of the subsidiary nature* [emphasis added] of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention.”¹²⁵

Eight years later, the ECtHR addressed the “division of tasks” or “division of labour” within the Convention system, by elaborating the concept of “primarity” and defining its own role in light of the notion of subsidiarity.¹²⁶ More specifically, the Court maintained that “State authorities are in principle in a better position than the international judge to give an opinion on the exact content” of the Convention requirements, and that “the Court, which ... is responsible for ensuring the observance of those States’ engagements (Article 19), is empowered to give the final ruling” as to whether the State’s actions are reconcilable with the specific Convention right.¹²⁷ Therefore, in substance, in the Court’s view, subsidiarity means that the ECtHR’s task is to examine whether domestic authorities have complied with the Convention obligations which they have undertaken to secure nationally.¹²⁸ The leeway which the States have in regulating and restricting the exercise of ECHR rights was expressed as a “margin of appreciation”,¹²⁹ a doctrine deriving from the core of the principle of subsidiarity as will be elaborated below.

¹²⁴ Gerards (2019), 5.

¹²⁵ ECtHR, *Case “relating to certain aspects of the laws on the use of languages in education in Belgium”* [Plenary], nos. 1474/62 and 5 others, Judgment (1968), § 10. See also, Gerards (2019), 5–6.

¹²⁶ ECtHR, *Handyside v. the United Kingdom* [Plenary], no. 5493/72, Judgment (1976), §§ 48–50. See also, Gerards (2019), 5; Spano (2014).

¹²⁷ ECtHR, *Case “relating to certain aspects of the laws on the use of languages in education in Belgium”* [Plenary], nos. 1474/62 and 5 others, Judgment (1968), § 48.

¹²⁸ Gerards (2019), 5. For other academic contributions on the principle of subsidiarity, see Spano (2014), Spano (2018), Mowbray (2015), Letsas (2006), Carozza (2013), Mjöll Arnardóttir (2016), Mjöll Arnardóttir (2017) and Besson (2016).

¹²⁹ Gerards (2019), 7.

In this way, subsidiarity should not be seen only as a “duty of restraint” for the ECtHR but as a “duty to act” for the national authorities, by the very fact that the latter have “first-line responsibility” to protect Convention rights and the Court is therefore obliged to “give them room to do so, both procedurally and in substance”.¹³⁰ In relation to this, it has been argued that the reliance on “negative subsidiarity”, i.e. the Court being restrained, should be replaced by a “positive subsidiarity” whereby the effectiveness principle “requires that the Court does whatever is within its powers, not only to control state performance *ex post*” but more importantly “to enable national authorities *ex ante* in their efforts to guarantee Convention rights”.¹³¹ In other words, the notion of “positive subsidiarity” requires strict scrutiny by the Strasbourg Court “with regard to cases that concern the capacity of domestic institutions and actors that play a key role in domestic human rights protection, to effectively perform their role”.¹³²

In terms of individual applications being reviewed by the ECtHR in line with Article 34 of the Convention, subsidiarity means that domestic authorities “must have sufficient room to detect and correct mistakes, flaws or omissions in their protection of Convention rights”.¹³³ In this respect, the principle of subsidiarity is closely connected with the admissibility requirement of exhaustion of domestic remedies before filing an application with the ECtHR.¹³⁴ In the Grand Chamber case of *Vučković and Others v. Serbia*, the ECtHR has concisely quantified and confirmed the general principles pertaining to the exhaustion of legal remedies, while requiring the applicants, with more persistence than in its previous case-law (as argued by some authors), “to be more diligent in raising their Convention complaints for domestic remedies to be properly exhausted”.¹³⁵ The most crucial stipulations of the Court’s case-law on exhaus-

¹³⁰ Brems (2019), 215.

¹³¹ *Ibid.*, 217.

¹³² *Ibid.*, 225.

¹³³ Gerards (2019), 7.

¹³⁴ Article 35 § 1 of the ECHR where it is foreseen that: “The Court may only deal with the matter after all domestic remedies have been exhausted ...”. See also, Gerards (2019), 7.

¹³⁵ ECtHR, *Vučković and Others v. Serbia* [GC], nos. 17153/11 and 29 others, Judgment (2014), §§ 69-77. Spano (2018), 486. See also, Joint Dissenting Opinion of Judges Popović, Yudkivska and De Gaetano in ECtHR, *Vučković and Others v. Serbia* [GC], stating, in substance, that the ECtHR employed “an excessively formalistic approach to Article 35 § 1” by “telling the applicants that they should have pleaded their case at the domestic level *in one particular and specific way and not another*”. It is also important to note that before the case was referred to the Grand Chamber at the Government’s request, the Chamber (ECtHR, *Vučković and Others v. Serbia*, nos. 17153/11 and 29 others, Judgment (2012)) admitted the case for

tion of domestic remedies revolve around the practical implementation of the subsidiarity principle, namely general principles such as: (i) “It is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights”; (ii) the Court “should not take on the role of Contracting States, whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level”; but rather, the Court should only be “concerned with the supervision of the implementation by Contracting States of their obligations under the Convention”; (iii) the “rule of exhaustion of domestic remedies is based on the assumption – reflected in Article 13 of the Convention, with which it has close affinity – that there is an effective remedy available in respect of the alleged violation”; (iv) “In so far as there exists at the national level a remedy enabling the domestic courts to address, at least in substance, the argument of a violation of a given Convention right, it is that remedy which should be exhausted”; (v) it would not be compatible with “the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground before the national authorities ... but then lodge an application before the Court on the basis of the Convention argument”, etc.¹³⁶

In conclusion, for the purposes of the analysis that this study seeks to undertake, it is important to highlight that the primary duty to secure protection of Convention rights at the domestic level pertains more generally to the domestic authorities as ‘first-line defenders’¹³⁷ and, more particularly, to the domestic courts as ‘last-line defenders’¹³⁸ of Convention rights at home. In the matrix of Convention rights protection, the Strasbourg Court has a secondary/

review on the merits (reasoning that there was no issue with the exhaustion of domestic remedies) and found a violation of Article 6 § 1 and Article 1 of Protocol No. 1 to the ECHR.

¹³⁶ ECtHR, *Vučković and Others v. Serbia* [GC], nos. 17153/11 and 29 others, Judgment (2014), §§ 69-77. See also cases cited there: ECtHR, *Demopoulos and Others v. Turkey* [GC] nos. 46113/99 and 7 others, § 69, Decision (2010); ECtHR, *Akdivar and Others v. Turkey* [GC], no. 21893/93, Judgment (1996).

¹³⁷ The phrase ‘first-line defenders’ – referring to domestic authorities as the primary guarantors of the Convention rights at the domestic level – was first utilised by Helfer (2008), 125-159.

¹³⁸ The phrase ‘last-line defenders’ – referring to the domestic courts as the last domestic authorities (in most cases) to secure protection of Convention rights is a term used by the author of this study, a term inspired by the similar utilisation of the term by Helfer (see *ibid.*).

supervisory role, as will be elaborated in subsequent parts of this general introduction where the roles of the Strasbourg Court and the domestic courts are more widely discussed.

3. The Margin of Appreciation Doctrine

The introduction of the margin of appreciation doctrine, as an interpretative tool, by the ECtHR in the early stages of its vital jurisprudential activity was a natural application of the principle of subsidiarity in practice.¹³⁹ While the ECtHR initiated the development of this doctrine in the *Belgian Linguists* case referred to above as the first case where the principle of subsidiarity was outlined, the *Handyside v. the United Kingdom* case is viewed as the judgment in which the Court formally introduced the doctrine of margin of appreciation in this famous reasoning:

The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights ... The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines.

Article 10 para. 2 ... leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force. ...

Nevertheless, Article 10 para. 2 ... does not give the Contracting States an unlimited power of appreciation. The Court ... is responsible for ensuring the observance of those States' engagements (Article 19), is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by Article 10 ... The domestic margin of appreciation thus goes hand in hand with a European supervision. ...

...

It follows from this that it is in no way the Court's task to take the place of the competent national courts but rather to review under Article 10 (art. 10) the decisions they delivered in the exercise of their power of appreciation.¹⁴⁰

¹³⁹ In respect of the margin of appreciation doctrine, see, *inter alia*, Mjöll Arnardóttir (2016), Arai-Takahashi (2002), Legg (2012), Kratochovil (2011), Letsas (2006), Greer (2006), Fabbrini (2015) and Arai-Takahashi (2013).

¹⁴⁰ ECtHR, *Handyside v. the United Kingdom* [Plenary], no. 5493/72, Judgment (1976), §§ 48-50. The case is known as the "Little Book" case; the national courts had ordered copies of the book to be seized on the ground that the information being distributed to teenagers in schools was obscene and damaging to public morals. The ECtHR deferred to the *ratio decidendi* of the domestic courts by not finding a violation of Article 10, after outlining the margin of appreciation doctrine for the first time. See also, Gerards (2019), 5.

Until 2021, this doctrine did not appear anywhere in the text of the Convention but it was abundantly present in the Court's case-law. According to the amendments introduced by Protocol No. 15, the Preamble of the Convention now specifically states that domestic authorities "enjoy a margin of appreciation" in securing Convention rights as primary responsible parties.¹⁴¹ Nevertheless, even before this concept was formally inserted, the ECtHR constantly relied on this doctrine in order to defer to domestic authorities and domestic courts.¹⁴² When this doctrine is in play, the ECtHR will "exercise a degree of judicial self-restraint" when reviewing decisions of the domestic courts or other domestic authorities, with the caveat that the degree of restraint varies depending on the context and the rights being reviewed.¹⁴³

Authors have argued that the Court has carved a "distinct role" for the margin of appreciation in its recent case-law by recognising a twofold task of the domestic courts, namely: (i) to take the ECtHR case-law into account when adjudicating cases based on the *res interpretata* principle; and (ii) to "concretise the principles" stemming from the Court's case-law in the national context in view of the circumstances of the particular national case.¹⁴⁴ This new phase in the Court's life resulting in more refined judicial review approaches towards the principle of subsidiarity has also had an impact on the practical utilisation of the margin of appreciation doctrine as well. This is particularly evident in cases where the Court is increasingly more inclined to defer to domestic courts that have performed well in balancing the competing Convention rights while utilising the standards set by the Court in its case-law. In this "age of deference",¹⁴⁵ as will shortly be discussed, the margin of appreciation seems to be widening by default. The examples in relation to Western Balkan States will show several instances where the Court showed trust towards its 'Convention partners' at the domestic level by according them substantial leeway for the Convention compliant solution that they had chosen to solve a case domestically.

¹⁴¹ Preamble to the ECHR and Protocol No. 15 to the ECHR.

¹⁴² See, among many examples, ECtHR, *Gustafsson v. Sweden* [GC], no. 15573/89, Judgment (1996), § 54 (no violation of Article 11); ECtHR, *Papachelas v. Greece* [GC], no. 31423/96, Judgment (1999), § 49 (no violation of Article 1 of Protocol No.1); ECtHR, *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, Judgment (2016), §§ 178-191 (no violation of Article 8); etc.

¹⁴³ Mahoney (2015), 23.

¹⁴⁴ Mjöll Arnardóttir (2017), 831.

¹⁴⁵ This term, as used in this study, is inspired by the utilisation of the term "age of subsidiarity" in Spano (2018).

III. The Roles of the Strasbourg Court and Domestic Courts in their Shared Responsibility to Ensure Effective Protection of ECHR Rights

The Strasbourg Court and domestic courts belong to two very different legal orders, international and national.¹⁴⁶ While their roles differ when it comes to the ultimate goal of securing and ensuring protection of Convention rights, they are also complementary in certain crucial respects. Their roles are different in the sense that the Strasbourg court is a supranational review court which is only “concerned with the supervision of the implementation by Contracting States of their obligations under the Convention”,¹⁴⁷ the national courts, meanwhile, are domestic review courts which are concerned with the overall application of Convention standards and the Court’s case-law by the public authorities in their respective States, in addition to other particular roles they have within their national judiciaries and towards other international law obligations.

Although the power division lines might at times be blurred in practice, the Convention has conferred specific roles on the national and supranational players in the process of guaranteeing effective enjoyment of Convention rights. The primary role to “secure to everyone within their jurisdiction the rights and freedoms” defined in the Convention pertains to each Contracting Party.¹⁴⁸ The subsidiary role to “ensure the observance of engagements undertaken” by the Contracting Parties pertains to the ECtHR.¹⁴⁹ Accordingly, while the former are obliged to “secure” Convention rights nationally, the role of the latter is merely to “ensure” that this obligation is indeed being fulfilled. This division of roles reflected in the “secure” versus “ensure” equation, “evidently places a rather heavy responsibility on national courts” as they are obliged to make sure that the ECtHR’s case-law is being implemented as well as to make full use of their jurisdictional competences to secure compliance

¹⁴⁶ Ulfstein (2016), 47.

¹⁴⁷ ECtHR, *Vučković and Others v. Serbia* [GC], nos. 17153/11 and 29 others, Judgment, (2014).

¹⁴⁸ Article 1 of the ECHR.

¹⁴⁹ Article 19 of the ECHR.

with the Convention.¹⁵⁰ This is particular true for the highest domestic courts which have the responsibility to act not only as ‘first-line defenders’ at times but also as ‘last-line defenders’ of Convention rights before cases reach the Strasbourg Court’s docket. In this sense, they are the last possible ‘Convention filterer’ and the Court’s last ‘Convention [application] partner’ at the domestic level.

Even if this classic “division of labour” as some have termed it¹⁵¹ has always existed, Protocol No. 15 reinforced “the subsidiary nature of the Strasbourg Court”,¹⁵² by inserting into the Preamble of the Convention a specific reference to the principle of subsidiarity and highlighting that the Contracting Parties “have the primary responsibility to secure the rights and freedoms” defined in the Convention.¹⁵³ As elaborated above, the injection of the principle of subsidiarity into the Preamble of the Convention has not been considered as a surprise but rather as an action that is “consistent with the essential thrust of the reform process ... which takes as its major premise the need to improve the protection of human rights at the domestic level”.¹⁵⁴ Accordingly and quite correctly, this new phase in the life of the Strasbourg Court has been defined as the “age of subsidiarity” under the premise “that it will be manifested by the Court’s engagement with empowering the member States to truly ‘bring rights home’ ... all over Europe”.¹⁵⁵ Many recent examples reflected in the subsequent part of this chapter will confirm that the Court is applying the principle of subsidiarity more robustly than ever before by constantly endeavouring to provide deference to domestic courts that have earned such deference through sound application of Convention standards.

Quite evidently, domestic courts are the most obvious “partners” of the ECtHR in building bridges with the national legal orders.¹⁵⁶ The direct contact of the ECtHR with other ‘first-line defenders’ at the domestic level is less frequent than its constant contact with the domestic courts, especially the highest domestic courts of a State Party. According to Article 1 of the Convention, each Contracting Party is obliged “to secure to everyone within their jurisdiction the rights and freedoms” proclaimed by the Convention and its Protocols.¹⁵⁷ As

¹⁵⁰ Gerards (2014).

¹⁵¹ Spano (2014) and Gerards (2019).

¹⁵² Spano (2014), 491.

¹⁵³ Preamble to the ECHR and Protocol No. 15 to the ECHR.

¹⁵⁴ Spielmann (2013).

¹⁵⁵ Spano (2014), 491.

¹⁵⁶ Mahoney (2015).

¹⁵⁷ Article 1 of the ECHR.

primary custodians of the effective protection of Convention rights at home, States have two important obligations according to the Convention. The first obligation is to provide an “effective remedy” to everyone whose rights and freedoms have been violated, as stipulated by Article 13 of the Convention; the second obligation is to abide by final judgments of the Court rendered against them, as stipulated by Article 46 of the Convention.¹⁵⁸ Although in *stricto sensu* the domestic authorities are only obliged to abide by the judgments of the Court rendered against their State,¹⁵⁹ the Court’s interpretation establishing the threshold of minimum level of protection in one given case “is equally pertinent to all applicable similar cases” in accordance with the *res interpretata* effect,¹⁶⁰ which has been embraced by the Court,¹⁶¹ as well as through the Interlaken High Level Declaration.¹⁶² In this respect, there is a growing consensus on the fact that States Parties are supposed to establish mechanisms to follow and apply the Court’s case-law in all cases as the only avenue of providing effective redress domestically and reducing the need for applicants to appear before the Strasbourg Court. The analysis for the Western Balkan States will show examples from both ends of the spectrum, namely domestic courts taking account of the *res interpretata* effects quite faithfully and other domestic courts completely ignoring such effects, even in almost identical cases.

Despite their primary versus secondary roles, the complementarity between the role of the Strasbourg Court and that of the domestic courts of the members States comes into play when we discuss their shared responsibility to protect Convention rights across the pan-European geographical space. In its preliminary opinion in preparation for the Brighton Conference, the Court made a link between the *res interpretata* effects of its case-law and the notion of shared responsibility by affirming that States “need to take account of the Court’s well-established case-law, beyond the particular respondent State concerned” in order to put in practice the “States’ shared responsibility for the system”.¹⁶³ In line with this, the Court also recalled that a “key element in the

¹⁵⁸ Articles 13 and 46 of the ECHR.

¹⁵⁹ Article 46 of the ECHR.

¹⁶⁰ Gerards and Fleuren (eds) (2014), 23.

¹⁶¹ Gerards (2013), 73-92.

¹⁶² See all High Level Conferences held in Interlaken (2010), Izmir (2011), Brighton (2012), Oslo (2014), Brussels (2015) and Copenhagen (2018), revealing discussions on the reform and the future of the Strasbourg Court <<https://www.echr.coe.int/Pages/home.aspx?p=basictexts/reform>> (accessed 25 December 2021).

¹⁶³ ECtHR (2012), ‘Preliminary Opinion of the Court in preparation for the Brighton Conference’, adopted by the Plenary Court on 20 February 2012, para. 23, <https://www.echr.coe.int/Documents/2012_Brighton_Opinion_ENG.pdf> (accessed 10 January 2022).

process initiated at Interlaken has been increased recognition that responsibility for the effective operation of the Convention has to be *shared* [emphasis added].¹⁶⁴ In the academic literature, the notion of shared responsibility or “partnership” between the Court and the domestic courts is described as “an expression of the Court’s desire to deal with the tension between its push and pull factors in an adequate manner, i.e. protecting fundamental rights effectively while respecting national legal traditions and national diversity”.¹⁶⁵ The jurisprudential shift of the Court has also been noted in respect of the application of shared responsibility in practice through which the Court aims to treat domestic courts as “allies”, not obliging them to act as “its marionettes”, but rather encouraging them “to provide for independent and high level protection of Convention rights in a manner which is compliant with their constitutional and legal systems”.¹⁶⁶

The relationship between the ECtHR and the domestic courts has been labelled elsewhere as “mutually distinct, but interrelated”¹⁶⁷ when commenting on an opinion expressed by Lord Reed in respect of their roles, where he stated articulately:

[The] Strasbourg Court’s aim is not to construct a code to be adopted by the 47 contracting states. It knows very well that there are important differences between the various societies and legal systems. But the Court is developing a body of high level principles which can be taken to be applicable across the different legal traditions. Bearing that in mind, in the Strasbourg law, as in our own, we need to identify the principles underlying the development of a line of authorities on a particular topic. We can then develop our law, when necessary, by finding the best way, faithful to our own legal tradition, of giving expression to those principles. If we do so, our domestic legal tradition can continue to develop.¹⁶⁸

In relation to this discussion, authors have identified various available possibilities for regulating the relationship between the domestic courts and the ECtHR, ranging from “a hierarchical approach” which would amount to “micro-management by the ECtHR” to a “collaborative approach” which would amount to “judicial dialogue” with shared responsibilities between the supranational court in Strasbourg and the domestic level courts.¹⁶⁹ In this respect,

¹⁶⁴ Ibid., 4.

¹⁶⁵ Gerards and Fleuren (eds) (2014), 34; Schukking (2018), 152-158; Ducoulombier (2019), 131.

¹⁶⁶ Gerards and Fleuren (eds) (2014), 51.

¹⁶⁷ Spano (2014), 493.

¹⁶⁸ Lord Reed (2013), 13 and 15. See also, López Guerra (2018), 262 where it is stated that the Court’s goal is not to “achieve a homogenous legal regime”.

¹⁶⁹ Mahoney (2015), 21. See also, the Superior Courts Network created by the ECtHR aiming “to enrich dialogue and implementation of the Convention”, in respect of which the ECtHR is undertaking to enhance the dialogue with the highest courts of the States Parties,

it has been suggested by two judges coming from domestic and supranational levels that the “long-term viability and strength of the Convention system depend on a division of labour [between the ECtHR and domestic courts] based on dialogue ... and subsidiarity” and this “dialogue between the courts in the exercise of their respective jurisdictions and the principle of subsidiarity are interconnected”.¹⁷⁰ Similarly, it has been emphasised that an effective realisation of Convention standards, rights and freedoms can only be achieved “through a clear distribution of labour between the member States and the Court”.¹⁷¹ The cooperation of the ECtHR with national courts should be perceived, on both sides, as open-minded and flexible with the overarching aim of “enabling the national courts to resolve human rights issues, so as to obviate the need for recourse to Strasbourg” but with the ECtHR “having the last word in the event of interpretative disagreement”.¹⁷² In this respect, “a cooperative rather than hierarchical or competitive relationship” between the domestic courts and the ECtHR may help to place “the centre of gravity for the judicial protection of human rights firmly and solidly at the national level” thus enabling the Strasbourg Court to effectively fulfil its subsidiary role.¹⁷³

In the academic literature, at least four types of judicial dialogue between the ECtHR and domestic courts have been identified as possible.¹⁷⁴ Due to their importance for the impact of the ECtHR in domestic legal orders, the following part will reflect the most important elements featuring these possible judicial exchanges.

Firstly, the most frequent cross-national judicial exchange is the “confirmative dialogue” where the domestic courts apply the case-law of the Court without any reservations and then the Strasbourg Court confirms the correct application of such standards by deferring to the *ratio decidendi* of the domestic courts.¹⁷⁵ An example of this type of dialogue may be noticed in the case of *Von Hannover v. Germany* (no. 2) where the Strasbourg Court commended the Convention application by the German courts by specifically stating that “the national courts carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for

<https://www.echr.coe.int/Pages/home.aspx?p=court/dialoguecourts/network&c=>> (accessed 25 December 2021). See also, Elósegui (2019), 277-292; Mits (2019), 589-602.

¹⁷⁰ Lübbecke-Wolff (2012), 11-12; Mahoney (2015), 22.

¹⁷¹ Spano (2019), 109.

¹⁷² Mahoney (2014), 116.

¹⁷³ Mahoney (2015), 29.

¹⁷⁴ López Guerra (2017).

¹⁷⁵ *Ibid.*, 402.

their private life” and that “the national courts explicitly took account of the Court’s relevant case-law”.¹⁷⁶ There are numerous other examples that reflect this frequent form of supranational versus national judicial exchange where the ECtHR confirms the stance of the domestic courts through a judgment¹⁷⁷ or where the ECtHR indirectly confirms the stance of the domestic courts by declaring the applicant’s complaints as manifestly ill-founded.¹⁷⁸ This form of dialogue is important to confirm the Convention *ratio decidendi* employed by the domestic courts for future cases and also “to encourage domestic courts’ active engagement with the ECHR and the ECtHR jurisprudence”.¹⁷⁹

Secondly, another type of judicial exchange has been termed “corrective dialogue” where the Court criticises the application of the Court’s case-law by the domestic courts.¹⁸⁰ In such instances, the Strasbourg Court is unable to defer to the *ratio decidendi* employed by the domestic courts. The situation reflected in the case of *Al-Skeini and Others v. the United Kingdom* is considered to be a “prime example” of this type of dialogue, where the Strasbourg Court disagreed with the application of the *Banković and Others v. Belgium and Others* case by the domestic courts and held that the United Kingdom was in fact responsible for a breach of the procedural obligation under Article 2 regarding its failure to carry out an effective investigation into the allegations brought by Iraqi citizens for the deaths of their family members at the hands of British troops in Iraq.¹⁸¹ This form of dialogue happens when the domestic

¹⁷⁶ ECtHR, *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, Judgment (2012), §§ 124-125.

¹⁷⁷ See e.g., ECtHR, *Bédat v. Switzerland* [GC], no. 56923/08, Judgment (2016), § 82 where the Court confirmed that “the exercise of balancing the various competing interests was properly conducted by the Federal Court” and hence there was no violation of Article 10; ECtHR, *Lambert and Others v. France* [GC], no. 46043/14, Judgment (2015), §§ 181-182, where the Court confirmed “both the legislative framework laid down by domestic law, as interpreted by the *Conseil d’État*, and the decision-making process, which was conducted in meticulous fashion in the present case, to be compatible with the requirements of Article 2” and that “the present case was the subject of an in-depth examination in the course of which all points of view could be expressed and all aspects were carefully considered”. See also ECtHR, *Rohlena v. the Czech Republic* [GC], no. 59552/08, Judgment (2015), § 71 where it was stated that “[t]he Court is satisfied that the approach followed by the Czech courts in the instant case is consonant with the object and purpose of Article 7 of the Convention”.

¹⁷⁸ ECtHR, *Harkins v. the United Kingdom* [GC], no. 71537/14, Decision (2017), §§ 58-68; ECtHR, *Bah v. the Netherlands*, no. 35751/20, Decision (2021), § 47; ECtHR, *De Carvalho Basso v. Portugal*, nos. 73053/14 and 33075/17, Decision (2021), § 56, etc.

¹⁷⁹ *López Guerra* (2017), 403.

¹⁸⁰ *Ibid.*, 404.

¹⁸¹ *Ibid.*, 404-405. See also, *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, Judgment (2011).

courts are receptive of the Court's case-law but they apply it incorrectly and the Strasbourg Court engages in correcting these erroneous interpretations¹⁸² by finding violations of specific Convention provisions contrary to the domestic courts' reasoning. There are many other examples reflected in the Court's case-law that pertain to this type of corrective judicial dialogue.¹⁸³

Thirdly, the term "dialogue with discrepancy" has been used to describe the type of judicial exchange between the ECtHR and the domestic courts whereby the latter may depart from the case-law of the former arguing that the case-law of the Strasbourg Court "should be modified or even reconsidered".¹⁸⁴ In such cases, the domestic courts invoke a certain reference stemming from the Court's case-law but then specifically state that "they do not or will not apply it to a specific case".¹⁸⁵ Motives for this departure may relate to domestic courts being of the opinion that: (i) the ECtHR case-law is not "wholly adequate" for solving a particular domestic legal question; (ii) the ECtHR case-law on a given Convention issue is incorrect and they might wish to signal a need for it to be reversed; (iii) due to the binding effect of the ECtHR case-law they acknowledge that their obligation to apply the relevant case-law of the Court whilst at the same time expressing severe criticism of the Court's rationale.¹⁸⁶ Examples of this type of dialogue resulting in a "slight" or "significant" rectification of the Court's case-law following the criticism levelled by the domestic courts may be noticed in the cases of *Scopola v. Italy (no. 3)*, *Hirst v. the United Kingdom (no. 2)* and *Al-Khawaja and Tahery v. the United Kingdom*.¹⁸⁷ In all three of these cases, the ECtHR amended, slightly or significantly, its previous case-law by showing greater deference to the rationale subsequently employed by the domestic authorities.

Finally, the fourth type of judicial exchange between the Court and the domestic court has been termed "proposed dialogue" where the domestic courts accept and apply the case-law of the ECtHR but nonetheless point out "alleged discrepancies".¹⁸⁸ Examples of this type of dialogue may be noticed in a few Spanish cases which related to the obligation imposed by the ECtHR to have a public hearing in cases in which a person had been sentenced by a second

¹⁸² López Guerra (2017), 402.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid., 406.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid., 406-407.

¹⁸⁸ Ibid., 402.

instance court following acquittal at the first instance level.¹⁸⁹ Although the stance of the ECtHR has been accepted and followed by the Spanish Constitutional and Supreme Courts they expressed broad criticism of the Court mainly by considering that this approach makes them repeat criminal proceedings at two levels unnecessarily.¹⁹⁰ This type of dialogue has been qualified as “incomplete” or as “attempted dialogue” in cases in which the Strasbourg Court has not yet responded to the domestic court’s criticism through its subsequent decisions.¹⁹¹ The case-law of the ECtHR shows that instead of a “one-way influence of the ECtHR on the national judiciary” there may also be instances where “a two-way interaction between the ECtHR and national courts” is possible due to courts taking note of each other’s decisions as the cases of *Von Hannover v. Germany (No.1 and No.2)* demonstrate.¹⁹²

In relation to this, other authors have suggested that, in recent years, the Strasbourg Court has started to shift its standard of “flexible” judicial review towards a “variable” judicial review reflecting a “fine-grained doctrinal refinement” which has been dubbed the “responsible courts doctrine”.¹⁹³ Albeit in different terms and with slightly different characteristics, others have called this jurisprudential shift a “process-based review” approach, as already elaborated above.¹⁹⁴ Under this new method of supranational judicial review, the ECtHR affords domestic courts “a larger discretionary interpretative space”, provided that the domestic courts “take ECtHR case-law seriously” and make serious efforts to implement it at home.¹⁹⁵ It has been suggested that, at its very core, this doctrine signals a willingness on the part of the Strasbourg Court to embark on a more “lenient” or “strict” form of judicial review, depending on the prior reaction and conduct of the domestic courts in dealing domestically with the Convention matter which has reached the Court’s docket.¹⁹⁶ A shift from the previous doctrine of “relevant and sufficient reasons” towards the “responsible courts doctrine” was considered indispensable as the ECtHR could “no longer afford” to continue applying the previous “flex-

¹⁸⁹ ECtHR, *Igual Coll v. Spain*, no. 37496/04, Judgment (2009); ECtHR, *Bazo González v. Spain*, no. 30643/04, Judgment (2008). See also, López Guerra (2017), 408-409.

¹⁹⁰ Díaz Martínez (2013), 87. See also, López Guerra (2017), 409.

¹⁹¹ López Guerra (2017), 409.

¹⁹² Ulfstein (2016), 52. See also, ECtHR, *Von Hannover v. Germany*, no. 59320/00, Judgment (2004); and ECtHR, *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, Judgment (2012).

¹⁹³ Çali (2016).

¹⁹⁴ Spano (2018).

¹⁹⁵ Çali (2016), 145.

¹⁹⁶ *Ibid.*

ible” doctrines.¹⁹⁷ In this respect, it has been stated that the turn to this new doctrine was motivated by several connected developments, namely: (i) the expansion of the Council of Europe membership to miscellaneous judicial audiences; (ii) the crystallisation of the well-established case-law of the ECtHR and therefore less need for transformative jurisprudence, and (iii) the backlash received by the ECtHR from some specific domestic courts in relation to the application of its “effective and dynamic interpretation” of Convention rights.¹⁹⁸ Through this new doctrine, the ECtHR “is proposing a more structured dual track: strict and lenient law-based review of domestic court decisions based on their handling of the ECtHR case-law”.¹⁹⁹

The “responsible courts doctrine” is to be seen as a culmination of the ECtHR’s growing confidence in the interpretative body of case-law which it has created as well as its “growing trust” in the ability of the domestic courts to apply its well-established standards.²⁰⁰ As a result, this new doctrine has experienced “its clearest formulation” and application in cases where the Strasbourg Court explicitly recognises that the final outcome of a case does not have to be a specific one, i.e. more than one “corridor of solutions” is possible provided that the domestic courts apply the ECtHR standards in a proper fashion.²⁰¹

If this doctrine is to be applied to the four types of judicial dialogue referred to above, it could theoretically be accommodated under the confirmative and corrective dialogues – considering that the Court, under the “responsible courts doctrine”, will either confirm or quash a decision of the national courts depending on their application of Convention standards and the Court’s case-law domestically. In practice, the “responsible courts doctrine” operates as follows: firstly, the Court proclaims that domestic courts have dealt with the Convention standards and the Court’s case-law comprehensively and convincingly; secondly, the Court then asks “whether there are ‘strong reasons’ to differ from the analysis of the facts” conducted by the domestic courts; and, thirdly, the Court defers to the domestic courts’ decisions of a violation of the Convention or not, in the event that the answer to the second step is not affirmative.²⁰²

¹⁹⁷ Ibid.

¹⁹⁸ Ibid., 152.

¹⁹⁹ Ibid.

²⁰⁰ Ibid., 153.

²⁰¹ Ibid. See also ECtHR, *Axel Springer AG v. Germany* [GC], no. 39954/08, Judgment (2012), §§ 62.

²⁰² Çali (2016), 153.

Lastly, a highly important point of distinction between the doctrine of responsible courts and the doctrine of margin of appreciation is needed so that these two are not confused. While, according to the former, the deference to domestic courts “is conditional” upon utilising and applying the ECHR seriously and faithfully, the latter operates as an a priori declaration that the domestic authorities enjoy a margin of appreciation which is not “dependent” on their ability to utilise and apply the ECHR seriously or faithfully.²⁰³ Therefore, the “responsible courts doctrine” represents a “qualified form” of the margin of appreciation doctrine through which domestic courts “earn” their (deserved) margin or deference by showing that the ECtHR case-law is “embedded” in their decisions and not necessarily by other virtues.²⁰⁴

Examples of the application of the “responsible courts doctrine” may be seen in several cases from the post 2010 era, including Grand Chamber cases, where the Court emphasised and summarised the following general principle:

(iv) ... In exercising its supervisory function, the Court does not have to take the place of the national courts but to review, in the light of the case as a whole, whether their decisions were compatible with the provisions of the Convention relied on.

(v) If the balancing exercise has been carried out by the national authorities in conformity with the criteria laid down in the Court’s case-law, the Court would require *strong reasons* [emphasis added] to substitute its view for theirs.²⁰⁵

A practical application of this general principle, which reflects the substance of the “responsible courts doctrine”, was made use of by the ECtHR through the utilisation of phrases such as: (i) the Court “discerns no strong reasons which would require it to substitute its view for that of the domestic courts and to set aside the balancing done by them” considering that “the Supreme Administrative Court gave due consideration to the principles and criteria as laid down by the Court’s case-law for balancing the right to respect for private life and the right to freedom of expression”.²⁰⁶

²⁰³ Ibid.

²⁰⁴ Ibid., 153 and 156.

²⁰⁵ ECtHR, *Perinçek v. Switzerland* [GC], no. 27510/08, Judgment (2015), § 198. Similarly, see also ECtHR, *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, Judgment (2012), § 67; ECtHR, *Axel Springer AG v. Germany* [GC], no. 39954/08, Judgment (2012), §§ 85–88.

²⁰⁶ ECtHR, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, Judgment (2017), § 198. See other similar Grand Chamber cases: ECtHR, *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06 and 3 others, Judgment (2011), § 57; ECtHR, *MGN Limited v. the United Kingdom*, no. 39401/04, Judgment (2011), §§ 150 and 155; ECtHR, *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, Judgment (2012), § 107; ECtHR, *Friend and Others v. the United Kingdom*, no. 16072/06, Decision (2009), § 58 where it is stated that “the domestic courts have given the greatest possible scrutiny to

The general principles of this doctrine were specifically invoked in certain cases rendered in respect of the Western Balkan States which are the focus of this study,²⁰⁷ despite there being similar cases where the exact words suggested by the doctrine might not have been utilised. For example, in the Grand Chamber case of *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*, the Court deferred to the domestic courts' rationale for finding a violation of Article 10 at the domestic level by emphasising that the Court "finds no reasons to depart from that finding" and that there are "no strong reasons which would require [the Court] to substitute its view for that of the domestic courts and set aside the balancing done by them".²⁰⁸ In its reasoning, the ECtHR analysed the case-law of the domestic courts extensively and based most of its reasoning on an explanation of their correct balancing exercise between the competing Convention rights,²⁰⁹ which is a method utilised more and more by the Court to argue why it is fair to defer to the domestic courts and why there are no strong reasons to replace their application of Convention standards and the Court's case-law. However, in contrast to the above-mentioned case, in *Hamidović v. Bosnia and Herzegovina*, despite seeing "no strong reasons to depart from the finding of the Constitutional Court" in respect of the issues as to whether the interference was prescribed by law and whether it pursued a legitimate aim, the ECtHR did not finally defer to the rationale of the Constitutional Court in not finding a violation of Article 9 in favour of the applicant who was sentenced for wearing a skullcap in the courtroom.²¹⁰ The ECtHR substituted the reasoning of the Constitutional Court with its own and went on to find a violation of Article 9 because it was not satisfied with the balancing exercise performed by the highest court in Bosnia and Herzegovina.²¹¹ The crux of the dissenting opinion filed by Judge Ranzoni relied precisely

the applicants' complaints under the Convention and especially those complaints brought under Article 1 of Protocol No. 1"

²⁰⁷ See [Chapters 2-7](#) of this study. The application of the "strong reasons" reasoning approach may be found in three cases against Bosnia and Herzegovina, two cases against Serbia and one case against Montenegro. No such cases were rendered against Albania or North Macedonia, with Kosovo's decisions not being able to be contested before the ECtHR.

²⁰⁸ ECtHR, *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, Judgment (2017), §§ 117 and 121.

²⁰⁹ *Ibid.*, §§ 89-120.

²¹⁰ ECtHR, *Hamidović v. Bosnia and Herzegovina*, no. 57792/15, Judgment (2017), §§ 30-43. See another case in respect of Bosnia where the Court utilised the general principle that "strong reasons" are needed to substitute its view for that of the domestic courts: ECtHR, *Marković and Arsić v. Bosnia and Herzegovina*, no. 40296/18 and 3 others, Decision (2020), §§ 27-28.

²¹¹ *Ibid.*, *Hamidović v. Bosnia and Herzegovina*, operative part.

on his criticism that in this particular case, the Court did not refrain from the temptation to substitute its own view for that of the domestic courts, despite not having “strong reasons” to do so.²¹² He specifically noted that:

... the Court should not, primarily, examine the applicant’s situation and the facts of the case as such, but rather it should review the assessment made by the national courts. If this assessment was carried out by independent and impartial domestic courts on the basis of the Court’s principles, taking due account of the particular circumstances of the case and the competing interests, and if the national courts’ decision, as a comprehensible result of this assessment, remained within the margin of appreciation afforded to member States under the respective Convention right, then their decision must be accepted by our Court. This is all the more true when the margin of appreciation, as in the present case, is wide. Otherwise, as I have already said on other occasions, we are just paying lip service to this principle.²¹³

In respect of Serbia, the ECtHR used the “responsible courts doctrine” twice in order to argue as to why it could not defer to the reasoning invoked by the domestic courts,²¹⁴ while, in respect of Montenegro, the ECtHR utilised the same doctrine to defer to the domestic courts by stipulating that it could “not find any reason, let alone a strong reason, to substitute its view for that of the final decision of the High Court”.²¹⁵

Lastly, in terms of dialogue between the ECtHR and the domestic courts, Protocol No. 16 is expected to “institutionalise” the national versus supranational judicial exchange with the highest courts and tribunals having the opportunity to “request the Court to give advisory opinions on questions of principle relating to the interpretation or application” of the Convention rights.²¹⁶

²¹² Ibid., Dissenting Opinion of Judge Ranzoni in *Hamidović v. Bosnia and Herzegovina*, §§ 10-22, where, *inter alia*, Judge Ranzoni wrote: “I fail to see sufficient, let alone strong reasons to hold that the State’s wide margin of appreciation was extensively restricted or that the State overstepped its remaining margin of appreciation, and to substitute the Court’s assessment or the judges’ personal view for that of the domestic courts. The majority’s judgment simply lacks such reasons as well as a nuanced approach, limiting itself to general statements and to a sort of “pick and choose” of preferred elements of the Court’s case-law. Therefore, I have voted against the finding of a violation of Article 9 of the Convention.”

²¹³ Ibid., Dissenting Opinion of Judge Ranzoni in ECtHR, *Hamidović v. Bosnia and Herzegovina*, no. 57792/15, Judgment (2017).

²¹⁴ ECtHR, *Milisavljević v. Serbia*, no. 50123/06, Judgment (2017), § 33 and §§ 35-43.

²¹⁵ ECtHR, *Ivanović and DOO Daily Press v. Montenegro*, no. 24387/10, Judgment (2018), § 74.

²¹⁶ Protocol No. 16 to the Convention entered into force on 1 August 2018. To date, the Protocol is in force only in respect of Albania (2018) and Bosnia and Herzegovina (2021) when it comes to Western Balkan States. <https://www.echr.coe.int/Documents/Protocol_16_ENG.pdf> (accessed 25 December 2021). See e.g. a few Advisory Opinions that have been issued by the Strasbourg Court, namely, ECtHR, no. P16-2019-001, Advisory Opinion [GC]

To sum up, there are four avenues of judicial dialogue that are important in terms of analysing the different, yet complimentary, roles of the ECtHR and the domestic courts in applying the Convention, namely: (i) confirmative dialogue; (ii) corrective dialogue; (iii) dialogue with discrepancy; and (iv) proposed dialogue. The forthcoming analysis in [Chapters 2-7](#) where the focus will lie on the domestic case-law of the Western Balkan States and the case-law of the ECtHR in respect of those countries, only reflects the presence of the first two types of dialogue. As will be shown, despite there being sufficient examples of instances where the ECtHR confirmed or corrected the stance held by the highest domestic courts in the Western Balkans, there are no records of any dialogue with discrepancy or proposed dialogue. In other words, the domestic case-law of the Western Balkans either shows classic examples of deference or non-deference on the part of the Court with no instances of resistance or attempts to influence the development of the Court's case-law.

Finally, for the purposes of the analysis that this study seeks to undertake, it is important to highlight that in the matrix of the Convention protection mechanism, the primary duty to secure protection of Convention rights at the domestic level pertains more generally to the domestic authorities as 'first-line defenders' and, more particularly, to the domestic courts as 'last-line defenders' of Convention rights at home. The Strasbourg Court has a secondary role in this whole process and with the ongoing jurisprudential shift towards a more process-based review approach entailing a more robust application of the subsidiarity principle, it seeks to make its role even more secondary than ever recorded in its more than 70 years of jurisprudential activity.

(2020) requested by the Armenian Constitutional Court; ECtHR, no. P16-2018-001, Advisory Opinion [GC] (2019) requested by the French Court of Cassation. To date no Western Balkan court, of those that have ratified Protocol No. 16, has requested an Advisory Opinion from the ECtHR.

IV. Deference to Domestic Courts and Other Domestic ‘First-Line Defenders’: When Can the Strasbourg Court Comfortably Defer?

What does deference mean and how is this notion used to describe an important subsidiarity-induced relationship between the Strasbourg Court and the domestic courts? A simple reading of deference means that the authority in question, in our case the ECtHR, “does not assume the role of assessing a situation” but “leaves it instead to some other” authority, in our case domestic courts or other ‘first-line defenders’ of Convention rights.²¹⁷ Mjöll Arnardóttir has pointed out a difference between “partial” and “complete” deference, whereby the former means that the opinions of other domestic authorities “are taken into account as factors that influence” the assessment of the ECtHR, while the latter means that the ECtHR will not assume the role of an independent assessor at all.²¹⁸ In cases where the States Parties fulfil their role by engaging in the application of the Court’s general principles established in its case-law, “the principle of subsidiarity provides that the Court may defer to their findings in a particular case”.²¹⁹ The overarching purpose of deference is “to incentivise national authorities to fulfil their obligations to secure Convention rights, thus raising the overall level of human rights protection in the European legal space” by making the Convention a truly effective human rights instrument.²²⁰ The State Parties “demonstrate with their actions, in particular the reasoning provided by national courts, whether deference is due under the principle of subsidiarity” or not.²²¹

Accordingly, the crucial question for the purposes of this study is to find out when the Strasbourg Court can comfortably defer to the *ratio decidendi* of the domestic courts and other domestic authorities. The scholarly work on this notion seems to be coherent in providing more-or-less similar answers to this

²¹⁷ Mjöll Arnardóttir, (2016), 27.

²¹⁸ Ibid., 19 and 46.

²¹⁹ Spano (2019).

²²⁰ Ibid.

²²¹ Ibid.

question, despite some divergences and some authors raising concerns over the new approach employed by the Court in its more recent jurisprudence. Before answering this important question, there is a need to briefly elaborate on the jurisprudential journey which the Court underwent leading to the current trend of greater preference for deference to domestic courts rather than interference with their method of Convention application, provided that this duty is soundly and correctly performed.

From a historical perspective, the jurisprudential journey which the Court has undergone to date can be divided into four different phases. Firstly, the phase of the 1970s and 1980s, where the majority of “overarching structural, interpretational and institutional principles” of the Convention were formulated, namely, the principle of subsidiarity and the margin of appreciation as its functional tool, the living instrument doctrine, the principle of autonomy of ECHR rights, and the principle of effectiveness.²²² Secondly, the phase of the past 40 years or so, where the Court formulated general principles on almost all rights and freedoms stipulated in the Convention, by extrapolating identifiable norms and principles from “the very vague and grand pronouncement in the Convention text” so that such norms and principles “could be infused into the domestic legal systems and practice so as to make the Convention effective in reality”.²²³ Thirdly, the phase where the Court had to reform itself, in addition to increasing its embeddedness efforts, in order to deal with a mass influx of cases being filed through member States that joined the Council of Europe after the fall of the Berlin Wall in 1989.²²⁴ Fourthly, the phase where the Court “began reformulating its case-law to increase further the embeddedness of Convention principles”, for example, (i) by requiring applicants “to exhaust domestic remedies in a more exacting manner”,²²⁵ (ii) by emphasising the need to establish and maintain effective domestic remedies in line with Article 13 of the Convention; and (iii) by utilising the Grand Chamber judgments to formulate general principles and other “objective interpretational criteria” that can serve as guidance for the domestic authorities in applying the Convention domestically.²²⁶

²²² Ibid., 111.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ See ECtHR, *Vučković and Others v. Serbia* [GC], nos. 17153/11 and 29 others, Judgment (2014), as an example of where this was specifically asked of the applicants. See also, Joint Dissenting Opinion of Judges Popović, Yudkivska and De Gaetano in ECtHR, *Vučković and Others v. Serbia* [GC].

²²⁶ *Spano* (2018).

It is suggested that the fourth phase ended with the so-called “Interlaken process” and that the Court has entered another phase “which manifests itself in the Court taking on a more framework oriented role when reviewing domestic decision-making” as opposed to previous strategic embedding exercises which invariably meant that the Court had to review more strictly the “domestic decision-making and to substitute its judgment for that of the national authorities”.²²⁷ The overarching aim of the current phase is “to increase the overall effectiveness of the Convention at the national level” by methodically examining whether the domestic authorities have adequately embedded the Convention principles within their domestic legal order and if so, “whether certain material elements allow it to *grant deference* [emphasis added] to national authorities so they can fulfil their duties as primary guarantors of Convention rights”.²²⁸

Therefore, the current phase in which the Court is now operating could be dubbed the “age of deference” to domestic authorities. This is a particularly vital phase for the deeper implementation of the subsidiarity principle and the subsequent increase in the Convention protection standards within national systems while at the same time making room for the Court to concentrate on more crucial interpretative questions as highlighted by the Brighton Declaration.²²⁹ The shift in the methodological approach reformulated by the Court – towards greater deference – means that the Court’s primary focus will no longer be “its own independent assessment of the ‘Conventionality’ of the domestic measure” but rather the Court’s focus will lie in assessing “whether the issue has been properly analysed by the domestic decision-maker in conformity with already embedded principles” and the obligation of the States Parties to secure Convention rights domestically.²³⁰ The aforementioned historical/jurisprudential trajectory of the ECHR protection system “called for a shift of focus to secure the increased effectiveness of human rights” domestically through a conscious and deliberate move “towards a bottom-up strategy empowering national rights-holders and decision-makers to take the lead in securing human rights”.²³¹ Indeed, a bottom-up application of the principle of subsidiarity comes into play only when national courts take the leading role in

²²⁷ Ibid., 113.

²²⁸ Ibid.

²²⁹ Brighton Declaration, 19–20 April 2012, <2012 Brighton Declaration – High Level Conference on the Future of the European Court of Human Rights ([coe.int](https://www.coe.int))> (accessed 25 December 2021).

²³⁰ Spano (2019), 113; Çali (2016).

²³¹ Spano (2018), 482. See also Articles 19 and 32 of the ECHR.

interpreting the ECHR at the domestic level as legitimate owners.²³² In this respect, it has been stated that “the ultimate success of the Convention system will depend on the quality of the cooperation” between the domestic courts, the ECtHR,²³³ and other national and supranational mechanisms charged with the implementation of Convention standards at home.

The waves of the deference era which led to a shift in the Court’s methodological approach were driven in no small part by the persistence of the Contracting Parties, expressed through various High Level Declarations since 2010, requiring the Court to pay greater attention to the principle of subsidiarity,²³⁴ which, in other words, means that the Court should be more open in providing greater deference to the domestic authorities. It all started in Interlaken in 2010, where the States stressed that the primary obligation of the States Parties called for a “strengthening of the principle of subsidiarity” in order to “ensure that the rights and freedoms set forth in the Convention are fully secured at the national level”, while maintaining that this foundational principle implies a “shared responsibility” between the States Parties and the ECtHR in protecting Convention rights.²³⁵ The Izmir Conference recalled the existence of a “shared responsibility” to guarantee the “viability of the Convention mechanism” while insisting that the States Parties should ensure effective redress domestically.²³⁶ The Brighton Declaration welcomed the development of general principles in the Court’s case-law and encouraged the Court to give “great prominence” to the principles of subsidiarity and margin of appreciation and to apply them in a consistent manner.²³⁷ More effective implementation at the national level was considered indispensable for the Court to be reinstated to a position from which it could “focus its efforts on serious or widespread violations, systemic and structural problems, and important questions of interpretation and application of the Convention” which would in turn mean that

²³² Ulfstein (2016), 57.

²³³ Mahoney (2015), 29.

²³⁴ See all High Level Conferences held in Interlaken (2010), Izmir (2011), Brighton (2012), Oslo (2014), Brussels (2015) and Copenhagen (2018), revealing discussions on the reform and the future of the Strasbourg Court <<https://www.echr.coe.int/Pages/home.aspx?p=basictexts/reform>> (accessed 25 December 2021).

²³⁵ Interlaken Declaration, 19 February 2010, <https://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf> (accessed 25 December 2021). See also, ECtHR, Jurisconsult, ‘Interlaken Follow-Up’ on the Principle of Subsidiarity, 8 July 2010 <2010 Interlaken - Follow-up ([coe.int](https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_COE_INT.pdf))> (accessed 25 December 2021).

²³⁶ Izmir Declaration, 26-27 April 2011, <https://www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf> (accessed 25 December 2021).

²³⁷ Brighton Declaration, 19-20 April 2012, <https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> (accessed 25 December 2021).

the Court “would need to remedy fewer violations itself and consequently deliver fewer judgments.”²³⁸ The follow-up High Level Conferences in Brussels and Copenhagen, in substance, repeated the previous emphasis on the shared responsibility to protect Convention rights and on making national systems better suited to provide effective protection at home.²³⁹

The aforementioned statements, combined with other factors noted in this chapter, have resulted in a form of “renewed subsidiarity” playing a “key role” in the reasoning of the Strasbourg Court by pushing the control exercised at the supranational level more towards a focus on “procedure” rather than “substance”, a trajectory which has been criticised for leading to “undue deference”,²⁴⁰ albeit with weak evidence to substantiate such claim. Some authors have even gone as far as saying that the ECtHR has “taken a rather drastic step that has the potential of reducing its own role in providing *in concreto* proportionality assessment to zero (complete deference)” with the new analysis approach being described as a “rebuttable presumption of Convention compliance for diligent national courts”.²⁴¹ In contrast, other authors have utilised the so-called notion of “positive subsidiarity” as opposed to “negative subsidiarity” to call for a greater involvement of the Court in assisting the domestic authorities to fulfil their duties as ‘first-line defenders’ by: (i) offering them procedural, substantive and discursive “guidance” in the exercise of their role as primary guarantors of ECHR rights; and by (ii) “restrict[ing] the margin of appreciation and exercis[ing] particularly thorough scrutiny of the human rights matter at stake”.²⁴²

Now, let us return to the crucial question, i.e. when can the Strasbourg Court comfortably defer to the *ratio decidendi* of the domestic courts and other domestic authorities? According to Mahoney, a former Judge of the ECtHR, the closer the analysis of cases in light of the Convention standards and the Court’s case-law by the domestic courts, “the greater the deference of the ECtHR towards the rulings of national courts is likely to be”.²⁴³ When deciding to grant deference to the domestic authorities, the Court pays special atten-

²³⁸ Ibid., § 33.

²³⁹ Brussels Declaration, 27 March 2015 <https://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf> and Copenhagen Declaration, 12-13 April 2018 <https://www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf>, (both accessed 25 December 2021).

²⁴⁰ Ducoulombier (2019), 138-139, 140-142 and Mjöll Arnardóttir (2017), 832.

²⁴¹ Mjöll Arnardóttir (2017), 832.

²⁴² Brems (2019), 218-224.

²⁴³ Mahoney (2015), 29.

tion to the quality of decision-making not just within the judiciary but also at the legislative level and the level of this quality “may ultimately be decisive in borderline cases” as to whether the ECtHR decides to defer or not.²⁴⁴

On the one hand, there are many cases indicating that the Strasbourg Court is willing to defer to “reasoned and thoughtful assessment” of Convention application at the domestic level,²⁴⁵ and the ECtHR will certainly defer to domestic courts in cases where they issue high quality decisions and when they apply the principles of interpretation developed by the ECtHR in a sound and faithful manner,²⁴⁶ despite the fact that there may be different solutions available to the Convention question raised at the domestic level. The case of *Hatton and Others v. the United Kingdom* has been considered as “a classic example of the appropriate way of constructing and applying a meaningful level of deference” that the Court affords to the domestic authorities in conformity with the principle of subsidiarity.²⁴⁷ This case forms part of a line of cases²⁴⁸ which are suggested to “support the claim that the Court is in the process of developing a more robust and coherent concept of subsidiarity” while also reformulating the appropriate conditions, substantial and procedural, “for allocating deference to member States”.²⁴⁹ This reformulation process conducted by the Strasbourg Court in recent years is considered to be an endeavour which will help “regulate the appropriate level of deference” that should be afforded to the domestic authorities “so as to implement a more robust and coherent concept of subsidiarity” that is in line with the “Brighton thinking process” and the *raison d'être* of Protocol No. 15.²⁵⁰

²⁴⁴ Spano (2014), 498.

²⁴⁵ *Ibid.*, 491.

²⁴⁶ Ulfstein (2016), 52.

²⁴⁷ Spano (2014), 497. See ECtHR, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, Judgment (2003).

²⁴⁸ See also other cases which were considered by authors as examples of deference: ECtHR, *Murphy v. Ireland*, no. 44179/98, Judgment (2003); ECtHR, *Evans v. United Kingdom* [GC], no. 6339/05, Judgment (2007); ECtHR, *Dickson v. United Kingdom* [GC], no. 44362/04, Judgment (2007); ECtHR, *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, Judgment (2005); ECtHR, *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, Judgment (2013); ECtHR, *Shindler v. the United Kingdom*, no. 19840/09, Judgment (2013). See, also, Spano (2014); Lady Hale (2013). Outside the context of the United Kingdom, see an example of deference in respect of other States Parties: ECtHR, *A, B and C v. Ireland* [GC], no. 25579/05, Judgment (2010).

²⁴⁹ Spano (2014), 497-498.

²⁵⁰ *Ibid.*

The case of *Von Hannover v. Germany* (no. 2) has also been considered by various authors as another exemplary portrayal of the Court's refined inclination to defer to domestic courts' *ratio decidendi* when the latter do a commendable job in applying the relevant standards developed by the Court to their domestic case.²⁵¹ In this case, the Court stated the general principle that in cases where "the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts".²⁵² The "strong reasons" requirement is closely linked with the "responsible courts doctrine" which was extensively elaborated above.²⁵³ In applying this general principle, the Court then decided to defer to the reasoning of the German courts and not find a violation of Article 8 considering that, unlike in *Von Hannover* (no. 1), this time: (i) the national courts had carefully balanced the freedom of expression of the publishing companies with the applicants' right to respect for their private life; and that (ii) the "national courts explicitly took account of the Court's relevant case-law" by performing a "detailed analysis of the Court's case-law in response to the applicants' complaints".²⁵⁴

The former President of the ECtHR, Nicolas Bratza, also acknowledged that there is a direct connection between the quality of decisions emanating from the domestic courts and the decision of the Strasbourg Court to defer or not defer to that domestic court.²⁵⁵ More specifically, in relation to decisions emanating from courts in the United Kingdom after the coming into force of the Human Rights Act, he stated that the Strasbourg Court has been "particularly respectful" of such decisions "because of the very high quality of the judgments of these courts, which have greatly facilitated [the ECtHR's] task of adjudication".²⁵⁶ For instance, in the case of *Animal Defenders v. the United Kingdom*, the Court specifically stated that it "attaches considerable weight to

²⁵¹ See ECtHR, *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, Judgment (2012). See also, Ducoulombier (2019), 138.

²⁵² ECtHR, *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, Judgment (2012), § 112. See also, Ducoulombier (2019), 138-139.

²⁵³ Çali (2016).

²⁵⁴ ECtHR, *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, Judgment (2012), §§ 124-125. See also, Brems (2019), 214, citing several other cases of the ECtHR where a wider margin of appreciation, and thus greater deference, was accorded to the national authorities, namely, ECtHR, *Garib v. the Netherlands* [GC], no. 43494/09, Judgment (2017), § 137; ECtHR, *İzzettin Doğan and Others v. Turkey* [GC], no. 62649/10, Judgment (2016), § 112, etc.

²⁵⁵ Bratza (2011), 507.

²⁵⁶ *Ibid.*

these exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom” as well as “to their view that the general measure was necessary to prevent the distortion of crucial public interest debates and, thereby, the undermining of the democratic process”.²⁵⁷

On the other hand, despite the criticism that the Court has received with regard to its new refined approach to assessing cases and being more generous in deferring to domestic authorities, there are many case-law examples indicating that the Court will not grant unmeritorious deference to domestic courts which have clearly failed in their duty to take into account the Convention standards and the Court’s case-law.²⁵⁸ In this respect, it has been pointed out that deference may be granted by the ECtHR only to those domestic authorities which are “structurally capable of fulfilling that task”, meaning that “the foundations of the domestic legal order have to be intact”.²⁵⁹ For example, States which do not respect basic principles such as the rule of law and do not ensure independence and impartiality of the judiciary while oppressing political opponents and being hostile towards vulnerable groups or minorities “cannot expect to be afforded deference”.²⁶⁰ In other words, the Court will defer only to responsible domestic courts and authorities which specifically demonstrate their faithfulness in applying the Convention standards and the Court’s case-law. In this respect, it has been cautiously pointed out that the “process-based review” and the increased role of subsidiarity in the Court’s decision-making is limited to qualified rights of the Convention (Articles 8-11),

²⁵⁷ ECtHR, *Animal Defenders International v. the United Kingdom*, [GC], no. 48876/08, Judgment (2013), § 116.

²⁵⁸ See, in this context, ECtHR, *Kasap and Others v. Turkey*, no. 8656/10, Judgment (2014), §§ 59 and 62, where the Court found a violation of Article 2 despite noting the general principle that “[a]lthough the Court should grant substantial deference to the national courts in the choice of appropriate sanctions for ill-treatment and homicide by State agents, it must exercise a certain power of review and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed”. For similar reasoning, see also, ECtHR, *A. v. Croatia*, no. 55164/08, Judgment (2010), § 66, where the Court found a violation of Article 8 despite noting the general principle that “[t]he Court must grant substantial deference to the national courts in the choice of appropriate measures, while also maintaining a certain power of review and the power to intervene in cases of manifest disproportion between the gravity of the act and the results obtained at domestic level”. See also, among other sources, ECtHR, *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, Judgment (2007), § 62; ECtHR, *Atalay v. Turkey*, no. 1249/03, Judgment (2008) § 40; ECtHR, *Beganović v. Croatia*, no. 46423/06, Judgment (2009), § 78.

²⁵⁹ Spano (2018), 493.

²⁶⁰ *Ibid.*

with some important caveats to be noted.²⁶¹ For instance, when the Court is called upon to deal with allegations of violation of negative obligations of the States in relation to absolute or core rights (Articles 2, 3, etc.), in principle, there is no room for the “Court to defer to the domestic authorities on whether the act in question comes within the scope of the Convention”.²⁶² Indeed, when the States themselves engage in a breach of their negative obligations by violating absolute rights, the final legal qualification of the act “resultantly falls outside the institutional realm of subsidiarity as it finds expression in process-based review”, meaning that in such cases it is the Court which decides that particular question “without granting deference to the views of the domestic decision-maker”.²⁶³

It therefore results that, according to the practice of the ECtHR and the observations of professionals and academics, the final answer to the question posed under this heading leads to the following two answers. Firstly, the Court is more inclined to defer to a court decision which applies the Convention standards by utilising assessment tests to be found in the Court’s own case-law and which therefore manages to convince the ECtHR that it has diligently performed its duty to effectively address the Convention complaint in accordance with the general principles established by the Court. Secondly, the Court is not inclined to defer to a court decision which does not have the elements just stated or, by default, to domestic authorities which do not respect fundamental principles such as the rule of law, the protection of minority groups or the independence of the judiciary.

The forthcoming analysis in this study will show that there does indeed exist a correlation between how well the highest domestic courts apply the Convention standards and the Court’s case-law and the number and type of violations found by the Strasbourg Court in respect of such States. The more seriously the ECtHR case-law is taken by the highest domestic courts, the better their record before the Strasbourg Court. The more seriously the ECtHR case-law is taken by the highest domestic courts, the more deference the Strasbourg Court is likely to show. The analysis from the six National Reports on Western Balkan States will also show that there are many instances where the domestic courts do a fairly good job in protecting Convention rights at home. In some instances, the judicial branch even orders the executive and legislative branches to align their decisions, practices and/or laws with the Convention

²⁶¹ Ibid., 483.

²⁶² Ibid.

²⁶³ Ibid., 484.

standards and the Court's case-law, but those partner branches of the judiciary fail to make such necessary alignments by refusing to implement the final decisions of the domestic courts which gave an *erga omnes* effect to the case-law of the ECtHR. Additionally and quite concerningly, the analysis will also show examples of executive and legislative branches objecting to implement ECtHR decisions due to daily national politics. Otherwise, an example of the other extreme will also be reflected, where we will see cases in which the domestic courts rarely refer to the ECtHR and rarely make use of its standards even in cases where they could benefit immensely from such case-law. As a result, the level of reception, embeddedness and deference in the Western Balkan States varies among States depending on how seriously the domestic authorities in general and the domestic courts in particular take the Convention standards and the Court's case-law.

V. Objectives, Scope, Areas of Interest, Structure, Research Methods and Relevance of the Study

1. Objectives, Scope and Areas of Interest

This study presents an analysis of the impact and effects of the Convention and the ECtHR case-law in the domestic legal order of six Western Balkan States, namely: (1) Albania; (2) Bosnia and Herzegovina; (3) Kosovo; (4) Montenegro; (5) North Macedonia; and (6) Serbia.²⁶⁴ The study has six objectives related to the overarching aim of the study, i.e. providing an in-depth analysis of the impact and effects of the Convention and the ECtHR case-law in the selected States.

The first objective is to provide an overview of the key notions, principles and doctrines which impact the process of reception and embeddedness of the Convention and the ECtHR's case-law in a domestic legal order. This objective contributes by offering the necessary framework for the assessment that follows in the six substantive chapters containing National Reports on the Western Balkan States. The examination on such notions, principles and doctrines appears in [Chapter 1](#) of this study which seeks to provide answers to the following research questions: (1) What do the notions of ECHR reception and embeddedness mean and how do they assist in assessing the impact and effects of the Convention and the Court's case-law in a domestic legal order? (2) Which are the most relevant principles and doctrines for the embeddedness of the Convention in a domestic legal order? (3) What exactly is the role of the three identified principles, namely (i) the principle of effectiveness; (ii) the principle of subsidiarity; and (iii) the margin of appreciation doctrine, in enabling Convention application at the national level and making it a truly

²⁶⁴ Alphabetically arranged for the purpose of not prioritising any national report over the other. This study only covers the Western Balkan States that are not members of the European Union and Croatia was excluded as a result. The research conducted for this PhD monograph provides analysis of the case-law that was published until 1 January 2022. Cases published by the ECtHR and domestic courts of the Western Balkan States after that date are not reflected in the forthcoming analysis. The same applies for any new law and/or reform that might have been enacted or pursued by the selected States after the said date.

domestic human rights instrument? (4) What are the roles of the ECtHR and of the domestic courts in view of their “shared responsibility” to secure and ensure effective protection of Convention rights? (5) What is the meaning of deference and when can the Strasbourg Court comfortably defer to domestic courts and other ‘first-line defenders’ of the Convention at the domestic level?

The second objective is to provide a comprehensive overview of the status of the Convention in all six domestic legal orders of the selected States as a means of assessing how this status affects the overall impact and effects of the Convention and the ECtHR case-law in the selected States. This objective contributes by providing the necessary tools for analysing whether a particular status of the Convention has an impact on the overall implementation of the Convention standards domestically and their effectiveness to redress possible Convention violations. The analysis in pursuit of this objective appears in Part II of the six National Reports ([Chapters 2-7](#)), which seeks to provide answers to the following research questions: (1) What is the relationship between the domestic and international law in the selected States, i.e. is the system more monist or dualist? (2) What is the status of the ECHR in the domestic legal orders of the selected States, i.e. does the Convention have at least supra-legislative status? (3) Can applicants directly invoke Convention provisions before the domestic courts? (4) Can applicants directly invoke the Court’s case-law to argue their case before the domestic courts relying on the *res interpretata* effect? (5) What have the domestic courts said about the status of the Convention and the Court’s case-law in their domestic legal order? (6) Can domestic courts set aside a norm in favour of applying the Convention directly and is there a domestic procedure obliging the executive and legislative branches to ensure compatibility of the proposed legislation with the Convention standards and the Court’s case-law?

The third objective is to provide a comprehensive overview of the whole case-law of the highest domestic courts in the selected States which relates to the (non)application of the Convention and the Court’s case-law at the domestic level, with occasional references to the judicial practice of other lower courts when they engage in Convention application. All Western Balkan States have a Constitutional Court and a Supreme Court, despite the fact that the exact name of the latter might be different. Therefore, the attainment of this objective contributes by providing the necessary tools for analysing the level of reception and embeddedness of the Convention principles and the Court’s case-law within the domestic courts. This objective also contributes by providing the necessary tools to assess the level of embeddedness of the Convention within a domestic legal order as well as to assess the level of ‘Convention talk’

between the highest domestic courts (Constitutional Courts versus Supreme Courts). The reflection on the analysis in pursuit of this objective appears in Part III of the six National Reports ([Chapters 2-7](#)) which seeks to provide answers to the following research questions: (1) How often do the domestic courts refer to the Convention and the ECtHR case-law in their judicial decisions? (2) In what type of cases may such references be found and are the references consistent, systematic and relevant or more general in nature? (3) Do national courts follow the interpretative methodologies that may be found in the Court's case-law when assessing allegations of violations of Convention rights? (4) How have the domestic courts reacted following a violation found at the Strasbourg level in respect of their State, i.e. have they aligned their judicial practice in conformity with the Court's case-law or not? (5) Do the domestic courts take account of the *res interpretata* effects of the Court's case-law in general or are they mainly concerned with following the case-law against their own State? (6) How often do the highest domestic courts, namely Supreme Courts as the highest judicial organs of the regular judiciary and Constitutional Courts as the ultimate organs for the domestic interpretation of the Constitution and the Convention, engage in 'Convention talk' and what is the quality of this judicial exchange? (7) What are the effects of the "individual constitutional appeal mechanism"²⁶⁵ and the "incidental control procedure"²⁶⁶ – two of the most crucial jurisprudential exchanges in the process of judicial embeddedness of the Convention standards at the domestic level? (8) Finally, and generally speaking, what stage have the highest domestic courts reached in the process of applying the Convention standards and the Court's case-law, i.e. early stage, intermediate stage or advanced stage?²⁶⁷

²⁶⁵ This is the competence through which individuals and legal persons may file constitutional complaints before a Constitutional Court against a decision of the highest court in the State or against decisions of the last available instance.

²⁶⁶ This is the competence through which regular courts (including the highest courts, i.e. Supreme Courts) can file preliminary review questions before the Constitutional Court in order to assess the compatibility of the legislation that they need to apply with the Convention/Constitution.

²⁶⁷ For the purposes of this study, "early stage" of preparedness to use Convention standards is used to describe courts which rarely rely on Convention provisions and the Court's case-law and even when they do, such reliance is not systematic, coherent, relevant or detailed; "intermediate stage" of preparedness is used to describe courts which rely more often (but not frequently) on Convention provisions and the Court's case-law and when they do, such reliance is usually explained and easily understood by the reader; "advanced stage" of preparedness is used to describe courts which frequently rely on Convention provisions and the Court's case-law and when they do, such reliance is directly relevant to the case, systematic, coherent and detailed.

The fourth objective is to provide a comprehensive overview of the whole case-law of the ECtHR rendered against the selected States Parties as a means of assessing the reaction of the domestic courts and other domestic authorities following violations found at the Strasbourg level. This objective contributes by providing the necessary tools for analysing the reaction of the domestic courts and other domestic authorities before and after a violation has been found. The reflection on the analysis in pursuit of this objective appears in Part IV of the six National Reports ([Chapters 2-7](#)) which seeks to provide answers to the following research questions: (1) In how many cases has the Strasbourg Court invoked Article 46 in respect of that particular State with a view to declaring the need for general and/or individual measures to be taken? (2) Has the Strasbourg Court ever declared a systemic or structural problem in respect of that particular State and if so, what was the reaction of the domestic courts and other domestic authorities after this declaration was made by the Court? (3) In which areas of Convention law has the Court found the most violations in respect of that State and are there any signs of repetitive cases being filed with the ECtHR? (4) In how many cases and for what reasons has the ECtHR found a violation of Article 13 of the Convention and what has been the reaction of the domestic authorities towards such violations? (5) Under which articles of the Convention has the ECtHR found violations of other Convention rights? (Note: the focus here is on those cases in which the domestic courts failed to act as the 'last-line defenders' of Convention rights or as 'Convention filterers' at the domestic level and therefore the Court could not defer to their reasoning.) (6) Under which articles of the Convention has the ECtHR declared complaints admissible but proceeded to find no violation? (Note: the focus here is mostly on those cases in which the ECtHR deferred to the *ratio decidendi* of the domestic courts.) (6) What are the most important inadmissibility cases where issues of exhaustion of domestic remedies were discussed?²⁶⁸ Here, it needs to be noted that only [Chapter 4](#) – the chapter on Kosovo – deviates from this structure under Part IV of the National Reports considering that Kosovo is not a State Party to the Convention and thus not part of the official Convention protection machinery which would enable its citizens to file petitions before the Strasbourg Court against decisions issued by the courts in Kosovo or other domestic authorities. As a result, Part IV in respect of Kosovo

²⁶⁸ [Chapters 2-7](#) analyse the whole case-law of the ECtHR against each Western Balkan State that is a member of the Council of Europe, except for inadmissibility decisions that are not related to exhaustion of domestic remedies. In other words, all Judgments (with and without a violation) are covered, together with important inadmissibility decisions (e.g. Grand Chamber level) and inadmissibility decisions related to non-exhaustion of domestic remedies.

seeks to answer slightly different questions, namely: (1) What is Kosovo's current relationship with the Council of Europe and the ECtHR? (2) In what types of cases has the ECtHR referred to Kosovo? (3) What are the (indirect) impact and effects of the Convention and the ECtHR's case-law in the Kosovar domestic legal order considering that this Western Balkan State has chosen to unilaterally give direct status to the ECHR through its Constitution? All other parts remain the same as in the other National Reports.

The fifth objective is to provide an overall assessment of the impact of the Convention and the ECtHR case-law in the selected States by also making observations, remarks and recommendations that can contribute to better reception and embeddedness of the ECHR in the selected domestic legal orders. This objective contributes by providing the concluding analysis, remarks and observations in respect of the impact and effects of the Convention and the ECtHR case-law in respect of each selected State. The reflection on the analysis in pursuit of this objective appears in Parts V of the six National Report ([Chapters 2-7](#)) where answers to the following questions are sought to be provided: (1) Overall, what has been the impact and effects of the Convention and the Court's case-law in that particular State? (2) What are the final observations, remarks and recommendations that can be made in view of assisting towards better embeddedness of the Convention in that particular State?

The sixth objective is to provide a comprehensive comparative analysis on the overall impact that the Convention and the Court's case-law has had in the Western Balkans. The analysis in pursuit of this objective appears in [Chapter 8](#) which seeks to provide answers to the following research questions: (1) What is the level of reception and embeddedness of the ECHR and the ECtHR's case-law in the Western Balkan States? (2) Do the Western Balkan States differ among themselves in how they have chosen to implement the Convention domestically and if so, what do such differences mean for the ultimate goal of protecting rights at home? (3) Are there particular reasons why the Court has found systemic problems for some of the States Parties and not for others? (4) What has been the role of the domestic courts in acting as final 'filterers' of Convention violations before cases reach the Court's docket and are there differences among the domestic courts in how they approach the Convention and the Court's case-law? (5) What are the good and not so good ECHR embeddedness practices that may be noticed across the Western Balkan States, with particular focus on the practices of the domestic courts? (6) What are the final observations, remarks and recommendations that this study can pro-

vide with a view to proposing ways of achieving better implementation of the Convention standards and the Court's case-law at home? (7) What is ultimately needed to bring the Convention home in all Western Balkan States?

The very final query of the concluding chapter will be to provide a list of possible solutions to the following question i.e. How can the Western Balkans become 'A Western Balkans of Rights' and what does it ultimately take to bring the Convention home?²⁶⁹

2. Selected States

This study covers the Western Balkan States, namely: Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia, and Serbia. There are three main reasons for this selection.

Firstly, all of the selected States are, generally speaking, at a comparable stage of embeddedness and application of the Convention standards and the Court's case-law, despite noticeable differences in how their domestic courts apply those standards domestically. While Kosovo is the only Western Balkan State which is not part of the Council of Europe, Albania joined the organisation in 1994; Bosnia in 2002; Montenegro (as an independent State) in 2007; North Macedonia in 1995; and Serbia in 2003.²⁷⁰ While three of the States joined the Council of Europe in the new millennium, Albania and North Macedonia joined in the 1990s. Moreover, with slight differences, all the Western Balkan States (except Croatia) are at a comparable stage of advancement in the European integration process and their records on the judiciary, the rule of law and human rights protection are comparable according to the yearly reports published by the European Union which has a joint enlargement policy and agenda specifically for the Western Balkan States. The analysis will show that despite being, more or less, to all intents and purposes, States with comparable levels of application of Convention standards, the differences between the practices of the highest domestic courts in the Western Balkans are quite noticeable, with some domestic courts being extremely well equipped and others being seriously underequipped to apply the Court's case-law in their domestic decisions.

²⁶⁹ The phrase 'A Western Balkans of Rights' is a term used by the author of this study; it is inspired by the utilisation of the term 'A Europe of Rights' in Keller and Stone Sweet (2008).

²⁷⁰ Council of Europe, list of member States: <<https://www.coe.int/en/web/about-us/our-member-states>>.

Secondly, all of the selected States, except Albania, were part of Socialist Federal Republic of Yugoslavia. As a result, despite having different historical trajectories and events that have shaped them as States, nations and people, they share similar legal and linguistic traditions and comparable problems in managing the domestic judiciary, the rule of law and Convention rights.

Thirdly, the author of this study comes from one of the Western Balkan States and has a great personal and professional interest in conducting this impact analysis in the hopes of contributing to a better implementation of Convention standards and the Court's case-law in the region which, for the greater part of its history, has been in turmoil. The proper functioning of a truly effective Convention protection mechanism in the Western Balkans region has the potential to greatly improve the lives of its peoples and enable them to enjoy the fundamental rights and freedoms which have so often been denied them.

3. Structure of the Monograph

[Chapter 1](#) serves as an introduction to key theoretical notions, principles and doctrines needed for an assessment of the impact and effects of the Convention standards and the Court's case-law in the domestic legal orders of the Western Balkan States. The first chapter offers an insight into the notions of reception, embeddedness, deference, the principle of effectiveness, the principle of subsidiarity, the margin of appreciation doctrine, and the shared responsibility to protect Convention rights.

[Chapters 2-7](#) present the analysis for six National Reports on the Western Balkan States: Albania ([Chapter 2](#)), Bosnia and Herzegovina ([Chapter 3](#)), Kosovo ([Chapter 4](#)), Montenegro ([Chapter 5](#)), North Macedonia ([Chapter 6](#)), and Serbia ([Chapter 7](#)). These National Reports are the substantive chapters of this study. Each chapter of the National Reports, except the chapter on Kosovo (for reasons which will be briefly explained), addresses the same research queries and seeks to provide answers to the same research questions (detailed above) which are needed for an overall assessment of the impact and effects of the ECHR and the ECtHR's case-law in that particular State.

Part I of the National Reports starts with a brief introduction which reflects the historical journey of that particular State towards joining the Council of Europe and becoming part of the Convention protection machinery. It also reflects a brief introduction to the rapport of that particular state with the ECtHR and the type of violations found by the latter. Lastly, it lays the ground for the analysis that follows.

Part II of the National Reports sheds light on the status of the Convention in the domestic legal order and court system by focusing on two aspects, namely: (i) the relationship between domestic and international law, and (ii) the status of the ECHR in the domestic legal order.

Part III of the National Reports provides an overview of the domestic court system by focusing on the highest courts in that particular State to then continue with an analysis of what has been termed ‘Convention talk’ between the Constitutional Court versus the Supreme Court.²⁷¹ The analysis focuses exclusively on the manner in which the highest domestic courts (with occasional references to the case-law of lower courts as well) apply the Convention standards and the Court’s case-law in their domestic judicial decisions.

Part IV of the National Reports initially provides an overview of the Court’s case-law against that particular State and then continues with an in-depth examination of all of the case-law that has been rendered against that State.²⁷² For a clearer analysis and in order to suit the needs of the study, the case-law of the Strasbourg Court is divided into six specific categories, namely: (1.1) cases under Article 46 – where general and/or individual measures have been requested by the Strasbourg Court;²⁷³ (1.2) cases with the highest number of violations found by the Strasbourg Court – Article 6 issues;²⁷⁴ (1.3) cases under Article 13 – lack of effective domestic remedies;²⁷⁵ (1.4) cases with violations under other Convention articles;²⁷⁶ (1.5) cases declared admissible with

²⁷¹ For more on the relations between the constitutional courts/supreme courts and the ECtHR, see Dzehtsiarou and Macronicola (2016). For transnational constitutional aspects of the ECtHR, see Ulfstein (2021).

²⁷² The analysis covers decisions rendered by the ECtHR in respect of the Western Balkan States from the moment they became part of the Court’s protection machinery until 1 January 2022.

²⁷³ Where Article 46 has never been invoked by the Court in respect of a respondent State, the analysis continues with the remaining categories of cases. This is the case with Montenegro and North Macedonia considering that the Court, to date, has never utilised Article 46 in its case-law against these States Parties.

²⁷⁴ The highest number of violations for all Western Balkan States stem from Article 6 issues.

²⁷⁵ The National Reports pay special attention to violations of Article 13 considering that they reflect a lack of effective domestic remedies to ensure the protection of Convention rights at home. Violations under this Article, together with violations where Article 46 was invoked are considered the most serious violations having a direct impact on the overall reception and embeddedness of the Convention standards and the Court’s case-law at home.

²⁷⁶ The National Reports showcase the most important cases where a violation has been found with respect to other articles of the Convention by elaborating at least one case under each article and focusing on those cases where the domestic courts have failed to act as ‘last-line defenders’ by successfully detecting a possible Convention violation.

no violation found;²⁷⁷ and (1.6) other important cases related to exhaustion of domestic remedies.²⁷⁸ Following a reflection on the findings of the Court in such cases and the reaction of the executive, legislative and judicial branches (as applicable) towards such cases, this part provides a more concrete analysis of the impact and effects of the ECHR and the ECtHR's case-law in that particular State.

Part V of the National Reports is reserved for conclusions, where an overview of the findings is presented, together with observations, remarks and recommendations.

There is one exception in the structure of the National Report in respect of Kosovo. While Part I, Part II, Part III and Part V contain the same structure as all of the other National Reports on the Western Balkan States, Part IV has a different structure. The reason for this necessary deviation from the regular structure has to do with the fact that Kosovo is not a member of the Council of Europe and therefore not formally part of the Convention protection machinery. Due to this lack of jurisdiction, the Strasbourg Court cannot render decisions against Kosovo even if the latter has unilaterally chosen to make the Convention directly applicable through its Constitution. As a result, Part IV of the National Report on Kosovo is adapted to the situation and it reflects three categories of cases/matters which nevertheless have to do with the ECtHR and Kosovo, namely: (i) Kosovo's relationship with the Council of Europe and the ECtHR; (ii) an overview of the ECtHR's case-law in which Kosovo is referred to; and (iii) the impact and effects of the ECHR and the ECtHR's case-law in the domestic legal order.

[Chapter 8](#) is the final chapter of this study where a comparative analysis, final conclusions and recommendations for better embeddedness of the Convention and the ECtHR's case-law are presented.

²⁷⁷ The National Reports pay attention to these cases in order to show instances when the Strasbourg Court considered it appropriate to defer to the *ratio decidendi* of the domestic courts or other domestic authorities.

²⁷⁸ The National Reports pay attention to these cases in order to reflect cases where the Court considered that the State provides sufficient domestic remedies which should have been exhausted, or, in the alternative, the proposed remedies by the Governments did not need to be exhausted due to their lack of effectiveness. Both aspects contribute by showing how prepared the domestic system is to offer effective protection of Convention rights.

4. State of the Art and Relevance of the Study

Although the impact of the ECHR and the case-law of the ECtHR in many States Parties has generated considerable interest in academia,²⁷⁹ there is limited research on this impact with respect to the Western Balkan States. The book edited by Motoc and Ziemele entitled ‘The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives’, is one of the publications in which five of the six Western Balkan States are covered, and another book edited by Hammer and Emmert entitled ‘The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe’, is another publication covering three of the six Western Balkan States.²⁸⁰ However, there is no publication to date which focuses exclusively on the impact of the ECHR and the ECtHR’s case-law in the six Western Balkan States. Moreover, to date, there is no publication which conducts the kind of analysis undertaken in this study.

As a result, the relevance of this study is particularly significant for the Western Balkan States and more specifically for: (i) national judiciaries and other domestic authorities of the selected States; (ii) researchers, academics and students of the selected States; (iii) lawyers and other legal professionals of the selected States. In addition, this study is relevant for comparative purposes also for other researchers who are interested in the impact and effects of the ECHR and the ECtHR’s case-law overall and, more specifically, in the Western Balkans as one particular region that is geographically in Europe but still outside of the European Union. Some of the particularities of this study that might increase its relevance have to do with the following factors: (i) the study conducts an overall analysis of the domestic case-law of 12 of the highest domestic courts of the Western Balkan States (six Constitutional Courts and six Supreme Courts); (ii) the study conducts an analysis of the ‘Convention talk’ between the highest courts in each of the Western Balkan States thus analysing for the first time in such depth the judicial exchange in respect of “individual constitutional complaint mechanisms” and “incidental control procedure” while focusing exclusively on the application of the Convention and the Court’s case-law at the domestic level; (iii) the study conducts an over-

²⁷⁹ Keller and Stone Sweet (2008); Gerards and Fleuren (eds) (2014); Popelier, Lambrecht and Lemmens (2016), Brems and Gerards (2013).

²⁸⁰ Motoc and Ziemele (2016), with special chapters on Albania, Bosnia and Herzegovina, North Macedonia, Montenegro and Serbia. See also another publication on the impact of the ECHR in Central and Eastern Europe, Hammer and Emmert (2012), with special chapters on Albania, Kosovo, and Serbia.

all analysis of all ECtHR judgments (with and without a violation having been found) rendered against the Western Balkan States (more than 650) by classifying them in groups of cases related to their importance for the embeddedness of the Convention at home; (iv) the study conducts an analysis of the reaction of domestic courts and domestic authorities following a violation found at the Strasbourg level, by focusing on cases where general measures were required for repetitive cases overloading the Convention protection machinery, cases where systemic problems were identified, cases where there is an evident lack of domestic remedies to address rights at home, and cases where the Court could and could not defer to the *ratio decidendi* of the domestic courts; (v) the study offers critical observations with respect to domestic reception mechanisms utilised by the domestic authorities to embed the Convention whilst also providing concrete examples of the “best and worst” embeddedness practices and recommendations on how to increase the impact and effects of the ECHR and the ECtHR’s case-law at home.

5. Note on Research Methods and Key Terms

Three main research methodologies have been used in conducting this study. Firstly, the doctrinal research was conducted by focusing on legal rules found in primary sources at the national and supranational levels (the Convention, national Constitutions and domestic laws, regulations and other legal documents). This was necessary to observe the legal basis under which the domestic courts/authorities and the ECtHR operate while sharing their responsibility to protect Convention rights. The second methodology involved an in-depth analysis of the case-law of the domestic courts as well as the case-law of the ECtHR. In order to research domestic case-law, this study used local case-law databases published by the Constitutional Courts and Supreme Courts of the Western Balkan States. Here, it needs to be noted that the research only covers those cases that were indeed published by the domestic courts according to their obligations as foreseen in the national laws, while noting with concern that there are courts in the Western Balkans that do not publish all their decisions despite the fact that they are supposed to be available for the public. Some of the domestic databases are better suited for research in English while for most of the databases the research was conducted in the local languages.²⁸¹ The HUDOC database was used to research the case-

²⁸¹ The national case-law law that was not available in English was read in the national language as published by the domestic courts and translated into English by the author as needed for the purposes of this study.

law of the ECtHR. For research on the implementation of the ECtHR case-law, in addition to HUDOC, the database of the Department for Execution of Judgments of the Council of Europe, HUDOC EX was used. The third methodology involved research in the relevant academic literature while mainly using the research facilities of the library of the University of Zürich and the library of the European Court of Human Rights, during long-term research stays in both venues.

There are several key terms that are used throughout this study for the purposes of achieving its overarching aim, i.e. assessing the impact and effects of the ECHR and the ECtHR's case-law in the Western Balkan States.

The term 'reception', although inspired by the authors that defined it,²⁸² is in practice, throughout this study, used to describe the mechanisms that are employed by domestic authorities to give domestic effect to Convention rights, i.e. how the domestic authorities have accepted and incorporated the Convention standards and the Court's case-law at the domestic level through various reception mechanisms.

The term 'embeddedness', although inspired by the authors that defined and redefined it,²⁸³ is in practice, throughout this study, used to describe the level of incorporation of Convention standards within a domestic system as well as the level of utilisation of such standards and the Court's case-law by the domestic authorities. The term 'domestication' is used as a synonym for the term embeddedness.

The term 'effective protection' is used to point to the availability or lack of domestic legal remedies to address and put right Convention violations.

The term 'shared responsibility' is used to point to the fact that the domestic authorities and the Strasbourg Court have a shared responsibility to protect Convention rights.

The term 'deference' is used to refer to the readiness of the Court to defer to the *ratio decidendi* of the domestic courts (or other domestic authorities) without the need to replace their rationale with its own.

The terms 'primary' and 'secondary' roles in protecting Convention rights are used to describe the role of the domestic courts/domestic authorities and the role of the Strasbourg Court, according to Articles 1 and 19 of the ECHR.

²⁸² Keller and Stone Sweet (2008).

²⁸³ Helfer (2008) and Spano (2018).

The term ‘first-line defenders’ is used to refer to the domestic authorities which have the primary role in protecting Convention rights at home.

The term ‘last-line defenders’ is used to refer to the highest domestic courts which serve as the final filterers of cases before they reach the docket of the ECtHR.

The term ‘Convention talk’ is used to describe ECHR related judicial dialogue between the highest domestic courts, namely supreme courts v. constitutional courts.

The term ‘Convention filterer(s)’ is used to describe the last domestic authority serving as the last filterer of potential Convention violations at the domestic level.

The term ‘Convention partner(s)’ is used to describe the Court’s partners in the implementation of the Convention at the domestic level.²⁸⁴

²⁸⁴ In subsequent chapters, all other terms (except the last four) will be used without single quotation marks.

Chapter 2 Albania

I. Introduction

The communist regime fell in 1991. Following four decades of dictatorship, Albania finally surrendered itself to democracy.¹ The era before the 90s has been described as “purely Orwellian”,² with almost inexistent human rights standards in place. Private property was seized from legitimate owners;³ religion was prohibited;⁴ and purges, torture and executions were the key tools of the so-called “Iron Fist” leader.⁵ With such a dark picture in mind, it comes as no surprise that Albania’s journey from a society where human rights were taboo towards one that guarantees fundamental rights and freedoms in conformity with the ECHR has not been an easy one. Joining the Council of Europe in 1995 and ratifying the Convention four years after the collapse of communism⁶ was meant as a gesture to distance the country from its past and to demonstrate Albania’s alignment with European values.

The first years of Convention applicability were characterised by enthusiasm and an overall sense of contentment for having joined the Council of Europe family. Such moods shifted slightly when the Strasbourg Court started to ren-

¹ Albania was the last country in Europe to end a communist regime. The infamous dictator, Enver Hoxha, ruled from 1944 until his death in 1985. His successor, Ramiz Alia, ruled until December 1990 when the student uprising took place. The first pluralist elections were held in 1991. For more on the topic of communism in Albania, see Fevziu (2016), Abrahams (2015), Rama (2021).

² Bianku (2016), 13.

³ During communism, private property was confiscated from its legitimate owners and held as public property. See, for example, Article 16 of the Constitution of the People’s Socialist Republic of Albania, of 28 December 1976, available in the Albanian language at <<https://shteti-web.org/2013/10/08/kushtetuta-e-republikes-socialiste-te-shqiperise-1976/>> (accessed 1 January 2022).

⁴ *Ibid.*, Article 37 of the 1976 Constitution providing that: “The State does not recognize any religion and supports and develops the atheist propaganda ...”.

⁵ Fevziu (2016), see the title of the book: *Enver Hoxha: The Iron Fist of Albania*.

⁶ Albania ratified the Convention on 31 July 1996 together with Protocol Nos. 1, 2, 4, 7 and 11. The ECHR entered into force in Albania in October 1996 and the country joined the ECtHR. On 3 February 2006, Albania ratified Protocol No. 14.

der judgments against Albania, especially in the area of systemic problems relating to the restitution of property which was arbitrarily confiscated during the communist regime.⁷ In addition to the systemic Convention related issues which will be elaborated in detail in this chapter, Albania has other serious problems within its judiciary which are currently being addressed via an unprecedented Justice Reform that started in 2016⁸ and is likely to continue for several years more than initially planned. International and national reports which preceded the Justice Reform, strongly called for an overall vetting of all sitting judges and prosecutors as well as judicial support staff.⁹ Calls for such a profound reform were supported, *inter alia*, by findings which portrayed the Albanian judiciary as: “plagued by corruption”; prone to “undue external influence”; lacking “transparent practices”; and also plagued by “kickback payments for the appointment of judges”; “corrupt judges delaying hearings”; “corrupt prosecutors accepting payments to avoid bringing charges”; “excessive length of proceedings”; “non-enforcement of final court decisions”; and a “low level of professionalism”.¹⁰ The drastic, yet indispensable measures proposed to tackle these endemic issues in the judiciary, which among others things foresaw the possibility of prematurely ending the mandate of judges and prosecutors if they did not pass the vetting process, were considered “necessary for Albania

⁷ ECtHR, *Manushaqe Puto and Others v. Albania*, nos. 604/07 and 3 others, Judgment (2012).

⁸ For an analysis of the Justice System in Albania which led to the Justice Reform, see the Report titled ‘Strategy on Justice System Reform’ prepared by the Ad Hoc Parliamentary Committee on Justice System Reform – Group of High Level Experts <<https://rm.coe.int/strategy-on-justice-system-reform-24-07-2015-en/16809eb53b>> (accessed 1 January 2022). See also, the website of the Euralius Project funded by the European Union on the ‘Consolidation of the Justice System in Albania’, for a general overview on the Justice Reform, including constitutional amendments and various laws introduced as a result of the Justice Reform <<https://www.euralius.eu/index.php/en/>> (accessed 1 January 2022).

⁹ *Ibid.* See also Venice Commission, ‘Interim Opinion on the Draft Constitutional Amendments of the Judiciary in Albania’, CDL-AD(2015)045, 21 December 2015.

¹⁰ ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, Judgment (2021), §§ 4-7 for the background to the case (i.e. the first vetting cases decided by the Strasbourg Court) and §§ 93-229 for relevant domestic and international materials related to the vetting process in Albania. It should be noted that this is the first vetting case decided by the ECtHR, while there are many other pending cases which were filed by judges and prosecutors who failed to pass the vetting process. See, for instance, the following communicated cases: ECtHR, *Sevdari v. Albania*, no. 40662/19, Communicated (2019), ECtHR, *Cani v. Albania*, no. 37474/20, Communicated (2021), ECtHR, *Bala v. Albania*, no. 21141/20, Communicated (2021), ECtHR, *Thanza v. Albania*, no. 41047/19, Communicated (2019), *Nikehasani v. Albania*, no. 58997/18, Communicated (2019) and *Gashi and Gina v. Albania*, no. 29943/18, Communicated (2018).

to protect itself from the scourge of corruption which, if not addressed, could completely destroy [the] judicial system”.¹¹

While the case-law of the Strasbourg Court against Albania reflects serious issues in dealing with the restitution of property confiscated during the former communist regime, it also reflects serious deficiencies in other areas of the right to a fair and impartial trial, especially in relation to the enforcement of final and binding decisions of state authorities and length of proceedings. There was litigation under other articles of the Convention but it was not as vast as the litigation under Article 6. This seems to be partly because, until the Justice Reform in 2016, the Constitutional Court was only allowed to review cases under the auspices of Article 6 and this led to litigation being concentrated on this particular provision. To date, there is one pilot judgment against Albania and several other cases where general measures have been requested by the Court in the areas of restitution of property, length of proceedings, the reopening of cases following a violation found by the ECtHR, and the detention of the mentally ill. Violations under other articles of the Convention are not as many, but this statistic does not seem to portray the reality of fundamental rights issues which undoubtedly exist in Albania.¹²

Following this introduction, [Part II](#) of this chapter will outline the status of the Convention in the Albanian legal order and court system. It will shed light on the relationship between domestic and international law with a specific focus on the status of the ECHR. [Part III](#) will explore the domestic court system and its relationship with the Convention by focusing mainly on the jurisprudence of the highest courts in Albania and the current ramifications of the ongoing Justice Reform. [Part IV](#) will then provide an in-depth analysis of the ECtHR’s case-law against Albania by classifying cases into six categories, namely: (1.1) [cases under Article 46 – where general and/or individual measures have been requested](#); (1.2) [cases with the highest number of violations – Article 6 issues](#); (1.3) [cases under Article 13 – lack of effective domestic remedies](#); (1.4) [cases with violations under other articles of the Convention](#); (1.5) [admissible cases where no violation was found](#); and (1.6) [other important cases related to exhaustion of domestic remedies](#). [Part IV](#) will focus on the effects and impact of the ECHR and the ECtHR’s case-law in the domestic legal order

¹¹ Venice Commission, ‘Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary of Albania’, CDL-AD (2016)009, 14 March 2016, § 52.

¹² See, for instance, European Commission of the European Union, ‘Albania 2021 Report’, Commission Staff Working Document no. SWD(2021) 289 final, 19 October 2021, paras 26-35.

by providing concrete impact examples as well as observations with respect to the lack of the much-needed impact. Lastly, [Part V](#) will reflect on these findings and draw some final conclusions.

II. Status of the Convention in the Albanian Legal Order

1. Relationship between Domestic and International law

Albania “applies international law that is binding upon it”.¹³ No legal norm, domestic or international, is above the Constitution.¹⁴ This makes Albania a ‘monist’ state which upholds the primacy of the Constitution.¹⁵ A reference to applicable normative acts is made in Article 116 § 1 of the Constitution which lists international agreements right after the Constitution, while laws and other normative acts are listed below international agreements.¹⁶ Although this order of reference may not in itself be a definite reflection of the hierarchy of sources of laws, scholars have argued that it does indeed represent a formal hierarchy for two main reasons.¹⁷ Firstly, the Constitution is confirmed as the highest law of the land; and secondly, in the case of incompatibility – the superiority of a ratified international agreement over the laws of the land is guaranteed.¹⁸ This translates into international agreements possessing infra-constitutional status on the one hand and supra-legislative status on the other. An international agreement constitutes part of the domestic legal order as soon as it is published in the Official Gazette.¹⁹ Norms issued by international organisations have priority, in the case of conflict, over the law of the country in cases when the direct application of such norms is expressly stipulated in the ratified international agreements.²⁰ The latter are directly implementable unless they are not self-executing and require the passage of a law for due implementation.²¹

¹³ Article 5 of the Constitution of the Republic of Albania (the Constitution). The latter entered into force in 1998 and was amended on several occasions. For an English version and a consolidated text of the Constitution of Albania see the CODICES database of constitutions published by the Venice Commission, <<http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>> (accessed 1 January 2022).

¹⁴ Article 4 § 2 of the Constitution.

¹⁵ Omari and Anastasi (2010).

¹⁶ Article 116 § 1 of the Constitution.

¹⁷ Omari and Anastasi (2010).

¹⁸ Zyberi and Sali (2015), 81-108.

¹⁹ Article 122 § 1 of the Constitution.

²⁰ Article 122 § 3 of the Constitution.

²¹ Ibid.

2. ECHR in the Domestic Legal Order

The status of the ECHR in the domestic legal order has generated some discussion among Albanian scholars in the past. There seemed to be a slight disagreement as to its exact placement and status in the domestic legal order, which was later clarified by the national judicial practice. On the one hand, some authors contended that the ECHR holds a “privileged” and “special status” compared to other ratified international agreements.²² They grounded this opinion on the fact that the ECHR is explicitly referred to in Article 17 of the Constitution while no other international agreement is specifically referred to in the Constitution.²³ On the other hand, some other authors contended that this specific reference on the possibility of limitation of rights is merely “a *renvoi* to Article 15 § 2 ECHR”,²⁴ therefore, it should not be viewed as providing any “super-power” status to the Convention.²⁵ Some authors went further in stipulating that, in fact, Article 17 of the Constitution grants “constitutional status”²⁶ to the ECHR because any limitation of rights and freedoms must be assessed in accordance with the Convention standards.²⁷ It is thus argued that such a constitutional choice gives the ECHR a substantial status rather than a formal-procedural one.²⁸ It needs to be noted that the specific reference to the ECHR in the Constitution refers to limitations that are not allowed to be made in respect of human rights. Public authorities may, in line with the principle of proportionality, limit rights and freedoms provided by the Constitution but such limitations may not infringe on the essence of the rights and freedoms and “in no case may exceed the limitations provided for in the European Convention on Human Rights”.²⁹

In accordance with a recent judgment of the Supreme Court rendered in 2021, in view of unifying the domestic judicial practice, all regular courts in Albania are authorised to set aside a specific provision of the ordinary legislation should they opine that it contradicts the ECHR or the ECtHR’s case-law.³⁰ In such cases, they are obliged to apply the Convention standards and the Court’s

²² Zaganjori (2012), 145-162; Met-Hasani Çani and Alimehmeti (2012), 39-54.

²³ Article 17 of the Constitution.

²⁴ Zyberi and Sali (2015).

²⁵ Ibid.

²⁶ Bianku (2016), 17.

²⁷ Met-Hasani Çani and Alimehmeti (2012), 41-42.

²⁸ Bianku (2016), 18; Met-Hasani Çani and Alimehmeti (2012), 42; Omari and Anastasi (2010).

²⁹ Article 17 § 2 of the Constitution.

³⁰ Supreme Court of Albania, Decision no. 00-2021-1317, of 22 July 2021. This case will be elaborated in detail in Section [III.2](#) of this chapter.

case-law directly. The Constitutional Court has also confirmed the special status of the ECHR in the Albanian legal order.³¹ The constitutional amendments introduced in 2016, which paved the way for the vetting of judges and prosecutors in Albania, introduced a specific reference to the ECtHR in the Constitution which explicitly foresees that those who will undergo the vetting process “may exercise the right of appeal to the European Court of Human Rights”.³²

With respect to the obligation of the executive and legislative branches to ensure the compatibility of any proposed legislation with Convention standards, while a specific mandatory procedure to ensure the compatibility of any proposed legislation with the *acquis* of the European Union exists, there is no specific procedure obliging lawmakers to ensure the compatibility of proposed legislation with Convention standards and the ECtHR case-law. However, it should be noted that there is an obligation to ensure compatibility of legislation with the Constitution, where the ECHR is incorporated.³³

In sum, these observations lead to the conclusion that the Convention is part of the *bloc de constitutionnalité* in Albania and it can be pleaded directly before domestic courts.³⁴ The latter are obliged to weigh and balance the limitation of human rights in line with Convention standards as well as the case-law of the ECtHR. Whether domestic courts do so and to what extent is a question which will be addressed below.

³¹ Constitutional Court of Albania, Decision no. 24 of 21 April 2014.

³² Article F.8 of the Constitution, part of the new Annex to the Constitution entitled ‘Transitional Qualification Assessment’.

³³ See Law no. 9000 of 30 January 2003 on the organisation and operation of the Council of Ministers in the Republic of Albania <https://kryeministria.al/wpcontent/uploads/2018/02/Ligj_9000_30.01.2003.pdf> (accessed 10 January 2022).

³⁴ See Article 134 of the Constitution, for more on the list of parties authorised to file a complaint before the Constitutional Court of Albania.

III. Domestic Court System and the ECHR

1. Overview of the Albanian Court System

The regular court system is composed of first instance courts, courts of appeals and a Supreme Court.³⁵ The latter is the highest instance court in the domestic judiciary vested with jurisdiction “to ensure the unification or development of case-law”.³⁶ There is also a Constitutional Court which does not form part of the regular court system but has wide competences in settling disputes among different public institutions and making final interpretations of constitutional provisions, in addition to dealing with individual complaints.³⁷ Furthermore, the Justice Reform introduced specialised courts, as well as specialised prosecutorial and investigative bodies, with exclusive jurisdiction to investigate and adjudicate on matters related to corruption and organised crime.³⁸ Before going into further detail on the competences and case-law of the Supreme Court and of the Constitutional Court as a precondition to assess the ‘Convention talk’ between the highest courts in the land, there is a need first to provide a recap of the recent changes of the Justice Reform in the Albanian domestic court system and their current and expected impact in the area of protection of fundamental rights and freedoms.

While the urgent need for an all-encompassing Justice Reform in Albania is beyond any meritorious debate, the manner in which it is being implemented deserves criticism. The poor planning of the vetting process has paralysed the judicial system and made many courts, including the Supreme Court and Constitutional Court, inoperable for several years.³⁹ This, in turn, has had an adverse effect on the protection of human rights. The judiciary in Albania has long been viewed as a nest of corruption. The Assessment Report drafted by

³⁵ Article 135 of the Constitution.

³⁶ Articles 136, 139 and 141 of the Constitution.

³⁷ Articles 124-134 of the Constitution.

³⁸ Article 135 of the Constitution.

³⁹ In 2018, the Constitutional Court was left with only one judge given that most of them failed the vetting process while three judges resigned and were therefore not vetted. The Constitutional Court became operational only in 2020. A similar scenario happened with the Supreme Court as well where, due to the effects of the vetting process, there was no quorum to render decisions for almost two years.

an *ad hoc* parliamentary committee responsible for the reform of the justice sector relied on a number of public opinion polls and surveys which pointed out the existence of a “widespread public perception that the justice system was plagued by corruption, undue external influence, a lack of transparent practices, excessively lengthy proceedings and non-enforcement of final court decisions”.⁴⁰ According to the same report cited by the ECtHR in the case of *Xhoxhaj*:

(...) some judges and prosecutors had to pay kickbacks to be appointed or transferred to vacant positions in the capital city or other major cities. Unofficial data indicated that the cycle of paying kickbacks – mainly with the involvement of a “middleman”, such as a family member, friend or lawyer – was pervasive among the main stakeholders, such as judicial police officers, prosecutors and judges. Consequently, this had hampered the delivery of justice: corrupt judicial police officers took bribes in order to destroy evidence related to the crime scene, corrupt prosecutors accepted payments to avoid instituting criminal proceedings or bringing charges, and corrupt judges delayed holding hearings or conditioned the delivery of a decision on receipt of a kickback. The low level of professionalism demonstrated by the main stakeholders of the justice system had been evident, as had the failings of the legal education system to shape citizens cognisant of their legal rights and obligations and of the importance of familiarity with and observance of the law. The Assessment Report also referred to a number of monitoring reports released by international bodies, which had pointed to varying problems affecting the justice system in Albania.⁴¹

Moreover, the official website of the Justice Reform in Albania, citing surveys and reports from non-governmental organisations, specifically cites three reasons as to why the extraordinary vetting of judicial figures was needed, namely because: (i) 25% of judges themselves recognised the presence of corruption in the judicial system; (ii) 1/3 of the judges admitted to owning assets over the value of EUR 300,000 with some judges declaring assets worth millions of euros; (iii) 57% of judges admitted that their decisions were influenced, in one way or another, by politics and organised crime.⁴²

Having this upsetting picture in mind, the key undertaking of the Justice Reform, in addition to the entire institutional restructuring of the judicial and prosecutorial services, is the *ex officio* vetting of all: (i) judges, including those of the Constitutional Court and of the Supreme Court; (ii) prosecutors, including the Prosecutor General, Chief Inspector and other inspectors of the High Council of State; and (iii) legal staff of the Constitutional Court, the Supreme

⁴⁰ ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, Judgment (2021), §§ 4-7. See also, Ad Hoc Parliamentary Committee on Justice System Reform, cited above, (n 8).

⁴¹ ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, Judgment (2021), § 4.

⁴² See the official website of the Justice Reform in Albania, which explains why the vetting process was indispensable: <<https://www.njihreformennedrejtisi.al/sq/procesi-i-vetting-ut/shkaqet>> (accessed 1 November 2021).

Court and of regular courts and prosecution offices.⁴³ According to the constitutional amendments which took several years of heated debate and resistance to be approved in the first place, the mission of the vetting process is to “guarantee the proper functioning of the rule of law, the independence of the judicial system, as well as to re-establish public trust and confidence in these institutions”.⁴⁴ The vetting process includes three layers of assessment which all assesses must pass in order to be confirmed in a judicial post, namely: (i) an assessment of their assets, which evaluates whether the accumulated wealth may be legitimately explained; (ii) a background check, which analyses possible inappropriate contacts with persons involved in organised crime; and finally, (iii) a proficiency evaluation, which evaluates the sufficiency of professional qualifications and past decisions taken by the assesses.⁴⁵

The first judges that underwent the vetting process were the judges of the Constitutional Court and of the Supreme Court. The fact that only one out of nine judges of the Constitutional Court and only seven out of nine judges of the Supreme Court managed to pass the vetting process successfully⁴⁶ and be confirmed in office illustrates perfectly the dramatic situation within the judicial system of Albania. Many prosecutors and judges, including judges of the Constitutional Court and the Supreme Court, resigned from their judicial posts in order not to undergo the vetting process – even though the law stipulated that such a resignation prohibited them from serving in any role in the judicial sector for 15 consecutive years.⁴⁷ In other words, it seems that such judges and prosecutors were prepared to renounce their careers in the justice sector in order to avoid being vetted. Such a large number of judges whose mandate was automatically terminated (either following their failure to pass the vetting process or through resignation) led to several years of total paralysis of the Constitutional Court and an obstruction of judicial services at the Supreme Court. The Constitutional Court became operational only in 2020. The paralysis was a result of the complicated manner in which new judges were to be elected in addition to extremely difficult criteria established for the recruit-

⁴³ Articles 179/b.3 and 179/b.4 of the Constitution.

⁴⁴ Article 179/b.1 of the Constitution.

⁴⁵ Articles Ç, D, DH, and E of the Annex to the Constitution, introduced following the Justice Reform in 2016.

⁴⁶ ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, Judgment (2021), §§ 23-27.

⁴⁷ See Article 10/a of the Law no. 8577 on the Organisation and Functioning of the Constitutional Court of Republic of Albania, as amended by the Law no. 99/2016 <https://www.gjk.gov.al/web/constitutional_court_law_2016_2021_2156.pdf> (accessed 6 January 2022).

ment of new judges.⁴⁸ This shows a poor analysis on the part of the drafters of the Justice Reform as they were not able to foresee approximately how many judicial figures would fail the vetting process and the evident fact that Albania does not have that many potential candidates who could fill a judicial post with the extremely high standards that the new legislation requires. The vacant seats in the judiciary, a situation which is likely to worsen as the vetting process continues in the Court of Appeal and regular courts and prosecution offices all over the country, are creating negative long-term ramifications for citizens whose basic right of access to court is being infringed due to poor planning and the delayed execution of the vetting process.

Decisions on the vetting process at first instance are taken by a special body known as the “Independent Qualification Commission” whose initial mandate was envisaged for five years according to the constitutional amendments on Justice Reform.⁴⁹ Its decisions may be appealed at second instance before an Appeal Chamber.⁵⁰ The Constitution explicitly foresees that the decisions of these two vetting bodies may be challenged before the ECtHR⁵¹ and many judges and prosecutors have already addressed their grievances in Strasbourg after failing to be cleared in the domestic vetting process. The case of *Xhoxhaj*, as the first vetting case decided by the ECtHR in respect of Albania, is an important key case which will serve as a basis for all other future decisions,⁵² without disregarding the possibility that in other cases the Court may find specific violations of the ECHR.⁵³ As will be elaborated in detail in the overview of the case-law of the Strasbourg Court against Albania,⁵⁴ in substance, by not finding any violation of Convention rights in respect of former Constitutional Court judge *Xhoxhaj*, the Strasbourg Court confirmed the overall legitimacy

⁴⁸ Articles 125 and 136 of the Constitution. See also, Venice Commission, ‘Opinion on the Appointment of Judges to the Constitutional Court’, document CDL-AD(2020)010, 19 June 2020.

⁴⁹ Articles 179/b.5 and 179/b.8 of the Constitution and Article C.1 of the Annex to the Constitution. Currently, there are ongoing talks to extend the mandate of this body since almost half of the judiciary has not been vetted yet.

⁵⁰ Article 179/b.5 of the Constitution.

⁵¹ Article F.5 of the Annex to the Constitution.

⁵² ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, Judgment (2021).

⁵³ See e.g. some of the communicated cases related to the vetting process in Albania: ECtHR, *Sevdari v. Albania*, no. 40662/19, Communicated (2019), ECtHR, *Cani v. Albania*, no. 37474/20, Communicated (2021), ECtHR, *Bala v. Albania*, no. 21141/20, Communicated (2021), ECtHR, *Thanza v. Albania*, no. 41047/19, Communicated (2019), *Nikehasani v. Albania*, no. 58997/18, Communicated (2019) and *Gashi and Gina v. Albania*, no. 29943/18, Communicated (2018).

⁵⁴ See [section IV](#) of this chapter.

and legacy of the vetting process by emphasising that this process “was introduced in response to the urgent need (...) to combat widespread levels of corruption in the justice system” and that as a result “the vetting process of judges and prosecutors in Albania is *sui generis* and must be distinguished from any ordinary disciplinary proceedings against judges or prosecutors”.⁵⁵ These findings by a seven-judge Chamber were confirmed by the refusal of the ECtHR’s panel to refer the case to the Grand Chamber following a request from the applicant.⁵⁶ The Chamber’s decision was not unanimous and it seems to have generated a heated debate within the ECtHR, reading from the two separate dissenting opinions which raised certain issues which cannot be disregarded in respect of the existence of a tribunal established by law as well as the rigorous criteria used for assessing the assets of those being vetted.⁵⁷ The former ECtHR judge for Albania has criticised the ECtHR for using double standards when evaluating the criterion of “a tribunal established by law” in cases relating to the judiciary in Poland and Albania.⁵⁸ While in the former, the Chamber of Extraordinary Review and Public Affairs of the Supreme Court was considered not to fulfil the criteria of a tribunal established by law, the ECtHR confirmed the status as a tribunal established by law of the vetting bodies in Albania, despite there being issues under Article 6.⁵⁹

Nevertheless, the *Xhoxhaj* judgment is now final and it will serve as a leading key case for all future vetting cases that have and will reach the Court’s docket. The Justice Reform was expected to be finished by the end of 2021, but talks on extending the mandate of the current bodies have already begun. Statistically speaking, the Reform is nowhere near its end with more than 50% of the judicial members still waiting to undergo the vetting process.

In addition to the highly debated vetting process, the Justice Reform also introduced several other constitutional amendments with regard to the court structure in Albania. These amendments opened the path for the establish-

⁵⁵ ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, Judgment (2021), § 299.

⁵⁶ ECtHR, Press Release No. 176 (2021) of 2 June 2021 notifying that the Grand Chamber Panel of five judges had decided to reject the request to refer the case of ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, Judgment (2021) to the Grand Chamber.

⁵⁷ See the Dissenting Opinion of Judge Serghides in ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, Judgment (2021), §§ 1-30; and the Dissenting Opinion of Judge Dedov with respect to the same case, §§ 1-10.

⁵⁸ Bianku (2021). See also Bianku (2014), another article published by the former ECtHR Judge in respect of Albania in relation to the vetting process in Albania <<https://shtetiweb.org/2014/07/15/kush-gjykon-gjyqtaret/>> (accessed 20 December 2021).

⁵⁹ *Ibid.* See also two dissenting opinions by Judges Serghides and Dedov in the case of ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, Judgment (2021).

ment of a specialised structure of courts and prosecutorial organs with the mandate to deal exclusively with issues of corruption and organised crime.⁶⁰ This led to the establishment of the so-called Special Structure against Corruption and Organised Crime (SPAK) which is used to refer to the Special Prosecution against Corruption and Organised Crime as well as the National Bureau of Investigations – which are competent to investigate criminal offences in the area of corruption and organised crime.⁶¹ A judicial body known as the Special Court against Corruption and Organised Crime was also established to deal with criminal offences that are investigated by the above-mentioned special prosecutorial and investigative bodies.⁶² In addition to dealing more generally with issues of corruption and organised crime, these new special bodies have exclusive jurisdiction to deal with criminal charges against the President of the Republic, the Assembly Speaker and her/his Deputy, the Prime Minister, members of the Council of Ministers, judges of the Constitutional Court and of the Supreme Court, the Prosecutor General, the High Justice Inspector, mayors, deputy ministers, members of the High Judicial Council and High Prosecutorial Council, heads of central and independent institutions, as well as charges against all former officials who in the past held these posts.⁶³ The Justice Reform also added (or significantly amended) several other managerial/administrative organs to the judicial structure, namely the High Judicial Council, the High Prosecutorial Council, the High Inspectorate of Justice, and the Commission for Appointments in the Justice sector.⁶⁴ Lastly, in relation to the latter, it should be noted that the Justice Reform has also amended the election procedure for judges and prosecutors by strengthening the criteria as well as setting up a pre-vetting process for all new candidates who wish to join the judiciary.⁶⁵

Having made this general observation on the Justice Reform which will be mentioned frequently in this chapter, an examination of the jurisdiction and the case-law of the Constitutional Court and of the Supreme Court will follow.

⁶⁰ Article 135 of the Constitution.

⁶¹ For more information on SPAK, see its official website <<https://spak.al/>> (accessed 1 January 2022).

⁶² Ibid.

⁶³ Article 135.2 of the Constitution.

⁶⁴ See in greater detail the amendments introduced by the new Justice Reform in 2016 available at <<http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>> (accessed 1 January 2022).

⁶⁵ Article 136/a of the Constitution.

The focus will be on their Convention related judicial dialogue and cooperation as a means of showing their capacity to act as the ECtHR's 'Convention partners' at the domestic level.

1.1. Supreme Court

The Supreme Court exercises important judicial powers as the highest judicial instance in Albania. It does so by supervising the lower courts in the application and interpretation of material law and procedural law,⁶⁶ in light of the Constitution and Convention guarantees, among other applicable national laws.⁶⁷ The Supreme Court is organised in three separate chambers, namely the Civil Chamber, the Criminal Chamber and the Administrative Chamber.⁶⁸ The Supreme Court has the prerogative to ensure the “unification or development of case-law” throughout the judiciary⁶⁹ as well as to amend its own existing judicial practice by reviewing the decisions of its separate chambers in a Joint Chamber.⁷⁰

At the time of writing, the Supreme Court is in a very difficult position because it faces an enormous backlog of cases, a situation made worse by the blockade which ensued following the Justice Reform. While in 2012 the Supreme Court's backlog consisted of 9,961 cases, one year before the Justice Reform it was 16,777 cases, while at the start of 2021 this backlog had risen to 36,609 cases.⁷¹ These statistics show that the backlog doubled while the Justice Reform was taking place, which made the Supreme Court inoperable. In view of this difficult situation, after the Supreme Court became barely operational on 30 July 2021, with just nine out of 19 judges that must be elected according to the law, several measures were taken to reduce the backlog, namely: (i) giving priority to the examination of the most urgent and oldest cases; and (ii) raising the number of seconded judges, legal advisers and additional human resources, who assisted the Supreme Court judges in alleviating the workload, by filtering and classifying the backlog.⁷² Despite this preparatory work to deal with the

⁶⁶ Zaganjori (2012), 46.

⁶⁷ Zaharia (2007), 22-26.

⁶⁸ See the consolidated version of the Law no. 98/2016 on the Organisation of the Judicial Power in the Republic of Albania <<https://www.eurallius.eu/index.php/en/library/albanian-legislation?task=download.send&id=193&catid=88&m=0>> (accessed 1 January 2022).

⁶⁹ Article 141 § 1 of the Constitution.

⁷⁰ Article 141 § 2 of the Constitution.

⁷¹ ECtHR, *Bara and Kola v. Albania*, nos. 43391/18 and 17766/19, Judgment (2021), §§ 28-29.

⁷² *Ibid.*, § 29.

backlog, the new judges of the Supreme Court will still have to decide on more than 35,000 cases.

As far as the relationship with the Convention goes, despite there being no obstacles in utilising Convention principles, it cannot be said that the Supreme Court has excelled in performing its tasks. It needs to be noted that until the entry into force of the Justice Reform, the Supreme Court was the last domestic remedy for all Convention rights, except Article 6 cases – for which the applicants had to file a constitutional complaint before filing an application with the ECtHR. The case-law of the ECtHR where violations on the side of the Supreme Court were found as well as examples of (non)utilisation of Convention principles that will be referred to in this chapter, demonstrate that the Supreme Court did not have the needed Convention impact at the domestic level.

However, in instances where there was a reliance on Convention standards, the Supreme Court's references were either drawn based on allegations raised by applicants⁷³ or *proprio motu*.⁷⁴ For instance, Article 6 of the ECHR is often referred to in cases that raise fair trial issues,⁷⁵ as is Article 1 of Protocol No. 1.⁷⁶ Reference to other provisions of the Convention is more rarely found,⁷⁷ while there are cases in which the ECHR generally, without any specific provision, is referred to in the section describing the legal basis,⁷⁸ or cases where provisions of the Convention are referred to in the legal basis but do not figure

⁷³ See e.g. Supreme Court of Albania, Decision no. 00-2018-44, 16 January 2018, where the applicant alleged a violation of Article 6. For an overview of all decisions of the Supreme Court, see the official website <<http://www.gjykataelarte.gov.al/>> (accessed 2 January 2021).

⁷⁴ See e.g. Supreme Court of Albania, Decision no. 153/2020, 12 June 2020, referring to Article 1 of Protocol No. 1 of the Convention as a legal basis for its decision; Supreme Court of Albania, Decision no. 00-2020-563, 12 June 2020, referring to Article 8 of the Convention as a legal basis for its decision. It should be noted that in none of these cases is there any elaboration on these two articles; they are merely referred to as a legal basis.

⁷⁵ See e.g. Supreme Court of Albania, Decision no. 8/2018, 31 January 2019, §§ 12 and 15; Supreme Court of Albania, Decision no. 147, 26 June 2020, page 2; Supreme Court of Albania, Decision no. 285, 21 March 2017.

⁷⁶ Supreme Court of Albania, Decision no. 00-2020-507, 12 June 2020, legal basis after § 5.

⁷⁷ See e.g. cases where a reference to other articles of the Convention is to be found: Supreme Court of Albania Decision no. 90, 8 June 2020, § 8, where Article 13 is referred to; Supreme Court of Albania, Decision no. 00-2021-181, 10 February 2021, legal basis after § 5, where Article 1 of Protocol No. 1 is referred to. For further statistics regarding references to the ECHR by the Supreme Court see also Bianku (2016) 33.

⁷⁸ Supreme Court of Albania, Decision no. 534, 12 June 2020, page 2.

in the reasoning of the decisions.⁷⁹ A very positive trend in the new judicial practice of the Supreme Court is the frequent and extensive reference to the decisions of the Constitutional Court.⁸⁰ There is also a limited number of cases where specific case-law of the ECtHR is referred to⁸¹ but it is difficult to find cases where Convention requirements and the Court's case-law are thoroughly analysed for the purposes of a particular case, although there are a few examples which merit mentioning. For instance, in a 2021 case, the Supreme Court found that a decision of the Basic Court in Tirana to dismiss a case based on alleged lack of jurisdiction was not in compliance with the "Constitution (...), international law, the case-law of the European Court of Human Rights, case-law of the Constitutional Court [of Albania] and the case-law of the Supreme Court in similar cases."⁸² The case concerned a person who had been dismissed from her job as an assistant in a Consulate based in Albania. In its analysis, the Supreme Court initially emphasised that the Convention has a "privileged status in the Albanian legal order, in rapport with other international instruments, by having the same status as the Constitution [...] in relation to limitation of fundamental human rights and freedoms."⁸³ Following that, the Supreme Court relied on *res interpretata* effects of the ECtHR case of *Cudak v. Lithuania*,⁸⁴ by explaining how such case-law related factually and legally to the applicant's complaints.⁸⁵ Both cases, the Albanian one and the Lithuanian one, concerned the dismissal from work of an employee working

⁷⁹ See e.g. cases referring to Articles 1 and 8 as a legal basis: Supreme Court of Albania, Decision no. 00-2020-175, 12 June 2020; Supreme Court of Albania, Decision no. 00-2020-563, 12 October 2020.

⁸⁰ See for example, Supreme Court of Albania, Decision no. 00-2021-1317, 22 July 2021, where the Strasbourg Court is referred to in more than 100 instances. See also, Supreme Court of Albania, Decision no. 11243-03850-2015, 17 May 2021; Supreme Court of Albania, Decision no. 00-2021-1311, 28 May 2021; Supreme Court of Albania, Decision no. 00-2021-1127, 8 July 2021.

⁸¹ See e.g. Supreme Court of Albania, Decision no. 31, 14 April 2003 citing *Pellegrin v. France* [GC], no. 28541/95, Judgment (1999); Supreme Court of Albania, Decision no. 928, 19 December 2006 citing *Peers v. Greece*, no. 28524/95, Judgment (2001); Supreme Court of Albania, Decision no. 443, 17 April 2007 citing *Mikulić v. Croatia*, no. 53176/99, Judgment (2002); Supreme Court of Albania, Decision no. 205, 4 April 2017, citing *Sporrong and Lönnroth v. Sweden* [Plenary], nos. 7151/75 and 7152/75, Judgment (1982) and *Papamichalopoulos and Others v. Greece*, no. 14556/89, Judgment (1993). See also Bianku (2016) 33 and Zaharia (2007).

⁸² Supreme Court of Albania, Decision no. 00-2021-1311, 28 July 2021.

⁸³ *Ibid.*, §15.

⁸⁴ See e.g. Supreme Court of Albania, Decision no. 00-2021-1311, 28 May 2021, citing ECtHR, *Cudak v. Lithuania* [GC], no. 15869/02, Judgment (2010).

⁸⁵ *Ibid.*, § 21.

in an Embassy/Consulate. The Supreme Court explained thoroughly why the ECtHR found a violation in the Lithuanian case by supporting its analysis with additional ECtHR cases rendered in similar cases.⁸⁶ This case and a few other recent cases where the Court's case-law is well utilised serve as good examples of how the Supreme Court should make use of the Convention principles and the case-law of the ECtHR with a view to redressing possible Convention violations at the domestic level.⁸⁷ These promising cases were rendered by the new judges of the revitalised Supreme Court who are considered to be successfully vetted judges. There is hope, therefore, that the situation will improve in terms of the application of the Convention standards within the Supreme Court.

1.2. Constitutional Court

The Constitutional Court is vested with the authority to settle constitutional disputes and serve as the final interpreter of the Constitution.⁸⁸ Its decisions are final and binding and have an *erga omnes* effect.⁸⁹ The Constitutional Court engages in abstract and concrete review of the constitutionality and convention-

⁸⁶ Ibid., §§ 22-24, where several cases of the Strasbourg Court were cited, namely, e.g., ECtHR, *Sabeh El Leil v. France* [GC], no. 34869/05, Judgment (2011); ECtHR, *Wallishauser v. Austria*, no. 156/04, Judgment (2012); and ECtHR, *Oleynikov v. Russia*, no. 36703/04, Judgment (2013). In addition, see Supreme Court of Albania, Decision no. 00-2021-142 of 1 February 2021, a 2021 case related to the expulsion of two Egyptian nationals from Albania where the Supreme Court found a violation of their rights and returned the matter for retrial before the Court of Appeal. Before finding this violation, the Supreme Court referred to the general principles established by the ECtHR in relation to Article 1 of Protocol No. 7, Article 3 of Protocol No. 4, Article 6 and Article 8 by citing the following ECtHR case-law: ECtHR, *Üner v. the Netherlands* [GC], no. 46410/99, Judgment (2006); ECtHR, *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, Judgment (2010); ECtHR, *Darren Omoregie and Others v. Norway*, no. 265/07, Judgment (2008); ECtHR, *Onur v. the United Kingdom*, no. 27319/07, Judgment (2009); ECtHR, *C.G. and Others v. Bulgaria*, no. 1365/07, Judgment (2008); ECtHR, *Lupsa v. Romania*, no. 10337/04, Judgment (2006); ECtHR, *Kaushal and Others v. Bulgaria*, no. 1537/08, Judgment (2010); and ECtHR, *Avotiņš v. Latvia* [GC], no. 17502/07, Judgment (2016). Additionally, the Supreme Court also relied on the case-law of the Constitutional Court as well as the case-law of the Federal Constitutional Court of Germany.

⁸⁷ See e.g. some recent cases decided during 2021 by the new composition of the Supreme Court where an increase in the reliance on the ECtHR case-law may be noticed: Supreme Court of Albania, Decision no. 00-2021-492, 6 July 2021, §§ 31-32 and 75; Supreme Court of Albania, Decision no. 00-2021-1279, 23 June 2021, § 34; Supreme Court of Albania, Decision no. 00-2021-1127, 8 July 2021, §§ 16-18.

⁸⁸ Article 124 § 1 of the Constitution.

⁸⁹ Article 132 of the Constitution.

ality of norms. *In abstracto*, the Constitutional Court reviews the compatibility of laws with the Constitution and international agreements.⁹⁰ Through this provision, the Constitutional Court is empowered to set aside legislation that runs counter to the Constitution or the ECHR.⁹¹ It also performs *ex ante* review of the compatibility of international agreements with the Constitution i.e. prior to their ratification.⁹² The Constitutional Court also has the competence to review the compatibility of normative acts of the central and local bodies with the Constitution.⁹³ Through *in concreto* norm review, the Constitutional Court performs *ex post* review of laws through an incidental control procedure that may be initiated by any domestic court.⁹⁴ The other important competence of the Constitutional Court is the possibility to review cases filed by individuals or legal persons through the constitutional complaint mechanism.⁹⁵

A highly commendable novelty of the Justice Reform is the expansion of the jurisdiction of the Constitutional Court in dealing with Convention related human rights complaints at the domestic level. Until the end of 2016, the Constitutional Court could only review complaints stemming from the ambit of Article 6,⁹⁶

⁹⁰ Article 131 (a) of the Constitution.

⁹¹ See e.g. Constitutional Court of Albania, Decision no. 243, 23 December 2016, a case filed by the National Association of Judges in Albania contesting the new Vetting Law No. 24/2016 of 30 October 2016 as being incompatible with Articles 6 and 8 of the ECHR. The Constitutional Court declared the Law to be compatible with the guarantees of the Convention. For an overview of all decisions of the Constitutional Court, see the official website <<http://www.gjk.gov.al/>> (accessed 2 January 2022).

⁹² Article 131 (b) of the Constitution. See e.g. Constitutional Court of Albania, Decision no. 186, 23 September 2002 where the Statute of the International Criminal Court was declared to be compatible with the Constitution. See also, Constitutional Court of Albania, Decision no. 15, 15 April 2010 where an international agreement between Albania and Greece was struck down by the Constitutional Court.

⁹³ Article 131 (c) of the Constitution.

⁹⁴ See Article 136 § 1 (dh) in conjunction with Article 145 § 2 of the Constitution. As far as relevant the constitutional provisions read: “When judges find that a law comes into conflict with the Constitution, they do not apply it. In this case, they suspend the proceedings and send the case to the Constitutional Court. Decisions of the Constitutional Court are obligatory for all courts.” This provision mandates the incidental control mechanism which, as stated in [Chapter 1](#) of this study, might, in other jurisdictions, be referred to as “preliminary review” or “preliminary question”.

⁹⁵ See Article 131 (f) of the Constitution, as amended following the Justice Reform in 2016. The vast majority of the case-law of the Constitutional Court derives from this provision. See also Article 145 of the Constitution in respect of the right of the regular courts to file a request for review of constitutionality of a law before the Constitutional Court.

⁹⁶ Article 131 (f) of the Constitution before the Justice Reform read as follows: “1. The Constitutional Court decides on: [...] f) final adjudication of the individual complaints for the violation of their constitutional rights to a fair hearing, after all legal means for the protection of those rights have been exhausted.”

when dealing with cases filed by individuals through the constitutional complaint mechanism.⁹⁷ Considering that individual referrals formed the highest number of cases filed before the Constitutional Court, this limitation has long been viewed as a handicap and a barrier to deeper Convention implementation at the domestic level.⁹⁸ Following the constitutional amendments envisaged by the Justice Reform, the Constitutional Court will now have the competence to review all acts of public authorities as well as the decisions of regular courts in light of the whole catalogue of human rights guaranteed by the Constitution and the ECHR.⁹⁹ This jurisdictional expansion is expected to deepen the Convention dialogue in Albania, to intensify the judicial dialogue between the Supreme Court and the Constitutional Court, and to provide better domestic redress to individuals claiming Convention violations. It should also turn the Constitutional Court into a better filter of cases before they reach the docket of the ECtHR. With time, the Constitutional Court is also expected to detect, better and more easily, possible Convention violations at the domestic level. All prospective applicants will have to exhaust the constitutional complaint procedure before lodging an application with the ECtHR. The latter is yet to confirm the effectiveness of the new jurisdiction of the Constitutional Court in relation to other Convention rights but there seem to be no reasons, at least in theory, for not confirming its effectiveness. It is almost certain that the Strasbourg Court will provide sufficient room for the revitalised constitutional complaint to be able to demonstrate its effectiveness at the domestic level. It is also in the ECtHR's interest that this remedy proves to be effective.

Before the modification of the jurisdiction of the Constitutional Court, the ECtHR had continuously maintained that the constitutional complaint mechanism as a domestic avenue is an effective remedy only for Article 6 com-

⁹⁷ It should be noted that the competence of review of the compatibility of legislation with constitutional guarantees, including the ECHR, existed even before the Justice Reform of 2016. The limitations of the Constitutional Court mostly related to the individual complaint mechanism that might be initiated by individuals (physical or legal persons).

⁹⁸ See e.g. Dedja (2017), a Speech on the 'Constitutional Court as an effective legal remedy according to the ECHR' by Bashkim Dedja, former President of the Constitutional Court of Albania, in which he called for the need to introduce legislative changes so that the jurisdiction of the Constitutional Court is expanded to an all rights review court. The speech is available in Albanian language only: <http://www.gjk.gov.al/web/4_cc_as_effectiveremedy_1191.pdf> (accessed 2 January 2022).

⁹⁹ Article 131 (f) of the Constitution after the Justice Reform reads as follows: "1. The Constitutional Court decides on: (...) f) final examination of the complaints of individuals against the acts of the public power or judicial acts impairing the fundamental rights and freedoms guaranteed by the Constitution, after all effective legal means for the protection of those right have been exhausted, unless otherwise provided by the Constitution."

plaints.¹⁰⁰ Even for such complaints, the ECtHR had stated, on several occasions, that the constitutional appeal did not provide adequate redress for certain aspects since the judgments of the Constitutional Court were merely of a “declaratory” nature in respect to violations it found in cases related to access to court and non-enforcement of final decisions.¹⁰¹ In particular, the Court noted that the Constitutional Court “did not make any awards of pecuniary and/or non-pecuniary damage, nor could it offer a clear perspective to prevent the alleged violation or its continuation”.¹⁰² For complaints under Article 5, or other Convention provisions, the Court typically maintained that “the Government failed to produce any relevant Constitutional Court decisions” which would prove the possibility of such a court ruling favourably in respect of such complaints.¹⁰³ However, the stance of the Strasbourg Court on the issue of effectiveness of the constitutional complaint is expected to change as soon as it is confronted with a case which, in line with the subsidiarity principle, should have been presented to the Constitutional Court for a domestic review.

Even with its previous jurisdictional limitations, the Constitutional Court was considered to be the forerunner in using the case-law of the ECtHR and referring to Convention provisions in Albania.¹⁰⁴ Statistically speaking, there are not many decisions where the Convention is not referred to.¹⁰⁵ Although there is

¹⁰⁰ See e.g. ECtHR, *Delijorgji v. Albania*, no. 6858/11, Judgment (2015), § 59 and the references cited therein.

¹⁰¹ See e.g. *Gjyli v. Albania*, no. 32907/07, Judgment 2009, §§ 27 and 55–61.

¹⁰² *Ibid.*, § 58. See also a recent case from 2020 where the Court recognised the efforts of the Constitutional Court in creating a long-established practice of finding violations on account of the applicants’ rights on non-enforcement of final domestic court decisions: ECtHR, *Sharxhi and Others v. Albania*, no. 10613/16, Judgment (2018), § 68. However, even here, the Court noted that no awards were made to the applicants after the violations had been found and no other means of redress were provided in relation to the continued non-enforcement or length of proceedings. See also some other decisions of the Constitutional Court of Albania: no. 63/17, 31 July 2017, no. 50/17, 3 July 2017, no. 35/17, 18 April 2017, no. 25/17, 27 March 2017, no. 89/16, 30 December 2016, no. 79/16, 27 December 2016, and no. 66/16, 7 November 2016. See also a few decisions of the Constitutional Court of Albania on the issue of proceedings being excessively long: no. 51/17, 3 July 2017, no. 42/17, 25 May 2017, no. 32/17, 30 March 2017, no. 22/17, 20 March 2017, no. 36/16, 27 June 2016, and no. 14/16, 10 March 2016.

¹⁰³ ECtHR, *Delijorgji v. Albania*, no. 6858/11, Judgment (2015), § 59.

¹⁰⁴ *Bianku* (2016) 31.

¹⁰⁵ Constitutional Court of Albania, Decision no. 2, 3 February 2010. See also, *Bianku* (2016) 31, for further statistics regarding references to the ECHR by the Constitutional Court of Albania.

room to argue as to whether the references were always used correctly¹⁰⁶ and whether the applicability of Convention principles was at the required level for a Constitutional Court, there is no room to argue that the Constitutional Court is not Convention-friendly. When reviewing legislation, for instance, the Constitutional Court tried to follow the jurisprudence of the ECtHR and have regard to the *res interpretata* effect.¹⁰⁷ It is interesting to note, however, that when deciding a case, the Constitutional Court never declares a violation of a Convention article. It might reason its decisions utilising the jurisprudence of the ECtHR and relying on the guarantees of a certain Convention provision but it never renders a law or a decision as being contrary to the Convention. It renders them only as unconstitutional.

Even in Article 6 cases, many violations found by the Strasbourg Court passed unnoticed by the Constitutional Court.¹⁰⁸ Such violations were, at times, of a fairly obvious nature and should have easily been detected by the Constitutional Court if the latter were to apply the well-established case-law of the Court which was widely available. For example, in the case of *Kaçiu and Kotorri v. Albania*, the Court found six different violations after both applicants were summarily rejected by the Constitutional Court under the general formula that “the applicants’ complaints did not raise any fair trial issues, but mainly concerned the assessment of evidence, which was the function of the lower courts”.¹⁰⁹ There is a serious issue with this line of reasoning that the Constitutional Court uses frequently, for at least two reasons. Firstly, the Constitutional Court should not consider itself as a supranational court which should not intervene in the face of grave and evident Convention violations and hide behind procedural formulations that do not suit the highest domestic court in respect of Convention application. Secondly, the Constitutional Court, especially now that it has all-encompassing jurisdiction to rule on all Convention related rights and not just Article 6 rights, should substantially increase its intervention by applying the ECHR and thus become a better filterer of possi-

¹⁰⁶ Constitutional Court of Albania, Decision no. 30, 1 December 2005; Constitutional Court of Albania, Decision No. 1, 6 February 2013.

¹⁰⁷ See e.g. Constitutional Court of Albania, Decision no. 1, 16 January 2017 with respect to the Law on Restitution of Property; Constitutional Court of Albania, Decision no. 243, 23 December 2016 with respect to the Vetting Law.

¹⁰⁸ ECtHR, *Topallaj v. Albania*, no. 32913/03, Judgment (2016); ECtHR, *Marku v. Albania*, no. 54710/12, Judgment (2014); ECtHR, *Çaush Driza v. Albania*, no. 10810/05, Judgment (2011).

¹⁰⁹ ECtHR, *Kaçiu and Kotorri v. Albania*, nos. 33192/07 and 33194/07, Judgment (2013), § 50.

ble violations at the domestic level. That is the only way in which the national courts, including constitutional courts, would be able to play their part in protecting Convention rights at home.

2. Constitutional Court v. Supreme Court: 'Convention talk'

Although the functions of the Constitutional Court and of the Supreme Court were clearly defined in the Constitution, there were clashes in practice, prior to the Justice Reform. In the past, the irritation mostly came from the Supreme Court which seemed to be displeased with frequent interferences by the Constitutional Court. The latter has been accused of being too judicially active, not exercising sufficient self-restraint and for turning itself into a fourth instance court.¹¹⁰ The analysis shows instances where the Supreme Court deliberately refused to follow the decisions of the Constitutional Court. In such cases, the Constitutional Court reacted by recalling the *erga omnes* effect of its decisions. It also reminded the Supreme Court that neglecting its binding decisions could set a dangerous precedent that would negatively affect the rule of law in Albania.¹¹¹ Lack of experience with constitutional justice review mechanisms has been described as one of the reasons for such a sensitive and delicate relationship between these two courts.¹¹² However, despite occasional tensions and conflicts, these two courts engage in cooperation and judicial dialogue regularly and will have to do so even more substantially following the expansion of the jurisdiction of the Constitutional Court to review decisions of the Supreme Court under any Convention allegation. The interplay between these two courts is constitutionally mandated through two mechanisms i.e. the incidental control procedure and the constitutional complaint procedure.¹¹³ These mechanisms compel them to engage in Convention dialogue.

Incidental control as a mechanism has been used by the Supreme Court as a means of unifying the national case-law, guaranteeing the independence of the judiciary,¹¹⁴ and aligning laws with the Constitution and the ECHR. In many cases, Convention rights were invoked as reasons for the 'unconventionality' of

¹¹⁰ Zaganjori (2012).

¹¹¹ See e.g. Constitutional Court of Albania, Decision no. 5, 7 February 2001; Constitutional Court of Albania, Decision no. 15, 17 April 2003; and Constitutional Court of Albania, Decision no. 14, 3 June 2009. See also Zaganjori (2012), 159.

¹¹² Zaganjori (2012).

¹¹³ For more on the relationship between the highest courts in Albania, see Zaganjori (2012).

¹¹⁴ *Ibid.*, 148.

a law side by side with similar constitutional provisions. For instance, based on a request by the Supreme Court, the Constitutional Court rendered the death penalty provision of the Criminal Code as unconstitutional for being incompatible with Article 2 of the ECHR.¹¹⁵ In another case, the Constitutional Court rendered as unconstitutional certain provisions of a law concerning restitution of property for being in breach of the principle of legal certainty according to the ECtHR case-law cited to support its reasoning.¹¹⁶ Contrary to allegations of unconstitutionality of four articles of the Labour Code presented by the Supreme Court, the Constitutional Court decided that there were no discriminatory effects and that the law is compatible with Article 14 of the ECHR.¹¹⁷ Even in cases in which the Constitutional Court decides that the Convention has not been violated, it tends to refer to the jurisprudence of the ECtHR offering reasons as to why the law is compatible Convention guarantees.¹¹⁸ In incidental procedure review cases, there are also instances where the Convention or the case-law of the ECtHR is not referred to at all, either because such cases entail specific national peculiarities whose analysis may be pursued without such references,¹¹⁹ or because, since 2011, the Constitutional Court has started to refer more often to its own case-law which, when tracing it back, does include references to the Court's case-law.¹²⁰

The constitutional complaint mechanism, on the other hand, supports another line of cooperation between the Supreme Court and the Constitutional Court. It is mostly here that the tensions and conflicts between these two courts tended to arise. The case of *Xheraj* can serve as an illustrative example.¹²¹

¹¹⁵ Constitutional Court of Albania, Decision no. 65, 10 December 1999.

¹¹⁶ Constitutional Court of Albania, Decision no. 27, 26 May 2010.

¹¹⁷ Constitutional Court of Albania, Decision no. 33, 12 September 2007.

¹¹⁸ See e.g. Constitutional Court of Albania, Decision no. 30, 17 June 2010, a case filed by the Joint Colleges of the Supreme Court concerning the alleged incompatibilities of the Criminal Procedure Code on issues related to trial *in absentia*. The reasoning of the Constitutional Court reflects extensive reference to the jurisprudence of the ECtHR which was utilised for declaring this law as being compatible with Convention guarantees.

¹¹⁹ See e.g. Constitutional Court of Albania, Decision no. 21, 7 June 2007, a case where certain provisions of the Law on the Organisation of the Judicial Power were rendered as unconstitutional without any reference to the ECtHR or the Convention. See also Constitutional Court of Albania, Decision no. 1, 12 January 2011, a case in which certain provisions of the Law on Banks were invalidated. See also Constitutional Court of Albania, Decision no. 52, 5 December 2012, a case related to electricity bills.

¹²⁰ See e.g. Constitutional Court of Albania, Decision no. 47, 26 July 2012.

¹²¹ ECtHR, *Xheraj v. Albania*, no. 37959/02, Judgment (2008). The ECtHR had found a violation of Article 6 § 1 ECHR because the Albanian courts allowed prosecutors leave to appeal out of time.

Briefly, the case concerned the reopening of a final acquittal judgment by the Supreme Court by allowing the review of an out-of-time appeal filed by the prosecutor.¹²² At the domestic level, the applicant was acquitted of all murder charges and these decisions have become final and binding in the absence of appeals.¹²³ This led the ECtHR to find that “the Supreme Court infringed the principle of legal certainty” and that, in view of the particular circumstances of the case,

the most appropriate form of redress for this continuing situation would be for the applicant’s final acquittal of 14 December 1998 to be confirmed by the authorities and his conviction in breach of the Convention to be erased with effect from that date.¹²⁴

This meant that the execution of the *Xheraj* judgment required the reopening of criminal proceedings at the domestic level. The Criminal Procedure Code, at the time, did not foresee that a case might be reopened following a violation at the level of the ECtHR. Owing to the absence of a legal basis, the Supreme Court refused the applicant’s request to reopen the criminal proceedings.¹²⁵ The applicant complained before the Constitutional Court. The latter maintained that, despite the existence of a legal vacuum, a solution must be found in order to implement the ECtHR’s judgment.¹²⁶ It pointed to the Supreme Court that a provision allowing a reopening in civil proceedings is foreseen by the Civil Procedure Code and ordered that it should take this into consideration when deciding the case which was remanded to them, following the finding of a violation by the Constitutional Court.¹²⁷ Yet, the Supreme Court refused to follow the decision of the Constitutional Court.¹²⁸ The applicant appealed for a second time. In its second judgment, the Constitutional Court decided to examine the case in full court, through a court hearing, and ordered the Supreme Court to reopen the case immediately while reminding them again of the dangerous precedent of not following a final and binding decision of the Constitutional Court.¹²⁹ An end to the *Xheraj* story came when the Supreme Court did ultimately open the way for the conviction of the applicant to be cancelled and deleted from the criminal record registers, as the

¹²² *Ibid.*, § 58.

¹²³ *Ibid.*, §§ 6-31.

¹²⁴ *Ibid.*, § 82.

¹²⁵ Supreme Court of Albania, Decision no. 417/2010, 7 March 2012.

¹²⁶ Constitutional Court of Albania, Decision no. 22, 5 May 2010.

¹²⁷ *Ibid.*

¹²⁸ Supreme Court of Albania, Decision no. 1042/2010, 15 January 2010.

¹²⁹ Constitutional Court of Albania, Decision no. 20, 28 April 2010.

ECtHR had indicated in its judgment.¹³⁰ The execution of the *Xheraj* judgment has now been confirmed by the Committee of Ministers. Such case-law incentivised the national authorities to amend the Criminal Procedure Code so that a reopening of proceedings following a finding of a violation in Strasbourg is now possible.

Contrary to the heated miscommunication among Albania's highest courts in relation to the case of *Xheraj*, the developments around the case of *Dauti*¹³¹ reflect a more optimistic aspect of professional dialogue between these two national courts and the ECtHR – in relation to their Convention talk. Beyond the applicant himself, the *Dauti* case had two other interrelated impacts, namely the amendments of previous legislation and the modification of domestic judicial practice. To simplify the case, the gist of the matter, dating back to 2005, was whether a second instance Appeals Commission, established by the Ministry of Health, responsible to review appeals of a first instance Commission for Medical Examination regarding work-related benefits, fulfils the criteria of a tribunal established by law and whether its decisions should be subject to scrutiny by regular courts. When the applicant's request for work-related benefits following a serious accident at work was rejected by both commissions, he attempted to challenge the legality of such decisions before the regular courts in Albania.¹³² His complaints were rejected in all regular court instances under the rationale that the "procedure before the Appeals Commission was final and not subject to challenge before the courts".¹³³ The Supreme Court also dismissed the applicant's complaints confirming the stance of the previous courts as did the Constitutional Court. The latter failed to address the complaint about the infringement of his right of access to a court due to the impossibility of obtaining judicial review of the decisions of the Appeals Commission.¹³⁴ As a result, the applicant brought his case before the Strasbourg Court repeating the same allegations on the infringement of his right of access to a court. The ECtHR maintained that this right had indeed been violated considering that "the Appeals Commission does not constitute an 'independent and

¹³⁰ Supreme Court of Albania, Decision no. 01226/2011, 7 March 2012. The case-law of the ECtHR shows that Albania faced similar issues in executing other judgments of the ECtHR which required the reopening of proceedings at the domestic level as a means to redress the violation. In this respect, see e.g. ECtHR, *Laska and Lika v. Albania*, nos. 12315/04 and 17605/04, Judgment (2010); ECtHR, *Caka v. Albania*, no. 44023/02, Judgment (2009); and ECtHR, *Berhani v. Albania*, no. 847/05, Judgment (2010).

¹³¹ ECtHR, *Dauti v. Albania*, no. 19206/05, Judgment (2009).

¹³² *Ibid.*, §§ 12-20.

¹³³ *Ibid.*, § 17.

¹³⁴ *Ibid.*, § 19.

impartial tribunal' and that its decisions (...) could not be challenged before a domestic court".¹³⁵ Following this judgment, the Albanian authorities amended the national legislation so that the decisions of such commissions can be challenged before the regular courts as any other administrative acts.¹³⁶ As a result, the Committee of Ministers closed the case and marked it as implemented by the Albanian authorities.¹³⁷

However, in 2021, the matter of the implementation of the *Dauti* case got very interestingly re-actualised in the Albanian judiciary, this time with respect to the implementation of the newly enacted post-*Dauti* legislation by the regular courts. The Supreme Court decided to pause the review of the case and send it for incidental control review before the Constitutional Court by posing, *inter alia*, several interesting questions regarding the compatibility of the new legislation with the ECHR, namely:

- (i) Can the Supreme Court reject the application of a law and apply the Constitution and international law directly in a particular case?
- (ii) What is the legal force of the conclusions of the Committee of Ministers in cases when they state that the general measures indicated by the ECtHR have been implemented, but in fact the analysis shows that the State Party has not in fact respected the case-law of the ECtHR and that there is still a violation of the Convention (with respect to new legislation)?
- (iii) Did the new legislation respect the ECtHR case-law in *Dauti* and does the newly established commission fulfil all the elements of Article 6?¹³⁸

The Constitutional Court, quite ambiguously, rejected a request to review the merits of the case under the rationale that these matters fall under the domain of "interpretation of law" as a natural function of the Supreme Court.¹³⁹ Even though it did not answer any of the questions posed by the referring court, nor did it review the merits of the case, the Constitutional Court stated that the new law guarantees access to a court¹⁴⁰ and that in deciding this case, the Supreme Court should decide itself whether there is room for unification, de-

¹³⁵ Ibid., § 55.

¹³⁶ Committee of Ministers, Resolution CM/ResDH(2016)210, 13 September 2016. See also, Action Report no. DH-DD(2016)684, 27 May 2016, §§ 5-19.

¹³⁷ Ibid.

¹³⁸ Ibid., § 22.

¹³⁹ Constitutional Court of Albania, Decision no. 55, 31 March 2021.

¹⁴⁰ This declaration of the Constitutional Court on the merits of the case was at odds with declaring the referral as inadmissible considering that the constitutionality of a provision cannot be indirectly confirmed by means of a decision which does not review the merits of the questions posed by the parties. The Supreme Court in its decision, § 125, disagrees with this stance of the Constitutional Court and goes on to elaborate its reasoning to the contrary.

velopment or change of judicial practice.¹⁴¹ It is regrettable that the Constitutional Court did not answer any of the important questions that might arise in the implementation process of the ECtHR's judgment. Such matters do not seem to be of a purely 'legal nature' as the Constitutional Court opined as they involve important constitutional questions on the issue of setting aside a law when such a law is considered to contradict the Convention or ECtHR case-law.

Nevertheless, following the rejection of the request of the Constitutional Court to deal with the merits of these important questions, the Supreme Court rendered a decision on the unification of judicial practice and answered the questions itself.¹⁴² The Supreme Court concluded that the legislation enacted to implement the *Dauti* case is contrary to the ECtHR's case-law.¹⁴³ In its analysis, which is by far the most excellent decision that the Supreme Court has ever produced in relation to Convention application, the Supreme Court noted that the Committee of Ministers has declared the case as executed and closed for further review following Albania's amendments to legislation, but it nevertheless considered that "the control of constitutionality and conventionality" of the new legislation "cannot be halted only because (...) the Committee of Ministers has concluded that the general measures undertaken by Albania" have been sufficient to implement the *Dauti* case.¹⁴⁴ In this respect, the Supreme Court added that the decisions of the Committee of Ministers, despite their important role in overseeing the implementation of ECtHR decisions in accordance with Article 46, cannot be equated to the mandatory legal force that the decisions of the ECtHR have.¹⁴⁵

On the question of whether the new legislation respects the *Dauti* judgment, the Supreme Court concluded that "based on the constitutional status of the ECHR, regular courts cannot be impeded from setting aside the application of a law when they evaluate that it is contrary to [the ECHR]."¹⁴⁶ On the question of whether the new law has managed to create a commission which fulfils the criteria of a quasi-judicial body as established by the Court's case-law, the Supreme Court concluded that such legislation "does not fulfil the standards set by the ECtHR in the case of *Dauti v. Albania* and the constitutional

¹⁴¹ Ibid.

¹⁴² Supreme Court of Albania, Decision no. 00-2021-1317, 22 July 2021.

¹⁴³ Ibid.

¹⁴⁴ Ibid., § 47.

¹⁴⁵ Ibid., § 46.

¹⁴⁶ Ibid., § 47.

standards of a tribunal established by law".¹⁴⁷ Having noted these findings, the Supreme Court concluded that the provision of the new law which is contrary to the ECtHR case-law shall remain "inoperable" and that on all occasions when this provision needs to be applied, the national courts must apply the *Dauti* case-law directly by allowing the contestation of the Commissions' decisions before the regular courts.¹⁴⁸

The analysis of the Convention talk between the Supreme Court and the Constitutional Court reflects two types of scenarios: negative and positive. On the one hand, the developments following the *Xheraj* case showed that communication between the two highest courts was fragile and also that the belated implementation of the Court's judgment was due to the Supreme Court's objection against respecting the decisions of the Constitutional Court. Fortunately, this was an isolated case and such scenarios have not been repeated in the course of dialogue between these two courts. On the other hand, the developments following the *Dauti* case showed a professional and respectful cooperation between these two courts. Generally speaking, it seems that the miscommunication difficulties between them pertain to the past and there is already proof to show that their Convention dialogue will evolve positively in the following years, especially after the expansion of the jurisdiction of the Constitutional Court and the reform of the benches in both courts. This is a welcome development that will undoubtedly contribute to making these two courts better 'Convention partners' of the ECtHR at the national level.

¹⁴⁷ *Ibid.*, § 121.

¹⁴⁸ *Ibid.*, § 159.

IV. Albania v. Strasbourg Court: Impact and Effects

1. Overview of the Court's Case-Law against Albania

The jurisprudence of the Strasbourg Court in respect of Albania, although limited compared to Convention issues at the domestic level, reflects some of the most profound problems in the Albanian judiciary and society. To date, there are no Grand Chamber cases against Albania. Two cases were reflected in Case Reports and two others are marked as Key Cases. Most of the violations were found under the domain of Article 6 but there are other important cases where violations of other provisions of the Convention have been found, namely Articles 2, 3, 5, 7, 8, 13, 34 and Article 1 of Protocol No. 1. To date, the Court has declared the need for general and/or individual measures to be taken by Albania within the meaning of Article 46 of the Convention on ten occasions while on one particular occasion a systemic problem was identified in relation to the restitution of property. The most concerning aspect of the violations is the fact that Albania has been found in breach of the right to an effective remedy on 29 occasions – a statistic which clearly reflects issues with the availability and effectiveness of domestic legal remedies to address Convention matters at the national level. The following part of the analysis, with the specificities that this chapter calls for, will focus on six categories of cases:

- (1.1) [Cases under Article 46: general and/or individual measures ordered](#)
- (1.2) [Cases with the highest number of violations: Article 6 issues](#)
- (1.3) [Cases under Article 13: lack of effective domestic remedies](#)
- (1.4) [Cases with violations under other convention articles](#)
- (1.5) [Cases declared admissible with no violation found](#)
- (1.6) [Other important cases related to exhaustion of domestic remedies.](#)

1.1. Cases under Article 46: General and/or Individual Measures Required

The Strasbourg Court has invoked Article 46 in respect of Albania on ten occasions in relation to issues of restitution of property, length of proceedings, reopening of proceedings following an ECtHR judgment and the detention of mentally ill persons in health institutions and in prisons.

In the first category of cases, namely those which concern restitution of property, the Court pointed out the same problem in several instances. Before going into the particularities of such cases and the general measures which were required by the Court, there is a need to provide some background information regarding the issue of restitution of property in Albania.

During the harsh communist regime which lasted for four decades, individuals in Albania were not entitled to own any property. This led to the mass seizure of property from those who had previously owned houses, plots of land or any other property under their name. Following the fall of communism and entry into a relatively fragile democratic system, Albania seemed inclined to make things right and decided to restore all confiscated property to former owners or provide them compensation *in lieu* where a full restoration was not possible for objective reasons. The legislation to put this policy ideal in place was enacted in 1993, two years after the fall of communism.¹⁴⁹ Today, observing from a distance, this decision might be considered to have been rushed, euphoric and lacking a prior cost-assessment analysis of the magnitude of the obligations that Albania was about to assume. While the decision was very popular at the time, there is no evidence that the authorities back then were concerned with how such legislation would be implemented in practice and how it would affect the rights and freedoms of the individuals who had legitimate claims. According to the well-established case-law of the ECtHR, Article 1 of Protocol No.1 to the ECHR does not oblige States Parties to restore property that was confiscated by former regimes.¹⁵⁰ Nevertheless, that provision generates an ECHR protected right from the moment when a State Party chooses to enact legislation providing for full or partial restoration of property.¹⁵¹

¹⁴⁹ See e.g. Law no. 7698 of 15 April 1993, Official Gazette, Volume 10, p. 656.

¹⁵⁰ ECtHR, *Maria Atanasiu and Others v. Romania*, nos. 30767/05 and 33800/06, Judgment (2010), §§ 134-37.

¹⁵¹ ECtHR, *Kopecký v. Slovakia* [GC], no. 44912/98, Judgment, Judgment (2004), § 35.

As a result of this legislation, domestic authorities began the process of recognising the property rights of former owners. Many of those decisions became final and binding but the Albanian authorities failed to execute them, mainly due to lack of funds and poor organisation and planning of the whole restitution process. This seems to confirm the argument that the decision was mostly based on popularity rather than proper analysis and commitment to ensure a fair process for all those affected. While many individuals passed away while waiting for the execution of the decisions awarding them restitution or some other form of compensation, others continue to wait to this day, almost three decades after this process was initiated. Property rights owners made repeated attempts to have their decisions enforced in Albania by seeking relief from national courts and other State authorities. Failing to find redress at home, former owners started to address their grievances in Strasbourg,¹⁵² which rendered their complaints admissible and played an important role in showing Albania specific ways in which this issue could be resolved.

In 2006, the first judgment assessing the issue of restitution of property in Albania was rendered.¹⁵³ It was followed by many other judgments with joined applications which, in substance, repeated the same violations, namely: (i) a violation of Article 6 for failure to enforce decisions rendered by the national authorities ordering restitution or compensation; (ii) a violation of Article 13 in respect of the ineffectiveness of the domestic remedies to secure enforcement of such final and binding decisions; and (iii) a violation of Article 1 of Protocol No. 1 in respect of the applicants' right to peaceful enjoyment of their property.¹⁵⁴

As a result, in 2007, in *Ramadhi and Others* the Court, in addition to finding the same violations as indicated above, also invoked Article 46 for the first time so as "to indicate the type of measures that the Albanian State could take in order to put an end to the nature and cause of the breaches found in the present case".¹⁵⁵ In this particular case, the Court declared the restitution of property as a systemic problem by noting that: (i) the violations originate in a "widespread problem affecting a large number of people" unjustly deprived of their

¹⁵² The first application was lodged in 2002.

¹⁵³ ECtHR, *Beshiri and Others v. Albania*, no. 7352/03, Judgment (2006).

¹⁵⁴ ECtHR, *Gjonbocari and Others v. Albania*, no. 10508/02, Judgment (2007), and ECtHR, *Driza v. Albania*, no. 33771/02, Judgment (2007).

¹⁵⁵ ECtHR, *Ramadhi and Others v. Albania*, no. 38222/02, Judgment (2007), §§ 89-94. See other post-*Ramadhi and Others* cases with similar violations: ECtHR, *Nuri v. Albania*, no. 12306/04, Judgment (2009); ECtHR, *Hamzaraj v. Albania* (no. 1), no. 45264/04, Judgment (2009); and ECtHR, *Eltari v. Albania*, no. 16530/06, Judgment (2011).

right to peaceful enjoyment of property which stem from the non-enforcement of final decisions awarding them some form compensation as foreseen by the national legislation; (ii) “there are already dozens of identical applications before the Court” which is an aggravating factor when it comes to the “State’s responsibility under the Convention and is also a threat for the future effectiveness of the system”; and that (iii) the legal vacuums detected in the applicants’ cases may give rise to many other well-founded applications.¹⁵⁶ After noting these facts the Court also maintained as follows:

In theory it is not for the Court to determine what may be the appropriate measures of redress for a respondent State to perform in accordance with its obligations under Article 46 of the Convention. However, the Court’s concern is to facilitate the rapid and effective suppression of a malfunctioning found in the national system of human rights protection. In that connection and having regard to the systemic situation which it has identified above (...) the Court considers that general measures at national level are undoubtedly called for in the execution of the present judgment.

It considers that the respondent State [Albania] should, above all, introduce a remedy which secures genuinely effective redress for the Convention violations identified in the instant judgment as well as in respect of all similar applications pending before it, in accordance with the principles for the protection of the rights laid down in Articles 6 § 1 and 13 of the Convention and Article 1 of Protocol No. 1. By introducing the relevant remedy, the State should, *inter alia*, designate the competent body, set out the procedural rules, ensure compliance with such rules in practice and remove all obstacles to the award of compensation under the Property Act. These objectives can be achieved by ensuring the appropriate statutory, administrative and budgetary measures. These measures should include the adoption of the maps for the property valuation in respect of those applicants who are entitled to receive compensation in kind and the designation of an adequate fund in respect to those applicants who are entitled to receive compensation in value, this in order to make it possible for all the claimants having successful Commission’s decisions in their favour to obtain speedily the lands or the sums due. Such measures should be made available as a matter of urgency.¹⁵⁷

Following this case, the Strasbourg Court started to become overwhelmed with applications containing identical complaints. With national authorities not fulfilling their obligations at the domestic level and not undertaking the general measures suggested by the Court, the latter invoked Article 46 requiring similar measures in two other follow-up cases,¹⁵⁸ before being obliged to initiate a pilot-judgment procedure due to the escalation of the problem and

¹⁵⁶ ECtHR, *Ramadhi and Others v. Albania*, no. 38222/02, Judgment (2007), §§ 90-91.

¹⁵⁷ *Ibid.*, §§ 93-94.

¹⁵⁸ ECtHR, *Driza v. Albania*, no. 33771/02, Judgment (2007), §§ 121-126, ECtHR, and *Eltari v. Albania*, no. 16530/06, Judgment (2011), §§ 97-100.

lack of constructive reaction from the Albanian authorities.¹⁵⁹ The *Manushaqe Puto and Others* pilot judgment built on the existing case-law on Article 46 and went on to emphasise that “the Court is seriously concerned that the number of well-founded applications registered could increase and, therefore, represent a critical threat to the future effectiveness of the Convention machinery”.¹⁶⁰ Further, the Court maintained that the application of the pilot-judgment procedure was necessary considering “the large number of problems besetting the compensation mechanism which continue to persist after the adoption of judgments in the cases of *Driza, Ramadhi and Others, Vrioni and Others* and *Delvina*” as well as due to the “urgent need to grant applicants speedy and appropriate redress at the domestic level”.¹⁶¹ In particular, the Court criticised: (i) the frequent legislative amendments to the property legislation by expressing concerns over legal certainty due to the complexity of legal provisions and the frequent changes which led to inconsistent judicial practice at the domestic level;¹⁶² (ii) the lack of “accurate and reliable information as regards the overall number of administrative decisions recognising property rights and awarding compensation”;¹⁶³ and, (iii) the fact that the Government’s Action Plan lacks any specific reference to time-limits.¹⁶⁴ Consequently, the Court considered that Albania “should take general measures, as a matter of urgency, in order to secure in an effective manner the right to compensation”.¹⁶⁵ In particular, the Court suggested that the Albanian authorities should undertake the following measures in order to remedy the problem at home, namely: (i) the compilation of a database which would estimate “the global compensation bill accompanied by a carefully devised and clear compensation scheme”; (ii) the elimination of cumbersome compliance procedures for the applicants; (iii) the reconsideration of payment modalities due to the considerable burden on the budget of the State and the use of alternative forms of compensation as provided by the legislation in force; (iv) the establishment of an efficient and transparent decision-making process which

¹⁵⁹ ECtHR, *Manushaqe Puto and Others v. Albania*, no. 604/07 and 3 others, Judgment (2012). See other cases deriving from the same structural problem: ECtHR, *Vrioni and Others v. Albania*, nos. 35720/04 and 42832/06, Judgment (2010), and ECtHR, *Delvina v. Albania*, no. 49106/06, Judgment (2011).

¹⁶⁰ ECtHR, *Manushaqe Puto and Others v. Albania*, no. 604/07 and 3 others, Judgment (2012), § 108. It should be noted that this is the first and only pilot judgment rendered against Albania.

¹⁶¹ *Ibid.*, § 109.

¹⁶² *Ibid.*, § 110.

¹⁶³ *Ibid.*, § 111.

¹⁶⁴ *Ibid.*, § 116.

¹⁶⁵ *Ibid.*, § 110.

enhances public confidence; and, (v) the setting of “realistic, statutory and binding time-limits in respect of every step of the process”.¹⁶⁶ The Court gave Albanian authorities 18 months to fulfil their obligations while, at the same time, it adjourned cases filed subsequent to this pilot judgment.¹⁶⁷

After the *Puto* pilot-judgment deadline of 18 months passed and after Albania neglected the opportunity to redress the issue domestically, the Court resumed finding violations and awarding considerable amounts of just satisfaction. *Karagjozi and Others*¹⁶⁸ was the first judgment rendered by the Court following the ineffective pilot-judgment procedure. It is an important judgment for two reasons. Firstly, it exposed the lack of urgency on the part of Albania to deal seriously with the restitution of property issue considering that despite the extensively reasoned *Puto* judgment, the Albanian authorities insisted that the applications should have been declared inadmissible for failing to exhaust the same legal remedies that had been declared ineffective on numerous occasions.¹⁶⁹ Secondly, it highlighted the Courts’ determination to hold Albania accountable for the limited progress in executing its pilot judgment. On the same date as *Karagjozi and Others*, the Court rendered two other judgments addressing the same systemic problem.¹⁷⁰ Following that, the Court continued to issue judgments and to award just satisfaction which caused the post-*Manushaqe Puto* bill to rise to 25 million euros.¹⁷¹ The Court awarded these amounts of compensation based on the property valuation maps produced by Albania and without any prejudice to the future development of an effective compensation mechanism.¹⁷²

¹⁶⁶ Ibid., §§ 110-118.

¹⁶⁷ Ibid., §§ 110-121, for an overview of all general measures that the Albanian authorities had to undertake in order to fully implement this judgment of the Court.

¹⁶⁸ ECtHR, *Karagjozi and Others v. Albania*, nos. 25408/06 and 9 others Judgment, (2014).

¹⁶⁹ Ibid., §§ 49-54.

¹⁷⁰ See e.g. ECtHR, *Halimi and Others v. Albania*, no. 33839/11, Judgment (2016), and ECtHR, *Aliçka and Others v. Albania*, nos. 33148/11 and 5 others, Judgment (2016).

¹⁷¹ This result is reached if one calculates the just satisfaction awards declared by the Court in the following cases after the *Puto*-Judgment: ECtHR, *Metalla and Others v. Albania*, nos. 30264/08 and 3 others, Judgment (2015); ECtHR, *Rista and Others v. Albania*, nos. 5207/10 and 6 others, Judgment (2016); ECtHR, *Aliçka and Others v. Albania*, nos. 33148/11 and 5 others, Judgment (2016); ECtHR, *Halimi and Others v. Albania*, no. 33839/11, Judgment (2016); ECtHR, *Karagjozi and Others v. Albania*, nos. 25408/06 and 9 others Judgment, (2014); and ECtHR, *Qerimi and Canaj v. Albania*, nos. 12878/10 and 74858/12, Judgment (2016).

¹⁷² ECtHR, *Manushaqe Puto and Others v. Albania*, no. 604/07 and 3 others, Judgment (2012), §125 where it is specifically provided that: “In view of the ineffective nature of the current system of compensation and having regard, in particular, to the fact that many years have passed since the applicants were initially awarded compensation, the Court, without prejudging possible future developments with regard to the establishment of an effective

Contrary to the optimistic belief that a pilot judgment would activate the domestic machinery of human rights protection in Albania, it took several years more than the foreseen deadline before the Committee of Ministers concluded that the pilot judgment had been implemented,¹⁷³ following frequent reproaches on the evident lack of progress.¹⁷⁴ In 2020, the Court issued a very important decision on admissibility in the case of *Beshiri and Others* where it assessed the effectiveness of the Property Act 2015 as a domestic remedy introduced by the Albanian authorities after the delivery of the *Manushaqe Puto* judgment with a view to resolving the issue of restitution of property.¹⁷⁵ In this case, the ECtHR recalled that the previous pilot judgment “was conceived as a response to the growth in the Court’s caseload, caused by a series of cases deriving from the same structural or systemic dysfunction.”¹⁷⁶ It must be noted that before *Manushaqe Puto* inspired legislative changes, former owners (under the preceding legislation) were compensated based on the market value of their lost property, which in practice meant huge amounts of money for centrally located plots of land in the capital city and other central locations. However, the new remedy drastically reduced the compensation scheme which (perhaps rightfully) led to many applicants’ complaints regarding the appropriateness of redress, the adequacy of compensation as well as the accessibility and efficiency of the remedy. After an analysis of the new remedy, the Court seemed keen to confirm its effectiveness on all possible grounds,¹⁷⁷ despite there being many aspects which interfered negatively with the applicants’ rights when compared to others who had already benefited from a much more favourable compensation scheme. In the most debated part and perhaps the most important part for the applicants, the Court in substance confirmed that the drastic lowering of the compensation scheme did not render the adequacy of compensation contrary to the Convention and that:

compensation mechanism, considers it reasonable to award the applicants a sum which would represent a final and exhaustive settlement of the cases before it ...”

¹⁷³ Committee of Ministers, Resolution CM/ResDH(2018)349 of 20 September 2018.

¹⁷⁴ Committee of Ministers, Interim Resolution CM/Res/DH(2013)115 of 6 June 2013. See additionally, Committee of Ministers, 1164th meeting, 7 March 2013 and 1186d meeting, 5 December 2013.

¹⁷⁵ ECtHR, *Beshiri and Others v. Albania*, no. 29026/06 and 11 others, Decision (2020).

¹⁷⁶ *Ibid.*, § 170.

¹⁷⁷ *Ibid.*, § 170. More specifically, see §§ 179-188 in relation to the Court’s reasoning for confirming (i) the appropriate form of redress; §§ 189-203 in relation to the Court’s reasoning for confirming (ii) the adequacy of compensation; and, finally, §§ 204-215 in relation to the Court’s reasoning for confirming (iii) the accessibility and efficiency of the remedy.

In the Court's view, the 10% minimum threshold for the amount of compensation could be considered reasonable in the specific context of the restitution and compensation of properties process in Albania in view of the overall level of sacrifice imposed by the new compensation scheme on the former owners, including the applicants, compared to their expectation to receive current market value compensation which flowed from prior legislation.¹⁷⁸

Following this inadmissibility decision, the Court cleared a considerable part of its docket by summarily rejecting hundreds of pending applications,¹⁷⁹ thus closing, for the time being, the Albanian property restitution saga. However, the truth remains that at the domestic level, the issue of restitution of property is nowhere near its conclusion with thousands of legitimate applicants awaiting the enforcement of their decisions and others still waiting to be awarded a decision recognising their property rights.

In the second category of cases under Article 46, the Court addressed the issue of length of proceedings. The practice of remanding cases repeatedly to lower courts for fresh examination¹⁸⁰ or leaving cases completely unattended for many years in one court instance¹⁸¹ are undoubtedly systems where length issues are prone to exist.¹⁸² Albania's issues with length of proceedings became an issue at the Strasbourg level in 2007 when *Gjonbocari and Others v. Albania* was rendered.¹⁸³ The Court found a breach of Article 6 § 1 of the ECHR on account of the excessive length of the third set of proceedings¹⁸⁴ as well as on account of the frequency of remittals which were already considered a deficiency of the Albanian legal system.¹⁸⁵ In addition, the Court found a violation of Article 13 of the ECHR as the applicant had no domestic remedy through which he could enforce his right to a hearing within a reasonable time.¹⁸⁶ It is interesting to note the observations of Albanian authorities when they were first presented with length of proceedings claims. They contended that such

¹⁷⁸ Ibid., § 196.

¹⁷⁹ ECtHR, *Gjergo and Others v. Albania*, no. 13618/10 and 76 others, Decision (2020), and ECtHR, *Ruci and Others v. Albania*, nos. 56937/10 and 191 others, Decision (2021).

¹⁸⁰ ECtHR, *Marini v. Albania*, no. 3738/02, Judgment (2007), § 145.

¹⁸¹ See e.g. ECtHR, *Bici v. Albania*, no. 5250/07, Judgment (2015), § 42. The proceedings lasted for 11 years, 9 months and 18 days before one level jurisdiction.

¹⁸² ECtHR, *Kudła v. Poland* [GC], no. 30210/96, Judgment (2000), and ECtHR, *Frydender v. France* [GC], no. 30979/96, Judgment (2000).

¹⁸³ ECtHR, *Gjonbocari and Others v. Albania*, no. 10508/02, Judgment (2007).

¹⁸⁴ Ibid., § 60.

¹⁸⁵ ECtHR, *Marini v. Albania*, no. 3738/02, Judgment (2007), § 145. See, *mutatis mutandis*, ECtHR, *Kaçiu and Kotorri v. Albania*, nos. 33192/07 and 33194/07, Judgment (2013), § 154, in the context of criminal proceedings.

¹⁸⁶ ECtHR, *Gjonbocari and Others v. Albania*, no. 10508/02, Judgment (2007), § 82.

remedy did not exist as excessive length of proceedings “was not a characteristic feature of the Albanian judicial system” and that the case-law of the Court “did not compel States to set up new remedies”.¹⁸⁷ While the first claim was an attempt to argue the inarguable, the second claim shows a disregard for the interpretative authority of the Court’s case-law.¹⁸⁸ In their observations, Albanian authorities contented that the applicant could have filed an application with the Constitutional Court, an argument which the Court rejected since there was no evidence of its effectiveness in practice.¹⁸⁹ An analysis of post-*Gjonbocari and Others* judgment illustrates the fact that Albanian authorities were not sufficiently preoccupied with the Court’s findings considering that in follow-up cases, the Court had to repeat its previous findings while refuting other (and similar) ungrounded observations of the Albanian authorities.¹⁹⁰ This time, the domestic authorities did not claim that excessive length of proceedings was not an issue in Albania; they did claim, however, that there were effective legal remedies that the applicant had not made use of, such as asking the President of the Constitutional Court to impose a fine or to file a claim against the High Judicial Council before domestic courts.¹⁹¹ The Court responded to such arguments by maintaining that the Albanian authorities had not provided any evidence that such remedies were effective in practice and therefore, in line with the criteria established in the case of *Kudła v. Poland*,¹⁹² they could not be considered as effective.

Despite these judgments and the Court’s clear recommendations¹⁹³ the situation at home did not improve. As a consequence, in *Luli and Others*¹⁹⁴, the Court had to go further and invoke Article 46 as a means of addressing the concern regarding the “malfunction found in the national system of human rights protection” which calls for the introduction of “a domestic remedy as

¹⁸⁷ Ibid., § 71.

¹⁸⁸ The ECtHR already had a practice of suggesting that States Parties set up new remedies to tackle length of proceedings, see e.g. ECtHR, *Scordino v. Italy* (no. 1) [GC], no. 3613/97, Judgment (2006); ECtHR, *Sürmeli v. Germany* [GC], no. 75529/01, Judgment (2006); ECtHR, *Kudła v. Poland* [GC], no. 30210/96, Judgment (2000); and ECtHR, *Frydlender v. France* [GC], no. 30979/96, Judgment (2000).

¹⁸⁹ ECtHR, *Gjonbocari and Others v. Albania*, no. 10508/02, Judgment (2007), § 80.

¹⁹⁰ ECtHR, *Mishqjoni v. Albania*, no. 18381/05, Judgment (2010).

¹⁹¹ Ibid.

¹⁹² ECtHR, *Kudła v. Poland* [GC], no. 30210/96, Judgment (2000).

¹⁹³ ECtHR, *Gjonbocari and Others v. Albania*, no. 10508/02, Judgment (2007), § 76 where it is specifically stated that: “Some States have understood the situation perfectly by choosing to combine two types of remedy, one designed to expedite the proceedings and the other to afford compensation ...”

¹⁹⁴ ECtHR, *Luli and Others v. Albania*, nos. 64480/09 and 4 others, Judgment (2014).

regards undue length of proceedings”.¹⁹⁵ It noted that excessive length of proceedings is becoming “a serious deficiency in domestic legal proceedings” and that the growing number of applications is a concerning issue for the Court’s case load and the effectiveness of the ECHR mechanism.¹⁹⁶ The Court also analysed two cases of the Constitutional Court where the latter had declared a violation of the right to fair trial within a reasonable time, as a follow-up to the Court’s case-law. However, the Court considered these declarative findings of violations to be ineffective since no awards were made and no other means of redress were provided by the Constitutional Court.¹⁹⁷ The Court then proceeded to provide a list of general measures to be undertaken by the Albanian authorities, including the duty to introduce a remedy for undue length of proceedings.¹⁹⁸ Subsequent case-law of the Court confirmed that the Albanian authorities had not yet managed to comply with the requested general measures.¹⁹⁹

The findings in *Luli and Others* were firmly reiterated by the Court in the *Topallaj* case,²⁰⁰ since the Albanian authorities had failed to comply with the Court’s judgment and introduce an effective legal remedy to tackle length at the domestic level. The Court “urge[d] the respondent State, as a matter of priority, to adopt general measures as indicated in paragraph 118 of that judgment [*Luli and Others*], and to introduce an effective domestic remedy for the excessive length of proceedings”.²⁰¹ A year after this judgment, the Albanian authorities introduced a new remedy to address unreasonable length of proceedings which entered into force in late 2017.²⁰² Its effectiveness was only recently reviewed in the case of *Bara and Kola*.²⁰³ While in the particular circumstances of this case the remedy was not effective,²⁰⁴ the Court did not find any reasons as to why the remedy in general would be ineffective for other appli-

¹⁹⁵ Ibid., § 118.

¹⁹⁶ Ibid., §§ 91 and 115.

¹⁹⁷ Ibid., §§ 63-64.

¹⁹⁸ Ibid., §§ 114-118.

¹⁹⁹ See e.g. ECtHR, *Bici v. Albania*, no. 5250/07, Judgment (2015); ECtHR, *Topallaj v. Albania*, no. 32913/03, Judgment (2016); ECtHR, *Shehu v. Albania*, no. 33704/09, Judgment (2016); and ECtHR, *Kaçiu and Kotorri v. Albania*, nos. 33192/07 and 33194/07, Judgment (2013).

²⁰⁰ ECtHR, *Topallaj v. Albania*, no. 32913/03, Judgment (2016).

²⁰¹ Ibid., § 107.

²⁰² See, in this respect, the Code of Civil Procedure of 5 November 2017, Chapter X – Examination of requests for finding a breach of the reasonable time requirement, acceleration of proceedings and just satisfaction.

²⁰³ ECtHR, *Bara and Kola v. Albania*, nos. 43391/18 and 17766/19, Judgment (2021).

²⁰⁴ Ibid., §§ 85-97

cants.²⁰⁵ The Court maintained that “the remedy in principle fulfils the obligation of the respondent State to provide effective remedies in respect of alleged violations of an individual’s rights under the Convention” and, as a result, this new remedy must be exhausted before filing an application with the Strasbourg Court.²⁰⁶ Nevertheless, having found a violation in the circumstances of *Bara and Kola*, the Court added a disclaimer stipulating that “it remains to be seen whether the remedy” will also be effective in practice and that the Government bears the burden of proof as to the effectiveness of this new remedy in all future cases.²⁰⁷

The other category of cases under Article 46 related to the issue of the reopening of cases following a violation at the Strasbourg level. While the most appropriate redress was considered, in principle, a trial *de novo* in the two previous cases against Albania,²⁰⁸ in the case of *Laska and Lika v. Albania* the ECtHR had to invoke Article 46 in order to emphasise the need for the elimination “of any obstacles” in the “domestic legal system that might prevent the applicants’ situation from being adequately redressed” or otherwise the introduction of “a new remedy that would enable the applicants to have the situation repaired”.²⁰⁹ According to the Strasbourg Court, such measures were necessary considering that Albania’s “criminal legal system does not provide for the possibility of re-examining cases, including reopening of domestic proceedings, in the event of this Court’s finding of a serious violation of an applicant’s right to a fair trial.”²¹⁰ In this particular judgment the Court found a flagrant violation of Article 6 because the applicants were found guilty of a crime after having been required to stand in an identification parade wearing balaclavas which were similar in colour to those worn by the authors of the crime.²¹¹ To make things worse, they were sentenced to imprisonment merely on the basis of the eyewitnesses’ identification of them as perpetrators of the crime.²¹² The Court found that such an “identification parade was tantamount to an open invitation to witnesses to point the finger of guilt at both applicants and B.L. as the perpetrators of the crime”.²¹³ This gross violation was not

²⁰⁵ Ibid., §§ 98-124.

²⁰⁶ Ibid., § 119.

²⁰⁷ Ibid., § 120.

²⁰⁸ ECtHR, *Caka v. Albania*, no. 44023/02, Judgment (2009); ECtHR, *Xheraj v. Albania*, no. 37959/02, Judgment (2008).

²⁰⁹ ECtHR, *Laska and Lika v. Albania*, nos. 12315/04 and 17605/04, Judgment (2010), § 77.

²¹⁰ Ibid., § 76.

²¹¹ Ibid., § 66.

²¹² Ibid., § 20.

²¹³ Ibid., § 66.

identified by any regular court in Albania despite repeated attempts by the applicants to raise this point, including the Constitutional Court which merely rejected the applicants' complaint as not falling under right to fair trial guarantees.²¹⁴ Following this judgment, the legislation was amended so that nowadays it is possible to reopen a case following a violation found in Strasbourg.

Another category of cases under Article 46 relates to the detention of mentally ill persons. In the case of *Strazimiri*, in addition to finding several violations under Article 5 (unlawful continuation of deprivation of liberty and failure to speedily examine his appeal) and a violation of Article 3 (conditions of detention and inadequate medical treatment),²¹⁵ the Court found it necessary to invoke Article 46 as a means of indicating the urgent necessity for measures of a general character within the Albanian legal order.²¹⁶ The case concerned an individual, diagnosed with schizophrenia, who was sentenced for attempted premeditated murder but due to his medical illness he was placed in compulsory medical treatment in a medical institution.²¹⁷ The Court considered that the Albanian authorities “should expeditiously take the necessary measures of a general character in order to secure appropriate living conditions and the provision of adequate health care services to mentally ill persons who are subject to deprivation of liberty” and that the Albanian state “should create an ‘appropriate institution’ by refurbishing existing facilities or building a new specialised facility for housing persons like the applicant with a view to improving their living conditions.”²¹⁸ Lastly, the Court also called for the national authorities to “ensure the recruitment of a sufficient number of qualified mental health care workers” who would work in those facilities.²¹⁹ The case was published in 2020 and it is still early to comment on whether the Albanian authorities will comply with all of the suggested general character measures. Past experience with similar cases relating to the detention conditions of mentally ill persons shows that Albanian authorities are not particularly proactive in this area considering that similar violations were found in the case of *Dybeku* in 2007²²⁰ but the case was only closed for further examination by the Committee of Ministers in 2016.²²¹

²¹⁴ *Ibid.*, § 26.

²¹⁵ ECtHR, *Strazimiri v. Albania*, no. 34602/16, Judgment (2020), §§ 104-112 and 126-129.

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*, §§ 5-7.

²¹⁸ *Ibid.*, §§ 148-149.

²¹⁹ *Ibid.*, § 149.

²²⁰ ECtHR, *Dybeku v. Albania*, no. 41153/06, Judgment (2007), §§ 59-64.

²²¹ Committee of Ministers, Resolution CM/Res/DH(2016)273 of 21 September 2016.

Lastly, in 2021, the Court invoked Article 46 in the case of *Laçi*, in order to stipulate the measures that ought to be taken by the national courts in order to redress the violation of the applicant's right of access to court.²²² In this respect, the Court decided that while no "general measures are called for" in respect of the implementation of the Legal Aid Act of 2017, there is an urgent need for the national courts to ensure the undertaking of an individual measure through which "the applicant's eligibility for exemption from the payment of court fees is assessed without undue delay."²²³

1.2. Cases with the highest number of violations: Article 6 issues

To date, Albania has been found in violation of Article 6 on more than 60 occasions in respect of many joined applications considering the repetitive nature of violations.

The vast majority of violations relate to restitution of property as the major systemic issue in Albania, and length of proceedings as the next major malfunction identified by the ECtHR. Considering that both these aspects were extensively elaborated under the preceding heading reflecting cases where Article 46 was invoked, the following part will only analyse Article 6 cases that concern other aspects of the right to a fair and impartial trial.

In addition to these two large pools of cases, Albania faces an additional problematic issue in respect of the non-enforcement of final and binding decisions that do not stem from the area of restitution of property. The Court has emphasised that the execution of a final and binding decision is an integral part of Article 6 ECHR guarantees²²⁴ and that such a right would be illusory if a domestic legal system allowed a final and binding judicial decision to remain unenforced.²²⁵ A delay in execution may occur for objective reasons; however, the delay cannot be such as to impair the essence of the protected right.²²⁶ States Parties must provide remedies which are effective in practice and in law,²²⁷ which Albanian authorities continuously failed to do. Although not directly in a case against Albania, this line of reasoning had already been established in the jurisprudence of the

²²² ECtHR, *Laçi v. Albania*, no. 28142/17, Judgment (2021), §§ 64-67.

²²³ *Ibid.*, §§ 66-67.

²²⁴ ECtHR, *Qufaj Co. Sh.p.k. v. Albania*, no. 54268/00, Judgment (2004), § 38.

²²⁵ *Ibid.*

²²⁶ See e.g. ECtHR, *Hornsby v. Greece*, no. 18357/91, Judgment (1997), and ECtHR, *Burdov v. Russia*, no. 59498/00, Judgment (2002).

²²⁷ ECtHR, *Gjyli v. Albania*, no. 32907/07, Judgment (2009).

ECtHR.²²⁸ The *res interpretata* effect obliged Albanian authorities to be aware of the Court's jurisprudence and refrain from breaching the fair trial guarantees of Qufaj Co. Sh.p.k, a company which had won a claim against the Government of Albania in domestic court litigation.²²⁹ The decision awarding the company a considerable sum in damages was never executed despite it being final. The company failed to find redress domestically despite numerous attempts. The Government claimed it lacked funds to enforce the decision²³⁰ while, at the time, the Constitutional Court considered that the enforcement of court decisions was outside its jurisdiction.²³¹ As a result, the company filed an application with the ECtHR which would turn out to be the first ever judgment rendered against Albania.²³² The Court held that the applicant's right to a fair trial had been violated due to non-enforcement of a final court decision, while a breach of Article 13 of the ECHR occurred due to the lack of remedies to address such a violation.²³³ In this regard, the Court maintained that the Constitutional Court should have interpreted the fair trial rules "in a way that guaranteed an effective remedy for an alleged breach of the requirement under Article 6 § 1 of the Convention."²³⁴ Following this judgment, the Constitutional Court diverged from its past case-law and started to regard non-execution as part of Article 6 § 1 guarantees.²³⁵ In light of such developments, in *Gjyli v. Albania*²³⁶ the Court recognised that the Constitutional Court had revisited and revised its previous case-law.²³⁷ However, considering that despite the finding of a violation in a declaratory manner the Constitutional Court could not award any damages, the ECtHR considered that the constitutional complaint, even if successful, "did not offer adequate redress."²³⁸ In partic-

²²⁸ ECtHR, *Hornsby v. Greece*, no. 18357/91, Judgment (1997), and ECtHR, *Burdov v. Russia*, no. 59498/00, Judgment (2002).

²²⁹ ECtHR, *Qufaj Co. Sh.p.k. v. Albania*, no. 54268/00, Judgment (2004).

²³⁰ *Ibid.*, § 34.

²³¹ Constitutional Court of Albania, Decision no. 1 of 19 January 2009; Constitutional Court of Albania, Decision no. 23 of 17 May 2010; and Constitutional Court of Albania, Decision no. 35 of 27 October 2010.

²³² ECtHR, *Qufaj Co. Sh.p.k. v. Albania*, no. 54268/00, Judgment (2004).

²³³ *Ibid.*

²³⁴ *Ibid.*, § 141.

²³⁵ See, in this respect, several decisions of the Constitutional Court of Albania i.e. Decision no. 26, 10 April 2006; Decision no. 6, 31 March 2006; Decision no. 43, 13 November 2007; Decision no. 1, 19 January 2009; Decision no. 35, 27 October 2010; Decision no. 23, 17 May 2010. None of these decisions awarded damages. They merely declared that a violation had occurred.

²³⁶ The applicant had decisions in favour of his job reinstatement and payment of salaries in arrears. Even though the Constitutional Court found a violation of his right to Article 6 of the ECHR due to non-enforcement, he still could not execute the decisions that were in his favour.

²³⁷ ECtHR, *Gjyli v. Albania*, no. 32907/07, Judgment (2009), §§ 21-27.

²³⁸ *Ibid.*, § 58.

ular, the Court considered the constitutional complaint as ineffective because it could not make any pecuniary and/or non-pecuniary awards and as such it did not offer the prospect of preventing a violation or its continuation.²³⁹ Through these two judgments it became well-established case-law that non-enforcement of final judicial decisions is a repetitive issue in Albania and that there are no effective legal remedies to address such violations. Based on this well-established case-law, the Court continued to render many other judgments addressing similar problems in the area of non-enforcement.²⁴⁰ The problem of non-enforcement of final and binding judicial decisions remains largely unresolved even today.

Other cases under Article 6 that do not fall under the category of cases stemming from the restitution of property, length of proceedings or non-enforcement of final decisions, have to do with different aspects of fair trial guarantees such as: access to a court, with some cases specifically addressing lack of access to the Constitutional Court due to tied votes of judges,²⁴¹ access to a lawyer,²⁴² witness cross-examination,²⁴³ legal certainty,²⁴⁴ the right to be heard in person,²⁴⁵ legal representation and the right to be heard,²⁴⁶ presumption of innocence,²⁴⁷ and the fairness of *in absentia* proceedings.²⁴⁸

²³⁹ Ibid.

²⁴⁰ See, in this context: ECtHR, *Cale v. Albania*, no. 50933/07, Judgment (2012) relating to non-execution of a final court decision due to lack of funds for 9 years; ECtHR, *Gjermeni v. Albania*, no. 57065/14, Judgment (2016) relating to enforcement of a decision of reinstatement in a job position and payment of salaries in arrears; ECtHR, *Molla v. Albania*, no. 29680/07, Judgment (2016) relating to non-enforcement of a Decision of the Supreme Court of 2008; and ECtHR, *Brahimaj v. Albania*, no. 4801/13, Judgment (2016) relating to non-enforcement of a final domestic decision and lack of remedies in respect of the failure to enforce the decision. See also, more generally on this topic, ECtHR, *Gjyli v. Albania*, no. 32907/07, Judgment (2009); ECtHR, *Themeli v. Albania*, no. 63756/09, Judgment (2013); ECtHR, *Memishaj v. Albania*, no. 40430/08, Judgment (2014); ECtHR, *Marini v. Albania*, no. 3738/02, Judgment (2007); and ECtHR, *Topi v. Albania*, no. 14816/08, Judgment (2018).

²⁴¹ *Dauti v. Albania*, no. 19206/05, Judgment (2009); ECtHR, *Marku v. Albania*, no. 54710/12, Judgment (2014); ECtHR, *Laçi v. Albania*, no. 28142/17, Judgment (2021); and ECtHR, *Topi v. Albania*, no. 14816/08, Judgment (2018).

²⁴² ECtHR, *Caka v. Albania*, no. 44023/02, Judgment (2009).

²⁴³ Ibid.

²⁴⁴ ECtHR, *Xheraj v. Albania*, no. 37959/02, Judgment (2008).

²⁴⁵ ECtHR, *Cani v. Albania*, no. 11006/06, Judgment (2012).

²⁴⁶ ECtHR, *Balliu v. Albania*, no. 74727/01, Judgment (2005).

²⁴⁷ ECtHR, *Mulosmani v. Albania*, no. 29864/03, Judgment (2013).

²⁴⁸ ECtHR, *Hysi v. Albania*, no. 72361/11, Judgment (2018); ECtHR, *Malo v. Albania*, no. 72359/11, Judgment (2018); ECtHR, *Muca v. Albania*, no. 57456/11, Judgment (2018); and ECtHR, *Izet Haxhia v. Albania*, no. 34783/06, Judgment (2013).

As this overview of Article 6 cases demonstrates, Albania's major problems in the area of fair trial mirrors the country's principal problems in the field of restitution of property, enforcement of final decisions and length of proceedings. Neither the State authorities nor the domestic courts seem to be capable of fulfilling their duties to ensure the proper and effective protection of these rights at the domestic level, despite the fact that numerous violations have already been found by the Strasbourg Court.

1.3. Cases under Article 13: lack of effective domestic remedies

The high number of violations under Article 13, read in conjunction with Article 46 cases, reflects Albania's problems with the effectiveness of domestic remedies in various areas of Convention rights. All 28 violations of Article 13 have been found in conjunction with violations of Article 6 and/or Article 1 of Protocol No. 1 in cases related to restitution of property,²⁴⁹ non-enforcement of other final and binding decisions,²⁵⁰ and length of proceedings.²⁵¹

²⁴⁹ See e.g. several cases where a violation of Article 13 was found in respect of restitution of property: ECtHR, *Gjonbocari and Others v. Albania*, no. 10508/02, Judgment (2007); ECtHR, *Ramadhi and Others v. Albania*, no. 38222/02, Judgment (2007); ECtHR, *Driza v. Albania*, no. 33771/02, Judgment (2007); ECtHR, *Vrioni and Others v. Albania and Italy*, nos. 35720/04 and 42832/06, Judgment (2009); ECtHR, *Manushaqe Puto and Others v. Albania*, no. 604/07 and 3 others, Judgment (2012); ECtHR, *Eltari v. Albania*, no. 16530/06, Judgment (2011); ECtHR, *Delvina v. Albania*, no. 49106/06, Judgment (2011); ECtHR, *Çaush Driza v. Albania*, no. 10810/15, Judgment (2011); ECtHR, *Karagjozi and Others v. Albania*, nos. 25408/06 and 9 others Judgment, (2014); ECtHR, *Siliqi and Others v. Albania*, nos. 37295/05 and 42228/05, Judgment (2015); ECtHR, *Metalla and Others v. Albania*, nos. 30264/08 and 3 others, Judgment (2015); ECtHR, *Luli and Others v. Albania*, nos. 64480/09 and 4 others, Judgment (2014); ECtHR, *Sharra v. Albania*, no. 25038/08 and 11 others, Judgment (2015); ECtHR, *Rista and Others v. Albania*, nos. 5207/10 and 6 others, Judgment (2016); ECtHR, *Alička and Others v. Albania*, nos. 33148/11 and 5 others, Judgment (2016); ECtHR, *Halimi and Others v. Albania*, no. 33839/11, Judgment (2016); and ECtHR, *Qerimi and Canaj v. Albania*, nos. 12878/10 and 74858/12, Judgment (2016).

²⁵⁰ See e.g. several cases where a violation of Article 13 was found in respect of non-enforcement of other binding judicial decisions not related to restitution of property: ECtHR, *Gjyli v. Albania*, no. 32907/07, Judgment (2009); ECtHR, *Themeli v. Albania*, no. 63756/09, Judgment (2013); ECtHR, *Tushaj v. Albania*, no. 13620/10, Judgment (2013); ECtHR, *Memishaj v. Albania*, no. 40430/08, Judgment (2014); ECtHR, *Brahimaj v. Albania*, no. 4801/13, Judgment (2016).

²⁵¹ See e.g. several cases where a violation of Article 13 was found in respect of length of proceedings: ECtHR, *Marini v. Albania*, no. 3738/02, Judgment (2007); ECtHR, *Mishgjoni v. Albania*, no. 18381/05, Judgment (2010); ECtHR, *Topallaj v. Albania*, no. 32913/03, Judgment (2016); ECtHR, *Bara and Kola v. Albania*, nos. 43391/18 and 17766/19, Judgment (2021).

There is only one case where a violation of Article 13 was found in conjunction with Article 8, in addition to the violation of Article 13 in conjunction with Article 6 and Article 1 of Protocol No. 1.²⁵² The case of *Sharxhi and Others* reflects grave violations on the part of the Albanian authorities who decided to seize and demolish with explosives the applicants' property, with the help of police and armed forces, without any prior notice and in spite of an order of domestic courts granting the stay of execution of a demolition order.²⁵³ The case shows that the national courts tried (albeit not sufficiently) to protect the rights of the applicants by issuing preventive orders against a possible demolition but the Government was firm in its intention to demolish the applicants' property on the ground that the licence had been obtained illegally in the first place.²⁵⁴ The applicants were owners of flats in the famous seaside resort of Vlorë on the Albanian coast.²⁵⁵ The Government intended to implement a project which would create a promenade area along the seafront and the building was situated in a place that would prevent this project from being completed. The Court, however, did not concern itself with such plans; it merely looked at the case from the perspective of the right of the applicants who were rightful owners of the property according to the documents they had obtained from the Albanian authorities themselves. Specifically in respect of Article 13, the Court found three distinct violations in relation to three Convention provisions. The first violation of Article 13 was found in conjunction with Article 6 considering that the applicants did not have an effective remedy to address the non-enforcement of an interim order issued by domestic courts which requested the stay of the demolition order.²⁵⁶ The second violation of Article 13 was found in conjunction with Article 8 considering that there was no effective legal remedy to address the seizure of the building and they were not entitled to any compensation in this regard.²⁵⁷ The third violation of Article 13 was found in conjunction with Article 1 of Protocol No. 1 considering that the applicants did not have any effective remedy at their disposal concerning the seizure of their building and, moreover, they "were not awarded any compensation by the domestic courts concerning the seizure of the building."²⁵⁸ The seafront promenade, in addition to other expenses for its construction, cost the Albanian Government no less than EUR 13,098,00 in respect of pecuniary

²⁵² ECtHR, *Sharxhi and Others v. Albania*, no. 10613/16, Judgment (2018).

²⁵³ *Ibid.*, §§ 6-15.

²⁵⁴ *Ibid.*, §§ 13-14.

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*, §§ 84-85.

²⁵⁷ *Ibid.*, §§ 119-123.

²⁵⁸ *Ibid.*, §§ 135-136.

damage which it has to pay to the applicants following numerous violations found unanimously by the Court.²⁵⁹ The case is yet to be executed by the Albanian Government.

1.4. Cases with Violations under Other Articles of the Convention

To date, in addition to the highest number of violations found under Articles 6 and 13 which were elaborated above, the Court has also found Albanian authorities to be in breach of Article 2, on two occasions, Article 3; on seven occasions; Article 5, on three occasions; Article 7, on one occasion; Article 8, on two occasions; Article 34, on two occasions, and Article 1 of Protocol No.1, on 24 occasions.

In the following part, this study will highlight one particular case from each article by selecting the most important one for the domestic application of Convention principles. If there are more cases worthy of noting, the study will do so either in the main body or in footnotes.

In the area of Article 2, the infamous case of *Tërshana* merits special attention.²⁶⁰ The applicant had been disfigured as a result of a serious acid attack by a person (allegedly her former husband) in a street in the capital city of Tirana.²⁶¹ She had to undergo at least 14 operations and faced physiological problems which made her unable to work for several years while she was treated in Italy, afraid to come back to Albania.²⁶² The criminal investigations initiated by the prosecutor turned out to be futile as no perpetrator had been found guilty nor has the nature of the substance with which she was attacked ever been established by a chemical or toxicological expert.²⁶³ Before finding a violation, the Court conducted a thorough analysis of international reports on gender-based violence in Albania which had repeatedly pointed to a high prevalence of violence against women.²⁶⁴ According to such reports, gender-based violence was “under-reported, under-investigated, under-prosecuted, and under-sentenced”.²⁶⁵ The Court noted that, in cases when an attack happens in such a difficult climate, “the investigation assumes even greater impor-

²⁵⁹ Ibid. See, specifically, point 13 of the operative part of the judgment.

²⁶⁰ ECtHR, *Tërshana v. Albania*, no. 48756/14, Judgment (2020).

²⁶¹ Ibid., § 6.

²⁶² Ibid.

²⁶³ Ibid., §§ 7-49 in respect of criminal investigations.

²⁶⁴ Ibid., § 156.

²⁶⁵ Ibid.

tance and the investigative authorities should be more diligent in conducting a thorough investigation” which would help protect the right to life through an “effective implementation of the domestic laws”.²⁶⁶ In declaring the investigations ineffective for the purposes of Article 2, the Court maintained that in all instances where “there is a suspicion that an attack might be gender motivated, it is particularly important that the investigation is pursued with vigour”. Even though a violation was found at the Strasbourg level and the applicant received some sort of satisfaction, the perpetrator of this horrendous gender-based crime never faced justice. The other case under Article 2 concerns the alleged lack of an effective investigation into the death of the applicant’s brother while he was serving a prison sentence in which the Court found a violation of Article 2 under the procedural limb.²⁶⁷

In the area of Article 3, there are several important cases.²⁶⁸ In the case of *Kaçiu and Kotorri v. Albania* the Court found a violation of Article 3 in respect of the first applicant under both aspects, substantive and procedural.²⁶⁹ This applicant complained that he had been ill-treated by police officers during his detention and that no effective investigation into his allegations had taken place.²⁷⁰ According to the applicant, he had been beaten during his questioning by a police officer who sought to make him sign a confession.²⁷¹ The Court observed that “the applicant’s beating was of such severity that he had to be carried to the court room by police officers” and that “the beating inflicted on the applicant was capable of (...) break[ing] his physical or moral resistance with the purpose of extracting a confession”.²⁷² The severity of the ill-treatment, which continued for a considerable period of time, amounted to torture according to the Court and it led him to make statements incriminating himself and the second applicant “in hope of putting an end to the severe mental and physical pain”.²⁷³ It is interesting to note that the Constitutional Court had the

²⁶⁶ Ibid., § 157.

²⁶⁷ ECtHR, *Prizreni v. Albania*, no. 29309/16, Judgment (2019).

²⁶⁸ ECtHR, *Strazimiri v. Albania*, no. 34602/16, Judgment (2020); ECtHR, *Prizreni v. Albania*, no. 29309/16, Judgment (2019); ECtHR, *Pulfer v. Albania*, no. 31959/13, Judgment (2018); ECtHR, *Pihoni v. Albania*, no. 74389/13, Judgment (2018); ECtHR, *Groni v. Albania*, no. 25336/04, Judgment (2009); and ECtHR, *Dybeku v. Albania*, no. 41153/06, Judgment (2007).

²⁶⁹ ECtHR, *Kaçiu and Kotorri v. Albania*, nos. 33192/07 and 33194/07, Judgment (2013).

²⁷⁰ Ibid., § 81.

²⁷¹ Ibid., § 94.

²⁷² Ibid., § 98.

²⁷³ Ibid., § 99.

opportunity to provide redress domestically for the applicants but it summarily rejected their complaints as not raising any constitutional issues.²⁷⁴

In the area of Article 5, in the case of *Delijorgji*, the Court found two types of violation under the right to liberty and security.²⁷⁵ The first violation was found with respect to the applicant's detention for a period of more than one year and a half. The Court considered that the continued house arrest pending trial was arbitrary and unlawful considering that the regular courts did not provide any reasons for their decision, despite their obligation to do so.²⁷⁶ This meant that the applicant was arbitrarily kept in a state of uncertainty not knowing the grounds of his continued house arrest.²⁷⁷ The second violation was found due to the failure of the authorities "to organise the legal system in such a way as to meet the 'speedy' requirements under Article 5 § 4 of the Convention."²⁷⁸ The Court noted with concern the practice of continuous remittals and delays caused by the lower courts' failure to comply with a decision of the Supreme Court requesting certain tasks to be performed with a view to treating the applicant's complaint.²⁷⁹ The Court maintained that Contracting States are compelled to "set up a second level of jurisdiction for the examination of the lawfulness of detention" and that in this respect the delay in treating the applicant's appeal did not comply with the standard of speediness.²⁸⁰ Two other cases where a violation of Article 5 was found concern the unlawful deprivation of liberty and the lack of compensation for such a violation.²⁸¹

In the area of Article 7, there is only one case where a violation has been found. In the case of *Alimuçaj* the Court found a violation of this provision on account of a heavier penalty imposed on the applicant than the one which was applicable at the time the criminal offence was committed.²⁸² The applicant was convicted of 57,923 counts of the same offence and sentenced to 20 years' imprisonment based on a Criminal Code article whose applicability, according to the Court, "the applicant could not reasonably foresee" even if he were to obtain

²⁷⁴ *Ibid.*, § 40.

²⁷⁵ ECtHR, *Delijorgji v. Albania*, no. 6858/11, Judgment (2015).

²⁷⁶ *Ibid.*, § 75.

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*, § 89.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*, §§ 85-90.

²⁸¹ ECtHR, *Strazimiri v. Albania*, no. 34602/16, Judgment (2020); ECtHR, *Grori v. Albania*, no. 25336/04, Judgment (2009).

²⁸² ECtHR, *Alimuçaj v. Albania*, no. 20134/05, Judgment (2012). See also, ECtHR, *Sharxhi and Others v. Albania*, no. 10613/16, Judgment (2018), where a violation of Article 8 was found in respect of the seizure of the applicant's building.

legal advice.²⁸³ It is interesting to note that even in this case, the Constitutional Court merely used its usual formula that the case did not raise any fair trial issues and rejected the applicant's complaints as inadmissible.²⁸⁴

In the area of Article 8, the case of *Bajrami* is of particular importance as it pointed out, at the time, a deficiency in the Albanian legal system concerning protection against child abduction.²⁸⁵ The applicant, a Kosovo national, had a child with an Albanian national to whom he had been married for a short period of time. Following their divorce and the remarriage of his former wife, the applicant was not permitted to see his child for many years, except on two occasions. His former wife travelled frequently to Greece with their child without his consent and her parents did not allow him to come near his daughter. He complained that the Albanian authorities failed to take any measures to ensure that he was reunited with his daughter.²⁸⁶ The Court noted that, at the time, there was no effective measure to secure the reunion of parents with their children and that there was "no specific remedy to prevent or punish cases of abduction of children from the territory of Albania",²⁸⁷ as the country was not a State Party to the Hague Convention on Child Abduction.²⁸⁸ In such circumstances, the Court concluded that, in absence of the ratification of this international instrument, the Albanian legal system did not provide any alternative framework which would afford the applicant practical and effective protection as "required by the State's positive obligation enshrined in Article 8".²⁸⁹ As a result "the efforts of the Albanian authorities were neither adequate nor effective to discharge their positive obligation under Article 8" which led to the Court finding a violation under this provision.²⁹⁰

In the area of Article 34, there are two interesting violations which concern the failure of the Albanian authorities to respect interim measures issued by the Court under Rule 39 of the Rules of Procedure. Firstly, in the case of *Rrapo*, the applicant claimed that his extradition to the United States, performed in breach of Rule 39, gave rise to a violation of Article 34.²⁹¹ The Court agreed. It

²⁸³ *Ibid.*, § 160.

²⁸⁴ *Ibid.*, §§ 63-64.

²⁸⁵ ECtHR, *Bajrami v. Albania*, no. 35853/04, Judgment (2006).

²⁸⁶ *Ibid.*, §§ 5-30 for facts of the case and § 46 for allegations raised by the applicant.

²⁸⁷ *Ibid.*, § 65.

²⁸⁸ Albania became a State Party to this Convention in 2007, one year after the ECtHR, *Bajrami v. Albania*, no. 35853/04, Judgment (2006) case was decided.

²⁸⁹ *Ibid.*, § 67.

²⁹⁰ *Ibid.*, §§ 68-69.

²⁹¹ ECtHR, *Rrapo v. Albania*, no. 58555/10, Judgment (2012), § 75.

reasoned extensively on the issue and concluded that “the domestic authorities’ non-compliance with the interim measure” issued by the Court “in the absence of any objective justification, constitutes a violation of Article 34”²⁹² In this particular case, the applicant was extradited to the United State in spite of a valid interim measure issued by the Court under Rule 39 requesting that “the applicant was not to be extradited ‘until the lapse of ten days following notification of the Court of Appeal’s decision to the Court.”²⁹³ Similarly, in the case of *Groni*, the applicant complained that his delayed transfer to a hospital, notwithstanding the interim measure indicated by the ECtHR, gave rise to a violation of Article 34.²⁹⁴ The Court’s interim measure requested that the applicant, a detainee serving life imprisonment in a high security prison in Albania, be transferred to a hospital for medical examinations and appropriate treatment for his medical condition.²⁹⁵ The Court noted that, despite the urgency of the interim measure, “the domestic authorities displayed a lack of commitment to assist the Court in preventing the commission of irreparable damage” and that “deficiencies of this kind are incompatible with the duties incumbent on the Contracting States.”²⁹⁶ As a result, the Court concluded that the delay in complying with the Court’s interim measure, without the presence of any objective justification, constituted a violation of Article 34.²⁹⁷

In the area of Article 1 of Protocol No. 1, most of the violations related to restitution of property and non-enforcement of other decisions issued by the domestic authorities. Considering the wide coverage of those issues under the previous headings of this chapter, such findings will not be repeated here. In this respect, one of the most flagrant violations appeared in the case of *Sharxhi and Others* where the Court found a violation of the right to protection of property (on several counts) due to the arbitrary seizure, expropriation and demolition of the applicants’ property, as well as a lack of any compensation in that regard.²⁹⁸

As a general remark, this part of the study shows that judgments in respect of Albania reflect that the case-law under other articles of the Convention is limited in diversity, given that the vast majority of violations are found under Articles 6, 13 and Article 1 of Protocol No. 1. The fact that there is no case-law in

²⁹² Ibid., § 88.

²⁹³ Ibid., § 83.

²⁹⁴ ECtHR, *Groni v. Albania*, no. 25336/04, Judgment (2009), § 172.

²⁹⁵ Ibid., § 186.

²⁹⁶ Ibid., § 191.

²⁹⁷ Ibid., § 195.

²⁹⁸ ECtHR, *Sharxhi and Others v. Albania*, no. 10613/16, Judgment (2018).

the field of freedom of expression, discrimination, electoral rights, etc. should not be understood to mean that Albania does not face issues in these areas. On the contrary, the reason why there is no variety of case-law has to do with the lack of trust in litigation before national courts which, in a way, ensures that applicants only pursue cases which are vital for their day-to-day living conditions. Another reason is the insufficient knowledge of Convention standards among those who practice law as well as the lack of non-governmental organisations which pursue strategic litigation as in other Western Balkan countries. The most concerning violations with respect to other articles of the Convention are those which could easily have been detected by the regular courts if they were more Convention cognizant when deciding cases before them. The aforementioned case-law reflects very little ‘Convention talk’ within the national judiciary when it comes to allegations of breaches of rights and freedoms guaranteed by the Convention. This should be a serious concern for the Albanian State in general and for the judiciary in particular. It remains to be seen whether the vetted prosecutors and judges that will run the reformed judicial system following the Justice Reform will be more inclined to utilise Convention standards in their decisions.

1.5. Cases declared admissible with no violation found

The Court’s data shows that, so far, there are around 15 cases where the Court reviewed the merits of specific cases but decided that there had been no violation of the Convention by the Albanian authorities, either entirely or for specific Convention allegations.

In the area of Article 2, there are two cases where the Court did not find a violation in respect of specific complaints. Both cases have been elaborated above with respect to other articles of the Convention where a violation had been found for some other particular complaints.²⁹⁹ For instance, in the case of *Rrapo*, the Court had found a violation of Article 34 of the Convention for the failure of the Albanian authorities to respect the interim measures issued by the ECtHR; but it had found no violation of Article 2 on account of the applicant’s extradition to the United States.³⁰⁰ In the notorious case of *Tërshana*, as explained above, the Court found a violation of Article 2 under the procedural limb but it found no such violation under the substantive limb.³⁰¹ The reason

²⁹⁹ ECtHR, *Rrapo v. Albania*, no. 58555/10, Judgment (2012), and ECtHR, *Tërshana v. Albania*, no. 48756/14, Judgment (2020).

³⁰⁰ ECtHR, *Rrapo v. Albania*, no. 58555/10, Judgment (2012), §§ 70-74.

³⁰¹ ECtHR, *Tërshana v. Albania*, no. 48756/14, Judgment (2020), §§ 147-152.

for not finding a violation under this limb was the failure of Ms Tërshana to bring to the attention of the domestic authorities any risks posed to her life by her former husband before the acid attack on her.³⁰² The absence of reporting such risks meant that the authorities' positive obligation to take preventive measures or other reasonable steps to protect the applicant's life could not have been triggered as they were not aware of any such risks.³⁰³

In the area of Article 3, there are three cases which have also been described above in respect of different violations found by the Court. However, for certain Convention complaints, the ECtHR considered that there had been no violation. For instance, in the case of *Rrapo*, the Court reasoned that there had been no violation of Article 3 on account of the applicant's extradition to the United States.³⁰⁴ Then, in the case of *Pihoni*, although a violation of Article 3 was found under its procedural aspect, no violation of Article 3 was found under its substantive aspect considering that the applicant did not submit any claim concerning the alleged ill-treatment while being escorted to the police station.³⁰⁵ Lastly, in the case of *Prizreni*, despite finding a violation of the procedural limbs of Articles 2 and 3, the Court did not find a violation of Article 3 under its substantive limb.³⁰⁶

In the area of Article 5, there is only one case where the Court declared a complaint admissible but did not go on to find a violation. The case of *Frrroku* involves a former member of the Parliament of Albania suspected of having committed several criminal offences, including premeditated murder.³⁰⁷ Based on such suspicions, his parliamentary immunity was lifted and he was subsequently detained.³⁰⁸ He complained before the ECtHR that his detention was unlawful and was not practically effected "in accordance with a procedure prescribed by law", considering that the Parliament had waived his immunity only in respect of the first and second set of criminal proceedings.³⁰⁹ However, the Strasbourg Court did not agree with the applicant's argument and ruled that, indeed, the detention was lawful as there was a valid authorisation to arrest the applicant.³¹⁰

³⁰² Ibid., § 151.

³⁰³ Ibid.

³⁰⁴ ECtHR, *Rrapo v. Albania*, no. 58555/10, Judgment (2012), §§ 70-74.

³⁰⁵ ECtHR, *Pihoni v. Albania*, no. 74389/13, Judgment (2018), § 81.

³⁰⁶ ECtHR, *Prizreni v. Albania*, no. 29309/16, Judgment (2019), § 57.

³⁰⁷ ECtHR, *Frrroku v. Albania*, no. 47403/15, Judgment (2018), §§ 5-23.

³⁰⁸ Ibid.

³⁰⁹ Ibid., §§ 43 and 54.

³¹⁰ Ibid., § 55.

In the area of Article 6, there are six cases in total. The case of *Xhoxhaj*, related to the vetting process in Albania following the Justice Reform, is the most important case in which no violation of the Convention was found, despite several allegations being raised by the applicant.³¹¹ The case was filed by a former Constitutional Court judge who failed to pass the vetting process. The gist of the case concerned the outcome of the vetting proceedings which resulted in her dismissal from her judicial post as a judge of the Constitutional Court.³¹² She raised four main complaints under Article 6 which were ultimately all considered insufficient for finding a violation. Firstly, with respect to the lack of independence and impartiality of the vetting bodies, the Court concluded that the applicant failed to adduce any arguments capable of proving her claims against the Appeals Chamber; while with regard to the Independent Qualification Commission (the first instance vetting body) the mere fact that this body “made preliminary findings in the applicant’s case is not sufficient to prompt objectively justified fears” over its impartiality.³¹³ Secondly, with respect to the unfairness of proceedings, the Court concluded that there was no issue in this regard and that both vetting bodies acted consistently with their duties and thus respected the principles of overall fairness of proceedings.³¹⁴ Thirdly, with respect to the lack of a public hearing before the Appeals Chamber, the Court concluded that the nature of the proceedings did not require a public hearing to be held as no witnesses or oral evidence were to be taken.³¹⁵ Fourthly, with respect to legal certainty, the Court recognised that the applicant was placed in the somewhat difficult position of having to justify her financial sources and lawful income due to the potential absence of supporting documents for events which had occurred many years before.³¹⁶ Nevertheless, the Court held that this situation “was partly due to the applicant’s own failure to disclose the relevant asset at the time of its acquisition” and her inability to provide “any supporting documents justifying the existence of an objective impossibility to demonstrate the lawful nature of her partner’s income from 1992 to 2000”.³¹⁷ The findings of the Court in this key case confirmed the legitimacy and legacy of the vetting process in Albania which was demanded and financially sup-

³¹¹ ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, Judgment (2021). It should be noted that the Court found neither a violation of Article 6 nor a violation of Article 8, despite declaring both complaints as admissible for review on the merits.

³¹² *Ibid.*, § 1.

³¹³ *Ibid.*, §§ 308 and 315.

³¹⁴ *Ibid.*, §§ 329-336.

³¹⁵ *Ibid.*, § 343.

³¹⁶ *Ibid.*, § 351.

³¹⁷ *Ibid.*

ported by international stakeholders, including the European Union. In fact, the latter had also intervened as a third party in the proceedings before the Court by generally supporting the vetting process in Albania in arguing that “any shortcoming that might be identified in the conduct of proceedings in individual cases was not to call into question the essential elements of the vetting process”.³¹⁸ In other words, the European Union was interested that the Court confirms the vetting process in principle and that all possible violations are, in a way, counted as ‘incidental mistakes’ that would not put the whole process at risk.

Other cases in which Article 6 complaints were declared admissible but the Court found no violation in terms of the right to a fair and impartial trial in respect of allegations regarding the quality of legal assistance and the inability to question witnesses,³¹⁹ length of proceedings,³²⁰ access to a lawyer and refusal of the trial court to cross-examine a witness,³²¹ and procedural unfairness.³²²

In the area of Article 7, there is one case which has already been described above due to the violation found under this provision.³²³ Although the Court found a violation of a certain aspect of Article 7, the Court did not consider that the qualification of the applicant’s actions as a criminal offence under the auspices of the national law constituted in itself a violation of the right to no punishment without law.³²⁴ In substance, the Court maintained that it is not its role to substitute domestic jurisdictions which are primarily responsible for resolving problems arising in the area of interpretation of domestic legislation, including the qualification of the applicant’s actions as deception in view of the facts of the case.³²⁵

In the area of Article 8, there are two cases in total. The first relates to the alleged failure of the Albanian authorities to secure the exercise of the applicant’s right of contact with his child.³²⁶ However, due to the particularities of this specific case, the Court maintained that “there was no positive obligation on Albania” considering that the child was residing in Italy and the applicant

³¹⁸ Ibid., § 275.

³¹⁹ ECtHR, *Balliu v. Albania*, no. 74727/01, Judgment (2005).

³²⁰ ECtHR, *Marini v. Albania*, no. 3738/02, Judgment (2007), § 143.

³²¹ ECtHR, *Caka v. Albania*, no. 44023/02, Judgment (2009), § 95 and 106.

³²² ECtHR, *Haxhia v. Albania*, no. 29861/03, Judgment (2013), § 145, and ECtHR, *Mulosmani v. Albania*, no. 29864/03, Judgment (2013), § 135.

³²³ ECtHR, *Alimuçaj v. Albania*, no. 20134/05, Judgment (2012).

³²⁴ Ibid., §§ 152-153.

³²⁵ Ibid., § 152.

³²⁶ ECtHR, *Qama v. Albania and Italy*, no. 4604/09, Judgment (2013).

should have initiated proceedings with the Italian courts in order to obtain contact with his child.³²⁷ The second case related to the vetting case of former judge *Xhoxhaj*, which was described at length above, albeit under the ambit of Article 6. In addition to not finding a violation under Article 6, the Court also considered that there was no violation of Article 8 in this case.³²⁸ The applicant claimed a violation of Article 8 “on account of her unlawful and arbitrary dismissal from office and lifetime ban imposed on her practising law”.³²⁹ While the complaint regarding the dismissal from office was declared admissible for review on the merits, the complaint regarding the lifetime ban on practising law was declared as *ratione personae* incompatible with the Convention considering that former judge *Xhoxhaj* merely alleged that she risked becoming “a potential victim in the future on account of a risk of being disbarred, pursuant to the Lawyers’ Act”.³³⁰ In respect of the admissible complaint, the Court concluded that the decision to dismiss the applicant from judicial office did not amount to a violation of Article 8 because: (i) the interference was foreseen by the Vetting Act and other supplementary provisions in the national legislation; (ii) the interference pursued a legitimate aim – namely that of reducing the level of public distrust and restoring trust in the justice system – as an aim closely linked with the interests of public order, national security and the rights of others; (iii) the interference was proportionate and necessary in a democratic society due to the *sui generis* nature of the vetting proceedings which foresaw dismissal from judicial office, *inter alia*, in cases when the evaluation of assets raised sufficiently serious problems, as was the applicant’s case according to the vetting bodies and the Court’s deference to their analysis.³³¹ Although the case of *Xhoxhaj* stamped, in principle, the conventionality of the vetting process, it remains to be seen whether any other dismissed judge or prosecutor will manage to convince the Court that there has been a violation in their particular case.

1.6. Other Important Cases related to Exhaustion of Domestic Remedies

In the area of exhaustion of domestic remedies as provided by Article 35 of the Convention, the most important cases for the purposes of this study are (i) cases that were declared inadmissible due to the applicant’s failure to ex-

³²⁷ *Ibid.*, § 88.

³²⁸ ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, Judgment (2021), §§ 354-414.

³²⁹ *Ibid.*, § 354

³³⁰ *Ibid.*, §§ 362-367 and 372.

³³¹ *Ibid.*, §§ 384-414.

haust domestic remedies before the national courts; and (ii) cases where the Court dismissed the Government's observation that the applicant(s) had failed to exhaust a particular remedy. Both aspects are important for an overall assessment of the availability and effectiveness of domestic remedies.

From the first pool of cases, namely those which were declared inadmissible on account of the applicant's failure to exhaust domestic remedies, the case of *Zalli* is one of the cases where the applicant's complaint regarding the impartiality of the composition of the Supreme Court bench was declared inadmissible due to non-exhaustion of the constitutional appeal before the Constitutional Court.³³² In another case, the Court declared the applicant's complaint regarding the breach of his right of presumption of innocence inadmissible for non-exhaustion as the applicant did not avail herself of the opportunity of bringing the complaint before either of the highest courts in Albania, even though such avenues had the ability to offer a remedy in respect of this complaint.³³³

From the second pool of cases, namely those where the Court dismissed the Government's objection for non-exhaustion of domestic remedies, it is worth noting the cases that fall under the area of right to life,³³⁴ protection of property³³⁵ and the issue of length of proceedings.³³⁶

2. Impact and Effects of the ECHR and the ECtHR's Case-Law in Albania

Following more than two decades of litigation before the Strasbourg Court, some positive effects may be noticed in Albania. The improvement of detention conditions, the inability of prosecutors to reopen cases following a final acquittal, a more effective prevention of child abduction, compensation for

³³² ECtHR, *Zalli v. Albania*, no. 52531/07, Decision (2011), page 10.

³³³ ECtHR, *Bara and Kola v. Albania*, nos. 43391/18 and 17766/19, Judgment (2021), §§ 127-128.

³³⁴ ECtHR, *Tërshana v. Albania*, no. 48756/14, Judgment (2020), §§ 137-140, where the Court dismissed two of the Government's objections on non-exhaustion regarding the alleged failure of the applicant to lodge a claim for damages and to challenge the prosecutor's decision on staying the investigations.

³³⁵ ECtHR, *Sharxhi and Others v. Albania*, no. 10613/16, Judgment (2018), §§ 81-85, where the Court dismissed the Government's objection on non-exhaustion regarding the effectiveness of the constitutional complaint to afford redress for non-enforcement.

³³⁶ ECtHR, *Marini v. Albania*, no. 3738/02, Judgment (2007), §§ 155-158, where the Court dismissed the Government's objection on non-exhaustion regarding the effectiveness of the constitutional complaint to afford redress for length of proceedings.

restitution of property and remedies for excessive length of proceedings have been listed as the most positive examples of the Convention's impact in the domestic legal order.³³⁷ Other positive examples may be seen in the area of the right to a fair trial³³⁸ and the prohibition of torture and inhuman and degrading treatment.³³⁹ These examples show a direct impact of the ECHR and the ECtHR's case-law not just in the judiciary but also in the executive and legislative branches. The latter two were mostly involved in cases which required legislative changes for the domestic implementation of Convention standards stipulated by the Court in various cases where the violations found could only have been remedied through interventions in legislation.

The data from the specific database where the status of the execution of ECtHR judgments is registered, HUDOC EXEC, shows 86 cases in total that have been through or are still going through execution monitoring procedures by the Committee of Ministers. From the total number of cases, 55 are considered as closed and 31 are still pending execution. Moreover, from the total number of cases, 8 were resolved through friendly settlement; 5 through friendly settlement with undertakings; 32 are marked as leading cases; while 48 are considered repetitive cases. From those 31 which are still pending execution, 3 are new cases, 24 are in standard supervisory procedure, and 3 are under so-called "enhanced procedure" of monitoring by the Committee of Ministers. The most concerning cases for the Albanian authorities should be the cases which are marked as "repetitive" and those which are under the scheme of "enhanced monitoring". Examples from these two problematic fields combined, which contain judgments yet to be im-

³³⁷ Parliamentary Assembly of the Council of Europe, AS/JUR/Inf (2016) 04, 8 January 2016, *Impact of the European Convention on Human Rights in States Parties: selected examples*, prepared by the Legal Affairs and Human Rights Department. See also the publication of the Department for Execution of Judgments of the European Court of Human Rights on the main achievements in respect of Albania: <<https://rm.coe.int/ma-albania-eng/1680a18676>> (accessed 9 November 2021).

³³⁸ See e.g. ECtHR, *Marini v. Albania*, no. 3738/02, Judgment (2007), for the right of access to a court; ECtHR, *Shkalla v. Albania*, no. 26866/05, Judgment (2011), for conviction in *absentia*; ECtHR, *Driza v. Albania*, no. 33771/02, Judgment (2007), for the principle of legal certainty and lack of impartiality; ECtHR, *Mullai and Others v. Albania*, no. 9074/07, Judgment (2010), for lack of reasoning; ECtHR, *Balliu v. Albania*, no. 74727/01, Judgment (2005), for legal representation and the right to be heard in criminal proceedings; and ECtHR, *Laska and Lika v. Albania*, nos. 12315/04 and 17605/04, Judgment (2010), for witness statements, police questioning and submissions.

³³⁹ See e.g. ECtHR, *Kaçiu and Kotorri v. Albania*, nos. 33192/07 and 33194/07, Judgment (2013), for the only case where a violation of Article 3 with respect to torture was found; ECtHR, *Dybeku v. Albania*, no. 41153/06, Judgment (2007), and ECtHR, *Grori v. Albania*, no. 25336/04, Judgment (2009), for inhuman and degrading treatment concerning the conditions of detention of applicants with particular health problems.

plemented at the domestic level, have to do with cases relating to: protection of the rights of mentally ill persons who are in detention,³⁴⁰ length of proceedings,³⁴¹ unfair criminal proceedings,³⁴² and restitution of property.³⁴³ The implementation of these cases requires joint efforts at the domestic level by the Government, Parliament and the national courts. Neither of these issues can be resolved without an intelligent combination of proactive reaction by those responsible institutions. While this chapter has demonstrated many examples where the national courts failed to detect a possible Convention violation for which there were domestic remedies available, most of the violations relate to issues that could not be solved by national courts without the involvement of the executive and legislative branches in creating an effective system of domestic remedies to protect the rights and freedoms guaranteed by the Convention.

Therefore, the positive impact of the ECHR in the Albanian domestic legal order may only be seen in cases in which Albania undertook the necessary measures to fully implement the judgments of the Court. Unfortunately, the Albanian authorities have not maintained the same attitude towards all of the Court's judgments. Examples in this chapter have shown that judgments identifying structural problems or requiring general measures due to other deficiencies in the domestic system have been implemented with a significant delay, while there are many which still await implementation. Albania's failure to implement such judgments within deadlines has led to many repetitive applications which the Court considered as posing a threat to the effectiveness of the Convention protection machinery in addition to representing a failure on the part of Albania to effectively guarantee Convention rights at the domestic level. Albania's negligence in implementing the Court's judgments in due time meant that it was the State Party which was ordered to pay the highest amounts for pecuniary and non-pecuniary damage, among all Western Balkan States Parties, despite the fact that all except Montenegro have had a higher number of judgments issued against them.³⁴⁴ The EUR 58,000,000 bill in damages is a direct consequence of non-implementation of the Court's suggested measures in due time.

³⁴⁰ ECtHR, *Strazimiri v. Albania*, no. 34602/16, Judgment (2020).

³⁴¹ ECtHR, *Gjonbocari and Others v. Albania*, no. 10508/02, Judgment (2007), and ECtHR, *Luli and Others v. Albania*, nos. 64480/09 and 4 others, Judgment (2014).

³⁴² ECtHR, *Muca v. Albania*, no. 57456/11, Judgment (2018), and ECtHR, *Hysi v. Albania*, no. 72361/11, Judgment (2018).

³⁴³ ECtHR, *Sharra v. Albania*, no. 25038/08 and 11 others, Judgment (2015).

³⁴⁴ It should be noted that, from 2011 to 2021, Albania was ordered to pay around 58 million euros in pecuniary and non-pecuniary damages, which is the highest amount among all other Western Balkan States, <<https://www.coe.int/en/web/execution/-/new-statistics-on-payment-of-just-satisfaction-awarded-by-the-european-court>> (accessed 4 January 2022).

There are few important points to be highlighted with respect to the status and developments in the judiciary and fundamental rights in Albania, deriving from the latest Progress Report on Albania issued by the European Union.³⁴⁵ Firstly, the Report positively noted that “good progress” has been made in the process of implementation of the Justice Reform, with the Constitutional Court regaining its functionality after a considerable blockade and with the Supreme Court increasing “its efficiency with the appointment of six additional judges”, following the vetting process.³⁴⁶ With respect to Albania’s relation with the ECtHR, the Report noted that domestic authorities continue “to ensure good cooperation” with the Strasbourg Court.³⁴⁷ More specifically, the Report pointed out that in 2021 the Strasbourg Court had decided on the first vetting case, namely *Xhoxhaj v. Albania* by “finding that the vetting process (...) had been in line with the general principles” of the ECHR and “overall proportionate.”³⁴⁸ Furthermore, the Report also recalled that following an interim measure issued by the ECtHR, domestic courts repealed “a first instance court decision for the seizure of servers, computes and telephones of the Lapsi.al journalists.”³⁴⁹

Overall, the analysis of the case-law of the highest courts in Albania shows traces of the positive impact of the ECHR and the ECtHR case-law in their judicial reasoning. In a few available academic materials, the Constitutional Court and the Supreme Court have overall been considered “to show persistent carefulness and prudence in tackling the problems considered in Strasbourg as violations of the Convention” and to have played an “active role” in implementing Convention standards.³⁵⁰ However, the impact of the ECtHR’s case-law on the domestic courts is mostly seen in the area of Article 6.³⁵¹ This is largely due to the Constitutional Court’s jurisdictional constraints prior to the Justice Reform. In recent decisions, there is a growing tendency to utilise Convention standards deriving from other provisions of the Convention and such reliance is expected to grow following the reformation of the judicial branch and the expansion of the jurisdiction of the Constitutional Court. As observed throughout this chapter, despite some good and inspiring examples, the highest courts in Albania need to take greater advantage of the know-how of the

³⁴⁵ European Commission of the European Union, ‘Albania 2021 Report’, Commission Staff Working Document no. SWD(2021) 289 final, 19 October 2021.

³⁴⁶ *Ibid.*, page 18.

³⁴⁷ *Ibid.*, page 27.

³⁴⁸ *Ibid.*, page 19.

³⁴⁹ *Ibid.*, page 30.

³⁵⁰ Bianku (2016), 34; Zaganjori (2012), 161.

³⁵¹ Zaganjori (2012).

Court and use it more productively to advance human rights and fundamental freedoms in Albania. That way, they can play a leadership role in further increasing the impact of the ECHR and the Court's case-law in the national judiciary.

V. Summary and Conclusion

This chapter has provided an in-depth analysis of four main areas of interest for this study, namely: (i) an analysis of the status of international law in general and the ECHR in particular in the domestic legal order; (ii) an in-depth analysis of the case-law of the highest courts in Albania and their Convention talk in relation to the utilisation of Convention principles and the Court's case-law in their judicial decision-making process; (iii) an in-depth scanning of the case-law of the Strasbourg Court against Albania; and (iv) the impact and effects of the Convention and the Court's case-law in the domestic legal order. Through concrete examples, this chapter has shown the manner in which the Convention principles are utilised by the highest national courts as a means of assessing whether they are sufficiently equipped to act as the Court's 'Convention partners' at the domestic level.

[Part I](#) of the chapter provided a historical reflection on Albania's difficult path from a society ruled by a dictator for more than 40 years to an entirely new system of governance where fundamental rights and freedoms are supposed to be the foundation of all actions taken by the public authorities, including the courts. Becoming a member of the Council of Europe four years after the collapse of communism, opened the way for new perspectives and possibilities for the citizens of Albania and the state itself. In that respect, the introductory part provided a synopsis of the most important events, from the accession to the Council of Europe in 1995 to the latest developments within the national judiciary and the case-law of the Strasbourg Court in respect of Albania.

[Part II](#) outlined the relationship of the domestic law *vis-à-vis* international law, with particular focus on the legal status of the ECHR in the domestic legal order. The analysis concluded that the Convention is well embedded in Albania's *bloc de constitutionnalité* and that national courts are obliged to render their decisions in compliance with Convention standards. National courts are obliged to weigh and balance the limitation of rights in conformity with the standards stipulated in the Constitution and the Convention. Moreover, as of 2021, national courts are also authorised to set aside any legislation that goes contrary to the Convention and the Court's case-law while being obliged to apply these directly in their reasoning. The national judicial practice showed

that, while Albania's highest courts tend to refer to the Convention and the Court's case-law, there is room for substantial improvement and advancement towards a more profound utilisation of Convention principles.

[Part III](#) examined the domestic court system and its relationship with the Convention principles, by focusing mostly on an in-depth analysis of the jurisprudence of the highest national courts. A considerable part of the analysis was dedicated to the Justice Reform and its unprecedented impact on the judiciary and its members who had to undergo or still have to undergo the vetting process in order to be confirmed in office. The expansion of the jurisdiction of the Constitutional Court which authorised it to review cases entailing allegations of any Convention provision was considered to be a highly commendable novelty of the Justice Reform. Before the Justice Reform, the Supreme Court and the Constitutional Court could engage in dialogue only in respect of Article 6 cases. With the new reforms in place, their relationship in terms of Convention talk is expected to deepen to a great extent, which, in turn, is expected to have an impact on how Convention standards and the Court's case-law are implemented in practice by them, the regular courts and other public authorities in Albania. The tensions that could be noticed between the Supreme Court and the Constitutional Court in the past³⁵² seem now to have been replaced by a much more insightful and professional cooperation between them.³⁵³ While it is too early to reach a firm conclusion, this chapter has highlighted several promising cases rendered by the new vetted judges which are a clear sign that the Convention application in Albania's national judiciary is on a good path towards improvement. Nevertheless, for this to happen, there is a need for the Supreme Court to effectively deal with its accumulated backlog and for both courts to substantially accelerate the utilisation of the ECHR standards in their decisions. Some of the latest decisions of the Supreme Court serve as perfect examples of the comprehensive utilisation of these standards.

[Part IV](#) provided an in-depth scanning and analysis of all cases that have been adjudicated before the ECtHR in respect of Albania. Such case-law was categorised in six different pools of cases, namely: (i) cases under Article 46 – where general and/or individual measures were required by the Court; (ii) cases with the highest number of violations – Article 6 issues; (iii) cases un-

³⁵² See section [III.2](#) of this chapter where the developments at the domestic level regarding the implementation of the ECtHR, *Xheraj v. Albania*, no. 37959/02, Judgment (2008) were discussed.

³⁵³ See section [III.2](#) of this chapter where the 'Convention talk' between the Supreme Court and the Constitutional Court with respect to developments regarding the case of ECtHR, *Dauti v. Albania*, no. 19206/05, Judgment (2009) were discussed.

der Article 13 – lack of effective domestic remedies; (iv) cases with violations of other articles of the Convention; (v) admissible cases where no violation was found; and, lastly, (vi) other important cases related to exhaustion of domestic remedies. The first pool of cases showed Albania’s systemic flaws and its difficulties in implementing the general measures suggested by the Court in the areas of restitution of property, length of proceedings, reopening of proceedings following a violation found by the Strasbourg Court and the detention conditions for mentally ill persons. The second pool of cases reflected Albania’s major issues in the area of the right to a fair and impartial trial, this being the most litigated provision at the domestic and supranational level. Issues related to non-enforcement of final and binding judicial decisions continue to pose enormous problems domestically and before the ECtHR. The third pool of cases reflected one of the most serious areas of Convention violations. Despite Albania’s obligation to secure effective protection of Convention rights at the domestic level, the case-law of the ECtHR showed serious flaws in this regard, especially with respect to rights guaranteed by Article 6 and Article 1 of Protocol No. 1. Unfortunately, Albania’s authorities, mainly the Government and Parliament, seem not to have been sufficiently incentivised by the violations of Article 13 found at the Strasbourg level considering that serious issues with the availability and effectiveness of domestic remedies continue to persist. The highest courts in the land attempted to play their part in declaring some violations of Article 13 at the domestic level but their findings were considered as merely declaratory by the Strasbourg Court considering that they could not provide any redress for the violation that had occurred nor were they able to stop an ongoing violation. The fourth pool of cases showed that there is limited case-law in respect of other Convention provisions compared to problems which Albanian citizens unquestionably face. The reporting of cases in this specific pool focused on those cases where domestic courts had failed to detect Convention violations at an earlier stage. The limited jurisdiction of the Constitutional Court, the lack of trust in domestic litigation, the lack of strategic litigation and the lack of awareness of other Convention related provisions have been suggested as some of the possible reasons why the number of violations in this pool of cases is rather low. The fifth pool of cases reflected certain cases, also low in number, where the ECtHR considered that the national authorities could not be held responsible for the breach of the alleged rights. Lastly, the sixth pool of cases shed light on some other important inadmissibility cases related to the issue of exhaustion of domestic remedies. Finally, in [part IV](#), this study reflected on the impact and effects of the ECHR and the ECtHR’s case-law in the domestic legal order by providing specific examples of positive impacts as well as examples of the necessary impact that is lacking.

Based on this analysis and these findings, the overall conclusion is that Albania and its national courts are still at an early stage of application of Convention principles at the domestic level. The current level of application of Convention standards cannot be considered satisfactory at any level of domestic adjudication, despite there being a few notable decisions that merit praise and recognition. While the openness and lack of resistance towards Convention principles and the Court's case-law by the national courts is to be greatly commended, there is room for substantial improvement in the day-to-day utilisation of such principles in domestic court decisions. There is much progress to be documented before the national courts become trusted 'Convention partners' to which the Strasbourg Court can effortlessly defer in line with the principles of subsidiarity and margin of appreciation. The national courts must greatly strengthen their internal mechanisms of legal research and analysis which could help them stay up-to-date with the latest developments at the ECtHR level and implement such standards in cases before them. The formal embeddedness of the ECHR through strong constitutional guarantees and case-law of the national courts confirming its special status within Albania's legal order, combined with the positive inclination of the national courts to utilise the ECtHR case-law in their decisions, are very good signs that the Convention principles are on track to be sufficiently domesticated by all those concerned. Only when this is achieved in practice and Albania has moved to an advanced stage of Convention application at the domestic level will the Court be able to defer to national courts as trustworthy 'first' and 'last' 'line defenders' of the Convention at home.

Chapter 3 Bosnia and Herzegovina

I. Introduction

It is impossible to embark on the analysis of any situation in Bosnia and Herzegovina without first looking back to the infamous historical events of the years 1992-1995. Whilst the break-up of the former Yugoslavia started without too much turmoil in Slovenia and got more violent in Croatia, “all hell broke loose” when Bosnia and Herzegovina decided to follow suit and declare its independence from Yugoslavia in 1992. Its people were subjected to the most heinous crimes against humanity committed in the territory of Europe since World War II, with more than 100,000 persons killed and two million people displaced as a result of ethnic cleansing or generalised violence.¹ Many of these facts have been confirmed by a United Nations court of law which was established to deal with the war crimes committed during the conflicts in the former Yugoslavia in the 1990s.² Contrary to the denials which still emanate from certain high-level public figures in Bosnia and Herzegovina and Serbia who continue to repudiate the Srebrenica genocide and other crimes against humanity that were committed by the former Milošević regime,³ the ICTY has confirmed

¹ ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, Judgment (2013), §§ 8-9.

² See the ICTY's website <<https://www.icty.org/>>, for a more comprehensive list of all final judgments confirming some of the abovementioned facts, including the infamous Srebrenica genocide.

³ See e.g. some media articles reflecting State officials, politicians, journalists and civilians claiming that a genocide never took place in Bosnia: The Guardian (2020), ‘Genocide denial gains ground 25 years after Srebrenica massacre’ <<https://www.theguardian.com/world/2020/jul/10/genocide-denial-gains-ground-25-years-after-srebrenica-massacre>>; Al Jazeera (2021), ‘Why Bosnia’s ban on genocide denial was a necessity’ <<https://www.aljazeera.com/opinions/2021/8/13/why-bosnias-ban-on-genocide-denial-was-a-necessity>>; Financial Times (2021) ‘Bosnia divided over ban on genocide denial as EU fights for influence’ <<https://www.ft.com/content/1b9a3a31-7107-4a11-bbe6-f9f440acc69d>>. These denials led to genocide denial being outlawed in Bosnia and Herzegovina in 2021. See, in this context, Balkan Transitional Justice (2021), ‘Bosnia’s High Representative Imposes

these atrocities through final and binding judicial decisions.⁴

After witnessing daily, for four consecutive years, the carnage that was happening in the territory of Bosnia and Herzegovina, the international community – albeit belatedly – decided to intervene and put a halt to the devastating war.⁵ Forty-four months of intermittent negotiations which started in Dayton, in the United States of America were finally concluded in Paris, on 14 December 1995, when the General Framework Agreement for Peace in Bosnia and Herzegovina was signed between the representatives of the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia.⁶

The so-called “Dayton Peace Agreement” became the basis for the new Constitution of Bosnia and Herzegovina that is still in force today.⁷ Its first article declared that the country “shall continue its legal existence under international law as a state” with its new internal structure but with the already recognised international borders.⁸ The next article, as expected, focused on human rights by automatically domesticating the international standards provided by the ECHR as part of the national legal order taking precedence over any other law in Bosnia and Herzegovina.⁹ Moreover, to ensure, at least legally-speaking, that

Genocide Denial Ban’ <<https://balkaninsight.com/2021/07/23/bosnias-high-representative-imposes-genocide-denial-ban/>>.

⁴ ICTY, no. IT-95-5/18, Judgment of 24 March 2016, finding Radovan Karadžić “guilty of genocide, crimes against humanity and violations of the laws or customs of war committed by Serb forces during the armed conflict in Bosnia and Herzegovina”. See, in this context, ICTY, ‘Case Information Sheet’ with respect to the trial against Radovan Karadžić, <https://www.icty.org/x/cases/karadzic/cis/en/cis_karadzic_en.pdf> (accessed 3 January 2022).

⁵ NATO led forces were deployed in Bosnia and Herzegovina in December 1995 in order to implement the military aspects of the Dayton Peace Agreement. In this context, see NATO, ‘Peace support operations in Bosnia and Herzegovina’, <https://www.nato.int/cps/en/natolive/topics_52122.htm> (accessed 3 January 2022). See also, Čufrović, Mirela (2019) ‘An International Quagmire: Genocide and Intervention During the Bosnian War, 1992-1995’ <<https://balkanist.net/international-quagmires-genocide-and-intervention-bosnian-war/>> (accessed 3 January 2022).

⁶ See ‘The General Framework for Peace in Bosnia and Herzegovina’, initialled in Dayton, United States of America on 21 November 1995 and signed in Paris on 14 December 1995, <<http://www.ohr.int/dayton-peace-agreement/>> (accessed 3 January 2022).

⁷ For an English version and a consolidated text of the Constitution of Bosnia and Herzegovina see the CODICES database of constitutions published by the Venice Commission: <<http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>> (accessed 1 January 2022).

⁸ Article I.1 of the Constitution.

⁹ Article II of the Constitution.

the brutal history is not repeated, Article X.2 constitutionalised the guarantee that: “No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph.”¹⁰

Another essential consequence of the new Constitution was that Bosnia and Herzegovina would be separated into two Entities,¹¹ namely (i) the Federation of Bosnia and Herzegovina, which covers 51% of the State territory, is divided into 10 specific cantons and is mostly inhabited by Bosniacs and Croats; and, (ii) Republika Srpska, which covers 49% of the State territory and is mostly inhabited by Serbs.¹² In addition, the multi-ethnic Brčko District encompasses the “third” territorial area which is owned jointly by the two Entities.¹³ All three territorial areas are entitled to enact their own laws and regulations on condition that they are in line with the Constitution of Bosnia and Herzegovina. Yet, although a need for the vertical harmonisation of laws might be implied, there is no obligation for the horizontal harmonisation of laws between the two Entities and the Brčko district.¹⁴ As will be shown in further detail below, Bosnia and Herzegovina has a very complex court system which comprises of four court systems in total, one for each of the “three territories” as well as one “State level” court system. This, in addition to other evident obstacles in ruling the country effectively through complicated power-sharing mechanisms, is a leading reason why the constitutional arrangements of the Dayton Peace Agreement are often criticised.¹⁵

¹⁰ Article X.2 of the Constitution.

¹¹ Article I.3 of the Constitution.

¹² Venice Commission, Opinion on ‘The Judicial Power in Bosnia and Herzegovina (BiH) Background Paper’, document CDL(2011)096Rev, 9 December 2011.

¹³ *Ibid.*, page 7. It is worth noting that issues related to the “Brčko area” were not fully resolved with the ‘The General Framework for Peace in Bosnia and Herzegovina’. In Article V, the latter provided that “The Parties agree to binding arbitration of the disputed portion of the Inter-Entity Boundary Line in the Brčko area indicated on the map attached at the Appendix” and that “The arbitrators shall issue their decision no later than one year from the entry into force of this Agreement.” As a result, the Brčko District was established on 5 March 1999 and took effect on 8 March 2000, following an Arbitration Decision on this matter.

¹⁴ *Ibid.*, page 7.

¹⁵ See e.g. Gisvold and O’Flaherty (1998), Benedek (1999), Bieber (2006), Parish (2007), Seizović and Šimić (2016), and Pehar (2019).

The Convention was formally signed and ratified by Bosnia and Herzegovina in 2002, when the country became the 44th member State of the Council of Europe.¹⁶ While few cases on admissibility matters were rendered in 2005,¹⁷ the very first judgment on the merits in respect of Bosnia and Herzegovina was delivered in 2006.¹⁸ As far as its relationship with the Strasbourg Court is concerned, Bosnia and Herzegovina falls, to a certain extent, within the list of States Parties that produce a large amount of repetitive case-law due to systemic issues in non-enforcement and the lack of (or extensive delay in) implementation of the Court's general measures as invoked by Article 46. Thus far, the Court has declared several systemic issues under Article 46 for Bosnia and Herzegovina while the very high number of Article 13 violations also reflects serious deficiencies in the area of effectiveness of domestic remedies to tackle Convention issues. The analysis in this chapter will reflect on such cases and show, through concrete examples, the state of application and utilisation of Convention standards in Bosnia and Herzegovina.

Following this introduction, [Part II](#) of this chapter will outline the status of the Convention in the Bosnian legal order and court system. It will shed light on the relationship between domestic and international law with a specific focus on the status of the ECHR. [Part III](#) will explore the highly complex domestic court system and its relationship with the Convention by focusing mainly on the jurisprudence of the highest courts in Bosnia and their 'Convention talk'. [Part IV](#) will then provide an in-depth analysis of the ECtHR's case-law against Bosnia and Herzegovina by classifying cases into six categories, namely: (1.1) [cases under Article 46 – where general and/or individual measures have been required](#); (1.2) [cases with the highest number of violations – Article 6 issues](#); (1.3) [cases under Article 13 – lack of effective domestic remedies](#); (1.4) [cases with violations under other articles of the Convention](#); (1.5) [admissible cases where no violation was found](#); and (1.6) [other important cases related to exhaustion of domestic remedies](#). [Part IV](#) will then focus on the impact and effects of the ECHR and the ECtHR's case-law in the domestic legal order by providing concrete impact examples as well as observations on the lack of the needed impact. Lastly, [Part V](#) will reflect on these findings and draw some final conclusions.

¹⁶ For information on Bosnia and Herzegovina's membership of the Council of Europe, see <<https://www.coe.int/en/web/portal/bosnia-and-herzegovina>> (accessed 3 January 2022).

¹⁷ ECtHR, *Hadžić v. Bosnia and Herzegovina*, no. 11123/04, Decision (2005).

¹⁸ ECtHR, *Jeličić v. Bosnia and Herzegovina*, no. 41183/02, Judgment (2006).

II. Status of the Convention in the Bosnian Legal Order

1. Relationship between Domestic and International law

The Constitution of Bosnia and Herzegovina provides that the general principles of international law form part of the law of Bosnia and Herzegovina and its Entities.¹⁹ Moreover, international law and international standards are referred to in many other provisions of the Constitution, including: the Preamble; Article II which outlines the internationally recognised human rights and freedoms and those to which the country has chosen to remain or become party to; Article III which provides that responsibilities and relations between institutions in Bosnia and Herzegovina and its Entities must honour the country's international obligations and that international law shall be an integral part not only of the law of the State but also the law of the Entities; etc.²⁰ These constitutional provisions combined with the fact that numerous international human rights agreements are directly applicable in the domestic legal order, has led authors to describe the relationship between domestic and international law in Bosnia and Herzegovina as being typically “monist”.²¹ Moreover, the formulation that the ECHR is “above all other law”,²² and the fact that any legal provision applicable at the national level may be subjected to an “assessment of compliance with fundamental principles of international law” has been considered to lead to the conclusion that “international law is promoted even above the entire legal system of the State”.²³ However, the Constitutional Court has ruled that “the source of (...) legal force” of fundamental human rights is the Constitution, irrespective of the fact that some of such rights arise from international treaties.²⁴

¹⁹ Article III.3.b of the Constitution.

²⁰ See, *inter alia*, the Preamble of the Constitution and Articles II and III of the Constitution.

²¹ Vehabović (2016), 80-109.

²² See Article II of the Constitution.

²³ Vehabović (2016), 89. For more on the application of international law in BiH, see Meškić and Samardžić (2015).

²⁴ Constitutional Court of BiH, Decision on Admissibility and Merits, no. AP-1107/06, 27 February 2008, § 72.

2. ECHR in the Domestic Legal Order

As stated above, the second Article of the Constitution is reserved for the proclamation of human rights and fundamental freedoms that are applicable in the whole territory of Bosnia and Herzegovina.²⁵ A specific reference to the ECHR provides that the rights and freedoms set forth in the Convention and its Protocols “shall apply directly in Bosnia and Herzegovina” and “shall have priority over all other law”.²⁶ Another specific reference to the ECHR provides that the Constitutional Court is authorised to check the compatibility of laws not just with the Constitution but also directly with the ECHR.²⁷ In this respect, it has been argued that the Convention “must be considered (at least) equivalent to the Constitution” which itself is part of an international agreement.²⁸

A constitutional level guarantee is provided for all possible future amendments affecting human rights and it states that no amendment to the Constitution “may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph”.²⁹ Despite the catalogue of human rights provided in Article II of the Constitution, Annex I to the Constitution provides a list of 15 international human rights instruments which are to be directly applied in the national legal order.³⁰ The case-law of the national courts has continuously confirmed the direct applicability of the Convention and the Court’s case-law within the national legal order,³¹ and there is no domestic dilemma pertaining to this issue, either at the court level or at the level of other public institutions. The discussions in Bosnia and Herzegovina with respect to the Convention pertain more to issues related to better utilisation of the ECHR principles as construed by the Strasbourg Court and the negligence of some public authorities (mainly the executive and legislative branches) to implement some of the Court’s judgments. With respect to the obligation of the executive and legislative branches to ensure the

²⁵ Article II of the Constitution.

²⁶ Article II.2 of the Constitution.

²⁷ Article VI.3.c of the Constitution.

²⁸ Vehabović (2016), 89.

²⁹ Article X.2 of the Constitution.

³⁰ See Annex I of the Constitution.

³¹ See e.g. Constitutional Court of BiH, Decision no. AP-953/05, 8 July 2006, § 34, where the Constitutional Court specifically stipulated (not for the first time) that: “the European Convention [of Human Rights] shall be directly applied in Bosnia and Herzegovina. Moreover, pursuant to Article II(6) of the Constitution of Bosnia and Herzegovina, (...) all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms (...) referred to in Article II(2) of the Constitution of Bosnia and Herzegovina.”

compatibility of any proposed legislation with Convention standards, while a specific mandatory procedure to ensure the compatibility of any proposed legislation with the *acquis* of the European Union exists, there is no specific procedure obliging lawmakers to ensure the compatibility of proposed legislation with Convention standards and the ECtHR case-law. However, it should be noted that there is an obligation to ensure compatibility of legislation with the Constitution, where the ECHR is incorporated. As will be argued in the following part of this chapter, even though the judicial branch has proven to be very a good 'Convention partner' at the domestic level, their efforts have been seriously undermined by the executive and legislative branches which have not fulfilled their role as one of the 'first-line defenders' at the domestic level.

III. Domestic Court System and the ECHR

1. Overview of the Bosnian Court System

The judicial power in Bosnia and Herzegovina is exercised at two levels, namely the “State level” and the level of “three territories” comprising of the Federation of Bosnia and Herzegovina, Republika Srpska and the Brčko District.³² This means that there are four different courts systems functioning simultaneously in Bosnia and Herzegovina, with their own specific laws in addition to laws that are applicable at the State level for some particular matters which fall under State level interest.³³

At the level of the State, there are only two courts, namely the Constitutional Court of Bosnia and Herzegovina and the Court of Bosnia and Herzegovina which is the only ordinary court functioning at State level and is commonly referred to as “the State Court”.³⁴ The Constitutional Court was established with the entry into force of the new Constitution,³⁵ whilst the latter was established in 2002 following, *inter alia*, an Opinion by the Venice Commission on the need for a judicial institution at the State level of Bosnia and Herzegovina.³⁶ At the level of the Entity of the Federation of Bosnia and Herzegovina, the following courts operate: the Constitutional Court of the Federation of Bosnia and Herzegovina; the Supreme Court of the Federation of Bosnia and Herzegovina; Cantonal Courts; and Municipal Courts.³⁷ At the level of the Entity of Republika Srpska, the following courts operate: the Constitutional Court of Republika Srpska; the Supreme Court of Republika Srpska; District Courts; and

³² See Articles III, VI and Annex I of the Constitution.

³³ Venice Commission, Opinion on ‘The Judicial Power in Bosnia and Herzegovina (BiH) Background Paper’, document CDL(2011)096Rev, 9 December 2011, page 7; see also Appendix I – Tables, Table 1: Judicial Systems of Bosnia and Herzegovina.

³⁴ Ibid.

³⁵ See Article VI of the Constitution.

³⁶ See Venice Commission, Opinion on ‘The Judicial Power in Bosnia and Herzegovina (BiH) Background Paper’, document CDL(2011)096Rev, 9 December 2011. See also, Venice Commission, ‘On the need for a Judicial Institution at the Level of the State of Bosnia and Herzegovina’, CDL-INF(98)17, 3 November 1998.

³⁷ Ibid.

Basic Courts.³⁸ At the level of Brčko District, which has a special status under the Constitution, the following courts operate: the Appellate Court and Basic Courts.³⁹

In addition to the current judicial structure of Bosnia and Herzegovina, there was another important judicial body known as “the Human Rights Chamber for Bosnia and Herzegovina” which was established through Annex 6 of the Dayton Peace Agreement.⁴⁰ The mandate of the Human Rights Chamber, *inter alia*, was to consider “alleged or apparent violations of human rights as provided” in the ECHR and its Protocols.⁴¹ This judicial body ended its mandate on 31 December 2003, having been active since March 1996. It was succeeded in its role by the Constitutional Court. The qualitative case-law of the Human Rights Chamber has influenced the overall perception of the ECHR in the domestic legal order and its decisions have been part of many decisions before the ECtHR, where the latter, on many occasions, confidently deferred to them or requested their execution as the appropriate remedy of redress for various applicants.⁴²

For the purposes of this study, the following analysis will focus on the case-law of the State level courts, making references to the three other lower court levels as necessary.

1.1. Court of Bosnia and Herzegovina (“the State Court”)

As stated above, the State Court was not foreseen by the new Constitution but its indispensability became evident at a later stage. According to the legislation which established the State Court, a State level court was necessary “to ensure the effective exercise of the State of Bosnia and Herzegovina and the respect

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ See Annex 6 of the Dayton Peace Agreement.

⁴¹ Ibid., Article II.2.

⁴² See the Human Rights Chamber’s website <<http://hrc.ustavnisud.ba/english/Default.htm>>, for further information on the competences of this body as well as decisions taken during its mandate. See also a few decisions where the ECtHR referred to the decisions of the Human Rights Chamber when reviewing cases against Bosnia and Herzegovina: ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, Judgment (2013); ECtHR, *Suljagić v. Bosnia and Herzegovina*, no. 27912/02, Judgment (2009); and ECtHR, *Palić v. Bosnia and Herzegovina*, no. 4704/04, Judgment (2011).

of human rights and the rule of law in the territory of this State”,⁴³ in matters that fall under the State level Constitution of Bosnia and Herzegovina.⁴⁴ The law establishing the State Court had been challenged before the Constitutional Court, prior to its entry into force, but all claims over its potential unconstitutionality were refuted by the Constitutional Court which, at the time, observed that “although it is not the task of the Constitutional Court to express an opinion on whether it is appropriate to enact a certain law”, the establishment of a State level court in Bosnia and Herzegovina is “expected to strengthen the rule of law which is one of the fundamental principles of any well-functioning democracy”.⁴⁵ While the original establishment of the State Court provided only for the Plenum and three court divisions (criminal, administrative and appellate), the amendments adopted in 2002 and 2004 introduced special sections within the existing divisions, most notably the War Crimes Chamber – following the introduction of the Completion Strategy of the ICTY and the referral of the remaining cases to the domestic courts for further adjudication.⁴⁶

Today, the State Court is comprised of three divisions. The first division, namely the “Criminal Division” consists of three sections: (i) Section I for War Crimes; (ii) Section II for Organised Crime, Economic Crime and Corruption; and (iii) Section III for all other criminal offences falling under the jurisdiction of the State Court.⁴⁷ The second division, namely, the “Administrative Division” consists of three subdivisions: (i) the Administrative Disputes Subdivision; (ii) the Civil Procedure Subdivision; and (iii) the Enforcement Procedure Subdivision. Lastly, the third division is the “Appellate Division” which consists of three sections: (i) Section I of the Appellate Division which rules on appeals and/or legal remedies stemming from Section I of the Criminal Division; (ii) Section II of the Appellate Division which rules on appeals stemming from decisions of Section II of the Criminal Division; and (iii) Section III of the Ap-

⁴³ See Article 1 of the Law on Courts of BiH (Official Gazette of BiH, Nos. 29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 9/04, 35/04, 61/04 and 32/07). For an unofficial consolidated version of this Law, see <<https://advokat-prnjavorac.com/legislation/Law-on-the-Court-of-Bosnia-and-Herzegovina.pdf>> (accessed 10 December 2021). In the following text, this Law will be referred to as “The Law on Courts of BiH”.

⁴⁴ See the State Court’s website for an overview of the work and competences of this court <<http://www.sudbih.gov.ba/stranica/91/pregled>> (accessed 3 January 2022).

⁴⁵ Constitutional Court of BiH, Decision no. U26/01, 28 September 2001, §§ 26-27.

⁴⁶ See the Law on Courts of BiH. See also, Completion Strategy of the ICTY <Completion Strategy | International Criminal Tribunal for the former Yugoslavia (icty.org)> (accessed 3 January 2022).

⁴⁷ Ibid.

pellate Division which rules on appeals stemming from Section III of the Criminal Division as well as all appeals stemming from the Administrative Division and complaints regarding election issues.⁴⁸

This enormously complex court structure houses 48 judges and a Registry composed of around 300 staff members (local and international) who assist the judges (local and international) in administering a high volume of the most complex cases in Bosnia and Herzegovina.⁴⁹ Initially, the State Court had 15 judges who were all locally appointed; however, with the addition of the competence to decide on war crimes cases following the end of the ICTY mandate and the transfer of cases to Bosnia and Herzegovina, the legislation was amended to allow for international judges and international staff to become part of the State Court.⁵⁰ The addition of international judges and legal support staff has assisted this national court to raise the quality of its decisions and judicial reasoning to a higher level. The overall analysis of the case-law of the State Court shows that its decisions are very well written and highly professional, despite the fact that there is room for improvement in the area of utilisation of the Convention standards.

As far as its competences go, the State Court has first instance level jurisdiction in State level criminal offences (including cases related to war crimes, economic and organised crime and corruption cases)⁵¹ and administrative offences (focusing on cases issued by the State level institutions)⁵² as well as an appellate jurisdiction against judgments delivered by the other sections of

⁴⁸ Ibid. For more information on the organisational chart of the Court of BiH (the State Court), <organisational structure of the Court of BiH - The Court of Bosnia and Herzegovina (sudbih.gov.ba)> (accessed 3 January 2022).

⁴⁹ Ibid.

⁵⁰ See the Law on Courts of BiH.

⁵¹ See Article 7 of the Law on Courts of BiH, where it is stipulated that: “The Court has jurisdiction over criminal offences defined in the Criminal Code of Bosnia and Herzegovina and other laws of Bosnia and Herzegovina.” Furthermore, the State Court has additional jurisdiction over criminal offences which are stipulated in the Laws of the Federation of Bosnia and Herzegovina, Republika Srpska and the Brčko District as specifically defined under points a) and b) of paragraph (2) of Article 7. Additional jurisdiction is specified under paragraph 3 of Article 7, points a), b), c), d) and e).

⁵² See Article 8 of the Law on Courts of BiH, where it is stipulated that: “The Court has jurisdiction to decide actions taken against final administrative acts or silence of the administration of the institutions of Bosnia and Herzegovina and its bodies, Public Agencies, Public Corporations, institutions of the Brčko District and any other organisation as provided by State Law, acting in the exercise of a public function”.

the State Court.⁵³ An important part of the jurisdiction of the State Court is to decide on property disputes between the State of Bosnia and Herzegovina, the Entities and the Brčko District. Moreover, the Appellate Panel of the State Court has exclusive jurisdiction to issue final and binding decisions, at a second instance level, for all election disputes in Bosnia and Herzegovina.⁵⁴

The analysis of the competences of the State Court reveal that this particular national high court is unlike any other State level court in other neighbouring Western Balkan States due to evident particularities that exist in Bosnia and Herzegovina. In this respect, it should be clarified that the State Court does not review decisions issued by the Entity courts which, as stated above, have their own appellate avenues, even their own supreme and constitutional courts which operate at the level of the Entities. However, decisions issued by the Entity courts may be reviewed by the State level Constitutional Court of Bosnia and Herzegovina, as can any decision issued by the State Court. This is one of the reasons as to why the Constitutional Court of Bosnia and Herzegovina deals with an enormous amount of cases that stem from both, the State level and the level of the Entities.

Having made these preliminary remarks, the following analysis will focus exclusively on assessing the level of utilisation of the Court's case-law and Convention standards by the State Court. The latter tends to utilise Convention standards in some of its cases but not as frequently as would be desired. As will be reflected in the examination of the case-law of the Constitutional Court, which will follow in [Part 1.2](#), the State Court utilises these principles to a lesser extent than the Constitutional Court, both numerically and substantially speaking.

What is particularly interesting at the level of State Court is that it renders decisions on three levels: first instance, second instance and third instance – de-

⁵³ See Article 9 of the Law on Courts of BiH, where it is stipulated that “The Court shall decide the following: a) appeals against a judgment or decision delivered by the Criminal Division of this Court, b) appeals against a judgment or decision delivered by the Administrative Division of this Court, c) extraordinary legal remedies against final judgments reached by the divisions of the Court, not including those that constitute requests for the reopening of proceedings.”

⁵⁴ See, in this respect, the Brochure of Court of BiH titled ‘Judicial Practice of the Election Process’ <<https://sudbih.gov.ba/Content/Read/brosura-suda>> (accessed 16 December 2021). See also, Article 9 of the Law on Courts of BiH, where it is stipulated that: “The Court shall also have jurisdiction over: a) complaints concerning violations of the electoral code and the additional regulations and directives issued by the Central Election Commission, b) any other case for which competence is provided by the laws of Bosnia and Herzegovina.”

pending on the type of case which is being tried and the number of permitted appeals. This means that a different division of the same court, namely the Appellate Division, reviews the legality of decisions of the lower instances of the same court. The analysis of such cases shows that the ECHR and the ECtHR case-law is used in both types of scenario, in those where the upper instances confirm the verdict (or a specific part of it) of the lower instances⁵⁵ as well as those where the upper instances quash the verdict (or a specific part of it) of the lower instances. For example, in a case related to crimes against humanity, the third instance level of the State Court (which in a way acts as a Supreme Court level instance within the State Court for State level matters) partly modified the decision of the second instance level by confirming the guilt of the accused and then lowering their sentences from 22 years' imprisonment to 20 and from 14 years' imprisonment to 12 years.⁵⁶ In this particular case, the defendants relied on Article 6 of the ECHR alleging a breach of the right to a reasoned decision, an allegation which was refuted by the third instance level utilising the Court's established case-law on this topic, namely *Helle v. Finland* and *Lindner and Hammermayer v. Romania*.⁵⁷ In addition, the third instance level of the State Court also refuted the defendant's allegations of a violation of Article 7 of the ECHR by relying on the ECtHR case-law as well as on the case-law of the Constitutional Court which makes extensive reference to the general principles on Article 7 established by the Strasbourg Court.⁵⁸ The case-law of the State Court shows many other examples where, in addition to relying on the case-law of the Strasbourg Court, it also relies on the rich judicial practice of the Constitutional Court where the general principles of the ECHR for many provisions are extensively and correctly elaborated.⁵⁹ The vast majority of cases in which the State Court relies on Convention principles has to do with cases relating to Article 7 of the ECHR.⁶⁰ Such reliance was particularly

⁵⁵ See e.g. State Court of BiH, Judgment (Second Instance), no. X-KŽ-07/436 of 16 December 2010.

⁵⁶ See e.g. State Court of BiH, Judgment (Third Instance), no. S1 1 K 003359 14 Kžž of 18 September 2014.

⁵⁷ *Ibid.*, §§ 43 and 85.

⁵⁸ *Ibid.*, §§ 218-219. In addition, see also the case-law Bulletins of the State Court of BiH which make reference to the case-law of the Constitutional Court. For example, see Bulletin (2019), pages 65, 69. For an access to all case-law Bulletins of the State Court of BiH, see <<http://www.sudbih.gov.ba/stranica/16/pregled>> (accessed 3 January 2022).

⁵⁹ See e.g. other cases where the State Court of BiH relies on the case-law of the Constitutional Court: Judgment (Second Instance) no. 11 K 017182 19 Krž, 6 June 2019, §15.

⁶⁰ State Court of BiH, Judgment (First Instance) no. X-KRŽ-05/42, 19 August 2008, page 40; State Court of BiH, Judgment (First Instance), no. S1 1 K 003807 14 Kžk, 9 March 2015, § 30; State Court of BiH, Judgment (Second Instance), no. X-KRŽ-05/122, 22 February 2011;

influenced by the Grand Chamber judgment against Bosnia and Herzegovina in *Maktouf and Damjanović*, where the Court had found a violation of Article 7 due to the application of provisions of the criminal code which were not applicable at the time of the commission of the criminal offence.⁶¹ Following this important Grand Chamber judgment of the ECtHR, the State Court amended its case-law practice in order to align it with such case-law, as did the Constitutional Court.⁶²

Other examples of reliance on Convention principles by the State Court may be seen in other areas of Convention law as well, for example: issues of ill-treatment and torture,⁶³ deprivation and/or restriction of liberty,⁶⁴ hate speech during an election process;⁶⁵ the postponement of elections;⁶⁶ discrimination issues related to pension schemes;⁶⁷ the right to private life in relation to declaring past convictions;⁶⁸ the right to protection of property,⁶⁹ in absentia trials;⁷⁰ the right of the accused to confront prosecution witnesses at a public hearing and cross-examine them;⁷¹ the right to a reasoned decision;⁷²

State Court of BiH, Judgment (Second Instance), no. S1 1 K 003336 15 Krž 4, 18 September 2015.

⁶¹ ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, Judgment (2013).

⁶² See, case-law Bulletin of the State Court of BiH, no. 9/2019, pages 44–46, where the importance of the case of *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC] is referred to. In this context, see also several pending (undecided) applications of the Constitutional Court of BiH in the cases of Milorad Trbić (AP1240/11), Mirko Pekez and Others (AP-2948/09), Slobodan Jakovljević and Others (AP-4065/09 i AP4100/09), Ratko Bundalo and Others (AP-2143/11).

⁶³ State Court of Bosnia and Herzegovina, Judgment (Second Instance), no. S1 1 K 020032 17 Kžk, 3 November 2017, paragraphs 46–47.

⁶⁴ State Court of BiH, Judgment (Appellate Section), no. S1 1 K 006028 17 Krž 5, 10 February 2017.

⁶⁵ State Court of BiH, Judgment (Appellate Section), no. S1 3 Iž 024037 16 Iž, 7 February 2017.

⁶⁶ State Court of BiH, Judgment (Appellate Section), no. S1 3 Iž 035961 20 Iž, 21 July 2020.

⁶⁷ State Court of BiH, Judgment (Appellate Section), no. S1 3 P 014403 15 Rev, 24 December 2015.

⁶⁸ State Court of BiH, Judgment (Appellate Section), no. S1 3 P 033973 19 Gž, 27 November 2019.

⁶⁹ State Court of BiH, Judgment (Appellate Section), no. S1 3 K 019120 18 Kž 6, 7 November 2018.

⁷⁰ State Court of BiH, Judgment (Appellate Section), no. X-KR-05/70, 4 July 2006.

⁷¹ State Court of BiH, Judgment (First Instance), no. S1 1 K 003807 12 KrI, 18 December 2013, § 83 (it should be noted that this decision was subsequently quashed and revoked by the Second Instance of the State Court of BiH).

⁷² State Court of BiH, Judgment (First Instance), no. S1 1 K 003472 12 Kžk, 15 February 2013, § 112.

and other issues relating to the right to a fair trial.⁷³ In its recent case-law bulletins, the State Court has also published articles written by the judges and staff of the Registry where the case-law of the ECtHR in various fields of Convention law is discussed.⁷⁴ This is a good strategy to disseminate Convention know-how and improve the record of utilisation of such standards at the domestic level.

Nevertheless, there is still a high number of cases where the ECHR or the ECtHR case-law is not referred to at all, as well as cases where the State Court did not use specific ECtHR principles which would have been very useful to elaborate the concepts used by the State Court in its reasoning.⁷⁵ In some inadmissible cases, there are occasions where the State Court refers to the ECtHR case-law in order to declare a complaint as manifestly ill-founded or otherwise inadmissible.⁷⁶

Overall, the conclusion is that the State Court is a national court which is sometimes inclined to rely on Convention standards, although there is room for more substantial utilisation of such standards especially by the second and third instance levels where they must deal with arguments of the parties in relation to the violation of fundamental human rights in the process of their adjudication by the lower instances. The analysis of the case-law of the State Court, despite the overall high quality of its decisions, did not encounter many cases where a thorough review of general principles of the ECtHR was undertaken. In contrast, the following analysis of the case-law of the Constitutional Court will demonstrate that the latter is much more inclined to utilise Convention principles and build its all-inclusive reasoning around the general principles established by the Strasbourg Court.

⁷³ State Court of BiH, Judgment (Appellate Panel), no. S1 3 K 024035 18 Kž 2, 15 May 2018.

⁷⁴ See case-law Bulletins of the State Court of BiH, no. 2019 and no. 2020.

⁷⁵ State Court of BiH, Judgment (First Instance), no. X-K-07/436, 10 May 2020, in relation to the smuggling of immigrants; State Court of BiH, Judgment (First Instance), no. X-K-10/979, 23 September 2010, in relation to the illicit international sale and purchase, dispatch and delivery of the narcotic drug Ecstasy; State Court of BiH, Judgment (Second Instance), no. S1 1 K 017302 17 Krž 2, 10 November 2017; State Court of BiH, Judgment (Second Instance), no. S1 1 K 005159 11 Kžk, 18 April 2012; State Court of BiH, Judgment, (Third Instance), no. S1 1 K 005159 11 Kžk, 17 June 2013; State Court of BiH, Judgment (First Instance), no. S1 2 K 003131 10 K, 11 April 2011; State Court of BiH, Judgment (First Instance), no. S1 1 K 01 4243 13 Kri, 6 December 2013.

⁷⁶ See e.g. State Court of BiH, Judgment (Second Instance), no. S1 1 K003472 09 Kri (X-KR-08/549), 21 December 2010, § 15.

1.2. Constitutional Court

The Constitutional Court of Bosnia and Herzegovina is an independent State level court responsible to “uphold” the State level Constitution.⁷⁷ Its competences are quite extensive, with three main categories of exclusive jurisdiction. Firstly, the jurisdiction to decide on any dispute between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of the State (disputes between State organs).⁷⁸ Such competence involves but is not limited to the assessment of: (i) whether “an Entity’s decision to establish a special parallel relationship with a neighbouring State is consistent with the Constitution”, the sovereignty and territorial integrity of the State; and, (ii) whether “any provision of an Entity’s constitution or law is consistent with the State level Constitution”.⁷⁹ Secondly, the jurisdiction to act as an appellate jurisdiction over matters arising out of a judgment deriving from all four court systems (State level and Entity level) in Bosnia and Herzegovina (individual constitutional complaint mechanism/constitutional appeal).⁸⁰ Thirdly, the jurisdiction to review issues raised by any regular court concerning the conformity of laws with the Constitution, the ECHR or with the State level laws of Bosnia and Herzegovina, as well as matters raising a case regarding “the existence of or the scope of a general rule of public international law relevant to the court’s decision” (incidental control procedure).⁸¹ The Constitutional Court also has the power to award compensation for non-pecuniary damages and it does so often in cases when it finds violations that cannot be redressed otherwise.⁸²

As far as the composition of the Constitutional Court is concerned, its judicial bench is quite particular. Four out of nine members are selected by the House of Representatives of the Federation of Bosnia and Herzegovina; two are selected by the Assembly of Republic Srpska; whilst three judges are selected by the President of the ECtHR.⁸³ This presence of international judges is undoubtedly one of the reasons as to why the record of the Constitutional Court in Convention application is so advanced.

⁷⁷ Article VI.3 of the Constitution. See also State Court of BiH, Judgment (First Instance), no. S11 K 005596 11 Kro, 31 May 2011, § 22.

⁷⁸ Article VI.3.a. of the Constitution.

⁷⁹ Ibid.

⁸⁰ Article IV.3.b of the Constitution.

⁸¹ Article VI.3.c of the Constitution.

⁸² See Article 74 of the Rule of the Constitutional Court of BiH <https://www.ustavnisud.ba/uploads/documents/rules_1611259624.pdf> (accessed 3 January 2022).

⁸³ Article VI.1. of the Constitution.

The jurisprudence of the Constitutional Court in dealing with matters within its jurisdiction is particularly high in quality, richness and variety. The most important area of jurisdiction to be explored for the purposes of this study is that of the individual constitutional complaint mechanism. However, reference to cases deriving from other areas of jurisdiction, namely disputes between State organs and cases of ‘conventionality’ review of legislation, will be reflected below as long as they pertain to the application of Convention principles at the domestic level.

In the area of individual constitutional complaints, the Constitutional Court has a very broad area of competence. As far as the review of court decisions is concerned, the Constitutional Court reviews decisions stemming from the Entity courts as well as decisions rendered by the State Court – making it the final domestic court that can review Convention complaints for all four levels of the judicial system. The jurisprudence of the Constitutional Court in Convention related provisions is very rich and substantial. To date, the Constitutional Court has decided on cases related to specific Convention rights stemming from Articles 2, 3, 5, 6, 7, 8, 9, 10, 11, 13, 14, Article 1 of Protocol No. 1, Article 2 of Protocol No. 1, Article 3 of Protocol No. 1, Article 2 of Protocol No. 4, Article 1 of Protocol No. 7, Article 2 of Protocol No. 7, Article 3 of Protocol No. 7, Article 4 of Protocol No. 7, and Article 1 of Protocol No. 12.⁸⁴ There are very few Convention provisions for which the Constitutional Court has no case-law. While it has not found violations in all such cases,⁸⁵ it has utilised extensively (and in the vast majority of cases accurately) the Convention principles to reason admissibility issues⁸⁶ as well as to support its stance on finding or not finding a violation. In all cases where the Constitutional Court has reviewed the merits

⁸⁴ See the Constitutional Court’s website for access to the case-law database which is available for search in English <<https://www.ustavnisud.ba/en/decisions?sp=DatumDesc&>>.

⁸⁵ See e.g. cases of the Constitutional Court declared admissible for review on the merits but where the case-law of the ECtHR is invoked to argue that there has been no violation of the Convention: Constitutional Court of BiH, Decision no. AP527/20, 2 December 2021, where no violation of Article 6 ECHR was found; Constitutional Court of BiH, Decision no. AP73720, 2 December 2021; Constitutional Court of BiH, Decision no. AP90/06, 6 July 2007, where no violation of Articles 14 and 17 of the ECHR or of Article 1 of Protocol No. 12 of the ECHR was found. There are numerous other cases showing the utilisation of ECtHR’s case-law in not finding a violation.

⁸⁶ See e.g. Constitutional Court of BiH, Decision no. AP785/08, 31 January 2009, citing ECtHR, *Foti and Others v. Italy*, nos. 7604/76 and 3 others, Judgment (1982); ECtHR, *Salduz v. Turkey* [GC], no. 36391/02, Judgment (2008), § 50; ECtHR, *Belilos v. Switzerland* [Plenary], no. 10328/83, Judgment (1988); ECtHR, *H. v. Belgium* [Plenary], no. 8950/80, Judgment (1987), § 50; ECtHR, *Pronina v. Russia*, no. 65167/01, Decision (2005); and ECtHR, *Kuznetsov and Others v. Russia*, no. 184/02, Judgment (2007).

of the case, the case-law of the ECtHR is extensively quoted and relied upon in a structured and well-organised manner. It is hard, not to say impossible,⁸⁷ to find a decision of the Constitutional Court that is not influenced by the case-law of the Strasbourg Court. The reasoning style resembles that of the ECtHR in that it first outlines the general principles established by the ECtHR and its own previous case-law followed by a sound and reasonable application of such principles in the circumstances of the case at hand. Considering that there is a vast amount of examples showing such utilisation of Convention principles and countless examples in which ECtHR case-law is cited, it would be impossible for this study to cover every single case.⁸⁸ Therefore, the study will focus below on certain key cases stemming from different Convention rights (with further references in footnotes) that illustrate how the Constitutional Court has 'domesticated' important Convention principles in its own practice.

One of many good examples that might help to illustrate the high standard of application of ECtHR principles by the Constitutional Court is the case of *Milorad Bilbija et al* where a violation of Article 13 was found at the domestic level.⁸⁹ It is a particularly interesting and complex case involving, *inter alia*, the impact of international agreements and their relationship with the State Constitution. In brief, the applicants had complained that their right to an effective legal remedy had been breached because they were unable to contest decisions of the High Representative in Bosnia and Herzegovina, via which they were removed from their public positions in the Intelligence and Security Agency in Banja Luka and in the National Assembly of Republika Srpska, respectively.⁹⁰ This particular body is an *ad hoc* international institution established under the General Framework Agreement for Peace in Bosnia and Herzegovina and is responsible to oversee the implementation of the civilian aspects of this peace

⁸⁷ There are, however, a few cases where the Constitutional Court of BiH does not refer to the ECHR or the ECtHR case-law. See, in this context, Constitutional Court of BiH, Decision no. U4/21, 23 September 2021; Constitutional Court of BiH, Decision no. U16/20, 2 December 2021. It should be noted that most of such examples relate to the jurisdiction of the Constitutional Court that does not derive from the individual complaint mechanism.

⁸⁸ For more on the case-law of this domestic court, see a special publication of the Constitutional Court of BiH titled 'Digest of the Case-Law of Constitutional Court of Bosnia and Herzegovina', third revised and supplemented edition, Sarajevo 2020 <<https://www.us-tavnisud.ba/en/case-law>> (accessed 3 January 2022).

⁸⁹ Constitutional Court of BiH, Decision on Admissibility and Merits, no. AP-953/05, 8 July 2006.

⁹⁰ *Ibid.*, see §§ 1-17 for facts of the case and allegations.

agreement.⁹¹ Its decisions are final and cannot be challenged before any international or domestic body.⁹² The Constitutional Court reviewed such allegations very attentively and, following a thorough analysis of the constitutional framework and of public international law matters applicable in this case,⁹³ came to the conclusion that there “is no effective legal remedy available within the existing legal system of Bosnia and Herzegovina against individual decisions of the High Representative concerning the rights of individuals” and that Bosnia and Herzegovina has not “undertaken the activities, required by its positive obligations, to ensure an effective legal remedy against the said decisions.”⁹⁴

In reaching this conclusion, the Constitutional Court relied heavily on principles established by the Strasbourg Court with respect to effectiveness of legal remedies. Referring to *Klass and Others v. Germany* and *Silver and Others v. the United Kingdom*, the Constitutional Court recalled that according to the ECtHR, Article 13 requires the availability of a “remedy before a national authority in order to, both, have [a] claim decided and, if appropriate, obtain redress” in instances “where an individual considers himself to have been prejudiced by a measure allegedly in breach of the European Convention”.⁹⁵ The principle that rights must be “real and effective both in law and in practice and not illusory and theoretical” was also based on the ECtHR’s case-law.⁹⁶ Based on Article 1 of the Convention, the Constitutional Court also recalled that member States are obliged “to secure to everyone within their jurisdiction the rights and freedoms” provided by the Convention and that this particular provision “does not exclude the transfer of competences to international organisations [such as the High Representative] provided that the European Conven-

⁹¹ See the website of the Office of the High Representative for further information on the mandate of this body established by the General Framework Agreement for Peace in Bosnia and Herzegovina, <Office of the High Representative | Office of the High Representative (ohr.int)> (accessed 4 January 2022).

⁹² Constitutional Court BiH, Decision on Admissibility and Merits, no. AP-953/05, 8 July 2006, § 57, where it is stated that: “The Constitutional Court has consistently held that the institution of the High Representative is established by international treaty and is not subject to the jurisdiction of domestic courts except for a situation in which a decision of the High Representative substitutes for the domestic legislator.”

⁹³ See Constitutional Court of BiH, Decision on Admissibility and Merits, no. AP-953/05, 8 July 2006, §§ 46-50 and 57-71.

⁹⁴ *Ibid.*, § 74.

⁹⁵ *Ibid.*, §§ 37-38.

⁹⁶ *Ibid.*, § 54.

tion rights continue to be secured”, meaning that its responsibility to protect such rights “continues even after such a transfer”.⁹⁷

In another interesting case, the Constitutional Court again utilised general principles established in the Court’s case-law in order to declare the unavailability of domestic remedies for certain violations of the Constitution with the following reasoning:

There is an urgent need for all persons in the territory of Bosnia and Herzegovina to be secured the highest level of protection of the guaranteed constitutional rights. (...) The obligation to protect, for example, the right to freedom and security of an individual, as well as the right not to be subjected to torture and inhuman treatment, are related to the general obligations of the state as referred to in Article 1 of the European Convention, which requires the state to secure the rights and freedoms defined in the European Convention to everyone under its jurisdiction. That is why the competent domestic bodies were obliged to conduct an investigation in relation to the violation of [the] appellant’s rights. The Constitutional Court considers that it has jurisdiction to make a decision in this case since the appellant had no effective or adequate legal remedy at his disposal to protect his rights.⁹⁸

Similar cases of proper reflection and utilisation of Convention standards may also be found in other areas of human rights law. For example, in the area of Article 2, the Constitutional Court found a violation of the right to life due to the failure of competent authorities “to initiate the official investigation into the disappearance and violent death of the applicants’ family member during the war in Bosnia and Herzegovina”.⁹⁹ It relied on several ECtHR cases¹⁰⁰ in order to evoke the general principle that whilst an investigation into the death of a person “is not an obligation of results but of means”, there must be “some form of effective official investigation when individuals have been killed as a result of the use of force” and that such an investigation must be capable of leading to “the identification and punishment of those responsible”.¹⁰¹ In the area of Article 11, for instance, the Court found a violation of the right to freedom of assembly following a referral filed by an LGBTIQ organisation, which

⁹⁷ Ibid., § 52.

⁹⁸ Constitutional Court of BiH, Decision on Merits, no. AP-694/04, 23 September 2005, § 101 for the conclusion and then also see §§ 36, 51-53, 60, 70, 83-84 and 91 for a reflection of the case-law of the Strasbourg Court.

⁹⁹ Constitutional Court of BiH, Decision on Admissibility and Merits, no. AP-1107/06, 27 February 2008.

¹⁰⁰ See, in this context, the case-law of the Strasbourg Court cited by the Constitutional Court: ECtHR, *L.C.B v. the United Kingdom*, no. 23413/94, Judgment (1998), § 36; ECtHR, *Osman v. the United Kingdom* [GC], no. 23452/94, Judgment (1998), § 115; ECtHR, *McKerr v. the United Kingdom*, no. 28883/95, Judgment (2001), § 111; and ECtHR, *Akdeniz v. Turkey*, no. 25165/94, Judgment (2005).

¹⁰¹ Ibid.

faced “insults, defamation and threats”.¹⁰² The Constitutional Court built its reasoning by following the standards set by the ECtHR and came to the conclusion that, in this particular case, the public authorities had “failed to take positive measures and provide an effective protection of this right” and thus awarded non-pecuniary damages to the applicant.¹⁰³

Furthermore, a similarly attentive approach to ECtHR case-law by the Constitutional Court may also be noticed in cases where a violation was found in respect of other Convention rights, such as: (i) Article 6 and Article 1 of Protocol No. 1 – a violation on account of non-compliance with a legally binding judicial decision which led to a situation where “two conflicting decisions excluding one another exist in the legal domain, and thus, [creating] legal confusion and violation of the fundamental principle of legal certainty”;¹⁰⁴ (ii) Article 8 and Article 2 of Protocol No. 4 – on account of orders on mandatory wearing of protective masks being issued by incompetent authorities during the COVID pandemic;¹⁰⁵ (iii) Article 3 – on account of the risk of being subjected to torture or inhuman and degrading treatment or punishment if the person is expelled to their country of origin;¹⁰⁶ (iv) Article 7 – on account of a violation of the applicant’s rights due to the retroactive application of the Criminal Code of Bosnia and Herzegovina to his detriment in respect of the sanctions that were imposed on him;¹⁰⁷ (v) Article 14 in conjunction with a specific Constitution right relating to education as well as a violation of Article 1 of Pro-

¹⁰² Constitutional Court of BiH, Decision on Admissibility and Merits, no. AP-1020/11, 25 September 2014, see §121 in respect of the threats received.

¹⁰³ *Ibid.*, §§ 69-74, 76, 83-84, 87, 90, 95, 106, 119, 121 for an insight into the case-law of the ECtHR reflected in the judgment of the Constitutional Court and § 126 for final conclusions.

¹⁰⁴ Constitutional Court of BiH, Decision on Admissibility and Merits, no. AP-2125/17, 29 November 2018, § 79. See other violations under Article 6, consisting of the highest number of violations found at the domestic level: Constitutional Court of BiH, no. AP-561/19, 16 July 2021, violation found due to the manifestly arbitrary application of a law; Constitutional Court of BiH, Decision no. AP-12/02, 19 April 2004, violation found due to undue length or proceedings. See also e.g. other cases where a violation of Article 1 of Protocol No. 1 was found: Constitutional Court of BiH, Decision no. AP-1624/16, 1 December 2016, violation found due to unlawful deprivation of property.

¹⁰⁵ Constitutional Court of BiH, Decision on Admissibility and Merits, no. AP-3683/20, 22 December 2020, see §§ 51, 62, 66 and 68 for an insight into the cited ECtHR case-law.

¹⁰⁶ Constitutional Court of Bosnia and Herzegovina, Decision on Admissibility and Merits, no. AP-555/09, 30 May 2009, §§ 30-31 for an insight into the cited ECtHR case-law and § 35 for a final conclusion.

¹⁰⁷ Constitutional Court of BiH, Decision on Admissibility and Merits, no. AP-4606/13, 28 March 2014, §§ 22, 27, 40, 43, 46, 52, 61 and 63-69 for an insight into the cited ECtHR case-law and § 82 for the final conclusion.

TOCOL No. 12 on its own motion – on account of the fact that the lower courts reached an arbitrary conclusion in respect of the appellant’s claim that the organisation of schools in certain cantons was based on ethnic principles and the implementation of school curricula on the basis of ethnicity “segregated students in schools (...) on the basis of their ethnic affiliation, which resulted in discrimination”;¹⁰⁸ (vi) Article 4 of Protocol No. 7 – on account of the right not to be tried twice in a case where the offence was both a misdemeanour offence and a criminal offence which resulted in the violation of this principle;¹⁰⁹ (vi) Article 14 in conjunction with Article 1 of Protocol No. 1 – with respect to discrimination against common-law partners living together for more than three years considering that, according to the law, they should be treated the same as married couples when it comes to rights and responsibilities, including property rights;¹¹⁰ (vii) Article 3 and Article 8 – on account of the failure of the competent authorities “to submit information to the appellants regarding the fate of members of their families that went missing during the (...) war”;¹¹¹ (viii) Article 10 – on account of an interference with the freedom of expression not in accordance with the law and the failure of courts to apply Article 10 standards.¹¹²

There are several good examples where the Constitutional Court received confirmation from the ECtHR that it had successfully implemented Convention principles at the domestic level, even in cases which generated heated debate at the Strasbourg level.¹¹³ The Grand Chamber case of *Medžlis Islamske*

¹⁰⁸ Constitutional Court of BiH, Decision on Admissibility and Merits, no. AP-166/18, 15 July 2021, §§ 45, 55 and 61 for an insight into the cited ECtHR case-law and § 66 for the final conclusion.

¹⁰⁹ Constitutional Court of BiH, Decision on Admissibility and Merits, no. AP-133/09, 30 March 2012, §§ 28, 30-35, 38 and 41 for an insight into the cited ECtHR case-law and § 48 for the final conclusion.

¹¹⁰ Constitutional Court of BiH, Decision on Admissibility and Merits, no. AP-4207/13, 30 September 2016, §§ 25, 27 and 29-31 for an insight into the cited ECtHR case-law and § 37 for the final conclusion.

¹¹¹ Constitutional Court of BiH, Decision on Admissibility and Merits, no. AP-129/04, 27 May 2005, §§ 35-36, 42, 54-56, 58 and 63 for an insight into the cited ECtHR case-law and § 68 for the final conclusion.

¹¹² Constitutional Court of BiH, Decision on Admissibility and Merits, no. AP1082/17, 7 February 2020; Constitutional Court of BiH, Decision on Admissibility and Merits, no. AP866/12, 29 May 2014; Constitutional Court of BiH, Decision on Admissibility and Merits, no. AP840/06, 25 January 2008; Constitutional Court of BiH, Decision on Admissibility and Merits, no. AP163/03, 22 April 2005.

¹¹³ ECtHR, *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, Judgment (2017). See also three dissenting opinions filed by the ECtHR judges in relation to this case, namely: (1) joint dissenting opinion of Judges Sajó, Karakaş, Motoc

*Zajednice Brčko and Others*¹¹⁴ may serve as a perfect example to illustrate what comfortable deference of the Strasbourg Court to domestic courts looks like. Considering the very good application of Convention tests on Article 10 by the Constitutional Court domestically, the Strasbourg Court completely endorsed its reasoning and found “no strong reasons which would require it to substitute its view for that of the domestic courts and to set aside the balancing done by them”.¹¹⁵ On several occasions, the ECtHR complimented the Constitutional Court’s application of Convention principles through statements such as:

In this connection the Court finds particularly noteworthy the approach followed by the Constitutional Court of Bosnia and Herzegovina in the present case ... relying in substance on Convention case-law developed in a comparable group of cases where the Court found on the facts that ‘the requirements of protection under Article 10 of the Convention ha[d] to be weighed not in relation to the interests of the freedom of the press or of open discussion of matters of public concern but rather against the applicants’ right to report alleged irregularities in the conduct of State officials ...’

...

In view of the foregoing, the Court discerns no strong reasons which would require it to substitute its view for that of the domestic courts and to set aside the balancing done by them ... It is satisfied that the disputed interference was supported by relevant and sufficient reasons and that the authorities of the respondent State struck a fair balance between the applicants’ interest in free speech, on the one hand, and M.S.’s interest in protection of her reputation on the other hand, thus acting within their margin of appreciation

...

Accordingly, there has been no violation of Article 10 of the Convention.¹¹⁶

Similarly, in several other cases the ECtHR deferred to the Constitutional Court.¹¹⁷ There are, of course, cases in which the Constitutional Court did not quite hit the mark with its reasoning and the Strasbourg Court found a violation.

and Mits; (2) separate dissenting opinion of Judge Vehabović; and (3) separate dissenting opinion of Judge Küris.

¹¹⁴ ECtHR, *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, Judgment (2017).

¹¹⁵ *Ibid.* See also [Chapter 1, Part III](#) for more on the “responsible courts doctrine”, “process-based review” and “confirmative dialogue”.

¹¹⁶ ECtHR, *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, Judgment (2017). In particular, see the relevant parts where the ECtHR referred to the reasoning of the Constitutional Court of BiH, §§ 32-34, 71, 82, 90, 97, 112 and 117.

¹¹⁷ See e.g. ECtHR, *Lončar v. Bosnia and Herzegovina*, no. 15835/08, Judgment (2014), §§ 41, and ECtHR, *Mago and Others v. Bosnia and Herzegovina*, nos. 12959/05 and 5 others, Judgment (2012), § 78.

Such instances, it should be noted, happened mostly in highly complex cases involving very particular and peculiar applications of Convention principles – which is precisely the type of cases that the ECtHR should generally be dealing with if there are to be better ‘Convention filters’ at the domestic level in all member States. For example, in the case of *Maktouf and Damjanović*,¹¹⁸ the Grand Chamber could not defer to the Constitutional Court considering that the latter had not found a violation of Article 7 of the ECHR when it reviewed the decision of the State Court.¹¹⁹ The Court’s opinion was in marked contrast to the findings of the Constitutional Court in considering that the applicant’s right to no punishment without law had been violated due to the retroactive application of a more stringent criminal law.¹²⁰ As will be elaborated in further detail later in this chapter, following the Court’s judgment, the applicants managed to secure the reopening of proceedings and were eventually sentenced to more lenient sanctions under the more lenient provisions that were applicable at the time.¹²¹ This, however, was not the only effect at the domestic level. Another major effect was the harmonisation of the case-law undertaken by the Constitutional Court following this Grand Chamber judgment. In a subsequent case relating to Article 7 and where the facts and allegations of the applicant were almost identical to those in the *Maktouf and Damjanović* case, the Constitutional Court used the opportunity to align its case-law in accordance with the jurisprudence of the ECtHR.¹²² In this particular case, the Constitutional Court showcased an exemplary alignment of its case-law with that of the Strasbourg Court by following step by step the tests for the application of Article 7.¹²³ Based on this alignment, the Constitutional Court went on to conclude, as had the ECtHR, that:

By interlinking the circumstances of the present case to the aforementioned standpoints of the European Court of Human Rights, and the positions taken in the case of *Maktouf and Damjanović*, the Constitutional Court holds that there is a realistic possibility in the present case that the retroactive application of the BiH Criminal Code was to the detriment of the appellant in respect of sentencing, which is contrary to Article 7(1) of the European Convention.¹²⁴

¹¹⁸ ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, Judgment (2013).

¹¹⁹ Constitutional Court of BiH, Decision on Merits no. AP1785/06, 30 March 2007.

¹²⁰ ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, Judgment (2013).

¹²¹ For more, see this Chapter, [Part IV](#).

¹²² Constitutional Court of BiH, Decision on Admissibility and Merits, no. AP-325/08, 27 September 2017.

¹²³ *Ibid.*, §§ 37-39, 40-48 and 50-51 for a direct reference to the ECtHR case-law and its approach in dealing with Article 7 cases.

¹²⁴ *Ibid.*, § 51.

In the area of constitutional review of legislation and disputes between State organs, the Constitutional Court deals with highly delicate national matters which tend to engender heated debate due to the particularities of the national power-sharing arrangements between the State and the Entities. In such specific cases, the Constitutional Court is inclined to rely less on the Convention and the ECtHR case-law,¹²⁵ mainly because the questions raised do not always involve (at least directly) individual human rights which would make the ECtHR's jurisprudence relevant.

However, in many instances where the Convention principles are necessary to decide on questions of legislative compatibilities which touch upon individual human rights, the Constitutional Court tends to utilise the general principles established by the ECtHR. This holds true especially for requests for the review of compatibility of legislation which are raised either by national courts through incidental control procedure¹²⁶ or by other parliamentary or governmental bodies authorised to raise such matters. The following examples, of the

¹²⁵ See e.g. several cases where the Constitutional Court did not find it necessary or useful to rely on the Court's general principles due to the particularity of the matters discussed: Constitutional Court of BiH, Decision on Admissibility and Merits, no. U-11/19, 15 July 2021, no reference to the Convention or ECtHR case-law in a case related to the review of the constitutionality of the Law Amending the Law on the Flag of Bosnia and Herzegovina; Constitutional Court of BiH, Decision on Admissibility and Merits, no. U-16/20, 16 July 2021, no reference to the Convention or ECtHR case-law in a case related to a dispute between Bosnia and Herzegovina and Republika Srpska with respect to property concession competences; Constitutional Court of BiH, Decision on Admissibility and Merits, no. U-8/19, 6 February 2020, no reference to the Convention or ECtHR case-law in a case related to the review of the Law on Agricultural Land of Republika Srpska; Constitutional Court of BiH, Decision on Admissibility and Merits, no. U-2/20, 26 November 2020, no reference to the Convention or ECtHR case-law in a case related to the review of the Law on Amendments to the Animal Welfare Law; Constitutional Court of BiH, Decision on Admissibility and Merits, no. U-22/18, 5 July 2019, no reference to the Convention or ECtHR case-law in an incidental control case related to a referral lodged by the Municipal Court in Tuzla requesting the review of a provision of the Law on Higher Education of the Tuzla Canton; Constitutional Court of BiH, Decision on Admissibility and Merits, no. U-10/16, 1 December 2016, no reference to the Convention or ECtHR case-law in a case related to a decision to call a referendum.

¹²⁶ In this context, see some cases pertaining to the incidental control procedure: Constitutional Court of BiH, Decision on Admissibility and Merits, no. U-2/17, 1 June 2017, regarding the review of the Law on Enforcement Proceedings of Republika Srpska, § 25; Constitutional Court of BiH, Decision on Admissibility and Merits, no. U-3/16 of 1 December 2016, regarding review of the Law on Enforcement Proceedings of Republika Srpska, see §§ 23-24 for references to the case-law of the ECtHR; Constitutional Court of BiH, Decision on Admissibility and Merits, no. U-6/15, 21 January 2016, regarding the review of a certain article of the Law on Transport, § 19.

many available, may illustrate this observation better. For instance, the Constitutional Court declared the amendments to the Rulebook on Wearing Uniforms in the part that read “when in uniform, police officers are not allowed to have a beard” as being incompatible with Articles 8 and 9 of the Constitution, relying extensively on ECtHR jurisprudence.¹²⁷ It declared a provision of the local level Constitution of Republika Srpska as incompatible with Article 1 of Protocol No. 13 because it prescribed, although exceptionally, the pronouncement “of the death penalty for the most serious crimes”.¹²⁸ The Constitutional Court recalled that the ECHR requires the abolition of the death penalty in all circumstances and that Bosnia and Herzegovina, including all levels of government, State and Entity level, have been legally bound by this prohibition from the moment that the Convention was ratified.¹²⁹ In another case, certain provisions of the Law on the Intelligence and Security Agency were declared incompatible with Article 8 due to the fact that such provisions did not “ensure that the measures of surveillance and search are not ordered haphazardly, irregularly or without due and proper consideration”.¹³⁰

There are also instances where the legislation is deemed compatible with the guarantees stipulated under the Convention. For example, the Constitutional Court declared the Law Declaring March 1 as the Independence Day of the Republic of Bosnia and Herzegovina as being compatible with the Preamble of the Constitution and with the relevant Convention provisions prohibiting discrimination.¹³¹ In that particular case, the National Assembly of Republika Srpska alleged that such a law is discriminatory against Serbs as it celebrates the secession of Bosnia and Herzegovina from former Yugoslavia, after a referendum in 1992 which “was supported mainly by Bosniacs and Croats and boycotted by Serbs”.¹³² In other cases, legislation was deemed compatible with other Con-

¹²⁷ Constitutional Court of BiH, Decision on Admissibility and Merits, no. U-8/17, 30 November 2017, see §§ 24, 23-25, 33-35, 40 and 42 for an insight into the cited ECtHR case-law and paragraph 47 for the final conclusion.

¹²⁸ Constitutional Court of BiH, Decision on Admissibility and Merits, no. U-7/19, 4 October 2019, see § 25 for an insight into the cited ECtHR case-law.

¹²⁹ *Ibid.*, § 31.

¹³⁰ Constitutional Court of BiH, Decision on Admissibility and Merits, no. U-21/16, 1 June 2017, see §§ 21-24 for an insight into the cited ECtHR case-law and § 27 for the final conclusion.

¹³¹ Constitutional Court of BiH, Decisions on Admissibility and Merits, no. U-18/16, 6 July 2017. See also the dissenting opinion by judges Zlatko Knežević and Miodrag Simić.

¹³² *Ibid.*, § 8. By way of contrast, other decisions, namely: Constitutional Court of BiH, Decision on Admissibility and Merits, no. U-3/13, 26 November 2015, related to the constitutionality of the Law on Holidays where the Constitutional Court found that a specific provision is inconsistent, *inter alia*, with Article 1 of Protocol No. 12 to the ECHR, concluding that “the contested Article 3(b) of the Law on Holidays, by designating the Day of the Re-

vention provisions in various other cases related to Article 6,¹³³ Article 1 of Protocol No. 1¹³⁴ Article 6 in conjunction with Article 13 and Article 8.¹³⁵

A particular category of the jurisprudence of the Constitutional Court relates to so-called “Rulings” which, in substance, declare the failure of State authorities to enforce decisions of the Constitutional Court. For instance, such Rulings were issued: (i) against the Parliamentary Assembly of Bosnia and Herzegovina for failing to amend the provisions of the Law on Citizenship that had been declared unconstitutional;¹³⁶ as well as for (ii) failing to take the necessary steps in harmonising the Statute of the City of Mostar with the Constitution in respect of provisions not allowing certain individuals to stand for elections;¹³⁷ (iii) against the Parliament of the Federation of Bosnia and Herzegovina for failing to align Article 3 of the Law Amending the Law on Enforcement Procedure with the Constitution and the Convention;¹³⁸ (iv) against the National Assembly of Republika Srpska and the Parliament of the Federation of Bosnia and Herzegovina for failing to bring the Law on the Coat of Arms and

public to be observed on 9 January, places members of the Serb population in a privileged position when compared to Bosniacs and Croats, others and citizens of Republika Srpska, due to the fact that this date represents a part of the historical heritage of Serb people only, and on account of the observance of the Patron Saint’s Day of Republika Srpska being connected to the traditions and customs of Serb people only.”

¹³³ Constitutional Court of BiH, Decision on Admissibility and Merits, no. U-11/17, 15 February 2018, relating to review of certain provisions of the Labour Law of the Republika Srpska with Article 6 of the Convention, see §§ 28-29 for an insight into the cited ECtHR case-law; Constitutional Court of BiH, Decision, no. U-1/18 of 15 February 2018, relating to the review of certain provisions of the Law on the Civil Procedure Code, see §§ 24, 26, 31, 34, 36-37 and 42 for an insight into the cited ECtHR case-law.

¹³⁴ Constitutional Court of BiH, Decisions on Admissibility and Merits, no. U-16/18, 28 March 2019 relating to the review of certain provisions of the Law on the Civil Procedure Code of Republika Srpska, see §§ 42, 64, 68-69 for an insight into the cited ECtHR case-law.

¹³⁵ Constitutional Court of BiH, Decision on Admissibility and Merits, no. U-5/16, 1 June 2017, see §§ 91-92.

¹³⁶ Constitutional Court of BiH, Ruling no. U9/11, 28 September 2012. In its previous decision related to this Ruling the Constitutional Court had found an inconsistency with Article I.7.b of the Constitution.

¹³⁷ Constitutional Court of BiH, Ruling no. U9/09, 18 January 2012. In its previous decision related to this Ruling the Constitutional Court had found an inconsistency with several provisions of the Constitution.

¹³⁸ Constitutional Court of BiH, Ruling no. U5/10, 18 January 2012. In its previous decision related to this Ruling the Constitutional Court had found an inconsistency with Article 6 and Article 1 of Protocol No. 1 to the ECHR.

Flags of the Federation of Bosnia and Herzegovina and the Coat of Arms and Anthem of Republika Srpska into alignment with the Constitution.¹³⁹

The analysis outlined above quite naturally leads to the conclusion that the Constitutional Court of Bosnia and Herzegovina is at an advanced stage of utilisation of Convention standards. It is highly cognizant of Convention principles and continually makes successful efforts in faithfully implementing the jurisprudence of the ECtHR. In fact, the number of violations found at the Strasbourg level which derive from an error of the Constitutional Court in absorbing and applying Convention principles is very low, as will be seen in further detail in the part of this chapter where the jurisprudence of the ECtHR against Bosnia and Herzegovina is reflected. This particular vigilance makes the Constitutional Court a trustworthy 'Convention partner' of the Court at the domestic level, not only because it serves as a good filter of possible Convention violations but also because it contributes significantly to the overall embeddedness of the ECHR in the domestic legal order and judicial system.

2. Constitutional Court v. the State Court: 'Convention talk'

Due to the wide area of jurisdiction vested in the Constitutional Court, the direct judicial dialogue with the regular courts in Bosnia and Herzegovina as well as other public authorities is quite prevalent and substantial. As stated above, the main competences of the Constitutional Court which are most relevant for the purposes of this study are the ones related to: (i) the individual complaint mechanism; and (ii) the incidental control procedure. As a result, the following analysis will focus on the 'Convention talk' between the two highest State level courts, namely the State Court and the Constitutional Court, while referring also to some other important national case-law due to the specific context of the complex judicial structure present in Bosnia and Herzegovina.

In the area of the individual constitutional complaint mechanism i.e. the constitutional appeal, the Constitutional Court has the power to review any decision rendered by the State Court, following the exhaustion of domestic remedies prior to filing a constitutional appeal. Thus far, the Constitutional Court

¹³⁹ Constitutional Court of BiH, Ruling no. U4/04, 27 January 2007. In its previous decision related to this Ruling the Constitutional Court had found an inconsistency with several articles of the Constitution as well as with the International Convention on the Elimination of All Forms of Racial Discrimination.

has found that several decisions of the State Court have been rendered in violation of different articles of the Convention.¹⁴⁰ It also cleared many decisions of the State Court as being compatible with the Constitution/Convention.¹⁴¹

In the following, this study will take as an example a few interrelated decisions of the State Court and the Constitutional Court which may illustrate the ‘Convention talk’ between these two high courts in relation to the aforementioned Grand Chamber case of *Maktouf and Damjanović*, namely the domestic decisions enacted by both courts, prior to and after this case was decided by the ECtHR. At the domestic level, the cases started being adjudicated in 2005 when the State Court found both applicants guilty and sentenced them to imprisonment based on the Criminal Code of Bosnia and Herzegovina which was enacted after the war ended.¹⁴² Both applicants filed their first constitutional appeals before the Constitutional Court. In the case of Mr Maktouf, this court confirmed the decision of the State Court in its entirety and found no violation of the Convention despite the fact that the applicant had alleged a violation of Article 7 of the ECHR due to the State Court’s failure to apply a “more lenient law”, hence a “more lenient punishment”, in his case according to the criminal legislation which was applicable at the time;¹⁴³ while, in the case of Mr Damjanović, it rejected his constitutional appeal as out of time.¹⁴⁴ In the part of its reasoning where it dealt with the merits of the Article 7 complaint, the Constitutional Court reasoned that there had been no violation by the State Court in this respect considering that “war crimes are ‘crimes according to international law’” and that, “given the universal jurisdiction to conduct proceedings”, it meant that “convictions for such offences would not be inconsistent with Article 7 § 1 of the European Convention under a law which subsequently defined and determined certain acts as criminal and stipulated criminal sanctions” even in occasions when “such acts did not constitute criminal offences

¹⁴⁰ Constitutional Court of BiH, Decision on Admissibility and Merits, no. AP-555/09, 30 May 2009, where a violation of Article 3 was found; Constitutional Court of BiH, Decision on Admissibility and Merits, no. AP-1885/13, 24 May 2013, where a violation of Article 5 was found, etc.

¹⁴¹ Constitutional Court of BiH, Decision on Admissibility and Merits, no. AP-4597/14, 14 May 2015; Constitutional Court of BiH, Decision on Merits, no. AP-542/05, 12 April 2006; Constitutional Court of BiH, Decision on Admissibility and Merits, no. AP-875/14, 15 February 2017; Constitutional Court of BiH, Decision on Admissibility and Merits, no. AP-875/14, 15 February 2017; Constitutional Court of BiH, Decision on Admissibility and Merits, no. AP-1785/06, 30 March 2007.

¹⁴² ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, Judgment (2013), §§ 13 and 22.

¹⁴³ *Ibid.*, § 15.

¹⁴⁴ *Ibid.*, § 23.

under the law that was applicable at the time the criminal offence was committed”¹⁴⁵

In the domestic court proceedings, the applicants were both convicted for war crimes and were subsequently sentenced based on the Criminal Code of 2003, although the 1976 Criminal Code of Former Yugoslavia had been applicable at the time of the commission of the offences.¹⁴⁶ They appealed before the ECtHR under the main argument that the domestic courts had violated their right under Article 7 considering that “a more stringent criminal law has been applied to them [Criminal Code 2003] than that which had been applicable at the time of their commission of the criminal offences [Criminal Code 1976]”¹⁴⁷ Due to its importance, the case of *Maktouf and Damjanović* was heard and decided in 2013 by the Grand Chamber. The latter was unanimous in finding a violation of the applicants’ right to “no punishment without law”, following the overseeing of this violation by the State Court and the Constitutional Court at the domestic level.¹⁴⁸

In its reasoning, the ECtHR clarified that its task is not to review said criminal legislation *in abstracto* but to assess matters on a case-by-case basis.¹⁴⁹ After a detailed review of the case, the Court concluded that there had been a violation of Article 7 in the applicants’ cases, in substance because the retroactive application of the 2003 Criminal Code had operated to the applicants’ disadvantage as regards sentencing and therefore it could not be said that the applicants had been afforded effective safeguards against the imposition of a heavier penalty.¹⁵⁰ Having found a violation, the Court clarified that its “conclusion should not be taken to indicate that lower sentences ought to have been imposed, but simply that the sentencing provisions of the 1976 [Criminal] Code should have been applied in the applicants’ cases”.¹⁵¹ This Grand Chamber judgment produced three different concurring opinions from four judges.¹⁵²

¹⁴⁵ Ibid., § 15 and 76.

¹⁴⁶ Ibid., §§ 66-67. See also, Constitutional Court of BiH, Decision no. AP-1785/06, 30 March 2007.

¹⁴⁷ Ibid., § 54.

¹⁴⁸ ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, Judgment (2013).

¹⁴⁹ Ibid., § 65.

¹⁵⁰ Ibid., §§ 70-75.

¹⁵¹ Ibid., § 76.

¹⁵² See e.g. three concurring opinions filed by ECtHR judges in the case of *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], namely: (1) concurring opinion of Judge Ziemele; (2) concurring opinion of Judge Kalaydjieva; and (3) concurring opinion of Judge Pinto de Albuquerque, joined by Judge Vučinić.

In particular, Judge Pinto de Albuquerque joined by Judge Vučinić considered that the applicants' convictions "must be declared null and void by the competent national court" considering that Article 7 is a non-derogable right and the principle *nulla poena sine lege* "must benefit all offenders, be their crimes petty or brutal".¹⁵³ As a result, they considered that the "legal effect" of finding a violation of Article 7 in this case means that "the applicants' convictions must be declared null and void" at the domestic level considering that "the national courts applied arbitrarily and retroactively the *lex gravior*".¹⁵⁴ In fact, even if the Court did not specifically ask for the cases to be reopened in order to redress the violation, at the domestic level the cases were successfully reopened and the applicants were then sentenced again but this time to more lenient sanctions according to the criminal legislation which was applicable at the time.¹⁵⁵

In the subsequent decisions of the national courts, after the 2013 Grand Chamber judgment, it is very important to observe and assess their reaction following the violation found by the Strasbourg Court. From the outset, the approach of the regular courts should be highly commended in that they reacted swiftly and ensured a harmonisation of their domestic case-law with that of the ECtHR so that there would be no further need for other applicants to lodge their complaints before a supranational court. Firstly, three months after the publication of the Grand Chamber judgment, the State Court granted the applicants' requests to reopen the proceedings before the State Court.¹⁵⁶ Following that, the State Court rendered fresh judgments, based on the 1976 Criminal Code, in respect of: (i) Mr Maktouf by sentencing him to three years' imprisonment – a more lenient sanction than the previous one;¹⁵⁷ and (ii) Mr Damjanović by sentencing him to six years' imprisonment – a more lenient sanction than the previous one.¹⁵⁸ Despite having remedied the individual situation of

¹⁵³ Ibid., § 15 of the concurring opinion of Judge Pinto de Albuquerque, joined by Judge Vučinić.

¹⁵⁴ Ibid.

¹⁵⁵ Committee of Ministers, Resolution CM/ResDH(2017)180, 7 June 2017.

¹⁵⁶ Ibid. See also Action Report submitted by Bosnia and Herzegovina in relation to this case, DH-DD(2017)33, 13 March 2017, § 10.

¹⁵⁷ To be noted that Mr Maktouf had been released from prison before the ECtHR rendered a judgment on his favor after having completed his initial five years of imprisonment sentence.

¹⁵⁸ Committee of Ministers, Resolution CM/ResDH(2017)180, 7 June 2017. See also, Action Report submitted by Bosnia and Herzegovina in relation to this case, DH-DD(2017)33, 13 March 2017, §§ 11-14, where it is stipulated that Mr Damjanović was effectively released from prison following the reopening of proceedings against him on 11 October 2013. His new conviction, decided after the ECtHR judgment, became final on 6 March 2014 and he served the remainder of his sentence until 3 June 2014 when he was finally released from prison.

both applicants, the regular courts then embarked on a rigorous review of the domestic court decisions in order to align them with the ECtHR's case-law.

Notably, only two months after the ECtHR rendered its Grand Chamber judgment, the Constitutional Court reacted proactively in changing its previous judicial practice by finding a violation of Article 7 of the Convention and quashing a verdict of the State Court in an almost identical case.¹⁵⁹ The applicant in that case had been found guilty and sentenced in 2007 by the State Court, i.e. prior to the Grand Chamber judgment.¹⁶⁰ The State Court had applied the Criminal Code of 2003 instead of the Criminal Code of 1976 exactly as it had done in the cases of Mr Maktouf and Mr Damjanović.¹⁶¹ This time however, the Constitutional Court, by relying heavily and correctly on the case-law of the ECtHR, found a violation of Article 7 and sent the case for a fresh examination before the State Court.¹⁶² The Constitutional Court started its analysis by recalling that the Strasbourg Court had rendered a judgment in a similar case and went on to provide a very detailed explanation of the *Maktouf and Damjanović* judgment,¹⁶³ before proceeding to apply such principles in the other similar case and qualifying the latter as factually and legally the same.¹⁶⁴ After setting the scene, the Constitutional Court stated:

Thus, these are identical arguments as those considered before the European Court of Human Rights in the case of *Maktouf and Damjanović* (paragraphs 69-74). Accordingly, the Constitutional Court holds that there is no reason not to accept, in this part, the reasons and reasoning provided by the European Court of Human Rights in the present case.

...

By interlinking the circumstances of the present case to the aforementioned standpoints of the European Court of Human Rights, and the positions taken in *Maktouf and Damjanović*, the Constitutional Court holds that there is a realistic possibility in the present case that the retroactive application of the BiH Criminal Code [2003] was to the detriment of the appellant in respect of the sentencing, which is contrary to Article 7(1) of the European Convention.¹⁶⁵

In that particular case, the Constitutional Court ordered the State Court to take a new decision “in an expedited procedure”, in accordance with Article 7

¹⁵⁹ Constitutional Court of BiH, Decision no. AP-325/08, 27 September 2013.

¹⁶⁰ State Court of BiH, Decision no. X-Kr-05/107, 18 June 2007.

¹⁶¹ Ibid.

¹⁶² Constitutional Court of Bosnia and Herzegovina, Decision no. AP-325/08, 27 September 2013.

¹⁶³ Ibid., §§ 37-45.

¹⁶⁴ Ibid., § 46.

¹⁶⁵ Ibid., §§ 48 and 51.

ECHR.¹⁶⁶ Besides this case, there were 19 other similar complaints concerning 25 other individuals convicted under the Criminal Code of 2003 which were pending before the Constitutional Court when the ECtHR Grand Chamber judgment was rendered, with more applications having been filed after the publication of the ECtHR judgment.¹⁶⁷ The Constitutional Court examined the conventionality of the State Court decisions on a case-by-case basis, subsequently quashing 21 decisions due to identical situations of application of heavier penalties than those which were applicable at the time of the commission of the war crimes in question.¹⁶⁸ The State Court, for its part, conducted a fresh examination of all such cases, as ordered by the Constitutional Court, and rendered new decisions with more lenient sanctions.¹⁶⁹ In conclusion, the analysis above shows two important facts, namely that the cooperation and the ‘Convention talk’ between the State Court and the Constitutional Court was very efficient and result-oriented in the area of Article 7 and that both courts realised meticulously their duties to act as ‘last-line defenders’ of Convention rights and thus prevent any flow of applications before the ECtHR by creating and implementing well-established national case-law inspired by that of the Strasbourg Court.

In the area of the incidental control mechanism, the State Court (for State level matters) or any other regular courts (for Entity level matters) may refer preliminary questions to the Constitutional Court in case they consider that the legislation that should be applied in the case before them is contrary to the Constitution and/or the Convention. It needs to be noted from an outset that the State Court has not utilised the incidental control mechanism very often¹⁷⁰ in comparison to Entity level courts in Bosnia and Herzegovina which have been quite successful in raising arguable claims over the incompatibility of

¹⁶⁶ Ibid., see the operative part of the judgment.

¹⁶⁷ Committee of Ministers, Resolution CM/ResDH(2017)180, 7 June 2017, §§ 24-25.

¹⁶⁸ Ibid., §§ 26-27.

¹⁶⁹ Ibid., § 34.

¹⁷⁰ In this respect, see several incidental control cases initiated by the State Court as a referring court: Constitutional Court of BiH, Decision on Admissibility and Merits, no. U6/12, of 13 July 2012, a case where the State Court challenged the compatibility of the Civil Procedure Code with Article 6 of the ECHR but the Constitutional Court did not finally consider it to be in breach of this Convention provision; Constitutional Court of BiH, Decision on Admissibility and Merits, no. U29/13, 28 March 2014, a case where the State Court challenged certain provisions of the Law on Salaries and the Constitutional Court agreed that said Law was incompatible with Article 14 ECHR.

certain provisions of the national legislation with the Convention.¹⁷¹ There are merely a few cases where the Constitutional Court either confirmed the compatibility of the legislation with the ECHR or declared it incompatible with it, following a referral from the State Court, which may serve to reflect, in more practical terms, the judicial ‘Convention talk’ between them in the area of compatibility of the legislation with the ECHR.

For instance, the State Court was faced with a lawsuit filed by a police officer who alleged that “a mandatory termination of the employment after reaching 40 years of contributions to the pension fund, without meeting the requirements for old-age pension concurrently, as prescribed by the pension legislation of Republika Srpska” is discriminatory when such scheme is compared “to the employees in the institutions at the same level of government” who reside in another Entity, namely the Federation of Bosnia and Herzegovina.¹⁷² Facing such a question, the State Court had dilemmas as to the ‘conventionality’ of the legal provisions it ought to apply and decided to pause any further decision-making on the case and refer the question to the Constitutional Court for a preliminary review, arguing that a specific provision of the Law on Police Officials was discriminatory.¹⁷³ The Constitutional Court disagreed with the allegations of the State Court and declared that such a legal provision “does not have a discriminatory effect on the police officials of Bosnia and Herzegovina residing in the territory of Republika Srpska”.¹⁷⁴ In deciding in this case, the Constitutional Court first outlined the relevant general principles of the ECtHR with respect to direct and indirect discrimination,¹⁷⁵ before proceeding to apply such general principles to the facts and allegations of the case.¹⁷⁶

¹⁷¹ In this respect, see several incidental control cases initiated by the other Entity level courts in Bosnia and Herzegovina: Constitutional Court of BiH, Decision on Admissibility and Merits, no. U-17/06, 29 September 2016, filed by the Supreme Court of the Federation of Bosnia and Herzegovina as a referring court and in which case the Constitutional Court concluded that several articles of the Law on Minor Offences are inconsistent with Article 6 ECHR; Constitutional Court of BiH, Decision no. U-55/02, 26 September 2003, filed by the Basic Court in Doboja as a referring court and in which case the Constitutional Court concluded that certain provisions of the Law on Housing Relations are in conformity with Article 8 of the ECHR as well as Article 1 of Protocol No. 1; Constitutional Court of BiH, Decision on Admissibility and Merits, no. U10/19, 6 February 2020, filed by the Municipal Court in Cazin and in which case the Constitutional Court concluded that certain provisions of the Law on Enforcement Procedure of the Federation of Bosnia and Herzegovina are not compatible with Article 1 of Protocol No. 1.

¹⁷² Constitutional Court of BiH, Ruling no. U9/15, 6 April 2016.

¹⁷³ *Ibid.*, § 7.

¹⁷⁴ *Ibid.*, § 28.

¹⁷⁵ *Ibid.*, §§ 19–20.

¹⁷⁶ *Ibid.*, §§ 21–27.

In particular, relying on *Muñoz Diaz v. Spain*, *Thlimmenos v. Greece*, *Burden v. the United Kingdom*, *Stec v. the United Kingdom*, and *Aziz v. Cyprus*, the Constitutional Court recalled that: (i) non-discrimination within the meaning of the ECHR “means treating persons in relevantly similar situations in a similar manner in terms of their rights safeguarded by the European Convention, unless objective and reasonable justification” for a difference in treatment exists; (ii) a difference in treatment “is discriminatory if ... it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised”; and, (iii) “the right to non-discrimination is a qualitative rather than an absolute right, and States can have a considerable margin of appreciation in that regard”.¹⁷⁷ Following this, the Constitutional Court defined the questions to be answered and applied the ECtHR principles by reasoning, in substance, that the challenged provision “[did] not prima facie disclose anything that could be considered as direct discrimination against the police officials regardless of their place of residence” and that there was also no issue of indirect discrimination in the present case either.¹⁷⁸ The reasoning of the Constitutional Court was quite extensive and detailed, encompassing a very comprehensive application of the Court’s general principles as well as a thorough analysis of the domestic legislation in order to argue why there was no discrimination in this particular case.¹⁷⁹ This decisions, therefore, may be considered as a textbook example of how national courts should utilise the general principles crafted by the Strasbourg Court and apply them to the particular circumstances of their domestic cases – with a view to redressing possible Convention violations at home. What is commendable about the approach of the Constitutional Court is that its reliance on such general principles is very clear, concise, direct and relevant. The reader may easily follow the line of argumentation and the connection of the ECtHR’s general principles to the facts and allegations of the case. The even better news is that the Constitutional Court employs a similar approach of utilising the Court’s general principles to reason the constitutionality or unconstitutionality of legislation in almost all of its cases (not necessarily filed by the State Court only)¹⁸⁰ when deciding on the incidental control proce-

¹⁷⁷ Ibid., §§ 19-20.

¹⁷⁸ Ibid., §§ 21-22.

¹⁷⁹ Ibid., §§ 21-27.

¹⁸⁰ There are exceptions involving cases where the Constitutional Court does not refer to the ECtHR case-law in the area of incidental control procedure, see e.g. Constitutional Court of BiH, Decision on Admissibility and Merits, no. U5/13, 5 July 2013, reviewing the constitutionality of a specific provision of the Law on Protection and Rescue of People and Ma-

dure.¹⁸¹ However, the low number of referrals from the State Court means that there have not been very many cases in which these two courts could engage in such 'Convention talk' at the domestic level.

Overall, the above analysis shows that the 'Convention talk' between the State Court and the Constitutional Court varies depending on the sphere of Convention rights. For example, in the area of the individual constitutional complaint mechanism, these two courts have shown an exemplary form of domestic judicial dialogue in implementing the case-law of the ECtHR by completely changing their previous judicial practice and aligning it with the Strasbourg Court. In other areas of Convention law, there is also 'Convention talk' between these two courts but it is more limited and the Constitutional Court is more profoundly involved in this exchange due to its greater Convention know-how and expertise. In the area of incidental control, the analysis showed that the 'Convention talk' between the two courts is not very frequent, particularly due to the low number of cases which are filed for preliminary review by the State Court.

terial Goods in Case of Natural or other Disasters. Such cases usually relate to matters that are not covered by the ECtHR case-law or pertain to national and local particularities.

¹⁸¹ In this context, see e.g. Constitutional Court of BiH, Decision on Admissibility and Merits, no. U29/13, 28 March 2018, reviewing the constitutionality of the law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the level of Bosnia and Herzegovina.

IV. Bosnia and Herzegovina v. Strasbourg Court: Impact and Effects

1. Overview of the Court's Case-Law against Bosnia and Herzegovina

The jurisprudence of the Strasbourg Court in respect of Bosnia and Herzegovina has produced many interesting cases which are important not just for the country itself but also for the overall application of Convention standards in all States Parties. To date, there have been four Grand Chamber cases against Bosnia and Herzegovina, which will be elaborated below in one of the categories of cases, depending on where each case falls. Starting from the oldest to the newest, the Court has found important Convention violations in three cases, namely *Sejdić and Finci*, *Maktouf and Damjanović* and *Ališić and Others*, whilst in the last Grand Chamber case of *Medžlis Islamske Zajednice Brčko and Others*, the Court did not find a violation.¹⁸² In addition to these high-profile judgments, there are two other cases which have been marked with high-level importance for Convention case-law by the ECtHR itself.¹⁸³ Most of the violations in respect of Bosnia and Herzegovina were found under the Article 6 domain but some really interesting cases have derived from violations of other Articles of the Convention, namely Articles 3, 5, 7, 8, 9, 13, 14, Article 1 of Protocol No. 1, and Article 3 of Protocol No.1. To date, the Court has declared the need for general and/or individual measures to be taken by Bosnia and Herzegovina within the meaning of Article 46 of the Convention on 12 occasions, as will be elaborated below. The following part of the analysis, with the specificities that this chapter calls for, will focus on six categories of cases:

¹⁸² ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, Judgment (2009); ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, Judgment (2013); ECtHR, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, Judgment (2014); and ECtHR, *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, Judgment (2017).

¹⁸³ ECtHR, *Jeličić v. Bosnia and Herzegovina*, no. 41183/02, Judgment (2006), and ECtHR, *Hamidović v. Bosnia and Herzegovina*, no. 57792/15, Judgment (2017).

- (1.1) [Cases under Article 46: General and/or Individual Measures Required](#)
- (1.2) [Cases with Highest Number of Violations: Article 6 issues](#)
- (1.3) [Cases under Article 13: Lack of Effective Domestic Remedies](#)
- (1.4) [Cases with Violations under Other Articles of the Convention](#)
- (1.5) [Admissible Cases where No Violation was Found](#)
- (1.6) [Other Important Cases Related to Exhaustion of Domestic Remedies](#)

1.1. Cases under Article 46: General and/or Individual Measures Required

The Court invoked Article 46 in 12 cases against Bosnia and Herzegovina. In the following part, all such cases will be analysed starting from the oldest to the newest. This part will also reflect on the measures that have been taken (or not yet taken) at the domestic level with a view to fulfilling the Court's recommendations under Article 46.

In the case of *Karanović*, the Court found a violation of the right of access to a court considering that a final judgment of the Human Rights Chamber ordering the transfer of the applicant's pension fund from one Entity to another had not been executed.¹⁸⁴ Due to the lack of legislation harmonisation between the two Entities, the applicant was still receiving a pension from Republika Srpska despite the fact that he had returned to the Federation of Bosnia and Herzegovina as a formerly displaced person.¹⁸⁵ The pension fund provided by the former Entity was much lower than that provided by the latter Entity, and there were numerous other displaced persons facing the same issue, namely "pensioners living in the Federation of Bosnia and Herzegovina who were internally displaced in Republika Srpska during the armed conflict".¹⁸⁶ In the domestic court proceedings, the Human Rights Chamber, as a general measure requirement, had ordered the Federation of Bosnia and Herzegovina to take necessary legislative and administrative measures with a view to ensuring that the applicant(s) were no longer discriminated against in their enjoyment of pension rights.¹⁸⁷ Its decision was never executed. The Court utilised Article 46 of the Convention to highlight that this case disclosed shortcomings in the national legal order which affect a whole class of citizens and that all such individuals could be potential applicants.¹⁸⁸ The Court considered that such a high num-

¹⁸⁴ ECtHR, *Karanović v. Bosnia and Herzegovina*, no. 39462/03, Judgment (2007), § 25.

¹⁸⁵ *Ibid.*, § 25.

¹⁸⁶ *Ibid.*, § 27.

¹⁸⁷ *Ibid.*, §§ 10-11.

¹⁸⁸ *Ibid.*, § 27.

ber of prospective applicants “represents a threat to the future effectiveness of the Convention machinery”.¹⁸⁹ Whilst recalling that it is not in principle for the ECtHR “to determine what remedial measures may be appropriate to satisfy the respondent State’s obligations under Article 46 of the Convention”,¹⁹⁰ the Court hinted at the need for legislative measures to be taken as the sole action which could remedy the situation at the national level.¹⁹¹ Therefore, the Court considered that the respondent State must “secure the enforcement of the Human Rights Chamber’s decision” and transfer the applicant to the pension fund of the Federation of Bosnia and Herzegovina due to the particularity of the case and “the urgent need to put an end to the impugned situation”.¹⁹² A similar violation was found in the case of *Šekerović and Pašalić*.¹⁹³ This time, the ECtHR invoked Article 46 again and, after recalling its previous judgment in *Karanović*, went on to be much more direct than on the first occasion by stipulating as follows:

In these conditions, given the large number of potential applicants, which represent a threat to the future effectiveness of the Convention machinery, the Court considers that the respondent State must secure the amendment of the relevant legislation in order to render the applicants and others in that situation ... eligible to apply, if they so wish, for FBH Fund pensions.¹⁹⁴

Following a few years of non-execution of these judgments which related to around 3,500 potential applicants, the Bosnian authorities finally managed to adopt amendments to the Law on Pension and Disability Insurance in accordance with the solution that was suggested by the ECtHR.¹⁹⁵ The Committee of Ministers was satisfied that the general and individual measures were taken and closed the further examination of the case.¹⁹⁶

In the case of *Suljagić*, the Court, after deciding a few other cases on this matter, declared the first systemic problem within the meaning of Article 46 in the area of “old” foreign currency savings.¹⁹⁷ The Court reviewed the repayment scheme that was set up by Bosnia and Herzegovina and sided with the national Constitutional Court’s view that the legislation in force is not contrary

¹⁸⁹ Ibid.

¹⁹⁰ ECtHR, *Broniowski v. Poland* [GC], no. 31443/96, Judgment (2004), § 193.

¹⁹¹ ECtHR, *Karanović v. Bosnia and Herzegovina*, no. 39462/03, Judgment (2007), § 29.

¹⁹² Ibid., § 30.

¹⁹³ ECtHR, *Šekerović and Pašalić v. Bosnia and Herzegovina*, nos. 5920/04 and 67396/09, Judgment (2011).

¹⁹⁴ ECtHR, *Karanović v. Bosnia and Herzegovina*, no. 39462/03, Judgment (2007), § 41.

¹⁹⁵ Committee of Ministers, Resolution CM/ResDH(2012)148, 6 December 2012.

¹⁹⁶ Ibid.

¹⁹⁷ ECtHR, *Suljagić v. Bosnia and Herzegovina*, no. 27912/02, Judgment (2009).

to the Convention.¹⁹⁸ Nevertheless, the Court found a violation of Article 1 of Protocol No. 1 due to the unsatisfactory state of implementation in practice.¹⁹⁹ More specifically, the Court observed that the national authorities have not yet issued bonds to the applicant and that they were late in paying the instalments which were due according to the national legislation.²⁰⁰ Whilst the Court recognised that “old” foreign currency savings inherited from the former Yugoslavia constituted a considerable burden on successor States, it also ruled that the latter must stand by their promises after having voluntarily undertaken the obligation to repay such savings through repayment schemes set in national laws.²⁰¹ Lastly and most importantly, after observing that this case affects many people and that, at the time, there were more than 1,350 applications submitted on behalf of 13,500 applicants pending before the ECtHR, the latter considered it “appropriate to apply the pilot-judgment procedure” thereby maintaining as follows:

Although it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State’s obligations under Article 46 of the Convention, in view of the systemic situation which it has identified, the Court would observe that general measures at national level are undoubtedly called for in execution of the present judgment. Notably, the Court considers that government bonds must be issued and any outstanding instalments must be paid in the Federation of Bosnia and Herzegovina within six months from the date on which the present judgment becomes final. Within the same time-limit, the Federation of Bosnia and Herzegovina must also undertake, as the Republika Srpska and the Brčko District did ..., to pay default interest at the statutory rate in the event of late payment of any forthcoming instalment. As regards the past delays, the Court does not find it necessary, at present, to order that adequate redress be awarded to all persons affected. If, however, the respondent State fails to adopt the general measures indicated above and continues to violate the Convention, the Court may reconsider the issue of redress in an appropriate future case.²⁰²

In relation to many other applications that were pending before the Court at the time, the proceedings were adjourned for six months, in respect of applicants who had obtained verification certificates in the Federation of Bosnia and Herzegovina and Brčko District; whilst for Republika Srpska, the Court stated that it might declare such applications inadmissible considering that no delay in implementation of the legislation is noted in respect of that Entity.²⁰³ When it comes to the implementation of the *Suljagić* judgment at the domes-

¹⁹⁸ Ibid., § 54.

¹⁹⁹ Ibid., § 55.

²⁰⁰ Ibid., § 54.

²⁰¹ Ibid., § 56.

²⁰² Ibid., § 64.

²⁰³ Ibid., § 65.

tic level, the Committee of Ministers has already closed the further consideration of this case following individual and general measures taken by Bosnia and Herzegovina.²⁰⁴ The latter has issued bonds to those who had verification certificates; it ordered (and realised) the payment of outstanding instalments; it extended deadlines to enable other potential applicants to obtain a verification certificate in respect of their “old” foreign savings; and it also adopted necessary decisions regarding the payment of default interest in the event of late payment of forthcoming instalments.²⁰⁵ The case of *Alisić and Others* concerns Bosnia as well but it did not have any effect on this State Party considering that violations were found only in respect of Serbia and Slovenia.²⁰⁶

In the case of *Čolić and Others*, the Court reviewed the general compensation scheme created by Republika Srpska through the War Damage Act of 2005.²⁰⁷ According to this legislation, individuals were entitled to apply for non-pecuniary damages caused by war, if they had suffered physical or mental pain, fear, the death or disappearance of a relative, etc.²⁰⁸ Numerous applicants obtained final and binding decisions of the domestic courts awarding them sums of money to be paid by Republika Srpska in accordance with the legislation in force. However, many such decisions were not enforced, even after the domestic courts found violations due to non-enforcement.²⁰⁹ The Court, as a result, found a violation of Article 6 in conjunction with Article 1 of Protocol No. 1 on account of the failure of national authorities to enforce the applicants’ final judgments with respect to war damages. Since there were more than one hundred similar applications pending before the Court, the latter invoked Article 46 in order to stipulate the obligation of the respondent State not just to pay just satisfaction awards “but also to implement ... appropriate general/or individual measures” that would contribute to “solving the problems that have led to the Court’s findings.”²¹⁰

However, the situation in Republika Srpska with respect to the enforcement of judgments awarding war damages did not improve. As a result, five years later, in the case of *Đurić and Others*, the Court rendered a follow-up judgment

²⁰⁴ Committee of Ministers, Resolution CM/ResDH(2011)44 of 8 June 2011.

²⁰⁵ *Ibid.*, see the part on general measures.

²⁰⁶ ECtHR, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, Judgment (2014), §§ 109-127.

²⁰⁷ ECtHR, *Čolić and Others v. Bosnia and Herzegovina*, nos. 1218/07 and 14 others, Judgment (2009).

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*, § 8.

²¹⁰ *Ibid.*, §§ 15 and 17.

where it again invoked Article 46 of the Convention.²¹¹ It was noted that by the end of 2005, around 9,000 judgments became final and required execution in government bonds that were to be amortised in ten annual instalments.²¹² Many such cases appeared before the Constitutional Court of Bosnia and Herzegovina which found, in a continuous fashion and rightly so, violations of Article 6 and Article 1 of Protocol No. 1 due to non-enforcement of final decisions awarding compensation for war damages.²¹³ Seeing this situation and the fact that it affects many people, the Court found it “appropriate to provide the respondent Government with some guidance as to what is required for the proper execution of the present judgment”.²¹⁴ In this respect, the Court found a violation of Article 6 due to non-enforcement of final judgments at the domestic level and, in respect of Article 46, it concluded:

[that] the respondent State should amend the settlement plan within a reasonable time-limit, preferably within a year, of the date on which the present judgment becomes final. In view of the lengthy delay which has already occurred, the Court considers that a more appropriate enforcement interval should be introduced. In that respect, the Court finds that the interval proposed by the initial settlement plan, in October 2012 ... was far more reasonable, at the time it was introduced. In any event, the Court considers that in the cases in which there had already been a delay of more than ten years, the judgments need to be enforced without further delay. Lastly, within the same time-limit, the respondent State should also undertake to pay default interest at the statutory rate in the event of a delay in the enforcement of judgments in accordance with the settlement plan as amended following this judgment.²¹⁵

The execution of this case was closely followed for several years and, only in 2018, the Committee of Ministers closed this and several other cases dealing with the same issue for further consideration in view of general measures that had been undertaken by the domestic authorities.²¹⁶ The authorities in Republika Srpska introduced a new settlement plan to enforce final judgments on war damages by ordering a payment in cash within 13 years starting from 2016.²¹⁷ According to the Action Report accepted by the Committee of Ministers, the current repayment time frame mirrors the ECtHR indications as to what would be the most reasonable redress for such cases.²¹⁸

²¹¹ ECtHR, *Đurić and Others v. Bosnia and Herzegovina*, nos. 79867/12 and 5 others, Judgment (2015), §§ 12-18 for facts and the relevant domestic practice.

²¹² *Ibid.*

²¹³ *Ibid.*, §§ 7-8.

²¹⁴ *Ibid.*, § 46.

²¹⁵ *Ibid.*, § 47.

²¹⁶ Committee of Ministers, Resolution CM/ResDH(2018)116, 4 April 2018.

²¹⁷ *Ibid.* See also Action Report DH-DD(2017)1374, 12 December 2017, page 25.

²¹⁸ *Ibid.*, page 25.

The case of *Zornić*²¹⁹ is a specific case which has further built upon the Court's findings in the highly fascinating case of *Sejdić and Finci*.²²⁰ The latter will be explained in more detail in the category of cases under other violations of the Convention but a brief introduction is needed in order to understand why the Court decided to invoke Article 46 in the follow-up case of *Zornić* and not in the initial case. Both cases, in substance, deal with the same Convention matter which has to do with the ineligibility of applicants to stand for elections to the House of Peoples and to the Presidency of Bosnia and Herzegovina. The Court has already concluded that the constitutional provision allowing only the "constituent people", namely Bosniacs, Croats and Serbs to run for a seat in the House of Peoples is in violation of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1 as well as in violation of Article 1 of Protocol No. 12.²²¹ The Court emphasised that the violation in *Zornić* "was the direct result of the failure of the authorities of the respondent State to introduce measures to ensure compliance with the judgment in *Sejdić and Finci*,"²²² The Court, somewhat alarmingly, emphasised that:

The failure of the respondent State to introduce constitutional and legislative proposals to put an end to the current incompatibility of the Constitution and the electoral law with Article 14, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 is not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs, but also represents a threat to the future effectiveness of the Convention machinery.²²³

In light of the lengthy delay in the execution of *Sejdić and Finci*, Article 46 was invoked in the case of *Zornić* considering that both the Court and the Committee of Ministers were "anxious to encourage the speediest and most effective resolution of the situation in a manner which complies with the Convention's guarantees".²²⁴ As a result, after finding similar violations in *Zornić*, the Court concluded as follows:

In *Sejdić and Finci* the Court observed that when the impugned constitutional provisions were put in place a very fragile ceasefire was in effect on the ground and that the provisions were designed to end a brutal conflict marked by genocide and "ethnic cleansing" ... The nature of the conflict [in Bosnia and Herzegovina] was such that the approval of the "constituent peoples" [Bosniacs, Croats and Serbs] was necessary to ensure peace

²¹⁹ ECtHR, *Zornić v. Bosnia and Herzegovina*, no. 3681/06, Judgment (2014).

²²⁰ ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, Judgment (2009).

²²¹ *Ibid.*, see also the operative part of the judgment.

²²² ECtHR, *Zornić v. Bosnia and Herzegovina*, no. 3681/06, Judgment (2014).

²²³ *Ibid.*, § 40.

²²⁴ *Ibid.*, § 42.

... However, now, more than 18 years after the end of the tragic conflict, there could no longer be any reason for the maintenance of the contested constitutional provisions. The Court expects that democratic arrangements will be made without further delay. In view of the need to ensure effective political democracy, the Court considers that the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities or citizens of Bosnia and Herzegovina.²²⁵

In addition to these two judgments which were never executed, the Court again ordered the same general measures to be undertaken after finding a violation in the case of *Šlaku*.²²⁶ Despite urgent calls from the Court and the Committee of Ministers,²²⁷ Bosnian authorities are yet to make the necessary constitutional amendments which could open the way for these judgments to be executed and therefore for future violations not to be considered necessary at the Strasbourg level.

In the case of *Hadžimejlić and Others*, the Court invoked Article 46 in order to indicate the type of individual measures that were needed for the execution of the Court's judgment.²²⁸ The applicants, all diagnosed with schizophrenia, had complained over the lawfulness of their detention in a social care home by alleging that they were held there against their will and were not able to obtain a release.²²⁹ In fact, the first two applicants had domestic court decisions which in substance maintained that their current health did not warrant continued confinement in the social care home.²³⁰ They even had enforceable decisions issued by the Constitutional Court which had found a violation of Article 5 of the Convention in view of the deprivation of liberty and the unlawfulness of their placement.²³¹ At the time of the review of the case by the ECtHR, they had not yet been released from the social care home. The Government tried to argue non-exhaustion of legal remedies for the third applicant because he had failed to lodge a constitutional appeal. However, the Court rejected this argument considering that the authorities had failed to comply with the judgments of the Constitutional Court for the two first applicants who had almost

²²⁵ Ibid., § 43.

²²⁶ ECtHR, *Šlaku v. Bosnia and Herzegovina*, no. 56666/12, Judgment (2016).

²²⁷ Committee of Ministers, Resolutions nos. 1701(2010), 1725(2010) and 1855(2012) and Parliamentary Assembly of the Council of Europe, Recommendation No. 2025(2013).

²²⁸ ECtHR, *Hadžimejlić and Others v. Bosnia and Herzegovina*, nos. 3427/13 and 2 others, Judgment (2015).

²²⁹ Ibid., § 36.

²³⁰ Ibid., §§ 12-14 and 21-24.

²³¹ Constitutional Court of BiH, Decision no. AP2472/11, 31 January 2013.

identical complaints,²³² and thus such an avenue would have been futile for the other applicant as well. As far as individual measures under Article 46 were concerned, the Court considered that the respondent State “must secure” the release of the first two applicants without further delay; whilst for the third applicant, the Court maintained that the respondent State “should secure that the necessity of his continued placement is examined by the competent civil court without further delay”.²³³ Although the judgment was rendered in 2015, the case is still open for final resolution before the Committee of Ministers.

The cases of *Spahić and Others* and *Kunić and Others* relate to the applicants’ complaints of non-enforcement of final domestic judgments in their favour.²³⁴ In both cases, the domestic authorities were ordered by national courts to pay the applicants various sums in respect of unpaid work-related benefits.²³⁵ What is also important to note is that the Constitutional Court, in both cases, found violations of the Convention “on account of prolonged non-enforcement of the final judgments” rendered in the applicants’ favour.²³⁶ However, these decisions were never enforced. The Court found a violation of Article 6 and Article 1 of Protocol No. 1 in both cases, as the Constitutional Court had done for the applicants and many other identical applications; in addition, it invoked Article 46 considering that there were more than one hundred similar applications before the Court at the time when *Spahić* was rendered,²³⁷

²³² ECtHR, *Hadžimejlić and Others v. Bosnia and Herzegovina*, nos. 3427/13 and 2 others, Judgment (2015), § 46.

²³³ *Ibid.*, §§ 62-66.

²³⁴ ECtHR, *Spahić and Others v. Bosnia and Herzegovina*, nos. 20514/15 and 15 others, Judgment (2017); ECtHR, *Kunić and Others v. Bosnia and Herzegovina*, nos. 68955/12 and 15 others, Judgment (2017).

²³⁵ *Ibid.*, *Spahić and Others v. Bosnia and Herzegovina*, §§ 5-12 for facts; and *Kunić and Others v. Bosnia and Herzegovina*, §§ 5-11 for facts.

²³⁶ See Constitutional Court of BiH, Decision no. AP 3438/12, 17 September 2014; Constitutional Court of BiH, Decision no. AP 4242/14, 26 February 2015. See other similar cases decided at the domestic level by the Constitutional Court on identical matters but which were never enforced in practice (it should be noted that these applicants did not appear before the ECtHR): Constitutional Court of BiH, Decision no. AP584/09, 9 November 2011; Constitutional Court of BiH, Decision no. AP549/09, 23 February 2012; Constitutional Court of BiH, Decision no. AP1316/09, 14 March 2012; Constitutional Court of BiH, Decision no. AP2979/09, 13 June 2012; Constitutional Court of BiH, Decision no. AP2535/09, 13 June 2012; Constitutional Court of BiH, Decision no. AP801/09, 18 April 2012; Constitutional Court of BiH, Decision no. AP633/09 of 18 April 2012; and Constitutional Court of BiH, Decision no. AP1209/09 of 18 April 2012.

²³⁷ ECtHR, *Spahić and Others v. Bosnia and Herzegovina*, nos. 20514/15 and 15 others, Judgment (2017), § 33.

and more than four hundred similar applications when *Kunić* was rendered.²³⁸ In both cases, similarly, the Court held that the respondent State is obliged to take general measures indicated by the Constitutional Court²³⁹ in order to address this issue for other persons that are in the applicants' position.²⁴⁰ With respect to applications lodged before the Court delivered this judgment, the Court stipulated that Bosnia and Herzegovina "must grant adequate and sufficient redress to all applicants" and that such redress "may be achieved through *ad hoc* solutions such as friendly settlements with the applicants or unilateral remedial offers in line with the Convention requirements".²⁴¹ The case of *Spahić and Others*, together with another group of related cases,²⁴² are considered as executed by Bosnia and Herzegovina,²⁴³ while *Kunić and Others* is still not. The Committee of Ministers has declared the former cases closed for further examination,²⁴⁴ even though the Action Report produced by the State leaves room to question whether this matter has been truly resolved at the domestic level.²⁴⁵ Especially since many of the statements in the Action Report sound more like promises for the future rather than real actions that will guarantee domestic implementation. The fact that the Court continues to render repetitive violations even following the closure of the case by the Committee of Ministers serves as an argument to support this observation.

The case of *Orlović and Others* concerns several applicants who alleged that they were prevented from enjoying their possessions "because an unlawfully built church has not been removed from their land".²⁴⁶ The main applicant was Ms Fata Orlović joined by her seven children. After her husband was killed during the Srebrenica genocide,²⁴⁷ she and her children was forced to flee their

²³⁸ ECtHR, *Kunić and Others v. Bosnia and Herzegovina*, nos. 68955/12 and 15 others, Judgment (2017), § 33.

²³⁹ Constitutional Court of BiH, Decision no. AP2110/18, 12 October 2011.

²⁴⁰ ECtHR, *Kunić and Others v. Bosnia and Herzegovina*, nos. 68955/12 and 15 others, Judgment (2017), § 34.

²⁴¹ ECtHR, *Spahić and Others v. Bosnia and Herzegovina*, nos. 20514/15 and 15 others, Judgment (2017), § 34; ECtHR, *Kunić and Others v. Bosnia and Herzegovina*, nos. 68955/12 and 15 others, Judgment (2017), § 35.

²⁴² Committee of Ministers, Resolution CM/ResDH(2020)95, 4 June 2020.

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

²⁴⁵ See, Action Report submitted by the Albanian Government, DH-DD(2020)417 of 15 May 2020, §§ 14-44.

²⁴⁶ ECtHR, *Orlović and Others v. Bosnia and Herzegovina*, no. 16332/18, Judgment (2019), § 3.

²⁴⁷ See, *inter alia*, Euronews (2021), 'Illegal Bosnia church is torn down after decades-long legal battle' <<https://www.euronews.com/2021/06/06/illegal-bosnia-church-is-torn-down-after-decades-lo>> (accessed 3 January 2022).

home located in the territory of today's Republika Srpska and they became internally displaced persons following the war in Bosnia. In 1998, the applicants' land was expropriated without their knowledge and a Serbian Orthodox church was built on it.²⁴⁸ Following numerous and tedious proceedings at the domestic level, the applicants' right to full restitution of their property was established by competent authorities and these decisions became final and enforceable.²⁴⁹ However, only certain plots of the applicants' land were returned to them but not the plot where the new church had been built.²⁵⁰ The Strasbourg Court found a violation of Article 1 of Protocol No. 1 because despite "having two final decisions ordering full repossession of their [entire] land" the applicants were still prevented "seventeen years after the ratification of the Convention and its protocols by the respondent State, from the peaceful enjoyment thereof" and this had led to the applicants suffering "serious frustration of their property rights".²⁵¹ In respect of Article 46, the Court called for individual measures to remedy the violation, namely to ensure the full enforcement of previous decisions including "the removal of the church from the applicants' land, without further delay and at the latest within three months from the date on which the judgment becomes final".²⁵² The Committee of Ministers has yet to conclude the final resolution of the case but local and international media confirm that the church has been demolished and removed from the applicants' land, where flowers have now been planted.²⁵³ Ms Fata Orlović became a national celebrity with her highly publicised story after winning this legal battle after 25 years of litigation before national and supra-national courts.²⁵⁴ This is one of the very few cases where the interpretation of the Convention principles by the Constitutional Court was not endorsed by the Strasbourg Court. The latter refused to defer to its reasoning. However, the divided vote of 5-4 before the Constitutional Court shows that applicant's referral before it was rejected based on a small majority and that there was a heated Convention debate over this case at the domestic level.²⁵⁵

²⁴⁸ Ibid., §§ 10-15.

²⁴⁹ Ibid., § 55.

²⁵⁰ Ibid., § 56.

²⁵¹ Ibid., §§ 61-62.

²⁵² Ibid., § 71.

²⁵³ See Sarajevo Times (2021), 'Wish fulfilled to Orlović: Flowers planted on the place where Church used to be' <<https://sarajevotimes.com/wish-fulfilled-to-orlovic-flowers-planted-on-the-place-were-church-used-to-be/>> (accessed 3 January 2022).

²⁵⁴ The husband of Ms Fata Orlović is among the victims who were killed during the Srebrenica genocide and her story was widely publicised in Bosnia and Herzegovina due to her 20 year legal battle for her property rights.

²⁵⁵ Constitutional Court of BiH, Decision no. AP4492/14, 28 September 2017.

The case of *Baralija* is the last case in which the Court invoked Article 46. In this case the Court echoed Bosnia's failure to fulfil their positive obligations of creating the conditions to hold democratic elections in the city of Mostar by not enforcing the final decisions of the Constitutional Court.²⁵⁶ To simplify a highly complex problem which derives from complex election arrangements in Mostar, the issue in this case was that most voters could vote for two classes of councillors while those in the Central Zone could only vote for one class of councillors.²⁵⁷ In 2010, the Constitutional Court declared such provisions of the 2001 Election Act unconstitutional as well as certain sections of the Statute of the City of Mostar, in substance because this legislation failed to secure equal suffrage for the voters of Mostar.²⁵⁸ As a result, the Constitutional Court ordered the Parliamentary Assembly of the State to amend the unconstitutional provisions as well as ordering the Mostar City Council to bring its Statute into line with the Constitution.²⁵⁹ That decision was never enforced. The Constitutional Court, as a result, adopted a follow-up ruling due to non-enforcement of its decision and it established that the unconstitutional provisions "would cease to be in effect on the day following the publication of its ruling in the Official Gazette".²⁶⁰ As a result of the non-enforcement of the decisions of the Constitutional Court, the city of Mostar was not able to hold elections from 2008 and was left with a technical mayor from 2012 until 2020. The applicant, who was president of a local branch of a political party in the city of Mostar, complained that "her inability to vote or stand in local elections in the city of Mostar amounted to discrimination on the grounds of her place of residence".²⁶¹ The Court also clarified that while in the cases of *Sejdić and Finci* and *Zornić* (cited above) "the Court dealt with the existing legislative arrangements" in the case of *Baralija* "there is a legal void which has made it impossible for the applicant to exercise her voting rights and her right to stand in local elections for a prolonged period of time".²⁶² As a result, the Court found a violation of Article 1 of Protocol No. 12 because the State had failed to "fulfil its positive obligations to adopt measures to hold democratic elections in Mostar".²⁶³ In applying Article 46, the Court emphasised that this violation is

²⁵⁶ ECtHR, *Baralija v. Bosnia and Herzegovina*, no. 30100/18, Judgment (2019), and ECtHR, *Pilav v. Bosnia and Herzegovina*, no. 41939/07, Judgment (2016).

²⁵⁷ ECtHR, *Baralija v. Bosnia and Herzegovina*, no. 30100/18, Judgment (2019), §§ 5-13.

²⁵⁸ Constitutional Court of BiH, Decision no. U7/10, 26 November 2010.

²⁵⁹ ECtHR, *Baralija v. Bosnia and Herzegovina*, no. 30100/18, Judgment (2019), § 9.

²⁶⁰ *Ibid.*, § 10.

²⁶¹ *Ibid.*, § 30.

²⁶² *Ibid.*, § 55.

²⁶³ *Ibid.*, § 59.

a direct result of the “failure on the part of the respondent State to implement the decision of the Constitutional Court and its ancillary orders” and having regard to the large number of potential applicants and the urgent need to put an end to the situation, the Court maintained that “the respondent State must, within six months of the date on which the present judgment becomes final, amend the Election Act of 2001 in order to enable the holding of local elections in Mostar”.²⁶⁴ Although not within the Court’s set deadline, the judgment in this case was executed following amendments to the Election Act in 2020 which enabled the organisation of elections in Mostar after more than a decade.²⁶⁵

All 12 cases in which Article 46 was invoked by the Court, except the case of *Orlović and Others*, reflect an almost impeccable utilisation of Convention principles by the national courts, especially the Constitutional Court. The latter may therefore be considered as a solid ‘Convention partner’ of the Strasbourg Court at the domestic level. All violations in which Article 46 was invoked stem directly from deficiencies in national legislation and the reluctance of the legislative and executive branches to execute the Court’s decisions by adopting the necessary general measures, including those which involve amendments to the Constitution and other laws. There are still cases which have not been implemented despite the Court’s deadlines having passed many years ago now. Therefore, it can be concluded that the national courts are genuinely fulfilling their role as active filterers of possible Convention violations at the national level; meanwhile, it is the legislative and executive branches which are continuously failing to fulfil their role and thus causing repetitive violations at the Strasbourg level.

1.2. Cases with Highest Number of Violations: Article 6 issues

To date, Bosnia and Herzegovina has been found in violation of Article 6 on more than 70 occasions in respect of many joined applications considering the repetitive nature of the violations. Without any exception, all the violations have been found solely under paragraph 1 of Article 6. There are no violations under any other paragraphs.

The vast majority of violations relate to what is in fact the principal systemic issue in Bosnia and Herzegovina, i.e. non-enforcement of Convention compliant final judicial decisions by national authorities, namely the legislative and

²⁶⁴ *Ibid.*, § 62.

²⁶⁵ Committee of Ministers, Resolution CM/ResDH(2020)240 of 3 December 2020.

the executive. This has led to most violations being found with regard to the breach of rights of access to a court due to non-enforcement of final judicial decisions related to: (i) “old” foreign currency savings; (ii) the transfer of pensions between Entities; (iii) war damages; and, (iv) work-related benefits. Whilst the first two issues can generally be considered resolved as was explained above with the execution of general measures stipulated in *Suljagić* (for “old” foreign currency savings) and *Karanović* (for pensions), the same cannot be said for the two other issues which continue to pose a problem for the Strasbourg Court. The following part of this analysis will focus on these problematic areas of non-enforcement. And finally, a few other cases which relate to other specific Article 6 rights will be explored. In order to better analyse and categorise these cases, the analysis will group Article 6 violations into four pools related to non-enforcement as stipulated under points (i), (ii), (iii) and (iv) above.

The first pool of non-enforcement cases relates to “old” foreign currency savings. The principles regarding the non-enforcement of final judicial decisions were set in the case of *Jeličić*,²⁶⁶ which also happens to be the first ever case finding a violation of Article 6 in respect of Bosnia and Herzegovina. The applicant had a final and enforceable judicial decision from 1998 which ordered a local bank to pay to him the amount of his savings and default interest.²⁶⁷ This decision was never enforced. As a result, the Human Rights Chamber found a violation of Article 6 and Article 1 of Protocol No. 1 due to non-enforcement of the 1998 judgment. Pursuant to the Old Foreign Currency Savings Act 2006, Bosnia and Herzegovina took over debts arising from such savings from its constituent units.²⁶⁸ Yet, the judgment of 1998 remained unenforced. Before the ECtHR, the applicant complained that such non-enforcement violated his right to a fair trial in conjunction with his right to protection of property. The Court agreed with him on both allegations. With respect to Article 6, the ECtHR reiterated the general principle that the right of access to a court “would be illusory if a Contracting State’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party” through, for example, non-implementation of judicial decisions.²⁶⁹ Additionally, the Court emphasised the general principle that the “execution of a judgment given by a court must ... be regarded as an integral part of the ‘trial’ for the purposes of Article 6” and that State authorities cannot “cite lack of funds

²⁶⁶ ECtHR, *Jeličić v. Bosnia and Herzegovina*, no. 41183/02, Judgment (2006).

²⁶⁷ *Ibid.*, § 12.

²⁶⁸ *Ibid.*, § 22.

²⁶⁹ *Ibid.*, § 38.

as an excuse for not honouring a judgment debt”.²⁷⁰ In applying these principles to the present case, the Court found a breach of Article 6 due to unjustified delay of the execution of a final and enforceable judgment.²⁷¹ With respect to the violation of Article 1 of Protocol No. 1, the ECtHR reiterated that “the impossibility of obtaining the execution of a final judgment in an applicant’s favour constitutes an interference with his right to the peaceful enjoyment of possessions”.²⁷² As a result and based on reasons stipulated under Article 6, there has also been a violation on this ground.²⁷³ The Court ordered Bosnian authorities to ensure that the applicant is paid the amounts which were awarded by the domestic courts whilst deducting some of the payments which she had already received.²⁷⁴ Following this key case, the Strasbourg Court routinely found similar violations with respect to non-enforcement of final judicial decisions with respect to “old” foreign currency savings by relying on the principles developed in *Jeličić* case.²⁷⁵ Then, after applications before the Court started to rise exponentially, the Court, in the case of *Suljagić* (cited and broadly explained above) invoked Article 46 in order to apply the pilot-judgment procedure.²⁷⁶ Following the successful execution of the *Suljagić* pilot judgment, the Court no longer had to deal with such cases.

The second pool of non-enforcement cases relates to pension transfers between Entities. These cases have been described in detail in the part of this Chapter addressing cases in which the Court invoked Article 46. Following the successful execution of the judgments in *Karanović* and the case of *Šekerović and Pašalić*, the Court no longer had to deal with such cases.

The third pool of non-enforcement cases relates to the war damages compensation scheme. It all started with the entry into force of the War Damages Act 2005 introduced by Republika Srpska. Numerous applicants obtained final and binding decisions awarding them non-pecuniary damages. These non-enforcement cases started to reach the Court. Therefore, as was explained above under Article 46 cases, the Court rendered two different cases requiring gen-

²⁷⁰ Ibid., §§ 38-39.

²⁷¹ Ibid., §§ 45-46.

²⁷² Ibid., § 48.

²⁷³ Ibid., § 49.

²⁷⁴ Ibid., §§ 51-55.

²⁷⁵ See in this respect, ECtHR, *Pejaković and Others v. Bosnia and Herzegovina*, nos. 337/04 and 2 others, Judgment (2007); ECtHR, *Kudić v. Bosnia and Herzegovina*, no. 28971/05, Judgment (2008); and ECtHR, *Pralica v. Bosnia and Herzegovina*, no. 38945/05, Judgment (2009).

²⁷⁶ ECtHR, *Suljagić v. Bosnia and Herzegovina*, no. 27912/02, Judgment (2009). See also, [Part III](#) of this Chapter.

eral measures to be taken, namely in *Čolić and Others* in 2010 and in *Durić and Others* in 2015.²⁷⁷ Between these years, the Court found many other judgments stipulating identical violations for several applications and numerous applicants.²⁷⁸ In all such cases the Court relied on its well-established case-law on this matter and used the Committee formation to free its docket from such cases.²⁷⁹ As stated above, the flow of these cases stopped only after the second judgment of the Court in *Durić and Others* ordered a revision of the compensation scheme which could be realistically implemented at the domestic level.

The fourth pool of non-enforcement cases relates to work-related benefits. The problem arose from the fact that several cantons of the Federation of Bosnia and Herzegovina failed to pay their public debt to applicants in relation to their work-related benefits. Due to the large number of unenforced decisions, including decisions of the Constitutional Court continuously finding violations of the Convention, the Court was pressed to invoke Article 46 on two occasions at the end of 2017. Once in the case of *Spahić and Others* and once in the case of *Kunić and Others*, as explained above in detail in the part regarding Article 46 cases.²⁸⁰ Until 2020, the Court continuously found routine violations in joinder judgments with many applications involving numerous applicants.²⁸¹ However, even after the Committee of Ministers closed the review of several

²⁷⁷ ECtHR, *Čolić and Others v. Bosnia and Herzegovina*, nos. 1218/07 and 14 others, Judgment (2009); ECtHR, *Durić and Others v. Bosnia and Herzegovina*, nos. 79867/12 and 5 others, Judgment (2015). See also [Part III](#) of this Chapter, the part where cases under Article 46 are reflected.

²⁷⁸ See in this context several cases decided by a Committee of three judges: ECtHR, *Janjić and Others v. Bosnia and Herzegovina*, nos. 29760/06 and 3 others, Judgment (2013); ECtHR, *Ignjatić and Others v. Bosnia and Herzegovina*, nos. 6179/08 and 3 others, Judgment (2013); ECtHR, *Tomić and Others v. Bosnia and Herzegovina*, no. 14284/08, Judgment (2013); ECtHR, *Ćosić and Others v. Bosnia and Herzegovina*, no. 31864/06 and 6 others, Judgment (2013); ECtHR, *Milinković v. Bosnia and Herzegovina*, no. 21175/13, Judgment (2014); and ECtHR, *Bokan and Others v. Bosnia and Herzegovina*, nos. 54629/11 and 4 others, Judgment (2014).

²⁷⁹ *Ibid.*

²⁸⁰ ECtHR, *Spahić and Others v. Bosnia and Herzegovina*, nos. 20514/15 and 15 others, Judgment (2017), and ECtHR, *Kunić and Others v. Bosnia and Herzegovina*, nos. 68955/12 and 15 others, Judgment (2017).

²⁸¹ See, in this context, several cases decided by a Committee of three judges: ECtHR, *Zahirović and Others v. Bosnia and Herzegovina*, nos. 4954/15 and 6 others, Judgment (2018); ECtHR, *Elčić and Others v. Bosnia and Herzegovina*, nos. 34524/15 and 5 others, Judgment (2019); ECtHR, *Šain and Others v. Bosnia and Herzegovina*, nos. 61620/15 and 53 others, Judgment (2019); and ECtHR, *Hrnjić and Others v. Bosnia and Herzegovina*, nos. 20954/13 and 57 others, Judgment (2019).

cases and declared that necessary measures had been undertaken with a view to amending the settlement plans, the Court continued to issue decisions finding identical violations.²⁸²

In addition to the aforementioned four pools of cases, there are a few other cases where non-enforcement was an issue but such cases do not fall under any of the abovementioned categories. Such cases relate, for instance, to non-enforcement of a final decision of the Human Rights Chamber over the ownership of an apartment;²⁸³ a final decision which became final with no appeals having been submitted against it;²⁸⁴ a final decision of the Human Rights Chamber regarding the internal shares of a company;²⁸⁵ a final decision in favour of the Roman Catholic Archdiocese of Vrhbosna;²⁸⁶ a final writ of execution;²⁸⁷ a final decision of the Constitutional Court related to the demolition of illegal buildings;²⁸⁸ and a final decision related to a severance pay settlement.²⁸⁹

As far as other cases under paragraph 1 of Article 6 go, the Court found a violation of the right of access to a court relying on its case-law in *Marini v. Albania* because the applicant did not receive a final determination of his civil rights and obligations by the Constitutional Court when there was a tie vote.²⁹⁰ Another case relates to the unfairness of labour proceedings in a case that had been wrongly dismissed in a summary procedure by the Constitutional

²⁸² See in this context, *inter alia*, several decisions of the Strasbourg Court: ECtHR, *Stipić and Others v. Bosnia and Herzegovina*, nos. 25230/20 and 2 others, Judgment (2021); ECtHR, *Duvnjak v. Bosnia and Herzegovina*, nos. 25192/20 and 11 others, Judgment (2021); ECtHR, *Softić v. Bosnia and Herzegovina*, nos. 48063 and 4 others, Judgment (2021); and ECtHR, *Crnković and Others v. Bosnia and Herzegovina*, nos. 38070/19 and 8 others, Judgment (2021).

²⁸³ ECtHR, *Milislavljević v. Bosnia and Herzegovina*, no. 7435/04, Judgment (2009), where a violation of Article 6 and Article 1 of Protocol No. 1 was found.

²⁸⁴ ECtHR, *Đukić v. Bosnia and Herzegovina*, no. 4543/09, Judgment (2012), where a violation of Article 6 and Article 1 of Protocol No. 1 was found.

²⁸⁵ ECtHR, *Murtić and Čerimović v. Bosnia and Herzegovina*, no. 6495/09, Judgment (2012), where a violation of Article 6 and Article 1 of Protocol No. 1 was found.

²⁸⁶ ECtHR, *Roman Catholic Archdiocese of Vrhbosna v. Bosnia and Herzegovina*, no. 40694/13, Judgment (2018). The Constitutional Court has confirmed that the decision has not been enforced.

²⁸⁷ ECtHR, *Martinović v. Bosnia and Herzegovina*, no. 41749/12, Judgment (2018). The Constitutional Court has confirmed that the decision has not been enforced.

²⁸⁸ ECtHR, *Kožul and Others v. Bosnia and Herzegovina*, no. 38695/13, Judgment (2019).

²⁸⁹ ECtHR, *Bradarić v. Bosnia and Herzegovina*, no. 84721/17, Judgment (2019).

²⁹⁰ ECtHR, *Avdić and Others v. Bosnia and Herzegovina*, nos. 28357/11 and 2 others, Judgment (2013), §§ 31-39.

Court,²⁹¹ and for which the ECtHR considered that there had been a violation of Article 6.²⁹² The other cases relate to overall length of enforcement proceedings.²⁹³

As this overview of Article 6 cases demonstrates, Bosnia and Herzegovina's case-law on Article 6 is a perfect mirror of the country's principal problems in its relationship with the Convention principles. Whilst the national courts seem to be performing quite well in the application of Convention standards related to Article 6 (with very few exceptions which are normal in any judiciary), their hard work is usually undermined by their other 'Convention partners' at the domestic level who fail to execute their decisions. The Court has already stipulated in its well-established case-law that non-enforcement of final judicial decisions "lead to situations incompatible with the principle of rule of law which the Contracting States undertook to respect" when they became part of the Convention protection machinery.²⁹⁴

1.3. Cases under Article 13: Lack of Effective Domestic Remedies

The Court has only found a violation of Article 13 in respect of Bosnia and Herzegovina on two occasions.

The first violation of Article 13 was found in conjunction with Article 3. The applicants raised two distinct complaints under Article 13, namely that (i) prison authorities failed to protect them from persecution at the hands of their fellow prisoners; and that (ii) the conditions of their detention in a hospital unit were not Convention compliant.²⁹⁵ With respect to the first complaint, the Court found a violation of Article 3 considering that the applicants' "physical well-being was not adequately secured" in Zenica Prison;²⁹⁶ whilst, with respect to the second complaint, the Court did not find a violation of Article 3 considering that the conditions of detainment at the Zenica Prison hospital did not attain "a sufficient level of severity to come within the scope of Article 3 of the Convention".²⁹⁷ The Court also agreed that they did not have any domestic le-

²⁹¹ Constitutional Court of BiH, Decision no. AP1886/15, 21 January 2016; Constitutional Court of BiH, Decision no. AP4589/15, 17 February 2016.

²⁹² ECtHR, *Lazarević v. Bosnia and Herzegovina*, no. 29422/17, Judgment (2020), §§ 28-35.

²⁹³ ECtHR, *Jakovljević and Others v. Bosnia and Herzegovina*, no. 51227/16, Judgment (2019).

²⁹⁴ ECtHR, *Hornsby v. Greece*, no. 18357/91, Judgment (1997).

²⁹⁵ ECtHR, *Rodić and Others v. Bosnia and Herzegovina*, no. 22893/05, Judgment (2008), § 50.

²⁹⁶ *Ibid.*, § 73.

²⁹⁷ *Ibid.*, § 78.

gal remedy to address their Article 3 complaints at the national level.²⁹⁸ It is worth noting that the Government had argued that the proceedings which were at the time pending before the Constitutional Court “were sufficient to afford redress for the alleged breaches”,²⁹⁹ but the ECtHR dismissed this objection as unfounded considering that the constitutional appeal deals with complaints about conditions of detention “only if prison inspectors have been petitioned beforehand”,³⁰⁰ which was not the case in this particular situation. The case is considered as resolved and closed.³⁰¹

The second violation of Article 13 was found in 2021 and it relates to the lack of an effective legal remedy with respect to length of pending proceedings. Before drawing on the conclusions of this case, a brief explanation of the situation with respect to length issues is necessary. In 2017, the Constitutional Court issued a pilot judgment through which it held that excessive length of proceedings posed a systemic problem in Bosnia and Herzegovina and thus indicated general measures to be introduced with a view to preventing unreasonable length of pending proceedings.³⁰² Considering that such general measures were not implemented, in 2018, the Constitutional Court decided “to no longer deal with the issue of the length of pending (as opposed to terminated) proceedings”.³⁰³ Turning to the present case, the applicant complained about the length of civil proceedings and the fact that he had no remedy to address his complaint. With respect to Article 6, the Court found a violation because of excessive length. With respect to Article 13, the Court clarified that the present case “does not call into doubt the effectiveness of a constitutional appeal for complaints about the length of finished proceedings” considering that the sole issue in the present case is “whether the applicant had any effective domestic remedy at his disposal for his complaint about the length of pending proceedings when he lodged his application with the Court”.³⁰⁴ In this regard, the Court noted that the present application was lodged when the applicant’s civil case was still pending before the first instance court and in 2018 “the Constitutional Court decided to no longer deal with the issue of the length of pending proceedings and rejected the applicant’s appeal raising that issue”.³⁰⁵ Therefore, the Court considered that there had been a violation of Article 13

²⁹⁸ Ibid., § 85.

²⁹⁹ Ibid., § 51.

³⁰⁰ Ibid., § 61.

³⁰¹ Committee of Ministers, Resolution CM/ResDH(2011)93, 14 September 2011.

³⁰² ECtHR, *Delić v. Bosnia and Herzegovina*, no. 59181/18, Judgment (2021), § 10.

³⁰³ Ibid., § 11.

³⁰⁴ Ibid., § 27.

³⁰⁵ Ibid., §§ 27-28.

considering that acceleratory remedies cannot be considered effective unless they are accompanied by a compensatory remedy which at the relevant time was not at the applicant's disposal.³⁰⁶

1.4. Violations Under Other Articles of the Convention

In addition to the vast majority of cases falling under the domain of right to fair and impartial trial, litigants from Bosnia and Herzegovina have generated some really interesting case-law in respect of other provisions of the Convention as well. To date, in addition to the violations under Articles 6 and 13 which were elaborated in detail above, the Court has found violations of Article 3, on three occasions; Article 5, on nine occasions; Article 7, on one occasion; Article 8, on two occasions; Article 9, on one occasion; Article 14, on four occasions; Article 1 of Protocol No. 1, on fifty-six occasions; Article 3 of Protocol No. 1, on three occasions; Article 1 of Protocol No. 12, on five occasions; and Article 4 of Protocol No. 7, on one occasion.

In the following part, this study will highlight one particular case under each article by selecting the most important one in terms of the domestic application of Convention principles. If there are more cases worthy of noting, the study will do so either in the main body or in footnotes.

In the area of Article 3, the case of *Pranjić-M-Lukić* merits elaboration due to the failure of the Constitutional Court to catch the violation at the domestic level. The applicant had complained that “he had been handcuffed by the judicial police during his forcible escort to an involuntary psychiatric examination”.³⁰⁷ The Constitutional Court declared his Article 3 complaint as manifestly ill-founded since it opined that the applicant had not managed to prove that he had been exposed to any treatment that would reach the minimum level of severity so as to fall under the scope of Article 3.³⁰⁸ In contrast, the Strasbourg Court, after recalling general principles applicable to the special vulnerability of mentally ill persons,³⁰⁹ concluded that his particular vulnerability was not taken into account when he was handcuffed even on an occasion when he was outnumbered by four police officers.³¹⁰ Considering that “handcuffing was

³⁰⁶ Ibid., § 28.

³⁰⁷ ECtHR, *Pranjić-M-Lukić v. Bosnia and Herzegovina*, no. 4938/16, Judgment (2020), § 68, where the Court found a violation of the substantive aspect of Article 3 and a violation of Article 8.

³⁰⁸ ECtHR, *Pranjić-M-Lukić v. Bosnia and Herzegovina*, no. 4938/16, Judgment (2020), § 46.

³⁰⁹ ECtHR, *Fernandes de Oliveira v. Portugal* [GC], no. 78103/14, Judgment (2019), § 113.

³¹⁰ ECtHR, *Pranjić-M-Lukić v. Bosnia and Herzegovina*, no. 4938/16, Judgment (2020), § 80.

not imposed in connection with lawful arrest or detention” combined with the fact that no previous conduct of the applicant gave “serious cause to fear that he might abscond or resort to violence”, the Court concluded that the use of handcuffs was not strictly necessary and it “diminished his human dignity and was in itself degrading”.³¹¹ Other Article 3 cases relate to a violation of Article 3 on account of the failure of national authorities to adequately protect the applicants from persecution at the hands of fellow prisoners (the applicants being persons of Serb and Croat origin who had committed war crimes against Bosniacs, specifically Bosnian Muslims, during the war);³¹² and another violation of Article 3 related to the possible deportation of the applicant to Syria considering that there was a real risk that, if deported, he would be subjected to ill-treatment.³¹³

In the area of Article 5, there are several interesting cases. In two cases, the same applicant appeared twice before the ECtHR and on both occasions, among other Convention rights, the Court found a violation of Article 5.³¹⁴ Before explaining the Court’s conclusions and the reaction of the domestic authorities, which was not considered Convention compliant, there is a need to provide a brief background of the situation that led to these cases. The applicant was a Syrian national who was “a member of the ‘El Mujahedin’ unit which had been organised as a unit within the local forces of the Army of the Republic of Bosnia and Herzegovina”.³¹⁵ After the war ended he remained in Bosnia and Herzegovina and acted as the leader of a group of foreign mujahedin who advocated “the Saudi-inspired Wahhabi/Salafi version of Islam”.³¹⁶ He was convicted after unlawfully depriving two local Serbs of their liberty and interrogating them – which led to his citizenship being revoked and to him being placed in an immigration centre on security grounds “because ... he posed a threat to national security”.³¹⁷ He was detained in the immigration centre for several years pending the execution of deportation orders, which were issued twice following decisions to expel him and prohibit his re-entry to Bosnia and Herzegovina for a number of years.³¹⁸ The Constitutional Court,

³¹¹ Ibid., § 82.

³¹² ECtHR, *Rodić and Others v. Bosnia and Herzegovina*, no. 22893/05, Judgment (2008), §§ 64-73.

³¹³ ECtHR, *Al Husin v. Bosnia and Herzegovina*, no. 3727/08, Judgment (2012), §§ 46-54.

³¹⁴ Ibid. See also ECtHR, *Al Husin v. Bosnia and Herzegovina* (no. 2), no. 10112/16, Judgment (2019).

³¹⁵ Ibid., §§ 6-15.

³¹⁶ Ibid., § 11.

³¹⁷ Ibid., §§ 12-13.

³¹⁸ Ibid., § 14.

the State Court and other governmental bodies had reviewed his Convention complaints several times and never found sufficient reason to declare a violation on any of the grounds on which he had complained.³¹⁹ As stated above, the applicant appeared before the Court on two occasions. In the first case which was decided in 2012, in addition to stopping his deportation to Syria through an application of Rule 39,³²⁰ the Court maintained that his detention for almost three years in the immigration centre breached Article 5.1 of the Convention.³²¹ In the second case which was decided in 2019, the Court again found a violation of Article 5.1 in respect of a certain period of the applicant's detention in the immigration centre pending the execution of his second expulsion order which, according to the Court, lacked a realistic prospect that the expulsion could be executed considering that more than 40 States had refused to take him.³²² The Court rejected his other complaints as either ungrounded or manifestly ill-founded.³²³ Both cases have been executed at the domestic level, with the non-pecuniary damage having been paid and no other measures required since the applicant had already been released from detention.³²⁴ Other Article 5 cases relate to violations of Article 5 on account of unlawful detention,³²⁵ unlawful detention in respect of mentally ill-patients,³²⁶ detention pursuant to an administrative decision,³²⁷ and a specific violation of Article 5.4 due to the inability of the Constitutional Court to review the lawfulness of detention because of the failure to reach a majority.³²⁸

³¹⁹ See, in this context, Constitutional Court of BiH, Decision no. AP 2832/15, 22 December 2015; Constitutional Court of BiH, Decision no. AP 222/13, 28 February 2013; Constitutional Court of BiH, Decision no. AP 2742/13, 17 June 2015.

³²⁰ ECtHR, *Al Husin v. Bosnia and Herzegovina*, no. 3727/08, Judgment (2012), where, despite a violation of Article 5, the Court also found a violation of Article 3 which is referred to in the part on Article 3 cases – the Court had used Rule 39 proceedings to halt the deportation of the applicant to Syria.

³²¹ *Ibid.*, §§ 57-69 regarding the detention between 6 October 2008 and 31 January 2011.

³²² ECtHR, *Al Husin v. Bosnia and Herzegovina* (No.2), no. 10112/16, Judgment (2019), where the Court found a violation of Article 5 only for the detention after August 2014 until his release in February 2016.

³²³ *Ibid.*

³²⁴ Committee of Ministers, Resolution CM/ResDH(2020)242, 3 December 2020.

³²⁵ ECtHR, *Tokić and Others v. Bosnia and Herzegovina*, nos. 12455/04 and 3 others, Judgment (2008); see also ECtHR, *Al Hamdani v. Bosnia and Herzegovina*, no. 31098/10, Judgment (2012).

³²⁶ ECtHR, *Hadžić and Suljić v. Bosnia and Herzegovina*, nos. 39446/06 and 33849/08, Judgment (2011); see also ECtHR, *Hadžimejlić and Others v. Bosnia and Herzegovina*, nos. 3427/13 and 2 others, Judgment (2015).

³²⁷ ECtHR, *Halilović v. Bosnia and Herzegovina*, no. 23968/05, Judgment (2009).

³²⁸ ECtHR, *Čović v. Bosnia and Herzegovina*, no. 61287/12, Judgment (2017), §§ 29-35.

There is only one case in the area of Article 7, but it is a highly significant one, not just for Bosnia and Herzegovina but also for its *res interpretata* effects in all other States Parties. Considering that the case has been described in detail above in the part where the 'Convention talk' between the State Court and the Constitutional Court is reflected, the finding will not be repeated here. What is important to mention is that, according to the Action Report confirmed by the Committee of Ministers as sufficient for the execution of this Grand Chamber case, proceedings for both applicants have been reopened at their request, and both applicants have now been sentenced to more lenient sanctions under the Criminal Code of 1976, which was applicable at the time.³²⁹ Additionally, as previously reflected, the case-law of the national courts on Article 7 was aligned in order to meet and respect the ECtHR standards set in this important Grand Chamber case.

In the area of Article 8, two violations have been found. The main case has to do with the failure of the national authorities to undertake all reasonable measures that would facilitate the reunion of the applicant with her son, despite several domestic decisions in her favour.³³⁰ Following an alleged episode of domestic violence, the applicant left her husband.³³¹ She managed to take her daughter, but her son was left with her husband. Subsequently, the applicant sought the custody of her son, a request which was approved by the domestic authorities but once it was enforced, the applicant's husband abducted the son and took him away from her.³³² The applicant made her first submission to be reunited with her son in 2001 but the actual reunion did not take place until 2007. This considerable delay, combined with the particular circumstances of the case, led to the Court finding a violation of Article 8.³³³ It should be noted that in the intervening years, between 2001 and 2007, the Human Rights Chamber had found a violation of Article 8 at the domestic level but this decision did not contribute to speeding up the reunion sought by the applicant.³³⁴ The other case, referred to above in respect of the violation of Ar-

³²⁹ See Committee of Ministers, Resolution CM/ResDH(2017)180, 7 June 2017. See also, Action Report submitted by the Albanian authorities, DH-DD(2017)323 of 17 March 2017, §§ 10-15.

³³⁰ ECtHR, *Šobota-Gajić v. Bosnia and Herzegovina*, no. 27966/06, Judgment (2017).

³³¹ *Ibid.*, §§ 5-38.

³³² *Ibid.*, § 16.

³³³ *Ibid.*, § 82.

³³⁴ *Ibid.*, § 15.

ticle 3, also resulted in a violation of Article 8 due to the fact that the applicant was repeatedly and forcibly taken for involuntary psychiatric and psychological examinations during criminal proceedings.³³⁵

In the area of Article 9, there is only one case which, due to its importance, is marked as a key case. The applicant was a witness in a highly publicised terrorism case which resulted in the conviction of a member of a local group advocating “the Wahhabi/Salafi version of Islam” with 15 years of imprisonment for attacking the US Embassy in Sarajevo in 2011.³³⁶ Mr *Hamidović*, who belonged to the same religious group, was summoned to appear as a witness and after refusing to remove his skullcap, notwithstanding an order from the court, he was expelled from the courtroom and convicted of contempt of court as well as sentenced to a fine.³³⁷ He considered that these measures violated his Article 9 rights in conjunction with Article 14 because “he had been punished for refusing to remove his skullcap while giving evidence before a criminal court”.³³⁸ The Constitutional Court found no breach of these Articles.³³⁹ However, even if the Court did not find a violation of Article 14, it did find a violation of Article 9.³⁴⁰ Considering the sensitivity of the case, the Court was extremely careful in its reasoning and made various disclaimers and clarifications throughout the judgment in order to avoid any misunderstandings. According to the Court, the applicant’s “punishment for contempt of court on the sole ground of his refusal to remove his skullcap was not necessary in a democratic society” for the following reasons: (i) unlike other groups present at the hearing who rejected the authority of the national courts, “the applicant appeared before the court as summoned and stood up when requested, thereby clearly submitting to the laws and courts of the country”; (ii) there was “no indication that the applicant was not willing to testify or that he had a disrespectful attitude”; (iii) there were no reasons to “doubt that the applicant’s act was inspired by his sincere religious belief that he must wear a skullcap at all times, without any hidden agenda to make a mockery of the trial, incite others to reject secular and democratic values or cause a disturbance”; (iv) the role of the authorities in a democratic society “is not to remove the cause of

³³⁵ ECtHR, *Pranjić-M-Lukić v. Bosnia and Herzegovina*, no. 4938/16, Judgment (2020), §§ 62-67.

³³⁶ ECtHR, *Hamidović v. Bosnia and Herzegovina*, no. 57792/15, Judgment (2017), § 6.

³³⁷ *Ibid.*, § 7.

³³⁸ *Ibid.*, §§ 3 and 25.

³³⁹ *Ibid.*, § 10.

³⁴⁰ The Constitutional Court relied on the general principles concerning Article 9 as summarised in ECtHR, *S.A.S. v. France* [GC], no. 43835/11, Judgment (2014), §§ 124-31.

tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.”³⁴¹ The case is considered as executed and closed for further review.³⁴²

In the area of Article 14 seen in conjunction with Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12, two cases are of utmost jurisprudential importance. The first is the Grand Chamber case of *Sejdić and Finci* and the second is the case of *Zornić*. The latter has been covered at length in the part of this chapter outlining cases in which Article 46 was invoked;³⁴³ the former, meanwhile, has only been referred to in respect of its linkage to other cases, in particular *Zornić*. We recall that when rendering *Zornić* and calling for general measures to be applied in view of Article 46, the Court relied heavily on the general principles established by the Grand Chamber in *Sejdić and Finci*. Therefore, in the following, this study will highlight some specific aspects of *Sejdić and Finci* which have not yet been covered. At the outset, however, it is worth repeating that none of the general measures which require constitutional amendments to make the situation in Bosnia and Herzegovina compatible with the guarantees of the right to stand for elections without discrimination have been implemented so far.³⁴⁴ Mr Sejdić was of Roma origin whilst Mr Finci was of Jewish origin and both applicants held prominent public positions in Bosnia and Herzegovina.³⁴⁵ They complained that, due to their origins, the Constitution prevented them from standing for election to the House of Peoples and the Presidency of Bosnia and Herzegovina, despite the fact that they possessed experience comparable to the highest elected officials.³⁴⁶ Seeing the sensitivity and difficulty of the complaints raised and their high-level importance for the State of Bosnia and Herzegovina, the Chamber relinquished jurisdiction in favour of the Grand Chamber.³⁴⁷ The salient issue in this case relied on the power-sharing arrangements introduced by the new Con-

³⁴¹ ECtHR, *Hamidović v. Bosnia and Herzegovina*, no. 57792/15, Judgment (2017), §§ 37-43.

³⁴² Committee of Ministers, Resolution CM/ResDH(2018)427 of 6 December 2018.

³⁴³ See [Part III](#) of this Chapter, where the case of ECtHR, *Zornić v. Bosnia and Herzegovina*, no. 3681/06, Judgment (2014) is elaborated.

³⁴⁴ See e.g. Committee of Ministers, Interim Resolution CM/ResDH(2021)427 of 2 December 2021, where the Committee of Ministers notes, *inter alia*, “with utmost concern that, if no measures are taken by the respondent State [Bosnia and Herzegovina] as obliged under Article 46 of the Convention, 12 years after the *Sejdić and Finci* judgment, the fourth general elections since this judgment (foreseen for October 2022) will be held in a constitutional and legislative context in violation of the European Convention”.

³⁴⁵ ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, Judgment (2009).

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*

stitution of Bosnia and Herzegovina, drafted in accordance with the Dayton Peace Agreement.³⁴⁸ The Constitution described “Bosniacs, Croats and Serbs” as “constituent peoples” and all power-sharing arrangements sought to make it impossible “to adopt decisions against the will of the representatives of any ‘constituent people’”.³⁴⁹ With a view to ensuring such specific arrangements, the Constitution, *inter alia*, foresaw a vital interest veto, an Entity veto, a bi-cameral system as well as a collective Presidency composed of three members of Bosniac and Croat origins from the Federation of Bosnia and Herzegovina and a Serb from Republika Srpska.³⁵⁰ The Grand Chamber, following an exhaustive showcase of international and domestic law and practice, divided its merits analysis into two parts. As regards the House of Peoples of Bosnia and Herzegovina, the Court concluded that “the applicant’s continued ineligibility to stand for election ... lacks an objective and reasonable justification and has therefore breached Article 14 taken in conjunction with Article 3 of Protocol No. 1”.³⁵¹ In reaching this conclusion, the Court, recalled that “the impugned constitutional provisions were put in place [when] a very fragile ceasefire was in effect on the ground” and that such provisions “were designed to end a brutal conflict marked by genocide and ‘ethnic cleansing’”.³⁵² However, the Court also noted many significant developments that had happened in the intervening years in Bosnia and Herzegovina following the Dayton Peace Agreement.³⁵³ It also recalled the fact that in 2002, when becoming a member of the Council of Europe, Bosnia and Herzegovina had undertaken to review, within one year, with the assistance of Venice Commission “the electoral legislation in the light of Council of Europe standards, and to revise it where necessary”.³⁵⁴ Bearing in mind the reasons stated above, the Court found that the discrimination based solely on the ethnic origin/race of the applicants could not be objectively justified in today’s democratic society and that, as a result, their continued ineligibility to run for office led to a violation of Convention provisions.³⁵⁵ As re-

³⁴⁸ Ibid., §§ 6-7. See, several other opinions drafted by the Venice Commission on the constitutional situation in BiH, e.g. CDL-AD(2005)004, 11 March 2005; ‘Opinion on different proposals for the election of the Presidency of Bosnia and Herzegovina’ (CDL-AD(2006)004, 20 March 2006); draft amendments to the Constitution of Bosnia and Herzegovina (CDL-AD(2006)019, 12 June 2006).

³⁴⁹ Ibid., § 7.

³⁵⁰ Ibid.

³⁵¹ ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, Judgment (2009), § 50.

³⁵² Ibid., § 45.

³⁵³ Ibid., § 47.

³⁵⁴ Ibid., § 49.

³⁵⁵ Ibid., §§ 43 and 49-50.

gards the Presidency of Bosnia and Herzegovina, the applicants relied only on Article 1 of Protocol No. 12 and the Court found a violation of that provision by recalling its extensive stance on the violations already found with regard to the House of Peoples of Bosnia and Herzegovina.³⁵⁶ As stated above under *Zornić*, despite general measures being continuously requested by the Court and other mechanisms of the Council of Europe and the European Union, the Convention in-compliant constitutional provisions continue to remain in force and any person who does not affiliate herself/himself with one of the three “constituent peoples” continues to be barred from the prospect of applying for a seat within the country’s most important public institutions.

In the area of Article 1 of Protocol No. 1, the most important cases falling under this provision have already been mentioned in the part which referred to cases where Article 46 was invoked. Such cases relate to systemic problems of non-enforcement such as those discussed in the case of *Suljagić* as well as in the cases of *Spahić and Others* and *Kunić and Others*.³⁵⁷ There is no need to repeat such findings considering that all of the cases where a violation of Article 1 of Protocol No. 1 was found relate to non-enforcement of final and binding judicial decisions and these have been extensively elaborated and cited above.

In the area of Article 4 of Protocol No. 7,³⁵⁸ there is one case which in substance had to do with the applicant’s conviction for the same offence in minor offence proceedings as well as in subsequent criminal proceedings.³⁵⁹ Whilst the national courts failed to see this matter from the perspective of *ne bis in idem*, the Court considered that “the nature of the offence in question was such as to bring the applicant’s conviction ... within the ambit of ‘penal procedure’ for the purposes of Article 4 of Protocol No. 7.”³⁶⁰ With respect to *idem* criteria, the Court considered that “two offences [a minor offence and a criminal offence] must therefore be regarded as substantially the same for the purposes of Article 4 of Protocol No. 7”;³⁶¹ meanwhile, with respect to *bis* criteria, the Court considered that “the Municipal Court should have terminated the criminal proceedings following the delivery of a ‘final’ decision in the first [minor offence] proceedings.”³⁶² The applicant’s constitutional appeal alleging that his right not to be tried or punished twice for the same offence had been violated

³⁵⁶ Ibid., §§ 55-56.

³⁵⁷ See [Part III](#) of this Chapter.

³⁵⁸ ECtHR, *Muslija v. Bosnia and Herzegovina*, no. 32042/11, Judgment (2014).

³⁵⁹ Ibid., §§ 38-40.

³⁶⁰ Ibid., § 31.

³⁶¹ Ibid., § 35.

³⁶² Ibid., § 37.

was rejected as unfounded.³⁶³ The Court ruled that the Constitutional Court overlooked the principles established for Article 4 of Protocol No.7 and thus “failed to apply the principles established in the *Zolotukhin* case and thus to correct the applicant’s situation”.³⁶⁴ The case was executed through reopening of proceedings at the national level which then led to the quashing of his criminal conviction and dismissal of all criminal charges against him.³⁶⁵ That was the conclusion of the case in terms of the individual measures taken. Additionally, as a general measure, it is worth mentioning that the Constitutional Court then revised its case-law in order to align it with the Court’s case-law by applying the criteria established in *Sergey Zolotukhin v. Russia* (as suggested by the ECtHR) and the criteria established in *Maresti v. Croatia*, a case almost identical to the one where the violation had been found by the Strasbourg Court.³⁶⁶

As a general remark, this part of the study shows that judgments in respect of Bosnia and Herzegovina are highly interesting and jurisprudentially important for the further development of Convention principles. The most concerning violations are those which remain unexecuted at the national level due to a lack of interest on the part of governmental and legislative bodies in undertaking the necessary measures to amend legislation and make it Convention compliant. There are very few violations which result from national courts being unable or unwilling to play their role as Convention defenders at the national level. This analysis has shown that in fact the national courts have only missed their opportunity to halt a violation in some of the most difficult and Convention specific cases. On most occasions, they have immediately changed their prospective case-law and started ruling in accordance with the case-law of the Court which shows great reactivity in protecting human rights and freedoms at the domestic level.

³⁶³ Ibid., §§ 14-15.

³⁶⁴ Ibid., § 38.

³⁶⁵ Committee of Ministers, Resolution CM/ResDH(2017)30, 1 February 2017. See also, Action Report DH-DD(2016)1237, 15 November 2016.

³⁶⁶ Ibid., Part III of the Action Report and pages 2-3 referring to: ECtHR, *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, Judgment (2009), and ECtHR, *Maresti v. Croatia*, no. 55759/07, Judgment (2009).

1.5. Cases Declared Admissible Where No Violation Was Found

The Court's docket shows that, so far, there are around ten cases where the Court reviewed the merits of the case but decided that there had been no violation of the Convention by the Bosnian authorities, either entirely or for specific Convention allegations.

In the area of Article 2, there is just one case which was filed by Ms Esmā Palić who complained concerning the abduction and disappearance of her husband immediately after the war in 1995.³⁶⁷ Her husband was Colonel Avdo Palić, a military commander of the Army of the Republic of Bosnia and Herzegovina who disappeared after going to negotiate terms of surrender with the Army of Republika Srpska in 1995.³⁶⁸ From 1999 onwards, the applicant lodged many complaints against Republika Srpska in an attempt to find out the truth about her husband's enforced disappearance. Before the Strasbourg Court, she claimed that, despite several orders by the Human Rights Chamber which found numerous violations of the Convention, not enough had been done to find out what had happened to her husband and thus punish the perpetrators responsible for his disappearance.³⁶⁹ However, the Court did not find a violation of Article 2 considering that: (i) "domestic authorities eventually identified the mortal remains of Mr Palić and carried out an independent and effective criminal investigation into his disappearance and death"; (ii) there was no substantial period of inactivity after 2005 and in the meantime the applicant had received substantial compensation from Republika Srpska in connection with her husband's disappearance. In news outside the Court, it is worth noting that the final endeavours of Ms Esmā Palić to find out the truth about her husband were not futile considering that the ICTY convicted Zdravko Tolimir, once considered as the right hand of Ratko Mladić during the war, for the disappearance and murder of her husband and sentenced him to life in prison.³⁷⁰

In the area of Article 3, there are three cases in total, with the case of *Al Hanchi* being an interesting case which contrasts with that of *Al Husin*, in terms of violations (not) found, as they both served as "foreign Mujahedin" during the war in Bosnia and Herzegovina and were subjected to deportation decisions. Whilst for *Al Husin* (No.1 and No. 2), the Court found, *inter alia*, that there

³⁶⁷ ECtHR, *Palić v. Bosnia and Herzegovina*, no. 4704/04, Judgment (2011), §§ 10–31.

³⁶⁸ *Ibid.*, § 11.

³⁶⁹ *Ibid.*

³⁷⁰ See TRT Bosanski (2021) <Majke Srebrenice zadovoljne presudom Tolimiru (trt.net.tr)> available in Bosnian language only (accessed 3 January 2022).

would be a violation of Article 3 if he were to be deported to Syria, the Court found no violation of Article 3 in the case of Mr Al Hanchi's eventual deportation to Tunisia.³⁷¹ After analysing many Council of Europe reports as well as those from UN Special Rapporteurs, the Court concluded that "there is no real risk that the applicant, if deported to Tunisia, would be subjected to ill-treatment" considering that "there is no indication, let alone proof, that Islamists, as a group, have been systematically targeted after the change of regime".³⁷² Two other cases relate to detention conditions,³⁷³ and the alleged refusal of authorities to engage with, acknowledge or assist an applicant in her efforts to find out the truth about the fate of her husband.³⁷⁴

In the area of Article 5, there are four cases. In the case of *Al Hamdani*, the Court found a violation for one aspect of Article 5,³⁷⁵ but it did not find a violation of that provision in respect of a particular period of the applicant's detention when his deportation proceedings were temporarily suspended following a successful application of Rule 39 measures issued by the ECtHR.³⁷⁶ The facts of this case were similar to those of the two previously mentioned cases of *Al Husin* and *Al Hanchi* in as much as they all related to deportation proceedings of former "foreign Mujahedin" who fought during the war in Bosnia and Herzegovina.³⁷⁷ The other cases concern two cases of *Al Husin* (No. 1 and No. 2) which have already been explained above. In these cases, with regard to certain aspects, the Court did not find a violation of Article 5. The last case is that of *Palić*, referred to above, in which the Court also did not find a violation of Article 5 relying on the reasoning already provided for the finding of no violation of Articles 2 and 3.

In the area of Article 6, there is only one case. The applicant was dismissed from work during the war in Bosnia and Herzegovina and claimed that it was impossible for him to challenge such a dismissal due to the situation caused by war.³⁷⁸ After the war ended, he tried to initiate proceedings against his dis-

³⁷¹ ECtHR, *Al Hanchi v. Bosnia and Herzegovina*, no. 48205/09, Judgment (2011), operative part.

³⁷² *Ibid.*, §§ 35-45.

³⁷³ ECtHR, *Rodić and Others v. Bosnia and Herzegovina*, no. 22893/05, Judgment (2008), §§ 74-78.

³⁷⁴ ECtHR, *Palić v. Bosnia and Herzegovina*, no. 4704/04, Judgment (2011), §§ 72-76.

³⁷⁵ ECtHR, *Al Hamdani v. Bosnia and Herzegovina*, no. 31098/10, Judgment (2012), §§ 56-61, where the Court found a violation of Article 5 with respect to the applicant's detention from 23 June 2009 to 8 November 2010.

³⁷⁶ *Ibid.*, §§ 62-64.

³⁷⁷ *Ibid.*, §§ 6-12 for the relevant background and §§ 13-26 for the facts of the case in question.

³⁷⁸ ECtHR, *Lončar v. Bosnia and Herzegovina*, no. 15835/08, Judgment (2014), §§ 5-22.

missal but the national courts, including the Constitutional Court, considered that his claim was time-barred, due to the fact that he could have submitted his claim to other functioning courts in Bosnia and Herzegovina without waiting for the war to end.³⁷⁹ Before the Strasbourg Court, he complained that he was denied access to court when his claim was rejected as statute-barred.³⁸⁰ The Strasbourg Court deferred to the national courts and stated its agreement with their reasoning. This was mainly because the legislation at the time allowed for claims to be submitted to any of the 28 first instance courts which were operational during the war and which were then obliged to forward the claim to the competent court.³⁸¹ As a result, the Court concluded that “the applicant did not suffer a disproportionate restriction on his right of access to court and finds that there was no violation of Article 6 § 1 of the Convention.”³⁸²

In the area of Article 10, there is only the case of *Medžlis Islamske Zajednice Brčko and Others* which was decided on two occasions, once by the Chamber in 2015³⁸³ and then by the Grand Chamber in 2017.³⁸⁴ Ultimately, both Court formations, by majority, came to the same conclusion that in the particular circumstances of the case there had been no violation of Article 10 and that the national courts had struck a fair balance between the applicant’s freedom of expression and the editor’s right to respect for her reputation.³⁸⁵ The defamation case started with a letter which the applicants wrote to the highest authorities of the Brčko District during the time when the procedure for the appointment of a director of a multi-ethnic public radio station was ongoing.³⁸⁶ In this letter, the applicants voiced their concerns regarding the procedure for the appointment of the director by especially targeting the candidature of Ms M.S. (the main respondent in this case who initiated defamation proceedings against the applicants).³⁸⁷ The letter, *inter alia*, stated:

According to our information ..., the lady in question: (1) stated in an interview published in ‘NIN’, commenting on the destruction of mosques in Brčko, that Muslims were not a people ..., that they did not possess culture and that, accordingly, destroying mosques could

³⁷⁹ Ibid.

³⁸⁰ Ibid.

³⁸¹ Ibid., § 43.

³⁸² Ibid., § 45.

³⁸³ ECtHR, *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*, no. 17224/11, Judgment (2015).

³⁸⁴ ECtHR, *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, Judgment (2017).

³⁸⁵ Ibid., §§ 27-31, and §§ 90-122 for the final conclusion.

³⁸⁶ Ibid., § 10.

³⁸⁷ Ibid.

not be seen as destruction of cultural monuments, (2) as an employee of the BD radio demonstratively tore to pieces on the radio's premises ... the calendar showing the schedule of religious services during the month of Ramadan, (3) on the radio's premises covered the coat of arms of Bosnia and Herzegovina with the coat of arms of the Republika Srpska, (4) as an editor of the cultural programme on the BD radio banned the broadcasting of *sevdalinka* arguing that that type of song had no cultural or musical value. We firmly believe that the above-described acts absolutely disqualify Ms M.S. as a candidate for the position of director of the multi-ethnic Radio and Television of Brčko District and that a Bosniac should be appointed to that [radio's director] position, which would be in compliance with the Statute of [BD] and the need to rectify the ethnic imbalance regarding employment in the public sector.³⁸⁸

The letter was then also published in three national newspapers by unknown persons. As a result Ms M.S. brought a civil defamation lawsuit against the applicants claiming that they had made defamatory statements which resulted in her reputation being damaged and discredited.³⁸⁹ National courts, including the Constitutional Court, reviewed the case and decided in favour of Ms M.S. considering that the interference with the applicants' right to freedom of expression had been necessary in a democratic society.³⁹⁰ She was awarded damages whilst the applicants were obliged to pay a fine and publish the judgment in two newspapers as redress for the reputational damage cause to Ms M.S.³⁹¹ Before the Strasbourg Court, the applicants "complained that their punishment, in the context of civil liability for defamation", violated their right to freedom of expression.³⁹² The Grand Chamber disagreed with the applicants and decided to defer to the reasoning of the national courts in this matter by concluding as follows:

In view of the foregoing, the Court discerns no strong reasons which would require it to substitute its view for that of the domestic courts and to set aside the balancing done by them ... It is satisfied that the disputed interference was supported by relevant and sufficient reasons and that the authorities of the respondent State struck a fair balance between the applicants' interest in free speech, on the one hand, and M.S.'s interest in protection of her reputation on the other hand, thus acting within their margin of appreciation ...

Accordingly, there has been no violation of Article 10 of the Convention.³⁹³

³⁸⁸ Ibid., § 11.

³⁸⁹ Ibid., § 13.

³⁹⁰ Ibid., see in particular §§ 14-34 for the reasoning of the national courts.

³⁹¹ Ibid., § 29.

³⁹² Ibid., § 51.

³⁹³ Ibid., operative part of the judgment.

In the area of Article 13, there is only the Grand Chamber case of *Alisić and Others* in which the Court did not find a violation of this provision in respect of Bosnia and Herzegovina.³⁹⁴

In the area of Article 1 of Protocol No. 1, there are two cases. One is the case of *Alisić and Others* where no violation was found in respect of Bosnia and Herzegovina.³⁹⁵ The second is that of *Mago and Others*, which concerned several applicants who abandoned their flats in Mostar and Sarajevo after the outbreak of the war in 1992 and then, after the war, were unsuccessful in their attempts to repossess the flats (which had been granted to them by the military under a social ownership regime).³⁹⁶ The Court found a violation of Article 1 of Protocol No. 1 only in respect of three of the applicants, mainly because they, in contrast to other applicants, were not provided with any compensation in lieu which in itself constituted a disproportionate interference with their right to peaceful enjoyment of property.³⁹⁷

1.6. Other Important Cases Related to Exhaustion of Domestic Remedies

In the area of exhaustion of domestic remedies as provided by Article 35 of the Convention, the most important cases for the purposes of this study are (i) cases that were declared inadmissible for the applicant's failure to exhaust domestic remedies before the national courts; and (ii) cases where the Court dismissed the Government's observation that the applicant(s) failed to exhaust a particular remedy. Both aspects are important for an overall assessment of the availability and effectiveness of domestic remedies.

From the first pool of cases, there are no decisions published in the HUDOC database where an application has been declared inadmissible due to non-exhaustion of domestic remedies. There are cases of that nature in the Court's docket but due to their simplicity and straightforwardness, the Court deals with them through single judges and does not publish them.

From the second pool of cases, namely those where the Court dismissed the Government's observation that the applicant had failed to exhaust a particu-

³⁹⁴ See ECtHR, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, Judgment (2014), §§ 131-136.

³⁹⁵ *Ibid.*

³⁹⁶ ECtHR, *Mago and Others v. Bosnia and Herzegovina*, nos. 12959/05 and 5 others, Judgment (2012), §§ 5-52.

³⁹⁷ *Ibid.*, §§ 101-105.

lar remedy, there are several interesting cases to mention. The most important inadmissibility decision in this respect is the case of *Mirazović* where the ECtHR extensively analysed the effectiveness of the constitutional appeal.³⁹⁸ The applicant obtained a judgment awarding him damages which was not enforced and he came directly to the ECtHR without seeking redress before the Constitutional Court. The Strasbourg Court analysed the relevant domestic legislation and practice and observed that the applicant had neither used the constitutional appeal as a remedy nor had he shown that it was inadequate or ineffective.³⁹⁹ As a result, the Court concluded that “an appeal to the Constitutional Court is, in principle, an effective domestic remedy within the meaning of Article 35 § 1 of the Convention for raising a complaint about statutory prevention of the enforcement of judgments” and that therefore it saw no reason to conclude that the applicant should be absolved from the requirement to exhaust it.⁴⁰⁰

Admissibility issues related to exhaustion of domestic legal remedies were raised in other cases as well. For instance, in the Grand Chamber case of *Maktouf and Damjanović*, referred to above, the Government argued that the complaint of one of the applicants should be dismissed for his failure to lodge a constitutional appeal.⁴⁰¹ The Court disagreed on the ground that the Constitutional Court had not found a breach of Article 7 in several almost identical cases.⁴⁰² Therefore, in the absence of any evidence that the Constitutional Court had found a violation of Article 7 in similar cases, the constitutional appeal, according to the Court, in the particular circumstance of the case, “did not offer reasonable prospects of success for Mr Damjanović’s complaint.”⁴⁰³ In a few cases the Government tried to argue non-exhaustion because the applicant had not sought redress before the Constitutional Court after obtaining a decision from the Human Rights Chamber.⁴⁰⁴ The Court summarily dismissed such observations owing to the fact that the Constitutional Court did not have any authorisation to examine a complaint which had already been examined by the former Human Rights Chamber.⁴⁰⁵ The Court also rejected the Govern-

³⁹⁸ ECtHR, *Mirazović v. Bosnia and Herzegovina*, no. 13628/03, Decision (2006).

³⁹⁹ *Ibid.*, page 8.

⁴⁰⁰ *Ibid.*

⁴⁰¹ ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, Judgment (2013), § 56.

⁴⁰² *Ibid.*, § 59.

⁴⁰³ *Ibid.*, § 60.

⁴⁰⁴ ECtHR, *Šobota-Gajić v. Bosnia and Herzegovina*, no. 27966/06, Judgment (2007), § 46, and ECtHR, *Palić v. Bosnia and Herzegovina*, no. 4704/04, Judgment (2011), §§ 53-56.

⁴⁰⁵ *Ibid.*

ment's argument regarding failure to exhaust a remedy before the Constitutional Court in cases when the latter had issued judgments in similar matters but its judgments had not been executed at the national level.

2. Impact and Effects of the ECHR and the ECtHR's Case-Law in Bosnia and Herzegovina

The analysis in this chapter has shown that the ECHR is well 'embedded' in the domestic legal order, through direct references in the Constitution which provide the Convention with a supra-legislative status. The judiciary in Bosnia and Herzegovina is obliged to take the Convention standards into consideration when deciding cases before it as well as when answering the allegations posed by litigants. Although the analysis shows some discrepancies in the level of Convention know-how and expertise among national courts, it does not reflect any reluctance or unfriendliness towards the Convention principles. In addition to the formal aspect of Convention embeddedness, the substantive implementation of the Convention standards at the domestic level is quite satisfactory at the level of the highest national courts but not at the level of the executive and the legislative branches. Most of the violations found at the Strasbourg level, especially those calling for general measures to be enacted, point to a legislative deficiency in the domestic legal order which cannot be redressed by the national courts. In fact, the national courts have tried to resolve systemic issues domestically by copying the ECtHR's stance on declaring the necessity for general measures, as with the issues related to elections in Bosnia and Herzegovina, but the executive and legislative branches failed to fulfil their role as 'first-line defenders' at the domestic level by not executing the decisions of the national courts. The case-law of the Court against Bosnia and Herzegovina also shows a very good record of national courts acting as 'filterers' of possible Convention violations at the domestic level – which, in turn, has made the ECtHR comfortable in deferring to the reasoning of the national courts in many instances.

Despite the negligence of some of the national authorities in applying the Court's case-law in some areas of Convention law, there are several positive results which may be discerned in Bosnia and Herzegovina following more than 20 years of litigation before the Strasbourg Court. For example, the enforcement of decisions ordering the release of "old" foreign currency savings

and the repayment of such savings,⁴⁰⁶ legislative amendments regarding the rules on psychiatric detention following the Court's case-law,⁴⁰⁷ and legislative reforms regarding the requirement to reunite children with their parents,⁴⁰⁸ have been listed as some of the positive examples of the Convention's impact in the domestic legal order.⁴⁰⁹ Other positive examples which have led to changes in domestic court practice as well as in legislation⁴¹⁰ may be seen in the areas of: detention with a view to deportation following the *Al Hamdani* case,⁴¹¹ changes in the national Criminal Procedure Code disallowing the psychiatric placement of criminal offenders who are found not guilty by reason of insanity,⁴¹² the amendment of rules at the level of the Constitutional Court to avoid the rejection of appeals due to the court's failure to reach a majority,⁴¹³ changes in the domestic court practice of the Constitutional Court with respect to the *ne bis in idem* principle,⁴¹⁴ redress for the pensions of displaced people during the war,⁴¹⁵ the enforcement of domestic court decisions award-

⁴⁰⁶ ECtHR, *Jeličić v. Bosnia and Herzegovina*, no. 41183/02, Judgment (2006), and ECtHR, *Suljagić v. Bosnia and Herzegovina*, no. 27912/02, Judgment (2009). See also, Committee of Ministers, Resolution CM/ResDH(2011)44 of 8 June 2011.

⁴⁰⁷ ECtHR, *Tokić and Others v. Bosnia and Herzegovina*, no. 12455/04, Judgment (2008), and ECtHR, *Halilović v. Bosnia and Herzegovina*, no. 23968/05, Judgment (2009). See also, Committee of Ministers, Resolution CM/ResDH(2014)197, 12 November 2014.

⁴⁰⁸ ECtHR, *Šobota-Gajić v. Bosnia and Herzegovina*, no. 27966/06, Judgment (2007). See also, Committee of Ministers, Resolution CM/ResDH(2011)45, 8 June 2011.

⁴⁰⁹ Parliamentary Assembly AS/JUR/Inf (2016) 04, 8 January 2016, *Impact of the European Convention on Human Rights in States Parties: selected examples*, prepared by the Legal Affairs and Human Rights Department, page 6.

⁴¹⁰ See the publication of the Department for Execution of Judgments of the European Court of Human Rights on the main achievements in respect of Bosnia and Herzegovina: <<https://rm.coe.int/ma-bosnia-and-herzegovina-eng/1680a186a0>> (accessed 10 January November 2022).

⁴¹¹ See ECtHR, *Al Hamdani v. Bosnia and Herzegovina*, no. 31098/10, Judgment (2012). See also, Committee of Ministers, Resolution CM/ResDH(2014)186, 8 October 2014.

⁴¹² ECtHR, *Tokić and Others v. Bosnia and Herzegovina*, no. 12455/04, Judgment (2008), and ECtHR, *Hadžić and Suljić v. Bosnia and Herzegovina*, nos. 39446/06 and 33849/08, Judgment (2011). See also, Committee of Ministers, Resolution CM/ResDH(2014)197, 12 November 2014.

⁴¹³ ECtHR, *Audić and Others v. Bosnia and Herzegovina*, nos. 28357/11 and 2 others, Judgment (2013). See also, Committee of Ministers, Resolution CM/ResDH(2015)170, 4 November 2015.

⁴¹⁴ ECtHR, *Muslija v. Bosnia and Herzegovina*, no. 32042/11, Judgment (2014). See also, Committee of Ministers, Resolution CM/ResDH(2017)30, 1 February 2017.

⁴¹⁵ ECtHR, *Karanović v. Bosnia and Herzegovina*, no. 39462/03, Judgment (2007). See also, Committee of Ministers, Resolution CM/ResDH(2012)148, 6 December 2012.

ing war damages according to the payment schemes set at the Entity level by Republika Srpska,⁴¹⁶ and the repayment of State debts through settlement plans.⁴¹⁷

These examples demonstrate that the impact and effects of the Convention and the Court's case-law have not been limited only to national courts. This impact has extended to the executive and legislative branches, considering that most of the violations found against Bosnia and Herzegovina could be only remedied through legislative interventions. Therefore, it can be said that the violations found at the Strasbourg level have been instrumental in assisting the national authorities in Bosnia and Herzegovina to create and implement effective domestic remedies with a view to ensuring that domestic redress is possible. Nevertheless, the impact in the executive and legislative branches is still not at the desired level due to their reluctance to follow up some of the Court's cases which touch upon sensitive issues at the domestic level, such as the case of *Sejdić and Finci*. The lack of reactivity of the executive and legislative branches in terms of the implementation of the general measures has led to a bad record of Convention application on their part. In contrast, the examples detailed above and throughout this chapter show a swift reactivity of the domestic courts following a violation found by the ECtHR to align their domestic judicial practice with the standards established in the jurisprudence of the Strasbourg Court. The Constitutional Court, in particular, has been very active in following up the developments in the case-law of the ECtHR, by amending its judicial practice with respect to rights under Articles 6, 7, 10, etc.

With respect to the implementation of the Court's judgments at the domestic level, the data from the specific database where the status of the execution of ECtHR judgments is registered, HUDOC EXEC,⁴¹⁸ shows 136 cases in total that have been through or are still going through execution monitoring procedures by the Committee of Ministers. Of the total number of cases, 97 are considered as closed and 39 are still pending execution. Moreover, of the total number of cases, 15 were resolved through friendly settlement; 25 through friendly settlement with undertakings; 40 are marked as leading cases; while 83 are considered repetitive cases. Of the 39 which are still pending execution, 3 are new cases, 29 are in standard supervisory procedure, and 7 are under the so-called

⁴¹⁶ ECtHR, *Čolić and Others v. Bosnia and Herzegovina*, nos. 1218/07 and 14 others, Judgment (2009). See also, Committee of Ministers, Resolution CM/ResDH(2018)116, 4 April 2018.

⁴¹⁷ ECtHR, *Momić and Others v. Bosnia and Herzegovina*, nos. 1441/07 and 4 others, Judgment (2013). See also, Committee of Ministers, Resolution CM/ResDH(2017)29, 1 February 2017.

⁴¹⁸ See HUDOC EXEC database <<https://hudoc.exec.coe.int>>, where the information regarding execution of judgments in all 47 Member States is provided.

“enhanced procedure” of monitoring by the Committee of Ministers. The most concerning list of cases are those under the enhanced monitoring procedure as some of them are still awaiting implementation several years after the general measures have been required by the Court. For instance, under that list, the cases relate to two main pools of repetitive cases which are yet to be resolved domestically. Namely, (i) cases deriving from the Grand Chamber case of *Sejdić and Finci* concerning ethnic discrimination on account of the ineligibility of all persons not affiliated with the three “constituent peoples” (Bosniacs, Croats or Serbs) to run for elections to the Presidency and the House of Peoples;⁴¹⁹ and (ii) cases deriving from the case of *Dokić* and the case of *Mago and Others* concerning the inability of the members of the former Yugoslav People’s Army to repossess their pre-war apartments in the aftermath of the war in Bosnia and Herzegovina.⁴²⁰ Other important cases which are pending implementation concern issues related to the protection of rights in detention for mentally ill juveniles,⁴²¹ non-enforcement of final judgments,⁴²² excessive length of proceedings,⁴²³ the right to life and protection against torture,⁴²⁴ etc. Despite lagging behind in some areas, Bosnia and Herzegovina has managed to close many cases where general measures were required albeit never within the deadlines suggested by the Court.

In respect of international reports monitoring the situation in Bosnia and Herzegovina, there are a few important points to be highlighted with respect to the judiciary and fundamental rights, deriving from the latest Progress Report issued by the European Union.⁴²⁵ First and foremost, the Report notes

⁴¹⁹ ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, Judgment (2009).

⁴²⁰ See, ECtHR, *Đokić v. Bosnia and Herzegovina*, no. 6518/04, Judgment (2010); *Mago and Others v. Bosnia and Herzegovina*, nos. 12959/05 and 5 others, Judgment (2012); ECtHR, *Zornić v. Bosnia and Herzegovina*, no. 3681/06, Judgment (2014); *Šlaku v. Bosnia and Herzegovina*, no. 56666/12, Judgment (2016); *Pilav v. Bosnia and Herzegovina*, no. 41939/07, Judgment (2016); and *Pudarić v. Bosnia and Herzegovina*, no. 55799/18, Judgment (2020).

⁴²¹ ECtHR, *Hadžimejić and Others v. Bosnia and Herzegovina*, nos. 3427/13 and 2 others, Judgment (2015).

⁴²² ECtHR, *Kunić and Others v. Bosnia and Herzegovina*, nos. 68955/12 and 15 others, Judgment (2017); ECtHR, *Martinović v. Bosnia and Herzegovina*, no. 41749/12, Judgment (2018); and ECtHR, *Orlović and Others v. Bosnia and Herzegovina*, no. 16332/18, Judgment (2019).

⁴²³ ECtHR, *Hadžajlić and Others v. Bosnia and Herzegovina*, nos. 10770/18 and 2 others, Judgment (2020), and ECtHR, *Bošnjak and Dobrić v. Bosnia and Herzegovina*, nos. 25103/19 and 61558/19, Judgment (2021).

⁴²⁴ ECtHR, *Pranjić-M-Lukić v. Bosnia and Herzegovina*, no. 4938/16, Judgment (2020).

⁴²⁵ European Commission of the European Union, ‘Bosnia and Herzegovina 2021 Report’, Commission Staff Working Document no. SWD(2021) 291 final/2, 19 October 2021.

that “Bosnia and Herzegovina’s Constitution remain[s] in breach of the [ECHR] following the *Sejdić-Finci* and related cases.”⁴²⁶ In this respect, the Report also emphasises that the ECtHR cases related to this Grand Chamber, such as *Zornić, Šlaku, Pilav* and *Pudarić* have still not been implemented and they “require constitutional amendments to ensure the equality of political rights among all citizens.”⁴²⁷ With respect to the pending cases, the Report notes that there are three main groups of cases which are “under standard and enhanced supervisory procedure” by the Committee of Ministers and they concern “electoral rights, repossession of properties, and detention conditions for vulnerable persons.”⁴²⁸ Lastly, with respect to implementation of the ECHR at the domestic level, the report also stipulates that there is a need to set up, without delay, an “effective remedy for excessive length of proceedings” at all “levels of government” considering that even though parties may file a complaint with the Constitutional Court, this “measure does not ensure acceleration of the pending proceedings, and remains a continuous violation of the individuals’ rights, under the ECHR.”⁴²⁹ Furthermore, with regard to the protection of fundamental rights, the Report notes that the Bosnian authorities and the judiciary “have taken limited action to address the findings of the Expert Report on Rule of Law issues” and the “political commitment towards justice reform remains insufficient.”⁴³⁰ The so-called Expert Report on Rule of Law prepared by the European Commission of the European Union outlined key priorities for Bosnia and Herzegovina, *inter alia*, in the field of rule of law and fundamental rights.⁴³¹ This Expert Report condemned the non-implementation of *Sejdić and Finci* and noted that the non-implementation of an “ECtHR ruling over a prolonged period is not only a violation of BiH’s international obligations ... but also indicates a serious lack of determination of the country to respect the rule of law.”⁴³² The Expert Report also highlighted the fact that the fundamental rights guaranteed by the Convention and the Court’s case-law “constitute general principles of the Union’s law” and ‘have priority over all other law’” according to the state level Constitution, and “not taking or not even attempting to take any serious actions to urgently comply with the case-

⁴²⁶ Ibid., page 4.

⁴²⁷ Ibid., page 25.

⁴²⁸ Ibid.

⁴²⁹ Ibid., page 20.

⁴³⁰ Ibid., page 15.

⁴³¹ European Commission of the European Union, ‘Expert Report on Rule of Law issues in Bosnia and Herzegovina’, 5 December 2019 <*ExpertReportonRuleofLawissuesinBosniaandHerzegovina.pdf (europa.ba)> (accessed 4 January 2022).

⁴³² Ibid., § 28.

law” of the Strasbourg Court means that Bosnia and Herzegovina “does not take its membership in the Council of Europe seriously”.⁴³³ Additionally, the Expert Report also called for the public authorities and all regular courts in Bosnia and Herzegovina “to respect and to enforce” the standards interpreted by the Constitutional Court considering that that court “has the potential to play a central role in ensuring high citizens’ rights standards”.⁴³⁴ Moreover, the Expert Report also stated that the Bosnian authorities and the national courts should see it as their task to enforce those standards “instead of ‘outsourcing’ protection of human rights and fundamental freedoms to international bodies, in particular to the European Court of Human Rights”.⁴³⁵

Overall, the analysis provided in this chapter leads to the conclusion that the ECHR and the ECtHR’s case-law has had considerable positive impact and effects in the Bosnian domestic legal order. However, there are important judgments issued by the Strasbourg Court which have still not been implemented by the State authorities even after 12 years have passed. This leads to the conclusion that some of the ‘first-line defenders’ in Bosnia and Herzegovina, namely the executive and legislative branches, are not fulfilling their duties to ensure domestic protection of the rights and freedoms guaranteed by the Convention which, among other things, undermines the efforts of the domestic courts to embed Convention principles in the national legal order.

⁴³³ Ibid., § 29.

⁴³⁴ Ibid., § 27.

⁴³⁵ Ibid.

V. Summary and Conclusion

This chapter has provided an in-depth analysis of four main areas of interest for this study, namely: (i) an analysis of the status of international law in general and the ECHR in particular in the Bosnian domestic legal order; (ii) an in-depth analysis of the case-law of the highest courts in Bosnia and their 'Convention talk' in relation to the utilisation of Convention principles and the Court's case-law in their judicial decisions; (iii) an in-depth examination of the case-law of the Strasbourg Court against Bosnia and Herzegovina; and (iv) the impact and effects of the Convention and the Court's case-law in the domestic legal order. Through concrete examples, this chapter has reflected a high level of expertise on the part of the domestic courts in utilising and implementing Convention principles, particularly by the Constitutional Court. However, the analysis also regretfully noted a high level of reluctance on the part of other important 'first-line defenders', such as the reluctance of the executive and legislative branches to follow the stance of the ECtHR, which has led to their failure to undertake the required general measures. The discrepancy in terms of readiness to follow Convention principles among different branches of government has led to repetitive cases before the ECtHR and the ineffectiveness of national remedies to redress Convention violations at the domestic level.

[Part I](#) of the chapter provided a historical reflection on the painful history of Bosnia and Herzegovina as a means of showing the difficult path which its citizens had to tread before becoming part of the Council of Europe family in 2002. The genocidal war has left the country devastated and it continues to cast a long shadow over its development to this day. Besides this, the introductory part also provided a synopsis of the most important milestones in the relationship of Bosnia and Herzegovina and its national courts with the Strasbourg Court, laying the ground for the analysis that would follow.

[Part II](#) outlined the relationship of the domestic law and the international law, by focusing particularly on the legal status of the ECHR in the domestic legal order. The analysis concluded that the Convention is "above all other law" and is firmly 'domesticated' within Bosnia's constitutional legal order. Such clear regulation provides a very good ground for the implementation of the Convention standards by the regular courts and all public authorities. The national courts, including the Constitutional Court, have confirmed the direct applicability of the ECHR and the case-law of the ECtHR in the domestic legal order

and there are no dilemmas in this regard. The analysis of the case-law of the highest courts reflects a high level of Convention know-how, especially by the Constitutional Court.

[Part III](#) examined the domestic court system and its relationship with the Convention principles, mainly by focusing on an in-depth analysis of the jurisprudence of the highest national courts at the level of the State, with occasional references to the case-law of other national courts. The initial part showed that Bosnia and Herzegovina has an extremely complex judicial system with four different levels of courts operating at the level of the State and at the level of the Entities. The Constitutional Court operating at the State level is the only court that has jurisdiction to review, as a final domestic instance before the Strasbourg Court, all decisions of the State Court operating at the State level and the regular courts operating at the Entity level. The case-law of the State Court showed its inclination to rely on Convention standards particularly in cases related to Article 7 and some other Convention rights. However, by comparison, the Constitutional Court's record with regard to the application of Convention standards is much higher. This examination showed that the Constitutional Court could be considered at an advanced stage of utilisation of Convention standards while the State Court is at an intermediate stage with ample room to deepen its reliance on ECtHR case-law. Their 'Convention talk' was particularly noteworthy and substantial following the Grand Chamber judgment in the case of *Maktouf and Damjanović*. The approach of both courts following this judgment is to be highly commended due to their swift reactivity in spreading the *res interpretata* effects of that judgment at the domestic level by aligning their case-law with that of the Strasbourg Court. The latter was comfortable to defer to these two national courts in many instances, except in some very difficult cases when these two courts did not quite strike the right interpretation of the Convention at the domestic level.

[Part IV](#) provided an in-depth examination and analysis of all cases that have been adjudicated before the ECtHR in respect of Bosnia and Herzegovina. This case-law was categorised into six different pools of cases, namely: (1.1) [cases under Article 46 – where general and/or individual measures have been required](#); (1.2) [cases with highest number of violations – Article 6 issues](#); (1.3) [cases under Article 13 – lack of effective domestic remedies](#); (1.4) [cases with violations under other Convention articles](#); (1.5) [cases declared admissible where no violation was found](#); and (1.6) [other important cases related to exhaustion of domestic remedies](#). The first pool of cases showed that there are in total 12 cases where Article 46 was invoked by the Court and that in 11 of these cases the fault of Convention in compliance at the domestic level rested with

the legislative and executive branches and not with the regular courts. The latter showed an almost impeccable utilisation of Convention principles by even ordering the same general measures at the domestic level as the ECtHR did later on at the supranational level. The analysis of this pool of cases showed that all the violations stemmed from deficiencies in the national legislation and the reluctance of the legislative and executive branches to execute the Court's decisions by adopting the necessary general measures, including those which involve amendments to the Constitution and other laws. While some of the general measures have been implemented (belatedly) by the Bosnian authorities, very important judgments, such as *Sejdić and Finci* case, still remain to be implemented. The second pool of cases reflected that most of the violations against Bosnia and Herzegovina were found under Article 6 and they related to: (i) "old" foreign currency savings; (ii) the transfer of pensions between Entities; (iii) war damages; and, (iv) work-related benefits. Such case-law mirrored Bosnia's problems in its relationship with the Convention principles, i.e. non-enforcement of final and binding judicial decisions. While the national courts performed well in the application of Convention standards related to Article 6, their hard work seems to not be sufficiently supported by their fellow 'Convention partners' at the domestic level who fail to execute their decisions. The third pool of cases reflected the fact that there are only two cases where a violation of Article 13 was found. The first violation was related to Article 3 and the failure of the authorities to offer protection in prison from fellow prisoners for a person convicted of war crimes. The other violation related to length of proceedings, an issue for which the Constitutional Court itself had requested general measures to be taken at the domestic level. The fourth pool of cases showed that there are many interesting and jurisprudentially important cases where different violations of the Convention have been found. The most concerning violations are those which remain unexecuted at the national level due to negligence of the executive and legislative branches to undertake the appropriate measures in amending the necessary legislation. The analysis of this pool of cases showed that there are very few violations which result from an omission of the national courts to apply the Convention domestically. The fifth pool of cases focused mostly on the cases where the ECtHR deferred to the reasoning and rationale employed by the national courts in not finding a violation of the Convention. The most complicated case was the Grand Chamber case of *Medžlis Islamske Zajednice Brčko and Others* where the ECtHR considered that the national courts had struck a fair balance which resulted in non-violation of Article 10. The sixth pool of cases shed light on some other important inadmissibility cases related to the issue of exhaustion of domestic remedies. Lastly, in [part IV](#), this study reflected on the impact and effects

of the ECHR and the ECtHR's case-law in the domestic legal order by providing concrete examples of positive impact as well as a critical evaluation of the failure of other 'first-line defenders' to open the way for the necessary impact of the Convention at the domestic level, namely the legislative and executive branches.

Based on this analysis and findings, the overall conclusion is that the national courts in Bosnia and Herzegovina are well equipped to apply Convention principles at the domestic level, with the Constitutional Court being the most advanced among all the national courts. This observation is supported by the fact that there are very few violations at the Strasbourg level which stem from a failure of the domestic courts to identify and apply the necessary Convention standards as stipulated by the ECtHR. There were only a few cases in which the latter was unable to defer to the national courts and these were some of the most difficult cases which, even at the national level, were decided with a very small majority and which gave rise to substantial Convention debate. However, while the domestic courts might be considered as trustworthy 'Convention partners' of the Court at the domestic level, the same cannot be said for the executive and legislative branches. The failure of the latter to act and implement the Court's judgments has undermined, on several occasions, the efforts made by the national courts. Therefore, while the current level of application of Convention standards at the level of the domestic courts could be considered advanced and, overall, satisfactory, the same cannot be said for the current level of application of such standards by the other two other important 'first-line defenders', the legislative and executive branches.

Chapter 4 Kosovo

I. Introduction

The last decade of the past millennium found Kosovo in very difficult circumstances. From a territory which enjoyed certain basic civil and political rights under the former Yugoslavia,¹ Kosovo gradually turned into a territory where even the most rudimentary human rights were denied.² Kosovars resisted the systematic deprivation of their rights and freedoms with many protestors being killed and others ending up as political prisoners.³ Any type of resistance that came from the people of Kosovo claiming reinstatement and further advancement of their rights was met by cruel force from the Milošević regime. A climate of fear and uncertainty prevailed all over Kosovo with the war breaking out in early 1998, in some of the villages that were considered to be breeding

¹ According to the Constitution of the Socialist Federal Republic of Yugoslavia of 1974, Kosovo was a constitutive element of the Yugoslav Federation and it had the constitutional status of an autonomous province with its own constitutional organs, such as a Constitutional Court, an Assembly, prosecutorial and judicial organs, etc. Although the situation regarding the rights in Kosovo was not identical to the six Yugoslav Republics (Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro and North Macedonia), its rights were nevertheless extensive. For further information, see the English version of the Constitution of the Socialist Federal Republic of Yugoslavia of 1974 <<https://www.worldstatesmen.org/Yugoslavia-Constitution1974.pdf>> (accessed 4 January 2022).

² On 23 March 1989, the status of Kosovo as an autonomous province within the Federation of Yugoslavia was withdrawn by changing the 1974 Constitution and making Kosovo part of Serbia. This event is considered to have started the “breakup of Yugoslavia” and to have opened the way for the subsequent ethnic conflicts of the 90s. For more on this aspect, see Silber and Little (1997), Judah (2000), Malcolm (1999), Mertus (1999), Haxhijaj, Serbeze and Stojanović, Milica (2020), <<https://balkaninsight.com/2020/03/23/suprimimi-i-autonomise-si-e-shtyu-milosevici-rreshqitjen-e-kosoves-ne-lufte/?lang=sq>> (accessed 4 January 2022), The Guardian (2019), ‘How Milosevic stripped Kosovo’s autonomy’ <<https://www.theguardian.com/world/from-the-archive-blog/2019/mar/20/how-milosevic-stripped-kosovos-autonomy-archive-1989>> (accessed 5 January 2022).

³ Los Angeles Times (1989) ‘Yugoslavia’s Ethnic Riots Spreading: Death Toll at 21’ <<https://www.latimes.com/archives/la-xpm-1989-03-29-mn-523-story.html>> (accessed 5 January 2022);

grounds for the Kosovo Liberation Army.⁴ A notorious massacre of civilians⁵ and the infamous ethnic cleansing operation,⁶ combined with an overall humanitarian emergency and refugee crisis mobilised the international community to intensify its efforts and stop another “Bosnia scenario” in the Western Balkans.⁷ When the year-long peace negotiation efforts proved futile,⁸ NATO engaged in a 72-day military operation against the Federal Republic of Yugoslavia.⁹ On 11 June 1999, Kosovo was liberated and its people embarked on a new and long-awaited path.

In 2008, following several years of governance by the international community, and a few years of co-governance with the international community,¹⁰ Kosovo declared its independence.¹¹ The question of the legality of the act itself gave rise to scholastic debate, with the International Court of Justice maintaining that the unilateral declaration of independence did not violate any rules of

⁴ Human Rights Watch (1998), New York Times (1998); Exit News (2020), describing, *inter alia*, the Prekaz Massacre where 51 Kosovars of the family of the founder of the Kosovo Liberation Army were killed in a single day by the Serbian forces.

⁵ For reports on the Rečak massacre, see Human Rights Watch (1999). See also PBS (2014), an interview with Ambassador William Walker who headed the Kosovo Verification Mission in 1999 and was the first to report the massacre to the media. It is said that “Walker’s frank statements about the Račak Massacre – in which 45 Kosovar Albanian civilians were killed by Serbian police – helped to galvanize international opinion, and led to both the Rambouillet peace talks and a more forceful U.S. policy against Serbia’s actions in Kosovo.”

⁶ Human Rights Watch (2001), ‘Under Orders. War Crimes in Kosovo.’ <<https://www.hrw.org/report/2001/10/26/under-orders/war-crimes-kosovo>> (accessed 5 January 2022). See also, Hetemi (2020), 199–229.

⁷ Weller (1999), 211–251.

⁸ See, Rambouillet Accords on the ‘Interim Agreement for Peace and Self-Government in Kosovo’, no. S/1999/648, 18 March 1999, available here <<https://peacemaker.un.org/kosovo-rambouilletagreement99>> (accessed 5 January 2022). The proposed Interim Agreement was signed by the delegation representing Kosovo in the peace talks while the delegation representing the Federal Republic of Yugoslavia, headed by Slobodan Milošević, refused to sign the proposed Interim Agreement. This led to the NATO bombing campaign over the Federal Republic of Yugoslavia which started on 24 March 1999 and ended on 10 June 1999, when the Serbian forces left Kosovo and the NATO troops entered Kosovo.

⁹ See ‘Military Technical Agreement’ between the International Security Force (KFOR) and the Government of the Federal Republic of Yugoslavia and the Republic of Serbia, 9 June 1999 <<https://www.nato.int/kosovo/docu/a990609a.htm>> (accessed 5 January 2022).

¹⁰ See UN, Resolution of the Security Council, S/RES/1244 (1999) of 10 June 1999, based on which Kosovo was governed after the war ended in 1999. See also, more generally, the website of the United Nations Mission in Kosovo (UNMIK) <<https://unmik.unmissions.org/>>.

¹¹ Assembly of Kosovo, ‘Kosovo Declaration of Independence’, 17 February 2008, <https://www.files.ethz.ch/isn/125409/8009_Kosovo_Independence.pdf> (accessed 5 January 2022). See also, Weller (2009).

international law,¹² which in itself invited academic reflections.¹³ The debate lingers among connoisseurs of international law and the discrepancies in opinion resurge in times of international crises involving old or newly contested territories.¹⁴ The opponents of Kosovo's independence consider it a dangerous precedent in international law, while its proponents refute such arguments by emphasising why the case of Kosovo is truly a *sui generis* case that cannot be replicated and cannot serve as a precedent in the ways opponents suggest.¹⁵ Kosovo's contested statehood¹⁶ has had a negative impact on the country's ability to become a member of international organisations and assume responsibilities in the international arena. Despite the widespread recognition that Kosovo has received to date, with more than 110 States recognising its independence as lawful and in accordance with international law,¹⁷ there are some influential States that oppose its independence.¹⁸ Such opposition is widely argued to be one of the main reasons why Kosovo is not yet a member of the Council of Europe – which is an immense handicap for human rights protection at the domestic level.

As it stands, Kosovo is the only territory in the Western Balkans which is outside of the *espace juridique* of the ECtHR.¹⁹ The latter uses the famous asterisk (albeit not always)²⁰ next to the word Kosovo*, as an expression of its neutrality in respect of its status.²¹ This stance will remain unchanged until Kosovo becomes a member of the Council of Europe. Unlike other Western Balkan

¹² International Court of Justice, 'Advisory Opinion of 22 July 2010', 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo', <<https://www.icj-cij.org/public/files/case-related/141/141-20100722-ADV-01-00-EN.pdf>> (accessed 5 January 2022).

¹³ Bothe (2019), Urrutia (2012), Ryngaert (2010), Warbrick and McGoldrick (2008), 675-690, Fierstein (2009).

¹⁴ See e.g. comparisons between Kosovo and Crimea in Dunay (2015), 57-68, Linden-Retek and Brewer (2014), Baranovsky (2016), 275-281; comparisons of Kosovo with Catalonia in Borgen (2010), 997-1033 and comparisons between Kosovo and South Ossetia and Abkhazia in Ryngaert and Sobrie (2011).

¹⁵ Weller (2009); Bothe (2019); Ker-Lindsay (2011); Christakis (2011).

¹⁶ For more on this issue see Weller (2009).

¹⁷ To date, Kosovo has been recognised by 116 members of the United Nations, of which 22 are members of the European Union and 34 are members of the Council of Europe.

¹⁸ See e.g. some of the states that are opposed to the independence of Kosovo: Russia, China, Greece, Spain, Slovakia, Romania, Azerbaijan, Armenia, Georgia, Moldova, Ukraine, etc.

¹⁹ Istrefi (2014), 388-394.

²⁰ There are cases where the ECtHR does not use the astérix (*) after the word Kosovo. For more on this, see [Part IV](#) of this Chapter.

²¹ ECtHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* [GC], nos. 71412/01 and 78166/01, Decision (2007).

countries that have formally ratified the Convention and thus can be held liable at a supranational level for not obeying the minimum standards set by it, Kosovo can only be held liable internally and nationally, via its own domestic courts. The national Constitution enacted following the declaration of independence in 2008 provides for the direct applicability of the Convention and its Protocols.²² It also obliges, in a direct and unequivocal manner, the domestic courts and all public authorities to interpret human rights and fundamental freedoms in line with the case-law of the Strasbourg Court.²³ However, all such endeavours, laudable in their intention, are fundamentally conditioned – considering that litigants cannot approach the ECtHR to finally confirm whether their Convention rights were properly protected by the domestic courts and other public authorities. The ultimate guardian of the Convention in Kosovo is the Constitutional Court which remains the last instance before which litigants may plead Convention violations. The role of the Constitutional Court in protecting Convention rights has been remarkable; yet, there are still areas where, for objective reasons, the Constitutional Court could not fully replicate the impact that the ECtHR would have had. This is particularly evident in the area of effectiveness of legal remedies and possible systemic problems.

Following this introduction, [Part II](#) of this chapter will outline the status of the Convention in the Kosovar legal order and court system. It will shed light on the relationship between domestic and international law with a specific focus on the status of the ECHR in a State which is not a formal Contracting Party. [Part III](#) will explore the specificities of the domestic court system and its relationship with the Convention by focusing mainly on the jurisprudence of the highest courts in Kosovo and their ‘Convention talk’ in view of embedding the ECHR at home. Due to the specificities applicable to Kosovo as a non-member State of the Council of Europe, [Part IV](#) differs from the other national reports in the type of analysis it conducts. Therefore, in [Part IV](#), the analysis will focus on three main areas, namely: (1) [Kosovo’s relationship with the Council of Europe and the ECtHR](#); (2) [an overview of the ECtHR’s case-law in which Kosovo is referred to](#); and (3) [the impact and effects of the ECHR and the ECtHR’s case-law in the domestic legal order](#). This part will provide a concrete analy-

²² Article 22 of the Constitution. For an English version and a consolidated text of the Constitution of Kosovo see the CODICES database of constitutions published by the Venice Commission: <<http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>> (accessed 5 January 2022).

²³ Article 53 of the Constitution.

sis of the impact examples as well as observations on the void left by the absence of supranational supervision from the ECtHR. Lastly, [Part V](#) will reflect on these findings and draw some final conclusions.

II. Status of the Convention in the Kosovar Legal Order

1. Relationship between Domestic and International law

The Constitution calls for a very amicable relationship between domestic law and international law. The latter has precedence over any domestic legislation,²⁴ and automatically forms part of the internal legal order – unless there is a need to enact a specific law for its application.²⁵ This monist approach and openness towards international law is to be credited to the human rights background preceding the enactment of the Constitution in 2008 and the involvement of the international community in its drafting process.²⁶ It is particularly fascinating to read Article 22 of the Constitution which provides for a direct application of nine important international treaties in the field of human rights protection, including the Convention and its Protocols.²⁷ None of these instruments have been ratified according to the ratification rules applicable for future international agreements.²⁸ The drafters of the Constitution chose the path of unilateral adherence knowing that it would take years before Kosovo consolidates its capacity as a legal persona that is able to engage freely and without resistance in the international legal fora.

²⁴ Article 19 § 2 of the Constitution. See Istrefi and Morina (2015) and Morina, Korenica and Doli (2011) for more on the relationship between international law and national law and the judicial application of international law in Kosovo.

²⁵ Article 19 § 1 of the Constitution.

²⁶ See, Weller (2009), for more on the drafting process of the Constitution of Kosovo.

²⁷ Article 22 of the Constitution provides that the following instruments are directly applicable in Kosovo: (1) the Universal Declaration of Human Rights; (2) the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; (3) the International Covenant on Civil and Political Rights and its Protocols; (4) the Council of Europe Framework Convention for the Protection of National Minorities; (5) the Convention on the Elimination of All Forms of Racial Discrimination; (6) the Convention on the Elimination of All Forms of Discrimination Against Women; (7) the Convention on the Rights of the Child; (8) the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment; (9) Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention).

²⁸ See Articles 17 and 18 of the Constitution.

2. ECHR in the Domestic Legal Order

The Constitution granted a unique status to the Convention and to the case-law of the ECtHR. As indicated above, the Constitution provides for the direct applicability of the Convention and all of its Protocols, without any prior formal ratification process.²⁹ The Constitution makes no reservations in respect of any of the Protocols nor does it condition their applicability in any way. Legally speaking, this means that, besides the main guarantees of the Convention, as soon as a Protocol enters into force at the Council of Europe level, its provisions (those that may objectively be applicable)³⁰ will automatically become part of Kosovo's *ordre public*. The adjudication in domestic courts proves this statement to be true considering that many violations have been found in respect of the rights guaranteed by certain Protocols to the Convention.³¹ Such an approach reflects an openness towards foreign legal norms, especially when looked at through the prism of how much debate the adoption and ratification of Protocols to the ECHR generates in various States Parties to the Convention.

Another distinguishing feature of the applicability of the Convention in the Kosovar legal order relates to the constitutional duty imposed on national courts and all public authorities to interpret human rights and freedoms guaranteed by the Constitution in a manner “consistent with the court decisions of the European Court of Human Rights”.³² Consequently, not only the Convention rights as such but also the *res interpretata* effects of the ECtHR's jurisprudence have been constitutionalised by the Constitution and confirmed by the practice of the domestic courts as entailing “justiciable rights”.³³ This means that any litigant may invoke a Convention right before the domestic courts and construe her/his arguments not just on the ECHR provisions but also on the specific case-law of the Strasbourg Court, while the domestic courts are

²⁹ See Article 22 § 2 of the Constitution. See De Hert and Korenica (2016) for more on the effects and implications of the direct application of the ECHR without formal ratification in Kosovo. See also Istrefi (2012) for more on the status of the ECHR in Kosovo.

³⁰ For instance, there are certain Convention provisions which cannot be applied in Kosovo considering that the country is not an official member of the Court's protection machinery.

³¹ See [Part III](#) of this Chapter where violations of specific provisions of various Protocols to the ECHR have been found by the domestic courts in Kosovo.

³² Article 53 of the Constitution.

³³ Constitutional Court of Kosovo, Judgment no. KI207/19, 10 December 2020, § 110.

obliged to respond to such allegations and arguments.³⁴ The Constitutional Court has stipulated that due to its constitutional status, it “must interpret the Constitution and the Convention in a complementary manner”³⁵

Lastly, with respect to the obligation of the executive and legislative branches to ensure the compatibility of any proposed legislation with Convention standards, there are two elements to point out. Firstly, according to the Government’s rules and principles on the legislative process, all institutions which participate in the drafting process of any legislation must ensure that the proposed normative act “is in accordance with the Constitution” and “in accordance with the International Agreements and Instruments that are directly applicable in the Republic of Kosovo”, including the ECHR.³⁶ Secondly, according to Parliament’s rules of procedure, a special commission for legislation is obliged to “analyse the constitutionality and legality of draft laws” and another commission is obliged to “monitor the implementation of the duties assumed by Kosovo from the Council of Europe Conventions”.³⁷ This results in the fact that, while a very specific mandatory procedure to ensure the compatibility of any proposed legislation with the *acquis* of the European Union exists,³⁸ there is no specific procedure obliging lawmakers to ensure the compatibility of proposed legislation with Convention standards and the ECtHR case-law.

³⁴ Ibid., § 110. Before this recent case-law of the Constitutional Court referred to above confirming the justiciability of the ECtHR case-law in the domestic court system in Kosovo, there were authors who posed the question as to whether the case-law of the ECtHR could be invoked in regular court proceedings or not due to the lack of case-law at that time; see, for example, in this context, Korenica and Doli (2011).

³⁵ Constitutional Court of Kosovo, Judgment no. KO01/09, 18 March 2010, § 40.

³⁶ See Article 4 of the Administrative Instruction of the Government of Kosovo, No. 03/2013, 16 May 2013 on Standards for the Drafting of Normative Acts <<https://gzk.rks-gov.net/actdocumentdetail.aspx?actid=8696>> (accessed 30 December 2021).

³⁷ Parliament of Kosovo, ‘Rules of Procedure’, 29 April 2010, Annex 2 <https://www.kuvendikosoves.org/Uploads/Data/Files/6/Rr_K_RK_29_04_2010_1_EDbu8aqXYd.pdf> (accessed 30 December 2021).

³⁸ See Article 30 of the Administrative Instruction of the Government of Kosovo, No. 03/2013, 16 May 2013 on Standards for the Drafting of Normative Acts <<https://gzk.rks-gov.net/actdocumentdetail.aspx?actid=8696>> (accessed 30 December 2021), where it is foreseen that any body proposing a legislative act is obliged to prepare “a Statement of Compliance with the EU *acquis*” with a view to ensuring that the draft is in accordance with EU legislation. See also, *ibid.*, Parliament of Kosovo, ‘Rules of Procedure...’, Annex 2, Commission for European Integration where it is specifically foreseen that draft laws are evaluated in respect of their compatibility with the EU *acquis*.

III. Domestic Court System and the ECHR

1. Overview of the Kosovar Court System

According to the Constitution, the judicial power in Kosovo “is unique, independent, fair, apolitical and ensures equal access to the courts”.³⁹ The regular court system consists of basic courts, a Commercial Court and a Court of Appeals, and the Supreme Court. There are seven basic courts which operate as first instance level courts in criminal, civil and administrative matters.⁴⁰ For decentralisation purposes, all basic courts have several branches in various geographical regions of the country.⁴¹ There is one main Court of Appeal, with six different departments, which operates as a “second instance court with territorial jurisdiction throughout” Kosovo and reviews decisions of all seven basic courts.⁴² While the Supreme Court stands at the top of the pyramid among the regular courts in Kosovo, the Constitutional Court, on the other hand, stands outside this structure as an independent institution responsible to serve as the ultimate guardian of the Constitution and the final interpreter of its provisions.⁴³

In addition to the regular court structure, in 2015, a highly contested constitutional amendment paved the way for the establishment of the “Specialist Chambers and the Specialist Prosecutor’s Office” or, as it is generally referred to, “the Special Court”.⁴⁴ The basis for this constitutional amendment rested on the ratification of an international agreement between Kosovo and the European Union which provided that Kosovo would enable the establishment of a

³⁹ Article 102 § 1 of the Constitution.

⁴⁰ Article 9 of the Law on Courts, No. 06/L-054 of 23 November 2018, published in the Official Gazette on 13 December 2018. Recently, a Commercial Court was also established, with the competence to decide commercial disputes and administrative conflicts in first and second instance.

⁴¹ *Ibid.*, Article 10.

⁴² *Ibid.*, Articles 21 and 24.

⁴³ Article 112 of the Constitution.

⁴⁴ See Constitutional Amendment No. 24, namely Article 162 of the Constitution according to which the Specialist Chambers and the Specialist Prosecutor’s Office will be established in order to comply with the international obligations in relation to the CoE Parliamentary Assembly Report Doc 13462 of 7 January 2011.

temporary Special Court in order to deal with the investigations conducted by the “Special Investigative Task Force” which was established to investigate the allegations raised by the Parliamentary Assembly of the Council of Europe in 2011, in the Report entitled: “Inhuman treatment of people and illicit trafficking in human organs in Kosovo”.⁴⁵ Among other competences of the Constitutional Court is the obligation to review, *ex ante*, every proposed amendment to the Constitution prior to its enactment by Parliament in order to confirm that it does not diminish the rights and freedoms guaranteed by Chapter II [Fundamental Rights and Freedoms] of the Constitution.⁴⁶ As a result, before approving this highly debated constitutional amendment, the Constitutional Court was able to review it and decide whether it diminished any rights and freedoms guaranteed by the Constitution.⁴⁷ Despite allegations of unconstitutionality of the Special Court and fervent opposition at the domestic level,⁴⁸ the Constitutional Court cleared this constitutional amendment as being constitutionally compliant, with the result that the new structural elements of the Special Court would: (i) be established by law, (ii) conform to the existing structure of the justice system of the Republic of Kosovo, (iii) have a specific scope of jurisdiction, (iv) function within the legal framework of criminal justice and that its establishment was “necessary for the Republic of Kosovo to comply with its international obligations”.⁴⁹ In reasoning its decision, the Constitutional Court relied on the case-law of the ECtHR reflected in *Fruni v. Slovakia*⁵⁰ in order to clarify that Article 6 of the ECHR “cannot be read as prohibiting the establishment of special criminal courts if they have a basis in law” and that “the object of the term ‘established by law’ [...] is to ensure ‘that the judicial organisation in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from the Parliament.’”⁵¹

⁴⁵ See Parliamentary Assembly of Council of Europe, Committee on Legal Affairs and Human Rights, Report no. 12462, 7 January 2011, prepared by Rapporteur Mr Dick Marty, Switzerland, member of the Alliance of Liberals and Democrats for Europe <coe.pdf (scp-ks.org)> (accessed 12 December 2021).

⁴⁶ See Article 113 § 9 of the Constitution which states that: “The President of the Parliament of Kosovo refers proposed Constitutional amendments before approval by the Parliament to confirm that the proposed amendment does not diminish the rights and freedoms guaranteed by Chapter II of the Constitution.”

⁴⁷ Constitutional Court of Kosovo, Judgment no. KO26/15, 14 April 2015.

⁴⁸ *Ibid.*, §§ 24-34 for comments of the parties submitted to the Constitutional Court.

⁴⁹ *Ibid.*, § 68.

⁵⁰ ECtHR, *Fruni v. Slovakia*, no. 8014/07, Judgment (2011).

⁵¹ Constitutional Court of Kosovo, Judgment no. KO26/15, 14 April 2015, §§ 47-48.

As a result, in 2015, the Special Court was established as an independent criminal court with temporal jurisdiction to try alleged war crimes and crimes against humanity which either “commenced or [were] committed in Kosovo” between “1 January 1998 and 31 December 2000”.⁵² Its work is regulated by a *lex specialis* which was enacted immediately following the entry into force of the constitutional amendment.⁵³ In said law, the ECHR is referred to four times in order to regulate that: (i) the Special Court will adjudicate and function, *inter alia*, in accordance with “international human rights law which sets criminal justice standards”, including the ECHR; (ii) the Special Court will apply customary international law and the criminal law of Kosovo “as it is in compliance with customary international law, both as applicable at the time the crimes were committed, in accordance with Article 7(2)” of the ECHR; (iii) the Special Court, when considering the punishment to be imposed, will take into account Article 7(2) of the ECHR; and that, (iv) any request for extraordinary review “may be filed on the basis of rights available under this Law which are protected under the Constitution or the [ECHR]”.⁵⁴ This *lex specialis* provides that the Special Court is “attached to each level of the court system in Kosovo” by having its own four-tier court system attached to the Basic Court in Prishtina (first instance level), the Court of Appeals (second instance level), the Supreme Court (third instance level) and the Constitutional Court (last instance level).⁵⁵ Despite the fact that the Special Court is a domestic court attached to the basic court system in Kosovo and has a symbolic seat at the domestic level, its daily work is steered from outside Kosovo, namely from The Hague, in the Netherlands, as part of an international agreement making the latter a Host State to the newly established Special Court.⁵⁶ Although the Special Court has been operational since 2015, the first indictments were not filed until 2020, against, among others, the then sitting President of Kosovo, Mr Hashim Thaçi and two former Presidents of the Parliament, Mr Kadri Veseli and Mr Jakup Krasniqi.⁵⁷ While the latter was arrested without the possibility of surrender-

⁵² See Articles 7-8 of the Law on Specialist Chambers and Specialist Prosecutor’s Office, No. 05/L-053, 3 August 2015 <https://www.scp-ks.org/sites/default/files/public/05-l-053_a.pdf> (accessed 10 January 2022).

⁵³ *Ibid.*

⁵⁴ *Ibid.*, Articles 3.2.e, 12, 44.2.c and 48.8.

⁵⁵ *Ibid.*, Article 3.

⁵⁶ See ‘Agreement between the Kingdom of the Netherlands and the Republic of Kosovo concerning the Hosting of the Kosovo Relocated Specialist Judicial Institution in the Netherlands’, No. 01332, 15 February 2016 <<https://www.scp-ks.org/en/documents/host-state-agreement-between-netherlands-and-kosovo>> (accessed 5 January 2022).

⁵⁷ Press Statement of the Special Court <Press statement | Kosovo Specialist Chambers & Specialist Prosecutor’s Office (scp-ks.org)> (accessed 12 December 2021).

ing voluntarily, the other two high-state officials immediately resigned from their public posts and voluntarily travelled to The Hague in order to face the charges against them. All of the accused, including the former member of the Parliament, Mr Rexhep Selimi, and others who were indicted, had served in the Kosovo Liberation Army during the time when they allegedly committed the crimes they are charged with.⁵⁸ They are currently in pre-trial detention in The Hague awaiting trial or being tried. The mandate of the Special Court is initially for five years,⁵⁹ but it will need to be extended considering that this court is far from completing its mandate. Considering that the foundations of this unusual court have been initiated by the “legislative” body of the Council of Europe, namely the Parliamentary Assembly in 2011, it is unfair and unfortunate that the accused individuals will not be able eventually, if needed, to argue their case before the “judicial” body of the Council of Europe, the ECtHR.⁶⁰ The crimes of which these individuals are accused⁶¹ are extremely serious and it seems only fair that they should have the final opportunity to have their claims heard before the ECtHR if they are not satisfied with the final decisions rendered by the Special Court. In any case, the developments in this area (namely, whether Kosovo will join the Council of Europe in time for the accused to be able to approach the ECtHR, if needed) and the end result of the criminal proceedings before this highly contentious court remain to be seen.

In the following part, the analysis will focus on the jurisdiction and case-law of the highest national courts as a means of assessing their contribution to the embeddedness of Convention principles and their adeptness to serve as ‘last-line defenders’ of the Convention rights at the domestic level. The ‘Convention talk’ between the highest courts, with occasional references to other case-law of the regular courts, will reflect the current (lack of) suitability of the national courts in Kosovo to fill the void that is inevitably left by the lack of supranational supervision in terms of the application of Convention standards and the Court’s case-law.

⁵⁸ In addition, the Special Court also indicted Mr Rexhep Selimi who was serving as a member of the Parliament of Kosovo.

⁵⁹ See Article 162 § 13 of the Constitution.

⁶⁰ Kabashi (2020) <<https://kosovotwopointzero.com/en/special-supervision-for-the-special-court/>> (accessed 5 January 2022).

⁶¹ It should be noted that the indictments of the Special Court do not include the crimes of human trafficking of organs which were mentioned in the Parliamentary Assembly Report of the CoE.

1.1. Supreme Court

As the “highest judicial authority” in Kosovo,⁶² the Supreme Court has six main areas of competence, namely jurisdiction to: (i) decide on requests for extraordinary legal remedies filed against final decisions of the regular courts; (ii) review decisions at the second instance level; (iii) decide as a third instance level in specific cases provided by the law; (iv) issue Legal Opinions and guidelines for the “unique application of laws by the courts in the territory of Kosovo”; (v) decide on cases related to the Kosovo Property Agency as well as on cases related to the Kosovo Privatisation Agency as provided specifically by the law.⁶³ This latter competence is the exclusive remit of a separate chamber operating within the Supreme Court which deals solely with issues related to the privatisation of socially owned enterprises.⁶⁴ The Supreme Court reviews cases in a panel of three judges except on occasions when it convenes a general session composed of all of the judges in order to issue a Legal Opinion on the harmonisation of the judicial practice.⁶⁵

When it comes to the utilisation of Convention standards and the Court’s case-law, the judicial practice of the Supreme Court is relatively poor, as the following analysis will demonstrate. There are scarce examples where the Supreme Court has used the case-law of the ECtHR to support its reasoning. In the vast majority of cases, more than 95%, the Supreme Court makes no reference to the Convention standards or the ECtHR case-law at all.⁶⁶ Even when it does, reliance on such principles is not systematic, coherent or detailed. On several occasions, the Supreme Court has generically referred to “international conventions on human rights”,⁶⁷ “international standards and European

⁶² Article 103 § 2 of the Constitution.

⁶³ Article 26 of the Law on Courts, No. 06/L-054, 23 November 2018.

⁶⁴ For more on this, see the Supreme Court’s website <<https://supreme.gjyqesori-rks.org/special-chamber-of-the-supreme-court/?lang=en>> (accessed 5 January 2022).

⁶⁵ Article 25 § 6 and Article 27 of the Law on Courts, No. 06/L-054, 23 November 2018.

⁶⁶ These data are derived from an analysis of the official case-law database of the Supreme Court <<https://supreme.gjyqesori-rks.org/publikimet/aktgjykimet/lista-me-aktgjykimet-e-fundit/?h=All&caseNO=>>> (accessed 5 January 2022). It should be noted that despite the obligation to publish all judgments, the database of the Supreme Court does not include every decision taken by the Supreme Court. Therefore, the analysis is based on those decisions which have been made accessible by the Supreme Court.

⁶⁷ Supreme Court of Kosovo, Judgment Pml.no. 45/2019, 4 March 2019, page 2; Supreme Court of Kosovo, Judgment Pml.no. 22/2019, 19 February 2019, page 2; Supreme Court of Kosovo, Decision Rev.no. 224/2016, 16 February 2017; Supreme Court of Kosovo, Judgment Pml.no. 21/2016, 6 June 2016, page 5.

conventions”,⁶⁸ the “European Convention on Human Rights”,⁶⁹ and “judicial practice of the ECtHR”⁷⁰ – without any further specific citation or elaboration as to exactly which standards or conventions it is relying on. Then, there is another category of cases in which the Supreme Court refers to the judicial practice of the Strasbourg Court *in abstracto* without citing any particular case-law but utilising general wording such as: “the ECtHR has stipulated that the right to a fair trial, guaranteed by Article 6 ECHR, encompasses the right to a reasoned judicial decision”.⁷¹ It has also used broader expressions in its reasoning such as: “Even the ECtHR has stipulated that a person accused of a criminal offence should remain free awaiting trial except in cases when the State may show that there are strong reasons ... justifying the continuation of pre-trial detention.”⁷²

In the area of Legal Opinions issued for the harmonisation of the domestic judicial practice, despite there being instances where qualitative opinions were issued based solely on the domestic law,⁷³ there is almost never any reliance on the ECHR principles or the ECtHR case-law, even though the matters under discussion would have benefited immensely from such Convention standards.⁷⁴ In some rare cases, for example in a Legal Opinion relating to the right of appeal against the compensation awarded in expropriation proceedings, the Supreme Court referred to Articles 6 and 13 of the ECHR in order to argue that there would be a violation of these provisions if the right to appeal for an ex-

⁶⁸ Supreme Court of Kosovo, Judgment Pml.no. 218/2017, 30 August 2017, pages 2-3.

⁶⁹ Supreme Court of Kosovo, Judgment Pml.no. 213/2017, 29 August 2017, page 2; Supreme Court of Kosovo, Judgment Pml.no. 207/2017, 16 August 2017.

⁷⁰ Supreme Court of Kosovo, Judgment ARJ.no. 77/2021, 11 August 2021.

⁷¹ Supreme Court of Kosovo, Judgment Pml.no. 194/2021, 29 June 2021, page 3.

⁷² Supreme Court of Kosovo, Judgment Pml.no. 350/2021, 4 October 2021.

⁷³ See e.g. Supreme Court of Kosovo, Legal Opinion no. 265/2020, 1 December 2020 – on the issue of calculation of interest.

⁷⁴ See e.g. some of the Legal Opinions of the Supreme Court where no reliance on the case-law of the ECtHR or Convention standards may be found despite the fact that such reliance would have been extremely useful: Legal Opinion no. 101/2019, 13 March 2019, relating to the issue of the prescription of deadlines for the execution of sanctions; Legal Opinion no. 266/2020, 2 December 2020, relating to the issue of the application of the Code for Minors; Legal Opinion no. 182/2019, 31 May 2019, relating to the issue of deadlines to issue indictments; Supreme Court of Kosovo, Legal Opinion no. 577/2016, 29 September 2016, relating to slapping and punching; Supreme Court of Kosovo, Legal Opinion no. 580/2016, 29 September 2016, relating to marriage contests; Supreme Court of Kosovo, Legal Opinion no. 12/2015, 12 January 2015, relating to covert and technical surveillance measures; Supreme Court of Kosovo, Legal Opinion no. 565/13, 19 September 2013, relating to the lawfulness of pre-trial detention; Supreme Court of Kosovo, Legal Opinion no. 94/2012, 20 February 2012, relating to defamation as a criminal offence.

propriated property were to be recognised “only after the publication of the decision on the determination of the award in the Official Gazette of Kosovo”.⁷⁵ Despite referring to these two Convention articles, there was no mention of any relevant case-law with respect to the right of appeal despite there being abundant and well-established case-law in this area at the Strasbourg level. However, in that particular Legal Opinion, the Supreme Court also referred to the case-law of the Constitutional Court which had declared a provision of the Law on Expropriation as being compatible with the Constitution, whilst utilising Convention standards.⁷⁶ The Supreme Court’s reliance on the case-law of the Constitutional Court, which entails abundant references to the ECtHR case-law, may be found in some other Legal Opinions of the Supreme Court as well.⁷⁷ There is also an instance where the Supreme Court retracted a previous Legal Opinion following the declaration of violations of the ECHR by the Constitutional Court, in a specific case related to quasi-judicial organs and the enforceability of their decisions.⁷⁸

However, among all of the Legal Opinions published by the Supreme Court for the years 2012-2020, there is no case where the ECtHR case-law has been utilised to support its stance. Such an approach towards the Convention standards as is found in Legal Opinions aimed at the unification of the judicial practice and directed to the whole judiciary, is not a good embeddedness strategy as it does not incentivise the regular courts to use Convention standards in their own decisions. As stated above, the obligation to rely on the ECtHR case-law when interpreting human rights and freedoms guaranteed by the Constitution does not pertain to the Constitutional Court only – as is often misunderstood – but rather to the entire judicial structure in Kosovo, including the Supreme Court as the highest instance.⁷⁹

In the area of the review of decisions of lower courts in Kosovo, the Supreme Court has found, in some rare cases, that the lower courts have violated Article 6 of the ECHR “by not notifying the convicted person and his defence

⁷⁵ Supreme Court of Kosovo, Legal Opinion no. 65/2016, 19 February 2016, page 2; see also, Supreme Court of Kosovo, Legal Opinion no. 66/2016, 18 February 2016, page 2.

⁷⁶ Constitutional Court of Kosovo, Judgment no. KO04/11, 1 March 2012.

⁷⁷ See e.g. Supreme Court of Kosovo, Legal Opinion no. 158/2020, 21 August 2020, relating to criminal offences during the COVID-19 pandemic, referring to the case-law of the Constitutional Court of Kosovo, Judgment no. KO54/20, 31 March 2020, where violations of the Convention were found for COVID-19 restrictions.

⁷⁸ Supreme Court of Kosovo, Decision to Retract Legal Opinion no. 584/2012, 11 December 2012, following the violation found by the Constitutional Court of Kosovo.

⁷⁹ See e.g. Constitutional Court of Kosovo, Judgment no. KI01/21, 7 October 2021, § 122, where this obligation is emphasised.

lawyer of the appeal session”,⁸⁰ or that the allegations of a violation of Article 5⁸¹ or Article 6 were ill-founded.⁸² There is a very small number of cases where other provisions of the Convention are briefly mentioned in the decisions of the Supreme Court, without extensive elaboration as to their pertinence to the facts of the case being decided.⁸³ In a very few cases, related, for example, to the right to a reasoned decision and administration of justice, the Supreme Court made a brief reference to an ECtHR case without extensive elaboration.⁸⁴ In a recent case related to pre-trial detention, the Supreme Court found the Court of Appeals to have breached Article 53 of the Constitution due to its failure to interpret “the rights and freedoms” in harmony with the “case-law of the European Court of Human Rights”.⁸⁵ However, the Supreme Court itself replicated the same omission by not explaining to the Court of Appeals and the general public how such an interpretation should have been made in line with the ECtHR case-law and which specific case-law would have been relevant in the particular circumstances of that case. Only then would the criticism of the Court of Appeals for not using the Court’s case-law have been sufficiently grounded.

On a more positive note, one of the best possible examples of utilisation of Convention principles may be found in a recent case related to an interception and the destruction of evidence produced following said interception.⁸⁶ The Supreme Court quashed a decision of the Court of Appeal and remanded it for retrial as it was not convinced by the conclusion that it is possible to use interceptions and retaining them “despite the fact that the convicted person (at first instance level) was not notified of the interceptions of his communica-

⁸⁰ Supreme Court of Kosovo, Judgment Pml.no. 81/2021, 19 April 2021, page 3; Supreme Court of Kosovo, Judgment Pml.no. 86/2021, 26 March 2021.

⁸¹ Supreme Court of Kosovo, Judgment Pml.no. 435/2021, 26 November 2021, page 2.

⁸² Supreme Court of Kosovo, Judgment Rev.no. 599/2020, 1 April 2021, page 3; Supreme Court of Kosovo, Judgment Pml.no. 194/2021, 29 June 2021, page 3; Judgment Pml.no. 354/2019, 16 December 2019, page 5.

⁸³ See e.g. Supreme Court of Kosovo, Judgment Rev.no. 232/2020, 3 December 2020, page 5, referring to Article 6; Judgment Pml.no. 18/2021, 20 January 2021, page 3, referring to Article 5; Judgment Pml.263/2021, 2 July 2021.

⁸⁴ See e.g. Supreme Court of Kosovo, Judgment Rev.no. 144/2021, 19 October 2021, page 4 citing ECtHR, *Hadjianastassiou v. Greece*, no. 12945/87, Judgment (1992), § 33; Supreme Court of Kosovo, Judgment Rev.no. 505/2020, 20 May 2021, page 4 citing ECtHR, *Hadjianastassiou v. Greece*, no. 12945/87, Judgment (1992), § 33; Supreme Court of Kosovo, Judgment Pml-Kzz.no. 147/2017, 20 July 2017, page 13 citing ECtHR, *Papon v. France*, no. 54210/00, Judgment (2002).

⁸⁵ Supreme Court of Kosovo, Judgment Pml.no. 328/2021, 30 July 2021, page 3.

⁸⁶ Supreme Court of Kosovo, Judgment Pml.no. 77/2021, 19 April 2021.

tions and his right to appeal for their destruction and possible utilisation in another case was not respected”⁸⁷ In this respect, the Supreme Court referred to and cited passages from several ECtHR cases, namely *Malone v. United Kingdom*, *Bugallo v. Spain*, *Klass and Others v. Germany*, *Kruslin v. France* and *Huvig v. France* to underline, *inter alia*, the general principle that persons who are under surveillance must be protected from the misuse of information obtained through secretive interception and that such evidence must be deleted or destroyed.⁸⁸ In all of these cases, the Supreme Court stated that the ECtHR had found a violation of Article 8 and similarly, it also found reasons to quash the decision of the Court of Appeal and send the case for retrial, requiring the Court of Appeal to comply with the observations made in its judgment.⁸⁹ This is a commendable example of the utilisation of the Court’s case-law and the Supreme Court should be encouraged to build on such case-law and contribute further to the embeddedness of the Convention within its own court and the rest of the regular judiciary.

In conclusion, in terms of the quality of the decisions of the Supreme Court in applying the Convention standards, it can be said that the overall structure of the decisions of the Supreme Court does not lend itself to the type of analysis that would be expected at the Supreme Court level. Only in 2021 did they start to utilise headings and sub-headings (in a few specific cases), to separate facts, allegations and the reasoning part – but there are still no paragraphs in any decision of the Supreme Court. The reasoning is usually quite brief and straightforward, except in certain specific cases. There are many reasons for this, but it is partly due to the Supreme Court’s practice of not providing an in-depth presentation of the allegations filed by the parties to the proceedings, and this makes it hard to follow which allegations the Supreme Court has actually addressed and which it has not. Without having access to the full file of a case, it is impossible to infer from a decision whether all crucial arguments of the parties have been addressed or not. For example, in a recent judgment the Supreme Court stipulated that in his request the applicant had “mentioned the judicial practice and cases of the ECtHR alleging that the challenged decisions had violated the principle of impartiality of the court” but the Supreme Court “did not find that such principles had been violated, in accordance with the reasoning provided above”.⁹⁰ In this particular case (without prejudging its merits or the final conclusion reached by the Supreme Court), it is not easy

⁸⁷ Ibid., page 12.

⁸⁸ Ibid., page 13.

⁸⁹ Ibid., page 14.

⁹⁰ Supreme Court of Kosovo, Judgment Pml.no. 171/2021, 13 July 2021, page 6.

to be certain whether the Supreme Court has interpreted the ECtHR case-law cited by the applicant correctly, considering that the reader is not informed of the case-law relied on by the applicant. Therefore, it would be extremely beneficial (and more transparent) if the Supreme Court would reflect more generously the applicant's allegations of possible Convention violations and then answer the crucial arguments directly by explaining why it has accepted or refuted them.

Considering that the Supreme Court deals with only around 1000 cases per year and most of them are inadmissible cases, this study considers that the quality of their decisions in respect of Convention utilisation should be much higher, especially since it serves as the highest judicial instance in Kosovo with the competence to review the decisions of all the regular courts.⁹¹ Additionally, it should also be mentioned that despite the obligation to publish all of its judgments as soon as they are final in Albanian and Serbian, the Supreme Court does not regularly perform this duty.⁹² The number of unpublished decisions outweighs the number of published decisions (despite the current trend of publishing more), and there is no regular practice of issuing case-law Bulletins as is the case with most supreme courts in the Western Balkans. The combination of these factors makes the case-law of the Supreme Court quite inaccessible for researchers as well as for regular courts and other interested parties in Kosovo.

Overall, the analysis of the case-law of the Supreme Court shows that this domestic court is at a fairly early stage of utilisation of the Convention standards and the ECtHR case-law. There is an urgent need for this domestic court to amend its working practices by introducing internal mechanisms which will enable it to follow developments in the area of Convention law more closely, as well as to develop these internal mechanisms in ways that will help judges

⁹¹ One reason for this might be the fact that most of the work is done by the judges themselves and they do not have a permanent Registry/Legal Office which assists judges in the writing and research process. The legal staff working at the Supreme Court deals only with some particular types of cases and does not function as a classic Registry. It should also be noted that this is not entirely a mistake on the part of the Supreme Court considering that such deficiencies are also due to the policy aspects of the laws governing its work and the work of the regular judiciary. In contrast, the Constitutional Court has a classic Registry (similar to the ECtHR model and that of other Constitutional Courts in the Western Balkans) which assists judges in the drafting and research process. At any given time, the number of legal advisors is higher than the number of judges, meaning that there is more than 1 legal advisor per judge.

⁹² European Commission of the European Union, 'Kosovo 2021 Report', Commission Staff Working Document no. SWD(2021) 292 final/2, 19 October 2021, page 19.

in their work with the ECtHR case-law. Save for the promising good examples that were referred to above, as long as the Supreme Court continues with its current practice, the level of application of the Convention standards will not progress to the required level. If the ECtHR were to assess the conventionality of certain decisions of the Supreme Court, it would not be able to defer to it in many cases due to the low level of Convention know-how and application of balancing exercises in terms of different provisions of the ECHR. The inability of the ECtHR to defer to the reasoning of the national courts as 'last-line defenders' means that the latter are not contributing sufficiently in terms of their shared responsibility to embed the Convention and thus protect rights at home.

1.2. Constitutional Court⁹³

The Constitutional Court is an independent institution vested with the competence to safeguard constitutionality,⁹⁴ by serving as the final authority for the interpretation of the Constitution and the compliance of laws with it.⁹⁵ In the absence of supervision from the Strasbourg Court, the Constitutional Court also serves as the final arbiter of Convention (mis)application at the domestic level. To draw a parallel with Article 19 of the Convention, owing to the absence of supranational supervision by the ECtHR, the burden of "ensur[ing] the observance of engagements"⁹⁶ undertaken by the Kosovo authorities when providing direct applicability to the Convention rests, for the time being and until Kosovo becomes a member of the Council of Europe, exclusively with the Constitutional Court. As a result, the case-law of this particular 'last-line defender' is of paramount importance for the embeddedness of Convention principles at the domestic level, both substantively and procedurally speaking.

As indicated above, an extensive jurisdiction and highly important competences were ascribed to the Constitutional Court with a view to ensuring that the human rights and freedoms of every person in Kosovo are duly protected.⁹⁷

⁹³ The author of this PhD monograph used to work for the Constitutional Court of the Republic of Kosovo. All opinions expressed in this academic work are personal and do not reflect or represent in any way the stance of that court.

⁹⁴ Article 4 § 6 of the Constitution.

⁹⁵ Article 112 of the Constitution.

⁹⁶ Article 19 of the Convention, providing that the ECtHR is responsible to "ensure the observance of the engagements undertaken by the High Contracting Parties ..."

⁹⁷ See Chapter III of the Constitution which specifically regulates the rights of the communities and their members. See also Botusharova (2012) for more on the Constitutional Court of Kosovo and the ECtHR.

The Constitutional Court has recently completed its first decade of judicial activity, a period in which it has been at the centre of attention with the issuance of many important decisions that have shaped the constitutional path of the newly born State in many directions.⁹⁸ Through its *ex post* and *ex ante* jurisdictional mechanisms of constitutional review, the Constitutional Court performs abstract and concrete norm control. The long list of authorised parties that may file a request before the Constitutional Court, all of them having the right to invoke Convention guarantees, includes the Parliament, the Government, the President, the Ombudsperson, a specific number of deputies of the Parliament, municipalities, the Supreme Court and any other regular court, and, last but not least, individuals and legal persons.⁹⁹ In this regard, two of the most important competences for the purposes of this study are those related to (i) the individual constitutional complaint mechanism, and (ii) incidental control initiated by the regular courts, including the review of the compatibility of legislation with the ECHR as requested by other authorised parties.

After an elaboration of the first decision rendered by the Constitutional Court and its importance for the embeddedness of the Convention principles, an analysis of the some of most important cases in respect of Convention utilisation will follow.

On 22 April 2009, the very first case was filed with the newly established Constitutional Court.¹⁰⁰ Some months later, the Constitutional Court declared the case admissible and found a violation.¹⁰¹ The case signalled the orientation and spirit of the Constitutional Court and it merits special attention in that regard. Firstly, the Constitutional Court elaborated, for the first time, the meaning of Article 22 of the Constitution which enumerates the ECHR as one of the eight directly applicable international treaties.¹⁰² It emphasised its “direct applica-

⁹⁸ See, *inter alia*, some of the ground-breaking decisions of the Constitutional Court of Kosovo: Judgment no. KO47/10, 28 September 2010, deciding that a former sitting President of Kosovo had violated the Constitution by holding a political post whilst also being President of the Republic; Judgment no. KO29/11, 28 March 2011, deciding that the procedure for the election of the President of the Republic by the Parliament was not compatible with the Constitution; Constitutional Court of Kosovo, Judgment no. KO95/13, 2 September 2013, deciding that the procedure for the ratification of the First International Agreement for the normalisation of relations between Kosovo and Serbia was compatible with the Constitution. For more on the role of the Constitutional Court of Kosovo in the development of the rule of law in Kosovo, see Hasani (2018).

⁹⁹ Article 113 of the Constitution.

¹⁰⁰ Constitutional Court of Kosovo, Judgment no. KO01/09, 18 March 2010

¹⁰¹ *Ibid.*, operative part.

¹⁰² See Article 22 of the Constitution. In addition to the ECHR, the Constitution also provided for the direct applicability of the following international conventions: (1) the Universal De-

bility in Kosovo” and the fact that it has “priority over provisions of laws and other acts of public institutions”.¹⁰³ In line with this, the Constitutional Court emphasised that “the decisions which emanate from the courts that adjudicate on these Conventions, principally the ECtHR sitting in Strasbourg, aid and assist not only all the courts of Kosovo but other State organs as to how fundamental rights and freedoms must be interpreted and applied in Kosovo”.¹⁰⁴ Then, in paragraph 40 of this judgment, the Constitutional Court emphasised that the “ECHR and its Protocols ... were incorporated into the law of Kosovo at the constitutional level” and that the Constitutional Court “must interpret the Constitution and the Convention in a complementary manner bearing in mind the necessity to protect the fundamental rights and freedoms enumerated in both”.¹⁰⁵

Interestingly, in this very first case, the Constitutional Court did not refer to any case-law of the ECtHR but focused its entire attention on emphasising the importance of the Convention and its status in the Kosovar legal order. This important judgment laid the groundwork for the subsequent jurisprudence in which the Constitutional Court then started quoting the Strasbourg Court more and more extensively. Today, it is almost impossible to find a decision of the Constitutional Court in which the case-law of the ECtHR is not referred to,¹⁰⁶ and the quality of the references and the rationale for invoking such specific references has improved steadily over the years.¹⁰⁷ The Constitutional Court uses the Convention standards and the Court’s case-law for three main purposes, namely (i) to support its reasoning in finding a violation of the Convention/Constitution; (ii) to

claration of Human Rights; (2) the European Convention on Human Rights; (3) the International Covenant on Civil and Political Rights and its Protocols; (4) the Council of Europe Framework Convention for the Protection of National Minorities; (5) the Convention on the Elimination of All Forms of Racial Discrimination; (6) the Convention on the Elimination of All Forms of Discrimination Against Women; (7) the Convention on the Rights of the Child; (8) the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.

¹⁰³ Constitutional Court of Kosovo, Judgment no. KO01/09, 18 March 2010, § 34.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*, § 40.

¹⁰⁶ Such cases are usually straightforward inadmissibility cases or cases which deal with very particular national issues which do not necessarily require an analysis of the ECtHR’s case-law.

¹⁰⁷ In this context, it is worth noting the difference in quality and number of references between early decisions of the Constitutional Court (2010) and those rendered after the first decade of judicial activity of the Constitutional Court. For an overview of all cases of the Constitutional Court of Kosovo, see the official database <<https://gjk-ks.org/en/decisions/>>, where every decision is published on a regular basis.

support its reasoning for not finding a violation of the Convention/Constitution; and (iii) to support its rationale on inadmissibility decisions.

Thus far, despite finding specific violations of the Constitution in different State related constitutional matters before it, the Constitutional Court has also found violations of the Convention provisions, namely Articles 2, 5, 6, 8, 11, 13, Article 1 of Protocol No. 1, Article 3 of Protocol No. 1 and Article 2 of Protocol No. 4.¹⁰⁸ There are still many provisions of the Convention for which no violations have been found and this is mostly due to the lack of litigation in such fields or the failure of the applicants to raise well-founded Convention claims.¹⁰⁹ For some other articles of the Convention, the Court has also issued judgments with no Convention violations having been found after analysing the merits of such complaints.¹¹⁰

In the area of the individual constitutional appeal mechanism, the vast majority of violations fall within the ambit of Article 6 and relate to violations of the right to a reasoned decision,¹¹¹ non-enforcement of final decisions,¹¹² the *res judicata* principle,¹¹³ the right to a public hearing,¹¹⁴ access to a court,¹¹⁵ equality of arms,¹¹⁶

¹⁰⁸ For a full overview of the case-law of the Court, see the official case-law database of Decisions of the Constitutional Court (gjk-ks.org) as well as the case-law Bulletins for each judicial year which are available in English here: Bulletin Archives of the Constitutional Court (gjk-ks.org)

¹⁰⁹ In this respect, it is worth noting that the vast majority of cases are declared as inadmissible due to the applicants' failure to comply with the admissibility rules. In this context, see the Annual Report 2020 on the work of the Constitutional Court <https://gjk-ks.org/wp-content/uploads/2021/04/rv_2020_gjkk_ang.pdf> (accessed 5 January 2022).

¹¹⁰ See e.g. cases where no violation has been found in respect of Articles 6, 10, Article 1 of Protocol No. 1, Article 3 of Protocol No. 1: Constitutional Court of Kosovo, Judgment nos. KI235/19, 28 April 2021; KI111/19, 28 April 2021; KI188/20, 28 April 2021; KI07/18, 18 December 2019; KI27/20, 22 July 2020; KI31/18, 12 April 2019; KI48/18, 23 January 2019; KO142/16, 9 May 2017.

¹¹¹ See several (among many) cases of the Constitutional Court where such a violation was found: Constitutional Court of Kosovo, Judgment no. KI177/19, 29 March 2021; Constitutional Court of Kosovo, Judgment nos. KI230/19, 9 December 2020; KI227/19, 10 December 2020; KI87/18, 27 February 2019; KI24/20, 3 February 2021; KI145/18, 19 July 2019; KI24/17, 27 May 2019; KI115/16, 27 May 2018; KI189/20, 20 October 2021.

¹¹² Constitutional Court of Kosovo, Judgment no. KI51/19, 28 April 2021; Constitutional Court of Kosovo, Judgment no. KI10/17 of 13 November 2017.

¹¹³ See several decisions of the Constitutional Court of Kosovo, Judgment nos. KI195/19, 7 April 2021; KI122/17, 18 April 2018; KI132/15, 19 May 2016; KI51/11, 19 June 2012; KI08/09, 17 December 2010.

¹¹⁴ See e.g. Constitutional Court of Kosovo Judgment nos. KI186/19, KI187/19, KI200/19 and KI208/19, 28 April 2021; Constitutional Court of Kosovo Judgment nos. KI220/19, KI221/19, KI223/19 and KI234/19, 25 March 2021; Constitutional Court of Kosovo Judgment nos. KI181/19, KI182/19 and KI183/19, 27 January 2021.

¹¹⁵ Constitutional Court of Kosovo, Judgment no. KI20/21, 13 April 2021; Constitutional Court of Kosovo, Judgment no. KI62/17, 29 May 2018; KI54/21, 4 November 2021.

¹¹⁶ Constitutional Court of Kosovo, Judgment no. KI193/19, 17 December 2020; Constitutional Court of Kosovo, Judgment no. KI209/19, 5 November 2020.

the principle of legal certainty,¹¹⁷ the right to be heard by a tribunal established by law,¹¹⁸ consistency of domestic case-law,¹¹⁹ manifestly erroneous and arbitrary application of the law,¹²⁰ the right of defence,¹²¹ the right to have a final decision,¹²² the inability to cross-examine witnesses or other witness/evidence issues,¹²³ etc. However, although lower in number, the case-law of the Constitutional Court has produced some other interesting violations which relate to the right to private life in conjunction with the right to an effective remedy,¹²⁴ the right to an effective remedy related to other Convention rights,¹²⁵ the right to freedom of assembly,¹²⁶ the passive aspect of the right to vote in a gender quotas case,¹²⁷ pre-trial detention,¹²⁸ the right to protection of property,¹²⁹ freedom of movement,¹³⁰ etc. Although rare in recent years, there are cases, however, where the Constitutional Court has only found a violation of the mirroring constitutional provisions of the Convention but not of the Convention itself, despite referring to the ECtHR's case-law.¹³¹

With regard to the utilisation of Convention principles and the Court's case-law, considering that there is an abundance of very good examples to choose from, the following analysis will use two illustrative examples to show such utilisation in practice, one from the area of the right to a fair and impartial trial as the most litigated area of law, and the second from a violation of Article 2 in conjunction with Article 13 of the Convention.

¹¹⁷ Constitutional Court of Kosovo, Judgment no. KI214/19, 29 July 2020.

¹¹⁸ Constitutional Court of Kosovo, Judgment nos. KI187/19 and KI11/19, 29 July 2019; Constitutional Court of Kosovo, Judgment no. KI128/17, 29 July 2019.

¹¹⁹ Constitutional Court of Kosovo, Judgment no. KI35/18, 11 December 2019.

¹²⁰ Constitutional Court of Kosovo, Judgment no. KI122/16, 30 May 2018.

¹²¹ Constitutional Court of Kosovo, Judgment no. KI104/16, 29 May 2017.

¹²² Constitutional Court of Kosovo, Judgment no. KI81/16, 31 May 2017.

¹²³ Constitutional Court of Kosovo, Judgment no. KI14/18, 15 January 2020; Judgment no. KI31/17, 30 May 2017; Judgment no. KI72/12, 5 December 2012.

¹²⁴ Constitutional Court of Kosovo, Judgment no. KI56/18, 22 July 2020;

¹²⁵ Constitutional Court of Kosovo, Judgment no. KI86/18, 3 February 2021; Constitutional Court of Kosovo, Judgment KI193/18, 22 April 2020.

¹²⁶ Constitutional Court of Kosovo, Judgment no. KO54/20, 31 March 2020.

¹²⁷ Constitutional Court of Kosovo, Judgment nos. KI45/20 and KI46/20, 26 March 2021.

¹²⁸ Constitutional Court of Kosovo, Judgment no. KI10/18, 8 October 2019.

¹²⁹ See e.g. several judgments of the Constitutional Court of Kosovo: KI65/15, 14 September 2017; KI144/14 and KI156/14, 4 August 2015; KI72/14, 9 December 2014; KI86/18, 3 February 2021; KI90/16, 5 December 2017; KI187/13, 1 April 2014; KI200/13, 24 March 2014; KI94/13, 24 March 2014; KI82/12, 5 July 2013; KI112/12, 5 July 2013.

¹³⁰ Constitutional Court of Kosovo, Judgment no. KI06/10, 30 October 2010.

¹³¹ See e.g. Constitutional Court of Kosovo, Judgment no. KI55/17, 5 July 2017.

The first illustrative case is an example of several other cases where the Constitutional Court has found a violation of Article 6 in conjunction with Article 1 of Protocol No. 1 and Article 13 of the Convention due to non-enforcement of a final and binding decision.¹³² In a recent example, in the case of *Slavica Đorđević*, the applicant had a final and binding decision in her favour with respect to the use of her property since 2005, a decision confirmed as final by domestic courts in 2012 but which remained unexecuted for more than 20 years despite her persistent litigation.¹³³

The Constitutional Court relied on the Court's general principles with respect to Articles 6 and 13 and Article 1 of Protocol No. 1 by recalling that: (i) "the enforcement of a decision rendered by a court should be seen as an integral part of the right to a fair trial" as guaranteed by Article 6 ECHR and that "non-enforcement of decisions produces effects which bring us to situations that are not in accordance with the rule of law principle" which institutions in Kosovo must respect;¹³⁴ (ii) "the effect of Article 13 is an obligation on the States to provide effective legal remedies ... to examine the substance of an arguable claim under the Convention and to grant appropriate relief;¹³⁵ (iii) "genuine, effective exercise of the right" to protection of property does not solely depend on the "State's duty not to interfere, but may require positive measures of protection, particularly where there is a direct link between the measures an applicant may legitimately expect from the authorities and his effective enjoyment of his possessions".¹³⁶ Following the application of such principles to the applicant's case, the Constitutional Court found a violation of all three

¹³² See e.g. Constitutional Court of Kosovo, Judgment no. KI187/13, 1 April 2014; Constitutional Court of Kosovo, Judgment no. KI194/13, 24 March 2014; Constitutional Court of Kosovo, KI172/14, 9 December 2014; Constitutional Court of Kosovo, Judgment nos. KI144/14 and KI156/14, 4 August 2015; Constitutional Court of Kosovo, KI90/16, 5 December 2017.

¹³³ Constitutional Court of Kosovo, Judgment no. KI86/18, 3 February 2021, §§ 20–68 and 111.

¹³⁴ *Ibid.*, §§ 113–114, where the Constitutional Court cited ECtHR, *Brumărescu v. Romania* [GC], no. 28342/95, Judgment (1999).

¹³⁵ *Ibid.*, §§ 120–125, where the Constitutional Court relied on ECtHR, *Kudła v. Poland* [GC], no. 30210/96, Judgment (2000); ECtHR, *Kaya and Others v. Turkey*, nos. 56370/00 and 2 others, Judgment (2007); ECtHR, *Voytenko v. Ukraine*, no. 18966/02, Judgment (2004), §§ 46–48; ECtHR, *Boyle and Rice v. the United Kingdom*, nos. 9659/82 9658/82, Judgment (1988), § 52; ECtHR, *Klass and Others v. Germany* [Plenary], no. 5029/71, Judgment (1978), § 64; ECtHR, *Erkner and Hofauer v. Austria*, no. 9616/81, Judgment (1987), § 68; ECtHR, *Öneryıldız v. Turkey* [GC], no. 48039/99, Judgment (2004), § 134; ECtHR, *Broniowski v. Poland* [GC], no. 31443/96, Judgment (2004), § 129.

¹³⁶ *Ibid.*, §§ 137–144, where the Constitutional Court relied on ECtHR, *Sporrong and Lönnroth v. Sweden* [Plenary], nos. 7151/75 and 7152/75, Judgment (1982), § 61; ECtHR, *James and Others v. the United Kingdom* [Plenary], no. 8793/79, Judgment (1982) § 37.

provisions by concluding, *inter alia*, that “it is intolerable that the applicant – despite her efforts for more than twenty years – has not enjoyed the rights recognised to her” by final decisions issued by public authorities in Kosovo.¹³⁷

The second illustrative case is an early high-profile case of the Constitutional Court, commonly known as the *Diana Kastrati* case, which dealt with the State’s obligation to secure the right to life and effective remedies in that regard.¹³⁸ A lady in her twenties had been killed in broad daylight in one of Prishtina’s main streets by her former partner and father of her daughter. Three weeks before the tragic event she had asked the domestic courts to issue an emergency protection order in her favour due to the death threats she was receiving from her former abusive partner, following her decision to part ways with him.¹³⁹ The domestic courts did not react within the prescribed deadlines and did not offer the sought protection. Following her death, the parents of the victim filed a constitutional appeal before the Constitutional Court alleging that the failure of the domestic courts to act on their daughter’s request for an emergency protection order within 24 hours, as foreseen by law, had breached their rights protected by Articles 2, 6 and 13 of the ECHR.¹⁴⁰

In assessing the case, the Constitutional Court relied on the Court’s case-law to argue in favour of the applicants’ indirect victim status following the death of their daughter and exhaustion of legal remedies,¹⁴¹ in addition to relying on such principles with regard to the merits, namely finding a violation of Articles 2 and 13 of the Convention.¹⁴² In respect of Article 2, after outlining the general principles established in the Court’s case-law,¹⁴³ the Constitutional Court concluded that “the Municipal Court in Pristina was responsible for taking actions foreseen by the Law on Protection against Domestic Violence and its inaction presents violations of constitutional obligations that derive from

¹³⁷ Ibid., § 134.

¹³⁸ Constitutional Court of Kosovo, Judgment no. KI41/12, 25 January 2013.

¹³⁹ Ibid., § 21.

¹⁴⁰ Ibid., § 27.

¹⁴¹ Ibid., §§ 44-53 where the Constitutional Court relied on ECtHR, *McCann and Others v. the United Kingdom* [GC], no. 18984/91, Judgment (1995); ECtHR, *Yaşa v. Turkey*, no. 22495/93, Judgment (1998); ECtHR, *Akdivar and Others v. Turkey* [GC], no. 21893/93, Judgment (1996).

¹⁴² Constitutional Court of Kosovo, Judgment no. KI41/12, 25 January 2013, §§ 54-74.

¹⁴³ Ibid., §§ 59-60, where the Constitutional Court relied on ECtHR, *L.C.B. v. the United Kingdom*, no. 23413/94, Judgment (1998), § 36; ECtHR, *Osman v. the United Kingdom* [GC], no. 23452/94, Judgment (1998); ECtHR, *Kontrová v. Slovakia*, no. 7510/04, Judgment (2007); ECtHR, *Opuz v. Turkey*, no. 33401/02, Judgment (2009).

... Article 2 of the ECHR¹⁴⁴. Moreover, in respect of Article 13, after outlining the general principles established in the Court's case-law,¹⁴⁵ the Constitutional Court also found a violation of Article 13 ECHR due to the failure of the domestic courts to issue an emergency protection order as well as the failure of the Kosovo Judicial Council to address the failure of the regular courts to act when they should have done, resulting in the victim and the applicants being obstructed from exercising their right to an effective legal remedy.¹⁴⁶

Considering that the Constitutional Court could not award any non-pecuniary damages for the violation of said rights, due to the lack of jurisdiction in that respect, the applicants initiated proceedings against the State of Kosovo by utilising the judgment of the Constitutional Court as a legal basis to request non-pecuniary damages. Eight years after the tragic event, a basic court in Kosovo awarded the parents of the deceased Diana Kastrati compensation in the sum of EUR 95,000 due to the State's failure to protect the life of their daughter as confirmed by the Constitutional Court.¹⁴⁷ Here, as hinted above, it is important to emphasise that the Constitutional Court does not have jurisdiction to award pecuniary or non-pecuniary damages in cases when it finds a violation of rights and freedoms guaranteed by the Constitution and/or the ECHR. This represents an enormous shortcoming in terms of ensuring that full redress is provided to victims of violations. However, as long as this discretionary policy choice of the Parliament remains as it is, it is a good sign that the regular courts are acting based on the decisions of the Constitutional Court and awarding damages in order to fill the void and provide full redress to the victims of human rights violations, even if this means that they need to continue their litigation process after the Constitutional Court has found a violation of their rights. In several other cases, being aware of its lack of jurisdiction to award damages, the Constitutional Court has hinted at the legal right of the applicants to seek damages through other legal avenues by utilising phrases such as, for example, the parties "have the right to utilise other available legal remedies for further realisation of their rights in conformity with the findings of this judgment and the case-law of the ECtHR cited in this judgment".¹⁴⁸

¹⁴⁴ Ibid., § 63.

¹⁴⁵ Ibid., §§ 68-70, where the Constitutional Court relied on ECtHR, *Silver and Others v. the United Kingdom*, nos. 5947/72 and 6 others, Judgment (1983), § 113.

¹⁴⁶ Ibid., § 74.

¹⁴⁷ Prishtina Insight (2019) <<https://prishtinainsight.com/court-awards-family-of-diana-kastrati-95000-euros-in-compensation/>> (accessed 5 January 2022).

¹⁴⁸ Constitutional Court of Kosovo, Judgment nos. KI45/20 and KI46/20, 26 March 2021, § 172; Constitutional Court of Kosovo, Judgment no. KI207/19, 10 December 2020, § 253; Constitutional Court of Kosovo, Judgment no. KI193/18, 22 April 2020, § 151.

In the areas of review of compatibility of legislation and review of acts issued by public authorities other than domestic courts, there are several cases worthy of mention in terms of the utilisation of Convention standards and the Court's case-law. In almost all cases where the Constitutional Court was called on to review a law, it has referred to the Convention and to the ECtHR case-law.¹⁴⁹ Besides the Constitutional Court, the authorised parties who raised cases before it have, in certain cases, also tended to utilise Convention guarantees and ECtHR case-law to build their arguments;¹⁵⁰ meanwhile, the Government as respondent has also used ECtHR case-law to defend its proposed legislation.¹⁵¹ For instance, when a highly debated piece of legislation awarding amnesty for certain crimes was introduced following the 2013 EU-brokered "First Agreement on normalisation of relations between Kosovo and Serbia", the Constitutional Court relied on Convention guarantees and ECtHR case-law to declare certain provisions incompatible with the Constitution and the rest of the law as being compatible with the Constitution.¹⁵² A similar trend of reliance may be noticed in other cases related to review of legislation or others acts of Parliament, the Government and the Presidency, where the Om-

¹⁴⁹ See, *inter alia*, Constitutional Court of Kosovo, Judgment no. KO219/19, 30 June 2020, reviewing the Law on Salaries in the Public Sector, §§ 115, 120, 123, 125-127; Constitutional Court of Kosovo, Judgment no. KO203/19, 30 June 2020, reviewing the Law on Public Officials, §§ 104, 132, 173; Constitutional Court of Kosovo, Judgment no. KO65/19, 29 July 2019, reviewing the Law on Notaries, §§ 68, 87, 90-92, 105; There are, however, cases where the Constitutional Court does not refer to the ECtHR case-law when reviewing the constitutionality of legislation, e.g. Constitutional Court of Kosovo, Judgment KO43/19, 13 June 2019, reviewing the Law on the duties, obligations and competences of the State delegation of the Republic of Kosovo in dialogue with Serbia.

¹⁵⁰ See e.g. Constitutional Court of Kosovo, KO108/13, 3 September 2013, §§ 36-42, where the deputies of the Parliament, as applicants, refer to ECtHR, *Iatridis v. Greece* [GC], no. 31107/96, Judgment (1999), ECtHR, *Büyükdaj v. Turkey*, no. 28340/95, Judgment (2000), and ECtHR, *Leander v. Sweden*, no. 9248/81, Judgment (1987), in arguing violations of Articles 6, 13 and 14 of the Convention. See also, Constitutional Court of Kosovo, Judgments nos. KO45/12 and KO46/12, 25 June 2012, §§ 67-68, where the deputies of the Parliament, as applicants, relied on ECtHR, *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, Judgment (2000), and ECtHR, *Alexandridis v. Greece*, no. 19516/06, Judgment (2008), to support their arguments.

¹⁵¹ See also Constitutional Court of Kosovo, KO108/13, 3 September 2013, §§ 58-61, where the Government, as respondent party, referred to ECtHR, *Dujardin and Others v. France*, no. 16734/90, Decision (1989); ECtHR, *Tarbuk v. Croatia*, no. 31360/10, Judgment (2012); and ECtHR, *Marguš v. Croatia*, no. 4455/10, Judgment (2012), in order to defend its position for the enactment of the Law on Amnesty.

¹⁵² *Ibid.*, §§ 99-100, 135, 138 and 40.

budsperson and other authorised parties have played an important role in ensuring compliance with the Convention by actively challenging laws and other decisions issued by the public authorities in Kosovo.¹⁵³

The *ex ante* review of proposed amendments to the Constitution, as briefly mentioned above where the establishment of the Special Court was explained, gives the final say to the Constitutional Court in deciding whether a proposed amendment diminishes the human rights and freedoms guaranteed by the Constitution and by the Convention.¹⁵⁴ In most instances the Constitutional Court has approved the proposed amendments as being compatible with the Constitution;¹⁵⁵ however, there have been instances where the Constitutional Court considered that certain proposed amendments would diminish the rights and freedoms guaranteed by the Constitution and made use of the ECtHR jurisprudence to convey and reason its decision.¹⁵⁶

In the area of admissibility issues, as indicated above, the Constitutional Court relies heavily on the admissibility standards and doctrines established by the Strasbourg Court when assessing the admissibility of cases. For instance, the Constitutional Court has endorsed the reasoning of the ECtHR with respect to authorised parties,¹⁵⁷ victim status,¹⁵⁸ exhaustion of legal remedies,¹⁵⁹ the time

¹⁵³ See a list of all cases that were filed by the President of the Republic, the Ombudsperson, the deputies of the Parliament and the Government, available at the website of the Constitutional Court of Kosovo, <https://gjk-ks.org/en/decisions/?prej=&deri=&lloji_i_kerkeses=ko&elp_txt_email=&elp_txt_name=&elp_txt_group=vendimet&numri_i_rastit=#n_av-id> (accessed 5 January 2022).

¹⁵⁴ See Article 113 § 9 of the Constitution.

¹⁵⁵ See, *inter alia*, Constitutional Court of Kosovo, Judgment no. KO44/14, 31 March 2014; Constitutional Court of Kosovo, Judgment No. KO09/13, 29 January 2013.

¹⁵⁶ See e.g. Constitutional Court of Kosovo, Judgment no. KO61/12, 20 September 2012, §§ 38, 40 and 44-45, where certain proposed amendments to the Constitution were not confirmed by the Constitutional Court as they were considered to diminish the rights and freedoms guaranteed by Chapter II of the Constitution. In reaching this stance, the Constitutional Court, *inter alia*, relied on two cases of the Strasbourg Court, namely, ECtHR, *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, no. 38433/09, Judgment (2012) §§ 141-142, and ECtHR, *D.H. and Others v. Czech Republic* [GC], no. 57325/00, Judgment (2007). See other cases related to constitutional amendments, Constitutional Court of Kosovo, Judgment nos. KO29/12 and KO48/12, 20 July 2012; Constitutional Court of Kosovo, Judgment no. KO13/15, 16 March 2015.

¹⁵⁷ See e.g. Constitutional Court of Kosovo, Decision no. KI202/18, 27 March 2019, § 24.

¹⁵⁸ See e.g. Constitutional Court of Kosovo, Decision nos. KI149_150_151_152_153_154/18, 19 July 2019, §§ 67-75.

¹⁵⁹ See e.g. Constitutional Court of Kosovo, Decision no. KI179/20, 27 January 2021, §§ 82-97; Constitutional Court of Kosovo, Decision no. KI136/19, 28 April 2021, §§ 81-97. It should be noted that, even in their dissenting opinions, judges of the Constitutional Court have

limit,¹⁶⁰ manifestly ill-founded,¹⁶¹ the compatibility of complaints *ratione materiae*, *ratione personae* and *ratione temporis* with the Constitution.¹⁶² Even when declaring certain important cases as inadmissible, the Constitutional Court has acted outside of the regular standard by providing an in-depth examination of the Court's general principles in order to assist the domestic courts in the subsequent application of such standards.¹⁶³ For example, in a case related to a transgender person who wished to change his gender marker and name in the public registry following hormonal therapy, the Constitutional Court, despite being obliged to declare the request as premature,¹⁶⁴ reflected extensively on the relevant ECtHR case-law for assessing such requests (without declaring or prejudging its stance on the merits).¹⁶⁵ On the same day on which the decision of the Constitutional Court was sent to the Basic Court in Prishtina, the latter decided to treat the case with the utmost urgency and expedited a decision recognising for the first time “the right to gender identity with-

utilised the case-law of the ECtHR to argue that a referral should have been declared inadmissible. In this context, see, for example, the dissenting opinion of Judge Gresa Cakanimani in Constitutional Court of Kosovo, Decision no. KI34/17 of 1 June 2017.

¹⁶⁰ See e.g. Constitutional Court of Kosovo, Decision no. KI154/20, 10 February 2021, § 32.

¹⁶¹ The vast majority of cases filed before the Constitutional Court are declared by the latter as manifestly ill-founded. In almost all such cases, the Constitutional Court repeatedly refers to the ECtHR case-law to support its stance. See e.g., among many available examples, Constitutional Court of Kosovo, Decision nos. KI176/21, 25 November 2021; KI123/20, 10 December 2021; KI136/21, 10 December 2021; KI57/21, 25 November 2021. For an exhaustive list of all cases declared as manifestly ill-founded through the utilisation of ECHR standards, see the Constitutional Court's database <<https://gjk-ks.org/en/decisions/>> under the search 'Referral is manifestly ill-founded'.

¹⁶² See e.g. Constitutional Court of Kosovo, Decision no. KI134/14, 28 December 2015, §§ 47-51 where the ECtHR case-law was utilised to declare the referral as *ratione temporis* incompatible with the Constitution; Constitutional Court of Kosovo, Decision no. KI63/21, 7 October 2021, §§ 66-76 where the ECtHR case-law was utilised to declare the referral as *ratione materiae* incompatible with the Constitution; Constitutional Court of Kosovo, Decision no. KI67/18, 14 May 2019, §§ 39-49 where the ECtHR case-law was utilised to declare the referral as *ratione personae* incompatible with the Constitution.

¹⁶³ See Constitutional Court of Kosovo, Decision no. KI198/18, 3 April 2019, §§ 150-161 for general principles of the ECtHR on the issue of exhaustion of legal remedies and §§ 162-193 for the application of those principles to the circumstances of the case.

¹⁶⁴ *Ibid.*, the Constitutional Court was obliged to declare the request as premature considering that the matter was filed with a basic court in Kosovo almost at the same time as it was filed with the Constitutional Court.

¹⁶⁵ *Ibid.*, §§ 106-111. It is interesting to note here that, following a request of the Constitutional Court to the Venice Forum for information on the case-law regarding transgender rights, the ECtHR also replied to the request of the Constitutional Court by providing a list of the applicable cases and general principles that might be relevant for the case. The Constitutional Court reflected all the suggested ECtHR cases in its decision in §§ 106-111.

out offering evidence for surgical intervention or any medical change”.¹⁶⁶ The Basic Court used the readily available Convention standards and the Court’s case-law cited by the Constitutional Court in its inadmissibility decision and went on to find a violation of Article 8 and order the responsible authorities to change the applicant’s name and gender identity based on his request.¹⁶⁷ This is therefore an excellent example of the way in which a high court may contribute creatively to the embeddedness of Convention principles even through inadmissibility decisions.

Lastly, from the area of inadmissibility, the way in which the Constitutional Court has endorsed the admissibility criterion of “manifestly ill-founded” and the application of the inter-related doctrines known as “fourth instance”, “subsidiarity” and “margin of appreciation”, is worthy of special consideration. There are two arguments for suggesting that this area might benefit from a critique of the reasoning. Firstly, at times it seems as though the Constitutional Court, despite being a domestic court, reproduces the stance of the Strasbourg Court as an international court on the application of such doctrines and principles without making the distinction or inference that such principles ought to be applied somewhat differently by a domestic court. When it comes to subsidiarity and the margin of appreciation, the hands of the Constitutional Court are not tied in the way those of the Strasbourg Court are. While the latter has a secondary role in ensuring the observance of obligations undertaken by the Contracting Parties and must respect these two interrelated principles more strictly, the former has a primary role in ensuring the observance of such obligations undertaken by the Kosovo authorities in that it is one of the most important domestic authorities responsible for ensuring Convention protection domestically. If the ECtHR were to analyse a decision of the Constitutional Court, it would see it as a domestic authority and it would probably expect it to exercise a greater degree of intervention in ensuring Convention application rather than deferring to its national subsidiarity arguments. Therefore, although the intentions of the Constitutional Court are good and this practice has arisen from an effort to replicate as far as possible the effects of the ECtHR domestically, there is a need for the Constitutional Court to start detaching itself from reasoning that makes it look like a supranational court within the national domestic system and become more interventionist as a ‘last-line defender’ of Convention rights. Secondly, the way in which the Constitutional Court, in some instances, uses the admissibility cri-

¹⁶⁶ See Kosovo Two Point Zero (2020) <<https://kosovotwopointzero.com/en/landmark-decision-for-transgender-rights/>> (accessed 5 January 2022).

¹⁶⁷ Ibid.

terion of manifestly ill-founded is not entirely correct. This criterion is not to be used in cases in which a court enters into a lengthy and detailed discussion of the merits of a complaint but decides nonetheless to declare it inadmissible. The Constitutional Court has avoided rendering judgments with no violations by relying on the doctrine of manifestly ill-founded but in fact the substance of some of its well-reasoned and lengthy decisions was indeed a judgment on the merits with no violation found. The rationale behind such a choice is not entirely clear but in recent cases the Constitutional Court has started to amend its previous practice by issuing more and more judgments with no violation and therefore moving away from its trend of reliance on the manifestly ill-founded doctrine.¹⁶⁸

The Constitutional Court is unquestionably at the forefront of the Kosovo judiciary when it comes to embedding the ECHR and it is to be considered at an advanced stage in respect of its utilisation of Convention principles and the ECtHR case-law. As demonstrated above, its case-law contains extensive, qualitative and relevant references to the ECtHR case-law and almost every violation is found after extracting the reasoning from such jurisprudence. Today, if the case-law of the Constitutional Court were to be scrutinised by the ECtHR, the vast majority of its decisions would merit deference from the Strasbourg Court. This study argues that the latter would find sufficient motives to defer to its reasoning in a high percentage of cases, except, for example, in those cases which are on the borderline between violation or no violation due to the complexity of the Convention matter that is being discussed, or cases for which the Constitutional Court would not be considered an effective remedy. Cases from the latter category would certainly entail cases where the Constitutional Court is not able to award any pecuniary or non-pecuniary damages in spite of finding a violation of Convention rights and cases where, even after finding a violation, the judgment of the Constitutional Court was not executed by the responsible authorities in Kosovo.¹⁶⁹

¹⁶⁸ See e.g. some recent cases where the referrals have been declared admissible but no violation was found: Constitutional Court of Kosovo, Judgments nos. KI01/21, 7 October 2021; KI111/19, 28 April 2021; KI188/20, 28 April 2021; KI195/20, 29 March 2021; KI07/18, 18 December 2019; KI27/20, 22 July 2020; KI128/17, 29 July 2019.

¹⁶⁹ Although the vast majority of the judgments of the Constitutional Court have been executed and respected by the public authorities in Kosovo, there are several judgments which are still pending execution. In this context, see, Constitutional Court of Kosovo, Decision on non-execution in relation to Judgment KI132/15, 22 September 2021; Constitutional Court of Kosovo, Decision on non-execution in relation to Judgment KI187/13, 6 February 2015; Constitutional Court of Kosovo, Decision on non-execution in relation to Judgment KI56/09, 22 September 2021. For the execution of the last case referred to here,

However, despite the fact that the Constitutional Court has played an immensely important role in the process of embedding the Convention domestically and despite there being many areas where the Constitutional Court has excelled in protecting Convention rights at the domestic level, there is one particular area where this domestic court has lagged behind and this has not always been its own fault. Despite there being a specific provision authorising the Constitutional Court to issue pilot judgments, this provision has not been used to date – mostly due to the absence of repetitive cases before the Constitutional Court. Nevertheless, generally speaking, the latter has shown some reluctance in proactively pointing out systemic problems in the Kosovar legal order, and such reluctance is to be considered a missed opportunity for much-needed judicial activism in some areas of Convention law which would have undoubtedly been flagged by the ECtHR. In this respect, the Constitutional Court has not fully managed to reproduce the impact that supervision from the ECtHR would have had in Kosovo. If it were to be more proactive in the area of declaring the need for general measures as some other constitutional courts in the Western Balkans have done, the Constitutional Court would have been able to protect the Convention rights to an even greater extent and, in a way, to narrow the evident gap left by the absence of the ECtHR's supervision. Despite this final observation, the Constitutional Court, as will be shown in the following subsection, is the most apt domestic court for 'Convention talk' and has consistently shown its eagerness and willingness to engage in judicial dialogue with the domestic courts.

2. Constitutional Court v. Supreme Court: 'Convention talk'

The vast majority of decisions issued by the Constitutional Court pertain to the assessment of a decision of the Supreme Court, due to the necessity for all applicants to exhaust all available and effective legal remedies before filing a constitutional complaint.¹⁷⁰ Despite the fact that the cases with violations are

one of the applicants tried to seek protection from the Strasbourg Court by suing Serbia for the non-execution of a decision of the Constitutional Court of Kosovo. The decision of the ECtHR in *Azemi v. Serbia*, no. 11209/09, Decision (2013) will be reflected in detail under [Part IV](#) of this Chapter. If these unexecuted cases were reviewed by the ECtHR, Kosovo would most surely be found in violation of the Convention due to non-enforcement of final and binding decisions issued by the domestic courts. The Strasbourg Court would also accord damages which the Constitutional Court cannot do.

¹⁷⁰ See Article 113 § 7 of the Constitution. As a result there are fewer cases where a decision of the Court of Appeals or of regular courts is directly challenged and far fewer cases where

more well-known to the public, in the vast majority of cases the Constitutional Court confirms the conventionality of a decision of the Supreme Court, either by declaring complaints as inadmissible on procedural grounds¹⁷¹ or by declaring no violation after reviewing the merits.¹⁷² On most occasions, the applicants contest a decision of the Supreme Court before the Constitutional Court arguing a violation of their right to a fair trial and, therefore, most of the violations found are precisely under this provision.¹⁷³ There are, however, cases where other provisions of the Convention are raised by the applicants.

The ‘Convention talk’ between the highest courts in Kosovo is not sufficiently balanced and it may qualify as mostly one-sided. On the one hand, there is a Constitutional Court which has built its entire jurisprudence on ECHR principles and precedents set by the ECtHR – which makes it a very good partner for a profound judicial dialogue on Convention rights. On the other hand, there is a Supreme Court which rarely uses Convention standards or the Court’s case-law in support of its decisions – which makes it a rather unequal partner for a profound judicial exchange on Convention related matters. Despite the number of decisions which have been quashed and sent for retrial by the Constitutional Court, the history of cooperation between them reflects mutual respect and understanding for each other’s role, save for a few occasions where the Supreme Court has shown a reluctance to fully implement the general principles highlighted by the Constitutional Court.

The most illustrative example of this unbalanced *tête-à-tête* ‘Convention talk’ is the case of *IKK Classic*, an insurance company which had challenged two different decisions of the Supreme Court before the Constitutional Court for the same matter. The crux of the matter was that the lower courts had ruled in the applicant’s favour in respect of damages following an accident of its insured person, but the Supreme Court quashed all such decisions and ruled that the insurance company was not to be compensated at all.¹⁷⁴ In *IKK Classic*

a violation is found in respect of such decisions. For more on constitutionalism in Kosovo and the relationship between the Constitutional Court and the Supreme Court, see Hasani (2012).

¹⁷¹ See e.g. Constitutional Court of Kosovo, Decision no. KI155/21, 10 November 2021; Constitutional Court of Kosovo, Decision no. KI184/20, 7 September 2021.

¹⁷² See e.g. Constitutional Court of Kosovo, Judgment no. KI01/21, 7 October 2021; Constitutional Court of Kosovo, Judgment no. KI31/18, 12 April 2019; Judgment no. KI48/18, 23 January 2019; Judgment KI01/18, 29 January 2019.

¹⁷³ See e.g. Constitutional Court of Kosovo, Judgment no. KI87/18, 27 February 2019; Constitutional Court of Kosovo, Judgment no. KI214/19, 29 July 2020; Constitutional Court of Kosovo, Judgment no. KI14/18, 15 January 2020.

¹⁷⁴ Constitutional Court of Kosovo, Judgment no. KI135/14, 10 November 2015.

No.1, the Constitutional Court had quashed the decision of the Supreme Court and remanded the matter for retrial after having found a violation of Article 6 of the ECHR due to the Supreme Court's failure to provide sufficient reasoning for its decision on the crucial matters raised by the case, respectively the rationale for annulling the compensation in its entirety and quashing all prior decisions in that regard.¹⁷⁵ When rendering this judgment, the Constitutional Court relied extensively and correctly on the general principles established in Court's case-law with respect to the applicable criteria for assessing the right to a "reasoned decision".¹⁷⁶ The Supreme Court took the matter for a retrial and once more reached a similar decision,¹⁷⁷ again failing to respond to the crucial arguments raised by applicant – the very reason for which a violation by the Constitutional Court had been found in the first place. As a result, the insurance company contested this second decision of the Supreme Court. In *IKK Classic No. 2*, the Constitutional Court, for the second time, emphasised that the judgment of the Supreme Court fell below the standards necessary to pass the threshold of a sufficiently reasoned decision.¹⁷⁸ In this respect, the Constitutional Court initially recalled its obligation to interpret rights and freedoms in harmony with the ECtHR case-law and then went on to reflect in a separate section all of the relevant general principles stemming from the Court's jurisprudence in order to emphasise that: (i) the right to a reasoned decision "reflects a principle linked to the proper administration of justice" and that "judgments of courts and tribunals should adequately state the reasons on which they are based";¹⁷⁹ (ii) courts must "indicate with sufficient clarity the grounds on which they based their decision" and that the function of a reasoned decision "is to demonstrate to the parties that they have been heard";¹⁸⁰ (iii) "while it is not necessary for the court to deal with every point raised ... the applicant's main arguments must be addressed";¹⁸¹ and that (iv) although "the establishment of the facts of the case and the interpretation of the law are a matter

¹⁷⁵ Ibid., §§ 38-62.

¹⁷⁶ Ibid., §§ 52-59.

¹⁷⁷ Supreme Court of Kosovo, Judgment E.Rev.no. 15/2016, 16 March 2016.

¹⁷⁸ Constitutional Court of Kosovo, Judgment no. KI97/16, 4 December 2017.

¹⁷⁹ Ibid., §§ 44-52 citing ECtHR, *Tatishvili v Russia*, no. 1509/02, Judgment (2007), § 58; ECtHR, *Hiro Balani v. Spain*, no. 18064/91, Judgment (1994), § 27; and ECtHR, *Higgins and Others v. France*, no. 20124/92, Judgment (1998), § 42.

¹⁸⁰ Ibid., §§ 45-46 citing ECtHR, *Hadjianastassiou v. Greece*, no. 12945/87, Judgment (1992), § 33; ECtHR, *Hirvisaari v. Finland*, no. 49684/99, Judgment (2001), § 30; and ECtHR, *Suominen v. Finland*, no. 37801/97, Judgment (2003), § 37.

¹⁸¹ Ibid., § 51 citing ECtHR, *Van de Hurk v. the Netherlands*, no. 16034/90, Judgment (1994), § 61; ECtHR, *Buzescu v. Romania*, no. 61302/00, Judgment (2005), § 63; and ECtHR, *Pronina v Ukraine*, no. 63566/00, Judgment (2006), § 25.

solely for the regular courts”, in cases where “a decision of a regular court is clearly arbitrary, the Court can and must call it into question”.¹⁸² In applying those general principles to the case, it was recalled that in its first judgment the Constitutional Court had specifically pointed out which issues ought to be addressed by the Supreme Court.¹⁸³ However, the latter had failed, for the second time, “to provide the applicant with the responses to its essential allegations” and “the failure of the Supreme Court to provide clear and complete answers with regard to the questions concerning the entitlement of the applicant to the compensation as determined by the courts of the lower instance” breached the applicant’s right to be heard and his “right to a reasoned decision, as a component of the right to a fair and impartial trial”.¹⁸⁴ The Constitutional Court ordered the Supreme Court to reconsider its judgment in conformity with the judgment of the Constitutional Court in order to “enable the parties and the public in general to follow the justification that led the court to make that decision” by answering the crucial allegations raised by the case.¹⁸⁵ At the time of writing, the matter was still pending for a third retrial before the Supreme Court.

Although the incidental control mechanism is an ideal tool to ensure that laws are compatible with the Constitution and the Convention,¹⁸⁶ it is seldom used by the Supreme Court or other courts in Kosovo. This mechanism, if utilised, serves as a great instrument to engage in judicial dialogue between regular courts and in particular between the Constitutional Court and the Supreme Court. The latter, however, has only referred a few cases to the Constitutional Court.¹⁸⁷

Among those few incidental control questions that the Constitutional Court received, the first case filed by the Supreme Court argued the unconstitutionality of a piece of legislation dealing with land expropriation.¹⁸⁸ The Court ad-

¹⁸² Ibid., § 48 citing ECtHR, *Sisojeva and Others v. Latvia* [GC], no. 60654/00, Judgment (striking out) (2007), § 89.

¹⁸³ Ibid., § 55.

¹⁸⁴ Ibid., § 65.

¹⁸⁵ Ibid., § 56 and operative part.

¹⁸⁶ See Article 113 § 8 of the Constitution. See also Articles 51, 52 and 53 of the Law on the Constitutional Court as well as Rule 75 of the Rules of Procedure of the Constitutional Court.

¹⁸⁷ See e.g. cases filed by the Supreme Court of Kosovo through the incidental control procedure: Constitutional Court of Kosovo, Judgment no. KO157/18, 13 March 2019; Constitutional Court of Kosovo, Judgment no. KO04/11, 1 March 2012; Constitutional Court of Kosovo, Decision no. KO50/19, 9 December 2020.

¹⁸⁸ Constitutional Court of Kosovo, Judgment no. KO04/11, 1 March 2012.

mitted the case for review on the merits but found no violation. In this case, the Supreme Court itself did not use the ECHR to build its arguments but the Constitutional Court felt the need to emphasise that the regular courts are entitled to refer questions in cases when they “have doubts or uncertainty as to whether the application of a law will infringe human rights and fundamental freedoms” guaranteed by the Constitution and other directly applicable international instruments, including the ECHR.¹⁸⁹ So, even in its first ever incidental control question, the Constitutional Court paid special attention to the ECHR and clarified that judges may pose ECHR compatibility questions if they are unsure as to whether a law that they must apply is compatible with Convention guarantees.¹⁹⁰

A very good example to illustrate the ‘Convention talk’ between the Supreme Court and the Constitutional Court is a case related to electoral disputes where the Supreme Court had decided to set aside a particular legal norm for being in contradiction with Article 3 of Protocol No. 1 to the ECHR.¹⁹¹ In this case, the Supreme Court was so sure that the legal norm was incompatible with the ECHR that it decided to set it aside without filing an incidental control question with the Constitutional Court.¹⁹² However, the party that lost the case before the Supreme Court considered, *inter alia*, that the Supreme Court had acted arbitrarily when setting aside the said legal norm because only the Constitutional Court is authorised to assess whether a legal norm is incompatible with the Constitution and the ECHR.¹⁹³ The crux of the legal matter in case KI207/19 pertained to the “legal conditions governing the procedural and practical aspects of exercising the right to vote by mail” from abroad and more specifically “the period within which the votes from abroad must reach the [Central Elections Commission]” and whether this deadline foreseen by law violated “the rights guaranteed by Article 3 of Protocol No. 1 of the ECHR”.¹⁹⁴ The Supreme Court had concluded that “the legal deadline for receiving votes from abroad”, namely 24 hours before election day, was “in collision” with Article 3 of Protocol No. 1 of the ECHR.¹⁹⁵ This important case raised, for the first time, the question whether the domestic courts are authorised to set aside a

¹⁸⁹ Ibid., § 35.

¹⁹⁰ See other incidental control cases: Constitutional Court of Kosovo, Judgment no. KO126/16, 27 March 2017; Constitutional Court of Kosovo, Judgment no. KO142/16, 9 May 2017.

¹⁹¹ Constitutional Court of Kosovo, Judgment no. KI207/19, 10 December 2020.

¹⁹² Supreme Court of Kosovo, Judgment no. A.A.U.ZH.no. 20/2019, 30 October 2019 and Judgment no. A.A.U.ZH.no. 21/2019, 5 November 2019.

¹⁹³ Constitutional Court of Kosovo, Judgment no. KI207/19, 10 December 2020.

¹⁹⁴ Ibid., § 168.

¹⁹⁵ Ibid., § 170.

domestic legal norm and directly apply an international legal norm. In answering this question, the Constitutional Court made three jurisprudential clarifications which are highly important for the domestic application of the ECHR and international legal norms more generally.

Firstly, with respect to the international instruments directly applicable in Kosovo through Article 22 of the Constitution, the Constitutional Court clarified that all such instruments, including the ECHR, are directly applicable and have precedence over any domestic law.¹⁹⁶ Furthermore, with respect to the status of the ECtHR's case-law and its *res interpretata* effects, the Constitutional Court stated:

“... the case-law of the ECtHR is a source of law from which derive rights for the interpretation of human rights and freedoms in accordance with the manner in which that case-law is developed [at Strasbourg level] – in line with the concept that the ECHR is “a living instrument” under continuous development. In practice, this means that, in addition to the fact that the citizens of the Republic of Kosovo may invoke specific articles of international instruments guaranteed by Article 22 of the Constitution, they may also invoke specific cases dealt with at the level of the ECtHR, in order to substantiate their claims ...”¹⁹⁷

Secondly, the Constitutional Court clarified that while the Constitutional Court “is the final authority for the interpretation of the Constitution”, other public authorities, including regular courts, are also authorised to “engage in constitutional interpretation”.¹⁹⁸ However, the manner of the interpretation, “both in procedure and in substance” that is made by public authorities may be examined by the Constitutional Court and the latter is authorised to “give the final interpretation by agreeing or disagreeing” with the given interpretation of the Constitution or the ECHR.¹⁹⁹ As a result, the regular courts, including the Supreme Court, have an obligation to interpret the laws in accordance with the Constitution but “the only authority in the Republic of Kosovo with exclusive constitutional authority to repeal a law or a legal norm as well as to make final interpretation of the Constitution and compatibility of laws with it” is the Constitutional Court.²⁰⁰

Thirdly, on the question as to whether domestic courts are allowed to set aside a domestic legal norm in favour of directly applying an international norm, including an ECHR provision, the Constitutional Court answered in the affir-

¹⁹⁶ Ibid., § 108.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid., § 127.

¹⁹⁹ Ibid. See also, Constitutional Court of Kosovo, Judgment no. KI48/18, of 23 January 2019, § 181.

²⁰⁰ Ibid., § 130.

mative.²⁰¹ More specifically, the Constitutional Court stipulated that a regular court may, “with sufficient and adequate reasoning”, “apply the norm of constitutional rank [ECHR included] and set aside the norm of the legal rank” and in this process, the regular courts are not mandatorily obliged to file an incidental control question with the Constitutional Court, despite having the right to do so in the event of doubt.²⁰² After clarifying these issues for the whole judiciary and making it clear that any judge in Kosovo is authorised to set aside a law which is considered as Convention incompliant and apply the ECHR directly, the Constitutional Court went on to find a violation in the specific case due to the manner in which the Supreme Court had set aside the legal norm in favour of the ECHR.²⁰³

In its final analysis, the Constitutional Court analysed the manner in which the Supreme Court had set aside the domestic legislation and whether it had provided sufficient reasons in that regard; it then continued with its own assessment of whether the final interpretation of the ECHR made by the Supreme Court was correct in the particular circumstances of the case. Before doing that, the Constitutional Court provided an extensive elaboration of the ECtHR’s case-law in respect of the right to free and fair elections as guaranteed by Article 3 of Protocol No.1 to the ECtHR, focusing mostly on the voting from abroad,²⁰⁴ in addition to relying on other ECtHR case-law to reason other specific aspects of the case in a rather long and detailed judgment.²⁰⁵ In applying those general principles, the Constitutional Court found that the Supreme Court had acted in an “arbitrary” manner when setting aside the legal norm by not providing “sufficient legal and constitutional reasoning” in finding a “col-

²⁰¹ Ibid., §§ 131-142.

²⁰² Ibid., §§ 135-139.

²⁰³ Ibid.

²⁰⁴ Ibid., §§ 148-170 where under the subsection “General principles of Article 3 of Protocol No. 1 of the ECHR, in particular those relating to ‘voting from abroad’, according to the case-law of the ECtHR”, the Constitutional Court relied on: ECtHR, *Yumak and Sadak v. Turkey* [GC], no. 10226/03, Judgment (2008), § 109; ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, no. 9267/81, Judgment (1987), §§ 48-51; ECtHR, *Ždanoka v. Latvia* [GC], no. 58278/00, Judgment (2006), § 102; ECtHR, *Podkolzina v. Latvia*, no. 46726/99, Judgment (2002), § 33; ECtHR, *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, Judgment (2005), § 61; and ECtHR, *Sitaropoulos and Giakoumopoulos v. Greece* [GC], no. 42202/07, Judgment (2012).

²⁰⁵ Ibid., §§ 80-81, 99, 109-110, 140-170, 175, 177, 179, 181, 190, 198, 200, 206-207, 215, 222-224, 226-228, 240, 242-246 and 260 for additional references to the ECtHR case-law in relation to this case. In total, the acronym “ECtHR” is mentioned 87 times in this 56-page judgment of the Constitutional Court which relies on Convention standards.

lision” between the domestic legal norm and the ECHR.²⁰⁶ In this respect, *inter alia*, the Constitutional Court noted that the “case-law of the ECtHR does not have a single case where a violation of the essence of the right to vote is found according to the reasoning and interpretation that the Supreme Court has made with regard to the ECHR”.²⁰⁷ Additionally, it added that the existing practice of the ECtHR on the right to vote does not “lead to the conclusion that the restriction of the right to vote from abroad can be considered as a violation of the essence of the right to vote” which means that “the reasoning of the Supreme Court is deficient, inaccurate and arbitrary because it invokes provisions of the ECHR as a way not to apply a legal norm without providing adequate support for the conclusions reached”.²⁰⁸ Then, when analysing the domestic norm itself in conjunction with the ECHR norm, the Constitutional Court reached the conclusion that the legal deadline set by the law of the Parliament stating that the votes from abroad should arrive in the Central Elections Commission 24 hours before election day represented “a restriction of the right to vote which was in compliance with Article 55 [Limitation of Rights and Freedoms] of the Constitution” because said restriction was provided by law; it pursued a legitimate aim; and there was a relationship of proportionality between the restriction and the aim pursued by that restriction.²⁰⁹ In the circumstances of the case in question, the Constitutional Court opined that “the limitation by legal deadline of the right to vote (as a relative right and not an absolute right) was not arbitrary” but “necessary” and it did not affect the “free expression of the will of the people regarding their representatives in the Parliament”.²¹⁰ Accordingly, the Constitutional Court quashed the decisions of the Supreme Court and left in force the decisions of the specialised body deciding on elections disputes which had applied the legal norm in question in accordance with the interpretation that the Constitutional Court confirmed as being Convention compliant.²¹¹

Even though the Constitutional Court has built a substantial case-law in interpreting Convention principles, there are very few cases in which the Supreme

²⁰⁶ Ibid., see conclusions part §§ 256-265.

²⁰⁷ It is worth noting that the Supreme Court merely stated that the election legal norms that were applied by the election body were “in collision with Article 3 of Protocol No. 1 to the ECHR”.

²⁰⁸ Ibid., § 228.

²⁰⁹ Ibid., § 204.

²¹⁰ Ibid.

²¹¹ Ibid., operative part.

Court refers to its case-law.²¹² In one specific case, for example, the prosecution had initiated a request for protection of legality where, *inter alia*, it stated that the lower courts “ha[d] not taken into consideration two judgments of the Constitutional Court” even though those decisions decided on similar issues relevant to the case in question.²¹³ To that specific argument, the Supreme Court replied that “since the courts in criminal procedure base their work on the law, there is no basis to argue that the courts have not taken into account the judgments of the Constitutional Court”,²¹⁴ a stance which – in a way – could be interpreted to mean that the regular courts do not have to follow up on the jurisprudence of the Constitutional Court as long as they follow the law. While strictly and legally speaking it is true that courts must base their decisions on the Constitution and the law, there are several issues with this type of phrasing, especially when proclaimed by the highest judicial instance court in Kosovo. Although the latter is not a country in which rules are based on precedent, the importance of the decisions of the Constitutional Court should be recognised and highlighted even by the Supreme Court itself. The general principles utilised by the Constitutional Court as the final interpreter of the Constitution and the ECHR at the national level should be used more frequently and not just by the lower courts but also by the Supreme Court itself. Discouraging the lower courts from following the jurisprudence of the Constitutional Court does not necessarily help the goal of deepening the embeddedness of the standards stipulated by the Constitution and the Convention.

On a more positive note, there are also abundant examples where the Constitutional Court deferred to the reasoning of the Supreme Court either by rejecting the applicant’s complaints as manifestly ill-founded or by reviewing the merits of a complaint and then not finding a violation. An interesting recent example is the case of *Ajshe Aliu*, where the Constitutional Court confirmed the compatibility of the decisions of the Supreme Court with the applicant’s right to respect for her private life and right to a fair trial.²¹⁵ In substance, the case concerned the refusal of the applicant’s request “to notify her adult biological child about her existence”.²¹⁶ The Supreme Court had rejected her request for extraordinary review of the decisions of the lower courts which had

²¹² See e.g. Supreme Court of Kosovo, Judgment Pml.no. 171/2021, 13 July 2021; Supreme Court of Kosovo, Judgment Pml.269/2019, 15 October 2019, page 2; Supreme Court of Kosovo, Judgment Pml.183/2019, 12 September 2019, page 2; Supreme Court of Kosovo, Judgment Pml.no. 158/2018, 26 September 2018.

²¹³ Supreme Court of Kosovo, Judgment Pml.no. 131/2020, 15 December 2020, page 2.

²¹⁴ *Ibid.*, page 3.

²¹⁵ Constitutional Court of Kosovo, Judgment no. KI01/21, 7 October 2021.

²¹⁶ *Ibid.*, § 166.

rejected her request and she thus appealed before the Constitutional Court. In her pleadings before the latter, the applicant relied on several cases of the ECtHR to argue her stance.²¹⁷ In its extensive analysis based entirely on ECtHR case-law, the Constitutional Court initially provided a detailed overview of the “general principles regarding the right to respect for private and family life”,²¹⁸ and then continued with a meticulous analysis of the decision-making by the Supreme Court to eventually confirm that such reasoning was compliant with Article 8 of the Convention.²¹⁹

In the end, however, it should be noted that the discrepancy in the utilisation of Convention standards and the ECtHR case-law between the highest courts in Kosovo is enormous, to the point that it should be an issue of concern for the embeddedness of the Convention domestically. While the Supreme Court refers to those principles in less than 5% of its cases; there is less than 5% of the case-law of the Constitutional Court in which the ECtHR case-law is not referred to. Therefore, as stated above, the ‘Convention talk’ between these two courts is decidedly unbalanced, with the Constitutional Court doing most of the ‘talking’ in their judicial exchanges. There is a need to increase the quality of utilisation of the Convention standards and the Court’s case-law on the part of the Supreme Court so that the latter becomes a leader for the regular judiciary in terms of implementing the Convention standards and guiding them towards such implementation. Only then will the Supreme Court be able to move towards more advanced stages of Convention utilisation and thus assist the Constitutional Court in incentivising a more profound ECHR embeddedness in the Kosovar legal order.

²¹⁷ *Ibid.*, § 58.

²¹⁸ *Ibid.*, §§ 84-90 where the Constitutional Court, in respect of Article 8, referred to ECtHR, *P. and S. v. Poland*, no. 57375/08, Judgment (2012); ECtHR, *Nunez v. Norway*, no. 55597/09, Judgment (2011); ECtHR, *Libert v. France*, no. 588/13, Judgment (2018), §§ 40-42; ECtHR, *Kroon and Others v. the Netherlands*, no. 18535/91, Judgment (1994); ECtHR, *Lozovyye v. Russia*, no. 4587/09, Judgment (2018), § 24; ECtHR, *Gaskin v. the United Kingdom*, no. 10454/83, Judgment (1989); ECtHR, *Evans v. the United Kingdom [GC]*, no. 6339/05, Judgment (2007).

²¹⁹ Constitutional Court of Kosovo, Judgment No. KI01/21, 7 October 2021, operative part.

IV. Kosovo v. the Council of Europe and the Strasbourg Court: Impact and Effects

Kosovo is not a member of the Council of Europe and therefore not an official Contracting Party to the Convention and its Protocols.²²⁰ As such, Kosovo represents the only territory in the Western Balkans where the official ECtHR supervisory machinery is not present. This unfortunate factual situation represents a major handicap for the protection of fundamental human rights and freedoms in Kosovo. The domestic courts, with the Constitutional Court at the forefront and leading the way, have constantly made efforts to mimic (as far as possible) the supervisory role that the Strasbourg Court would have had in respect of Convention application at the domestic level. However, their hands are tied in many respects and it is objectively impossible to replicate the effects that formal oversight from the ECtHR would have had.

Considering the fact that Kosovo is not part of the Convention protection machinery by not being a member of the Council of Europe, this part of the chapter is adapted to the particular circumstances of the situation at hand. In this respect, due to an absence of direct case-law of the ECtHR against Kosovo, the following part of this chapter will focus on three other important aspects. Firstly, the analysis will focus on (1) [Kosovo's relation with the Council of Europe and the ECtHR](#); it will then provide an (2) [overview of the ECtHR case-law in which Kosovo is referred to](#); before concluding with an overall analysis of (3) [the impact and effects of the ECHR and the ECtHR's case-law in the domestic legal order](#). In the preceding part of this chapter, due to the absence of direct ECtHR case-law against Kosovo, the study reflected an in-depth analysis of the case-law of the domestic courts by providing a more extensive elaboration of the case-law of the Constitutional Court as the last possible instance for the protection of Convention rights within the Kosovar legal order.

²²⁰ Kosovo has recently applied for membership of the Council of Europe and its application is currently being considered by the Parliamentary Assembly, following the request made by the Committee of Ministers. See Istrefi (2018) for more on Kosovo's quest for membership of the Council of Europe.

1. Kosovo's Relationship with the Council of Europe and the ECtHR

Kosovo is still not a member of the Council of Europe and the ECtHR does not have jurisdiction to review whether the domestic authorities are acting in compliance with the Convention guarantees. However, this does not mean that Kosovo is completely detached from the Council of Europe and the ECtHR. Despite the fact that the Council of Europe's stance towards the status of Kosovo is neutral, there are several avenues of cooperation that have been established since the end of the war in 1999 and which continue to develop to this day.

Firstly, the Council of Europe has had a presence in Kosovo since 1999 with a local office in Prishtina which continuously runs vital projects to assist the national authorities, including the domestic courts, in the process of applying Convention standards.²²¹ Secondly, since 2013, Kosovo has been a member of the Council of Europe Development Bank and has benefited from several projects that aim to promote social cohesion and social integration in Europe.²²² Thirdly, Kosovo has managed to place itself under the monitoring umbrella of different bodies of the Council of Europe, such as, for example, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, or as it is commonly referred to, the "CPT".²²³ This important cooperation was achieved through a so-called "special monitoring arrangement".²²⁴ To date, the CPT has been on four missions in Kosovo, the last one being in 2020, and it has prepared

²²¹ See the website of the Council of Europe, Office in Prishtina, for further information on the projects that have been developed and implemented since 1999: <<https://www.coe.int/fr/web/pristina/home>> (accessed 4 January 2022). See among the most important projects for the domestic judiciary and domestic application of Convention rights in other public institutions: (1) Enhancing Human Rights in Policing; (2) Enhancing the Protection of the Human Rights of Prisoners; (3) Strengthening the Quality and Efficiency of Justice; (4) Freedom of Expression and Freedom of the Media in Kosovo; (5) The Promotion of Diversity and Equality in Kosovo; (6) Human Rights Education for Legal Professionals; (7) Improving the Protection of European Human Rights Standards by the Constitutional Court; (8) The Implementation of Human Rights Standards and Support for the Institution of the Ombudsperson; (9) Reinforcing the Fight against Violence against Women and Domestic Violence in Kosovo, etc.

²²² See the website of the Council of Europe Development Bank, the page about Kosovo: <<https://coebank.org/en/about/member-countries/kosovo/>> (accessed 30 December 2021).

²²³ See the webpage of the CPT where the relation between the CPT and Kosovo is reflected: <<https://www.coe.int/en/web/cpt/kosovo>> (accessed 30 December 2021).

²²⁴ See the Agreement between UNMIK and the Council of Europe 'On technical arrangements related to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment', signed on 23 August 2004.

detailed and valuable reports regarding venues of deprivation of liberty in different Kosovo facilities.²²⁵ In addition to the CPT, other important monitoring bodies of the Council of Europe, have also issued special reports assessing the situation in Kosovo and the role of the Council of Europe, the application of Council of Europe standards related to anti-corruption, violence against women and domestic violence, protection of national minorities, actions against trafficking in human beings, etc.²²⁶ Fourthly, Kosovo is represented in the Parliamentary Assembly of the Council of Europe by a delegation from the national parliament where it attends meetings on a yearly basis and has recently been granted the right to speak. Lastly and most importantly, since 2014, Kosovo has been a member of the European Commission for Democracy through Law, commonly referred to as “the Venice Commission” and is represented in the forum like any other member state.²²⁷ When accepting Kosovo into the Venice Commission, the latter stipulated that this accession was “without prejudice to the positions of individual Council of Europe member States on the status of Kosovo*” and that “the current practice of using a footnote for references to Kosovo* should stop with immediate effect within the Venice Commission”.²²⁸ The relationship of Kosovo with the Venice Commission has helped the country to come closer to Convention standards. Thus far, the Venice Commission has issued several Opinions in relation to Kosovo.²²⁹ The Constitutional Court has also benefited from the Venice Forum Network and has been regular in publishing its most important judgments in the CODICES database of the Venice Commission,²³⁰ as well as utilising numerous Venice Commission Opinions to support its decisions.²³¹

²²⁵ See e.g. CPT Report no. CPT/Inf(2021)23, 23 September 2021; CPT Report no. CPT/Inf(2016)23, 8 September 2016; CPT Report no. CPTInf(2011)26, 6 October 2011; and CPT Report no. CPTInf(2009)3, 20 January 2009.

²²⁶ For more details with respect to relevant reports from the Council of Europe monitoring bodies, see the list of reports produced by different Council of Europe bodies <<https://www.coe.int/en/web/pristina/monitoring>>.

²²⁷ Venice Commission, Decision CM/Del/Dec(2014)12000/10.3, 1202nd meeting held on 10-11 June 2014, through which Kosovo was accepted as a member.

²²⁸ *Ibid.*, §§ 1-2.

²²⁹ For an overview of all opinions issued in relation to Kosovo by the Venice Commission, see <<https://www.venice.coe.int/webforms/documents/?country=243&year=all>> (accessed 4 January 2022).

²³⁰ For an overview of all decisions published by the Constitutional Court in the Codices database of the Venice Commission see <<http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>> (accessed 4 January 2022).

²³¹ See, *inter alia*, Constitutional Court of Kosovo, Judgment K148/18, 23 January 2019; Constitutional Court of Kosovo, Judgment KO95/20, 21 December 2020; Constitutional Court of Kosovo, Judgment K145/46/20, 26 March 2021.

As far as the relationship with the ECtHR is concerned, there are two aspects worth mentioning. Firstly, according to the initial provisions of the Constitution which were subsequently amended, the President of the ECtHR was to be consulted for the appointment of three international judges which were to serve their mandate in the first composition of the Constitutional Court, following its establishment in 2009.²³² Of the three international judges selected following this consultation with the ECtHR's President, one was a judge who had served her mandate as a judge at the ECtHR in respect of Bulgaria.²³³ One of the reasons the Constitutional Court is so much better equipped in terms of Convention know-how compared to other regular courts in Kosovo is also thanks to the presence of international judges and international legal advisors who joined the national team to help the judges in their daily work. Secondly, the cooperation that the domestic courts have managed to create with the ECtHR is also important. Many delegations from Kosovar courts have been received by the ECtHR, usually in the process of implementation of projects run by the Council of Europe. In addition to such exchanges, the judicial community in Kosovo has also had the opportunity to benefit from training sessions delivered by the judges and lawyers of the Court's Registry. Of particular importance here is the cooperation that the Constitutional Court has managed to create with the ECtHR by sending its judges and legal advisers to the Strasbourg Court for study and work visits. This exchange practice has been instrumental for the advancement of the judicial practice of the Constitutional Court in the utilisation of Convention standards and the Court's case-law. The possibility to work for a longer period of time alongside and with the members of the Court's Registry, has equipped the legal staff of the Constitutional Court, not just with valuable Convention know-how, but also with valuable insight into the working methods of the Court in respect of the processing of cases and the procedures for ensuring the consistency of case-law and the quality of the judicial decision-making process.

Although the aforementioned avenues of cooperation have contributed immensely to helping the domestic authorities and national courts to align their judicial decision-making practices with the Convention standards, the fact

²³² See Article 152 of the Constitution which was subsequently deleted by Amendment 13 of the Constitution following the end of the supervision of the independence of Kosovo.

²³³ See, in this respect, the list of serving judges before the ECtHR: Snezhana Botusharova 1998–2008 <https://www.echr.coe.int/Documents/List_judges_since_1959_BIL.pdf> (accessed 4 January 2022). Two other judges who served as judges of the Constitutional Court were Judge Almiro Rodrigues who had previously served as a judge at the ICTY and Judge Robert Carolan who had served as a judge in the United States of America.

that Kosovo cannot fully benefit from full membership of the Council of Europe remains an issue which holds the country back in its endeavours to truly embed Convention standards at home. Those that are most affected by the lack of such membership are individuals, legal persons and NGOs who cannot approach the ECtHR, but also the highest domestic courts and the State of Kosovo itself which cannot benefit from the advisory opinion procedure or the possibility of initiating an inter-State application. This situation will endure until Kosovo is able to successfully conclude its accession process to the Council of Europe and thus establish formal relations with all bodies of the organisation.

Until Kosovo becomes part of the ECtHR, it will be up to the Constitutional Court and other domestic authorities in Kosovo to ensure Convention compatibility at the domestic level without a final Strasbourg arbiter to finally confirm whether they have struck a fair balance or not. Nevertheless, the status quo (which is not expected to last) should not discourage the domestic authorities in their efforts to further domesticate the Convention. On the contrary, it should encourage them to align domestic laws, practices and domestic court decisions with the Convention standards so that the country is well-prepared to join the Council of Europe family, whenever such an opportunity presents itself.

2. Overview of the ECtHR's Case-Law in which Kosovo is referred to

Kosovo is not under the direct jurisdiction of the ECtHR and its citizens cannot file individual complaints at the Strasbourg level alleging a violation of their Convention rights by the Kosovo authorities. However, this has not stopped Kosovo citizens from trying to get the attention of the Strasbourg Court through alternative jurisdictional routes, namely by filing applications against the current member States.

Before reflecting on these examples, a preliminary remark with respect to the official stance of the ECtHR towards Kosovo is needed. Although the Strasbourg Court is neutral towards the status of Kosovo, there are some specific phrases to be found in its case-law which might not necessarily reflect neutrality. For example, in a Grand Chamber case dealing with two applications that were filed by Kosovo citizens against several Contracting Parties to the Convention, the Court introduced the applicants with the following statement: "These applicants live in the municipality of Mitrovica in Kosovo, Republic of

Serbia.²³⁴ This statement, although made before the declaration of independence, seems to not reflect the neutrality that the ECtHR claims to follow on the issue of the status of Kosovo. This was a judgment of 2007 and at a later stage, i.e. that of post-independence Kosovo, the ECtHR started using the famous astérix (*) next to the word “Kosovo*” in its decisions by stipulating that: “All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with UN Security Council Resolution 1244 and without prejudice to the status of Kosovo.”²³⁵ However, even now there are cases in which the ECtHR is not consistent in the manner in which it phrases its neutrality towards Kosovo, sometimes using disclaimers and sometimes not.²³⁶

At the time of writing, the word “Kosovo” was mentioned in more than 150 verdicts of the ECtHR, including 19 Grand Chamber judgments and 3 Grand Chamber decisions. In order to reflect the relevance of such references to Kosovo, the following part of this chapter will elaborate three categories of cases in which Kosovo is referred to in the Court’s case-law, namely: (i) cases where Kosovo citizens, residing in Kosovo, attempted to seek the protection of their rights in Kosovo by filing complaints against existing Contracting Parties to the Convention; (ii) cases in which Kosovo is referred to due to its particular status in international law; (iii) other interesting cases in which Kosovo is referred to.

²³⁴ ECtHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* [GC], nos. 71412/01 and 78166/01, Decision (2007), § 1. See other cases with statements made by the ECtHR that do not necessarily reflect a perfect neutrality: ECtHR, *Živić v. Serbia*, no. 37204/08, Judgment (2011), § 1 where it is stated: “He resides in Kosovska Mitrovica in Kosovo[], where he is employed as a police officer with the Ministry of Internal Affairs of the Republic of Serbia”, with Kosovska Mitrovica not having been the official name of city of Mitrovica for more than two decades.

²³⁵ See ECtHR, *Azemi v. Serbia*, no. 11209/09, Decision (2013), § 1. See other cases, including a recent one from 2021, for similar reference: ECtHR, *Imeri v. Croatia*, no. 77668/14, Judgment (2021), § 9; ECtHR, *Milanović v. Serbia*, no. 44614/07, Judgment (2010), § 57; ECtHR, *Berisha v. Switzerland*, no. 948/12, Judgment (2013); ECtHR, *Bajrami v. Albania*, no. 35853/04, Judgment (2006); ECtHR, *Dementyev v. Russia*, no. 3244/04, Judgment (2008), § 7. Compare with some other international institutions which also refer to the ICJ opinion on Kosovo.

²³⁶ See for example, ECtHR, *Banković and Others v. Belgium and Others* [GC], no. 52207/99, Decision (2001), §§ 6 and 8; ECtHR, *Elezi v. Germany*, no. 26771/03, Judgment (2008), §§ 19 and 22; ECtHR, *V.M. and Others v. Belgium*, no. 60125/11, Judgment (2015), §§ 7, 9, 10, 18 and 33.

In the first category of cases, namely situations where Kosovo citizens filed complaints against States Parties to the ECHR, two cases are of the utmost importance: (i) the Grand Chamber case of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (hereinafter, *Behrami and Saramati*),²³⁷ and (ii) *Azemi v. Serbia*.²³⁸

The first case was filed by applicants who were Kosovo citizens complaining against acts performed by KFOR²³⁹ and UNMIK²⁴⁰ in Kosovo under the aegis of the United Nations.²⁴¹ The facts of the cases are not interrelated but the Court joined the applications because they raised the same admissibility issues. The first application was filed by Mr Agim Behrami complaining “under Article 2, on his own behalf and on behalf of his son Gadaf Behrami, about the latter’s death and Bekir Behrami complained about his serious injury”.²⁴² After the war in Kosovo, a number of unexploded cluster bombs which were dropped during the NATO bombardment of the Former Republic of Yugoslavia in 1999 remained unexploded in various parts of Kosovo. Two of Mr Behrami’s children had played with these bombs which exploded and killed one of his sons while seriously injuring the other. The incident was investigated domestically and the conclusion was that the accident amounted to “an unintentional homicide committed by imprudence” – which resulted in no criminal prosecution being initiated. The applicants complained that the respondent parties had not respected UN Security Council Resolution 1244²⁴³ concerning the demining of the territory and that this had resulted in the accident. The second application was filed by Mr Saramati who complained “under Article 5 alone, and in conjunction with Article 13 of the Convention, about his extra-judicial detention by KFOR”.²⁴⁴

²³⁷ ECtHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, nos. 71412/01 and 78166/01, Decision [GC] (2007).

²³⁸ ECtHR, *Azemi v. Serbia*, no. 11209/09, Decision (2013).

²³⁹ See KFOR’s website for further information <<https://jfcnaples.nato.int/kfor>>.

²⁴⁰ See UNMIK’s website for further information <<https://unmik.unmissions.org/>>.

²⁴¹ ECtHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* [GC], nos. 71412/01 and 78166/01, Decision (2007), § 1.

²⁴² *Ibid.*, § 61.

²⁴³ At the material time, in March 2000, the applicants lived in a area of Kosovo for which a NATO brigade led by France was responsible. The brigade was part of the international security force (KFOR) presence in Kosovo, mandated by UN Security Council Resolution 1244, 10 June 1999 <Resolution 1244 (unscr.com)> (accessed 6 January 2022).

²⁴⁴ *Ibid.*, § 62.

The Grand Chamber did not analyse the merits of these complaints but looked at the case exclusively from the admissibility point of view. While the *Saramati* application against Germany was struck out from the list at the applicant's request, the applications filed against France and Norway were rejected for being *ratione personae* incompatible with the ECHR provisions.²⁴⁵ Whereas the applicants "maintained that there was a sufficient jurisdictional link, within the meaning of Article 1 of the Convention, between them and the respondent States [France and Norway]", the Court agreed with the counterarguments filed by the respondent and third-party States²⁴⁶ that such a link was inexistent in the case in question.²⁴⁷ Before reaching this conclusion, the ECtHR clarified that the question that arises in this case is whether the Strasbourg Court has competence "*ratione personae* to review acts of the respondent States carried out on behalf of the UN and, more generally, as to the relationship between the Convention and the UN acting under Chapter VII of its Charter".²⁴⁸ In answering these questions, the ECtHR, *inter alia*, reasoned that: (i) "the impugned action[s] and inaction[s] are, in principle, attributable to the UN";²⁴⁹ (ii) the UN "has a legal personality separate from that of its member States ..." and that said organisation "is not a Contracting Party to the Convention";²⁵⁰ and that (iii) the "Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions [United Nations Security Council Resolutions] and occur prior to or in the course of such missions, to the scrutiny of the Court".²⁵¹ As a result, the Court declared the applicants' complaints as incompatible *ratione personae* with the Convention.²⁵² Although this case is quite important from the jurisdictional point of view and has been cited on numerous occasions by the ECtHR and others interested in international law, the applicants were not able to have the merits of their case reviewed due to the lack of an international judicial forum which would analyse the substance of their complaints.

²⁴⁵ Ibid., operative part.

²⁴⁶ Ibid., see §§ 82-95 for observations submitted by France and Norway as respondent parties and §§ 96-120 for observations submitted by third parties, namely the United Nations, Denmark, Estonia, Germany, Greece, Poland, Portugal and the United Kingdom.

²⁴⁷ Ibid., §§ 66-72 and §§ 82-95.

²⁴⁸ Ibid., § 146.

²⁴⁹ Ibid., § 144.

²⁵⁰ Ibid.

²⁵¹ Ibid., § 149.

²⁵² Ibid., § 152.

The second case, *Azemi v. Serbia*, is another interesting case filed by Kosovo citizens who were trying to enforce a *res judicata* decision of a basic court in Kosovo.²⁵³ The crucial question before the Strasbourg Court was whether Serbia, within the meaning of Article 1 of the ECHR, could be held responsible for non-enforcement of a decision rendered by domestic courts in Kosovo.²⁵⁴ The applicant (together with 572 other employees of a socially owned enterprise) had obtained a decision from a basic court in Kosovo in 2002 stipulating that they should be paid EUR 25,649,250 as compensation for unpaid salaries.²⁵⁵ Due to the lack of an appeal, the decision became final and executable in 2002 and since then, a number of Kosovo courts have recognised its *res judicata* status, including the Constitutional Court in 2010.²⁵⁶ The latter, relying on the case-law of the ECtHR in respect of the *res judicata* principle found a violation of Article 6 in conjunction with Article 13 of the Convention due to the failure of the responsible authorities to execute a final and binding decision rendered in the applicants' favour.²⁵⁷ In 2012, following the failure of the Government and the Kosovo Agency for Privatisation to enforce the judgment of the Constitutional Court, the latter issued a so-called "Decision on non-execution" stipulating that the rights of the applicants had been violated due to non-enforcement and that the responsible authorities had breached their constitutional duty to enforce a judgment of the Constitutional Court.²⁵⁸ Here, the Constitutional Court again relied on the ECtHR case-law to articulate the positive obligation of the State to ensure the enforcement of final and binding judgments effectively and without unnecessary delays.²⁵⁹ Moreover, in 2019, almost a decade after it issued a decision in the applicants' favour which still remains to be executed, the Constitutional Court published a notification via which it

²⁵³ ECtHR, *Azemi v. Serbia*, no. 11209/09, Decision (2013).

²⁵⁴ *Ibid.*, § 38.

²⁵⁵ See Municipal Court in Ferizaj, Decision [no number], of 11 January 2002 cited in § 21 in Constitutional Court of Kosovo, Judgment no. KI08/09, 17 December 2010.

²⁵⁶ ECtHR, *Azemi v. Serbia*, no. 11209/09, Decision (2013), §§ 6-11. See also, Constitutional Court of Kosovo, Judgment KI08/09, 17 December 2010.

²⁵⁷ Constitutional Court of Kosovo, Judgment KI08/09, 17 December 2010, see operative part and §§ 57-66. See also, ECtHR, *Azemi v. Serbia*, no. 11209/09, Decision (2013), §§ 10-11.

²⁵⁸ Constitutional Court of Kosovo, Decision on non-Execution in relation to Judgment no. KI08/09, 18 October 2012, §§ 18-27.

²⁵⁹ *Ibid.*, §§ 13-14, referring to ECtHR, *Sovtransavto Holding v. Ukraine*, no. 48553/99, Judgment (2002), § 72; ECtHR, *Ryabykh v. Russia*, no. 52854/99, Judgment (2003) § 52; ECtHR, *Pecevi v. the former Yugoslav Republic of Macedonia*, no. 21839/03, Judgment (2008); ECtHR, *Martinovska v. the former Yugoslav Republic of Macedonia*, no. 22731/02, Judgment (2006); ECtHR, *Romashov v. Ukraine*, no. 67534/01, Judgment (2004).

has informed the Chief State Prosecutor of the failure of the responsible national authorities to enforce the judgment of the Constitutional Court.²⁶⁰

It needs to be noted however that the applicant had approached the ECtHR in 2009, one year before the Constitutional Court rendered its decision declaring a violation of the *res judicata* principle. The ECtHR decided the case in 2013 and included the facts that had happened before the Constitutional Court after the introduction of the application and up to that date.²⁶¹ As far as the period between 1990 and 10 June 1999 was concerned, the Strasbourg Court found that, even if Serbia exercised jurisdiction, the complaints for failure to act during that period would be incompatible *ratione temporis* since the Convention entered into force in respect of Serbia in 2004.²⁶² As regards the period between 10 June 1999 and the present day, the Court concluded that the complaint was incompatible *ratione personae* since Serbia had not been exercising effective control in Kosovo during that period.²⁶³ In other words, the ECtHR maintained that Serbia could not be held responsible under Article 1 of the Convention for the non-enforcement of a Kosovo court decision issued in 2002. Authors commenting on the *Azemi* case have argued that on one hand, the Court's approach "based on status neutrality, as a minimum can be seen as not endorsing Serbia's *de jure* jurisdiction in Kosovo"; and, on the other hand, this case "places Kosovo in a legal vacuum where its inhabitants are 'not resident[s]' in the legal space of the Convention".²⁶⁴

Indeed, this case confirmed that the citizens in Kosovo do not have an avenue of redress at the supranational level even when their Convention rights and freedoms are flagrantly breached by the State authorities. The last instance towards which they may turn is the Constitutional Court and even that has proven to be ineffective in some cases, as in the case in question, despite its great efforts to ensure that the public authorities are held accountable for violating the rights and freedoms guaranteed by the Convention. If the applicants had been able to file a complaint before the ECtHR against Kosovo in this particular case, the end result would have been different and quite straightforward. The ECtHR would have found a violation due to continued non-enforcement of a final and binding judicial decision while also declaring that the constitutional complaint was ineffective in the applicant's case as it was not

²⁶⁰ Constitutional Court of Kosovo, Notification of non-execution of the Judgment of the Constitutional Court no. KI08/09, of 28 May 2019.

²⁶¹ ECtHR, *Azemi v. Serbia*, no. 11209/09, Decision (2013), §§ 1-11.

²⁶² *Ibid.*, §§ 39-40.

²⁶³ *Ibid.*, §§ 41-49.

²⁶⁴ Istrefi (2014), 6.

able to speed up or ensure the enforcement, despite its attempts. Lastly, the ECtHR would have found that the State of Kosovo was to pay the exact amount as stipulated in the final and binding domestic decision and additionally, it might also award non-pecuniary damages due to the distress suffered by the applicants, this being an area where the Constitutional Court is also non-effective due to its lack of jurisdiction to award damages.

In the second category of cases, namely situations in which Kosovo is referred to due to its particular status in international law, there are several cases that are worth noting. For instance, in the case of *Al-Jedda v. the United Kingdom*, the crucial issue was whether the detention of the applicant in Iraq by British forces “was attributable to the respondent State” and whether “the applicant fell within the respondent State’s jurisdiction”.²⁶⁵ The analysis of the case described how: (i) Lord Bingham utilised the situation in Kosovo to distinguish it from the factual situation in Iraq by stating that the analogy with the situation in Kosovo did not stand; (ii) Baroness Hale also agreed that “the analogy with the situation in Kosovo breaks down at almost every point”; (iii) Lord Carswell similarly distinguished the situation in Kosovo from that of Iraq; (iv) Lord Rodger dissented because he considered that the legal ground on which “the members of the NATO-led Kosovo Force (KFOR) were operating in Kosovo could not be distinguished from that on which British forces in the Multinational Force were operating during the period of the applicant’s internment” in Iraq.²⁶⁶ Additionally, the applicant and the Government relied on different arguments regarding the situation in Kosovo to argue that the applicant fell (or did not fall) “within the United Kingdom’s jurisdiction under Article 1 of the Convention”.²⁶⁷ The Court agreed with the majority of the House of Lords “that the United Nations’ role as regards security in Iraq in 2004 was quite different from its role as regards security in Kosovo in 1999” and that “Mr Saramati’s detention [in Kosovo by KFOR] was attributable to the United Nations and not to any of the respondent States”.²⁶⁸ However, in the case in question and due to the noted differences between Kosovo and Iraq, the Court concluded that the “internment of the applicant [in Iraq] was attributable to the United Kingdom and that during his internment the applicant fell within the jurisdiction of the United Kingdom for the purposes of Article 1” of the ECHR.²⁶⁹

²⁶⁵ ECtHR, *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, Judgment (2011).

²⁶⁶ *Ibid.*, §§ 18-20.

²⁶⁷ *Ibid.*, §§ 63-72.

²⁶⁸ *Ibid.*, § 83.

²⁶⁹ *Ibid.*, § 86. See other cases in which Kosovo is referred to: ECtHR, *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, Judgment (2011).

The judges of the ECtHR have used Kosovo to argue their concurring and dissenting opinions in several cases related to international law issues. For instance, in its dissenting opinion in the Grand Chamber case of *Chiragov and Others v. Armenia*, Judge Gyulumyan relied on the Advisory Opinion of the International Court of Justice on the “Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo” to argue, *inter alia*, that the declaration of independence by the Republic of Nagorno-Karabakh “has never been criticised or invalidated by the Security Council, unlike similar declarations in Southern Rhodesia, northern Cyprus and Republika Srpska”.²⁷⁰ In another Grand Chamber case, Judge Yudkivska in her dissenting opinion utilised the Court’s case-law in *Azemi v. Serbia* to argue that “the Court recognised that such areas [*de facto* ‘black holes’ with limited Convention protection] may also exist *de jure* – after Kosovo proclaimed its independence” which resulted in “objective limitations which prevented Serbia from securing the rights and freedoms in Kosovo”.²⁷¹

In the third category of cases, namely other important and interesting cases in which Kosovo is referred to, there are several cases that merit mentioning. For instance, in the case of *D.L. v. Austria*, the ECtHR held that “the extradition of the applicant to Kosovo would not give rise to a violation of Articles 2 or 3 of the Convention”.²⁷² Following an international arrest warrant issued by a regular court in Kosovo, under the suspicion of having committed aggravated murder, the applicant (residing in Austria) was apprehended and put in detention pending extradition to Kosovo.²⁷³ The domestic courts in Austria decided that the extraction to Kosovo was permissible and that following his extradition, “the Kosovo courts [were] to evaluate the evidence against the applicant”.²⁷⁴ The last instance court in Austria which finally confirmed the applicant’s extradition to be in conformity with Convention guarantees also stipulated that, “despite not being a State Party to the Convention or the Council of Europe, Article 22 of the Constitution of Kosovo granted the Convention direct effect under and superiority to national law” and as a result the “domestic

²⁷⁰ See e.g. dissenting opinion of Judge Gyulumyan, § 13, in ECtHR, *Chiragov and Others v. Armenia* [GC], no. 13216/05, Judgment (2015).

²⁷¹ See e.g. concurring opinion of Judge Pinto de Albuquerque joined by Judges Hajiyev, Pejchal and Dedov, § 67, in ECtHR, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, Judgment (2016). See also, dissenting opinion of Judge Kovler in ECtHR, *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, Judgment (2004).

²⁷² ECtHR, *D.L. v. Austria*, no. 34999/16, Judgment (2017), operative part.

²⁷³ *Ibid.*, § 11.

²⁷⁴ *Ibid.*, § 13.

law equally offered protection from violations of the Convention”.²⁷⁵ After assessing the merits of the applicant’s allegations that “he would run the risk of torture, inhuman or degrading treatment or even death if he were extradited to Kosovo” contrary to Article 2, and allegations that “detention conditions in Kosovo prisons fell short of Article 3 standards and that he could be subject to police violence”,²⁷⁶ the Court endorsed the reasoning of the Austrian courts and concluded that “the applicant ha[d] failed to show substantial grounds for believing that he would be exposed to a real risk of being subjected to treatment contrary to Article 2 or 3 of the Convention” in the event of being extradited to Kosovo.²⁷⁷ In a way, this case confirmed, indirectly, that the domestic legislation and Kosovo’s institutions provide sufficient guarantees to protect a person in pre-trial detention from potential violations of Articles 2 and 3 of the Convention.

The other cases relate to various allegations of applicants of Kosovar origin that their expulsion to Kosovo from certain member States of the Council of Europe would breach their Convention rights. In the vast majority of such cases the ECtHR did not find a violation of Convention rights if the applicants had already been expelled or if they were to be deported. For instance, in the case of *Nacic and Others v. Sweden*, the Court did not find “that the applicants’ Roma ethnicity would have such consequences that their rights under the Convention would be disrespected if they were deported to Kosovo ...”.²⁷⁸ Similarly, in other cases rejected as inadmissible, the Court found that there were no substantial grounds to believe that “being ethnic Bosnian” or “ethnic Roma” would mean that the applicants would be subjected to torture or other proscribed treatment against Article 3 upon their return to Kosovo.²⁷⁹ Additionally, in two other judgments the Court did not find a violation of Article 8 in the applicants’ cases with respect to their expulsion to Kosovo or the non-approval of their residence permits on the ground of family reunification.²⁸⁰ Cases like this provide an indirect supranational review by the ECtHR *vis-à-vis* the application of Convention standards in Kosovo which is nonetheless an important indication for the domestic authorities.

²⁷⁵ Ibid., § 23.

²⁷⁶ Ibid., § 38.

²⁷⁷ Ibid., § 69.

²⁷⁸ ECtHR, *Nacic and Others v. Sweden*, no. 16567/10, Judgment (2012), § 86.

²⁷⁹ ECtHR, *Hida v. Denmark*, no. 38025/02, Decision (2004); ECtHR, *Haliti and Others v. Denmark*, no. 14712/03, Decision (2004); ECtHR, *Muratović v. Denmark*, no. 14513/03, Judgment (2004).

²⁸⁰ ECtHR, *Berisha v. Switzerland*, no. 948/12, Judgment (2013); ECtHR, *Krasniqi v. Austria*, no. 41697/12, Judgment (2017); ECtHR, *Shala v. Switzerland*, no. 52873/09, Judgment (2012).

The above analysis has reflected several categories of cases where Kosovo has been referred to by the Strasbourg Court. Despite not being a member State, citizens of Kosovo have tried to find alternative routes to gain the attention of the ECtHR and have it express its opinion on issues related to Convention problems within the Kosovo territory. Such endeavours have proved unsuccessful considering that the ECtHR has understandably ruled that Kosovo is to remain outside of its jurisdiction as long as there are no changes with respect to its membership to the Council of Europe. The case-law produced by the Court in respect of Kosovo has assisted in creating important case-law that is then used for other cases in respect of the existing member States. Lastly, it should be pointed out that, even if direct access to the ECtHR is not possible for the moment, the importance of its case-law for the domestic authorities, in particular the domestic courts, should remain at the highest levels. The *res interpretata* effects of the ECtHR should be utilised in all cases containing a human rights element in order to replicate within Kosovo, as far as possible, the impact and effects that direct supervision from the ECtHR would have had in the Kosovar legal order.

3. Impact and Effects of the ECHR and the ECtHR's Case-Law in Kosovo

As confirmed in several instances in this chapter, the territory of Kosovo is *de jure* and *de facto* the only legal space in the Western Balkans which falls outside the jurisdiction of the Strasbourg Court. The scope of the latter's protection, save for the few occasions on which it has indirectly evaluated the Convention situation in Kosovo as highlighted above, does not extend to Kosovo citizens complaining about actions or omissions of the domestic authorities.

However, despite the fact that Kosovo is outside the official Convention protection machinery because it is not a member State of the Council of Europe, there have been many noticeable positive effects in Kosovo since 1999. Here, it is worth noting that Kosovo's relationship with the Convention did not start from the moment Kosovo enacted its Constitution following the declaration of independence in 2008. In fact, before 2008, Kosovo was ruled on the basis of the so-called "Constitutional Framework for Provisional Self-Government in Kosovo" which was enacted by UNMIK and entered into force in 2001, two

years after the war in Kosovo ended.²⁸¹ The ECHR was referred to in the Preamble of the provisional constitutional framework and in two other provisions which in substance provided that the provisional institutions of self-government in Kosovo were obliged to “observe and ensure internationally recognised human rights and fundamental freedoms, including those” which are set forth in the Convention.²⁸² This means that even before the new Constitution entered into force in 2008, the ECHR was applicable in Kosovo – always on voluntary basis and without a formal ratification process due to obvious legal obstacles. The new Constitution then embedded the Convention even further and more firmly by requiring all public authorities, including the domestic courts, to interpret human rights and freedoms in harmony with the case-law of the ECtHR.²⁸³ As stated above, the Constitutional Court has interpreted those norms to mean that even the jurisprudence of the ECtHR is a “source of law” based on which parties may plead their Convention claims before any public authority in Kosovo with the latter being obliged to render ECHR compliant decisions.

Unlike all the other national reports in which positive examples were taken from the direct impact and effects of the ECtHR case-law in respect of those specific countries, the following positive examples are a direct result of the domestic application of Convention standards and the Court’s case-law by different public authorities in Kosovo, mostly by the domestic courts. For example, as stated in the part where the judicial practice of the Constitutional Court was reflected, the latter, through direct utilisation of the case-law of the Strasbourg Court has: (i) recognised numerous Convention rights of individuals and legal persons by providing them with redress for the violations they had experienced; (ii) quashed decisions of the national courts, the Parliament, the Government, the President and other public authorities as Convention incompatible; and has (iii) rendered many legal provisions as not compatible with the ECHR or, alternatively, confirmed their Convention compatibility.²⁸⁴ Through such domestic case-law, even if the Constitutional Court was not objectively in a position to fully replace the impact and effects of supranational supervision from the ECtHR, it has nevertheless contributed to filling this void and clos-

²⁸¹ See Constitutional Framework for Provisional Self-Government in Kosovo <<https://www.esiweb.org/pdf/bridges/kosovo/12/1.pdf>>. See also, UNMIK Regulation No. 2001/9, 15 May 2001 <https://unmik.unmissions.org/sites/default/files/regulations/02english/E2001regs/RE2001_19.pdf> (both documents accessed 6 January 2022).

²⁸² *Ibid.*, Constitutional Framework for Provisional Self-Government in Kosovo, Article 3.2 (b).

²⁸³ See, Articles 22 and 53 of the Constitution.

²⁸⁴ See [Part III, points 1.2](#) and [2](#) of this Chapter.

ing, at least partially, the evident gap left by not being part of the official protection mechanism of the ECHR. In addition to the Constitutional Court, the other domestic courts are also to be commended for those occasions when they ensured that their application of Convention standards and the Court's case-law would leave a positive impact in favour of protecting the fundamental human rights guaranteed by the Convention.²⁸⁵ Lastly, positive examples may also be seen in various legislative initiatives such as, for example, the fact that the Criminal Procedure Code of Kosovo specifically provides for the possibility of filing an extraordinary appeal based on the rights "available under this Code which are protected under the Constitution ... or the [ECHR] and its Protocols, as well as any decision of the European Court of Human Rights".²⁸⁶ These impact examples, inspired by Convention standards and the Court's case-law, demonstrate that even in the absence of direct ECtHR case-law against Kosovo, there are still many positive examples that are worth noting.

Nevertheless, many international reports on the human rights situation in Kosovo and the adeptness of the judiciary in dealing with human rights cases, among others, note that the domestic authorities have a long way to go before they can be considered to have reached an advanced stage of guaranteeing human rights in practice. In this regard, there are a few important points to be highlighted with respect to the judiciary and fundamental rights, deriving from the Progress Report on Kosovo issued by the European Union.²⁸⁷ In the part reflecting the situation in the area of rule of law and fundamental rights, including the judiciary, the Report noted that "Kosovo is still at an early stage in developing a well-functioning judicial system" considering that the "overall administration of justice continues to be slow, inefficient and vulnerable to undue political influence"; with the capacity of the judiciary to handle cases being "weak".²⁸⁸ The Report mentions the ECtHR twice in relation to Kosovo in

²⁸⁵ See, for example, [Part III](#) of this Chapter where two interesting decisions of the basic courts in Kosovo are referred to: (1) Prishtina Insight (2019) <<https://prishtinainsight.com/court-awards-family-of-diana-kastrati-95000-euros-in-compensation/>> (accessed 5 January 2022), in relation to the compensation for the failure of the State to protect the life of Diana Kastrati; and (2) See Kosovo Two Point Zero (2020) <<https://kosovotwopointzero.com/en/landmark-decision-for-transgender-rights/>> (accessed 5 January 2022), in relation to the recognition of transgender rights in Kosovo. Both decisions had as their basis the Convention standards and the ECtHR case-law.

²⁸⁶ Article 441 of the Criminal Code No. 04/L-123, 13 December 2012, published in the Official Gazette on 28 December 2012.

²⁸⁷ European Commission of the European Union, 'Kosovo 2021 Report', Commission Staff Working Document no. SWD(2021) 292 final/2, 19 October 2021.

²⁸⁸ *Ibid.*, page 16.

order to highlight that: (i) in terms of quality of justice, more work is needed in a few specialised areas, including the case-law of the ECtHR; and that (ii) generally speaking, from the legislative point of view, the media laws “including on defamation and access to information are in line with the standards of the Council of Europe and the case-law” of the ECtHR.²⁸⁹ The Report also refers to the Rule of Law Strategy and Action Plan introduced by the executive branch and calls for it to be implemented “without delay”.²⁹⁰ In 2021, the Government of Kosovo enacted the Rule of Law Strategy 2021-2026.²⁹¹ The ECHR and the ECtHR’s case-law are referred to in respect of the issue of length of proceedings which was considered as “one of the most critical and complex issues in the rule of law sector” which directly affects “the right to a fair trial within a reasonable time, as defined by the Constitution and the ECHR”.²⁹² Despite the objective of reducing the backlog of cases before the domestic courts, the Strategy stated that “the number of pending cases still remains extremely high”.²⁹³ In this respect, the Strategy stipulated that the issue of length of proceedings will be addressed by the introduction of new legal remedies via “amendments” to the existing legislation or a new “law” which could introduce, for example, “the right to appeal to the Constitutional Court; the right to appeal to a higher instance court; the introduction of accelerating and compensatory legal remedies specific to criminal justice”.²⁹⁴ Additionally, the Strategy also stated that by fulfilling the strategic objectives, the public authorities in Kosovo will take indispensable measures to increase “their institutional cooperation, in developing the knowledge and skills of staff regarding the understanding of and familiarisation with the basic principles and standards embodied in the ECHR and the case-law of the EC[t]HR”.²⁹⁵ It remains to be seen whether these ambitious strategic goals will be achieved within the prescribed time.

In the meanwhile, the domestic authorities in Kosovo, including the executive and legislative branches, should be more proactive in analysing the impact and effects of the ECtHR case-law on other States Parties, mostly in the Western Balkans due to similar legal traditions and history, and make efforts to

²⁸⁹ Ibid., pages 19 and 31.

²⁹⁰ Ibid., page 16.

²⁹¹ See Strategy on Rule of Law 2021-2026, Ministry of Justice, July 2021, <<https://md.rks-gov.net/desk/inc/media/8EF86336-E250-4EA2-9780-D4B8F7E853B5.pdf>> (accessed 6 January 2022).

²⁹² Ibid., page 12.

²⁹³ Ibid.

²⁹⁴ Ibid., page 36.

²⁹⁵ Ibid.

voluntarily replicate such effects at the domestic level. In that way, they can contribute more towards two important aspects, namely preparing Kosovo for the upcoming membership of the Council of Europe and ensuring that, while accession is pending, the citizens of Kosovo are able to enjoy in practice, at home, the rights guaranteed by the Convention. In relation to this, it is of paramount importance that court decisions which find Convention violations are executed in a timely fashion. Due to the non-enforcement of some decisions of the Constitutional Court,²⁹⁶ which are supposed to be final and executed without any delay, the impact of the Convention standards and the Court's case-law in the domestic legal order has been obstructed by other 'first-line defenders' in Kosovo. Therefore, despite the efforts of the judicial branch, at times and in some areas, the other branches of government did not fulfil their Convention partnership role in advancing the process of embeddedness of Convention standards in the country.

²⁹⁶ See [Part III](#) of this Chapter.

V. Summary and Conclusion

This chapter has provided an in-depth analysis of four main areas of interest for this study, namely: (i) an analysis of the status of international law in general and the ECHR in particular in the Kosovar domestic legal order; (ii) an in-depth analysis of the case-law of the highest courts in Kosovo and their 'Convention talk' in relation to the utilisation of Convention principles and the Court's case-law in their decisions; (iii) (due to the specific circumstances of Kosovo not being part of the official Convention protection machinery) a reflection of (a) cases where Kosovo citizens, residing in Kosovo, attempted to seek the protection of their rights in Kosovo by filing complaints against existing States Parties to the ECHR; (b) cases in which Kosovo is referred to due to its particular status in international law; and (c) other interesting cases in which Kosovo is referred to; finally concluding with an analysis of (d) the impact and effects of the Convention and the Court's case-law in the domestic legal order.

[Part I](#) of the chapter provided a brief reflection on the difficult years which have marked the recent painful history of Kosovo and its people, while following up with a reflection on the beginnings of the new State and its aspirations to join the Council of Europe family. Unlike all the other national reports, [Part I](#) of this report could not provide a synopsis of the most important milestones in the relationship of the domestic courts with the Strasbourg Court, considering that Kosovo is not part of the official Convention protection machinery. Despite being independent since 2008 and having gained more than 110 recognitions from 22 out of the 27 member States of the European Union and 34 out of the 46 member States of the Council of Europe, Kosovo has not yet managed to become part of the most important human rights organisation in Europe – a situation which has been considered an enormous drawback for the protection of human rights. Lastly, this part laid the groundwork for the analysis that would follow.

[Part II](#) outlined the relationship of the domestic law *vis-à-vis* the international law, by focusing on the peculiar legal status of the ECHR in a State which has provided direct effect to the Convention, unilaterally, without formal ratification. The analysis concluded that the Convention is deemed to have a special constitutional rank and has priority over domestic legislation in the event of conflict. All public authorities in Kosovo, including the regular courts and

the Constitutional Court itself, as confirmed by the jurisprudence of the latter, are obliged to render their decisions in harmony with the ECHR and the Court's case-law. The jurisprudence produced by the Strasbourg Court may be invoked as a source of law before any public authority in Kosovo and they are obliged to abide by the *res interpretata* effects of the invoked case-law. Therefore, despite not being an official Contracting Party to the Convention, Kosovo's domestic legal order has provided a special status to the ECHR by deeply embedding its principles in the human rights constitutional architecture of the State. As far as legislative process is concerned, despite the obligation to ensure compatibility of laws with the Constitution and international agreements (including the ECHR), there is no specific procedure to monitor whether the Convention standards and the Court's case-law have been duly followed.

[Part III](#) examined the domestic court system and its relationship with the Convention principles, by focusing mostly on an in-depth analysis of the jurisprudence of the highest national courts, with occasional references to the case-law of lower courts. The initial part showed that in addition to the regular court structure, a temporary Special Court was established in 2015 and is currently operating from The Hague with specific jurisdiction to adjudicate on war crimes and crimes against humanity which allegedly either commenced or were committed in Kosovo between 1 January 1998 and 31 December 2000. Considering that court proceedings in respect of the accused are still ongoing, the end results of this peculiar court remain to be seen in years to come and in this respect, it was viewed as unfortunate that the decisions of the Special Court might not be under the scrutiny of the ECtHR, should Kosovo's ongoing accession process to the Council of Europe be unduly prolonged. The analysis then focused on the case-law of the Supreme Court and the Constitutional Court individually followed by an assessment of their 'Convention talk'. This analysis exposed a huge discrepancy in terms of adeptness between Kosovo's highest courts in utilising Convention standards and the ECtHR case-law in their decisions. While the Supreme Court was found to rely on those principles in less than 5% of its cases, the Constitutional Court has not rendered more than 5% of its cases without relying on such principles. The discrepancy was not noted merely in the quantitative sense but also in the qualitative sense, with the Constitutional Court's case-law, on one hand, containing extensive, qualitative and relevant references to the ECtHR case-law and the Supreme Court's case-law, on the other, being found not to be systematic, coherent or detailed in its utilisation of Convention standards. As a result, while the former was considered to be at an advanced stage of utilisation of Convention princi-

ples, the latter was considered to be at a fairly early stage in this process. Accordingly, the study noted that the 'Convention talk' between these two courts is quite unbalanced, with the Constitutional Court doing most of the work in their Convention judicial exchanges. The need for an increase in the quality of utilisation of the Convention standards and the Court's case-law on the part of the Supreme Court was highlighted as the sole means of embedding such principles within the judicial practice of the regular domestic judiciary.

[Part IV](#), unlike in all the other national reports, due to the specific circumstance of Kosovo not being a member of the Council of Europe and thus not being part of the ECtHR, provided an overview of (a) cases in which Kosovo citizens, residing in Kosovo, attempted to seek the protection of their rights in Kosovo by filing complaints against existing States Parties to the ECHR; (b) cases in which Kosovo is referred to due to its particular status in international law; and (c) other interesting cases in which Kosovo is referred to. The first pool of cases confirmed that the ECtHR considers Kosovo to be outside of its *espace juridique* and that its protective arm cannot reach its territory as long the current status quo of it not being an official Contracting Party remains as it is. In two cases in which the applicants tried to sue current member States (acting under the aegis of the UN) for violations which occurred in Kosovo, the ECtHR declared their requests inadmissible for being incompatible *ratione personae* with Convention provisions. The second pool of cases showed that the *sui generis* situation of Kosovo is utilised by different courts and governments within the Council of Europe to convey arguments in complex international law issues. Two of the cases, the *Behrami and Saramati* case and the *Azemi* case, reflected in the first category of cases for being incompatible *ratione personae* with the Convention, were regularly cited before the ECtHR and by the ECtHR. Even in concurring and dissenting opinions, judges have used the particular international law situation of the State of Kosovo to refute or otherwise distance themselves from the majority's reasoning. The third pool of cases reflected some examples where the ECtHR had to analyse the applicable situation in Kosovo prisons or more broadly to assess whether a deportation of Kosovo citizens back to Kosovo would amount to a breach of their rights under Articles 2 and 3. There were no cases where the ECtHR confirmed that the situation in Kosovo would give rise to such breaches in the event of deportation or in the event of completion of a prison sentence in Kosovo. As a result, it was suggested by this study that such evaluations by the ECtHR provided indirect supranational evaluation of the Strasbourg Court on the Convention application in Kosovo by certain domestic authorities. Lastly, in this part, the impact and effects of the Convention standards and the Court's

case-law were analysed. The study concluded that despite the evident shortcomings of not being officially part of the Convention protection machinery, the ECHR and the ECtHR case-law has had various positive impacts in the domestic legal order. While such impacts were mostly noted within the judiciary, other branches of government also had commendable examples that were worth sharing. One of the main flaws was considered to be the non-implementation of some of the judgments of the Constitutional Court which had found various violations of the ECHR. Lastly, in order to increase the impact and effects of the ECHR and the Court's case-law in Kosovo while its accession to the Council of Europe is still pending, the study suggested that the domestic authorities should be more proactive in copying this impact on a voluntary basis by noting positive examples from the neighbouring States which are part of the Convention protection machinery.

Based on this analysis and findings, the overall conclusion is that while the Convention has a very secure place in the Kosovar domestic legal order, the embeddedness process is still ongoing and there is sufficient room for improvement within the regular judiciary and other branches of government. While, hypothetically speaking, the Strasbourg Court would be able to defer more comfortably to decisions of the Constitutional Court, the same cannot be said for the Supreme Court. The latter needs to improve its mechanisms for following up the Court's case-law and increasing, to a great extent, its level of utilisation of Convention standards. Bearing in mind that the Strasbourg Court cannot "ensure the observance of the engagements undertaken" by the Kosovo authorities in respect of Convention application, the burden to ensure substantial and procedural embeddedness of the ECHR remains with the domestic courts in Kosovo as the furthest 'last-line defenders' to which applicants may appeal. This burden falls heavily on the Constitutional Court as the last possible defender of Convention rights at the domestic level, which means that this domestic court must wear two hats until the ECtHR is able to assume its supervisory role over Kosovo. Until the latter becomes a member of the Council of Europe, its domestic authorities should not be satisfied with the current level of impact and effects that have been produced, directly and indirectly, by the Convention standards and the Court's case-law. On the contrary, the domestic authorities should intensify their efforts with a view to strengthening their capacities to absorb and implement more efficiently and more qualitatively the ECHR standards and the case-law of the Court. Only in this way will the domestic authorities in Kosovo be able, one day, to earn the trust of the ECtHR and merit its deference to them.

Chapter 5 Montenegro

I. Introduction

The aftermath of the Socialist Federal Republic of Yugoslavia's collapse produced, *inter alia*, the Union of Serbia and Montenegro whose longevity was rather short. In 2006, the majority of Montenegrin citizens voted in favour of re-establishing an independent state.¹ This momentous event opened the door to the dissolution of the Union and for Montenegro to continue its Convention journey separate from Serbia, as a sovereign state.²

The ECHR entered into force in respect of Montenegro in 2004, while the country was part of the Union with Serbia.³ Following the dissolution of the Union, Montenegro declared the continuation of its Council of Europe membership by becoming the 47th member in 2007.⁴ In the very first judgment against Montenegro, which was filed while the country was still in the Union with Serbia, the Court clarified that the Convention continued to be binding on Montenegro since it had joined the Council of Europe in 2004 together with Serbia.⁵ This judgment dismissed all possible uncertainties with respect to *ratione temporis* jurisdiction in respect of the date from which the Convention

¹ On 21 May 2006, Montenegro held a referendum, whereby 55% of the population voted in favor of independence of Montenegro. See Assembly of the Council of Europe, for more on the consequences of the 2006 referendum <<https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11480&lang=EN>> (accessed 6 January 2022). The 2006 referendum was considered a vote which finally sealed the “death of Yugoslavia”; see, in this context, The Guardian (2006) <<https://www.theguardian.com/world/2006/may/22/balkans>> (accessed 6 January 2022).

² On 3 June 2006, the Parliament of Montenegro made a formal Declaration of Independence. For more on this, see the website of the Parliament of Montenegro <<https://www.skupstina.me/en/home>> (accessed 6 January 2022).

³ On 11 May 2007 Montenegro became the 47th member State of the Council of Europe <<https://www.coe.int/en/web/podgorica/council-of-europe>> (accessed 6 January 2022).

⁴ Committee of Ministers, Declaration on the Continuation by the Republic of Serbia of Membership of the State Union of Serbia and Montenegro, DECI-14.06.2006/1E, 14 June 2006.

⁵ ECtHR, *Bijelić v. Montenegro and Serbia*, no. 11890/05, Judgment (2009), § 69.

was applicable in Montenegro, by clarifying that its newest contracting party is to be held responsible for any Convention violations as of 3 May 2004, when it first acceded to the Convention.⁶

Montenegro's monist approach towards international law facilitates a favourable positioning of the Convention in its domestic legal order. The ECHR is an integral part of the Montenegrin legal system and applies directly in matters that may be regulated differently by the national legislation by having priority over it.⁷ Courts are bound to decide in accordance with the ECHR and ECtHR's case-law.

Montenegro does not fall into the list of States Parties that generate a vast amount of case-law although it does have the highest number of litigants per capita before the ECtHR.⁸ In any event, important cases have been decided in respect of Montenegro which have ultimately had a significant impact for the Convention embeddedness process in the country. Domestic court practices were modified, laws were amended and proceedings were reopened as a result of litigation endeavours by various applicants. Montenegrin authorities have shown adequate eagerness and loyalty in implementing ECtHR judgments within the set deadlines, with no judgments under enhanced supervision by the Committee of Ministers. In addition, the executive and the legislative branches have been proactive in introducing new remedies to redress Convention issues domestically in instances when they perceived that it was the national legislation that had caused the violation in the first place. Such examples may be found in pension rules, judicial enforcement processes, and defamation. Thus far, Montenegro has also been proactive in introducing general measures of wider Convention impact without specifically being asked to do so by the ECtHR, which is to be regarded as a highly commendable approach for preventing possible Convention violations domestically. While such reactivity might not be the sole factor as to why Montenegro does not have any systemic issues flagged at the ECtHR level, it is certainly a very important factor. Overall, Montenegrin authorities seem to employ a precautionary ap-

⁶ Vučinić (2016), 291.

⁷ Article 9 of the Constitution. For an English version and a consolidated text of the Constitution of Montenegro see the CODICES database of constitutions published by the Venice Commission, <<http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>> (accessed 6 January 2022).^[7] Article 145 of the Constitution.

⁸ ECtHR, Yearly Report 2020 <https://www.echr.coe.int/Documents/Annual_report_2020_ENG.pdf> (accessed 6 January 2022).

proach that aims to prevent predictable violations at the domestic level. This chapter uses concrete examples from the areas of freedom of expression and length of proceedings to illustrate how this approach has worked in practice.

Following this introduction, [Part II](#) of this chapter will outline the status of the Convention in the Montenegrin legal order and court system. It will shed light on the relationship between domestic and international law with a specific focus on the status of the ECHR. [Part III](#) will explore the domestic court system and its relationship with the Convention by focusing mainly on the jurisprudence of the highest courts in Montenegro and their dialogue in the area of implementing Convention standards. [Part IV](#) will then provide an in-depth analysis of the ECtHR's case-law against Montenegro by classifying cases into five categories, namely: (1.1) [cases with the highest number of violations – Article 6 issues](#); (1.2) [cases under Article 13 – lack of effective domestic remedies](#); (1.3) [cases with violations under other Convention articles](#); (1.4) [admissible cases where no violation was found](#); and (1.5) [other important cases related to exhaustion of domestic remedies](#). [Part IV](#) will focus on the impact and effects of the ECHR and the ECtHR's case-law in the domestic legal order by providing concrete impact examples within the national judiciary and beyond. Lastly, [Part V](#) will reflect on these findings and draw some final conclusions.

II. Status of the Convention in the Montenegrin Legal Order

1. Relationship between Domestic and International Law

Article 9 of the Constitution of Montenegro stipulates the superiority of “international treaties and generally accepted rules of international law” by seeing them as “an integral part of the Montenegrin legal system” that “shall apply directly when they regulate relations differently to national legislation”.⁹ The Constitution also provides that laws must not just be in line with the Constitution but also in line with “confirmed international agreements”,¹⁰ among which the Convention. This constitutional choice shows that Montenegro has opted for a “monistic position”¹¹ when it comes to the ranking of international law over national law. Such an unambiguous monist approach evidently provides for an easier path towards implementation of the international human rights standards provided by the ECHR as well as the case-law of the ECtHR. The Convention has supremacy over national legislation,¹² and, accordingly, any natural or legal person may rely on the provisions of the applicable international law in order to seek protection of their rights and freedoms while the Montenegrin courts are obliged to review such complaints.¹³

2. ECHR in the Domestic Legal Order

The ECHR is not specifically referred to in the Constitution of Montenegro. Part II of the Constitution lists human rights and liberties which are to be exercised “on the basis of the Constitution and confirmed international agreements”.¹⁴ Evidently, the ECHR is in the list of confirmed international agreements that must be taken into account when interpreting human rights and liberties guaranteed by Montenegro. Therefore, there are no doubts that par-

⁹ Article 9 of the Constitution.

¹⁰ Article 145 of the Constitution.

¹¹ Vučinić (2016), 289–290.

¹² *Ibid.*, 290.

¹³ For more on the judicial application of international law in Montenegro, see Rakitić (2015).

¹⁴ Article 17 of the Constitution.

ties may rely on Convention provisions in their enquiries before public authorities and that the latter must render decisions in compliance with the Convention standards. With respect to the obligation of the executive and legislative branches to ensure the compatibility of any proposed legislation with Convention standards, while a specific mandatory procedure to ensure the compatibility of any proposed legislation with the *acquis* of the European Union exists, there is no specific procedure obliging lawmakers to ensure the compatibility of proposed legislation with Convention standards and the ECtHR case-law. However, it should be noted that there is an obligation to ensure compatibility of legislation with the Constitution, where the ECHR is incorporated.

The supra-legislative status of the Convention makes it convenient for the Montenegrin judges and other public officials of the justice system to rely on ECHR provisions and enforce them directly. Even though analysis of the national case-law shows that there is no debate over the direct applicability of the Convention and the Court's case-law, there are discrepancies in the extent to which each court in Montenegro utilises the Convention standards in their argumentation and reasoning. The difference is quite visible, with the Constitutional Court leading in the utilisation of Convention standards, followed by the Supreme Court and then by other lower courts. The following part of this chapter will shed more light on this point by providing concrete examples of reliance on the Convention as well as application of the ECtHR's case-law by the Montenegrin judiciary.

III. Domestic Court System and the ECHR

1. Overview of the Montenegrin Court System

The judicial power in Montenegro is run by autonomous and independent courts which are obliged to decide matters before them “on the basis of the Constitution, laws and confirmed and published international agreements”.¹⁵ According to the Law on Courts, all courts in Montenegro are obliged to decide their cases objectively, based on law and within a reasonable time.¹⁶ The court system is widely decentralised with numerous first instance courts covering small territorial areas as well as specialised courts with exclusive jurisdiction on matters regarding misdemeanours, commercial and administrative matters.¹⁷

Besides the Supreme Court which heads the regular justice system and stands at the top of the pyramid, there is an Appellate Court responsible for the whole territory of Montenegro and two other High Courts which sometimes act as first instance courts and at other times review cases coming from other regular first instance courts.¹⁸ There are in total fifteen basic first instance courts which deal with civil and criminal matters; three misdemeanour courts which deal exclusively with misdemeanour matters; one administrative court and one commercial court – both specialised to deal solely with administrative and commercial matters, respectively, for the whole territory. The specific competences of each court are prescribed in detail by the Law on Courts.¹⁹ The Constitutional Court, on the other hand, stands completely outside of the organisational structure of the Montenegrin regular court system. Its specific jurisdiction focusing on the application of Convention standards will be further elaborated right after an initial elaboration of the relationship between

¹⁵ Article 118 of the Constitution.

¹⁶ See Article 2 of the Law on Courts nos. 5/2002 and 49/2004, published in Official Gazette Nos. 22/2008, 39/2011, 46/2013 and 48/2013 (hereinafter, the Law on Courts) <83e9ca76-3071-4225-aa83-525fb1d994cf (wapi.gov.me)> (accessed 6 January 2022).

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*, Articles 1-27.

the Supreme Court and the ECHR and the Court's case-law. The analysis of this part will conclude by an assessment of the 'Convention talk' between the highest courts in Montenegro.

1.1. Supreme Court

As indicated above, the Supreme Court is the highest court in Montenegro with a primary responsibility to ensure uniform application of laws for the judiciary as a whole.²⁰ It acts as a court which reviews matters coming from the lower courts based on the utilisation of regular and extraordinary remedies by authorised parties, while also acting as a third instance court when this is specifically foreseen by law.²¹

The analysis of the case-law of the Supreme Court reveals that this court rarely makes any reference to the Convention and/or the ECtHR case-law. According to the data provided in the official case-law database of the Supreme Court, less than 5% (approximately) of its decisions contain a reference to the ECHR or to the Strasbourg Court's jurisprudence.²² In clearly inadmissible cases there is usually no such reference at all because applicable national legislation seems to suffice to reach a conclusion and the stance of the Supreme Court does not need to be supported through case-law examples from the Strasbourg Court. There are a few inadmissible cases, however, in which the Supreme Court considered that relying on the ECtHR case-law was necessary. Such examples may be found in a few cases related to abuse of the right to petition,²³ payment of taxes,²⁴ reopening of proceedings,²⁵ deprivation of lib-

²⁰ Article 124 of the Constitution

²¹ Article 24 of the Law on Courts.

²² For an overview of all cases of the Supreme Court published online, see the official database <Odluke (sudovi.me)>. There are around 35,826 decisions of the Supreme Court published in the official case-law database. From that number, only 308 decisions have the name "European Court" [*Evropski sud*] in their content. This means that only around 0.85%, less than 1%, of the decisions of the Supreme Court quote the ECtHR case-law. These results are to be taken only as a general reference showing a trend of citations by the Supreme Court.

²³ Supreme Court of Montenegro, Decision no. Tpz122020, 10 July 2020, citing, ECtHR, *Bogićević-Ristić v. Serbia*, no. 50586/07, Decision (2018), § 26.

²⁴ Supreme Court of Montenegro, Decision no. Tpz61/2019, 9 December 2019, citing ECtHR, *Ferrazzini v. Italy* [GC], no. 44759/98, Judgment (2001), § 9.

²⁵ Supreme Court of Montenegro, Decision no. Tpz13/2018, 14 March 2018, citing ECtHR, *Ptičar v. Croatia*, no. 24088/07, Decision (2011).

erty,²⁶ right to a fair and impartial trial,²⁷ freedom of expression and private life,²⁸ parental rights,²⁹ and enjoyment of property.³⁰ In these cases the references are often brief (at times incomplete and inaccurate) and without extensive elaboration.

On the other hand, the analysis also shows that the Supreme Court relies, more and more with each year, on the ECtHR's case-law in cases of a greater level of difficulty and when it needs to base its decisions on complicated legal arguments that may not easily be construed from the materials available at the domestic level. Even after taking this into account, it cannot be said that the level of application of Convention standards by the Supreme Court is at an advanced level, especially considering that it is the highest regular court in Montenegro. A substantial increase in the utilisation of Convention standards, both numerically and in terms of quality, is called for.

Having said that, it must also be noted that even the limited Convention related jurisprudence of the Supreme Court offers some good examples of Convention application that merit appreciation and recognition. For instance, the case-law of the ECtHR is referred to in several decisions of the Supreme Court which aim to ensure uniform application of laws in the whole judiciary. In a swift follow-up to the violation of Article 1 of Protocol No. 1 found in the *Nešić* case in respect of Montenegro in 2020,³¹ the Supreme Court rendered a decision to ensure uniform application of the Law on Goods of the Sea in compliance with the findings by the Strasbourg Court.³² The Supreme Court provided an extensive analysis of the reasons as to why the ECtHR had found a violation and then went on to issue a legal stance on how the applicable legislation in

²⁶ Supreme Court of Montenegro, Decision no. Kr.227/2016, 21 November 2016, citing ECtHR, *Letellier v. France*, no. 12369/86, Judgment (1991).

²⁷ Supreme Court of Montenegro, Decision no. Kž-III/2015, 22 September 2015, citing ECtHR "*Lj. K. v. Croatia*", a case which cannot be found on HUDOC due to the limited reference provided by the Supreme Court of Montenegro.

²⁸ Supreme Court of Montenegro, Decision no. Rev718/2016, 23 November 2016, citing ECtHR, *Paturel v. France*, no. 54968/00, Judgment (2005), § 30 in respect of Article 8 ECHR; and ECtHR, *Handyside v. the United Kingdom* [Plenary], no. 5493/72, Judgment (1976) § 46 in respect of Article 10 ECHR.

²⁹ Supreme Court of Montenegro, Decision no. Rev1031/2020, of 16 February 2021, citing ECtHR, *Sahin v. Germany* [GC], no. 30943/96, Judgment (just satisfaction) (2003), § 66.

³⁰ Supreme Court of Montenegro, Decision no. Rev333/2020, 17 March 2021, citing ECtHR, *Iatridis v. Greece* [GC], no. 31107/96, Judgment (2000), § 58.

³¹ ECtHR, *Nešić v. Montenegro*, no. 12131/18, Judgment (2020).

³² Supreme Court of Montenegro, Decision on Legal Stance no. SUIbr.343-2/20, 15 December 2020, pages 1, 5-9.

Montenegro should be interpreted in order to be in line with the legal stance stipulated by the Strasbourg Court.³³ Some other decisions rendered for the unification of judicial practice were issued in respect of the right to property,³⁴ guilty plea decisions,³⁵ the obligation to assess, *ex officio*, reasons for continuation of pre-trial detention,³⁶ and the presumption of innocence.³⁷ While in some other cases only the Convention is referred to,³⁸ in the majority of the decisions rendered with a view to unifying the domestic judicial practice, there is no reference at all to either the Convention or the Court's case-law.³⁹ Evidently, in the majority of such cases there is relevant case-law that could be utilised as a means of supporting and strengthening the argumentation of the Supreme Court.

It is also worthy of note that in numerous cases related to fair and impartial trial within a reasonable time, the Supreme Court has used standard Convention principles to argue its stance and accord compensation of pecuniary damages to the applicants, based on the applicable legislation.⁴⁰ Additionally, the Supreme Court has made use of Convention principles with respect to various articles in order to overturn decisions of other regular courts and send them for trial *de novo*. Such examples may be seen mostly in the domain of Article 6,⁴¹ namely

³³ *Ibid.*, pages 9-10.

³⁴ Supreme Court of Montenegro, Decision on Legal Stance no. SUibr.198-3/19, 16 October 2019, pages 3-4.

³⁵ Supreme Court of Montenegro, Decision on Legal Stance no. Su.Vibr.64/17, 10 July 2017, pages 3-8.

³⁶ Supreme Court of Montenegro, Decision on Legal Stance no. Su.V.br.7/17, 17 January 2017, pages 2-3.

³⁷ Supreme Court of Montenegro, Decision on Legal Stance no. Su.V.br.6/17, 17 January 2017, pages 2-4.

³⁸ Supreme Court of Montenegro, Decision on Legal Stance no. Su.I.br.166-6/16, 10 June 2016 where Article 6 is briefly referred to.

³⁹ For a general overview of all Decisions on Legal Stance, see the official website of the Supreme Court where these decisions are published <Načelni pravni stavovi (sudovi.me)> (accessed 6 January 2022).

⁴⁰ Supreme Court of Montenegro, Judgment no. Tpz22/2019, 21 June 2019, citing, *inter alia*, ECtHR, *Napijalo v. Croatia*, no. 66485/01, Judgment (2003), § 61, and ECtHR, *Camasso v. Croatia*, no. 15733/02, Judgment (2005), § 32, etc; Supreme Court of Montenegro, Judgment no. Tpz34/2019, 14 September 2019, citing ECtHR, *Arčon and Others v. Montenegro*, no. 15495/10, Judgment (2018), § 16; Supreme Court of Montenegro, Decision no. Tpz50/2018, 17 November 2018, citing ECtHR, *Matović v. Serbia*, no. 33104/16, Decision (2018).

⁴¹ Supreme Court of Montenegro, Judgment no. UžKžSI.br.1/2019, 4 December 2019, §§ 46.2, 48, 77, 77.1, 77.2. It should be noted that this Judgment was made after the Constitutional Court of Montenegro rendered a previous Judgment of the Supreme Court as incompatible with the Constitution.

cases related to the rights of the accused,⁴² access to court,⁴³ etc. A few examples may also be observed with respect to other articles of the Convention, namely Article 1 Protocol No. 1 cases related to compensation for property deprivation,⁴⁴ Article 5 cases related to the extension of pre-trial detention,⁴⁵ etc.

What is interesting to note is that even in cases where a violation is found, the length of reasoning of a Supreme Court decision almost never exceeds 2-3 pages. Only exceptionally is the reasoning longer. This probably has a great deal to do with how busy the Supreme Court is and the fact that it does not have sufficient time or resources to engage in detailed analysis of Convention standards and principles generated by the Strasbourg Court. It is also interesting to note that even in cases when the Supreme Court relies on the Convention and the ECtHR's case-law to support its conclusion, it never declares a violation of the Convention directly. The violation is always based on a specific provision of the domestic legislation. In contrast, this is not the case with the Constitutional Court which is greatly inclined to declare a violation of the Convention in conjunction with the sister provision of the Constitution while using lengthy quotations and crucial reliance on Convention standards, as will be demonstrated below.

Overall, the examples and analysis provided in this part of the chapter have shown that the Supreme Court has not been particularly inclined to rely on the case-law of the ECtHR in its decisions, although recently the practice of utilisation of such standards has started to ameliorate. This is a good first sign but the Supreme Court should continue to advance its know-how and utilisation of Convention standards considering its role and impact in the judicial system in Montenegro. Being at an early stage of utilisation of Convention principles, there is still ample room for the Supreme Court to move forward in this direction and become a better 'filterer' of Convention violations.

⁴² Supreme Court of Montenegro, Judgment no. Kzz2/2018, 6 February 2018, citing ECtHR, *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, Judgment (2011), § 131.

⁴³ Supreme Court of Montenegro, Decision no. Rev959/2017, 22 November 2017, citing ECtHR, *H. v. France*, no. 10073/82, Judgment (1989), § 47.

⁴⁴ Supreme Court of Montenegro, Decision no. Rev1352/2017, 22 November 2017, citing ECtHR, *H. v. France*, no. 10073/82, Judgment (1989), § 47; Supreme Court of Montenegro, Decision no. UŽRev15/2020, 17 March 2021, citing ECtHR, *Perić v. Croatia*, no. 34499/06, Judgment (2008).

⁴⁵ Supreme Court of Montenegro, Decision no. Kr.5/2020, 24 January 2020, citing, ECtHR, *Šuput v. Croatia*, no. 49905/07, Judgment (2011), § 108.

1.2. Constitutional Court

As previously indicated, the Constitutional Court stands outside the regular judicial system and has specific jurisdictional competences. For the purposes of this study, the two most important of these competences that merit extensive elaboration are (i) the competence to review the conformity of laws not just with the Constitution but also with the ECHR; and (ii) the mechanism of individual constitutional appeal as a direct-access remedy available to applicants claiming violations of their human rights and liberties guaranteed by the ECHR and the Constitution.⁴⁶ The Constitutional Court has other important competences as well,⁴⁷ but these two are particularly important for the embeddedness of the Convention at the domestic level.

The first competence, namely the review of the conformity of laws with the Constitution and the ECHR, may be exercised by various authorised parties such as the courts through incidental control procedures, individuals, organisations, other State authorities including local governments and members of parliament. A number of particularly interesting cases have emerged from this competence and it is significant to note that when reviewing the constitutionality of a piece of legislation, the Constitutional Court relies heavily on the jurisprudence of the Strasbourg Court. Moreover, there are many occasions where it specifically finds that the legislation it reviews is in contradiction with the Convention, as the following examples will show.

The most interesting example is the case of mothers being compensated for the birth of their children (if certain conditions were met), which was ultimately found to be discriminatory against other mothers who were not in the same position as those who were eligible for compensation according to the national legislation in force at the time.⁴⁸ In this particular case, the Constitutional Court reviewed the constitutionality and conventionality of the Law on Child Social Protection and found that two provisions of this law contradicted Article 14 and Article 1 of Protocol No. 12 of the Convention. In a succinct description that risks oversimplifying a rather difficult case, the violation was found because the right to lifetime compensation for mothers who gave birth was recognised only for mothers who gave birth to four children, had 15 years of working experience and who were more than 35 years old as well as those who gave birth to three children, had 25 years of working ex-

⁴⁶ Article 149 of the Constitution.

⁴⁷ For a full list of competences of the Constitutional Court, see Part Six of the Constitution.

⁴⁸ Constitutional Court of Montenegro, Decision no. 6/16, 19 April 2017.

perience and who were more than 45 years old. This compensation scheme was considered to be unconstitutional because it was discriminatory against mothers in different circumstances and was therefore not in the best interests of all mothers and children.⁴⁹ The case was of a complex nature and it has had significant ramifications for many individuals. The Constitutional Court provided an extensive and elaborate reasoning of the Convention principles on the issue of discrimination by using relevant case-law from the jurisprudence of the ECtHR. Following this analysis, the Constitutional Court ordered the Government of Montenegro to implement the decision of the Constitutional Court, in the name of “general measures”, by sending to the parliament a draft law aimed at executing this decision.⁵⁰ As a result, these important Convention related discrimination issues were dealt with domestically by the authorities in Montenegro without the need for the involvement of the Strasbourg Court. This is a good example of how the highest national courts should act in order to be ‘first’ and ‘last’ ‘line defenders’ of Convention protection at the domestic level.

There is another interesting example deriving from the competence of review of legislation. Following a referral from five parliamentarians to review the constitutionality and ‘conventionality’ of the Law on Execution and Security, the Constitutional Court of Montenegro declared that the impugned provisions were not in compliance with Article 1 of Protocol No. 1.⁵¹ In its reasoning, the Constitutional Court relied extensively and comprehensively on the ECtHR’s case-law in order to explain the meaning of “prescribed by law”,⁵² “lawfulness”,⁵³ and “foreseeability of the law”⁵⁴ as well as the concept of “balancing the general interest with that of an individual”.⁵⁵ After quoting verbatim the relevant general principles deriving from the Court’s case-law, the Constitutional Court analysed these findings and linked them with the facts of the case and the legal arguments raised by the applicants. Such an in-depth analysis makes it very clear to the reader why this specific case-law was quoted and how it connects with the case at hand. At the end of its analysis, the Consti-

⁴⁹ Ibid., § 7.6.

⁵⁰ Ibid., points I, II, III and the operative part of the judgment.

⁵¹ Constitutional Court of Montenegro, Decision no. U-I-br.22/15, 4 June 2015.

⁵² Ibid., § 49 citing ECtHR, *The Sunday Times (no. 1) v. the United Kingdom* [Plenary], no. 6538/74, Judgment (1979).

⁵³ Ibid., § 68 citing ECtHR, *Malone v. United Kingdom* [Plenary], no. 8691/79, Judgment (1984).

⁵⁴ Ibid., § 141 citing ECtHR, *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, Judgment (2012).

⁵⁵ Ibid., §§ 55 and 58 citing ECtHR, *Iatridis v. Greece* [GC], Decision no. 31107/96, Judgment (2000).

tutional Court found a violation of Articles 24 and 58.2 of the Constitution in conjunction with Article 1 of Protocol No.1 to the ECHR and ordered the repeal of the impugned provisions of the national legislation.⁵⁶ Such examples of qualitative reasoning in respect of Convention principles are not an isolated example in the jurisprudence of the Constitutional Court of Montenegro.⁵⁷ The analysis of this study shows that a similar approach with the same form of in-depth analysis of ECHR provisions and ECtHR case-law has been applied in many other cases where the constitutionality and/or the conventionality of a national legal provision had been contested before the Constitutional Court, either by parliamentarians or other authorised parties.⁵⁸

Even in cases in which the Constitutional Court rejects as inadmissible a request for review of legislation based on different rationales, its reasoning is still based on the ECtHR case-law that is considered relevant to explain why

⁵⁶ See e.g. the operative part in Constitutional Court of Montenegro, Decision no. U-I-br.22/15, 4 June 2015, page 11.

⁵⁷ See e.g. Constitutional Court of Montenegro, Decision no. U-I.br.5/13, 31 October 2017, declaring a provision of the Criminal Procedure Code as incompatible with Article 8 § 2 of the ECHR as well as Article 42 § 2 of the Constitution because telephone tapping/bugging may be done only following a decision of the court. For this specific case, the Constitutional Court made extensive reference to the jurisprudence of the Strasbourg Court, namely, ECtHR, *Rotaru v. Romania*, no. 28341/95 Judgment (2000), §§ 47 and 59; ECtHR, *Beian v. Romania (no. 1)*, no. 30658/05, Judgment (2007), § 39; ECtHR, *Silver and Others v. the United Kingdom*, nos. 5947/72 and 6 others, Judgment (1983); ECtHR, *Klass and Others v. Germany* [Plenary], no. 5029/71, Judgment (1978), § 41; ECtHR, *Malone v. the United Kingdom* [Plenary], no. 8691/79, Judgment (1984), §§ 64 and 67; ECtHR, *Dragojević v. Croatia*, no. 68955/11, Judgment (2015), §§ 78-81.

⁵⁸ See e.g. Constitutional Court of Montenegro, Decision nos. U-I.br.11/13 and U-I.br.30/15, 21 April 2017, where the Constitutional Court reviewed the Law on the Prevention of Illegal Business and where it cited ECtHR, *AGOSI v. the United Kingdom*, no. 9118/80, Judgment (1986), § 52 in order to show that the State has a wide margin of appreciation in matters of economic policy; ECtHR, *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, no. 15375/89, Judgment (1995), § 59 for issues related to confiscation of inheritance; ECtHR, *Špaček s.r.o. v. the Czech Republic*, no. 26449/95, Judgment (1999), § 41 for issues related to tax evasion; and ECtHR, *Ferrazzini v. Italy* [GC], no. 44759/98, Judgment (2001), § 29 to stipulate that obligations stemming from tax legislation are part of normal civic duty in a democratic society. See, in this context, other decisions of the Constitutional Court employing a similar strategy towards reasoning based on ECHR principles and ECtHR case-law: Decision no. U-I-br.29/15, 24 February 2017, concerning the constitutional review of the Law on Civil Procedure – citing extensively the ECtHR case-law on Article 6 with respect to the right to a reasoned decision, pages 1, 3 and 5-7; Decision no. U-I.br.28/15, 24 February 2016, concerning the constitutional review of the Law on Misdemeanors – citing extensively the ECtHR case-law on Article 1, Protocol No. 1, pages 3-5.

the case is to be declared inadmissible.⁵⁹ For instance, in a case where the applicants contested the constitutionality of the Procurement Law, the Constitutional Court used Article 13 of the Convention and the case-law of the Strasbourg Court related to that article in order to explain why the remedies provided by this law were Convention compliant.⁶⁰ There are cases in which the Constitutional Court refers to Convention articles and the stance of the Strasbourg Court only in abstract terms without quoting any relevant case-law.⁶¹ Such cases are, however, very rare.

The second competence, namely the individual constitutional appeal, may be exercised by any individual or legal entity, organisation, community, group of persons or other kind of organisation which does not have the status of a legal entity, if they believe that their human rights have been violated by “an individual act, action or inaction of State authorities”.⁶² Such a complaint may be filed only after the exhaustion of other available remedies, i.e. after the applicant has made use of all regular and extraordinary legal remedies that may address the merits of the complaint. An applicant need not exhaust a legal remedy which is not effective or has not been effective in the past,⁶³ making this an exception to the general rule of exhaustion. If a violation of rights and freedoms is found, the applicant is entitled to just satisfaction.⁶⁴

There are some remarkable examples where the Constitutional Court used the case-law of the ECtHR to support its reasoning for declaring a violation of the Convention. For instance, in an Article 5 case related to pre-detention trial,

⁵⁹ See e.g. Constitutional Court of Montenegro, Decision nos. U-I-br.47/14 and U-I-br.10/15, 30 January 2018, pages 4-9.

⁶⁰ See e.g. Constitutional Court of Montenegro, Decision no. U-I-br.38/15, 25 December 2015, citing ECtHR, *Kudła v. Poland* [GC], no. 30210/96, Judgment (2000), § 157; ECtHR, *Lukenda v. Slovenia*, no. 23032/02, Judgment (2005), § 67; ECtHR, *Ališić and Others v. Bosnia and Hercegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, Judgment (2014), § 131 in order to explain the duty of Montenegro in respect of setting up effective legal remedies by law – see point 7.7 on page 7; ECtHR, *Prince Hans-Adam II of Lichtenstein v. Germany* [GC], no. 42527/98, Judgment (2001), in order to show that the State has a margin of appreciation in the way in which it decides to set up national remedies.

⁶¹ Constitutional Court of Montenegro, Decision no. U-I-br.37/14, 29 December 2016, where Article 14 and Article 1 of Protocol No. 12 to the ECHR are mentioned but no case-law of the ECtHR is referred to; the Constitutional Court does, however, explain the Strasbourg stance on discrimination in its own words.

⁶² See Article 68 of the Law on the Constitutional Court of Montenegro 2015 which repealed the Constitutional Court Act of 2008.

⁶³ *Ibid.*

⁶⁴ For more information on this, see the Law on Courts.

the Constitutional Court made at least 18 direct and relevant references to the ECtHR case-law to support its reasoning on finding a violation of the Article in question.⁶⁵ In particular, the Constitutional Court relied on tests used by the Strasbourg Court to confirm the stance that pre-trial detention cannot be turned into a penalty for an accused person who is still presumed innocent and, moreover, each continuation of pre-trial detention must be based on well-founded reasons as to why other means of securing the defendant were not sufficient.⁶⁶ The same quality of Convention reasoning may be seen in other Article 5 cases.⁶⁷ In another case related to Article 10, the Constitutional Court referred extensively to the general principles established by the Strasbourg Court when quashing a decision of the Supreme Court for breach of the applicant's right to freedom of expression.⁶⁸ The Constitutional Court used this case-law to explain why ordering the applicant, a journalist, to pay large amounts of money as compensation for reputational damages was not necessary in a democratic society, even if the interference was prescribed by law and pursued a legitimate aim.⁶⁹ The theme of high level of corruption in the public sphere covered by the applicant was considered to be a matter of significant public interest and therefore protected by the right of freedom of expression. Several other violations found under Article 10 of the Convention demonstrate the high level of expertise in Convention application that the Constitutional Court has achieved in this area of law.⁷⁰ In practical terms, this means that the Constitutional Court has become a very good domestic filter of

⁶⁵ See e.g. Constitutional Court of Montenegro, Decision no. U-III-br.1037/20, 16 October 2020, page 3 and §§ 5, 5.2, 5.4, 5.9, 5.10, 6.1, 6.2, 6.3, and 6.5 where specific decisions of the ECtHR in relation to Article 5 are cited.

⁶⁶ *Ibid.*, § 6.3.

⁶⁷ See, *inter alia*, other cases where a violation of Article 5 was found: Constitutional Court of Montenegro, Decision no. U-III-br.348/20, 6 April 2020, §§ 4.1, 5.2, 5.3 and 7.2; Constitutional Court of Montenegro, Decision no. U-III-br.615/20, 18 June 2020, § 4.3.

⁶⁸ Constitutional Court of Montenegro, Decision no. U-III-br.785/16, 2 December 2016, §§ 7-13, where specific §§ of various decision of the ECtHR on Article 10 are cited. In this case, even the Supreme Court of Montenegro and the applicant had made extensive references to Article 10 cases deriving from the ECtHR case-law.

⁶⁹ *Ibid.*, § 12.

⁷⁰ *Ibid.* See also other cases of the Constitutional Court of Montenegro where a violation of Article 10 has been found: Constitutional Court of Montenegro, Decision no. U-III-br.785/16, 27 February 2020; Constitutional Court of Montenegro, Decision no. Už-III-br.823/15, 27 November 2017; Constitutional Court of Montenegro, Decision no. Už-III-br.180/15, 27 February 2010; Constitutional Court of Montenegro, Decision no. Už-III-br.752/14, 30 January 2018; Constitutional Court of Montenegro, Decision no. Už-III-br.743/14, 18 November 2016; and Constitutional Court of Montenegro, Decision no. Už-III-br.89/13, 29 December 2016.

applications before they reach the Strasbourg Court – which is a crucial element for the successful implementation of the subsidiarity principle. As far as other articles of the Convention are concerned, the Constitutional Court has not yet found any violation of Articles 2, 3, 4, 7, 9, 11, and other Protocols but it has used Convention principles prescribed in the Court's case-law to find violations of Article 6,⁷¹ Article 3 of Protocol No. 1⁷² and Article 1 of Protocol No.1.⁷³

It is important to note that an extremely high percentage of constitutional appeals filed before the Constitutional Court are declared inadmissible, either on procedural grounds or after reviewing the merits of the complaint. Most of them fall under the domain of Article 6. However, even in inadmissible cases, the Constitutional Court tends to quote the case-law of the Strasbourg Court. For example, relevant and important ECtHR references may be found in many inadmissible cases related to the right to a fair trial,⁷⁴ freedom of movement,⁷⁵ discrimination,⁷⁶ property matters,⁷⁷ effective legal remedies,⁷⁸ social rights,⁷⁹ freedom of expression,⁸⁰ etc. There are also a handful of cases where no reference to the ECtHR case-law is made when declaring a constitutional appeal as ungrounded.⁸¹

⁷¹ Constitutional Court of Montenegro, Decision no. U-III-br.1624/18, 29 January 2018.

⁷² Constitutional Court of Montenegro, Decision no. U-II-br.46/20, 20 August 2020, page 5 and § 6.2.

⁷³ Constitutional Court of Montenegro, Decision no. UŽ-III.br.828/15, 27 December 2017, page 6.

⁷⁴ Constitutional Court of Montenegro, Decision no. U-III-br.81/16, 18 March 2016, page 4; Constitutional Court of Montenegro, Decision no. U-III-br.815/16, 15 December 2016, page 5; Constitutional Court of Montenegro, Decision no. U-III-br.791/16, 5 December 2016.

⁷⁵ Constitutional Court of Montenegro, Decision no. U-III-br.337/18, 30 March 2018, pages 1-2.

⁷⁶ Constitutional Court of Montenegro, Decision no. U-III-br.234/17, 22 March 2017, pages 3-5.

⁷⁷ Constitutional Court of Montenegro, Decision no. U-III-br.240/17, 27 March 2017, page 4.

⁷⁸ Constitutional Court of Montenegro, Decision no. U-III-br.1851/18, 29 October 2018, §§ 3.1, 4.1 and 4.2.

⁷⁹ Constitutional Court of Montenegro, Decision no. U-III-br.1075/18, 11 July 2018, §§ 1.2, 5.3.1, 6.1.

⁸⁰ Constitutional Court of Montenegro, Decision no. U-III-br.857/18, 22 March 2018, page 5, 7 and 8.

⁸¹ See Constitutional Court of Montenegro, Decision no. U-VII.br.2/20, 12 August 2020, where Article 3 of Protocol No. 1 relating to elections is cited but no case-law of the ECtHR.

At the level of the Strasbourg Court, however, it is noteworthy that the constitutional appeal has not always been deemed an effective remedy. In the past, the reason behind its non-effectiveness relied on the wording of the former Constitutional Court Act of 2008 which provided that a constitutional appeal is allowed only against an “individual act” of a public authority which is deemed to violate someone’s rights or freedoms.⁸² This wording did not allow applicants to challenge the inaction and/or omission of State authorities or their failure to act in compliance with the Convention. In this respect, in the case of *Mijušković*, the Court maintained that the constitutional appeal could not be considered an effective legal remedy “in cases of non-enforcement due to there being no ‘individual decision’ against which such an appeal could be filed”.⁸³ The ECtHR continued to maintain the same stance in other cases that followed, particularly because the Government failed to provide any case-law that would prove the contrary, despite its repeated general objections that the constitutional appeal should have been exhausted by applicants.⁸⁴ However, later on, in case of *Siništaj and Others*, following the entry into force of the new Constitutional Court Act of 2015, the ECtHR changed its stance on the effectiveness of the constitutional appeal considering that the new legislation completely changed the legal criteria for this domestic remedy.⁸⁵ In that particular case, the Strasbourg Court maintained that:

The new legislation [Constitutional Court Act of 2015], however, explicitly provides for a possibility of lodging a constitutional appeal in respect of not only a decision but also an action or an omission. In addition, it further provides, *inter alia*, for a possibility of awarding just satisfaction and limits processing of all the cases pending before the Constitutional Court, including upon constitutional appeals, to 18 months at most (...). In view of this the Court is of the opinion that a constitutional appeal in Montenegro can in principle be considered an effective domestic remedy as of 20 March 2015, this being the date when the new legislation entered into force.⁸⁶

⁸² See Article 48 of the Constitutional Court Act of 2008 which was repealed by the new Constitutional Court Act of 2015 <Law on the Constitutional Court of Montenegro.pdf (ustavnisud.me)> (accessed 6 January 2022).

⁸³ ECtHR, *Mijušković v. Montenegro*, no. 49337/07, Judgment (2010), §§ 73-74.

⁸⁴ ECtHR, *Bulatović v. Montenegro*, no. 67320/10, Judgment (2014), § 109, in relation to conditions of detention; ECtHR, *Boucke v. Montenegro*, 26945/06, Judgment (2012), §§ 76-79, in relation to length of proceedings.

⁸⁵ See ECtHR, *Siništaj v. Montenegro*, nos. 1451/10 and 2 others, Judgment (2015). Specifically, see §§ 62-68, where provisions of both Constitutional Court Acts are explained, namely the one from 2008 and also the one from 2015 which repealed the former; and §§ 120-125 in relation to the effectiveness of the constitutional complaint.

⁸⁶ *Ibid.*, § 123.

Therefore, since March 2015, the constitutional appeal has been considered to be an effective legal remedy that ought to be exhausted by prospective applicants wishing to file an application with the Strasbourg Court. This new remedy has generated even more litigation before the Constitutional Court whose record on the application of Convention standards has been further enhanced since the entry into force of the changes to the mechanism of constitutional appeal.⁸⁷

The analysis in this part of the chapter has shown that the Constitutional Court relies heavily on the standards stipulated by the Strasbourg Court by using its case-law intelligently and in a structured manner. The fact that the Constitutional Court cites relevant case-law of the ECtHR, connects it to the case it has to decide, and bases its Convention violations on legal arguments that have already been answered by the Strasbourg Court in similar cases – thus taking care of the *res interpretata* effect of the Court's judgments – is commendable. The analysis has shown that the case-law of the Constitutional Court advanced still further towards a more profound utilisation of Convention standards, following the expansion of the jurisdiction of the Constitutional Court to review not just individual decisions of public authorities but also acts of omission. There are several cases in which the Constitutional Court failed to detect Convention violations at an earlier stage, as will be shown in the part where the Court's case-law against Montenegro is reflected, but the number of such cases is not sufficient to cause concern regarding the effectiveness of the Convention protection machinery. The good news is that the Constitutional Court takes such violations seriously by making efforts to evade them in subsequent cases with a view to redressing those Convention issues domestically.

⁸⁷ Drašković, Dragoljub (2018), 'Constitutional Complaint in Constitutional and Legal System of Montenegro', Speech by the former President of the Constitutional Court of Montenegro: <<https://dergipark.org.tr/tr/download/article-file/939071#:~:text=Constitution of Montenegro from 2007,and liberties of the citizens.>> (accessed 30 December 2021).

2. Supreme Court v. Constitutional Court: ‘Convention talk’

While there is no doubt that all lower courts in Montenegro have an obligation to implement the ECHR directly as well as apply the case-law of the ECtHR in cases before them,⁸⁸ the main actors responsible for leading the way towards

⁸⁸ The record of citing ECtHR case-law varies considerably when comparing data from different regular courts in Montenegro. The trend shows that for difficult types of cases (especially Article 10 cases) and those that require a judgment to be rendered with more extensive reasoning, the regular courts occasionally rely on the jurisprudence of the ECtHR. For illustration purposes, this reference provides some interesting examples deriving from different basic courts in Montenegro with a focus on those citing specific cases from the Strasbourg Court: (1) the Court of Appeal, Decision no. Pž387/2020, 15 April 2021, citing ECtHR, *Almeida Garret, Mascarenhas Falcão and Others v. Portugal*, nos. 29813/96 and 30229/96, Judgment (2000), in a case related to Article 1 of Protocol No. 1; (2) the Basic Court in Podgorica, Decision no. P266/2015, 8 November 2015 citing ECtHR, *Testa v. Croatia*, no. 20877/04, Judgment (2007), in a case related to Article 3; (3) the Administrative Court, Decision no. U2953/2017, 16 January 2018, citing, *inter alia*, ECtHR, *Wieczorek v. Poland*, no. 18176/05, Judgment (2009), in a case related to pensions; (4) the Commercial Court, Decision no. P996/2016, 7 February 2020, citing ECtHR, *Garzičić v. Montenegro*, no. 17931/07, Judgment (2010), in a case related to Article 1 of Protocol No. 1; (5) the High Court in Podgorica, Decision no. Kž296/2020, 13 April 2020, citing ECtHR, *Gradinger v. Austria*, no. 15963/90, Judgment (1995) in a case related to Article 4 of Protocol No. 7 to the ECHR; (6) the High Court in Bijelo Polje, Decision no. Kž191/2020, 22 September 2020, citing *The Sunday Times (no. 1) v. the United Kingdom* [Plenary], no. 6538/74, Judgment (1979), in a case related to Article 10; (7) the Basic Court in Bari, Decision no. P1019/2017, 14 June 2018, citing ECtHR, *Hirvisaari v. Finland*, no. 49684/99, Judgment (2001), in a case related to right to a fair trial under Article 6; (8) the Basic Court in Danilovgrad, Decision no. P397/2016, 6 March 2017, citing ECtHR, *Dalban v. Romania*, no. 28114/95, Judgment (1999), in a case related to Article 10; (9) the Basic Court in Bijelo Polje, Decision no. K33/2020, 9 October 2020, citing ECtHR, *Sandra Janković v. Croatia*, no. 38478/05, Judgment (2009), in a case related to Article 8; (10) the Basic Court in Hercegnovi, Decision no. K86/2018, 27 January 2018, citing ECtHR, *Ajdarić v. Croatia*, no. 20883/09, Judgment (2011), in a case related to the presumption of innocence under Article 6; (11) the Basic Court in Kolašin, Decision no. P426/2017, 9 March 2018, citing ECtHR, *Vujisić and Others v. Montenegro*, nos. 17412/07 and 18 others, Decision (2013), in an Article 6 case; (12) the Basic Court in Kotor, Decision no. 245/2018, 14 March 2019, citing ECtHR, *Maresti v. Croatia*, no. 55759/07, Judgment (2009), in a case related to Article 6 (criminal limb); (13) the Basic Court in Nikšić, Decision no. P1685/2015, 19 January 2017, citing ECtHR, *Andreas Wabl v. Austria*, no. 24773/94, Judgment (2000), in a case related to Article 10; (14) the Basic Court in Plava, Decision no. P633/2018, 16 May 2019, citing ECtHREctHR, *Hirvisaari v. Finland*, no. 49684/99, Judgment (2001), in a case related to the right to a reasoned decision under Article 6; (15) the Basic Court in Pjevljime, Decision no. P472/2018, 20 March 2019, citing, *inter alia*, ECtHR, *Šabanović v. Montenegro and Serbia*, no. 5995/06, Judgment (2011), in a case related to Article 10. [It should be noted that some regular courts in Montenegro, such as the Basic Court in Žabljak, the Misdemeanor Court in Bijelo Polje, the Mis-

an improved record of Convention application at the domestic level remain the Supreme Court and the Constitutional Court.⁸⁹

According to Vučinić, a former ECtHR judge in respect of Montenegro, “the domestic implementation of standards developed by the [Strasbourg] Court, is slowly starting to be accomplished”.⁹⁰ He refers to some concrete examples which show how the Supreme Court and the Constitutional Court have (mis)applied the ECtHR case-law in important cases before them.⁹¹ He takes a well-known example from the area of freedom of expression which has had an immense impact in Montenegro on how courts view and use Article 10 tests in specific cases before them.

The aforementioned case reflects the most profound ‘Convention talk’ between the two highest courts considering the fame of the protagonists which raised the stakes of the case. Mr Andrej Nikolaidis, the applicant, was a well-known journalist and novelist who had written an article entitled “The Devil’s Apprentice” in which he harshly criticised a famous film director, Mr Emir Kosturica, for his relationship with the Serbian nationalist regime and his views on Yugoslav wars and atrocities committed by war criminals in Bosnia and Herzegovina.⁹² The applicant described the film director as “bad, ugly and stupid” among other harsh characterisations he used to describe his personality. The High Court and the Supreme Court of Montenegro, in contradiction to the opinion of the Basic Court in Podgorica which had ruled in favour of Mr Nikolaidis, considered this as

demeanor Court in Budva and the Misdemeanor Court in Podgorica have never made a reference to an ECtHR decision or at least there is no such reference published on the official website where all other court decisions are published <www.sudovi.me/sdvi/od-luke> (accessed 27 August 2021). It should also be noted that in the decisions of some basic courts, such as the Basic Court in Rožaje, Decision no. P857/2015, 17 October 2016, the Basic Court in Ulcinj, Decision no. PI25/2017, 14 November 2017, the High Misdemeanor Court, Decision no. PŽP233/2018, 23 March 2018, and the High Misdemeanor Court, Decision no. PŽP824/2020, 6 May 2020, these being their only cases ever citing the ECtHR, they do not refer to any specific case-law but just generally paraphrase the ECtHR’s stance on a given Convention right.

⁸⁹ The official case-law database where all of the decisions of all of the courts in Montenegro are published shows that the Supreme Court has a very significant lead over the regular courts in terms of the number of ECtHR cases quoted ECtHR. The Constitutional Court has a special database which is separate from that of the regular courts where an increasing trend of ECtHR reliance might be noticed. The regular courts also quote ECtHR cases but at a much lower rate than the Supreme Court and the Constitutional Court. For details, see the databases of the regular courts <www.sudovi.me/sdvi/odluke> and the database of the Constitutional Court <Ustavni Sud Crne Gore>.

⁹⁰ Vučinić (2016), 289.

⁹¹ *Ibid.*, 289-304.

⁹² Constitutional Court of Montenegro, Decision Už-III.no. 87/09, 19 January 2012.

defamation which had severely insulted the honour and reputation of Mr Kosturica and ordered the applicant to pay EUR 12,000 in damages. The Constitutional Court did not agree with the proportionality test performed by the Supreme Court in this case and found a violation of Article 10.⁹³ Throughout its reasoning, the Constitutional Court relied on numerous ECtHR cases to outline, quite clearly, the Strasbourg test for Article 10 allegations before concluding that the interference with Mr Nikolaidis' right to freedom of expression was not necessary in a democratic society and that therefore the Supreme Court had erred in applying the Convention standards. In his academic work in relation to this case, former ECtHR judge Vučinić is critical of the High Court and the Supreme Court stance in quashing a perfectly Convention compliant decision of the Basic Court in Podgorica in respect of Article 10, a mistake which then was fixed by the Constitutional Court.⁹⁴ His critique in this regard revolves around the fact that the lower courts were discouraged from applying Convention standards by the higher courts which instead should have encouraged them to do so.⁹⁵ The Constitutional Court, he maintains, applied "properly and completely" for the first time "the test developed in the Court's case-law for assessing whether the interference with the respondent's freedom of expression could be considered justified under Article 10.2 of the Convention".⁹⁶ This influence on the national case-law has been hailed as the most significant influence because, in a relatively short period following the entry into force of the Convention, "the domestic courts have started to apply those very sophisticated standards".⁹⁷ In fact, the analysis made by this study attests to a rise in the quality of reasoning on the part of the Montenegrin courts when it comes to freedom of expression cases and this seems to be the result of a few high-profile cases in relation to this particular Convention right. What is commendable here is the reactivity of the domestic courts to start using such Convention standards in the subsequent cases which related to freedom of expression – which is exactly how such standards are to be utilised at the domestic level.

⁹³ Ibid. See, especially the ECtHR cases cited by the Constitutional Court: ECtHR, *Barberà, Messegué and Jabardo v. Spain*, nos. 10588/83 and 2 others, Judgment (1988), § 68; ECtHR, *Tolstoy Miloslavski v. the United Kingdom*, no. 18139/91, Judgment (1995); ECtHR, *Handyside v. the United Kingdom* [Plenary], no. 5493/72, Judgment (1976); ECtHR, *Castells v. Spain*, no. 11798/85, Judgment (1992); ECtHR, *Dalban v. Romania*, no. 28114/95, Judgment (1999), § 50; and ECtHR, *Hrico v. Slovakia*, no. 49418/99, Judgment (2004), § 40.

⁹⁴ See Constitutional Court of Montenegro, Decision no. UŽ-III-br.87/09, 19 January 2012.

⁹⁵ Vučinić (2016), 299.

⁹⁶ Ibid., 300.

⁹⁷ Ibid.

Instances in which the Constitutional Court renders a decision of the Supreme Court as Convention non-compliant are more of an exception than a rule. In fact, the vast amount of cases that reach the docket of the Constitutional Court with allegations of a Convention violation on the part of the Supreme Court end up being rejected as inadmissible on procedural grounds or manifestly ill-founded. In such cases, the ‘Convention talk’ between the two courts is not inexistent but it not highly interesting *per se*. The signs of more profound ‘Convention talk’ between the two courts is seen in cases where the Constitutional Court finds a violation on the part of the Supreme Court and sends the case for a fresh review before the Supreme Court. There are over a hundred cases which have been returned to the Supreme Court for retrial.⁹⁸ A particularly significant example will be used to illustrate this exchange.⁹⁹ It has to do with a case in which the Constitutional Court quashed two separate decisions of the Supreme Court for the same violation, namely its failure to provide the applicant with a “reasoned decision” that would be in line with Article 6 of the Convention. It is also a case where the Supreme Court reached the same decision for a third time, offering almost identical reasons, despite numerous remarks that it received from the Constitutional Court. Due to this situation, which resembled a game of ping-pong, the proceedings lasted several years because of the legal battle between the highest courts. The case related to a mortgage issue. Initially, in 2013, the Supreme Court rejected the applicant’s request for revision as ungrounded,¹⁰⁰ with less than a page of reasoning and without any reference to Convention principles or other arguments that would render its decision compliant with the obligation to sufficiently reason a decision. In 2017, the Constitutional Court, relying on several ECtHR cases,¹⁰¹ rightfully rejected this poorly reasoned decision and as a result found a violation of Article 6 on the ground that the Supreme Court had failed to reason its decision on crucial arguments raised by the applicant and the case itself.¹⁰² In particular, the Constitutional Court found that the Supreme Court did not, in any part of its decision, refer to any evidence, argument or proof that would show how it had reached such a decision.¹⁰³ In the first retrial, the Supreme Court again rejected the applicant’s request for revision by explaining the stance of the Constitutional Court but then arguing, in substance,

⁹⁸ See the Supreme Court’s database where all decisions are published <Odluke (sudovi.me)>.

⁹⁹ Constitutional Court of Montenegro, Decision no. Už-IIIbr.50/14, 31 March 2017.

¹⁰⁰ Supreme Court of Montenegro, Judgment no. Rev1046/2013, 12 November 2013.

¹⁰¹ *Ibid.*, §§ 6–8 for the case cited by the Constitutional Court, namely ECtHR, *Ajdarić v. Croatia*, no. 20883/09, Judgment (2011), § 13.

¹⁰² Constitutional Court of Montenegro, Decision no. Už-IIIbr.50/14, 31 March 2017.

¹⁰³ *Ibid.*, § 8.3.3.

that its opinion on the subject matter had not changed.¹⁰⁴ Considering that the Constitutional Court cannot oblige other judges to decide one way or another, this exchange would be perfectly normal if the Supreme Court were to fulfil its Convention duty to reason its decision sufficiently on the second try. However, the Supreme Court was again, for the second time on the same matter, found in breach of the obligation to reason its decision in accordance with Article 6 guarantees.¹⁰⁵ In 2021, in its second retrial, in other words, its third time deciding the same case, the Supreme Court once again rejected the applicant's request for revision as unfounded. The reasoning provided by the Supreme Court in its third attempt again extends to a mere two pages with no references to the Strasbourg Court at all – despite the fact that the Constitutional Court had referred to many cases which the Supreme Court could easily have used to strengthen its apparently strong stance on the matter. It remains to be seen whether the applicant will seek the avenue of constitutional complaint for the third time before the Constitutional Court and whether the latter will be satisfied this time with the limited reasoning provided by the Supreme Court.

This particular case is relevant when describing the 'Convention talk' between these two courts for three main reasons. Firstly, it clearly shows that the talk is mostly one-sided, with the Constitutional Court struggling to feed Convention know-how to the Supreme Court and the latter being resistant to accepting such principles. Secondly, it also shows the difference in utilisation of Convention principles by both courts, with the Supreme Court being far less inclined to rely on such principles than the Constitutional Court. Lastly, it shows that more efforts are needed to achieve an advanced domestication and utilisation of the Convention standards at the level of the Supreme Court and its subordinate courts. It is beyond the scope of this study to analyse the reasons for this occurrence but this study can at least stand firmly behind these observations, after conducting a thorough analysis of the case-law of both courts.

¹⁰⁴ Supreme Court of Montenegro, Judgement no. Rev.br.12/17, 8 November 2017.

¹⁰⁵ Constitutional Court of Montenegro, Decision no. U-III-br.371/18, 9 December 2020.

IV. Montenegro v. the Strasbourg Court: Impact and Effects

1. Overview of the Court's Case-Law against Montenegro

Montenegro is the youngest member of the Court. The first judgment against Montenegro (as an independent state) was rendered in 2010,¹⁰⁶ while few other judgments were rendered when it was still part of the Union with Serbia.¹⁰⁷ To date, 68 judgments have been delivered, with no Grand Chamber case yet in respect of Montenegro. The vast majority of violations have been found under the domain of Article 6 but there are a few violations under other provisions of the Convention, namely Articles 2, 3, 5, 6, 8, 10, 13, 14 and Article 1 of Protocol No. 1 to the ECHR. As far as general measures are concerned, in contrast to most of the Western Balkan States that are supervised by the Strasbourg Court, there is no case in which measures of a general or individual character were required to be taken by Montenegro.¹⁰⁸ Such data shows that the Strasbourg Court has not identified any systemic issues in respect of Montenegro to date and that cases where violations were found concerned the circumstances of that particular individual case. Considering the lack of general measures cases against Montenegro and therefore the lack of any systemic flaw that needs to be discussed, the next part will reflect an in-depth examination of the most important cases against Montenegro and their meaning for the embeddedness of the Convention in the domestic legal system. In the absence of any Article 46 cases, the following part of the analysis, with the specificities that this chapter calls for, will focus only on five categories of cases, namely:

- (1.1) [Cases with the highest number of violations: Article 6 issues;](#)
- (1.2) [Cases under Article 13: lack of effective domestic remedies;](#)
- (1.3) [Cases with violations under other Convention articles;](#)

¹⁰⁶ ECtHR, *Mijušković v. Montenegro*, no. 49337/07, Judgment (2010).

¹⁰⁷ ECtHR, *Stojanović v. Serbia and Montenegro*, no. 34425/04, Judgment (2005), and ECtHR, *Šabanović v. Montenegro and Serbia*, no. 5995/06, Judgment (2011).

¹⁰⁸ It should be noted that the Strasbourg Court, to date, has not invoked Article 46 in respect of either Montenegro or North Macedonia. However, it has invoked that Article in respect of Albania, Bosnia and Herzegovina and Serbia, while Kosovo is not part of the ECtHR's jurisdiction.

- (1.4) [Cases declared admissible with no violation found](#); and
 (1.5) [Other important cases related to exhaustion of domestic remedies](#).

1.1. Cases with the Highest Number of Violations: Article 6 issues

Montenegro is no exception to the general trend whereby Article 6 is the most litigated Convention article, with around 40 violations having been found to date under this provision – out of a total of close to 70.¹⁰⁹ The vast majority of Article 6 violations were found in relation to length of proceedings, an issue which will also be discussed below under the ambit of Article 13 – considering that all violations of Article 13 relate exclusively to length of proceedings. The following analysis will therefore report a few other Article 6 violations which are not related to undue length of proceedings but rather to access to a court, the right to a fair hearing and presumption of innocence before continuing with the main cases in the area of length of proceedings.

The case of *Garzičić* was the first ever judgment which found a violation of Article 6 in respect of Montenegro.¹¹⁰ The applicant claimed that her right of access to court had been violated by the Supreme Court's refusal to review her appeal on the merits because of a miscalculation of court fees to be paid by the applicant.¹¹¹ The Court agreed with the applicant and found a breach of the applicant's right of access to the Supreme Court.¹¹² What is commendable here is the swift reactivity of the Supreme Court to change and harmonise its national case-law in order to make it compatible with the Court's position on the issue of right of access to a court *vis-à-vis* court fees.¹¹³ In addition to this case which brought about a change in the practice of the domestic courts, there were seven other cases where a violation of the right of access was found.¹¹⁴

¹⁰⁹ Out of these violations, four concern administrative proceedings; twenty-nine concern civil proceedings; six concern enforcement proceedings; eight concern access to court; three concern the right to a fair hearing; thirty concern reasonable time; and one concerns the presumption of innocence.

¹¹⁰ ECtHR, *Garzičić v. Montenegro*, no. 17931/07, Judgment (2010).

¹¹¹ *Ibid.*, § 22.

¹¹² *Ibid.*, §§ 33-34.

¹¹³ Committee of Ministers, Resolution CM/ResDH(2011)136 of 14 September 2011, where it is stated that the Supreme Court of Montenegro, as a general measure action has changed its case-law through a Legal Stance Opinion which declared admissible all cases in a similar situation to that of ECtHR, *Garzičić v. Montenegro*, no. 17931/07, Judgment (2010).

¹¹⁴ See ECtHR, *Boucke v. Montenegro*, no. 26945/06, Judgment (2012); ECtHR, *Mijanović v. Montenegro*, no. 19580/06, Judgment (2013); ECtHR, *Radunović and Others v. Montenegro*, nos. 45197/13 and 2 others, Judgment (2016); ECtHR, *Brajović and Others v. Montenegro*,

In the case of *Mugoša*, the Court found the first and only violation with respect to a breach of presumption of innocence.¹¹⁵ A high court in Montenegro had expressly stated that the applicant “in an insidious manner and for material gain, deprived X of his life [...] by shooting him [...]”.¹¹⁶ The pronouncement of the domestic court was considered by the ECtHR as pronouncing the applicant guilty before such guilt was proved according to the law.¹¹⁷ The violation failed to be rectified by subsequent courts, including by the Constitutional Court which did not accept the applicant’s constitutional appeal on this point.¹¹⁸ In two other instances, respectively in the case of *Barać and Others* and the case of *Tripčevići*, the Court found a violation of the fair hearing guarantees.¹¹⁹ In the first case, the violation was found due to the fact that the applicant’s case was decided on the basis of a legislative act which had previously been declared unconstitutional by the Constitutional Court and was thus no longer in force.¹²⁰ This was considered to be a breach of the requirement of fairness as guaranteed by Article 6 § 1.¹²¹ In the second case, the violation was found due to a manifestly unreasonable decision taken by a regular court in Montenegro when it decided to reject the applicant’s claim as out of time.¹²² No other violations of Article 6 guarantees, except those for length of proceedings, have been found to date by the Court.

As stated above, of the total number of Article 6 violations, around 30 have to do, *inter alia*, with a violation of the right to a fair trial within a reasonable time, which could be described as the major issue which the Strasbourg Court has to deal with in respect of Montenegro. The latter, in its defence, tried to prevent this problem by introducing, in 2007, a specific law for undue length of proceedings, known as the Right to a Trial within a Reasonable Time Act,¹²³ even when no violations had been declared with respect to this right. The leg-

no. 52529/12, Judgment (2018); ECtHR, *Kešelj and Others v. Montenegro*, no. 33264/11, Judgment (2018); ECtHR, *Vujović and Lipa D.O.O. v. Montenegro*, no. 18912/15, Judgment (2018); and ECtHR, *Madžarović and Others v. Montenegro*, nos. 54839/17 and 71093/17, Judgment (2020).

¹¹⁵ ECtHR, *Mugoša v. Montenegro*, no. 76522/12, Judgment (2016).

¹¹⁶ *Ibid.*, § 68.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ ECtHR, *Barać and Others v. Montenegro*, no. 47974/05, Judgment (2011), and ECtHR, *Tripčevići v. Montenegro*, no. 80104/13, Judgment (2017).

¹²⁰ ECtHR, *Barać and Others v. Montenegro*, no. 47974/05, Judgment (2011), §§ 34-35.

¹²¹ *Ibid.*, § 34.

¹²² ECtHR, *Tripčevići v. Montenegro*, no. 80104/13, Judgment (2017), §§ 45-47.

¹²³ See, in this context, the Right to a Trial within a Reasonable Time Act, 13 December 2007, Official Gazette No. 11/07.

isolation in question introduced two new remedies: (i) a “request for review”; and, (ii) an “action for fair redress”, which could award monetary compensation if the conditions set out in the law were fulfilled.¹²⁴ However, despite this legislation, the first judgment declaring a violation of length of proceedings was rendered in 2012, in the case of *Boucke*.¹²⁵ Back then, the Government argued that Montenegro had effective domestic legal remedies which the applicant should have exhausted, namely the “request for review” and the “action for fair redress” referred to above.¹²⁶ However, the Court dismissed those objections on the ground of admissibility. In respect of the “request for review”, the Court maintained that it would be unreasonable to require the applicant to try such an avenue considering that her case had been “pending more than nine years and eight months before the Right to a Trial within a Reasonable Time Act entered into force and more than three years and nine months elapsed after the Convention entered into force in respect of the respondent State”.¹²⁷ Then, in respect of the “action for fair redress”, the Court maintained that its inability to expedite pending proceedings had already been established in another case and the Court saw no reason to hold otherwise in the present case.¹²⁸ Accordingly, the ECtHR admitted the applicant’s complaint as admissible and went on to find Montenegro in violation of Article 6 on account of length of proceedings, for the first time. Following the *Boucke* case, the Court did not look at length of proceedings only in respect of Article 6; it started looking at such cases from the perspective of Article 13 as well. Considering that all five cases where a violation of Article 13 was found relate exclusively to length of proceedings, the developments in that regard will be detailed in the following part of this study.

1.2. Cases under Article 13: Lack of Effective Domestic Remedies

In total, as stated above, Montenegro has been found in breach of Article 13 on only five occasions. All violations of the right to an effective legal remedy have been found in relation to one particular Article 6 right, namely the right to a fair and impartial trial within a reasonable time. To date, the Court has not found any Article 13 violations in conjunction with other Convention rights and freedoms. On three instances the violation related to a trial within a reasonable time in

¹²⁴ Ibid.

¹²⁵ ECtHR, *Boucke v. Montenegro*, no. 26945/06, Judgment (2012).

¹²⁶ Ibid., § 64 for observations of the Government.

¹²⁷ Ibid., §§ 72-74.

¹²⁸ Ibid., § 75.

civil, administrative and labour proceedings¹²⁹ while the remaining two instances related to length of proceedings due to non-enforcement of final judicial decisions.¹³⁰ In all instances, the ECtHR came to the conclusion that there were no effective domestic legal remedies in Montenegro to redress these length issues. As will be demonstrated, some of the remedies introduced by the Montenegrin authorities were declared effective at a later stage due to their reactivity in amending existing legislation and court practice in order to resolve the issue of length of proceedings domestically. In this regard, it is noteworthy that for all five Article 13 violations, the Court did not find it necessary to order Montenegro to introduce any general measures, nor did it consider this matter to be of such an overwhelming nature as to amount to a systemic issue.

The interaction with the Court in respect of length of proceedings started in 2012, when the Court rendered its first judgment, *Stakić and Others*, finding a violation of Article 6 in relation to undue length of proceedings and lack of an effective domestic remedy to that end.¹³¹ The applicant had waited for more than 28 years for the conclusion of his case before the domestic courts, of which more than three years and nine months had elapsed after the entry into force of the Convention in respect of Montenegro.¹³² The main reasons for such excessive length of proceedings was the judicial practice of frequent remittals of cases from the appeal level to the basic court level. When the applicant appeared before the Strasbourg Court the case was still pending a final resolution.¹³³ The crucial issue in the debate over the availability of a domestic remedy related to the effectiveness of the 2007 Right to a Trial within a Reasonable Time Act.¹³⁴ While the Government contended that the applicant should have made use of the remedy provided in that act as well as filing a constitutional appeal, the Court reiterated its previous findings in *Boucke*¹³⁵ to

¹²⁹ ECtHR, *Stakić v. Montenegro*, no. 49320/07, Judgment (2012); ECtHR, *Stanka Mirković and Others v. Montenegro*, nos. 33781/15 and 3 others, Judgment (2017); and ECtHR, *Sinex D.O.O. v. Montenegro*, no. 44354/08, Judgment (2017).

¹³⁰ ECtHR, *Milić v. Montenegro and Serbia*, no. 28359/05, Judgment (2012), and ECtHR, *KIPS DOO and Drekalović v. Montenegro*, no. 28766/06, Judgment (2019).

¹³¹ See ECtHR, *Stakić v. Montenegro*, no. 49320/07, Judgment (2012). See also a judgment rendered in the same year regarding undue length of non-enforcement proceedings, ECtHR, *Milić v. Montenegro and Serbia*, 28359/05, Judgment (2012).

¹³² ECtHR, *Stakić v. Montenegro*, no. 49320/07, Judgment (2012), §§ 6-15.

¹³³ *Ibid.*, § 40.

¹³⁴ See, in this context, the Right to a Trial within a Reasonable Time Act, 13 December 2007, Official Gazette No. 11/07.

¹³⁵ See ECtHR, *Boucke v. Montenegro*, no. 26945/06, Judgment (2012), §§ 72-74, where the Court said that the Right to a Trial Within a Reasonable Time Act of Montenegro of 2007 is not an effective remedy.

the effect that, for the time being, a remedy under that law is to be regarded as ineffective considering that the Government did not demonstrate its effectiveness through case-law examples or by any other means.¹³⁶ Moreover, in respect of the constitutional appeal, the Court also found that such a remedy cannot be considered effective as it cannot expedite proceedings that are still pending.¹³⁷

In line with the general principles of Article 13, the Court emphasised that the existence of a remedy “must be sufficiently certain not only in theory”, as it was in this particular case, but “also in practice”.¹³⁸ As a result, the Court found a violation of Article 6 in conjunction with Article 13 “on account of the lack of an effective remedy under domestic law for the applicant’s complaints regarding the length of civil proceedings”.¹³⁹ Several other violations due to length were subsequently found.¹⁴⁰ The domestic authorities reacted following these violations found at the Strasbourg level by introducing legislative amendments with a view to creating “the necessary framework and conditions conducive to more efficient civil and labour proceedings”.¹⁴¹ More specifically, with respect to civil proceedings, Montenegrin authorities introduced amendments to the Civil Procedure Law by abolishing the possibility of multiple remittals and introducing tight procedural deadlines; meanwhile, with respect to labour proceedings, they introduced tight procedural deadlines and the possibility to resort to alternative dispute resolution.¹⁴²

However, even with the introduction of such measures, the situation at the domestic level did not improve sufficiently. Five years after the first judgment (*Stakić and Others*), the Court rendered another judgment in the case of *Stanka Mirković and Others*, following allegations of repeated remittals in administrative proceedings which contributed to the overall length of proceedings.¹⁴³ This was a particularly straightforward judgment (involving nine remittals in

¹³⁶ ECtHR, *Stakić v. Montenegro*, no. 49320/07, Judgment (2012), §§ 39-42.

¹³⁷ *Ibid.*, § 41.

¹³⁸ *Ibid.*, § 58.

¹³⁹ *Ibid.*, §§ 55-61.

¹⁴⁰ See, in this context, ECtHR, *Novović v. Montenegro*, no. 13210/05, Judgment (2012), and ECtHR, *Bujković v. Montenegro*, no. 40080/08, Judgment (2015). See also, ECtHR, *Milić v. Montenegro and Serbia*, no. 28359/05, Judgment (2012), where a violation of Article 13 was found due to the length of non-enforcement proceedings.

¹⁴¹ Committee of Ministers, Resolution CD/ResDH(2017)38 of 1 February 2017; see also the Action Report submitted by Montenegro in relation to this case on 4 November 2016.

¹⁴² *Ibid.*, §§ 14-15.

¹⁴³ ECtHR, *Stanka Mirković and Others v. Montenegro*, nos. 33781/15 and 3 others, Judgment (2017).

total) considering that the Government did not reply to specific questions posed by the Court on whether anything had changed in practical terms with the issue of effectiveness of domestic legal remedies.¹⁴⁴ As a result, in finding a violation of Article 13, the Court merely referred to its previous findings in the case *Stakić and Others* and maintained that there is still a lack of an effective remedy under domestic law.¹⁴⁵ Several months later, the Court rendered another judgment finding identical violations of Article 13 due to length of proceedings,¹⁴⁶ while a year later another judgment found a violation of Article 13 in relation to length regarding non-enforcement of a final decision.¹⁴⁷ It needs to be noted that in its last judgments, the Court repeated its previous findings which considered that the impugned facts had taken place before the general measures were introduced by Montenegro, on their own initiative and without the need for the Court to invoke Article 46, following the judgment in *Stakić and Others*.¹⁴⁸ In their Action Report regarding the implementation of this judgment, the Montenegrin authorities noted that, according to the Court's case-law issued in the meantime, the "request for review" became effective as of 4 September 2013, the constitutional appeal became effective as of 20 March 2015 in respect of length of proceedings and the "action for fair redress" became effective as of 18 October 2016.¹⁴⁹ The Committee of Ministers closed these cases for further review and concluded that the Montenegrin authorities had taken all necessary measures to implement these judgments of the Court.¹⁵⁰ Following these judgments, the Court continued to find many violations of length of proceedings in respect of particular circumstances of each case, but it has not found another violation of Article 13 to date.¹⁵¹ It remains to

¹⁴⁴ Ibid.

¹⁴⁵ Ibid., § 63.

¹⁴⁶ ECtHR, *Sinex D.O.O. v. Montenegro*, no. 44354/08, Judgment (2017), §§ 43-45.

¹⁴⁷ ECtHR, *KIPS DOO and Drekalović v. Montenegro*, no. 28766/06, Judgment (just satisfaction) (2019).

¹⁴⁸ Committee of Ministers, Resolution CM/ResDH(2018)165, 18 April 2018; see also the Action Report submitted by Montenegro on 10 October 2017.

¹⁴⁹ Ibid., Action Report, 11-12. See ECtHR, *Nedić v. Montenegro*, no. 15612/10, Judgment (2017), § 22, and ECtHR, *Sinex D.O.O. v. Montenegro*, no. 44354/08, Judgment (2017), § 42.

¹⁵⁰ Ibid.

¹⁵¹ ECtHR, *Rajak v. Montenegro*, no. 71998/11, Judgment (2018); ECtHR, *Novaković and Others v. Montenegro*, no. 44143/11, Judgment (2018); ECtHR, *Montemlin Šajo v. Montenegro*, no. 61976/10, Judgment (2018); ECtHR, *Arčon and Others v. Montenegro*, no. 15495/10, Judgment (2018); ECtHR, *Vujović v. Montenegro*, no. 75139/10, Judgment (2018); ECtHR, *Jasavić v. Montenegro*, no. 32655/11, Judgment (2018); ECtHR, *Despotović v. Montenegro*, no. 36225/11, Judgment (2020); ECtHR, *Piletić v. Montenegro*, no. 53044/13, Judgment (2020); ECtHR, *Mercur System A.D. and Others v. Montenegro*, nos. 5862/11 and 70851/13,

be seen whether the Court will find other violations of Article 13 when it has the opportunity to analyse the new legislative amendments introduced by the Montenegrin authorities. According to the former Judge in respect of Montenegro, Vučinić, although not a systemic issue *per se*, “length of proceedings remains a significant and, to a certain extent, a widespread issue”.¹⁵² In this respect, he argued that the violations found at the Strasbourg level in respect of length of proceedings have “considerably influenced the evolution of domestic case-law” and they also “represented a considerable impetus for full, efficient, and effective implementation” of the national legislation, in addition to the positive evolution of the case-law.¹⁵³

The relatively low number of violations under Article 13 in respect of Montenegro and only in respect of length of proceedings, combined with the lack of any need for the Court to invoke Article 46, lead to the conclusion that, generally speaking, there are no significant problems at the domestic level with the availability and effectiveness of remedies. Article 20 of the Constitution of Montenegro, which guarantees everyone the right to a legal remedy to complain against a decision which encroaches upon her/his interests,¹⁵⁴ in conjunction with Article 13 of the Convention, seems to have generated far less case-law than in other Western Balkan countries. This is a good sign that Montenegrin authorities are fulfilling their obligation to secure for everyone within their jurisdiction the right to an effective legal remedy for addressing their Convention complaints.

1.3. Cases with Violations Under Other Convention Articles

To date, in addition to the highest number of violations found under Article 6 and those referred to under Article 13, the Court has also found Montenegrin authorities to be in breach of Article 2, on one occasion; Article 3, on five occasions; Article 5, on five occasions; Article 8, on six occasions; Article 10, on two occasions; Article 14, on one occasion; and Article 1 of Protocol No.1, on five occasions.

Judgment (2020); and ECtHR, *Siništaj v. Montenegro*, nos. 1451/10 and 2 others, Judgment (2015).

¹⁵² Vučinić (2016), 293

¹⁵³ *Ibid.*, 298.

¹⁵⁴ Article 20 of the Constitution.

In the following part, this study will highlight a few specific cases from each article by selecting the most important ones for the domestic application of Convention principles. If there are more cases worth noting, the study will do so, either in the main body or in footnotes.

In the area of Article 2, the first and only case in which a violation was found relates to the tragic maritime incident which resulted in the bodies of 35 out of the 70 Roma who had boarded the boat being found in the sea.¹⁵⁵ It was suspected that they had drowned in their attempt to reach Italy. Following the event, investigations into illegal border crossing and reckless endangerment were initiated against several individuals. The applicants, who were the next of kin of those who had died or disappeared in the tragic event, complained before the Court that “there had not been a prompt and effective investigation into the deaths and/or disappearances of their family members and that those responsible had not been brought to justice.”¹⁵⁶ The Court noted that 17 years after the impugned event and more than 10 years after a new indictment had been issued, the case was still pending before a second instance court in Montenegro.¹⁵⁷ According to the Court, in Article 2 cases which concern the proceedings to elucidate the circumstances of an individual’s death “lengthy proceedings are a strong indication that the proceedings were defective to the point of constituting a violation of the respondent State’s procedural obligations under the Convention.”¹⁵⁸ Indeed, in that case, the Court considered that the Montenegrin authorities had failed to justify such lengthy proceedings and, as a result, such delays could not be regarded as compatible with the State’s obligations under Article 2.¹⁵⁹ Consequently, the Court found a violation of Article 2 because the investigation and the subsequent criminal proceedings conducted by the Montenegrin authorities had not complied with the requirements of promptness and efficiency.¹⁶⁰ Following the decision of the ECtHR in this case, the second instance court in Montenegro before which the case was pending for many years finally rendered a judgment finding four defendants guilty and acquitting two others.¹⁶¹ Despite the fact that the ECtHR did not de-

¹⁵⁵ ECtHR, *Randelović and Others v. Montenegro*, no. 66641/10, Judgment (2017).

¹⁵⁶ *Ibid.*, § 63.

¹⁵⁷ *Ibid.*, § 130.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*, §§ 129-131 (It should be noted that the violation was found only in respect of the 11th applicant as other applicants did not fulfil the admissibility criteria).

¹⁶¹ See §§ 6-7 of the Action Report of 20 June 2018 DH-DD(2018)646 submitted by the Government of Montenegro. See also, Committee of Ministers, Resolution CM/ResDH(2018)331 of 20 September 2018.

clare any general measures to be taken by Montenegrin authorities, the latter undertook several actions on its own motion in view of preventing a similar violation in the future. One such measure was the amendment of the Criminal Procedure Code by introducing strict time-limits in criminal investigations and proceedings.¹⁶² The other measure was the introduction of a new remedy (constitutional appeal) which enables the applicants to contest not only the decisions but also the omissions of public authorities, as was the issue in this particular case.¹⁶³ The Committee of Ministers was satisfied with how the case was concluded and declared it closed.¹⁶⁴

In the area of Article 3, there are five cases in which a violation was found. These cases relate to conditions of detention and lack of medical care;¹⁶⁵ torture and ill-treatment by prison guards with no effective investigation into the matter;¹⁶⁶ torture and ill-treatment by police officers with no effective investigation into the matter;¹⁶⁷ poor conditions in detention and lack of medical care;¹⁶⁸ ill-treatment by unidentified special unit officers and lack of effective investigation in that regard.¹⁶⁹ Of these five cases, two have been declared closed by the Committee of Ministers,¹⁷⁰ with Montenegro having fulfilled all individual measures required in such cases, while three other cases are still under review. Of these five cases, two are particularly important in relation to the issue of effectiveness of legal remedies to address Convention violations domestically.

¹⁶² Ibid., § 15 of the Action Report.

¹⁶³ Ibid., §§ 19-20.

¹⁶⁴ Committee of Ministers, Resolution CM/ResDH(2018)331 of 20 September 2018.

¹⁶⁵ ECtHR, *Bulatović v. Montenegro*, no. 67320/10, Judgment (2014). See §§ 119-127 for the reasoning of the Court in finding a violation of Article 3 in relation to the conditions of detention on remand; and §§ 132-136 for the reasoning of the Court in not finding a violation of Article 3 regarding lack of medical care.

¹⁶⁶ ECtHR, *Milić and Nikezić v. Montenegro*, nos. 54999/10 and 10609/11, Judgment (2015), where the Court found a violation with respect to the substantial limb of Article 3 (§§ 78-82) as well as a violation with respect to the procedural limb of Article 3 (§§ 93-100).

¹⁶⁷ ECtHR, *Siništaj v. Montenegro*, nos. 1451/10 and 2 others, Judgment (2015), where the Court found a violation of Article 3 on both aspects, procedural and substantive, §§ 138-149.

¹⁶⁸ ECtHR, *Bigović v. Montenegro*, no. 48343/16, Judgment (2019), where a violation of Article 3 in respect of poor prison conditions was found (§§ 144-147) with no violation of Article 3 in respect of lack of medical care (§§ 167-174).

¹⁶⁹ ECtHR, *Baranin and Vukčević v. Montenegro*, nos. 24655/18 and 24656/18, Judgment (2021).

¹⁷⁰ Committee of Ministers, Resolution CM/ResDH(2017)35 of 1 February 2017; and Committee of Ministers, Resolution CM/ResDH(2016)200 of 6 September 2016.

Firstly, in the case of *Siništaj and Others*, the Court found a violation of Article 3 under both the substantive and procedural limbs, in respect of the third applicant, after having declared the remaining applications inadmissible.¹⁷¹ The applicant alleged, before all national courts, that he was ill-treated by police officers and that there was no effective investigation with respect to his complaints.¹⁷² Nevertheless, his grievances were dismissed by all court instances for lack of evidence, including by the Supreme Court and the Constitutional Court.¹⁷³ However, the Strasbourg Court considered that it could not defer to the reasoning of the national courts as there was, in fact, sufficient evidence to conclude that the applicant had been subjected to a violation of his rights guaranteed by Article 3.¹⁷⁴

Secondly, the case of *Baranin and Vukčević* concerned the applicants' complaints that they had been ill-treated by unidentified police officers and that they had no effective domestic remedy to challenge the lack of an effective investigation.¹⁷⁵ Following protests by the opposition in Montenegro, the applicants were ill-treated by the Special Anti-Terrorist Unit and the scene was recorded and posted on YouTube by a journalist.¹⁷⁶ After seeing the video, the prosecution opened investigations against unknown officers for ill-treatment.¹⁷⁷ Following the failure of the domestic authorities to identify the officers, the applicants lodged constitutional appeals "complaining of torture, inhuman and degrading treatment and lack of an effective investigation".¹⁷⁸ The Constitutional Court found a violation of Article 3 on both substantive and procedural limbs and it ordered the internal service authorities to implement its decision within three months by conducting "a thorough, prompt and independent investigation" which would "ensure the identification and criminal prosecution of the police officers in relation to whom there was a reasonable suspicion that they had committed ill-treatment against the applicants".¹⁷⁹ The decision of the Constitutional Court was not enforced and the investigations were still ongoing when the applicants filed their complaints with the Strasbourg Court.¹⁸⁰ After analysing the facts, the allegations, the decisions

¹⁷¹ ECtHR, *Siništaj v. Montenegro*, nos. 1451/10 and 2 others, Judgment (2015).

¹⁷² *Ibid.*, §§ 8-26.

¹⁷³ *Ibid.*, §§ 27-43.

¹⁷⁴ *Ibid.*, §§ 138-149.

¹⁷⁵ ECtHR, *Baranin and Vukčević*, nos. 24655/18 and 24656/18, Judgment (2021), § 1.

¹⁷⁶ *Ibid.*, §§ 5-6.

¹⁷⁷ *Ibid.*, § 7.

¹⁷⁸ *Ibid.*, § 20.

¹⁷⁹ *Ibid.*, §§ 22-25.

¹⁸⁰ *Ibid.*, § 36.

of the national authorities and those of the Constitutional Court, the ECtHR concluded that there had been a violation of the procedural aspect of Article 3 considering that the investigation “conducted by the prosecutor and the police, was not prompt, thorough, independent, and did not afford sufficient public scrutiny”.¹⁸¹ Moreover, the Court also noted that insufficient efforts were made following the violations found by the Constitutional Court to address the deficiencies in the investigation process and thus comply with the instructions of the Constitutional Court.¹⁸² In relation to this, the Court reasoned that the constitutional appeal could only be lodged after all effective legal remedies had been exhausted and that since the Constitutional Court – as the highest court in the land – had agreed to review the merits of the applicants’ complaints and declare that their deprivation of liberty was lawful “it [could not] be said that the national authorities [had] not been given the opportunity to put matters right through the national legal system”.¹⁸³ The fact that the civil proceedings were still pending did not affect this conclusion, according to the Court.¹⁸⁴

In the area of Article 5, there are several cases in which a violation was found, with respect to the length of pre-trial detention,¹⁸⁵ the unlawfulness of detention due to the lack of precision regarding its duration,¹⁸⁶ and the lack of due diligence in conducting proceedings.¹⁸⁷ The latest case under Article 5 is particularly interesting for the domestic application of standards concerning the right to liberty and security as well as for the issue of exhaustion of domestic remedies. The case related to the unlawful deprivation of liberty of an attorney, whose complaints at the domestic level were dismissed by the Constitutional Court as unfounded¹⁸⁸ but were considered as founded by the Ombudsperson who considered that there had been a breach of Article 5 § 1 (c) of the Convention as there were no grounds for his arrest.¹⁸⁹ The Government, *inter alia*, argued that the applicant – in addition to the constitutional appeal – should also have exhausted the civil proceedings for unlawful deprivation of

¹⁸¹ Ibid., § 149.

¹⁸² Ibid.

¹⁸³ Ibid., § 55.

¹⁸⁴ Ibid.

¹⁸⁵ ECtHR, *Bulatović v. Montenegro*, no. 67320/10, Judgment (2014), §§ 144-149, where a violation of Article 5 was found.

¹⁸⁶ ECtHR, *Mugoša v. Montenegro*, no. 76522/12, Judgment (2016), §§ 52-57, where a violation of Article 5 was found.

¹⁸⁷ ECtHR, *Bigović v. Montenegro*, no. 48343/16, Judgment (2019), §§ 183-191 and 209-214.

¹⁸⁸ ECtHR, *Asanović v. Montenegro*, no. 52415/18, Judgment (2021), § 19.

¹⁸⁹ Ibid., § 20.

liberty which he had instituted before filing a complaint with the ECtHR but which he had failed to disclose as information.¹⁹⁰ The Court clarified that in cases when a “failure to comply with domestic law entails a breach of the Convention, (...) the Court can and should therefore review whether this law has been complied with” even considering that “it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, under Article 5 § 1”.¹⁹¹ The Court found that the applicant was brought to the police by force, contrary to the national legislation, and that he was not given the opportunity to comply voluntarily with the summons that has been issued.¹⁹²

In the area of Article 8, the jurisprudence against Montenegro is quite diverse, despite the fact that it does not involve a vast number of cases. Such cases relate to the failure of Montenegrin authorities to fulfil their positive obligations in ensuring effective enjoyment of Article 8 rights. For example, some of the Article 8 cases relate to enforcement of parental custody rights,¹⁹³ failure to effectively investigate a series of ethnically and/or religiously motivated attacks against a Roma Muslim individual,¹⁹⁴ and unlawful video surveillance in a school amphitheatre ordered by a Dean who intended to conduct surveillance of teaching.¹⁹⁵ Lastly, in 2021, the Court found an interesting violation in the case of *Špadijer* due to the failure of the Montenegrin authorities to protect the applicant from bullying by her colleagues.¹⁹⁶ She was a prison guard who was allegedly bullied by her colleagues after she reported an incident involving inappropriate contacts between male prison guards and female prisoners, and her subsequent attempt to raise this matter with the responsible authorities. The applicant attempted to resolve the matter domestically by going through numerous proceedings before the public authorities and national courts, including before the Constitutional Court where she complained “of a violation of her dignity, honour and reputation and of her personal and professional integrity”.¹⁹⁷ However, the Constitutional Court dismissed her appeal by finding, in substance, that there were not sufficient grounds “to find that the applicant had been bullied at work, and that the Supreme Court’s judgment was in accordance with the legislation, providing sufficient, relevant and con-

¹⁹⁰ Ibid., § 47.

¹⁹¹ Ibid., § 68.

¹⁹² Ibid., §§ 66–67.

¹⁹³ ECtHR, *Mijušković v. Montenegro*, no. 49337/07, Judgment (2010), §§ 84–91.

¹⁹⁴ ECtHR, *Alković v. Montenegro*, no. 66895/10, Judgment (2017), §§ 63–73.

¹⁹⁵ ECtHR, *Antović and Mirković v. Montenegro*, no. 70838/13, Judgment (2017), §§ 55–60.

¹⁹⁶ ECtHR, *Špadijer v. Montenegro*, no. 31549/18, Judgment (2021).

¹⁹⁷ Ibid., § 34.

stitutionally acceptable reasons¹⁹⁸. The Court could not defer to the reasoning of the Constitutional Court and it was critical of its decision not to address at all the applicant's crucial complaint concerning the failure of the State prosecutor to deal with her criminal complaint for more than eight years.¹⁹⁹ This led the Court to conclude that even though the domestic legislation provided sufficient protection:

(...) the manner in which the civil and criminal-law mechanisms were implemented in the particular circumstances of the applicant's case, in particular the lack of assessment of all the incidents in question and the failure to take account of the overall context, including the potential whistle-blowing context, was defective to the point of constituting a violation of the respondent State's positive obligations under Article 8 of the Convention.²⁰⁰

In the area of Article 10, the Court found two violations, both of them in 2011. The case of *Koprivica* is of particular importance not just for the violation of Article 10 but also for the discussions on the effectiveness of the constitutional appeal to deal, at the time, with allegations stemming from the right to freedom of expression.²⁰¹ Before analysing the complaint under Article 10 that a civil judgment rendered against the applicant had violated his right to freedom of expression by ordering him to pay for defaming a fellow journalist, the Court initially addressed the issue of non-exhaustion of constitutional appeal by the applicant.²⁰² The Court considered that the applicant was not required to exhaust the constitutional appeal considering that at the time when he filed his case with the ECtHR, the Constitutional Court had not published any decision on Article 10 which meant that the efficacy of the remedy was not documented with concrete examples.²⁰³ As was noted in the part about the Constitutional Court, the developments (legislative and case-law wise) regarding the efficiency of the constitutional appeal have rendered this domestic remedy effective and all parties are now required to exhaust it, including for Article 10 cases. Going back to the merits of the case, the Court found a violation as it considered the damages award by the national courts against the applicant to be extremely high (25 times greater than the applicant's pension) and disproportionate to the aim pursued.²⁰⁴ The other case relates to criminal sanctions imposed on Mr Šabanović for allegedly defaming a public official through his comments on the quality of drinking water, which was a matter of public de-

¹⁹⁸ Ibid., § 35.

¹⁹⁹ Ibid., § 36.

²⁰⁰ Ibid., § 101.

²⁰¹ ECtHR, *Koprivica v. Montenegro*, no. 41158/09, Judgment (2011), §§ 38-47.

²⁰² Ibid., §§ 45-47.

²⁰³ Ibid., § 46.

²⁰⁴ Ibid., § 74.

bate at the time in Montenegro.²⁰⁵ The Court found that the criminal sanction imposed on the applicant regarding the criminal offence of defamation was very serious and that the reasons provided by the domestic courts could not be considered as “relevant and sufficient”.²⁰⁶ Considering the fact that there is little scope to restrict debate on questions of public interest, such as drinking water for example, the Court concluded that “the interference in question was not necessary in a democratic society” and it led to a violation of the applicant’s right to freedom of expression.²⁰⁷ The implementation of these two cases related to defamation also led to the decriminalisation of defamation as well as a change in the practice of the domestic courts.²⁰⁸

In the area of Article 14, there is only one case and it concerns ethnically and/or religiously motivated attacks against a Roma and a Muslim individual.²⁰⁹ In particular, the applicant complained about two incidents, namely: his neighbour pointing a gun in the direction of the terrace of his apartment and firing shots; and the drawing of a large cross on his apartment door on the day when he was celebrating a Muslim religious holiday, with a message that said: “move out or you’ll bitterly regret it”.²¹⁰ Owing to another incident involving his daughter, whose life had been threatened, he finally moved out of his apartment.²¹¹ Before the domestic authorities, the applicant tried to find redress by informing the police, filing complaints with the prosecution as well as challenging decisions of the regular courts which rejected his complaints for lack of evidence.²¹² He also filed a constitutional appeal with the Constitutional Court, relying on his right to a private life, right to an effective remedy and prohibition of discrimination.²¹³ However, the Constitutional Court dismissed his appeal by considering that there had been no violation in the applicant’s case.²¹⁴ In contrast, the ECtHR admitted the case for review on the merits and found a violation of Article 14 in conjunction with Article 8 because “the manner in which the criminal-law mechanisms were implemented in the present case by the judicial authorities was defective”.²¹⁵ In substance, the Court main-

²⁰⁵ ECtHR, *Šabanović v. Montenegro and Serbia*, no. 5995/06, Judgment (2011), §§ 36-44

²⁰⁶ *Ibid.*, § 42.

²⁰⁷ *Ibid.*, § 44.

²⁰⁸ Committee of Ministers, Resolution CM/ResDH(2016)44 of 30 March 2016.

²⁰⁹ ECtHR, *Alković v. Montenegro*, no. 66895/10, Judgment (2017).

²¹⁰ *Ibid.*, §§ 8-11.

²¹¹ *Ibid.*, § 35.

²¹² *Ibid.*, §§ 12-24.

²¹³ *Ibid.*, § 25.

²¹⁴ *Ibid.*, § 26.

²¹⁵ *Ibid.*, § 73.

tained that despite these serious incidents, the applicant “was not provided with the required protection of his right to psychological integrity” and that there was a “lack of sufficient response in respect of the applicant’s complaints regarding the shooting and the threat”.²¹⁶

In the area of Article 1 Protocol No. 1, the Court found Montenegro in violation of varying types of property issues, although there are only six violations in total. This statistic shows that, in comparison to other Western Balkan states, Montenegro does not have serious problems with the issue of protection of property. All the cases are of a particular nature and concern the specific circumstances of each case. Thus far, the Court has found violations in respect of non-enforcement of a final judgment ordering third parties to be evicted from the applicant’s apartment,²¹⁷ non-enforcement of a final judgment against a State owned company,²¹⁸ expropriation of land in the coastal zone,²¹⁹ and old foreign currency savings.²²⁰ An interesting violation of the right to protection of property was rendered with respect to unjustified pension reductions for individuals who decided to work part-time as attorneys after retirement, but who were not allowed to benefit from the pension’ right following a new legislation which entered into force.²²¹ The practice of working after retirement and obtaining both a pension and the revenues from the part-time job had been allowed under a former law that was applicable when the applicants went into retirement but later on the law changed, making it impossible to earn a pension and additional funds from a part-time job.²²² As a result, their pensions were halted and the applicants were even made to pay back some of their earned pension for a certain period of time. The Constitutional Court had been involved in the matter when asked to review the constitutionality of the legislation but it considered that the matter fell outside its jurisdiction as it was a “matter of legislative judgment”.²²³ The Court maintained that “the applicants were made to bear an excessive and disproportionate burden” and that even though States enjoy a wide margin of appreciation in the area of social legislation, “the impact of the impugned measure on the applicants’ rights, even assuming its lawfulness [...], cannot be justified by the legitimate public inter-

²¹⁶ Ibid., § 72.

²¹⁷ ECtHR, *Bijelić v. Montenegro and Serbia*, no. 11890/05, Judgment (2009), §§ 79-85.

²¹⁸ ECtHR, *Mijanović v. Montenegro*, no. 19580/06, Judgment (2013).

²¹⁹ ECtHR, *Nešić v. Montenegro*, no. 12131/18, Judgment (2020).

²²⁰ ECtHR, *A. and B. v. Montenegro*, no. 37571/05, Judgment (2013).

²²¹ ECtHR, *Lakicević and Others v. Montenegro and Serbia*, nos. 27458/06 and 3 others, Judgment (2011), §§ 59-73.

²²² Ibid.

²²³ Ibid., § 28.

est relied on by the Government”.²²⁴ Lastly, the Court stipulated that it “could have been otherwise had the applicants been obliged to endure a reasonable and commensurate reduction rather than the total suspension of their entitlements” or if, for example, “the legislature had afforded them a transitional period within which to adjust themselves to the new scheme”.²²⁵ The case was fully implemented by Montenegrin authorities. The amendments introduced to the pension legislation enabled the applicants to receive their full pensions regularly while continuing to work part-time in their private practice as attorneys.²²⁶ The analysis presented by the Montenegrin authorities in their Action Report states that the violation in this case stemmed from “inadequate legal provisions” of the former Pension Act which was resolved with the new Pension Act that was introduced after the judgment of the ECtHR.²²⁷

In general terms, this part of the study shows that judgments in respect of Montenegro, albeit low in number as regards violations under other articles of the Convention, reflect various interesting Convention matters which the national authorities, including the highest courts in the land, have failed to detect and address. In particular, this part has highlighted several cases where the Constitutional Court had the opportunity to redress the issues domestically but failed to do so, either because of its previous jurisdictional constraints or because it did not find certain Convention complaints to be well-founded. However, overall, the fact that there are no systemic issues under any Convention provision is a good sign that the domestic remedies are generally working well and that applicants have sufficient avenues for finding redress domestically.

1.4. Admissible Cases where No Violation was Found

The Court’s docket shows that, so far, there have been around nine cases where the Court reviewed the merits of specific complaints but decided that there had been no violation of the Convention by the Montenegrin authorities, either entirely or for specific Convention allegations. From that list of cases, five pertain to Article 6 rights, one to Article 2 rights, and two to Article 3 rights.

²²⁴ Ibid., § 72.

²²⁵ Ibid.

²²⁶ Committee of Ministers, Resolution CM/ResDH(2013)91 of 29 May 2013. See also, Action Report DH-DD(2013)106 of 6 February 2013.

²²⁷ Ibid.

In the area of Article 2, the case of *Ražnatović* concerned “an alleged act of medical negligence within the context of a suicide during a period of voluntary hospitalisation in a psychiatric institution”.²²⁸ The applicants had raised their Article 2 complaints at the domestic level before the Supreme Court and the Constitutional Court, but both of the highest courts dismissed their appeals as unfounded.²²⁹ In this case, the Court entirely deferred to the findings of the domestic courts which, in substance, did not find sufficient evidence that the authorities knew or ought to have known that there was an imminent risk to the life of the applicants’ next of kin.²³⁰ Therefore, by deferring to the reasoning of the national courts, the Court concluded that there had been no violation of Article 2 considering that “no cogent elements have been provided which could lead the Court to depart from the findings of fact of the national courts”.²³¹

In the area of Article 3, both cases concerned, *inter alia*, allegations about conditions in detention and medical care in detention.²³² In both cases, as stipulated above, the Court found violations under Article 3 with respect to conditions in detention but it did not find a violation of Article 3 with respect to medical care in detention.²³³ In the case of *Bulatović*, the Court did not find such a violation as “the failure of the authorities to provide for a further medical examination in March 2006 did not attain a sufficient level of severity to entail a violation of Article 3 of the Convention”.²³⁴ In the case of *Bigović*, the Court did not find such a violation considering that “the presence of prison guards during the medical examinations did not, alone, attain a sufficient level of severity to entail a violation of Article 3 of the Convention”.²³⁵

In the area of Article 6, three cases relate to a non-violation of fair hearing guarantees²³⁶ and the remaining two non-violations concern the reasonable

²²⁸ ECtHR, *Ražnatović v. Montenegro*, no. 14742/18, Judgment (2021).

²²⁹ *Ibid.*, §§ 18-19.

²³⁰ *Ibid.*, §§ 40-42.

²³¹ *Ibid.*, § 43.

²³² ECtHR, *Bulatović v. Montenegro*, no. 67320/10, Judgment (2014), and ECtHR, *Bigović v. Montenegro*, no. 48343/16, Judgment (2019).

²³³ *Ibid.*, see operative parts of both judgments.

²³⁴ ECtHR, *Bulatović v. Montenegro*, no. 67320/10, Judgment (2014), § 135.

²³⁵ ECtHR, *Bigović v. Montenegro*, no. 48343/16, Judgment (2019), § 173.

²³⁶ ECtHR, *Tomić and Others v. Montenegro*, nos. 18650/09 and 9 others, Judgment (2012); ECtHR, *Mugoša v. Montenegro*, no. 76522/12, Judgment (2016); and ECtHR, *Petrović and Others v. Montenegro*, no. 18116/15, Judgment (2018).

time requirement.²³⁷ The most important one for the domestic application of Convention standards is the latest case of *Petrović and Others*, which concerns the applicants' complaint that the coastal land they should have inherited had effectively been expropriated by the Montenegrin State without compensation.²³⁸ Relying on Article 6, the applicants contended that the decisions of the domestic courts were arbitrary as they failed to provide reasons for the different status of plots of lands along the Montenegrin coast.²³⁹ The gist of the initial domestic court decision which was subsequently approved by all higher courts, including the Supreme Court and the Constitutional Court, was that even though the land they were complaining about "had indeed been owned by their predecessors, notably their father, grandfather and grand-grandfather, [...] they had not proved that they had inherited it when their last predecessor had died in 1997".²⁴⁰ As a result, the Court found that the domestic courts did not render arbitrary decisions and that they, in fact, "provided in their judgments specific and explicit reasons for the dismissal of the applicants' claim, which rendered irrelevant the latter's [specific] argument based on the status of an adjacent plot".²⁴¹

1.5. Other Important Cases Related to Exhaustion of Domestic Remedies

In the area of exhaustion of domestic remedies as provided by Article 35 of the Convention, the most important cases for the purposes of this study are (i) cases that were declared inadmissible for the applicant's failure to exhaust domestic remedies before the national courts; and (ii) cases where the Court dismissed the Government's observation that the applicant(s) had failed to exhaust a particular remedy.

From the first pool of cases, there are no cases (published in the HUDOC database) which have been declared inadmissible due to the applicant's failure to exhaust domestic remedies.

From the second pool of cases, there are three cases in which the Government raised objections arguing that the applicants had failed to exhaust specific remedies. In all three cases, the Court rejected the Government's objections

²³⁷ ECtHR, *Jovović v. Montenegro*, no. 46689/12, Judgment (2017); ECtHR, *Vujović v. Montenegro*, no. 75139/10, Judgment (2018).

²³⁸ ECtHR, *Petrović and Others v. Montenegro*, no. 18116/15, Judgment (2018), §§ 5-16.

²³⁹ *Ibid.*, § 33.

²⁴⁰ *Ibid.*, §§ 9-16.

²⁴¹ *Ibid.*, §§ 42-43.

mainly because the remedies being referred to were considered to be incapable of affording effective redress for the applicants' complaints. Firstly, in 2013, in the case of *A. and B.* which related to foreign currency deposits in certain banks, the Government argued that the applicants had failed to institute civil proceedings against the bank of Podgorica, while they also could have filed a civil claim against the State.²⁴² The Court considered that the applicants did not have to additionally exhaust the avenues of redress suggested by the Government considering the "contradictions in the relevant legislation, varying interpretations thereof, numerous futile attempts by both applicants [...] to re-obtain the savings at issue at the domestic level after having obtained judgments against the debtor bank".²⁴³ Then, in 2019, in the case of *Bigović* which related to an Article 3 complaint about poor conditions in detention and lack of medical care, the Government argued that the applicant had failed to lodge a complaint to the prison director and/or lodge a compensation claim pursuant to the Obligations Act.²⁴⁴ The Court rejected this objection procedurally due to the fact that the Government had raised it belatedly and also that it did not provide any explanation for the delay.²⁴⁵ Lastly, in 2021, in the case of *Ražnatović* related to an allegation of violation of Article 2, the Government argued that the applicants had not filed a criminal complaint regarding the death of their next of kin nor had they initiated a subsidiary prosecution following the decision of the public prosecutor to stay the proceedings and not prosecute the case any further.²⁴⁶ As stated above, the case related to an alleged act of medical negligence within the context of a suicide and the applicants had pursued several remedies in an attempt to raise their complaints. In this respect, the Court recalled its well-established case-law stipulating that "in the event of there being a number of remedies which an individual can pursue, that person is entitled to choose a remedy which addresses his or her essential grievance".²⁴⁷ The fact that the Government did not contest the effectiveness of the remedies which the applicants had chosen to pursue led to the Court's conclusion that "the applicants were not required to use the criminal avenue in addition to, or instead of, the civil avenue".²⁴⁸

²⁴² ECtHR, *A. and B. v. Montenegro*, no. 37571/05, Judgment 2013, §§ 49-64.

²⁴³ *Ibid.*, § 63.

²⁴⁴ ECtHR, *Bigović v. Montenegro*, no. 48343/16, Judgment (2019), § 133.

²⁴⁵ *Ibid.*, §§ 134-136.

²⁴⁶ ECtHR, *Ražnatović v. Montenegro*, no. 14742/18, Judgment (2021), § 25.

²⁴⁷ *Ibid.*, § 30.

²⁴⁸ *Ibid.*, § 31.

2. Impact and Effects of the ECHR and the ECtHR's Case-Law in Montenegro

The analysis in this chapter showed that the ECHR is well 'embedded' in the domestic constitutional order and that it is directly applicable before the national courts. The latter are obliged to review Convention allegations posed before them by litigants as well as render decisions which are compliant with the guarantees of the ECHR as interpreted by the Strasbourg Court. This obligation has been confirmed by the judicial practice of the highest courts and it is not a matter of debate domestically. Despite this formal aspect of Convention embeddedness, the substantive implementation of the Convention standards at the domestic level cannot be regarded as satisfactory at the level of all courts. While the Constitutional Court has reached an advanced stage of implementation of Convention standards, the same cannot be said for the Supreme Court or other regular courts. The in-depth examination of the ECtHR case-law against Montenegro exposed in the preceding analysis, reflects several examples where the domestic courts did not manage to fulfil their duty as 'last-line defenders' of the Convention in that they failed to detect violations beforehand at the domestic level. In comparison, there were a few other cases where the Strasbourg Court was comfortable to defer entirely to the rationale used by the national courts in not finding a Convention violation in certain cases.

As far as the impact and effects of the ECHR and the ECtHR's case-law in the domestic legal order are concerned, there are several positive results which may be discerned in Montenegro following almost two decades of litigation before the Strasbourg Court.²⁴⁹ The impact and effects of the Convention and the Court's case-law have not been limited only to national courts but they have had an effect in the executive and legislative branches. For example, the expansion of the right of access to the Supreme Court in relation to the value of the matter of the dispute resulting in a change in the domestic judicial practice;²⁵⁰ the decriminalisation of defamation with the amendment to the Criminal Code and a streamlining of the domestic judicial practice to align it with

²⁴⁹ See the publication of the Department for Execution of Judgments of the European Court of Human Rights on the Main achievements in respect of Montenegro <<https://rm.coe.int/ma-montenegro-eng/1680a186b9>> (accessed 6 January 2022).

²⁵⁰ See ECtHR, *Garzičić v. Montenegro*, no. 17931/07, Judgment (2010). See also, Committee of Ministers, Resolution CM/RESDH(2011)136 of 14 September 2011.

the Court's case-law,²⁵¹ and the confirmation of the right of retired persons to resume work without losing their pension entitlement²⁵² have been listed as the most positive examples of the Convention's impact in the domestic legal order.²⁵³ Other positive examples may be seen in the area of conditions of detention in remand centres which were improved following the case of *Bulatović*;²⁵⁴ the obligation of the domestic courts to clearly indicate the ground for detention and strictly follow statutory time-limits following the case of *Mugoša* where a violation of Article 5 was found;²⁵⁵ the execution of final judicial decisions through the introduction of public enforcement officers;²⁵⁶ and the abolition of multiple remittal possibilities and tightening of deadlines with a view to creating effective domestic remedies to address excessive length of proceedings.²⁵⁷

These examples of the impact of the case-law of the ECtHR in the domestic legal order demonstrate that the violations found at the Strasbourg level have been instrumental in assisting the national authorities in Montenegro to create and implement effective domestic remedies with a view to ensuring that domestic redress is possible. Their reactivity in certain areas is to be highly commended considering that they decided to introduce general measures on their own motion, without being asked by the ECtHR, thus giving life to the notion of shared responsibility to protect Convention rights. The aforementioned evidence of actions shows that the Montenegrin authorities have extended their remedying actions beyond what was strictly necessary in an individ-

²⁵¹ See two cases related to Article 10: ECtHR, *Šabanović v. Montenegro and Serbia*, no. 5995/06, Judgment (2011), and ECtHR, *Koprivica v. Montenegro*, no. 41158/09, Judgment (2011). See also, Committee of Ministers, Resolution CM/ResDH(2016)44 of 30 March 2016, and Committee of Ministers, Resolution CM/Res/DH(2016)45 of 30 March 2016.

²⁵² ECtHR, *Lakicević and Others v. Montenegro and Serbia*, nos. 27458/06 and 3 others, Judgment (2011). See also, Resolution CM/Res/DH(2013)91 of 29 May 2013.

²⁵³ Parliamentary Assembly AS/JUR/Inf (2016) 04, 8 January 2016 *Impact of the European Convention on Human Rights in States Parties: selected examples*, prepared by the Legal Affairs and Human Rights Department, page 26. See also the publication of the Department for Execution of Judgments of the European Court of Human Rights on main achievement of Montenegro <1680a186b9 (coe.int) <https://rm.coe.int/ma-albania-eng/1680a18676>> (accessed 6 January 2022).

²⁵⁴ ECtHR, *Bulatović v. Montenegro*, no. 67320/10, Judgment (2014). See also, Committee of Ministers, Resolution CM/ResDH(2017)35 of 1 February 2017.

²⁵⁵ ECtHR, *Mugoša v. Montenegro*, no. 76522/12, Judgment (2016). See also, Committee of Ministers, Resolution CM/ResDH(2017)141 of 10 May 2017.

²⁵⁶ ECtHR, *Boucke v. Montenegro*, no. 26945/06, Judgment (2012). See also, Committee of Ministers, Resolution CM/ResDH(2016)165 of 29 June 2016.

²⁵⁷ ECtHR, *Stakić v. Montenegro*, no. 49320/07, Judgment (2012). See also, Committee of Ministers, Resolution CM/ResDH(2017)38 of 1 February 2017.

ual case. Additionally, the examples also show a reactivity of the domestic courts following a violation found by the ECtHR to align their domestic judicial practice with the standards stipulated in the jurisprudence of the Strasbourg Court. The Constitutional Court, in particular, has been very active in following up the developments in the case-law of the ECtHR, not just in respect of Montenegro but also with the aim of respecting the *res interpretata* effect of the Court's judgments. Its high level of expertise in the application of Convention standards – in certain cases – demonstrates its know-how and predisposition to utilise such standards in the reasoning of its decisions. The same cannot be said for the Supreme Court, except for the specific cases already discussed in the analysis in this chapter. In relation to this topic, according to the Montenegrin National Strategy for the Reform of the Judiciary, “the level of knowledge of judges, public prosecutors and experts on general and specific principles of the European Union legal order [where knowledge of the Convention is also covered], is not satisfactory and improvements are needed”.²⁵⁸ In this respect, the Strategy pinpointed three strategic goals related to the Strasbourg Court, namely, (i) to harmonise national case-law with that of the ECtHR; (ii) to raise the level of awareness of judges and prosecutors with respect to ECtHR case-law; and (iii) to strengthen the capacities of the Supreme Court division for monitoring and disseminating ECtHR case-law.²⁵⁹

With respect to the implementation of the Court's judgments at the domestic level, the data from the specific database where the status of the execution of ECtHR judgments is registered, HUDOC EXEC,²⁶⁰ shows a total of 86 cases that have been through or are still going through execution monitoring procedures by the Committee of Ministers. From the total number of cases, 74 are considered as closed and only 6 are still pending execution. Moreover, from the total number of cases, 19 were resolved through friendly settlement; 1 through friendly settlement with undertakings; 35 are marked as leading cases; while 26 are considered repetitive cases. Of the six which are still pending execution, two are new cases and four are in standard supervisory procedure, with no case under the so-called “enhanced procedure” of monitoring by the Committee of Ministers. These six cases that remain to be implemented at the domestic level have to do with cases relating to: ill-treatment during police

²⁵⁸ See, Strategy for the Reform of the Judiciary in Montenegro 2019-2022 <<https://wapi.gov.me/download-preview/deb3e3ae-7b6a-4963-9b3e-b5892118c8c8?version=1.0>>, page 37, (accessed 4 January 2022).

²⁵⁹ *Ibid.*, page 38.

²⁶⁰ See HUDOC EXEC database <<https://hudoc.exec.coe.int>>, where the information regarding execution of judgments in all 47 Member States is provided.

custody;²⁶¹ unlawful detention and poor conditions of detention;²⁶² disproportionate restrictions on the right of property in the process of expropriation of coastal land;²⁶³ the ineffectiveness of investigations into police brutality;²⁶⁴ and excessive length of proceedings before the Constitutional Court.²⁶⁵ Except these six cases which will require implementation at the domestic level, there are not many challenging cases for the Montenegrin authorities compared to other Western Balkan countries. This is especially true considering that there are no systemic issues that have been flagged by the ECtHR which the domestic authorities would need to address swiftly. However, the issue of length of proceedings in Montenegro continues to persist as the largest problem that appears before the ECtHR. Lately, this issue was further aggravated by the fact that the Constitutional Court itself was found to have breached this guarantee due to the large backlog of cases it is experiencing.²⁶⁶

In respect of international reports monitoring the situation in Montenegro, there are some important points to be highlighted with respect to the judiciary and fundamental rights, deriving from the latest Progress Report on Montenegro issued by the European Union.²⁶⁷ Firstly, the Report positively noted that Montenegro “continued to ensure good cooperation with the European Court of Human Rights” and that no case is subject to enhanced supervision by the Committee of Ministers.²⁶⁸ In this context, the Report further noted that the “quality of the Constitutional Court’s decisions continued to improve with regard to awareness and application of human rights standards and the ECtHR’s case-law”.²⁶⁹ However, the Report also noted that “divergent interpretation of human rights standards” between the Supreme Court and the Constitutional Court raises “concerns over legal certainty, the right to final judgment and duration of proceedings”.²⁷⁰ Lastly, with respect to Montenegro’s relations with the ECtHR, the Report pointed out that the shortcomings noted by the Stras-

²⁶¹ ECtHR, *Siništaj v. Montenegro*, nos. 1451/10 and 2 others, Judgment (2015).

²⁶² ECtHR, *Bigović v. Montenegro*, no. 48343/16, Judgment (2019), and ECtHR, *Asanović v. Montenegro*, no. 52415/18, Judgment (2021).

²⁶³ ECtHR, *Nešić v. Montenegro*, no. 12131/18, Judgment (2020).

²⁶⁴ ECtHR, *Baranin and Vukčević v. Montenegro*, nos. 24655/18 and 24656/18, Judgment (2021).

²⁶⁵ ECtHR, *Siništaj v. Montenegro*, nos. 1451/10 and 2 others, Judgment (2015).

²⁶⁶ *Ibid.*

²⁶⁷ European Commission of the European Union, ‘Montenegro 2021 Report’, Commission Staff Working Document no. SWD(2021) 293 final/2, 19 October 2021.

²⁶⁸ *Ibid.*, page 29.

²⁶⁹ *Ibid.*, pages 28-29.

²⁷⁰ *Ibid.*, page 29.

bourg Court in the expropriation process of the land in the coastal zone, in the case of *Nešić*,²⁷¹ call for a “systemic follow-up including revision of the legal framework” in order to be properly addressed.²⁷² Furthermore, at the level of fundamental rights protection, the Report noted that even if “Montenegro continued meeting obligations from international human rights instruments [the ECHR included] and legislation”, there are challenges which remain to be addressed “in ensuring the effective implementation of legislation on human rights”.²⁷³ Finally, the Report concluded that only “limited progress was made in the area of the judiciary, with stagnating implementation of key judicial reforms” due to a lack of political commitment.²⁷⁴

Overall, the analysis provided in this chapter leads to the conclusion that the ECHR and the ECtHR’s case-law has had considerable positive impact and effects in the Montenegrin domestic legal order. The impact may be noticed in the advancement and development of the case-law of the national courts as well as in other branches of government where the Court’s case-law mandated changes and alignment with Convention principles.

²⁷¹ ECtHR, *Nešić v. Montenegro*, no. 12131/18, Judgment (2020).

²⁷² *Ibid.*, § 33.

²⁷³ *Ibid.*, § 17.

²⁷⁴ *Ibid.*

V. Summary and Conclusion

This chapter has provided an in-depth analysis of four main areas of interest for this study, namely: (i) an analysis of the status of international law in general and the ECHR in particular in the Montenegrin domestic legal order; (ii) an in-depth analysis of the case-law of the highest courts in Montenegro and their 'Convention talk' in relation to the utilisation of Convention principles and the Court's case-law in their judicial decision-making process; (iii) an in-depth examination of the case-law of the Strasbourg Court against Montenegro; and (iv) the impact and effects of the Convention and the Court's case-law in the domestic legal order. Through concrete examples, this chapter has shown the manner in which the Convention principles are utilised by the highest national courts as a means of assessing whether they are sufficiently equipped to act as the Court's 'Convention partners' at the domestic level.

[Part I](#) of the chapter provided a historical reflection on Montenegro's path towards accession to the Council of Europe, initially as part of the Union with Serbia and then as an independent State Party from 2007 onwards. In that respect, the introductory part provided a synopsis of the most significant milestones in the relationship of Montenegro and its national courts with the Strasbourg Court, by laying the ground for the analysis that would follow in this chapter.

[Part II](#) outlined the rapport that exists between relationship the domestic law and international law by focusing specifically on the legal status of the ECHR in the domestic legal order. The analysis concluded that the Convention is sufficiently 'domesticated' within Montenegro's constitutional legal order and that the supremacy of the ECHR provides a very good ground for the implementation of the Convention standards by the regular courts and all public authorities. The special status of the ECHR and the ECtHR's case-law in the domestic legal order has been confirmed in the judicial practice of the national courts and there are no dilemmas in this matter. The analysis of the case-law of both courts showed a noticeable difference in utilisation of Convention principles by both courts, with the Supreme Court being significantly less inclined to rely on such principles than the Constitutional Court and the latter being much more advanced in its Convention know-how and expertise.

[Part III](#) examined the domestic court system and its relationship with the Convention principles, by focusing mostly on an in-depth analysis of the jurisprudence of the highest national courts. The initial part showed that there are many regular courts operating within the Montenegrin legal system and that the Supreme Court stands at the top of the pyramid of the regular court system. The jurisdiction of the Constitutional Court covers a wide range of competences and the changes to its jurisdiction in 2015, it allows for review of the constitutionality of all decisions of the regular courts and other public acts, including any failure to properly protect Convention rights and freedoms. The analysis of the case-law of the highest courts showed that the Constitutional Court is well ahead of the Supreme Court in utilising Convention standards and the Court's case-law to support the rationale for its decisions. As a result, the 'Convention talk' between the highest courts in Montenegro was qualified as mostly one-sided, with the Constitutional Court struggling to feed Convention know-how to the Supreme Court and the latter being more resistant to taking those principles on board. The analysis concluded that while the Constitutional Court has reached an advanced stage of implementing Convention standards in its decisions, there is a need for substantive advancement on the part of the Supreme Court to reach a similar level of expertise as the Constitutional Court. The latter has advanced its reliance on Convention principles following the legislative amendments in 2015 which turned it into an effective domestic remedy even for cases where public authorities fail to undertake positive actions to guarantee Convention rights and not just for cases where they directly encroach on rights and freedoms through an individual decision.

[Part IV](#) provided an in-depth examination and analysis of all the cases that have been adjudicated before the ECtHR in respect of Montenegro. This case-law was categorised in five different pools of cases, namely: (i) [cases with the highest number of violations – Article 6 issues](#); (ii) [cases under Article 13 – lack of effective domestic remedies](#); (iii) [cases with violations under other articles of the Convention](#); (iv) [admissible cases where no violation was found](#); and, lastly, (v) [other important cases related to exhaustion of domestic remedies](#). In comparison to other Western Balkan States, there are no cases in which the Court found it necessary to invoke Article 46 and thus declare the need for general measures to be taken. This makes Montenegro a State Party with no systemic issues or cases that are of particular concern for the effectiveness of the Convention protection machinery. The first pool of cases showed that the major issues in Montenegro relate to length of proceedings, considering that such cases form the largest part of the case-law issued against this State Party. The second pool of cases revealed that all five cases where a violation of Arti-

cle 13 was found relate exclusively to length of proceedings and that the Court did not find a breach of this Article in relation to any other Convention provision. The third pool of cases showed that there are a variety of different types of violations even though overall the number of violations of other articles of the Convention is not particularly high. The reporting of cases in this specific pool mostly focused on selecting cases where the domestic courts had failed to detect Convention violations at an earlier stage, despite having had the opportunity to do so. Several examples were reported where the Constitutional Court had failed to act as the 'last-line defender' before successful applications reached the Strasbourg Court. The fourth pool of cases reflected cases, also low in number, where the ECtHR considered that the national authorities or the Montenegrin regular courts could not be held responsible for the breach of the alleged rights. The fifth pool of cases shed light on some other important inadmissibility cases related to the issue of exhaustion of domestic remedies. Lastly, in [part IV](#), this study reflected on the impact and effects of the ECHR and the ECtHR's case-law in the domestic legal order by providing concrete examples of positive impact as well as a critical evaluation of the areas where the impact has not been sufficient.

Based on this analysis and findings, the overall conclusion is that Montenegro and its national courts are still at an intermediate stage of application of Convention principles at the domestic level. While the current level of application of Convention standards at the level of the Constitutional Court could be considered advanced and, overall, satisfactory, the same cannot be said for the current level of application of such standards before the Supreme Court. Therefore, although Montenegro's record of Convention violations is not particularly concerning compared to other Western Balkan States Parties, there is room for the national courts (especially the Supreme Court) and other public authorities to advance the utilisation of Convention standards in order to become trustworthy 'Convention partners' of the ECtHR at the domestic level.

Chapter 6 North Macedonia

I. Introduction

North Macedonia is one of the few countries whose sovereignty from former Yugoslavia has been achieved peacefully and without much resistance from Belgrade. In the referendum held in 1991, more than 95% of Macedonians voted in favour of establishing “the Republic of Macedonia” and enacted a new modern Constitution under which the country would be governed for years to come.¹ Due to reactions that had arisen from the neighbouring country Greece over the name of the newly established sovereign State, the latter was known for almost three decades as “The Former Yugoslav Republic of Macedonia” (FYROM) in the international fora.² In 2018, following another important referendum that confirmed the so-called “Prespa Agreement” with Greece, the country was renamed “the Republic of North Macedonia”, or North Macedonia for short.³ From then on, including before the ECtHR, the State has been referred to as North Macedonia.⁴

¹ On 8 September 1991, North Macedonia held a referendum which was approved by 96.4% of votes with a turnout of 75.7%. See <<https://www.strasbourg-europe.eu/macedonia/>> (accessed 7 January 2022).

² United Nations, General Assembly A/RES.47/225 of 27 April 1993, 9th plenary meeting of 8 April 1993, where it is stipulated that: “The General Assembly, [...] Decides to admit the State whose application is contained in document A/47/876-S/25147 to membership in the United Nations, this State being provisionally referred to for all purposes within the United Nations as ‘the Former Yugoslav Republic of Macedonia’ pending settlement of the difference that has arisen over the name of the State.” For more, see <A/RES/47/225 - E - A/RES/47/225 -Desktop (undocs.org)> (accessed 7 January 2022).

³ On 30 September 2018, North Macedonia held another successful referendum approving the ‘Final Agreement for the Settlement of the Differences as Described in the United National Security Council Resolutions 817 (1993) and 845 (1993), the Termination of the Interim Accord of 1995, and the Establishment of a Strategic Partnership Between the Parties’, of 17 June 2018, known as the “Prespa Agreement”, <<https://www.mfa.gr/images/docs/eidikathemata/agreement.pdf>> (accessed 7 January 2022).

⁴ See, ECtHR, Press Country Profile factsheet where it is stated that: “Following the entry into force on 12 February 2019 of the Final Agreement as notified notably to international Organisations, the official name of the respondent State is Republic of North Macedonia – short name North Macedonia”, <https://www.echr.coe.int/Documents/CP_Repub-

The Convention was signed by North Macedonia a few years after the secession from Yugoslavia, and in 1995 the country became the 38th member State of the Council of Europe.⁵ Whilst few cases on admissibility matters were rendered in early 2000,⁶ the very first judgment in respect of North Macedonia was delivered in 2001⁷ and it was published in Case Reports due to its jurisprudential importance. The year 2001 marked a turbulent time in North Macedonia due to the escalation of ethnic conflicts between Albanians and Macedonians, which were subsequently halted after the conclusion of the Ohrid Framework Agreement.⁸

As far as its relationship with the Strasbourg Court is concerned, North Macedonia does not appear in the list of States Parties that produce enormous amount of case-law; however, a close observation of its cases reflects major deficiencies in the utilisation of Convention principles at the domestic level, primarily by the domestic courts but also by other national ‘first-line defenders’ in North Macedonia. Thus far, the Court has not declared any systemic issues under Article 46 nor has it invoked this article to declare a need for general or individual measures to be implemented by the domestic authorities. However, the number of violations under Article 13 reflects various issues with the effectiveness of domestic remedies at the national level. This seems to occur largely due to weak ‘Convention filters’ at the domestic level, especially before the Supreme Court and the Constitutional Court. The analysis in this chapter will show such feeble points through concrete examples.

[lic_of_North_Macedonia_ENG.pdf](#)> (accessed 15 January 2022). See also, the first ECtHR case where the name of the country was changed to North Macedonia: ECtHR, *Sedlovski v. North Macedonia*, no. 56273/14, Decision (2019).

⁵ On 9 November 1995 North Macedonia became the 38th member State of the Council of Europe <<https://www.coe.int/en/web/portal/north-macedonia>> (accessed 7 January 2022).

⁶ ECtHR, *Veselinski v. the former Yugoslav Republic of Macedonia*, no. 45658/99, Decision (2000).

⁷ ECtHR, *Solakov v. the former Yugoslav Republic of Macedonia*, no. 47023/99, Judgment (2001).

⁸ Ohrid Framework Agreement of 13 August 2001 <<https://www.osce.org/files/f/documents/2/8/100622.pdf>> (accessed 7 January 2022). The purpose of this Framework Agreement is stated to be as follows: “The following points comprise an agreed framework for securing the future of Macedonia’s democracy and permitting the development of closer and more integrated relations between the Republic of Macedonia and the Euro-Atlantic community. This Framework will promote the peaceful and harmonious development of civil society while respecting the ethnic identity and the interests of all Macedonian citizens.”

The monist approach towards international law facilitates a fairly good positioning of the Convention in the domestic legal order, a position which has been confirmed firmly by the judicial practice of the highest courts in the land as well as legislation which obliges the national courts to make use of the Court's case-law in their reasoning. However, a discrepancy between what the law stipulates and what practice shows may be easily noticed. Regular courts very rarely rely on Convention principles to argue their cases whilst the Supreme Court has only recently shown an inclination to (sometimes) rely on the Court's general principles. The Constitutional Court, on the other hand, having its hands tied with a very limited jurisdiction to decide only in respect of certain Convention rights is not capable of filling the gap left by a generally insufficient Convention related adjudication at the domestic level.

Following this introduction, part II of this chapter will outline the status of the Convention in the North Macedonian legal order and court system. It will shed light on the relationship between domestic and international law with a specific focus on the status of the ECHR. Part III will explore the domestic court system and its relationship with the Convention by focusing mainly on the jurisprudence of the highest courts in North Macedonia. Part IV will then provide an in-depth analysis of the ECtHR's case-law against North Macedonia by classifying cases into five categories, namely: (1.1) cases with the highest number of violations – Article 6 issues; (1.2) cases under Article 13 – lack of effective domestic remedies; (1.3) cases with violations under other Convention Articles; (1.4) cases declared admissible with no violation found; and (1.5) other important cases related to exhaustion of domestic remedies. Part IV will focus on the effects and impact of the ECHR and the ECtHR's case-law in the domestic legal order by providing concrete impact examples as well as observations with respect to the lack of much-needed impact. Lastly, Part V will reflect on these findings and draw some final conclusions.

II. Status of the Convention in the North Macedonian Legal Order

1. Relationship between Domestic and International law

The Constitution of North Macedonia provides that all international agreements which are ratified in accordance with said Constitution “are part of the internal legal order and cannot be changed by law”.⁹ Two of the fundamental values of the North Macedonian constitutional order are considered to be the basic freedoms and rights which are recognised in international law and set out in the Constitution and respect for the generally accepted norms of international law.¹⁰ The Constitution is silent on the issue of whether the Constitution or international law has priority in the event of conflict and the judicial practice seems not to have been confronted with such a dilemma yet. Nevertheless, there are no dilemmas when it comes to the supremacy of international law over national law. Authors have described the relationship between domestic and international law as being inspired by “monist traditions”.¹¹ The new Law on Courts makes this particularly clear by specifically providing that in instances when a national court deems that the application of a law in a specific case is contrary to the provisions of a ratified international agreement, such a court “shall apply the provisions of the international agreement, provided that they may be directly applied”.¹²

2. ECHR in the Domestic Legal Order

The ECHR is not specifically referred to in the Constitution of North Macedonia. However, Article 8 of the Constitution proclaims that basic freedoms and rights “recognised in international law and rights down in the Constitution” form

⁹ Article 118 of the Constitution. For an English version and a consolidated text of the Constitution of North Macedonia see the CODICES database of constitutions published by the Venice Commission, <<http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>> (accessed 7 January 2022).

¹⁰ Article 8 of the Constitution.

¹¹ Lazarova Trajkovska and Trajkovski (2016), 266-288.

¹² Article 18 (4) of the Law on Courts (2019) <https://vlada.mk/sites/default/files/dokumenti/zakoni/law_on_courts.pdf> (accessed 10 December 2021).

part of the fundamental values of the North Macedonian constitutional order.¹³ All national courts are obliged to decide matters before them not just on the basis of the Constitution and applicable laws, but also on the basis of the international agreements which have been duly ratified by the North Macedonian authorities in accordance with the procedure prescribed in the Constitution.¹⁴ Moreover, an exciting development that will greatly contribute to improved domestication of the ECHR came with the proclamation of the new Law on Courts which entered into force in 2019.¹⁵ Under the basic principles, this particular law makes a specific reference to the ECtHR by stipulating that North Macedonian courts “shall directly apply the final and enforceable decisions of the European Court of Human Rights” and they shall be obliged “to apply the views expressed in final judgments” of the Strasbourg Court when deciding cases before them.¹⁶

With respect to the obligation of the executive and legislative branches to ensure the compatibility of any proposed legislation with Convention standards, while a specific mandatory procedure to ensure the compatibility of any proposed legislation with the *acquis* of the European Union exists, there is no specific procedure obliging lawmakers to ensure the compatibility of proposed legislation with Convention standards and the ECtHR case-law. However, it should be noted that there is an obligation to ensure compatibility of legislation with the Constitution, where the ECHR is incorporated.

¹³ Article 8 of the Constitution.

¹⁴ See Article 98 of the Constitution. See also, Constitutional Court of North Macedonia, Decision U.no. 31/2006 of 1 November 2006, § 6, where it is stipulated that: “Pursuant to Article 118 of the Constitution of the Republic of Macedonia, with the act of ratification it [the Convention] became an integral part of the legal order of the Republic of Macedonia.”

¹⁵ Law on Courts (2019).

¹⁶ See Articles 18 (5) and (6) of the Law on Courts (2019).

III. Domestic Court System and the ECHR

1. An overview of the North Macedonian Court System

The judicial power in North Macedonia is exercised by autonomous and independent courts, which are obliged to judge “on the basis of the Constitution and laws and international agreements ratified in accordance with the Constitution”.¹⁷ The Supreme Court of North Macedonia serves as the highest court whilst the Constitutional Court is a separate body which does not form part of the regular judiciary. The latter, in addition to the Supreme Court, is composed of several basic and appeals courts which are spread throughout the territory. There are in total twenty-seven basic courts; four Courts of Appeal; one Administrative Court with the competence to decide on administrative matters for the whole country and which is then supervised by the Higher Administrative Court.¹⁸ Whilst all courts are important for the domestication of the ECHR, the highest courts in the land play a pivotal role in leading this process. As a result, the following analysis, whilst making references to other courts if relevant, will mostly focus on the jurisprudence of the Supreme Court and that of the Constitutional Court – concluding with an overview of the ‘Convention talk’ between these two courts. Or, in the specific circumstances of this chapter, lack of ‘Convention talk’ as will be discussed shortly.

1.1. Supreme Court

The primary responsibility of the Supreme Court of North Macedonia defined at the level of the Constitution is to provide “uniformity in the implementation of laws by the courts”.¹⁹ Being the highest court in the land, several other important competences are vested in this court, namely deciding on second instance and third instance appeals; deciding on extraordinary legal remedies;

¹⁷ Article 98 of the Constitution and Section 4 of the Constitution for the judiciary as a whole. See also Article 2 of the new Law on Courts (2019). For all changes to the Law on Courts see <<https://www.pravdiko.mk/zakon-za-sudovite/>> (accessed 7 January 2022).

¹⁸ Articles 22-37 of the Law on Courts (2019).

¹⁹ Article 101 of the Constitution.

and deciding on conflicts of competences for various courts.²⁰ In addition to these main duties, the Supreme Court is also responsible to decide on requests regarding the right to a trial within a reasonable time, a duty which, according to the applicable law, must be exercised “in accordance with the rules and principles determined” by the ECHR and the jurisprudence of the Strasbourg Court.²¹

In this crucial area of competence of the Supreme Court, namely providing uniformity in the implementation of laws by the courts, following the Court’s judgment in the case of *Stoimenov*,²² the Supreme Court took a ‘Legal Position’ to harmonise national law with Convention standards by stipulating that:

For each and every freedom and right foreseen in the Convention and whose protection is effectuated before the ECtHR, the courts in the Republic of Macedonia directly apply its judgments and, in accordance with the Law on Criminal Procedure, in the reasons of their decisions should invoke the case-law of the ECtHR.²³

According to certain authors, this was a clear message to all lower courts that they ought to implement the Convention directly in cases before them.²⁴ Nevertheless, the research performed by this study demonstrates that this objective is far from being reached even by the highest courts in North Macedonia, let alone other regular courts. The latter rarely use the Convention or the Court’s case-law to reason their decisions, whilst the Supreme Court is also quite deficient in this regard. In other words, the Supreme Court seems to have set a standard for the regular courts which it does not necessarily follow for all of its own decisions; however, it is very important that such a standard was proclaimed, at least as a matter of principle. It will certainly contribute to bringing the Convention closer to the national courts. In fact, before the year 2017, the Supreme Court almost never referred to Convention standards, despite the fact that the latter have been in force since the 90s. The Supreme Court seems to have started the (limited) practice of relying on such standards only in the last few years and only in a few selected cases.

²⁰ See Article 35 of the Law on Courts (2019).

²¹ See Article 35 (5) of the Law on Courts (2019) where the duties of the Supreme Court are described.

²² ECtHR, *Stoimenov v. the former Yugoslav Republic of Macedonia*, no. 17995/02, Judgment (2007).

²³ Supreme Court of North Macedonia, Legal Position of the Department of Criminal Offences of 29 June 2007.

²⁴ Lazarova Trajkovska and Trajkovski (2016), 284.

For example, in a case from 2020, the Supreme Court admitted the applicants' appeals as grounded and requested the lower courts to retry their case by respecting their presumption of innocence and evaluating their assertion that the witness statements were extracted from them by the police in contradiction to Article 3 of the Convention.²⁵ The Supreme Court obliged the lower courts to have several cases of the Strasbourg Court in mind when retrying the case and reason the new decision by relying on certain specific cases that had already been decided before the ECtHR.²⁶ This is a very good example of the role that the highest court should play in respect of guiding the lower courts toward a better embeddedness of Convention principles and thus a better utilisation of general principles established in the Court's case-law. There have, however, been numerous other decisions issued in the area of harmonisation of legal practice where there is no mention of the ECHR or ECtHR case-law.²⁷ Whilst there might be cases where such reliance was not necessarily called for, there are sufficient cases where the matter being harmonised certainly calls for utilisation of Convention standards.

In more recent cases, the Supreme Court has also referred to ECtHR case-law in some cases which it declared inadmissible and which potentially might end up before the ECtHR, considering that the Constitutional Court is not mandated to review the legality of Supreme Court decisions. That being the case, it is particularly important for the Strasbourg Court to see how the Convention standards were applied at the domestic level by the Supreme Court and it is much easier for the ECtHR to defer to national courts when they have provided sufficient Convention reasoning as to why they have rejected as unfounded the applicant's complaints. For example, in a child-abuse case where allegations of violation of Articles 6, 11 and 14 of the Convention were raised, the Supreme Court rejected the applicant's appeal as unfounded based on the Court's principles defined in the case of *Al-Khawaja and Tahery v. the United Kingdom*, as well as two cases rendered against North Macedonia.²⁸ There are a

²⁵ Supreme Court of North Macedonia, Decision Kvp2.no. 89/2020, 3 February 2021.

²⁶ *Ibid.*, see some cases of the Strasbourg Court cited by the Supreme Court: ECtHR, *Leviñta v. Moldova*, no. 17332/03, Judgment (2008); ECtHR, *Harutyunyan v. Armenia*, no. 36549/03, Judgment (2007); and ECtHR, *Kitanovski v. the former Yugoslav Republic of Macedonia*, no. 15191/12, Judgment (2015).

²⁷ In this context, see the Supreme Court's website where such decisions are reflected <www.vrhoven.sud.mk/VSUD/MatraVSUD.nsf/PravnaPodelba.xsp> (accessed 7 January 2022).

²⁸ Supreme Court of North Macedonia, Decision Vkž2.no. 39/19, 3 February 2021, citing: ECtHR, *Al-Khawaja and Tahery* [GC], nos. 26766/05 and 22228/06, Judgment (2011); ECtHR, *Papadakis v. the former Yugoslav Republic of Macedonia*, no. 50254/07, Judgment

few other interesting inadmissibility decisions where the Supreme Court used specific Convention standards to reason its decisions, in matters related to the opportunity to present a defence;²⁹ the protection of property;³⁰ the right to have witnesses present at the hearing;³¹ the use of physical force;³² the crime of rape.³³ There are also some cases where the Supreme Court refers only to decisions rendered against North Macedonia by stating that it took the Convention into consideration when deciding the case;³⁴ or when it refers only to a specific Convention provision.³⁵ Yet, in the majority of cases (especially those before 2017) there is no reference to Convention principles at all.³⁶

(2013); and ECtHR, *Stoimenov v. the former Yugoslav Republic of Macedonia*, no. 17995/02, Judgment (2007).

- ²⁹ Supreme Court of North Macedonia, Vkž2.no. 19/2019, 9 July 2020 citing ECtHR, *Pélissier and Sassi v. France* [GC], no. 25444/94, Judgment (1999), § 62; ECtHR, *Block v. Hungary*, no. 56282/09, Judgment (2011), § 24; ECtHR, *Dallos v. Hungary*, no. 29082/95, Judgment (2001), §§ 49-52; ECtHR, *Sipavičius v. Lithuania*, no. 49093/99, Judgment (2002), §§ 30-33; ECtHR, *Zhupnik v. Ukraine*, no. 20792/05, Judgment (2010), §§ 39-43; and ECtHR, *I.H. and Others v. Austria*, no. 42780/98, Judgment (2006), §§ 36-38.
- ³⁰ Supreme Court of North Macedonia, Decision Kvp2.no. 48/19, 21 May 2020, citing ECtHR, *James and Others v. the United Kingdom* [Plenary], no. 8793/79, Judgment (1986), § 46, and ECtHR, *Öneryıldız v. Turkey* [GC], no. 48939/99, Judgment (2004), § 134.
- ³¹ Supreme Court of North Macedonia, Decision Kvp2.no. 98/19, 2 July 2020, citing ECtHR, *S.N. v. Sweden*, no. 34209/96, Judgment (2002), § 44; ECtHR, *Accardi and Others v. Italy*, no. 30598/02, Decision (2005); ECtHR, *Solakov v. the former Yugoslav Republic of Macedonia*, no. 46023/99, Judgment (2001), § 57; and ECtHR, *Murtazaliyeva v. Russia* [GC], no. 36658/05, Judgment (2018), § 139.
- ³² Supreme Court of North Macedonia, Decision Kvp2.no. 165/19, 4 March 2020, citing ECtHR, *M.C. v. Bulgaria*, no. 39272/98, Judgment (2003), §§ 156-185.
- ³³ *Ibid.*
- ³⁴ Supreme Court of North Macedonia, Decision Rev2.no. 248/2018, 19 March 2019 citing ECtHR, *Balažoski v. the former Yugoslav Republic of Macedonia*, no. 45117/08, Judgment (2013). See also, Supreme Court of North Macedonia, Decision Vkž2.no. 39/19, 3 February 2021.
- ³⁵ Supreme Court of North Macedonia, Decision Rev3.no. 51/2018, 5 December 2018; Supreme Court of North Macedonia, Decision Kzz.no. 32/2014, 12 November 2014; and Supreme Court of North Macedonia, Decision Kvp.no. 253/2013, 27 December 2013, citing Article 6 of the ECHR.
- ³⁶ Supreme Court of North Macedonia, Decision Rev3.no. 94/2020, 13 May 2020; Supreme Court of North Macedonia, Decision Rev3.no. 139/2018, 19 May 2020; Supreme Court of North Macedonia, Decision Rev2.no. 97/2019, 5 November 2019; Supreme Court of North Macedonia, Decision Rev2.no. 351/2017, 12 April 2018; Supreme Court of North Macedonia, Decision Rev1.no. 170/2016, 26 October 2017; Supreme Court of North Macedonia, Decision Rev2.no. 367/15, 19 October 2016; Supreme Court of North Macedonia, Decision Kvp2.no. 82/2015, 22 December 2014; Supreme Court of North Macedonia, Decision Kvp.no. 61/2013, 10 April 2013; Supreme Court of North Macedonia, Decision Rev.no. 1179/08, 9 September 2009.

It also needs to be noted that the decisions of the Supreme Court do not clearly reflect whether the parties before them relied on Convention arguments, so it is impossible to see whether the Supreme Court always responds to such allegations or not. As far as dissemination of Convention knowledge is concerned, on the official webpage of the Supreme Court, only six high-profile judgments of the ECtHR are available fully translated into the Cyrillic Macedonian language, namely *Soering v. the United Kingdom*, *Société Colas and others v. Spain*, *Thlimmenos v. Greece*, *Opuz v. Turkey*, *Airey v. Ireland*, and *Salduz v. Turkey*.³⁷ Whilst these cases are very important, there is a need to do more in this regard so that the accessibility of Convention principles is enhanced among the judiciary.

A significant difference in the trend of reliance on Convention principles may be noticed in the area of cases that have to do with the right to fair and impartial trial within a reasonable time. In such cases, the Supreme Court has published numerous decisions where it repeatedly refers to Article 6 of the Convention and the Court's case-law principles with respect to length of proceedings.³⁸ This is one of the new competences with which the Supreme Court was vested following the entry into force of the new Law on Courts which was subsequently revised on several occasions.³⁹ The remedy foreseen by this law, according to the case of *Adži-Spirkoska and Others*, is considered, in principle, effective by the ECtHR since the parties are required to exhaust it.⁴⁰ However, as will be seen in the next part of this chapter, the Court has already expressed its concerns in respect of the low level of compensation that is being awarded by the Supreme Court in respect of length of proceedings.

The overall analysis of the case-law of the Supreme Court shows a slight trend towards improvement in respect of the utilisation of Convention principles in the last few years. However, this trend is still not up to the required level to be considered as proper domestication of the ECHR in the judicial practice of the Supreme Court. This is especially true considering that the Supreme Court, in the majority of cases, is the last domestic 'Convention filter' to catch possible

³⁷ See, in this context, the Supreme Court's website where these judgments of the ECtHR are cited <Почетна - Резултати од пребарување (sud.mk)> (accessed 7 January 2022).

³⁸ Supreme Court of North Macedonia, Decision PSRRG.no. 20/2017, 3 October 2017; Supreme Court of North Macedonia, Decision PSRRG.no. 191/2016, 9 February 2017; Supreme Court of North Macedonia, Decision PSRRG.no. 140/2016, 19 December 2016; Supreme Court of North Macedonia, Decision PSRRG.no. 539/2012, 23 November 2012.

³⁹ Law on Courts (2019).

⁴⁰ See ECtHR, *Adži-Spirkoska and Others v. the former Yugoslav Republic of Macedonia*, nos. 38914/05 and 17879/05, Decision (2011).

Convention violations before they reach the docket of the Strasbourg Court. There are only a few instances when parties may appear before the ECtHR following a Court of Appeal decision; excluding cases which might successfully argue the ineffectiveness of any prospective domestic legal remedies at the national level.⁴¹ Depending on how well the Supreme Court applies Convention principles, the level, seriousness and intensity of violations at the Strasbourg Court will differ for better or worse. As a result of its status in the national judiciary, the jurisprudence of the Supreme Court is more important than that of the Constitutional Court, which, as will be shown below, has limited effects on the overall embeddedness of the ECHR in the North Macedonian judiciary, due to its jurisdictional constraints.

1.2. Constitutional Court

The Constitutional Court of North Macedonia was established in the 60s and has been through various changes throughout the history of its existence. For the purposes of this study, the work of the Constitutional Court following the enactment of the new Constitution in 1991 is of the most profound importance. Under the new Constitution, which has been amended on several occasions,⁴² the Constitutional Court “is a body of the Republic protecting constitutionality and legality”.⁴³ The Constitutional Court has various competences prescribed by the Constitution,⁴⁴ which are quite limited in comparison to other constitutional courts in the Western Balkans, thus making it an ineffective instance for the vast majority of Convention rights. For the purposes of domestic application of Convention standards, the most relevant competences of the Constitutional Court are those related to: (i) the competence to decide on the conformity of laws with the Constitution; and (ii) the competence to protect the freedoms and rights of individuals relating, in substance, to Articles 9, 10, 11 and 14 of the Convention. The Constitutional Court does not have the competence to review and/or quash decisions of the Supreme Court or any other

⁴¹ See e.g. *X v. the former Yugoslav Republic of Macedonia*, no. 29683/16, Judgment (2019), where the observations of the Government on exhaustion of domestic remedies were rejected as ungrounded due to the lack of effectiveness of the proposed domestic remedies.

⁴² For an English version and a consolidated text of the Constitution of North Macedonia see the CODICES database of constitutions published by the Venice Commission, <<http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>> (accessed 7 January 2022).

⁴³ Article 108 of the Constitution. See also, more generally, Section IV of the Constitution.

⁴⁴ See Article 110 of the Constitution for a full list of competences of the Constitutional Court.

decision of the regular courts.⁴⁵ This is one of the chief constraints on the jurisdiction of the Constitutional Court, as it does not make the mechanism of individual constitutional appeal as effective as this study argues that it should be for the purposes of Convention embeddedness in a national judiciary.

As far as the first competence goes, namely the competence to decide on the conformity of laws with the Constitution, anyone is entitled to submit an initiative for review of the constitutionality of a law as well as the constitutionality and legality of a regulation or other acts.⁴⁶ What is interesting and different from all other Western Balkan countries is that even the Constitutional Court itself is authorised to initiate the constitutionality and legality of a law, regulation or other act.⁴⁷

An in-depth analysis of the Constitutional Court's case-law reveals that more cases merit to be mentioned due to lack of domestic application of Convention standards and the case-law of the ECtHR, rather than cases that demonstrate good examples of this domestic application. In this regard, it ought to be noted with a degree of concern that, in the vast majority of cases where legislation is reviewed, which is the crucial competence of the Constitutional Court, the latter does not utilise the ECHR or the ECtHR's case-law – despite there being relevant principles that could have been well utilised for the review of cases in the areas of judicial practice, the electoral code, amnesty, labour discrimination, insurance and employment matters, public servants, etc.⁴⁸

⁴⁵ Article 110 of the Constitution.

⁴⁶ Article 11 of the Rules of Procedure of the Constitutional Court.

⁴⁷ Article 14 of the Rules of Procedure of the Constitutional Court. See also, Constitutional Court of North Macedonia, Decision U.no. 262/2009, 2 February 2011, where two provisions of the Law on Construction were repealed without any reference to the ECHR or the ECtHR case-law.

⁴⁸ See e.g. several cases of the Constitutional Court of North Macedonia where there is no reliance on the ECHR or ECtHR case-law: Decision U.no. 160/2014, 18 January 2017, where the Law on Judicial Service was repealed; Decision U.no. 121/2015, 1 February 2017, where the Law on Administrative Officials was repealed; Decision U.no. 35/2017, 17 May 2017, where particular provisions of the Law on the Electoral Code were repealed; Decision U.no. 19/2016, 16 March 2016, where the amendments to the Law on Amnesty were repealed; Decision U.no. 114/2016, 29 June 2016, where particular provisions of the Law on Labour with respect to working-age limits were repealed; Decision U.no. 43/2013, 4 December 2013, where a specific provision of the Law on Banks was repealed; Decision U.no. 173/2010, 22 June 2011, where a specific provision of the Law on Employment and Insurance in Case of Unemployment was repealed; Decision U.no. 77/2011, 21 September 2011, where a specific provision of the Law on Public Servants was repealed.

There are only a few examples where Convention provisions (with no reference to the Court's case-law) are utilised to argue a point. For instance, during the COVID-19 pandemic, the Constitutional Court found that the Law on Construction amended during a state of emergency is to be annulled for being incompatible with Article 15 of the Convention.⁴⁹ In this particular case, the Constitutional Court only made a reference to this Convention provision but did not use any case-law of the Court to reason its decision. Numerous similar examples may be observed in other cases when the Constitutional Court found an incompatibility between a certain legislative act and specific provisions of the Constitution but only referred to the text of various articles of the Convention, namely Article 3 of Protocol No. 1,⁵⁰ Article 2 of Protocol No. 4,⁵¹ and Article 6.⁵² In all such instances, the Constitutional Court paraphrased the content of the Convention Article as part of its reasoning but was strictly confined to solely using the text of that provision, without referring to any relevant ECtHR case-law, despite the existence of relevant principles that would have greatly enhanced its reasoning.

Generally speaking, in cases rejected on inadmissibility grounds, there are very scarce exceptions where the ECtHR case-law is referred to.⁵³ In those rare cases, there are a few interesting examples, such as the one initiated by 12 associations and citizens under Article 110 of the Constitution requesting that the Constitutional Court initiate a procedure for review of compatibility of certain articles of the Law on Civil Liability for Insult and Libel.⁵⁴ Unexpectedly, this happens to be the best example of a case (albeit an inadmissibility case) where the Convention principles of the Court's case-law on Articles 8 and 10

⁴⁹ Constitutional Court of North Macedonia, Decision U.no. 209/2020, 23 September 2020.

⁵⁰ Constitutional Court of North Macedonia, Decision U.no. 93/2014, 11 February 2015, § 5, in which certain provisions of the Electoral Code were declared to be incompatible with the Constitution.

⁵¹ Constitutional Court of North Macedonia, U.no. 189/2012, 25 June 2014, § 5, in which a specific provision of the Law on Travel Documents of Citizens of the Republic of Macedonia was repealed.

⁵² Constitutional Court of North Macedonia, Decision U.no. 166/2012, 24 April 2013, § 7, in which several provisions of the Law on Attorney's Stamps were repealed.

⁵³ See e.g. the database of the Constitutional Court of North Macedonia <UstavenSudMK – Уставен суд на Република Северна Македонија> where Resolutions for cases being rejected as inadmissible are published for the years 2003-2019. In all such cases, only limited references to the Convention may be found. See e.g. Constitutional Court of North Macedonia, Resolution U.no. 16/2014, 3 June 2015, in which Article 1 of Protocol No. 1 is referred to in a paraphrased form.

⁵⁴ Constitutional Court of North Macedonia, Resolution U.no. 48/2013, 18 February 2015.

have been more extensively elaborated.⁵⁵ In no other case has the Constitutional Court conducted such an in-depth analysis of Convention principles and applied them to the circumstances of a case as it did in this particular case related to defamation.

Another interesting inadmissibility decision is the case initiated by Gorgija Bosevski alleging, *inter alia*, that Article 400 of the Law on Contentious Procedure⁵⁶ is not compatible with Article 13 of the Convention.⁵⁷ In this respect, the applicant had claimed, *in abstracto*, that it was unconstitutional that all citizens who have realised a right before the Strasbourg Court are required to request that a court in North Macedonia decide the case again instead of the judgment of the Strasbourg Court being implemented directly.⁵⁸ The Constitutional Court provided some interesting views whilst (rightly) rejecting the applicant's request as unfounded because, in substance, he was not himself affected by the contested legislation. In any case, it is important to highlight the

⁵⁵ *Ibid.*, see for example §§ 5-11, where Articles 8 and 10 of the ECHR are referred to as well as the case-law of the Strasbourg Court, namely, *inter alia*, ECtHR, *Otto-Preminger-Institut v. Austria*, no. 13470/87, Judgment (1994), regarding artistic expression; ECHR, *Jersild v. Denmark*, no. 15890/89, Judgment (1994); ECtHR, *Lionarakis v. Greece*, no. 1131/05, Judgment (2007); ECtHR, *Gündüz v. Turkey*, no. 35071/97, Judgment (2003); ECtHR, *Fuentes Bobo v. Spain*, no. 39293/98, Judgment (2000); ECtHR, *Filatenko v. Russia*, no. 73219/01, Judgment (2007); ECtHR, *McVicar v. the United Kingdom*, no. 46311/99, Judgment (2002); ECtHR, *Bladet Tromso and Stensaas v. Norway*, no. 21980/93, Judgment (1999); ECtHR, *Fressoz and Roire v. France* [GC], no. 29183/95, Judgment (1999); see also a reference to the dissenting opinion of Judge De Meyer in the case of ECtHR, *Müller and Others v. Switzerland*, no. 10737/84, Judgment (1998).

⁵⁶ Article 400 of the Law on Contested Procedure entitled "Repetition of the procedure following a final decision of the European Court of Human Rights in Strasbourg", stipulates as follows: "When the European Court of Human Rights establishes a violation of some human right or of the fundamental freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the Additional Protocols to the Convention, which the Republic of Macedonia has ratified, the party may, within 30 days from the date on which the judgment of the European Court of Human Rights became final, file a request with the court in the Republic of Macedonia that adjudicated in the procedure in the first instance in which the decision violating a human right or fundamental freedom was taken, to change the decision that violated that right or fundamental freedom. [...] In the repeated procedure the courts are obliged to observe the legal stances in the final judgment of the European Court of Human Rights finding a violation of the fundamental human rights and freedoms." See another decision of the Supreme Court related to this Article based on which the party requested the reopening of proceedings following a judgment rendered by the ECtHR, namely, Supreme Court of North Macedonia, Rev3.no. 146/2016, 1 November 2017.

⁵⁷ Constitutional Court of North Macedonia, Resolution U.no. 35/2006, 13 September 2006 (note: only cases involving a dispute over MKD 500,000, approximately EUR 8,000, could be filed for revision whilst before it was MKD 1,000,000 or approximately EUR 16,000).

⁵⁸ *Ibid.*, § 2.

reasoning of the Constitutional Court. After noting the content of Articles 32, 34, 35, 41 and 46 of the Convention with respect to Court's competences, the Constitutional Court, *inter alia*, concluded that: (i) the ECtHR "does not modify the domestic judgment, does not impose the obligation for a reopening of the case, nor can it impose an obligation of the State that has violated a certain right to stop such violations in the future"; and that (ii) the applicant's request to directly implement in a national court decision a judgment of the Strasbourg Court so that the latter "judgment [is] to be [considered] the source of law, that is, the 'pilot decision' of the Court in Strasbourg to be applied in all cases that may be ranked on the same ground, ... in the opinion of the Constitutional Court is unacceptable".⁵⁹ In substance, the Constitutional Court seems to be of the opinion that even in cases that are "ranked on the same ground", the *res interpretata* effect of the ECtHR is not absolutely required. Whilst theoretically and strictly speaking that might be an sustainable argument, the role of a Constitutional Court in a country that already does not make sufficient use of Convention principles is not to discourage others from their usage but instead to use its jurisdiction to bring them closer to those principles.

There are a few other inadmissible cases where brief references to the Court's case-law were made regarding: issues related to long-term sentencing;⁶⁰ oaths by atheist national judges;⁶¹ a few cases where the general wording "European standards" was mentioned with respect to election matters;⁶² lustration laws;⁶³ and a handful of other cases where Convention Articles were merely paraphrased as part of the reasoning.⁶⁴ There are also instances in which the ap-

⁵⁹ Ibid., § 5.

⁶⁰ Constitutional Court of North Macedonia, Resolution U.no. 28/2008, 23 April 2008, where Articles 3 and 5 of the ECHR are cited as well as the following case-law: ECtHR, *Léger v. France*, no. 19324/02, Judgment (2006); ECtHR, *Kafkaris v. Cyprus* [GC], no. 21906/04, Judgment (2008); ECtHR, *Stanford v. the United Kingdom*, no. 16757/90, Judgment (1994); ECtHR, *Hill v. the United Kingdom*, no. 19365/02, Judgment (2004); and ECtHR, *Wynne v. the United Kingdom*, no. 15484/89, Judgment (1994).

⁶¹ Constitutional Court of North Macedonia, Resolution U.no. 52/2008, 12 November 2008; see also the dissenting opinion attached to this decision.

⁶² Constitutional Court of North Macedonia, Resolution U.no. 61/2011, 18 May 2011, § 3.

⁶³ Constitutional Court of North Macedonia, Resolution U.no. 1112012, 9 April 2014; see the dissenting opinion attached to this decision, where the Convention and the case-law of the ECtHR are mentioned (without specific references), with the following statement: "The Constitutional Court should, to a much greater extent, have taken into consideration the jurisprudence of the European Court of Human Rights, which carefully considered the national circumstances of all cases regarding lustration ...".

⁶⁴ See e.g. Constitutional Court of North Macedonia, Resolution U.no. 2/2004, 16 February 2005, and Constitutional Court of North Macedonia, Resolution U.no. 2/2004, 16 February 2004, citing Article 6.

plicants refer to specific cases of the ECtHR to support their allegations of Convention violations, which the Constitutional Court does not respond by offering a reasoning as to why these particular cases do not stand in the circumstances of the applicants' case.⁶⁵ Relying on high-profile ECtHR cases with respect to reproductive and family rights, such as *Tysqç v. Poland*, *P. and S. v. Poland*, and *Airey v. Ireland*, a few applicants argued that North Macedonia had a positive obligation to create a procedural framework which would allow pregnant women to effectively exercise their right of access to legal abortion.⁶⁶ As a result, the applicants requested the Constitutional Court to initiate proceedings for review of the constitutionality of the Law on Termination of Pregnancy.⁶⁷ The fact that the Constitutional Court considered nothing wrong with said law and decided not to initiate a constitutionality procedure review is perhaps not so surprising, because that may well have been the case; however, it is nonetheless striking that the Constitutional Court did not find it necessary to analyse the relevant ECtHR case-law cited accurately by the applicants and use the principles stipulated therein to argue its stance as to why the applicants' arguments did not stand in that particular case. In cases of such high sensitivity as those related to abortion rights, the Constitutional Court should be obliged to render well-reasoned decisions based on Convention principles invoked by the applicants so that they are able to see clearly how their crucial allegations have been refuted and why. The reading of this case leaves one wondering whether true constitutional justice was done or whether it was simply avoided by not responding to crucial arguments raised by the applicants.

As far as the second competence goes, namely the competence to protect the freedoms and rights of individuals relating only to specific rights, Article 110 of the Constitution of North Macedonia provides that the Constitutional Court is only authorised to protect:

⁶⁵ See e.g. Constitutional Court of North Macedonia, Resolution U.no. 137/2013, 8 October 2014, which was filed by Karolina Ristova-Asterud, the Association of Citizens H.E.R.A, the Association for Health Education and Research, the Coalition "Sexual and Health Rights of Marginalised Communities", and the Helsinki Committee for Human Rights, alleging that certain provisions of the Law on Termination of Pregnancy are not Convention compliant.

⁶⁶ Constitutional Court of North Macedonia, Resolution U.no. 137/2013, 8 October 2014, citing ECtHR, *Tysqç v. Poland*, no. 5410/03, Judgment (2007); ECtHR, *P. and S. v. Poland*, no. 57375, Judgment (2012); and ECtHR, *Airey v. Ireland*, no. 6289/73, Judgment (1979).

⁶⁷ Constitutional Court of North Macedonia, Resolution U.no. 137/2013, 8 October 2014.

(...) the freedoms and rights of the individual and the citizen relating to freedom of conviction, conscience, thought and public expression of thought, political association and activity as well as the prohibition of discrimination on the grounds of gender, race, religion, national, social and political affiliation.⁶⁸

In practical terms, applicants may appear before the Constitutional Court only for specific alleged violations that might fall under Articles 9, 10, 11, 14 and Article 1 of Protocol No. 1 of the Convention. This shows that the mechanism of individual constitutional appeal is far too limited for it to provide the all-encompassing Convention redress which is needed at the domestic level. This mechanism is not the same as in other Western Balkan countries, considering that the Constitutional Court in North Macedonia is not entitled to review individual decisions taken by the regular courts. Specifically, the Constitutional Court does not have the competence to quash a decision of the Supreme Court or other regular courts. This makes the Constitutional Court more of a court that reviews matters *in abstracto* rather than *in concreto*. The examples below will serve to illustrate this point.

Even though the Constitutional Court is entitled to protect the rights and freedoms of individuals only for a few selected Convention rights, the analysis of the case-law under this competence does not portray the Constitutional Court as a skillful implementer of the Convention principles related to such rights. Two of the following examples are cases which ended up in the ECtHR's docket after the failure of the Constitutional Court to detect certain manifest violations under Articles 10 and 11.

In the first case, in the domestic court proceedings related to the ECtHR case of *Selmani and Others*,⁶⁹ the Constitutional Court relied generally on three ECtHR cases⁷⁰ in order to reject as unfounded the applicants' allegations of violation of their right to freedom of expression. The Constitutional Court did not properly cite such cases or its paragraphs, nor did it provide a detailed examination of how they linked to the case at hand. Contrary to what the Strasbourg Court would later decide in this particularly important case for journal-

⁶⁸ Article 110 of the Constitution.

⁶⁹ Constitutional Court of North Macedonia, Decision U.no. 27/2013, 16 April 2014. See also ECtHR, *Selmani and Others v. the former Yugoslav Republic of Macedonia*, no. 67259/14, Judgment (2017).

⁷⁰ Constitutional Court of North Macedonia, U.no. 27/2013, 16 April 2014, § 3 which cites ECtHR, *The Sunday Times v. the United Kingdom (no. 1)* [GC], no. 6538/74, Judgment (1979); ECtHR, *Lingens v. Austria*, no. 9815/82, Judgment (1986); and ECtHR, *News Verlags GmbH & Co.KG v. Austria*, no. 31457/96, Judgment (2000).

istic freedom,⁷¹ the Constitutional Court saw no reasons to find a violation of Article 10 because, according to its strict interpretation of the restrictions on freedom of expression, the applicants' rights were not violated as "there was no advance intent to obstruct the journalists and prevent them from reporting on the [parliamentary] session".⁷² The Strasbourg Court recalled the reasoning of the Constitutional Court but could not consider it as Convention compliant in the circumstances of the case, as will be explained in detail in the section on Article 10 cases against North Macedonia. Thus, the Court found a violation of the applicants' rights to freedom of expression.

In the second case, in the domestic court proceedings related to the ECtHR case of *Bektashi Community and Others*,⁷³ the Constitutional Court relied only generally on one (irrelevant) ECtHR case⁷⁴ as a supporting argument to reject the allegations of violations raised by the religious community of Bektashi.⁷⁵ The latter had complained of the refusal of the domestic courts to recognise their association as a religious entity and register it as such in the respective State registers. The Constitutional Court referred to guarantees provided by Articles 9, 14, and Article 1 of Protocol No. 12 of the Convention and one sole case of the ECtHR in order to explain that there is an "objective and reasonable justification" if the measure concerned has a legitimate goal and if there is a "reasonable link of proportionality between the means used and the goal achieved".⁷⁶ However, in performing the test, the Constitutional Court concluded that the rejection of the applicant's request was prescribed by law and that the interference was legitimate and necessary because it aimed "to prevent religious conflicts" among believers.⁷⁷ The Strasbourg Court again disagreed with how the Constitutional Court performed the proportionality test and went on to find a violation of Article 11 read in light of Article 9.⁷⁸ In substance, the ECtHR maintained that: (i) the refusal of the North Macedonian courts to recognise the association's continuing status as a religious entity cannot be said to have been necessary in a democratic society; and that (ii) the

⁷¹ ECtHR, *Selmani and Others v. the former Yugoslav Republic of Macedonia*, no. 67259/14, Judgment (2017).

⁷² Constitutional Court of North Macedonia, Decision U.no. 27/2013, 16 April 2014, § 6.

⁷³ ECtHR, *Bektashi Community and Others v. the former Yugoslav Republic of Macedonia*, nos. 48044/10 and 2 others, Judgment (2018).

⁷⁴ Constitutional Court of North Macedonia, Decision U.no. 24/2012, 20 November 2012.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, § 5.

⁷⁸ ECtHR, *Bektashi Community and Others v. the former Yugoslav Republic of Macedonia*, nos. 48044/10 and 2 others, Judgment (2018), operative part.

Constitutional Court merely stated that the non-registration of the association was necessary in order “to prevent religious conflict” but it produced no evidence that the denomination seeking recognition presented any danger for a democratic society.⁷⁹ Whilst the ECtHR relied on its well-established general principles on the topic freedom of assembly related to freedom of religion,⁸⁰ the Constitutional Court relied on one irrelevant ECtHR case,⁸¹ despite the fact that the former principles were readily available for utilisation at the time when the domestic judgment was rendered. The Court’s judgment on this case remains to be implemented by North Macedonia.⁸²

In a few cases related to Article 6,⁸³ Article 8,⁸⁴ Article 10,⁸⁵ and Article 11,⁸⁶ the Convention provision is referred to – without extensive elaboration – and with no mention of ECtHR case-law. In the vast majority of cases, there is no reference to ECtHR principles at all.⁸⁷ It is almost impossible to find a case in the docket of the Constitutional Court of North Macedonia where Convention principles deriving from the Court’s case-law are outlined or utilised in a fitting manner.

The Constitutional Court has been criticised for evading the utilisation of ECtHR decisions as a legal basis for their decisions and for not applying “con-

⁷⁹ Ibid., §§ 61-74.

⁸⁰ See, in respect of general principles on this matter, ECtHR, *Jehovah’s Witnesses of Moscow and Others v. Russia*, no. 302/02, Judgment (2010), §§ 99-104; ECtHR, *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, nos. 70945/11 and 8 others, Judgment (2014), §§ 75-79; and ECtHR, *Bektashi Community and Others v. the former Yugoslav Republic of Macedonia*, nos. 48044/10 and 2 others, Judgment (2018), § 60.

⁸¹ ECtHR, Case “relating to certain aspects of the laws on use of languages in education in Belgium” [Plenary], nos. 1474/62 and 5 others, Judgment (1968).

⁸² European Commission of the European Union, ‘North Macedonia 2021 Report’, Commission Staff Working Document no. SWD(2021) 294 final, 19 October 2021, page 28.

⁸³ Constitutional Court of North Macedonia, Decision U.no. 139/2005, 21 December 2005, where a particular provision of the Law on Labor was revoked.

⁸⁴ Constitutional Court of North Macedonia, Decision U.no. 211/2016, 5 November 2008.

⁸⁵ Constitutional Court of North Macedonia, Decision U.no. 107/2010, 16 February 2011, § 3; Constitutional Court of North Macedonia, Decision U.no. 147/2011, 24 November 2011.

⁸⁶ Constitutional Court of North Macedonia, Decision U.no. 31/2006, 1 November 2006, revoking a provision of the Law on Public Assemblies for being incompatible with Article 11 of the Convention.

⁸⁷ See the following decisions of the Constitutional Court of North Macedonia, Decision U.no. 74/2008, 10 September 2008; Decision U.no. 241/2007, 11 June 2018; Decision U.no. 134/2008, 17 December 2008; Decision U.no. 185/2006, 17 January 2007; Decision U.no. 99/2006, 10 January 2007; Decision U.no. 179/2006, 4 April 2007; Decision U.no. 85/2006, 13 September 2006; Decision U.no. 192/2004 of 2 March 2005.

sistency in interpretation and application of ECtHR decisions”.⁸⁸ In this respect, the criticism states that the Constitutional Court employs a selective strategy when applying the jurisprudence of the ECtHR by ignoring the relevant decisions of the Strasbourg Court or applying only those decisions that are favourable to justify its own decisions, and by explicitly refusing direct application of the ECtHR’s case-law as a source of international law.⁸⁹ The analysis of the case-law of the Constitutional Court conducted by this study generally confirms this stance, while adding concrete examples of how this is done in practice.

This chapter has highlighted that the access of individuals (physical and/or legal persons) to the Constitutional Court is limited only to the protection of rights which would in practice correspond to Articles 9, 10, 11, 14 and Article 1 of Protocol No. 12 of the Convention. For all other Convention rights guaranteed by other Convention provisions, the hands of the Constitutional Court are tied – though not due to its own fault. This has led many practitioners and academics to point out and argue for the need to extend and expand the jurisdiction of the Constitutional Court so that it is able to protect all rights and freedoms through a stronger constitutional complaint mechanism.⁹⁰ Based on a thorough analysis of the limited case-law of the Constitutional Court and thus its limited impact on the domestication of the ECHR within the North Macedonian judiciary, and although an attempt to do so has failed in the past, this study strongly calls for an amendment to Article 110 of the Constitution which would turn the Constitutional Court into an effective domestic remedy for all Convention rights and not just a selected few. That would be a sound policy decision leading to better domestication of the ECHR and further strengthening of the ‘Convention talk’ between the two highest courts when it comes to the application of Convention principles, which, as will be demonstrated below, lacks depth, intensity and quality.

2. Supreme Court v. Constitutional Court: ‘Convention talk’

Considering the limited competences of the Constitutional Court and the fact that it is not entitled to review the decisions of the Supreme Court, the ‘Convention talk’ between these two courts is non-existent due to the constraints

⁸⁸ Risteska and Shurkov (2016), 37.

⁸⁹ See, Risteska and Shurkov (2016), 36; Risteska and Misheva (2015).

⁹⁰ Lazarova Trajkovska and Trajkovski (2016), 285.

posed by the jurisdiction. The case-law of the Constitutional Court, in addition to the applicable legislation, confirms this stance. In one of its cases, the Constitutional Court confirmed that it has no jurisdiction to review the lawfulness of a decision of the Supreme Court.⁹¹ In turn, this limitation also means that the Supreme Court does not have another national court which would check the 'conventionality' of its decisions or another national court from which it could seek direction regarding the Convention, except at the supranational level in Strasbourg.

The absence of 'Convention talk' between the two courts elevates the importance of the Supreme Court decisions to the highest possible level. The fact that the Constitutional Court cannot review the decisions of the Supreme Court means that the latter is the last 'Convention filter' and thus the Court's best possible 'Convention partner' at the national level. As a last filter, the Supreme Court must substantially advance its Convention absorption capacity in order to serve as the final 'first-line defender' of Convention rights in North Macedonia.

⁹¹ ECtHR, *Poposki and Duma v. the former Yugoslav Republic of Macedonia*, nos. 69916/10 and 36531/11, Judgment (2016), § 22 where, after citing Decision U.no. 18/2011 of the Constitutional Court of North Macedonia of 22 June 2011, the Court stated: "the Constitutional Court rejected the appeal finding that it had no jurisdiction to review the lawfulness of the SJC's decision" following the allegation by the applicant that "her dismissal had violated her rights under Articles 9 (equality of citizens) and 16 (freedom of conscience, thought and public expression of thought) of the Constitution".

IV. North Macedonia v. the Strasbourg Court: Impact and Effects

1. An overview of the Court's case-law against North Macedonia

The jurisprudence of the Strasbourg Court in respect of North Macedonia is rich and diverse. To date, there are two Grand Chamber cases against North Macedonia. The first is the notorious case of *El-Masri* which, due to its importance, is also published in the Case Reports.⁹² The second is the *Alisić and Others* case, which is not as important for North Macedonia as it is for other respondent parties, mainly for Serbia⁹³ and Slovenia.⁹⁴ That is so because the Court found that North Macedonia had in fact paid back the “old” foreign-currency savings and, as a result, the Court did not have to order any individual or general measures to be undertaken by North Macedonia.⁹⁵ In addition to these two high-profile judgments, there are three other cases marked with high-level importance for Convention case-law by the ECtHR itself.⁹⁶ Most of the violations in respect of North Macedonia were found under the domain of Article 6 but some really interesting cases have derived from violations of several other articles of the Convention, namely Articles 2, 3, 5, 6, 8, 10, 11, 13, 14, Article 1 of Protocol No. 1, and Article 1 of Protocol No. 7. To date, the Court has not proclaimed any general measures to be taken by North Macedonia under Article 46 of the Convention. Therefore, there are no systemic issues identified by the Court in the domestic legal order. The following part of the analysis will focus on five categories of cases:

⁹² ECtHR, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, Judgment (2012).

⁹³ ECtHR, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, Judgment (2014). See Chapter 7, Part IV where this judgment is explained in greater detail.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*, §§ 52 and 144-150.

⁹⁶ ECtHR, *Solakov v. the former Yugoslav Republic of Macedonia*, no. 47023/99, Judgment (2001), where no violation of Article 6 was found; ECtHR, *Association of Citizens “Radko” and Paunkovski v. the former Yugoslav Republic of Macedonia*, no. 74651/01, Judgment (2009), where a violation of Article 11 was found; and ECtHR, *Sašo Gorgiev v. the former Yugoslav Republic of Macedonia*, no. 49382/06, Judgment (2012), where a violation of Article 2 was found.

- (1.1) [Cases with the highest number of violations: Article 6 issues;](#)
- (1.2) [Cases under Article 13: lack of effective domestic remedies;](#)
- (1.3) [Cases with violations under other Convention articles;](#)
- (1.4) [Cases declared admissible with no violation found;](#) and
- (1.5) [Other important cases related to exhaustion of domestic remedies.](#)

1.1. Cases with the Highest Number of Violations: Article 6 issues

North Macedonia is also no exception to the well-known affinity whereby Article 6 is the most litigated Convention Article, with more than one-hundred violations having been found to date. A further categorisation of this pool of cases is needed to better understand North Macedonia's areas of weakness with regard to the right to a fair and impartial trial.

In this respect, it is to be noted that the highest number of violations has been found under the first paragraph of Article 6. The largest pool of violations, some 30 plus, derive from issues related to length of proceedings at the domestic level. The first case finding such a violation was the case of *Dumanovski*, where the Court maintained there had been a breach of the reasonable time requirement in the applicant's case and that the Government had not put forward any argument or fact that would show that the case had been decided with due expediency.⁹⁷ At this point, the Court had not yet discussed the issue of availability of domestic remedies to address length of proceedings. However, in the subsequent case, the Court considered that, in addition to finding a violation of the reasonable time requirement, it was necessary to declare that there were no effective legal remedies for the applicant to address his unreasonable time complaint.⁹⁸ Following this case, the Court then continued to find violations of Article 6 by relying on its previous case-law, without extensive elaboration,⁹⁹ except in certain specific cases. In one such specific

⁹⁷ ECtHR, *Dumanovski v. the former Yugoslav Republic of Macedonia*, no. 13898/02, Judgment (2005), §§ 40-50.

⁹⁸ ECtHR, *Atanasovic and Others v. the former Yugoslav Republic of Macedonia*, no. 13886/02, Judgment (2005), §§ 33-47.

⁹⁹ See e.g. ECtHR, *Milošević v. the former Yugoslav Republic of Macedonia*, no. 15056/02, Judgment (2006), § 27; ECtHR, *Rizova v. the former Yugoslav Republic of Macedonia*, no. 41228/02, Judgment (2006), § 51; ECtHR, *Arsov v. the former Yugoslav Republic of Macedonia*, no. 44208/02, Judgment (2006), § 43; ECtHR, *Markoski v. the former Yugoslav Republic of Macedonia*, no. 22928/03, Judgment (2006), §§ 39-42; ECtHR, *MZT Learnica A.D. v. the former Yugoslav Republic of Macedonia*, no. 26124/02, Judgment (2006), §§ 49-50; ECtHR, *Stojković v. the former Yugoslav Republic of Macedonia*, no. 14818/02, Judgment

case, the Government attempted to argue that the Supreme Court's backlog had contributed to the length of proceedings but the Court refuted this argument by reasoning that "while a temporary backlog of court business does not entail a Contracting State's international liability if that State takes appropriate remedial action with the requisite promptness, a chronic overload cannot justify an excessive length of proceedings".¹⁰⁰

The stance of the Strasbourg Court on the issue of the ineffectiveness of domestic legal remedies to tackle the length of proceedings remained unchanged until North Macedonia enacted a new law which introduced a remedy to address this challenging issue.¹⁰¹ In the case of *Adži-Spirkoska and Others*, the Court analysed the remedy and declared that prospective applicants should use it before filing an application with the Court.¹⁰² This remedy is explained in further detail below under Article 13 cases.

Following this new development, the Court then continued to render decisions on a case-by-case basis by addressing specific arguments raised by the parties in respect of the exhaustion or ineffectiveness of this particular remedy in practice, and more generally on the merits of each specific complaint related to length. For instance, despite the new remedy being in place and used by the applicants, in a specific case the Court rejected the Government's observation on non-exhaustion of this new remedy by stating three main arguments, namely that: (i) the compensatory remedy is only effective for redressing a violation that has already occurred; (ii) the new remedy is ambiguous in certain areas as it does not specify what happens when the case is pending before the Supreme Court, which was the applicant's case; and, lastly, (iii) the absence of any domestic case-law for more than 12 months after the remedy entered into force appears to confirm the ambiguity of the new legislation.¹⁰³ Hence, the Court found, in that particular case, that the Government's arguments did not hold and that a violation of length had indeed occurred.¹⁰⁴

(2007), § 42; and ECtHR, *Stoilkovska v. the former Yugoslav Republic of Macedonia*, no. 29784/07, Judgment (2013), § 58.

¹⁰⁰ ECtHR, *Lickov v. the former Yugoslav Republic of Macedonia*, no. 38202/02, Judgment (2006), § 31.

¹⁰¹ Law on Courts of 2006. For all changes to the Law on Courts see <<https://www.pravdiko.mk/zakon-za-sudovite/>> (accessed 7 January 2022).

¹⁰² See ECtHR, *Adži-Spirkoska and Others v. the former Yugoslav Republic of Macedonia*, nos. 38914/05 and 17879/05, Decision (2011), pages 14-15.

¹⁰³ ECtHR, *Parizov v. the former Yugoslav Republic of Macedonia*, no. 14258/03, Judgment (2008), §§ 43-44.

¹⁰⁴ *Ibid.*, § 60.

The Court also reviewed a particular case where the applicants presented three main complaints, namely that the compensation provided by the Supreme Court based on the new remedy was insufficient, that the impugned proceedings had been unduly prolonged, and that they had no effective remedy to tackle length.¹⁰⁵ In respect of the first complaint, the Court, in line with its established case-law,¹⁰⁶ considered that a compensation of EUR 325 and EUR 980, respectively, awarded by the Supreme Court were amounts “manifestly unreasonable having regard to what the Court would have been likely to award under Article 41 of the Convention”.¹⁰⁷ In respect of the second complaint, the Court saw no reason to depart from cases raising similar issues to the present one,¹⁰⁸ and went on to find a violation of Article 6 with respect to length of proceedings.¹⁰⁹ In respect of the third complaint, the Court simply maintained that its stance on the ineffectiveness of domestic remedies pre-dating the *Adži-Spirkoska and Others* case remains unchanged.¹¹⁰ Similarly, in another case, the Court found a violation after noting that “the amount is approximately 35% of what the Court generally awards for non-pecuniary damage in similar cases against the respondent State” and that, therefore, “the compensation awarded to the applicant by the domestic court is manifestly inadequate”.¹¹¹

The other related pool of cases falling within the group of cases in which length of proceedings is at issue concerns various types of proceeding, mainly those related to length of proceedings in the enforcement of final decisions,¹¹² defamation issues,¹¹³ restitution of property matters,¹¹⁴ expropriation proceed-

¹⁰⁵ ECtHR, *Ogradžden Ad and Others v. the former Yugoslav Republic of Macedonia*, nos. 35630/04 and 2 others, Judgment (2012), §§ 13 and 19.

¹⁰⁶ See, in this context, ECtHR, *Cocchiarella v. Italy* [GC], no. 64886/01, Judgment (2006), §§ 65-107, and ECtHR, *Parlov-Tkalčić v. Croatia*, no. 24810/06, Judgment (2009), § 62.

¹⁰⁷ ECtHR, *Ogradžden Ad and Others v. the former Yugoslav Republic of Macedonia*, nos. 35630/04 and 2 others, Judgment (2012), § 16.

¹⁰⁸ ECtHR, *Pakom Slobodan Dooel v. the former Yugoslav Republic of Macedonia*, no. 33262/03, Judgment (2010), § 23; ECtHR, *Docevski v. the former Yugoslav Republic of Macedonia*, no. 66907/01, Judgment (2007), § 28.

¹⁰⁹ ECtHR, *Ogradžden Ad and Others v. the former Yugoslav Republic of Macedonia*, nos. 35630/04 and 2 others, Judgment (2012), § 22.

¹¹⁰ *Ibid.*, § 29.

¹¹¹ ECtHR, *Petrović v. the former Yugoslav Republic of Macedonia*, no. 30721/15, Judgment (2017), § 21.

¹¹² ECtHR, *Bočvarska v. the former Yugoslav Republic of Macedonia*, no. 27865/02, Judgment (2009), §§ 65-73

¹¹³ ECtHR, *Popovski v. the former Yugoslav Republic of Macedonia*, no. 12316/07, Judgment (2013), §§ 52 and 65-70.

¹¹⁴ ECtHR, *Goreski and Others v. the former Yugoslav Republic of Macedonia*, no. 27307/04, Judgment (2014), §§ 7 and 19.

ings¹¹⁵ and general administrative proceedings.¹¹⁶ There are also cases where the Court found a violation of other articles of the Convention but not specifically with respect to length allegations as it considered the proceedings not to have been excessive.¹¹⁷ In the last case to date against North Macedonia in respect of length of proceedings, the Court found yet another violation due to insufficiency of the compensation award at the domestic level by reiterating that such low amounts of compensation awarded by the North Macedonian authorities cannot be regarded as adequate.¹¹⁸ This means that North Macedonia might either have to amend its legislation again so that the compensation scheme is in line with the Court's requirements or the practice of the Supreme Court must be streamlined in order to be in line with the Court's findings in this particular respect. This stands true although the Court has not yet gone as far as hinting at a need to amend the legislation; but it has seen this issue as problematic on a case-by-case basis. The opinion formed by this study is that specific parts of this remedy are not in alignment with Convention principles and it remains to be seen how the case-law will develop in this regard.

Despite violations in the realm of length of proceedings, there are some other interesting violations of Article 6 which find North Macedonian courts in violation of other basic guarantees of the right to fair and impartial trial. For instance, the ECtHR has found a serious breach of Convention principles in a case where the applicants were not granted the benefit of being adjudicated by an impartial tribunal; instead, their case was decided by a Supreme Court judge who was closely related to the proceedings and failed to bring the matter before the national court.¹¹⁹ Another interesting case is that of *Selmani and Others*, where the journalists were forcibly removed from the national Parliament's gallery by security forces immediately after tensions between MPs started to get heated due to a discussion over the State budget which was par-

¹¹⁵ ECtHR, *Nikolova v. the former Yugoslav Republic of Macedonia*, no. 31154/07, Judgment (2015), § 31.

¹¹⁶ ECtHR, *Mitkova v. the former Yugoslav Republic of Macedonia*, no. 48386/09, Judgment (2015), § 51.

¹¹⁷ ECtHR, *Lazoroski v. the former Yugoslav Republic of Macedonia*, no. 4922/04, Judgment (2009), §§ 80-81.

¹¹⁸ ECtHR, *Sinadinovska v. North Macedonia*, no. 27881/06, Judgment (2020), §§ 49-58.

¹¹⁹ ECtHR, *Stoimenovikj and Miloshevikj v. North Macedonia*, no. 59842/14, Judgment (2021), §§ 34-45; ECtHR, *Poposki and Duma v. the former Yugoslav Republic of Macedonia*, nos. 69916/10 and 36531/11, Judgment (2016), §§ 41-49; ECtHR, *Mitrinovski v. the former Yugoslav Republic of Macedonia*, no. 6899/12, Judgment (2015), §§ 38-46; and ECtHR, *Mitrov v. the former Yugoslav Republic of Macedonia*, no. 45959/09, Judgment (2016), §§ 49-56.

ticularly controversial at the time.¹²⁰ Although the main complaint in this case related to Article 10 (as will be explained in detail later in this chapter), an important violation was also found in respect of Article 6 due to the lack of an oral hearing in the proceedings before the Constitutional Court.¹²¹ In this respect, the Court concluded that “the administration of justice would have been better served in the applicants’ case by affording them the right to explain their personal experience in a hearing before the Constitutional Court” and that in the Court’s view “this factor outweighs the considerations of speed and efficiency on which the Government relied in their submissions.”¹²² Moreover, the Court also pointed out that, despite the applicants’ specific request for a hearing, the Constitutional Court did not give any reasons as to why it considered this to be unnecessary. Some other specific violations have also been found in the area of equality of arms before Supreme Court proceedings,¹²³ issues related to the applicants’ right to an adversarial trial¹²⁴ and the right to a reasoned decision.¹²⁵

Lastly, it is to be noted that in addition to the aforementioned violations which fall under paragraph 1 of Article 6, the ECtHR has found several other violations of Article 6 in relation to other paragraphs of Article 6, albeit in much lower numbers. For instance, the Strasbourg Court found a dozen violations with respect to the specific right of the defendant (6-3-d) to examine witnesses against him/her and to obtain the attendance and examination of witnesses.¹²⁶ In one such case, the Court concluded that the applicant’s defence had been constrained in a manner that was irreconcilable character with fair trial guarantees because he could not examine the only eyewitness and there were no counterbalancing factors to remedy this failure.¹²⁷ In the last case un-

¹²⁰ ECtHR, *Selmani and Others v. the former Yugoslav Republic of Macedonia*, no. 67259/14, Judgment (2017), §§ 5-15 for facts and developments in the domestic proceedings.

¹²¹ *Ibid.*

¹²² *Ibid.*, §§ 41 and 43.

¹²³ ECtHR, *Eftimov v. the former Yugoslav Republic of Macedonia*, no. 59974/08, Judgment (2015), §§ 38-42.

¹²⁴ ECtHR, *Bajić v. North Macedonia*, no. 2833/13, Judgment (2021), § 58.

¹²⁵ ECtHR, *Atanasovski v. the former Yugoslav Republic of Macedonia*, no. 36815/03, Judgment (2010), §§ 38-39.

¹²⁶ ECtHR, *Papadakis v. the former Yugoslav Republic of Macedonia*, no. 50254/07, Judgment (2013); ECtHR, *Iljazi v. the former Yugoslav Republic of Macedonia*, no. 56539/08, Judgment (2013); ECtHR, *Duško Ivanovski v. the former Yugoslav Republic of Macedonia*, no. 10718/05, Judgment (2014); ECtHR, *Asani v. the former Yugoslav Republic of Macedonia*, no. 27962/10, Judgment (2018); and ECtHR, *Smičkovski v. the former Yugoslav Republic of Macedonia*, no. 15477/14, Judgment (2018).

¹²⁷ ECtHR, *Ziberi v. the former Yugoslav Republic of Macedonia*, no. 27866/02, Judgment (2007), §§ 31-43.

der this particular right, the Court outlined the standard test in which the case failed because there was not a sufficiently good reason for the witness not to attend trial, especially since his evidence had sole or decisive weight in the applicant's conviction.¹²⁸ In another case, the Court found a violation of the right of defence in a case with a protected and anonymous witness which carried significant weight for the outcome of the case and where the proper administration of justice was considered to have failed.¹²⁹

As this overview of cases under Article 6 demonstrates, North Macedonia has several issues that need to be addressed at the domestic level so that the decisions of the national courts are declared as Convention complaint when reviewed by the Strasbourg Court.

1.2. Cases under Article 13: Lack of Effective Domestic Remedies

The Court found a violation of Article 13 in respect of North Macedonia on 13 occasions. In the first case ever involving a violation of Article 13, the Court found that North Macedonia's legal order did not provide any remedy at all for addressing allegations with respect to length of proceedings,¹³⁰ as was explained in detail above under Article 6 cases. A similar violation of Article 13 was found in a subsequent case.¹³¹ In both these cases, the Government acknowledged the reality that there is no domestic remedy to address length of proceedings.¹³² In a later case, in the absence of any comments from the Government, the Court found another violation of Article 13 considering that there were no arguments for it to change its stance on the inexistence of domestic legal remedies to tackle the issue of length.¹³³ In a few other cases, a violation of Article 13 was found due to the lack of domestic legal remedies to tackle non-enforcement of a final decision.¹³⁴ All these violations were quite straight-

¹²⁸ ECtHR, *Janevski v. North Macedonia*, no. 30259/15, Judgment (2020), §§ 27-36.

¹²⁹ ECtHR, *Boshkoski v. North Macedonia*, no. 71034/13, Judgment (2020), §§ 41-55.

¹³⁰ ECtHR, *Atanasovic and Others v. the former Yugoslav Republic of Macedonia*, no. 13886/02, Judgment (2005), §§ 41-47.

¹³¹ ECtHR, *Kostovska v. the former Yugoslav Republic of Macedonia*, no. 44353/02, Judgment (2006), §§ 47-53

¹³² *Ibid.*, § 52. See also, ECtHR, *Atanasovic and Others v. the former Yugoslav Republic of Macedonia*, no. 13886/02, Judgment (2005), § 46.

¹³³ ECtHR, *Krsto Nikolov v. the former Yugoslav Republic of Macedonia*, no. 13904/02, Judgment (2008), §§ 29-33.

¹³⁴ ECtHR, *Nesevski v. the former Yugoslav Republic of Macedonia*, no. 14438/03, Judgment (2008), §§ 30-34; ECtHR, *Ogradžden Ad and Others v. the former Yugoslav Republic of Macedonia*, nos. 35630/04 and 2 others, Judgment (2012); ECtHR, *Mihajlov Ristov and Others v.*

forward, without long elaborative analysis, as there clearly was no legal remedy at all to address length and therefore no need to discuss its effectiveness at any length.

Following repeated violations of Article 13 at the ECtHR level in respect of the unavailability of a domestic legal remedy to tackle length, in 2006, North Macedonia enacted a new law specifically aimed at addressing this matter at the domestic level.¹³⁵ The said law was amended twice with a view to ameliorating the applicable remedies to address length.¹³⁶ In the case of *Adži-Spirkoska and Others*, as briefly stated above, the Court made an in-depth analysis of the domestic remedy introduced by the new legislation, together with the domestic practice of national courts in applying it, and came to the conclusion that the remedy is to be “[r]egarded, in principle, as effective within the meaning of Article 35 § 1 of the Convention”.¹³⁷ Consequently, the Court maintained that prospective applicants should exhaust this remedy before filing an application with the ECtHR.¹³⁸ Having said that, the Court also issued a disclaimer and a few further clarifications, namely that the Court may, in the future, review the effectiveness of the remedy with respect to the level of just satisfaction and that the requirement of exhaustion does not concern cases already pending before it which will be treated in light of the circumstances of each case.¹³⁹ Subsequently, in other follow-up cases, the Court maintained that “[i]t sees no reason to depart from its earlier case-law in which it found a violation of Article 13, taken in conjunction with Article 6, due to lack of an effective remedy concerning length-of-proceedings cases that pre-dated the *Adži-Spirkoska and Others* case [...]”.¹⁴⁰ To date, there is no case-law which shows that the Court has changed position in respect of this remedy, despite there being multiple cases in which compensation awarded by this remedy was considered to be inadequate.

the former Yugoslav Republic of Macedonia, no. 40127/04, Judgment (2014), §§ 16–20; and ECtHR, *Šterjov and Others v. the former Yugoslav Republic of Macedonia*, no. 40160/04, Judgment (2014), §§ 18–22.

¹³⁵ See Section 36 of the Law on Courts 2006.

¹³⁶ See e.g. the Law of 2008 amending the 2006 Act, published in Official Gazette No. 35 of 14 March 2008; the Law of 2010 amending the 2006 Act, published in Official Gazette No. 150 of 26 November 2010.

¹³⁷ ECtHR, *Adži-Spirkoska and Others v. the former Yugoslav Republic of Macedonia*, nos. 38914/05 and 17879/05, Decision (2011).

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ ECtHR, *Velinov v. the former Yugoslav Republic of Macedonia*, no. 16880/08, Judgment (2013), §§ 92–93.

In addition to the aforementioned cases where a violation of Article 13 was found in relation to Article 6 rights, there are a few other examples where a violation has been found in connection to other articles of the Convention.

The first example that merits illustration is the Grand Chamber case of *El-Masri*, where North Macedonia appallingly violated several articles of the Convention, namely: (i) Article 3 in its procedural aspect on account of failure of the respondent State to carry out an effective investigation into the applicant's allegations of ill-treatment; (ii) Article 3 on account of the inhuman and degrading treatment to which the applicant was subjected in the hotel in Skopje; (iii) Article 3 due to State's responsibility for the ill-treatment that classifies as torture to which the applicant was subjected at Skopje airport; (iv) Article 3 due to State's responsibility in being engaged with the transfer of Mr El-Masri into the custody of the United States authorities despite the existence of a real risk that he would be subjected to further treatment contrary to Article 3 of the Convention; (v) Article 5 for arbitrary detention in the hotel, for subsequent captivity in Afghanistan and for failing to carry out an effective investigation into the applicant's allegations of arbitrary detention; (vi) Article 8 as well as, finally, an overarching violation of (vii) Article 13 on account of lack of effective domestic remedies in respect of the applicant's grievances under Articles 3, 5 and 8 of the Convention.¹⁴¹ This case is notorious due to its highly sensitive factual situation whereby Mr El-Masri was a victim of secret rendition, torture, illegal captivity, arbitrary secret detention, and secret movement to foreign lands due to allegations of terrorism related offences which ultimately proved to be based on unfounded suspicions.¹⁴² The Court found that for all the violations to which he was subjected he had no effective legal remedies to address any of his serious complaints.¹⁴³ In the process of implementation of the Court's judgment by the Committee of Ministers, some concerning 'fair redress resolutions' were glossed over with a mere acknowledgement of regret.¹⁴⁴ For instance, North Macedonian authorities allowed the criminal prosecution to become time-barred because they did not deal with the criminal complaint lodged Mr El-Masri and got away with a mere reprimand from the Committee of Ministers where it was "noted with regret that due to the

¹⁴¹ ECtHR, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, Judgment (2012). More specifically, see §§ 180-222 for the violation under Article 3, §§ 230-243 for the violation under Article 5, §§ 248-250 for the violation under Article 8 and §§ 254-262 for the violation of Article 13 in conjunction with Articles 3, 5 and 8.

¹⁴² *Ibid.*, §§ 15-36 for the facts of the case.

¹⁴³ *Ibid.*, §§ 254-262.

¹⁴⁴ Committee of Ministers, Resolution CM/ResDH(2019)369 of 5 December 2019.

passage of time the criminal investigation into the facts of this case has become time-barred and that other measures are therefore called for to provide redress to the applicant”¹⁴⁵ What the Committee of Ministers meant by “other measures” was for North Macedonia to offer a “public apology” to Mr El-Masri which the Committee of Ministers then accepted as fair redress for the resolution of the case.¹⁴⁶ North Macedonian authorities were more than happy to offer an apology and close this infamous case by considering this apology as fair redress for the applicant,¹⁴⁷ but the crude truth remains that the respondent party in this case seemed to get away very easily with some of the most serious Convention violations recorded against it. Some might suggest that there was nothing more that the Committee of Ministers could have done; but this study argues that the reaction should have been much harsher so that any other respondent party is discouraged from seeking devious ways to evade their Convention obligations. A true redress for the applicant would have been if North Macedonia were to take the criminal investigations seriously, find the perpetrators and put them before its court system – whilst always respecting their Convention rights. Lastly, it is to be noted that Mr El-Masri did not stop his litigation endeavours to have his truth recognised and after the Court’s judgment in his case he managed to obtain a symbolic EUR 1.00 award for non-pecuniary damages after the Basic Court in Skopje acknowledged the truthfulness of his story.¹⁴⁸ This perhaps is the only fair redress that he obtained from the North Macedonian authorities, in addition to the personal satisfaction that he had won a case before the Strasbourg Court and that his tragic story is now well-known among the judicial community.

The second example of a violation of Article 13 in conjunction with Article 8 may be found in two different cases. In the first case, the Court initially found a violation of Article 8 on account of the failure of domestic authorities to make adequate and effective efforts to enforce the applicants’ right to have contact with their daughter, before finding a violation of Article 13 considering that the applicants did not have an effective remedy to address their Article 8 complaints.¹⁴⁹ Similarly, in the second case, the Court initially found a violation of Article 8 because of protracted non-enforcement of a decision regarding child

¹⁴⁵ Ibid.

¹⁴⁶ Ibid., §§ 8-14.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ ECtHR, *Mitovi v. the former Yugoslav Republic of Macedonia*, no. 53565/13, Judgment (2015), §§ 57-65 for the reasoning on Article 8, and §§ 71-76 for the reasoning on Article 13.

custody which made it impossible for the applicant to create an emotional bond with her child, before finding a violation of Article 13 considering that no remedy existed to address this complaint.¹⁵⁰

As stated above, despite its huge importance for the case-law of the Court, the *Alisić and Others* case found a violation of Article 13, among others, but it had no impact on North Macedonia or on its remedies at the domestic level. Therefore, in conclusion, there are various cases where a violation of Article 13 was found in respect of North Macedonia but no case where general measures have been requested by the Court. As a result, North Macedonia has no systemic issue declared at this point but has work to do in the area of securing an effective remedy system for all Convention rights.

1.3. Cases with Violations Under Other Convention Articles

In addition to the vast majority of cases falling under the domain of the right to a fair and impartial trial, litigants from North Macedonia have generated some really interesting case-law in respect of other provisions of the Convention as well. To date, the Court has found North Macedonian authorities and domestic courts to have rendered a number of decisions that are incompatible with other Conventions rights, namely: with Article 2, on three occasions; Article 3, on 17 occasions; Article 5, on 11 occasions; Article 8, on 10 occasions; Article 10, on three occasions; Article 11, on five occasions; Article 14, on one occasion; Article 1 of Protocol No. 1, on one occasion; and Article 7 of Protocol 1, on one occasion.

In the following section, this study will comment on one particular case under each article by selecting the most important one in terms of the domestic application of Convention principles.

In the area of Article 2, without any doubt, the most important case is that of *Sašo Gorgiev*.¹⁵¹ In this case, the applicant was shot by an intoxicated police reservist whilst he was working as a waiter in a bar in Skopje. He survived the life-threatening shot but sustained serious bodily injury with life-threatening damage and lasting consequences.¹⁵² As already established by the ECtHR, Article 2 applies also in cases where the alleged victim has not died as a result

¹⁵⁰ ECtHR, *Oluri v. North Macedonia*, no. 3368/18, Judgment (2020), §§ 36-45 for the reasoning on Article 8 and §§ 48-53 for the reasoning on Article 13.

¹⁵¹ ECtHR, *Sašo Gorgiev v. the former Yugoslav Republic of Macedonia*, no. 49382/06, Judgment (2012).

¹⁵² *Ibid.*, §§ 5-15.

of the impugned conduct.¹⁵³ The Court also clarified that this case should be distinguished from the *Krastanov* case¹⁵⁴ since it concerns action taken by a State agent (police reservist) outside his duties.¹⁵⁵ However, the responsibility of the respondent State could not be ruled out considering that the perpetrator of the crime caused the incident during working hours after having left the police station in an intoxicated condition and without authorisation from his supervisors.¹⁵⁶ Having established these facts, the Court recalled two important strands from its well-established general principles, namely that: (i) “the State has to put in place and rigorously apply a system of adequate and effective safeguards designed to prevent its agents (...) from making improper use of service weapons provided to them in the context of their official duties” and that (ii) “States are expected to set high professional standards within their law-enforcement systems and ensure that the persons serving in these systems meet the requisite criteria”.¹⁵⁷ Finally, the Court established that North Macedonia was responsible for not having established a system which would prevent this incident from happening and therefore concluded that there had been a violation of Article 2 under its substantive limb.¹⁵⁸

In the area of Article 3, there are several cases where the Court found violations of procedural and substantive aspects or cases where the Court found a violation of one aspect but not the other.¹⁵⁹ In this pool of cases, evidently that of *El-Masri* is the most important but since it has already been described in detail above, the study will focus on discussing the *L.R.* case due to the fact that it raised impor-

¹⁵³ ECtHR, *Makaratzis v. Greece* [GC], no. 50385/99, Judgment (2004), §§ 49-55.

¹⁵⁴ ECtHR, *Krastanov v. Bulgaria*, no. 50222/99, Judgment (2004), § 53.

¹⁵⁵ ECtHR, *Sašo Gorgiev v. the former Yugoslav Republic of Macedonia*, no. 49382/06, Judgment (2012), § 49.

¹⁵⁶ *Ibid.*, § 47.

¹⁵⁷ *Ibid.*, §§ 50-51.

¹⁵⁸ *Ibid.*, §§ 52-54.

¹⁵⁹ See cases for which North Macedonia has been found to have violated Article 3: ECtHR, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, Judgment (2012); ECtHR, *Jasar v. the former Yugoslav Republic of Macedonia*, no. 69908/01, Judgment (2007); ECtHR, *Trajkoski and Others v. the former Yugoslav Republic of Macedonia*, no. 13191/02, Judgment (2008); ECtHR, *Kitanovski v. the former Yugoslav Republic of Macedonia*, no. 15191/12, Judgment (2015); *Georgiev v. the former Yugoslav Republic of Macedonia*, no. 26984/05, Judgment (2012); ECtHR, *Ilievska v. the former Yugoslav Republic of Macedonia*, no. 20136/11, Judgment (2015); ECtHR, *Andonovski v. the former Yugoslav Republic of Macedonia*, no. 24312/10, Judgment (2015); ECtHR, *Hajrulahu v. the former Yugoslav Republic of Macedonia*, no. 37537/07, Judgment (2015); ECtHR, *Asllani v. the former Yugoslav Republic of Macedonia*, no. 24058/13, Judgment (2015); ECtHR, *Selami and Others v. the former Yugoslav Republic of Macedonia*, no. 78241/13, Judgment (2018); ECtHR, *Trendafilovski v. North Macedonia*, no. 59119/15, Judgment (2020); and ECtHR, *Memedov v. North Macedonia*, no. 31016/17, Judgment (2021).

tant issues in respect of effective legal remedies in the domestic legal system.¹⁶⁰ The applicant's case was brought to the attention of the Court by the Helsinki Committee for Human Rights, a non-governmental organisation based in Skopje. They represented a mentally disabled applicant, abandoned at birth and still a minor, who was subjected to inadequate care over a period of one year and nine months in an inappropriate institution whilst he was a young boy.¹⁶¹ After a thorough analysis of this highly sensitive case in terms of facts and allegations, the Court came to the conclusion that North Macedonian authorities had violated the applicant's rights under both the substantive and procedural limbs of Article 3.¹⁶² For the substantive part, the Court considered that the authorities had failed to safeguard the applicant's dignity and well-being by placing him in an inappropriate institution where he lacked the requisite care and was subjected to inhuman and degrading ill-treatment.¹⁶³ For the procedural part, the Court maintained that the overall response of the authorities in investigating the applicant's allegations of such serious human rights violations was inadequate and lacked appropriate reaction, let alone appropriate redress that would be compatible with the procedural obligation of the State under Article 3.¹⁶⁴ This study notes that, compared to other Convention rights, the high number of cases involving violations of Article 3 is to be regarded as an urgent matter for the North Macedonian authorities and domestic courts because it clearly shows their inability, not to say unwillingness, to protect one of the most basic non-derogable Convention rights. The shocking stories of the 17 other applications where a violation of Article 3 has been found involve numerous applicants and portray a dark picture of police brutality motivated by ethnic and racial hatred against Roma; severe police beatings and shootings resulting in brain damage and fractures; incommunicado holdings; various torture techniques and ill-treatment in psychiatric and other State-run institutions.¹⁶⁵ This is especially alarming considering that the Strasbourg Court and other Council of Europe bodies have established very detailed general principles¹⁶⁶ on how to ensure that there are domestic

¹⁶⁰ ECtHR, *Sašo Gorgiev v. the former Yugoslav Republic of Macedonia*, no. 49382/06, Judgment (2012).

¹⁶¹ See ECtHR, *L.R. v. North Macedonia*, no. 38067/15, Judgment (2020), §§ 5-15.

¹⁶² *Ibid.*, §§ 69-95.

¹⁶³ *Ibid.*, § 82.

¹⁶⁴ *Ibid.*, §§ 94-95.

¹⁶⁵ See all Article 3 cases cited above.

¹⁶⁶ To date, the ECtHR has published case-law Guides for all articles of the Convention except for Article 3 (which is expected to be published in the future). Nevertheless, the latest summary of general principles on Article 3 may be found in some of the most recent cases, namely ECtHR, *X and Others v. Bulgaria* [GC], no. 22457/16, Judgment (2021), and ECtHR, *Georgia v. Russia (II)* [GC], no. 38263/08, Judgment (2021).

remedies in place to effectively address Article 3 complaints. Yet, it seems that North Macedonian authorities, prosecution, police, judges and other State-run institutions, are a long way from making use of these well-established Convention principles domestically despite the fact that they have been part of the Convention protection mechanism for more than two decades now.

In the area of Article 5,¹⁶⁷ excluding the case of *El-Masri* for the reasons already noted above, one of the other important cases is that of *Lazoroski*, where the Court found a violation of the applicant's right to liberty and security on two specific counts.¹⁶⁸ Firstly, the Court found a violation of point c) of the first paragraph of Article 5 because the applicant's arrest did not constitute lawful detention effectuated on a reasonable suspicion of having committed an offence.¹⁶⁹ Secondly, the Court found a violation of the second paragraph of Article 5 considering that the applicant was not informed of the reasons of his arrest and no report was drawn up regarding his questioning while in police custody.¹⁷⁰ The Government had objected to the admissibility of the application on the ground of non-exhaustion of domestic remedies regarding the compensation claim but the Court dismissed this objection by clarifying that the applicant had put the substance of his complaints before the national courts and this was sufficient for exhaustion purposes.¹⁷¹

In the area of Article 8,¹⁷² the case of *X* is one of the most interesting cases due to the lack of a regulatory framework for legal recognition of gender identity.¹⁷³

¹⁶⁷ See, *inter alia*, some of the cases for which North Macedonia has been found to have violated Article 5: ECtHR, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, Judgment (2012); ECtHR, *Selami and Others v. the former Yugoslav Republic of Macedonia*, no. 78241/13, Judgment (2018); ECtHR, *Sejdiji v. the former Yugoslav Republic of Macedonia*, no. 8784/11, Judgment (2018); ECtHR, *Miladinov and Others v. the former Yugoslav Republic of Macedonia*, no. 46398/09 and 2 others, Judgment (2014); ECtHR, *Mitreski v. the former Yugoslav Republic of Macedonia*, no. 11621/09, Judgment (2010); ECtHR, *Trajče Stojanovski v. the former Yugoslav Republic of Macedonia*, no. 1431/03, Judgment (2009).

¹⁶⁸ ECtHR, *Lazoroski v. the former Yugoslav Republic of Macedonia*, no. 4922/04, Judgment (2009), operative part.

¹⁶⁹ *Ibid.*, § 49.

¹⁷⁰ *Ibid.*, § 52-54.

¹⁷¹ *Ibid.*, §§ 33-40.

¹⁷² See, *inter alia*, some of the cases for which North Macedonia has been found to have violated Article 8: ECtHR, *Ivanovski v. the former Yugoslav Republic of Macedonia*, no. 29908/11, Judgment (2016); ECtHR, *Karajanov v. the former Yugoslav Republic of Macedonia*, no. 2229/15, Judgment (2017); ECtHR, *Tasev v. North Macedonia*, no. 9825/13, Judgment (2019); ECtHR, *Trajkovski and Chipovski v. North Macedonia*, nos. 53205/13 and 63320/13, Judgment (2020); and ECtHR, *J.M. and A.T. v. North Macedonia*, no. 79783/13, Judgment (2020).

¹⁷³ ECtHR, *X v. the former Yugoslav Republic of Macedonia*, no. 29683/16, Judgment (2019).

The applicant was a transgender person who was born female but who, from an early age, became aware that he was male rather than female. Following hormone therapy to increase testosterone levels with a view to eventual genital reassignment surgery which he did not undergo, he applied for a change to his first and family name and gender marker.¹⁷⁴ The North Macedonian authorities changed the applicant's name according to his wishes but did not agree to change his gender marker from female "F" to male "M". The applicant initiated tedious litigation procedures with various responsible public institutions in North Macedonia but to no avail for more than seven years. Eventually, the Registry Office rendered a decision rejecting his claim to change the gender marker, claiming that the applicant had not provided "evidence of an actual change of sex", namely surgery or another medical intervention that would prove that he had altered his genitals from female to male. This decision was upheld in another instance.¹⁷⁵ However, due to the protracted procedure and the negative consequences this long process was having on the applicant's psychosocial and mental health, he decided to file an application with the ECtHR whilst the proceedings were still pending before the Administrative Court.¹⁷⁶ Not unexpectedly, the Government objected on the ground of non-exhaustion but the Court dismissed the objection as ungrounded considering that the proceedings which the applicant had instituted for obtaining redress have been pending for more than seven years and it was impossible to predict their end.¹⁷⁷ Relying on the case of *X v. Germany*, the Court declared the application admissible for review on the merits "given the nature and the particular situation of the applicant, who faces a continuing situation highly prejudicial to his private life" and for that reason "he cannot be expected to await any longer the outcome of the impugned proceedings".¹⁷⁸ As far as the merits of the Article 8 complaint go, the applicant's main grievances were that North Macedonia lacked a regulatory framework for legal gender recognition and that such recognition is conditional on proof of complete sex reassignment surgery.¹⁷⁹ The Court looked at this case from the aspect of the State's positive obligation to "put in place an effective and accessible procedure, with clearly defined conditions securing the applicant's rights to respect for his private life".¹⁸⁰ Following a thorough analysis of the national framework and proceedings up to that point, the Court observed that the case reveals serious deficiencies and leg-

¹⁷⁴ Ibid., §§ 6-22 for the facts and circumstances of the case.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid., § 21.

¹⁷⁷ Ibid., §§ 42-46.

¹⁷⁸ Ibid., § 45.

¹⁷⁹ Ibid., § 64.

¹⁸⁰ Ibid., §§ 63-65.

islative gaps which leave the applicant in a distressing situation of uncertainty; as a result, the Court went on to conclude that “the current legal framework in the respondent State does not provide ‘quick, transparent and accessible procedures’ for changing on birth certificates the registered sex of transgender people”.¹⁸¹ According to the latest data from the Committee of Ministers, the case is still not closed and pending final execution at the domestic level.

In the area of Article 10,¹⁸² the case of *Selmani and Others*, which was already described above in respect of the violation of the right to a public hearing before the Constitutional Court, is highly interesting and important.¹⁸³ Despite the fact that the interference with the applicants’ freedom of expression as journalists was prescribed by law and pursued a legitimate aim, the Court, by relying mostly on the *Delfi AS* test,¹⁸⁴ found that such interference did not meet the threshold of being necessary in a democratic society nor that of constituting a pressing social need.¹⁸⁵ More specifically, the Court maintained that important elements of applicants’ journalistic functions were halted when the applicants were forcibly removed from the Parliament’s gallery considering that such actions created “[i]mmediate adverse effects that instantaneously prevented them from obtaining first-hand and direct knowledge based on their personal experience of the events unfolding in the chamber”.¹⁸⁶

In the area of Article 11,¹⁸⁷ the case that merits special attention is the case of *Association of Citizens “Radko” and Paunkovski*, which was also published in

¹⁸¹ *Ibid.*, §§ 70-71.

¹⁸² See, *inter alia*, some of the cases for which North Macedonia has been found to have violated Article 10: ECtHR, *Makraduli v. the former Yugoslav Republic of Macedonia*, nos. 64659/11 and 24133/13, Judgment (2018), and ECtHR, *Gelevski v. North Macedonia*, no. 28032/12, Judgment (2020).

¹⁸³ ECtHR, *Selmani and Others v. the former Yugoslav Republic of Macedonia*, no. 67259/14, Judgment (2017).

¹⁸⁴ ECtHR, *Delfi AS v. Estonia* [GC], no. 64569/09, Judgment (2015), § 131.

¹⁸⁵ ECtHR, *Selmani and Others v. the former Yugoslav Republic of Macedonia*, no. 67259/14, Judgment (2017).

¹⁸⁶ *Ibid.*, §§ 84-86. See also, Committee of Ministers, Resolution CM/ResDH(2018)216 of 7 June 2018.

¹⁸⁷ See, *inter alia*, some of the cases for which North Macedonia has been found to have violated Article 11: ECtHR, “*Orthodox Ohrid Archdiocese (Greek-Orthodox Ohrid Archdiocese of the Peć Patriarchy)*” *v. the former Yugoslav Republic of Macedonia*, no. 3532/07, Judgment (2017); ECtHR, *Bektashi Community and Others v. the former Yugoslav Republic of Macedonia*, nos. 48044/10 and 2 others, Judgment (2018); ECtHR, *Stavropegic Monastery of Saint John Chrysostom v. the former Yugoslav Republic of Macedonia*, no. 52849/09, Judgment (2018); and ECtHR, *Church of Real Orthodox Christians and Ivanovski v. the former Yugoslav Republic of Macedonia*, no. 35700/11, Judgment (2018).

the Court's Case Reports.¹⁸⁸ To simplify the facts which are related to various historical events and personages, the North Macedonian authorities opined that this association calls into question the identity of Macedonian ethnicity through the revival of the ideology of Ivan Mihajlov-Radko who proclaimed that Macedonian ethnicity never existed but belonged to Bulgarians.¹⁸⁹ The name Radko was part of the name of the association. The Constitutional Court declared the association's articles and programme null and void because it considered that, through a revival of Ivan Mihajlov-Radko's ideology, the association "explicitly encourage[d] an incitement to national hatred and intolerance" which were "directed towards the violent destruction of the state order; hindrance of free expression of the national affiliation of the Macedonian people, i.e. negation of its identity and incitement to national or religious hatred or intolerance."¹⁹⁰ Following this decision of the Constitutional Court, the Ohrid Court of first instance *ex officio* decided to terminate the activities of the association.¹⁹¹ Before the Strasbourg Court, the applicants complained that the decision of the Constitutional Court violated their right to freedom of assembly and association by leading to the dissolution of their association thus making impossible the pursuit of their programme purposes.¹⁹² The Court agreed with the applicants and rejected all the Government's objections.¹⁹³ Considering the fact that this was a topic of heated nationalistic debate between North Macedonia and Bulgaria, the latter had intervened as a third party opining that the applicants' rights to freedom of association had been violated by the Constitutional Court of North Macedonia.¹⁹⁴ Despite the fact that the case passed the threshold of the interference being prescribed by law and pursuing a legitimate aim, the Court concluded that the interference with the applicants' rights was not necessary in a democratic society,¹⁹⁵ for the following reasons which were based on its well-established general principles on Article 11 interference.¹⁹⁶ Firstly, the Court observed that the Constitutional Court "did not provide any explanation as to why a negation of Macedonian ethnicity is tantamount to violence, especially to violent destruction of the consti-

¹⁸⁸ ECtHR, *Association of Citizens "Radko" and Paunkovski v. the former Yugoslav Republic of Macedonia*, no. 74651/01, Judgment (2009).

¹⁸⁹ *Ibid.*, §§ 20-23.

¹⁹⁰ *Ibid.*, § 29.

¹⁹¹ *Ibid.*, §§ 20-23 for the facts of the case.

¹⁹² *Ibid.*, § 38.

¹⁹³ *Ibid.*, §§ 46-49.

¹⁹⁴ *Ibid.*, §§ 50-52 for comments by the third-party intervener.

¹⁹⁵ *Ibid.*, §§ 53-78 for the reasoning of the Court in this respect.

¹⁹⁶ *Ibid.*, §§ 63-67 for general principles.

tutional order”, especially since no evidence was presented to show that the applicants had advanced or could have advanced the use of such means.¹⁹⁷ Secondly, whilst it is undisputed that “the creation and registration of the Association under the pseudonym of Ivan Mihajlov ‘Radko’, generated a degree of tension given the special sensitivity of the public to his ideology”, the Court maintained that the sole act of naming an association “after an individual who was negatively perceived by the majority of population”, without any concrete evidence to demonstrate a real threat “could not in itself be considered reprehensible or to constitute in itself a present and imminent threat to public order”.¹⁹⁸ Therefore, the Court concluded that there had been a violation of Article 11 because the reasons invoked by the North Macedonian authorities for the dissolution of the association were not relevant or sufficient.¹⁹⁹

In the area of Article 14, there is only one case which was rendered recently and it concerns allegations of racially motivated police brutality against the applicant of Roma ethnic origin²⁰⁰ and the alleged failure of the North Macedonian authorities to investigate possible racist motives.²⁰¹ Whilst the Court declared manifestly ill-founded the applicant’s allegations of racially motivated police brutality,²⁰² it found a violation of Article 14 read in conjunction with the procedural limb of Article 3 “on account of the failure of the authorities of the respondent State to investigate the applicant’s allegations of racially motivated police brutality.”²⁰³ Said violation was found considering that the sole authorities who were vested with the competence to investigate any possible racist motives, namely the prosecution, failed to comply with their duties requiring the authorities to take all possible steps to ascertain whether or not a discriminatory attitude toward the applicant as an ethnic Roma might have played a role in the events that occurred.²⁰⁴

In the area of Article 1 of Protocol No.1, several violations have been found,²⁰⁵ among which the case of *Andonoski* is particularly interesting for the purposes

¹⁹⁷ Ibid., § 72.

¹⁹⁸ Ibid., § 75.

¹⁹⁹ Ibid., § 78.

²⁰⁰ For more on the protection of Roma rights in North Macedonia see the Report of the Centre for Legal Research and Analysis, ‘Do Roma Enjoy the Guaranteed Rights? Need to establish equality’ <Do-Roma-Enjoy-the-Guaranteed-Rights.pdf> (accessed 7 January 2022).

²⁰¹ ECtHR, *Memedov v. North Macedonia*, no. 31016/17, Judgment (2021).

²⁰² Ibid., §§ 54-59 for the part declared as manifestly ill-founded.

²⁰³ Ibid., see the operative part.

²⁰⁴ Ibid., §§ 45-50.

²⁰⁵ See, *inter alia*, some of the cases for which North Macedonia has been found to have violated Article 1 of Protocol No. 1: ECtHR, *Jankulovski v. the former Yugoslav Republic of*

of this study due to the ineffectiveness of the domestic practice to provide redress for the applicant's complaint.²⁰⁶ The applicant was a taxi driver who, unknowingly, as confirmed by regular court decisions, had transported several illegal migrants. Initially, he was suspected of being involved in the smuggling of migrants but due to lack of evidence the prosecution dropped all charges against him. Despite these facts, his vehicle was confiscated and not returned to him despite the fact that he had not been convicted of any offence.²⁰⁷ As a rationale for having confiscated his vehicle, the North Macedonian courts argued that based on national legislation, "confiscation of the objects and the means of transport used to commit the offence [is done], irrespective of whom they belong to, whom they are for, or whom they come from."²⁰⁸ The Court noted that the Criminal Code provided for automatic confiscation of the means of transport used to smuggle migrants, without any exceptions that would have been applicable to the applicant's case.²⁰⁹ The automatic deprivation of the applicant's vehicle, with which he was making a living as a taxi driver, was considered to have "deprived the applicant of any possibility to argue his case and have any prospect of success in the confiscation proceedings". As a result, the Court concluded that the confiscation order was disproportionate and it imposed on the applicant an excessive burden which resulted in a violation of his right to peaceful enjoyment of his property.²¹⁰

In the area of Article 1 of Protocol No.7, there is one case only which relates to procedural safeguards relating to the expulsion of aliens.²¹¹ In this particular case, the applicant had settled in North Macedonia after fleeing the Kosovo war in 1999. She was granted asylum and her residence permit was extended each year until 2014, when the Ministry of Interior suddenly terminated her asylum.²¹² The entire reason for terminating her asylum was that Ms. Ljatifi was "a risk to national security". She was never provided with any further rea-

Macedonia, no. 6906/03, Judgment (2008); ECtHR, *Vasilevski v. the former Yugoslav Republic of Macedonia*, no. 22653/08, Judgment (2016); ECtHR, *Romeva v. North Macedonia*, no. 32141/10, Judgment (2019); ECtHR, *Anastasov v. North Macedonia*, no. 46082/14, Judgment (2019); ECtHR, *Avto Atom DOO Kochani v. North Macedonia*, no. 21954/16, Judgment (2020); and ECtHR, *Anev and Najdovski v. North Macedonia*, nos. 17807/15 and 17893/15, Judgment (2020).

²⁰⁶ See ECtHR, *Andonoski v. the former Yugoslav Republic of Macedonia*, no. 16225/08, Judgment (2015).

²⁰⁷ *Ibid.*, §§ 5-13 for facts of the case.

²⁰⁸ *Ibid.*, § 12.

²⁰⁹ *Ibid.*, § 37.

²¹⁰ *Ibid.*, §§ 40-41.

²¹¹ ECtHR, *Ljatifi v. the former Yugoslav Republic of Macedonia*, no. 19017/16, Judgment (2018).

²¹² *Ibid.*, §§ 7-13.

sons, information or documents as to why she was considered a risk to national security and she was not provided with any redress despite her legal endeavours to seek protection from national courts. The latter merely confirmed the decision of the Ministry of Interior by stating that the decision was made based on classified information obtained from the Intelligence Agency.²¹³ Before the Court, the applicant complained that there had been no evidence that she represented a risk to national security nor had she ever been provided with the possibility of having knowledge of any evidence leading to such a conclusion.²¹⁴ In such an easy case of clear violation and complete disregard of the applicant's rights, the Court agreed with the applicant and found a violation of paragraph 1 (a) and (b) of Article 1 of Protocol No. 7.²¹⁵ The Court presented two main arguments for its stance, namely that: (i) even in cases where national security is at stake, "the concepts of lawfulness and the rule of law in a democratic society require that deportation measures affecting fundamental human rights be subject to some form of adversarial proceedings before an independent authority or a court competent to effectively scrutinise the reasons for them and review the relevant evidence, if need be with appropriate procedural limitations on the use of classified information"²¹⁶ and that (ii) the measure of the Ministry of Interior which simply stated that the applicant was a risk to national security was merely a general statement which contained no "indications of the facts serving as the basis for that assessment" and was accepted by the North Macedonian courts without any discussion or further details.²¹⁷

Generally speaking, this study shows that judgments in respect of North Macedonia are quite rich and diverse. The most concerning violations are those which could easily have been halted at the domestic level if the national authorities were sufficiently equipped with Convention know-how on how to offer judicial protection for specific Convention rights. In addition, such violations could be halted by the regular courts if they were to hold accountable other national authorities which have clearly acted in contradiction with Convention principles. In this regard, it is fair to state that North Macedonian authorities, including domestic courts, have a long way to go in becoming a proper 'Convention filter' of violations at the domestic level, before well-founded cases reach the Court's docket.

²¹³ *Ibid.*, §§ 8-11.

²¹⁴ *Ibid.*, § 18.

²¹⁵ *Ibid.*, § 42.

²¹⁶ *Ibid.*, § 35.

²¹⁷ *Ibid.*, § 36.

1.4. Cases Declared Admissible with No Violation Found

The Court's data shows that, so far, there have been some 20 plus cases where the Court reviewed the merits of the case but decided that there had been no violation of the Convention by North Macedonian authorities, either entirely or for specific Convention allegations.

One of the five cases in respect of North Macedonia which were marked as important by the ECtHR and published in Case Reports is the case of *Solakov v. FYROM* where no violation of Article 6 was found, neither in its first paragraph nor in its third paragraph point d).²¹⁸ In this case, the applicant had lived for a while in the United States and was suspected of drug trafficking which resulted in a warrant for his arrest to be issued internationally. He was then arrested and, following numerous domestic proceedings, sentenced to 13 years imprisonment.²¹⁹ He complained before the Court that he had been unable to cross-examine the witnesses whose statements served, according to him, as the sole basis for his conviction and that he had been unable to obtain the attendance of two witnesses.²²⁰ The Court disagreed that there had been a violation in this case by maintaining that “[t]he applicant was given an adequate and proper opportunity to present his defence” and that the “[r]efusal to summon the two additional witnesses did not restrict his defence rights to such an extent that he was not afforded a fair trial within the meaning of Article 6 §§ 1 and 3 (d) of the Convention”.²²¹

There are several other interesting cases where the Court did not find a violation. In the area of Article 2, in the sole case with no violation, the Court did not consider that there was a failure on the part of domestic authorities in carrying out an adequate investigation into the death of the applicant's son.²²² In the area of Article 3, there is no case that was discussed on the merits and where no violation of Article 3 was found. However, there are several cases where the Court, in the same judgment in which it found a violation of a certain aspect of Article 3, under either the substantive or procedural limbs, considered that no violation could be declared with respect to some other specific allegations raised on Article 3 grounds. For instance, no violation of Article 3

²¹⁸ ECtHR, *Solakov v. the former Yugoslav Republic of Macedonia*, no. 47023/99, Judgment (2001).

²¹⁹ *Ibid.*, §§ 8-33 for facts of the case.

²²⁰ *Ibid.*, §§ 40-55 for the applicant's submissions and the Government's observations.

²²¹ *Ibid.*, §§ 56-67 for the Court's analysis and final conclusion.

²²² ECtHR, *Neškoska v. the former Yugoslav Republic of Macedonia*, no. 60333/13, Judgment (2016).

was found in respect of the applicants' allegations of police brutality (procedural limb),²²³ ill-treatment by policemen during a visit to a police station (substantive limb),²²⁴ excessive use of force by the police (substantive limb),²²⁵ ill-treatment during arrest and in police custody,²²⁶ prison authorities' failure to protect against the aggressiveness of a bull (substantive limb).²²⁷ In all such cases, the Court did not state that no ill-treatment had occurred, but carefully maintained that "the evidence before it does not enable the Court to find beyond reasonable doubt that the applicants were ill-treated".²²⁸ In the area of Article 6, the Court, relying on the circumstances of each particular case, declared several cases admissible but did not find a violation of Article 6 in respect of specific allegations raised by the applicants regarding, for instance, the involvement of an *agent provocateur* in the commission of the offence,²²⁹ the right to effectively participate in the proceedings,²³⁰ access to a court,²³¹ examination of the undercover witness,²³² presumption of innocence,²³³ or lack of sufficient reasoning by the domestic courts.²³⁴ Generally speaking, in all such Article 6 cases where a violation was not found, the Court was satisfied with regard to how proceedings were handled at the national level and relied on a combination of the doctrines of margin of appreciation and subsidiarity

²²³ ECtHR, *Jasar v. the former Yugoslav Republic of Macedonia*, no. 69908/01, Judgment (2007), §§ 50-54.

²²⁴ ECtHR, *Trajkoski and Others v. the former Yugoslav Republic of Macedonia*, no. 13191/02, Judgment (2008), §§ 38-42.

²²⁵ ECtHR, *Dzeladinov and Others v. the former Yugoslav Republic of Macedonia*, no. 13252/02, Judgment (2008), §§ 61-68.

²²⁶ ECtHR, *Sulejmanov v. the former Yugoslav Republic of Macedonia*, no. 69875/01, Judgment (2008), §§ 40-46.

²²⁷ ECtHR, *Sašo Gorgiev v. the former Yugoslav Republic of Macedonia*, no. 49382/06, Judgment (2012), §§ 69-74.

²²⁸ ECtHR, *X and Y v. North Macedonia*, no. 173/17, Judgment (2020), § 63.

²²⁹ ECtHR, *Gorgievski v. the former Yugoslav Republic of Macedonia*, no. 18002/02, Judgment (2009), §§ 50-54.

²³⁰ ECtHR, *Lazoroski v. the former Yugoslav Republic of Macedonia*, no. 4922/04, Judgment (2009), §§ 64-67.

²³¹ ECtHR, *Boris Stojanovski v. the former Yugoslav Republic of Macedonia*, no. 41916/04, Judgment (2010), §§ 56-57; ECtHR, *Ivanovski v. the former Yugoslav Republic of Macedonia*, no. 29908/11, Judgment (2016), §§ 125-130 where no violation was found on account of the lack of access to court and §§ 136-151 for a violation on account of the unfairness of the lustration proceedings.

²³² ECtHR, *Dončev and Burgov v. the former Yugoslav Republic of Macedonia*, no. 30265/09, Judgment (2014), §§ 48-61.

²³³ ECtHR, *Ramkovski v. the former Yugoslav Republic of Macedonia*, no. 33566/11, Judgment (2018), §§ 81-85.

²³⁴ ECtHR, *Bajić v. North Macedonia*, no. 2833/13, Judgment (2021), §§ 47-51.

to conclude that “its role is essentially subsidiary to that of the domestic authorities which are better placed than the Court to assess the credibility of evidence with a view to establishing facts” and that, as a result, the Court “sees no reason to depart from the assessment made by the domestic courts”.²³⁵

With respect to Articles 8, 9 and 14, there is one case for the first of these articles and one joint case for the second two where the Court declared the complaints admissible for review but found that there had been no violation. In respect of Article 8, the applicants, a mother and a daughter, complained that the custodial sentence imposed on the mother as well as the failure of the authorities to determine the rights of contact between them during and immediately after her imprisonment, had violated both their rights.²³⁶ The Court, with a split five-two majority, decided that the North Macedonian authorities did not violate the applicants’ rights and that the Court was satisfied with the rationale of the decision-making at the level of the Supreme Court, which had considered the best interests of the child at that time.²³⁷ However, Judges Spano and Bianku disagreed with the majority’s decision particularly because, according to them, the Government failed to prove that “the national authorities duly took into consideration the child’s best interests in the proportionality assessment of the measures taken against the first applicant [the mother]”.²³⁸ In respect of Article 9 in conjunction with Article 14, the Court was unanimous that there had been no violation on any of the grounds. The applicant complained that “he was fined for absence from work when he was celebrating a Muslim holiday”.²³⁹ In respect of Article 9, the Court concluded that the disciplinary proceedings initiated against the applicant for missing work without permission did not disproportionately interfere with his freedom of religion;²⁴⁰ whilst, in respect of Article 14, the Court concluded that it was not unreasonable for authorities to require the applicant to prove adherence to the religion in question, especially since he was seeking to obtain a privilege or exemption based on the fact that he claimed to be an adherent of the Muslim faith.²⁴¹

²³⁵ ECtHR, *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, nos. 26711/07 and 2 others, Judgment (2016), § 66.

²³⁶ ECtHR, *Mitrova and Savik v. the former Yugoslav Republic of Macedonia*, no. 42534/09, Judgment (2016), § 63.

²³⁷ *Ibid.*, §§ 82-101.

²³⁸ *Ibid.*, see joint dissenting opinion of Judges Bianku and Spano, §§ 1-14.

²³⁹ ECtHR, *Kosteski v. the former Yugoslav Republic of Macedonia*, no. 55170/00, Judgment (2006), §§ 30 and 41.

²⁴⁰ *Ibid.*, §§ 37-40.

²⁴¹ *Ibid.*, §§ 44-47.

As far as Article 13 is concerned, it has been extensively referred to above and there is no need to repeat the findings. In fact, the only case where the Court did not find a violation of Article 13 after declaring the complaint admissible is the Grand Chamber case of *Ališić and others*, where the Court exempted North Macedonia from a violation of Article 13 considering that it had already “paid back ‘old’ foreign-currency savings in domestic banks and local branches of foreign banks [...] regardless of the citizenship of the depositor concerned”.²⁴² Lastly, in the area of Article 1 of Protocol No. 1, there are a few cases where the Court rejected the applicant’s allegations as unfounded and rendered judgments with no violation. In one particular case related to the confiscation of a vehicle, the Court found no violation because it considered that “the applicant had a judicial remedy before a civil court of general jurisdiction to be indemnified for the damage suffered as a result of the confiscation of the vehicle” and that despite clear instructions, he chose not to “embark on that avenue of redress”.²⁴³ All other cases, in substance, were related to decisions of the Supreme Court to quash a previous restitution order and rectify a decision six years later;²⁴⁴ or allegations of deprivation of property in breach of the principle of legal certainty through extraordinary quashing of previously legitimate restitution orders.²⁴⁵ In such cases, the Court endorsed the rationale of the Supreme Court and found no violation of Convention rights.

1.5. Other Cases Related to Exhaustion of Domestic Remedies

In the area of exhaustion of domestic remedies as provided by Article 35 of the Convention, the most important cases for the purposes of this study are (i) cases that were declared inadmissible due to the applicant’s failure to exhaust domestic remedies before the national courts; and (ii) cases where the Court dismissed the Government’s observation that the applicant(s) failed to exhaust a particular remedy. Both aspects are important for an overall assessment of the availability and effectiveness of domestic remedies.

²⁴² ECtHR, *Ališić and Others v. Bosnia and Hercegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, Judgment (2014), § 52 in connection with the operative part.

²⁴³ ECtHR, *Sulejmani v. the former Yugoslav Republic of Macedonia*, no. 74681/11, Judgment (2016), §§ 37-44.

²⁴⁴ ECtHR, *Vikentijevik v. the former Yugoslav Republic of Macedonia*, no. 50179/07, Judgment (2014), §§ 60-77.

²⁴⁵ ECtHR, *Toleski v. the former Yugoslav Republic of Macedonia*, no. 17800/10, Judgment (2017), §§ 78-86, and ECtHR, *Spiridonovska and Popovski v. the former Yugoslav Republic of Macedonia*, no. 40676/11, Judgment (2017), §§ 6-76.

From the first pool of cases, namely those which are declared inadmissible on account of the applicant's failure to exhaust domestic remedies, there are a few cases that merit reporting. In a case related to Article 14, where the applicant complained that his young daughter was refused access to a Turkish-speaking school based on her place of residence, the Court declared the application inadmissible due to the applicant's failure to exhaust domestic remedies and his failure to prove that a constitutional complaint "would inevitably have been ineffective or incapable of providing redress" which could thereby exempt him "from the requirement to put the substance of his Convention complaints before appropriate domestic bodies before coming to Strasbourg".²⁴⁶ In a case related to Articles 8, 9, 10 and 14, five mothers complained that their children, after attaining 18 years of age, "joined the monastic order of the Macedonian Orthodox Church" and they did so "without the applicants' prior knowledge or consent".²⁴⁷ The Court considered the whole application as premature and substantially reasoned that for a "complaint to be submitted to the Court [it] must first have been made to the appropriate national courts [...] in accordance with the formal requirements of domestic law".²⁴⁸

From the second pool of cases, namely those where the Court dismissed the Government's observation that the applicant failed to exhaust a particular remedy, there are many more important cases that merit reporting. First and foremost, this list is headed by the case of *Osmani and Others v. FYROM* which, due to its importance, was also published in the Court's Case Reports.²⁴⁹ In this case related to amnesty, the Court reasoned that there was no effective remedy available to the applicant given that "he was no longer able to challenge effectively his conviction before courts" and as a result, the Government's objection should be dismissed.²⁵⁰ In matters of length of proceedings, the Court had rejected, on several occasions, the Government's observations by reasoning that the remedies they had referred to "were not of an adequate and effective nature" for the applicants to be required to exhaust them for the purposes of Article 35.²⁵¹ In a case related to allegations of assault and ill-

²⁴⁶ ECtHR, *Skender v. the former Yugoslav Republic of Macedonia*, no. 62059/00, Decision (2005), pages 9-10.

²⁴⁷ ECtHR, *Sjakova and Others v. the former Yugoslav Republic of Macedonia*, no. 67914/01, Decision (2003), pages 8-9.

²⁴⁸ *Ibid.*, pages 7-9.

²⁴⁹ ECtHR, *Osmani and Others v. the former Yugoslav Republic of Macedonia*, no. 50841/99, Decision (2001).

²⁵⁰ *Ibid.*, page 13.

²⁵¹ ECtHR, *Atanasovic and Others v. the former Yugoslav Republic of Macedonia*, no. 13886/02, Judgment (2005), § 32.

treatment by police officers, the Government attempted to argue that there was an exhaustion issue, a matter which the Court dismissed following an extensive elaboration of relevant principles in this regard.²⁵² In substance, the Court dismissed such observations by recalling the principle that “when there are several remedies available, the victim is not required to pursue more than one”.²⁵³ The fact that the applicant had made a criminal complaint to the public prosecutor was considered sufficient, especially since his complaint was never formally rejected by the prosecution and he could thus not take over the matter as a subsidiary prosecutor.²⁵⁴ In the case of *Association of Citizens “Radko” and Paunovski v. FYROM*, the analysis on the availability of domestic remedies gave rise to lengthy reasoning by the Court, especially since the Government claimed that the applicants had failed to lodge a constitutional complaint with the Constitutional Court and that “proceedings on human rights protection were separate from constitutional review proceedings”.²⁵⁵ The Court refuted this particular observation of non-exhaustion by stating that: (i) in 2001, the Constitutional Court had already declared the applicant association’s programme as unconstitutional based on Article 110.7 of the Constitution²⁵⁶ and the Court was not persuaded that a new constitutional complaint under Article 110.3 of the Constitution²⁵⁷ would have been effective in the particular case or that it would have made a difference; (ii) the Government had presented no jurisprudence of the Constitutional Court that would prove the contrary.²⁵⁸

²⁵² ECtHR, *Jasar v. the former Yugoslav Republic of Macedonia*, no. 69908/01, Decision (2006), pages 10-12.

²⁵³ ECtHR, *McCann and Others v. the United Kingdom* [GC], no. 18984/91, Judgment (1995), and ECtHR, *Yağci and Sargin v. Turkey*, nos. 16419/90 and 16426/90, Judgment (1995).

²⁵⁴ ECtHR, *Jasar v. the former Yugoslav Republic of Macedonia*, no. 69908/01, Decision (2006), pages 10-12.

²⁵⁵ ECtHR, *Association of Citizens “Radko” and Paunkovski v. the former Yugoslav Republic of Macedonia*, no. 74651/01, Decision (2008), page 11.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*, pages 13-14.

2. Impact and Effects of the ECHR and the ECtHR's Case-Law in North Macedonia

Following more than two decades of litigation in Strasbourg, there are several noteworthy impact examples deriving from the national implementation of the Court's case-law.²⁵⁹ For instance, the Supreme Court reversed its previous case-law on the basis of the Court's finding in the case of *Stoimenov* by stipulating that the ECtHR's case-law is directly applicable in the national legal order and that all domestic courts ought to make use of it when rendering their decisions.²⁶⁰ The implementation of the case of *Petkovski* also contributed to a change of practice of the Supreme Court whereby the latter clarified that Article 400 of the Law on Civil Proceedings provides the opportunity to reopen a case following a violation found by the ECtHR.²⁶¹ Additionally, the Law on Courts was amended following violations found in the case of *Dumanovski*, in order to introduce measures for the acceleration of administrative proceedings.²⁶² Other important achievements may be noted from various cases that have been successfully implemented at the domestic level or in areas of law that have been influenced by Convention principles.²⁶³

The data from the specific HUDOC database where the status of the execution of ECtHR judgments is registered,²⁶⁴ shows 348 cases in total that have been through or are still going through execution monitoring procedures by the Committee of Ministers. From the total number of cases, 299 are considered as closed and 49 are still pending execution. Moreover, from the total number of cases, 182 were resolved through friendly settlement; 3 through friendly settlement with undertakings; 60 are marked as leading cases; whilst 111 are considered repetitive cases. From those 49 which are still pending execution, 8 are new cases, 32 in standard supervisory procedure, and 9 are under so-called "enhanced procedure" of monitoring by the Committee of Ministers. The most concerning cases for North Macedonian authorities should be the cases which

²⁵⁹ Parliamentary Assembly, *Impact of the European Convention on Human Rights in States Parties: selected examples*, AS/Jur/Inf (2016) 04, 8 January 2016, pages 39–41.

²⁶⁰ Committee of Ministers, Resolution CM/ResDH (2009)139 of 3 December 2009.

²⁶¹ ECtHR, *Petkovski v. the former Yugoslav Republic of Macedonia*, no. 27314/04, Judgment (2008).

²⁶² Committee of Ministers, Resolution CM/ResDH (2011)81 of 8 June 2011.

²⁶³ See also, Department for Execution of Judgments of the European Court of Human Rights on main achievements in respect of North Macedonia <<https://rm.coe.int/ma-north-macedonia-eng/1680a186bb>> (accessed 7 January 2022).

²⁶⁴ See HUDOC EXEC database <<https://hudoc.exec.coe.int>>, where information regarding the execution of judgments in all 47 Members States is provided.

are marked as “repetitive” and those which are under the scheme of “enhanced monitoring”. Examples from these two problematic fields combined, which contain judgments yet to be implemented at the domestic level, have to do with cases relating to: the recognition of gender identity,²⁶⁵ ill-treatment of Roma applicants at the hands of the police,²⁶⁶ treatment by police officers during transfer to a hospital,²⁶⁷ physical assault by the police,²⁶⁸ inhuman and degrading treatment in a psychiatric hospital,²⁶⁹ police brutality,²⁷⁰ the refusal of domestic courts to register the Greek-Orthodox Ohrid Archdiocese,²⁷¹ and the refusal of domestic courts to recognise the Bektashi community as a religious entity.²⁷² What is also interesting to note is that despite the fact that the Court has not officially found any structural issues in respect of North Macedonia within the meaning of Article 46 of the Convention, the Committee of Ministers’ database has classified eight cases as cases which contain a “structural problem” and they all relate to the case of *Kitanovski*, which is marked as a leading case in issues relating to repetitive violations of Article 3 by the police authorities.²⁷³

In the academic literature, authors, among them the former ECtHR Judge in respect of North Macedonia, Lazarova Trajkovska, have distinguished two phases in terms of the scope and character of Convention effects in North

²⁶⁵ ECtHR, *X v. the former Yugoslav Republic of Macedonia*, no. 29683/16, Judgment (2019).

²⁶⁶ ECtHR, *X and Y v. North Macedonia*, no. 173/17, Judgment (2020).

²⁶⁷ ECtHR, *Ilievka v. the former Yugoslav Republic of Macedonia*, no. 20136/11, Judgment (2015).

²⁶⁸ ECtHR, *Asllani v. the former Yugoslav Republic of Macedonia*, no. 24058/13, Judgment (2015).

²⁶⁹ ECtHR, *Kitanovski v. the former Yugoslav Republic of Macedonia*, no. 15191/12, Judgment (2015).

²⁷⁰ ECtHR, *Trendafilovski v. North Macedonia*, no. 59119/15, Judgment (2020), and ECtHR, *Andonovski v. the former Yugoslav Republic of Macedonia*, no. 24312/10, Judgment (2015).

²⁷¹ ECtHR, “*Orthodox Ohrid Archdiocese (Greek-Orthodox Ohrid Archdiocese of the Peć Patriarchy)*” v. *the former Yugoslav Republic of Macedonia*, no. 3532/07, Judgment (2017).

²⁷² ECtHR, *Bektashi Community and Others v. the former Yugoslav Republic of Macedonia*, nos. 48044/10 and 2 others, Judgment (2018).

²⁷³ ECtHR, *Kitanovski v. the former Yugoslav Republic of Macedonia*, no. 15191/12, Judgment (2015), as a leading case. See also other repetitive cases: ECtHR, *Memedov v. North Macedonia*, no. 31016/17, Judgment (2021); ECtHR, *X and Y v. North Macedonia*, no. 173/17, Judgment (2020); ECtHR, *Trendafilovski v. North Macedonia*, no. 59119/15, Judgment (2020); ECtHR, *Ilievka v. the former Yugoslav Republic of Macedonia*, no. 20136/11, Judgment (2015), ECtHR, *Andonovski v. the former Yugoslav Republic of Macedonia*, no. 24312/10, Judgment (2015); ECtHR, *Asllani v. the former Yugoslav Republic of Macedonia*, no. 24058/13, Judgment (2015); and ECtHR, *Hajrulahu v. the former Yugoslav Republic of Macedonia*, no. 37537/07, Judgment (2015).

Macedonia.²⁷⁴ The first period which extends from the signature of the Convention up to the very first violation found by the Strasbourg Court is said to be characterised mainly by effects of a “legislative and institutional nature”; whilst the second period covering the last decade or so is characterised by effects which may be mainly observed “within the judicial system”.²⁷⁵ Additionally, the ECtHR’s impact in North Macedonia has been regarded to have had a “limited effect” on the judiciary and that this impact was “conditioned by the Court’s treatment of Macedonian cases”.²⁷⁶ In this regard, the *res interpretata* effects of other ECtHR cases that do not concern North Macedonia directly, has been described to be “rather indirect, less visible, and weaker than the national cases handled by the Court”.²⁷⁷

Whilst this study supports the conclusion that the largest effects on the national judiciary might be seen from cases that were rendered in respect of North Macedonia; the observation leads to another related conclusion that even the cases rendered against North Macedonia have not produced the needed effects in the domestic legal system. This stands true especially considering that even after several judgments finding serious violations of Articles 3, 5, 6, 9, 10 and 11, it is still impossible to find exemplary decisions of the domestic courts which have used the North Macedonian case-law in order to prevent the next repetitive or similar violation. The utilisation of Convention principles in “a formalistic way without substantive analysis”,²⁷⁸ cannot produce Convention compliant domestic court decisions. The overall analysis of the Strasbourg case-law against North Macedonia detects an absence of proper ‘Convention filters’ at the domestic level, which is one of the main contributors as to why so many serious and diverse Convention violations have been found at the Strasbourg level without attracting the attention of the domestic courts. In this regard and as it currently stands, it cannot be said that the Constitutional Court or the Supreme Court are playing their part to serve as the Court’s domestic partners at the domestic level and this lack of partnership can be felt in the number of repetitive violations being found. The Strasbourg Court is obliged to continuously decide on cases which could perfectly well have been concluded at the domestic level if the highest national courts were able and willing to detect such evident violations. The inability to de-

²⁷⁴ Lazarova Trajkovska and Trajkovski (2016), 267.

²⁷⁵ Ibid.

²⁷⁶ Ibid., 269 and 283.

²⁷⁷ Ibid., 269.

²⁷⁸ Ibid., 288.

tect such violations domestically is one of the crucial reasons as to why North Macedonia is found to be in breach of diverse Convention rights.

National studies on the performance of the judiciary have shown that, despite the fact that 61.3% of the judges themselves believe that they invoke the Court's case-law in their decisions, lawyers practicing before national courts strongly disagree with this declaration, whilst court associates, prosecutors, parties to proceedings, other legal professionals and journalists also seem to disagree with the judges' self-evaluation in this regard.²⁷⁹ National academics opine that a raise in interest among judges and improvements in the area of utilisation of Convention principles may be noticed "but still there is an insufficient invocation of the judgments of the ECtHR" in domestic court decisions.²⁸⁰ According to the national academic community, the need for improvement in the judicial practice calls also for improvements in court decisions where there is a need for better explanation of the factual situation, allegations, application of law, invocation of domestic case-law and the case-law of ECtHR.²⁸¹ An emphasis is also placed on the need for the reasoning of national courts to be better structured and clearer.²⁸² The analysis provided in this chapter does not match the overconfidence of the judges who, by a majority, seem to be of the view that they invoke the Court's case-law sufficiently. Rather, the analysis is more inclined to agree with the other observers who disagree with the judges' overall self-evaluation.

The overall perception at the domestic level seems to be that the case-law of the ECtHR "is not applied consistently and sufficiently" and that "most judges are not familiar at all with the judgments of the ECtHR" which do not relate directly to North Macedonia.²⁸³ Technical aspects such as the lack of a special unit to follow case-law or the lack of an "established system through which the case-law of the higher courts would be available to judges" are some of the reasons mentioned as to why there is insufficient application of the case-law of the ECtHR and the case-law of the higher courts.²⁸⁴

²⁷⁹ Centre for Legal Research and Analysis (2019), pages 64–65.

²⁸⁰ *Ibid.*, page 65.

²⁸¹ *Ibid.*, page 67.

²⁸² *Ibid.*

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*, page 66.

V. Summary and Conclusion

This chapter has analysed the impact and effects of the ECHR and the ECtHR's case-law in North Macedonia by focusing on the national case-law of the highest courts and the case-law of the Strasbourg Court. The (lack of) influence of the latter on the former was the crucial aim of this analysis. Another important objective of the analysis provided in this chapter was to show, with concrete examples, the utilisation of Convention principles by the highest national courts as a means of concluding that, in fact, they are not yet to be considered as trustworthy 'Convention partners' of the Strasbourg Court. The later, for many cases, still cannot differ back to them.

[Part I](#) of the chapter started with a brief historical reflection on the most significant developments in North Macedonia, including its legal tradition and practice, as a means of laying the ground for an in-depth discussion of its relationship with the ECHR protection mechanism. In that respect, that part provided a synopsis of the most important events, from the accession to the Council of Europe in 1995 to the latest developments in the case-law of the Strasbourg Court in respect of North Macedonia.

[Part II](#) outlined the relationship of the domestic law *vis-à-vis* international law, with particular focus on the legal status of the ECHR in the domestic legal order. The analysis showed that the Convention is part of the national legal order and that national courts are obliged to refer to its principles in cases before them. Despite the fact that the Convention or the Court's case-law is not referred to in the Constitution, national laws related to the judiciary and the judicial system itself have filled in the void by emphasising the direct applicability of the ECHR and the Court's case-law in the domestic legal order. Consequently, and formalistically speaking, no obstacle was detected regarding the use of Convention principles by the national courts or other public authorities in the country. However, the practice showed that, despite the lack of obstacles, reliance on such principles is poor.

[Part III](#) examined the court system and its relationship with the Convention principles, mostly by focusing on an in-depth analysis of the jurisprudence of the highest national courts. On the one hand, the analysis showed a narrow impact of the case-law of the Constitutional Court on the embeddedness of the ECHR due to its limited competences to adjudicate on all Convention violations and lack of competence to review decisions of the lower courts; on the

other hand, the analysis also showed a fairly weak inclination on the part of the Supreme Court to utilise Convention principles deriving from the Court's case-law, despite its full constitutional authorisation to do so. Only a few good examples of such utilisation could be noticed from the year 2017 onwards. As a result, there is an urgency for the highest national courts, and especially for the Supreme Court, to up their game and start becoming better 'Convention filters' at the domestic level. The current *status quo* is not a picture which reflects a good partnership in the application of Convention principles nor a picture that portrays North Macedonian courts fairly sharing the burden to provide Convention protection within their legal space.

[Part IV](#) provided an in-depth scanning and analysis of all cases that have been adjudicated before the ECtHR in respect of Macedonia, starting from the first case in 2000 up to the last case rendered in 2021. This case-law was categorised in five different pools in order to serve the purposes of this study, namely to analyse such cases in light of the availability of domestic remedies, or lack thereof, to tackle them domestically. Despite the fact that no systemic issues have been identified by the Court in respect of North Macedonia, the analysis showed very serious deficiencies in applying Convention principles by the domestic courts, even in cases that were of a repetitive nature. For instance, such cases showed lack of compatibility with Convention standards in the fields of arbitrary police conduct, gender recognition, treatment in psychiatric hospitals, recognition of religious entities, etc. In this respect, this part also outlined some concrete examples of the impact and effects of the ECHR and the ECtHR's case-law in the North Macedonian domestic legal order.

The overall conclusion is that North Macedonian courts are at an early stage of utilisation of the Convention principles. The current level of application of Convention standards cannot be considered satisfactory at any level of domestic adjudication. There is much progress to be sought after for the national courts to become trusted 'Convention partners' to which the Strasbourg Court can easily defer. Two of the highest courts must bear the burden of leading the way for better Convention application at the domestic level. They ought to create internal mechanisms that will help them stay up-to-date with and informed of the newest developments at the ECtHR level so that they contribute to deeper embeddedness of the Convention in the national judiciary. Only after this is done, and done well, will they be able to serve as trustworthy 'first-line defenders' of the Convention at home.

Chapter 7 Serbia

I. Introduction

Shortly before its 50th birthday, in 1992, the Socialist Federal Republic of Yugoslavia (SFRY) ceased to exist.¹ The Yugoslav wars had started and the region entered into a dark era of war and enduring inter-ethnic tensions.² The aftermath of the collapse of the SFRY, amid its notoriously tragic events,³ produced a fragile amalgamation that came to be known as the Union of Serbia and Montenegro (“the Union”). In spite of its loose connections and a lack of enthusiasm to share a future together, the Union continued to exist for several years. In 2006, following a successful independence referendum in Montenegro, both of these former constituent republics of the SFRY became independent countries. Serbia became the legal successor of the Union whilst Montenegro embarked on a new sovereign path.

The ECHR was ratified by Serbia in 2003 and entered into force in 2004, whilst the country was still part of the Union.⁴ Following the dissolution of the Union, Serbia declared the continuation of its membership of the Council of Europe.⁵ Becoming and remaining part of the latter marked a turning point for human rights protection in Serbia as well as an effort to bring about a “clean break with the past”.⁶ The new Constitution, adopted in 2006, replacing the ‘90s Constitution,⁷ also signalled Serbia’s objective to embrace a European vi-

¹ SFRY was established in the aftermath of World War II. It existed for almost 50 years until its final dissolution in 1992. For an overview of the history of the SFRY and its break-up see, Glenny (1996) and Silber and Little (1997).

² Ibid. See also, Baker (2015).

³ Ibid.

⁴ On 3 April 2003 Serbia became the 45th Member State of the Council of Europe <<https://www.coe.int/en/web/portal/serbia>> (accessed 8 January 2022).

⁵ Committee of Ministers, Declaration on the Continuation by the Republic of Serbia of Membership of the State Union of Serbia and Montenegro, DECL-14.06.2006/1E of 14 June 2006.

⁶ Beširević and Marinković (2012).

⁷ For an English version and a consolidated text of the Constitution of Serbia see the CODICES database of constitutions published by the Venice Commission, <<http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>> (accessed 8 January 2022).

sion of human rights protection. Some authors claim that Serbia entered this new era with a “lack of proper legal and political culture”, which manifested itself in a misunderstanding of some fundamental concepts of the ECHR mechanism.⁸ Such shortcomings are claimed to be one of the reasons why Serbia is the country with the highest number of applications per capita before the ECtHR.⁹ In this respect, even though Serbia is the second youngest member of the ECtHR, it has created turmoil in respect of the number of well-founded applications that it has generated.¹⁰ Such turmoil was produced, in essence, due to Serbia’s failure to deliver on its primary Convention duty to create a system where effective domestic redress is available for all Convention rights. The lack of effective legal remedies combined with a lack of commitment on the part of the national authorities to address domestic flaws is one of the crucial factors that explain the high number of repetitive cases filed against Serbia before the ECtHR. The main areas where systemic faults may be noticed are those pertaining to “old” or “frozen” foreign-currency savings,¹¹ length of proceedings and non-enforcement of final court decisions.¹² Although Serbia has struggled to find ways to deal with these repetitive cases domestically, it has taken considerable steps forward and has partly played its role in sharing the responsibility to protect Convention rights at home, especially in the area where general measures were required by the Court through Article 46. The analysis in this chapter will show this through concrete examples.

Following this introduction, [Part II](#) of this chapter will outline the status of the Convention in the Serbian legal order and court system. It will shed light on the relationship between domestic and international law with a specific focus on the status of the ECHR. [Part III](#) will explore the domestic court system and its relationship with the Convention by focusing mainly on the jurisprudence of the highest courts in Serbia. [Part IV](#) will then provide an in-depth analysis of the ECtHR’s case-law against Serbia by classifying cases into six categories, namely: (1.1) [cases under Article 46 – where general and/or individual measures have been required](#); (1.2) [cases with the highest number of violations – Article 6 issues](#); (1.3) [cases under Article 13 – lack of effective domestic remedies](#); (1.4) [cases with violations under other Convention articles](#); (1.5) [admissi-](#)

⁸ Popović and Marinković (2016), 373.

⁹ Ibid.

¹⁰ See the ECtHR (2022), Country report on Serbia, <https://www.echr.coe.int/Documents/CP_Serbia_ENG.pdf> (accessed 8 January 2022).

¹¹ See *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, Judgment (2014).

¹² See [Part IV](#) of this Chapter.

[ble cases where no violation was found](#); and (1.6) [other important cases related to exhaustion of domestic remedies](#). [Part IV](#) will focus on the impact and effects of the ECHR and the ECtHR's case-law in the domestic legal order by providing concrete impact examples as well as observations with respect to the lack of impact in certain areas of Convention law. Lastly, [Part V](#) will reflect on these findings and draw some final conclusions.

II. Status of the Convention in the Serbian Legal Order

1. Relationship between Domestic and International Law

Serbia opted for a monist relationship between domestic and international law, albeit with a twist. The Constitution stands first in the hierarchy of applicable norms, both national and international, in Serbia.¹³ Ratified international treaties cannot be noncompliant with the Constitution whilst other laws and other general acts that are below the Constitution cannot be noncompliant with the ratified international agreements.¹⁴ Ratified international treaties together with generally accepted principles of international law¹⁵ are part of the domestic legal system and as such are directly applicable in Serbia.¹⁶ Accordingly, individuals and legal persons may ground their claims on such provisions whereas the courts and other public authorities are obliged to render decisions based on those invoked grounds.¹⁷ A law may be enacted if it proves necessary to exercise a certain right stipulated in an international treaty; however, such law may not influence the substance of the guaranteed right.¹⁸ The case-law of the national courts has also confirmed the direct applicability of international treaties and the generally accepted rules of international law.¹⁹

2. ECHR in the Domestic Legal Order

The Convention is not superior to the Constitution but is superior to the domestic law.²⁰ Articles 16 and 194 of the Constitution recognise the applicability of the ECHR in the national legal order, albeit indirectly.²¹ Neither the ECHR nor

¹³ Article 194 of the Constitution.

¹⁴ *Ibid.*

¹⁵ Constitutional Court of Serbia, Decision no. Už-43/2009, 9 July 2009. See also, Ivanović and Lukić, (2015), 248.

¹⁶ Article 16 § 2 of the Constitution.

¹⁷ *Ibid.* See also, Hadzi-Vidanović (2012).

¹⁸ Ivanović and Lukić (2015), 244.

¹⁹ Constitutional Court of Serbia, Decision no. IU-149/2008, 28 May 2009.

²⁰ See Articles 16 § 2 and 194 § 4 of the Constitution.

²¹ *Ibid.*

the ECtHR are directly referred to in the text of the Constitution but there is a general provision which provides that human and minority rights must be interpreted in line with the “practice of international institutions supervising their implementation”.²² Moreover, Article 22 of the Constitution also provides that the citizens of Serbia “shall have the right to address international institutions in order to protect their freedoms and rights guaranteed by the Constitution”.²³ It is not therefore disputable that a reference to the Convention and the Court’s case-law may be legitimately inferred from such provisions of the Constitution. With respect to the obligation of the executive and legislative branches to ensure the compatibility of any proposed legislation with Convention standards, while a specific mandatory procedure to ensure the compatibility of any proposed legislation with the *acquis* of the European Union exists, there is no specific procedure obliging lawmakers to ensure the compatibility of proposed legislation with Convention standards and the ECtHR case-law. However, it should be noted that there is an obligation to ensure compatibility of legislation with the Constitution, where the ECHR is incorporated.

The supra-legislative status of the Convention makes it possible for Serbian judges as well as for litigants to rely on the ECHR provisions and to enforce them directly at the domestic level. It is argued that the lower hierarchical rank of the Convention compared to that of the Constitution has been mitigated precisely by those constitutional stipulations that guarantee a direct applicability of the Convention and the obligation to follow the Court’s case-law when interpreting constitutional provisions on human and minority rights.²⁴ This assertion has also been confirmed through some highly significant decisions of the Constitutional Court.²⁵ On such occasions, the latter maintained that the rights and freedoms stipulated in the Convention hold the same rank as those protected under the Constitution and as such can be the subject of a constitutional appeal before the Constitutional Court.²⁶ The practice of the regular courts also shows that the direct applicability of the Convention and the Court’s case-law is not a matter of debate. The discussion that arises in respect of Serbia is more of a substantial nature, i.e. how often and how well the Convention and the Court’s jurisprudence is utilised and followed. An in-depth analysis in that regard will follow.

²² Article 18 § 3 of the Constitution.

²³ Article 22 of the Constitution.

²⁴ Popović and Marinković (2016).

²⁵ See e.g. Constitutional Court of Serbia, Legal Opinion no. 1-8/11/2, 2 April 2009 for an official legal stance on this matter. All decisions and opinions of the Constitutional Court are available at <<http://www.ustavni.sud.rs/>>.

²⁶ Ibid.

III. Domestic Court System and the ECHR

1. Overview of the Serbian Court System

The judicial power in Serbia derives from “courts of general and special jurisdiction” whose establishment, organisation, structure and jurisdiction are regulated by law.²⁷ Domestic courts with general jurisdiction encompass basic courts, higher courts, appellate courts and the Supreme Court of Cassation as the supreme court of law; whilst the courts with special jurisdiction include commercial courts, the Commercial Appellate Court, misdemeanour courts, the High Misdemeanour Court, and an Administrative Court.²⁸ While the Supreme Court of Cassation is the highest court of the land, there is also a highly powerful Constitutional Court with a vast amount of competences. Until 2016, there was no possibility for a direct constitutional appeal to be filed with the Constitutional Court but the constitutional reform which entered into force that year together with a new Constitution, changed many aspects of the domestic legal order in Serbia. Following the introduction of the revived constitutional competences and the case-law of the highest courts in Serbia, this chapter will analyse the level and depth of the Convention related judicial dialogue between Serbia’s highest domestic courts.

1.1. Supreme Court of Cassation

Before the new Constitution entered into force, the Supreme Court of Cassation was known as the Supreme Court. Authors have indicated that the new lexis chosen after the 2006 constitutional reform was considered necessary in order to distance the new court with the former Supreme Court, whose reputation had been tarnished by serious allegations of political influence and control.²⁹

²⁷ See Articles 142 § 1 and 143 of the Constitution.

²⁸ Articles 142-152 of the Constitution. See also Chapter II [External Organisation of Courts] of the Law on the Organisation of Courts, Official Gazette Nos. 116/2008, 104/2009, 101/2010, 31/2011, 78/2011, 101/2011, 101/2013, available at <<http://www.vk.sud.rs/sites/default/files/attachments/Zakon%20o%20uredjenju%20sudova-01-03-17.pdf>> (accessed 8 January 2022).

²⁹ Čukalović (2012), 116.

Today, being the highest court in the land, the Supreme Court of Cassation issues decisions based on the Constitution, the law and ratified international treaties.³⁰ The silence of the Constitution on the Supreme Court of Cassation has been criticised compared to the lengthy and detailed regulation on the competences of the Constitutional Court which is referred to no less than 60 times in the Constitution itself.³¹ The legislation on domestic courts enacted to implement the constitutional reform in 2006 foresees that the jurisdiction of the Supreme Court of Cassation is divided into two categories, namely “in-trial” jurisdiction and “out-of-trial” jurisdiction.³² The first line of action, i.e. in-trial jurisdiction, entrusts the Supreme Court of Cassation with the competence to decide on extraordinary legal remedies filed against lower court decisions, conflicts of jurisdiction between courts and transfers of jurisdiction.³³ Here, the Supreme Court is responsible to decide in criminal, civil and administrative cases on the utilisation of the legal remedies specifically provided by the national laws. The second line of action, i.e. out-of-trial jurisdiction, assigns to the Supreme Court of Cassation, *inter alia*,³⁴ the duty to provide uniform application of laws and equality of the parties in court proceedings and to review the application of laws and regulations by the lower courts.³⁵ In this respect, one of the most important activities of the Supreme Court of Cassation is the harmonisation of the judicial practice of all lower domestic courts in Serbia through the issuance of so-called “Legal Opinions”. Another jurisdiction was added to the duties of the Supreme Court when the issue of length of proceedings became particularly problematic within the national judiciary; this resulted in legislative amendments providing for new domestic remedies.³⁶ In this respect, the Supreme Court of Cassation is responsible to decide on requests of the parties to accelerate the process of their proceedings as well as requests for equitable remuneration following undue length of proceedings.³⁷ In order to assist the parties in the process of realising their Article 6 right to protection against undue length of proceedings, the Supreme Court has published a comprehensive list of ECtHR inspired criteria which can be applied for the assessment of length of proceedings, together with several complemen-

³⁰ Article 145 of the Constitution.

³¹ Čukalović (2012), 116.

³² Article 30 of the Law on the Organisation of Courts.

³³ *Ibid.*

³⁴ Article 31 of the Law on the Organisation of Courts.

³⁵ *Ibid.*

³⁶ See Articles 8a and 9b of the Law on the Organisation of Courts.

³⁷ *Ibid.*

tary Legal Opinions and other documents of the Council of Europe which are very helpful for grasping the stance of the Supreme Court of Cassation and of the Strasbourg Court on this topic.³⁸

When compared to the jurisprudence of the Constitutional Court, the Supreme Court of Cassation makes fewer references to the ECHR and to the jurisprudence of the Strasbourg Court. Even when the Supreme Court of Cassation refers to the ECtHR's case-law – it seems to do so in a less thorough manner considering that it does not enter into in-depth deliberations with respect to the Convention standards being cited in that specific case-law.³⁹ It neither provides any comparison of certain case-law of the Court nor does it methodically examine the general principles presented therein. Even though in most cases the Supreme Court of Cassation does not refer to the Convention standards or the ECtHR case-law when issuing Legal Opinions on the harmonisation of the judicial practice,⁴⁰ there are, nonetheless, some exemplary cases in which the Supreme Court of Cassation has used the ECtHR's case-law rendered in respect of Serbia in order to harmonise the national case-law of the domestic courts, thereby creating domestic solutions which remove the need of the litigants to reach out to the Strasbourg Court. For instance, an Opinion harmonising the judicial practice rendered by the Supreme Court of Cassation clarified that enforcement proceedings which have been established by final court decisions “cannot be stayed even in cases when a certain debtor is being restricted as part of the process of privatisation”.⁴¹ This Opinion was adopted in response, *inter alia*, to the need to undertake measures that aim to comply with the judgments of the ECtHR rendered against Serbia in respect of non-enforcement proceedings.⁴² In another similar Opinion, the Supreme Court of Cassation ordered all courts in Serbia to follow the judgment of the ECtHR in the case of *Lepojić*, according to which the degree of acceptable criticism of public persons compared to individuals, in Article 10

³⁸ See e.g. the publications of the Supreme Court of Cassation under the heading ‘On the protection of the right to a decision within a reasonable time’ <<https://www.vk.sud.rs/sr-lat/u-zaštiti-prava-na-sudjenje-u-razumno-roku-2>> (accessed 8 January 2022).

³⁹ Supreme Court of Cassation, Decision no. Rev. 862/2015, 24 February 2016; and Supreme Court of Cassation, Decision no. Rev. 260/2013 of 17 October 2013.

⁴⁰ See e.g. the list of Legal Opinions issued by the Supreme Court of Cassation on criminal, civil and administrative matters <<https://www.vk.sud.rs/sr-lat/pravna-shvatanja-stavovi-zaključci-i-referati>> (accessed 8 January 2022).

⁴¹ See Supreme Court of Cassation of Serbia, Legal Opinion of 24 February 2011.

⁴² See [Part IV](#) of this Chapter for more on the ECtHR case-law against Serbia in relation to non-enforcement of final and binding judicial decisions.

cases, must be higher.⁴³ The latter was a case dealing with freedom of expression, an area in which there has been considerable case-law against Serbia,⁴⁴ and therefore the intervention of the Supreme Court of Cassation in this regard is very useful for the embeddedness of these principles at the domestic level. There are also cases where the Supreme Court of Cassation relies on the case-law of the Constitutional Court which is based on the jurisdiction of the ECtHR.⁴⁵ In its recent case-law bulletins, the Supreme Court has dedicated a special part entitled “The case-law of the ECtHR” to the most important decisions issued by the Court’s Grand Chamber in the preceding year, in addition to publishing professional articles dedicated to the jurisprudence of the ECtHR written by the judges of the Supreme Court of Cassation as well as by judges of the Constitutional Court.⁴⁶ This combination of efforts to disseminate Convention know-how among the rest of the judiciary in Serbia, interested parties and prospective applicants, is a very useful strategy for further domestication of the ECHR standards and thus the overall advancement of implementation of the ECtHR case-law at the national level.

In other types of cases, where the Supreme Court of Cassation reviews the decisions of the lower courts, there are only occasional references to the Convention standards⁴⁷ and the ECtHR’s case-law, for example in cases related to the right to protection of property⁴⁸ and in cases related to the reopening of proceedings following a Court’s judgment;⁴⁹ etc. However, in most cases there is no such reliance as the special section of the most important decisions published by the Supreme Court of Cassation itself demonstrates. In that section, the Supreme Court of Cassation selects on a yearly basis the most important

⁴³ ECtHR, *Lepojić v. Serbia*, no. 13909/05, Judgment (2007). See also, the Opinion of the Supreme Court of Cassation of Serbia of 25 November 2008 through which the legal position arguing for the direct application of the case-law of the ECtHR in the context of cases involving freedom of expression claims was adopted. According to this legal opinion, the degree of acceptable criticism is to be considered much wider for public figures than private individuals. This legal opinion was ordered to be followed by all basic courts in Serbia.

⁴⁴ ECtHR, *Filipović v. Serbia*, no. 27935/05, Judgment (2007); ECtHR, *Bodrožić and Vujin v. Serbia*, no. 38435/05, Judgment (2009); ECtHR, *Tešić v. Serbia*, nos. 4678/07 and 50591/12, Judgment (2014); and ECtHR, *Milislavljević v. Serbia*, no. 50123/06, Judgment (2017).

⁴⁵ Supreme Court of Cassation, Decision no. Rev. 10/2014, 7 May 2014; Supreme Court of Cassation, Decision no. Rev. 1285/2013, 19 November 2014.

⁴⁶ See e.g. case-law bulletins of the Supreme Court of Cassation for the years 2010–2020 <<https://www.vk.sud.rs/sr-lat/bilten-vrhovnog-kasacionog-suda>> (accessed 8 January 2022).

⁴⁷ See e.g. Supreme Court of Cassation, Decision Rev2. 1052/18, 12 February 2019.

⁴⁸ Supreme Court of Cassation, Decision no. Rev. 284/2017, 12 February 2019.

⁴⁹ Supreme Court of Cassation, Decision no. Rev2. 788/2016, 24 April 2018.

reasoning from its decisions on criminal, civil and administrative matters and publishes such reasoning for the general public. A reliance on the Convention standards and the Court's case-law is seldom ever found in any of the selected texts.⁵⁰

In conclusion, despite the fact that this study has observed some positive examples of reliance on the Convention standards and principles, especially in the area of length of proceedings and Article 10 cases, the overall adeptness of the Supreme Court of Cassation in utilising the ECtHR case-law and Convention standards and its inclination to do so are still to be considered at an early stage. There is, therefore, substantial room for advancement in this area to allow this national court to be able to play its role as a national defender of ECHR rights and motivate the other lower courts to utilise the standards created at the Strasbourg level.

1.2. Constitutional Court

The Constitutional Court is an independent and autonomous institution empowered with the duty to protect the “constitutionality and legality, as well as human and minority rights and freedoms”.⁵¹ It renders final, binding and enforceable decisions.⁵² From 1963 onwards, the SFRY had one centralised federal constitutional court and six other constitutional courts in each of its federal units.⁵³ Even though the Constitutional Court of Serbia has existed for more than half a century, its ground-breaking impact was only seen following the entry into force of the new Constitution in 2006.⁵⁴ It has been pointed out that during the communist regime and the “Milošević era of façade democracy”, the review of constitutionality amounted, at most, to a farce.⁵⁵ The new Constitution provides for an extensive list of competences for the newly envisaged Constitutional Court intended to revive and revitalise this court, an endeavour which authors argued was, at times, made at the expense of the former Supreme Court.⁵⁶ The expanded jurisdiction entrusted the Constitutional Court with exclusivity in numerous areas of *ex post* and *ex ante* norm con-

⁵⁰ See e.g. the selected reasoning highlighted by the Supreme Court of Cassation on a yearly basis <<https://www.vk.sud.rs/sr-lat/izabrane-sentence>> (accessed 8 January 2022).

⁵¹ Article 166 of the Constitution.

⁵² Ibid.

⁵³ Constitution of the Socialist Federal Republic of Yugoslavia (1974) <<https://www.world-statesmen.org/Yugoslavia-Constitution1974.pdf>> (accessed 8 January 2022).

⁵⁴ Papić and Đerić (2017).

⁵⁵ Beširević and Marinković (2012), 405.

⁵⁶ Čukalović (2012).

trol.⁵⁷ The new jurisdiction,⁵⁸ amongst other competences listed in Article 167 of the Constitution,⁵⁹ also made the Constitutional Court responsible for deciding on electoral disputes;⁶⁰ jurisdictional disputes between courts and State bodies;⁶¹ the dismissal of the President of the Republic;⁶² appeals following the termination of a judge's or prosecutor's tenure of office;⁶³ bans on political parties, trade union organisations or other civic organisations;⁶⁴ and bans on religious communities.⁶⁵ The Constitutional Court may also, *proprio motu*, institute proceedings to assess the constitutionality or legality of a law.⁶⁶ As far as the incidental control procedure is concerned, the courts in Serbia cannot file preliminary review questions with the Constitutional Court as is the case with many other Western Balkan States. The assessment of constitutionality may only be instituted by "State bodies, bodies of territorial autonomy or local self-government, as well as at least 25 deputies" of the Parliament.⁶⁷ On the other hand, the Constitution also provides that any individual or legal person "shall have the right to an initiative to institute proceedings of assessing the constitutionality and legality."⁶⁸

However, the main constitutional novelty introduced through the 2016 reform in Serbia was the possibility for individuals and legal persons to file a direct constitutional complaint with the Constitutional Court "if other legal remedies for their protection have already been applied or not specified".⁶⁹ Such a constitutional appeal may be directed "against individual general acts or actions performed by State bodies or organisations exercising delegated public powers which violate or deny" the rights and freedoms guaranteed by the Constitution, including the ECHR.⁷⁰ The direct access of individuals to the Con-

⁵⁷ See Articles 167 § 1, 168 § 2, 168 § 3, 168 § 4 and 168 § 5 of the Constitution.

⁵⁸ For a detailed and complete view of the full jurisdiction of the Constitutional Court see Part 6 of the Constitution, Articles 168-175.

⁵⁹ See Article 167 of the Constitution where the full list of competences of the Constitutional Court is reflected.

⁶⁰ Article 167 § 4 of the Constitution.

⁶¹ Pavlović (2012), 39-54. See also Articles 167 § 2 and 167 § 3 of the Constitution.

⁶² Article 118 of the Constitution.

⁶³ Articles 148 and 161 of the Constitution.

⁶⁴ Article 167 of the Constitution.

⁶⁵ Article 44 of the Constitution.

⁶⁶ Articles 168 and 175 of the Constitution.

⁶⁷ Article 168 of the Constitution.

⁶⁸ *Ibid.*

⁶⁹ Article 170 of the Constitution

⁷⁰ *Ibid.*

stitutional Court did not exist in the past and its introduction in 2016 has ameliorated the overall review of constitutionality and conventionality in Serbia.

Two years after the introduction of the individual constitutional appeal mechanism in Serbia, the ECtHR, through the case of *Vinčić and Others*, declared the new avenue of domestic redress to be an effective remedy starting from 7 August 2008, which coincided with the date when the first case establishing a violation was published in the Official Gazette.⁷¹ However, since all applicants had filed their complaints with the ECtHR before the date from which the remedy was to be considered effective, the Court maintained that they were under “no obligation to exhaust this particular avenue of redress before turning to Strasbourg.”⁷² The effectiveness of the constitutional complaint was subsequently tested on several other occasions before the ECtHR, including at the Grand Chamber level when the case of *Vučković and Others* was rendered.⁷³ These joined applications ended up being heard by the Grand Chamber precisely due to diverse views on the effectiveness of the constitutional complaint mechanism. Even within the ECtHR, there was disagreement with respect to its (non-)effectiveness.⁷⁴ Meanwhile, the Chamber considered that for some particular complaints made by Serbian army reservists the constitutional complaint mechanism would not have been effective and therefore rejected the Government’s objections and found several violations on applicants’ favour;⁷⁵ the Grand Chamber opined that the evidence in the Constitutional Court’s case-law points in an opposite direction and that the applicants should have specifically raised their discrimination complaints domestically before the Constitutional Court.⁷⁶ In this respect, the Grand Chamber held that it could not consider the merits of the case due to the applicants’ failure to exhaust the constitutional appeal before the Constitutional Court.⁷⁷ An analysis of the dissent joined by three judges, who viewed the majority as being “too

⁷¹ ECtHR, *Vinčić and Others v. Serbia*, nos. 44698/06 and 30 others, Judgment (2009), § 56.

⁷² *Ibid.*, § 51.

⁷³ ECtHR, *Vučković and Others v. Serbia* [GC], nos. 17153/11 and 29 others, Judgment (2014).

⁷⁴ See joint dissenting opinion of Judges Popović, Yudivska and De Gaetano in ECtHR, *Vučković and Others v. Serbia* [GC], nos. 17153/11 and 29 others, Judgment (2014). See also differences in argumentation between the Chamber judgment and the Grand Chamber judgment.

⁷⁵ See also, the Chamber judgment in *Vučković and Others v. Serbia*, nos. 17153/11 and 29 others, Judgment (2012).

⁷⁶ ECtHR, *Vučković and Others v. Serbia* [GC], nos. 17153/11 and 29 others, Judgment (2014).

⁷⁷ *Ibid.*, operative part of the judgment.

stringent” on the applicants, may also help to illustrate the heated debate at the Strasbourg level over the effectiveness of the Serbian constitutional appeal mechanism.⁷⁸

As far as the utilisation of the ECHR standards and the case-law of the Court goes, the Constitutional Court tends to utilise them in some of its decisions but not in the vast majority of them. The research conducted in this study shows that the Constitutional Court most often refers to Convention principles and the Court’s case-law in cases filed by individuals or legal persons through the individual constitutional complaint mechanism;⁷⁹ it does this much more rarely in cases related to a review of legislation or other jurisdictional competences as reflected above.⁸⁰ In many instances when the Constitutional Court declares a provision of the law as unconstitutional, it does not use the Court’s case-law to support its reasoning;⁸¹ and the same approach is to be found in some other cases where the utilisation of the Court’s general principles would have been very useful.⁸² On certain occasions, the Constitutional Court refers *in abstracto* to the stance of the ECtHR as reflected in its case-law, without citing any pertinent case-law.⁸³ The greatest reliance

⁷⁸ See joint dissenting opinion of Judges Popović, Yudivska and De Gaetano in ECtHR, *Vučković and Others v. Serbia* [GC], nos. 17153/11 and 29 others, Judgment (2014).

⁷⁹ According to the research conducted in the official database of the Constitutional Court, the term “European Court” was referred to in 1800 cases decided in the process of the individual complaint mechanism, with most references related to clone cases regarding length of proceedings. However, this number is not very high compared to the total number of decisions that the Constitutional Court has issued in relation to this competence. For more see <<http://www.ustavni.sud.rs/page/jurisprudence/102/sr-Latn-CS/>> (accessed 8 January 2022).

⁸⁰ See some examples where the Constitutional Court of Serbia referred to the case-law of the ECtHR in its decisions which are not related to the individual complaint mechanism but to other competences of the Constitutional Court under Article 167 of the Constitution, such as review of legislation and other competences: Decision no. IUz-253/2018, 28 October 2021, where the case-law of the ECtHR on Article 13 is referred to; Decision nos. IU-260/2003 and IU-216/2004, 9 December 2010, where the case-law of the ECtHR on Article 13 refers to Article 1 of Protocol No. 1; Decision nos. IU-347/2005, 22 July 2010; IUz-252/2002, 27 February 2013; and IUz-1245/2010, 13 June 2013, where the case-law of the ECtHR on Article 8 is referred to; Decision no. IUz-51/2012, 23 May 2013 and Decision no. VIIIU-102/2010, 28 May 2010, where the case-law of the ECtHR on Article 6 is referred to.

⁸¹ Constitutional Court of Serbia, Decision no. IUz-96/2015, 20 May 2021, assessing the constitutionality of certain provisions of the Criminal Procedure Code and deeming them to be contrary to the right to a fair and impartial trial.

⁸² Constitutional Court of Serbia, Decision no. UŽ-7859/2019, 16 September 2021.

⁸³ Constitutional Court of Serbia, Decision no. IU-292/2005, 25 March 2009; Constitutional Court of Serbia, Decision no. IUz-147-2012, 15 November 2012; Constitutional Court of

on Convention standards is to be found in the area of length of proceedings, where the Constitutional Court issues decisions finding a violation of the right to a fair trial simply by mentioning Article 6 of the Convention,⁸⁴ or by utilising specific case-law of the ECtHR,⁸⁵ although there are also cases in this field where no such reliance is to be found.⁸⁶ One reason for such heavy reliance on ECHR principles in cases related to the issue of length of proceedings is due to the fact that this problem is widespread in Serbia⁸⁷ and even the Constitutional Court itself was found to have violated this right with regard to an applicant by not deciding his case for more than 3 years and 5 months, as the case of *Milanović* points out.⁸⁸

Scholars, academics and experts, including the former Serbian judge before the ECtHR, have argued that the application of the Court's case-law by the Constitutional Court is not systematic,⁸⁹ with the *res interpretata* effect of the ECtHR's jurisprudence often being ignored,⁹⁰ and that close scrutiny of its case-law "reveals certain discrepancies in its rulings", with inconsistencies and "incoherent application" in some important cases and "mechanical ... overciting" in "clone" or repetitive cases.⁹¹ Such observations have been confirmed even by judges of the Constitutional Court themselves, who have criticised their court for often relying on "inadequate", insufficient and "erroneous" "examples from the case-law of the ECtHR" in their decisions as well as for using its case-law for "routine" references.⁹² In particular, a national judge of the Constitutional Court pointed to an important example from the area of discrimination where the Constitutional Court had relied on at least twelve judgments of the ECtHR⁹³ when deciding a case; yet, according to this judge, none

Serbia, Decision no. IUz-147/2012, 21 February 2013; Constitutional Court of Serbia, Decision no. IUz-424/2014, 17 November 2016; Constitutional Court of Serbia, Decision no. IUo-515/2011, 27 June 2013.

⁸⁴ See e.g. Constitutional Court of Serbia, Decision no. UŽ-14899/2018, 7 January 2021, and Constitutional Court of Serbia, Decision no. UŽ-4661/2019, 17 June 2021.

⁸⁵ See e.g. Constitutional Court of Serbia, Decision no. UŽ-1911/2017, 15 July 2021, and Constitutional Court of Serbia, Decision no. UŽ-7065/2018, 15 July 2021.

⁸⁶ See e.g. Constitutional Court of Serbia, Decision no. UŽ-5337/2018, 15 July 2021, and Constitutional Court of Serbia, Decision no. UŽ-7065/2018, 15 July 2021.

⁸⁷ See [Part IV](#) of this Chapter where an in-depth analysis of the ECtHR's case-law with respect to length of proceedings in Serbia is provided.

⁸⁸ ECtHR, *Milanović v. Serbia*, no. 56065/10, Judgment (2019), §§ 84-90.

⁸⁹ Beširević and Marinković (2012); Papić and Đerić (2017).

⁹⁰ *Ibid.*

⁹¹ Popović and Marinković (2016), 388.

⁹² See case-law bulletin of the Supreme Court 2019, pages 216-217.

⁹³ Constitutional Court of Serbia, Decision no. UŽ-738/2014, 30 June 2017.

of these decisions had any relevance or relation to the decision that was to be taken by the Constitutional Court.⁹⁴ Here, the honourable judge seems to argue that when choosing to apply general principles of the ECtHR, a national court should also make sure that the circumstances of the case treated by the Strasbourg Court are similar to the national case at hand. This study argues that although that represents an ideal scenario, there is nothing wrong with utilising the general principles established by the ECtHR in a specific area of Convention law and then applying them to the national case – despite the fact that the factual situation of both cases is not identical or entirely similar.

In some cases, it is argued that the Constitutional Court demonstrated an “ability and readiness” to enforce human rights protection in some areas of law (recognition of sex change for example), and, in some other cases it was not “too enthusiastic” with respect to other concepts, such as the prohibition of discrimination.⁹⁵ In particular, the Constitutional Court’s “commitment” to apply the Court’s case-law is considered to have been “particularly significant when it comes to civil rights” in that it used the Court’s case-law “to fill in gaps in domestic legislation”.⁹⁶ Equally important has been the role of the Constitutional Court “in the promotion of due process rights”, despite the fact that at certain moments “it appeared to be subject to societal pressures”.⁹⁷ This unbalanced trend and varied approach towards the utilisation of Convention standards makes the case-law of the Constitutional Court somewhat unpredictable and non-systematic.

On a more positive note, however, there are also examples where the Constitutional Court goes so far as to utilise the case-law of the Court to create new rights and act as a positive legislator in Serbia.⁹⁸ There are, therefore, some exemplary cases where the Constitutional Court used Convention standards and the Court’s case-law in a thorough and skilful manner. For example, the Constitutional Court used Articles 10 and 11 of the Convention and the case-law of the Court reflected in the cases of *Association Nouvelle Des Boulogne Boys v. France*, *Feret v. Belgium*, *Vejdeland and Others v. Sweden*, *Refah Partisi v. Turkey*, *Herri Batasuna and Batasuna v. Spain*, *Özdep v. Turkey*, and *Marckx*

⁹⁴ See case-law bulletin of the Supreme Court 2019, page 217, where the judge of the Supreme Court of Cassation (in his personal work published in the bulletin) considers that ECtHR, *A.B. v. Switzerland*, no. 20872/92, Decision (1995) dealt with a completely different issue than the one for which it was cited.

⁹⁵ Popović and Marinković (2016), 388.

⁹⁶ *Ibid.*, 399.

⁹⁷ *Ibid.*, 388-389.

⁹⁸ Constitutional Court of Serbia, Decision no. UŽ-3238/2011, 8 March 2012.

v. *Belgium*, in order to ban the work of the association known as the “Patriotic Movement Obraz”, whose actions aimed at violating human and minority rights as well as inciting national and religious hatred.⁹⁹ In addition to propagating hate speech and spreading racial, religious and national hatred and intolerance against Muslims, Bosnians, Albanians, the LGBTI community as well as other religious communities in Serbia, the association called for violence in the media and was directly engaged in numerous violent incidents documented by the State authorities.¹⁰⁰ Utilising the general principles reflected in the aforementioned case-law of the ECtHR, the Constitutional Court reasoned, *inter alia*, that: (i) the ECHR confirms that everyone has the right to freedom of assembly except for explicit restrictions and that the Convention prohibits the abuse of rights to the detriment of others; (ii) freedom of assembly is not an absolute right and when such a right is misused, an interference is called for; (iii) the function of the Constitutional Court is to protect the rights and freedoms of all, including minorities and, in this respect, to ensure that no association or organisation negatively affects such rights; (iv) the ECtHR’s position on hate speech is that incitement to hate speech does not necessarily require a call for a certain act of violence but even “an attack on a certain group of persons by insulting, slandering and ridiculing them” amounts to hate speech.¹⁰¹ This national case-law, for instance, is a very good example of where the Constitutional Court utilised the Convention standards deriving from several different cases of the ECtHR in order to support various aspects of its reasoning. For every part of its reasoning, the Constitutional Court identified the relevant case-law of the Strasbourg Court and utilised its general principles by linking them to the facts of the case at hand. In a dissenting opinion, however, a Constitutional Court judge criticised her colleagues for utilising certain case-law of the ECtHR which, according to her, could not be used in the sense of having the legal force of a “precedent” for the particular circumstances of the case in question.¹⁰² Besides this good example, there are a few other worthy examples of good Convention application to be noted, for instance, in cases related to the *ne bis in idem* principle,¹⁰³ the right of the defence to examine witnesses,¹⁰⁴ rights under Articles 6, 13 and Article 2 of Protocol No. 7,¹⁰⁵ and other Conven-

⁹⁹ Constitutional Court of Serbia, Decision no. VIIIU-249/2009, 12 June 2012.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² See paragraph 9 of the dissenting opinion of Judge Katarina Manjlović Andrić in Constitutional Court, Decision no. VIIIU-249/2009, 12 June 2012.

¹⁰³ Constitutional Court of Serbia, Decision no. Už-1285/2012, 26 March 2014.

¹⁰⁴ Constitutional Court of Serbia, Decision no. Už-2768/2009, 13 June 2012.

¹⁰⁵ Constitutional Court of Serbia, Decision no. Už-3020/2011, 5 June 2014.

tion rights.¹⁰⁶ Nevertheless, more than 95% of the judgments in which reliance on the ECtHR case-law is to be found relate to Article 6 issues and most of such cases relate to length of proceedings.¹⁰⁷

Lastly, it is interesting to note that every violation found by the Constitutional Court is based on a specific article of the Constitution, with no violations of the Convention specifically found, even if its principles were used to find that particular violation. This tends to happen even in cases in which the applicants rely on specific provisions of the Convention, for instance, Articles 6, 8, 13 and Article 2 of Protocol No. 4, the Constitutional Court requalifies such rights by clarifying that it “assesses the existence of [such provisions] in relation to the relevant provisions of the Constitution”.¹⁰⁸ In a way, this shows the slight distance that the Constitutional Court keeps from the ECHR by always making sure it is cited in conjunction with the relevant constitutional provisions. Despite the fact that, by far, the Constitutional Court is the best equipped national court to apply the ECHR and the ECtHR case-law, the study of the case-law against Serbia rendered at the Strasbourg level will show many examples where this important national court failed to act as the much needed ‘last-line defender’ in Serbia. As a result, despite reaching an intermediate stage of utilisation of Convention standards, there is room for further improvement in order for the Constitutional Court to become the last domestic instance to which the ECtHR may confidently defer.

2. Supreme Court of Cassation v. Constitutional Court: ‘Convention talk’

The interplay and judicial dialogue between the Constitutional Court and the Supreme Court of Cassation, in terms of Convention application, is not particularly rich or profound. The ‘Convention talk’ between these two courts is confined to one mechanism only, i.e. the individual complaint mechanism which may be initiated by individuals by filing a constitutional appeal, considering that the legal system in Serbia does not foresee the mechanism of in-

¹⁰⁶ Constitutional Court of Serbia, Decision no. UŽ-909/2020, 16 September 2021.

¹⁰⁷ See e.g. the case-law research confirming this <<http://www.ustavni.sud.rs/page/jurisprudence/102/sr-Latn-CS/>> (accessed 20 December 2021)

¹⁰⁸ See, in this regard, Constitutional Court of Serbia, Decision no. UŽ-2586/2016, 17 July 2021. See also e.g. Constitutional Court of Serbia, Decision no. UŽ-9956/2016, 29 December 2020, where the applicant complained about a violation of Articles 3 and 13 of the ECHR but the Constitutional Court immediately reframed these rights in terms of the relevant articles of the Constitution, namely Articles 25 and 36.

cidental control, through which the Supreme Court of Cassation could possibly raise issues of compliance of laws with the Convention. As a result, when the Supreme Court of Cassation or other regular courts in Serbia are not sure whether a particular legal norm is compatible with the Constitution or the ECHR, they cannot rely on the guidance of the Constitutional Court to clarify the conventionality of such a norm, as is the case with other countries in the Western Balkans. The domestic courts must apply the law themselves to the best of their knowledge. This is not to say that the constitutionality of norms remains unchecked in Serbia as there are many alternative mechanisms, as described above, through which the compliance of laws with the Constitution and the ECHR is maintained.¹⁰⁹ Yet, there is a drawback in this respect considering that the Supreme Court of Cassation and other regular courts cannot engage in domestic judicial dialogue with the Constitutional Court in respect of the compatibility of certain norms with the ECHR.

Another reason as to why the interaction between the Supreme Court of Cassation and the Constitutional Court is not so profound is due to the fact that litigants are not always required to obtain a decision of the Supreme Court of Cassation before filing a constitutional appeal with the Constitutional Court. The exhaustion rule in regard to filing a constitutional complaint with the Constitutional Court is much broader and more flexible in Serbia. There are a significant number of decisions rendered by the Constitutional Court in which the decisions of basic courts and appellate courts are directly quashed because of various breaches of the Constitution and/or ECHR standards.¹¹⁰ On such occasions, the applicants had filed a constitutional appeal directly with the Constitutional Court without reaching out to the Supreme Court of Cassation for review of extraordinary legal remedies. This might be another reason why the Constitutional Court is so overwhelmed with applications coming from all parts of the Serbian domestic court system.

In general, the Constitutional Court and the Supreme Court of Cassation tend to refer to constitutional provisions on human rights that mirror Convention rights but they very rarely refer to ECHR provisions directly. Both courts are disinclined to find a violation of a specific Convention right even if the case-law of

¹⁰⁹ See Article 169 of the Constitution about the possibilities of examining the constitutionality of a law prior to its coming into force.

¹¹⁰ See e.g. decisions of the Constitutional Court quashing decisions of other regular/basic courts in Serbia: Constitutional Court of Serbia, Decision no. UŽ-9691/2019, 15 April 2021 (quashing several decisions of the High Court in Subotica for violating Article 6); Constitutional Court of Serbia, Decision no. UŽ-1360/2021, 15 April 2021 (partly quashing a decision of the High Court in Pančevo for violating Article 6); etc.

the ECtHR led to finding such a violation. As stated above, the violation found always pertains to the Convention mirroring provision which is guaranteed by a specific provision of the Constitution. There are many cases in which the Constitutional Court confirms the verdict of the Supreme Court of Cassation in full and, in such cases, references to the ECHR or the case-law of the Court are seldom found, despite some good examples of thorough utilisation of Convention standards.¹¹¹ In other cases, when the Constitutional Court quashes the decisions of the Supreme Court of Cassation and remands them for fresh review, it is more likely that ECtHR references will be found.¹¹² For example, in one particular case, the Constitutional Court used the principles established by the Strasbourg Court with respect to the arbitrariness of a decision in order to argue that the Supreme Court of Cassation had arbitrarily refused to review the complaints of the applicant.¹¹³ In another case, the Constitutional Court used the case-law of the Court to explain why frequent and numerous remittals by the regular courts, including the Supreme Court of Cassation, had violated the applicants' right to a fair trial within a reasonable time.¹¹⁴ Thorough references to the case-law of the ECtHR may also be found in other cases in which the Constitutional Court quashed decisions of other regular courts.¹¹⁵ There are also cases where the Constitutional

¹¹¹ Constitutional Court of Serbia, Decision no. UŽ-4474/2016, 3 December 2020, where the Constitutional Court relied on the case-law of the Strasbourg Court, namely, ECtHR, *Fogarty v. the United Kingdom* [GC], no. 37112/97, Judgment (2001); ECtHR, *Cudak v. Lithuania* [GC], no. 15869/02, Judgment (2010); and ECtHR, *Radunović and Others v. Montenegro*, nos. 45197/13 and 2 others, Judgment (2016), in order to argue that there had been no violation of Article 6 by the Supreme Court of Cassation.

¹¹² See e.g. Constitutional Court of Serbia, Decision no. UŽ-9329/2012, 21 May 2015, where the Constitutional Court quashed a Decision of the Supreme Court of Cassation because the latter was considered to have violated the applicant's right to a fair and impartial trial. In its Decision, the Constitutional Court cited at length two judgments of the Strasbourg Court, namely, ECtHR, *Bochan v. Ukraine* (no. 2) [GC], no. 22251/08, Judgment (2015), § 62, and ECtHR, *Dulaurans v. France*, no. 34553/97, Judgment (2000), § 33. See also certain other cases where the Constitutional Court quashed decisions of the Supreme Court of Cassation: Constitutional Court of Serbia, Decision no. UŽ-14350/2018, 15 April 2021; Constitutional Court of Serbia, Decision no. UŽ-9889/2017 of 15 April 2021.

¹¹³ *Ibid.*, Constitutional Court of Serbia, Decision no. UŽ-9329/2012, 21 May 2015.

¹¹⁴ Constitutional Court of Serbia, Decision no. UŽ-5461/2012, 11 December 2014 citing ECtHR, *Sokolov v. Russia*, no. 3734/02, Judgment (2005), § 38; ECtHR, *Sürmeli v. Germany* [GC], no. 75529/01, Judgment (2006), § 131; ECtHR, *Božić v. Croatia*, no. 22457/02, Judgment (2006), § 39; and ECtHR, *Proszak v. Poland*, no. 25086/94, Judgment (1997), § 40. In this particular case the Constitutional Court provided very specific citations and reasons as to the importance of ECtHR decisions for the conclusions that it had reached.

¹¹⁵ See e.g. Constitutional Court of Serbia, Decision no. UŽ-8996/2014, 23 March 2017, citing ECtHR, *Ruiz Torija v. Spain*, no. 18390/91, Judgment (1994), § 29; ECtHR, *Hiro Balani v. Spain*, no. 18064/91, Judgment (1994), § 27; ECtHR, *Higgins and Others v. France*,

Court states, in general, that its decision is based on the case-law of the ECtHR without making any specific reference to any particular case.¹¹⁶

Compared to the Supreme Court of Cassation, the judges of the lower courts fall even shorter in fulfilling their constitutional duty to use the Convention and the case-law of the Court when interpreting human rights. However, despite the fact that the utilisation of the Court's case-law by the lower courts (first instance and appellate level) is "sometime[s] insufficient, short, and not properly following the line of the Court's case-law", the fact that it is present in their judgments is evidence of a significant shift "in the legal practices in Serbia towards adoption of the European values and standards as embodied in the Convention".¹¹⁷ Nevertheless, the main burden of applying and following the Court's case-law is placed on the Constitutional Court which serves as the leading institution for the reception of the Convention and the ECtHR's jurisprudence in Serbia.¹¹⁸

Academics as well as former judges of the ECtHR have argued that the Constitutional Court's case-law "reproaching" the regular courts in Serbia, including the Supreme Court of Cassation, for "inconsistency and lack of foreseeability" is, in fact, a reproach which "equally applies to its own case-law".¹¹⁹ There is in fact concrete evidence of such inconsistency as was pointed out by the ECtHR in the case of *Mirković and Others* where the Court found a violation of Article 6 "concerning the divergence in the case-law of domestic courts", including before the Supreme Court of Cassation and the Constitutional Court.¹²⁰ This particular case is important to show an aspect of the non-functioning of the 'Convention talk' between these two high courts at the domestic level.

The gist of the matter in the aforementioned ECtHR case was whether the applicants' right to legal certainty was breached following the rejection of their civil claims by the domestic courts, despite the fact that the latter had accepted as grounded "identical claims lodged by other claimants" who were colleagues of the applicants.¹²¹ From the factual point of view, the applicants were employees

no. 20124/92, Judgment (1998), § 42; ECtHR, *Van de Hurk v. the Netherlands*, no. 16034/90, Judgment (1994), § 61; and ECtHR, *Helle v. Finland*, no. 20772/92, Judgment (1997), § 60.

¹¹⁶ See e.g. Constitutional Court of Serbia, Decision no. Už-7975/2014, 15 September 2016, quashing a decision of the Appellate Court in Belgrade; Constitutional Court of Serbia, Decision no. Už-5669/2011, 2 April 2015, quashing a decision of the Administrative Court.

¹¹⁷ *Ibid.*

¹¹⁸ Beširević and Marinković (2012), 405.

¹¹⁹ *Ibid.* See also, Popović and Marinković (2016), 388.

¹²⁰ ECtHR, *Mirković and Others*, nos. 27471/15 and 12 others, Judgment (2018), operative part.

¹²¹ *Ibid.*, § 4.

working in the execution of criminal sanctions and, according to a specific law in Serbia, they were entitled to certain employment benefits due to the hardships that prison staff had to endure.¹²² A specific provision of the legislation in question was struck down as unconstitutional by the Constitutional Court¹²³ but while that provision was still in force, the applicants had received lower salaries than the amount they had been entitled to.¹²⁴ As a result, the applicants claimed before the domestic courts that they should receive the difference in their salaries “for the period during which the unconstitutional norm had been applied” to them.¹²⁵

The regular courts started reviewing such requests which affected numerous prison employees, and it is here that the inconsistencies and divergences in the domestic case-law started to appear. Certain applicants were successful while others were unsuccessful, despite having identical claims.¹²⁶ Considering the differences in adjudication, an appeal court in Serbia sought for the Supreme Court of Cassation to “harmonise the case-law of courts of appeal” on that particular issue.¹²⁷ In 2013, considering that there was “an interest of general concern to deal with this issue”, the Supreme Court of Cassation held that the appeal court should have rendered a decision in the claimant’s favour, namely granting him the difference in payment.¹²⁸ Furthermore, it could be said that the Supreme Court of Cassation laid the blame for the situation created on the Constitutional Court and the Government of Serbia by maintaining that, on the one hand, the authorities in Serbia were engaged in “unlawful work because the Constitutional Court failed to adopt a decision in which manner the consequences of the unconstitutional norm should have been overcome”; and, on the other hand, that the Government of Serbia “did not secure the execution of the impugned decision of the Constitutional Court concerning the disputed period in which the claimant’s salary was unconstitutionally and illegally reduced”.¹²⁹ Several other similar judgments were rendered by the Supreme Court of Cassation.¹³⁰

¹²² *Ibid.*, § 6.

¹²³ Constitutional Court of Serbia, Decision no. IU-63/2007, 18 November 2010.

¹²⁴ *Ibid.*, §§ 9-11.

¹²⁵ *Ibid.*, § 16.

¹²⁶ *Ibid.*, §§ 12-16.

¹²⁷ *Ibid.*, § 17.

¹²⁸ *Ibid.*, § 18.

¹²⁹ Supreme Court of Cassation, Decision no. Rev. no. 293/2013, 26 September 2013; Supreme Court of Cassation, Rev. no. 883/2012 of 26 September 2013. See also, Supreme Court of Cassation, Judgment no. Gžl. 2444/13, 27 December 2013, page 4.

¹³⁰ Supreme Court of Cassation, Decision no. Rev2. 381/2016, 17 March 2016; Supreme Court of Cassation, Rev2. 1383/2016, 21 July 2016; Supreme Court of Cassation, Decision nos. Rev2. 400/2015 and Rž 134/2015, 2 April 2015.

The applicants appealed before the Constitutional Court alleging a violation of their Article 6 rights due to the “inconsistent case-law of the Serbian courts which had caused the rejection of their claims and the simultaneous acceptance of identical claims lodged by their colleagues”.¹³¹ The Constitutional Court reviewed the applicants’ complaints but rejected them as “unsubstantiated” and, on some occasions, since the evidence adduced by the applicants “could not amount to proof of either profound or long-standing differences in the adjudication of the courts”.¹³² However, in 2016, the Constitutional Court departed from its previous practice by finding a violation of Article 6 in a case which was similar to the applicants’ cases.¹³³ The case which managed to win the constitutional appeal before the Constitutional Court was filed by a colleague of the applicants and he was even represented by the same lawyer in the domestic proceedings as some of the other applicants.¹³⁴ Contrary to its previous decisions, in this case the Constitutional Court found a violation of the principle of legal certainty “because of the inconsistent domestic case-law” with respect to the difference in salaries they had received.¹³⁵ More specifically, the Constitutional Court stated that: “the fact that the courts of last instance have been adopting discordant decisions while deciding the same factual and legal issues has created a situation of legal uncertainty” which is sufficient reason “to find a violation of the right to equal protection guaranteed under Article 36.1 of the Constitution”.¹³⁶

The Strasbourg Court analysed in detail the whole domestic practice of the national courts in Serbia *vis-à-vis* the applicants’ allegation that such evident divergence in case-law had violated their right to legal certainty. The ECtHR agreed with the applicants¹³⁷ that there had been a violation of Article 6 – precisely due to divergent domestic case-law.¹³⁸ In reasoning its decision the Court noted that even if the “domestic law in Serbia provided a judicial machinery capable of resolving inconsistencies in adjudication”, the case-law of the Supreme Court of Cassation and its efforts to harmonise the domestic case-law “did not in the present case have any effect until, at best, the latter

¹³¹ ECtHR, *Mirković and Others*, nos. 27471/15 and 12 others, Judgment (2018), § 21.

¹³² *Ibid.*, §§ 22-71.

¹³³ Constitutional Court of Serbia, Decision no. UŽ-8442/2013, 13 January 2016.

¹³⁴ ECtHR, *Mirković and Others*, nos. 27471/15 and 12 others, Judgment (2018), § 86.

¹³⁵ *Ibid.*, § 85.

¹³⁶ *Ibid.*, § 88.

¹³⁷ *Ibid.* It should be noted that for some applicants the complaints were declared inadmissible for procedural reasons.

¹³⁸ *Ibid.*, see the operative part of the judgment.

part of 2016”¹³⁹ Moreover, the ECtHR noted that “even though in the Serbian legal system the Constitutional Court plays an important part in the protection of an individual’s right to legal certainty”, the inconsistent adjudication on this matter “existed” within the Constitutional Court too.¹⁴⁰ These inconsistencies in the domestic legal practice, according to the Court, “created a state of continued uncertainty, which in turn must have reduced the public’s confidence in the judiciary, such confidence being one of the essential components of a State based on the rule of law”.¹⁴¹ The Court concluded by stating that the Supreme Court of Cassation and the Constitutional Court had “failed to resolve with their decisions” the “four years of judicial uncertainty” which had deprived the applicants of a fair hearing as guaranteed by the ECHR.¹⁴²

The analysis performed in this study on the case-law of the highest national courts in Serbia leads to the conclusion that the interaction between the Constitutional Court and the Supreme Court of Cassation on Convention related judicial dialogue is not particularly profound, despite occasional reliance on ECtHR standards in the process of quashing or confirming the stance of the Supreme Court of Cassation. Lack of consistency, lack of in-depth knowledge and misplaced usage of the Convention are some of the most common observations expressed by those most familiar with the national application of the ECHR in Serbia.¹⁴³ However, despite such well-founded criticism and while there is a need to accelerate the utilisation of the Convention standards, the vital role played by the national courts, with the Constitutional Court at the forefront, in domesticating the Convention must be duly noted and valued.

¹³⁹ Ibid., § 140

¹⁴⁰ Ibid.

¹⁴¹ Ibid., § 141.

¹⁴² Ibid., § 142.

¹⁴³ Popović and Marinković (2016).

IV. Serbia v. Strasbourg Court: Impact and Effects

1. Overview of the Court's Case-Law against Serbia

The jurisprudence of the Strasbourg Court in respect of Serbia reflects varying issues in the application of Convention principles at the domestic level. Of all the Western Balkan countries, Serbia has the highest number of applications and the highest number of violations. As of 2021, Serbia is the 7th State Party with most applications being filed against it.¹⁴⁴ To date, there have been two Grand Chamber cases against Serbia, two cases which were published in Case Reports and three others marked as Key Cases.¹⁴⁵ Most of the violations were found under Article 6 and Article 1 of Protocol No. 1 but there are other important cases where violations of other provisions of the Convention have been found, namely Articles 2, 3, 5, 8, 10, 13, 14, Article 3 of Protocol No. 1 and Article 4 of Protocol No. 7. To date, the Court has declared the need for individual or general measures to be taken by Serbia within the meaning of Article 46 of the Convention on ten occasions whilst on three particular occasions general measures have been considered necessary in relation to the repayment of “old” or “frozen” foreign-currency savings; the notorious issue of the “missing babies”; and the payment of pensions. The most concerning aspect of these violations is the fact that Serbia has been found in breach of the right to an effective remedy on twenty occasions – a statistic that reflects issues with the availability and effectiveness of domestic legal remedies to tackle Convention issues. The following part of the analysis will focus on six categories of cases:

- (1.1) [Cases under Article 46: General and/or Individual Measures Required](#)
- (1.2) [Cases with the Highest Number of Violations: Article 6 issues](#)
- (1.3) [Cases under Articles 13: Lack of Effective Domestic Remedies](#)

¹⁴⁴ See the ECtHR's Annual Report 2020 <https://www.echr.coe.int/Documents/Annual_report_2020_ENG.pdf> (accessed 8 January 2022). See also Press Country Profile on Serbia (2021) <https://www.echr.coe.int/Documents/CP_Serbia_eng.pdf> (accessed 8 January 2022).

¹⁴⁵ See, ECtHR, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, Judgment (2014); ECtHR, *Zorica Jovanović v. Serbia*, no. 21794/08, Judgment (2013); and ECtHR, *Matijasević v. Serbia*, no. 23037/04, Judgment (2006).

- (1.4) [Cases with Violations Under Other Articles of the Convention](#)
- (1.5) [Cases Declared Admissible with No Violation Found](#)
- (1.6) [Other Important Cases Related to Exhaustion of Domestic Remedies.](#)

1.1. Cases under Article 46: General and/or Individual Measures Required

The Strasbourg Court has invoked Article 46 in respect of Serbia on ten occasions. On three occasions measures of a general character were required by the Court, whilst in the remaining cases only specific individual measures were indicated as being necessary to redress the violations found.

In the first category of cases, there are three high profile cases where general measures were considered a matter of urgency in order to secure redress for the applicants that had already approached the Court and many other potential applicants.

In the first case, that of *Zorica Jovanović*, the Court dealt with a highly sensitive case where Article 46 measures were indispensable for providing domestic redress to numerous potential victims, including the applicant.¹⁴⁶ The latter had given birth to a healthy baby boy in 1983 and when she was about to be discharged from the State run hospital, she was informed that her baby had died.¹⁴⁷ The body of the applicant's baby was never released to her nor was she ever provided with an autopsy report or notified as to where her baby was allegedly buried.¹⁴⁸ All her attempts to find out the truth about the fate of her baby were futile considering that no domestic authority in Serbia was able to provide her with any meaningful redress. In 2001 and 2002, there were several reports in the Serbian media informing the public that there were thousands of similar cases of babies who had gone missing from State run hospitals.¹⁴⁹ There were even reports showing people who admitted to having bought babies from Serbia for EUR 10,000.¹⁵⁰ Before the ECtHR, the applicant complained that her right to Article 8 had been violated due to the continuing failure of the Serbian authorities "to provide her with information about the real fate or her

¹⁴⁶ ECtHR, *Zorica Jovanović v. Serbia*, no. 21794/08, Judgment (2013).

¹⁴⁷ *Ibid.*, §§ 7-11.

¹⁴⁸ *Ibid.*, § 22.

¹⁴⁹ *Ibid.*, § 12.

¹⁵⁰ For more on this sensitive topic, see a special website created in Serbia to provide news and cooperation between interested parties in relation to missing babies <<http://www.kradjabeba.org/index.html>> (accessed 8 January 2022).

son”, who “might still be alive, having been unlawfully given up for adoption”.¹⁵¹ The Court noted that despite a few promising official initiatives, the Serbian authorities had “effectively offered nothing to those parents ... who ha[d] endured the ordeal” of their babies suddenly going missing.¹⁵² As a result, the Court concluded that “the applicant has suffered a continuing violation of the right to respect for her family life” on account of Serbia’s “continuing failure to provide her with credible information as to the fate of her son”.¹⁵³ After finding this violation, the Court required Serbia to “secure the establishment of a mechanism aimed at providing individual redress to all parents in a situation such as, or sufficiently similar to, the applicant’s” preferably by a means of a *lex specialis*.¹⁵⁴ The Court suggested that the mechanism should be supervised by an independent body which would be equipped with adequate powers to provide “credible answers regarding the fate of each child and awarding adequate compensation as appropriate”.¹⁵⁵ It adjourned cases for one year (until 2014) thus providing Serbia with the necessary time and space to address this sensitive matter domestically. However, as has been recognised in the latest report of the Committee of Ministers, Serbia only managed to enact a *lex specialis* entitled “the Zorica Jovanović Implementation Act” in 2020, i.e. six years after the deadline set by the Court.¹⁵⁶ In a recent case in 2021, the Court noted that while the implementing “legislation was enacted after a significant delay”, the issues which required regulation were “of great sensitivity and considerable complexity” and that the act enacted by the Serbian Parliament provides judicial and extrajudicial procedures aimed at discovering the truth with respect to the “status of newborn children believed to have disappeared from maternity wards in the Republic of Serbia”.¹⁵⁷ Consequently, the Court decided to strike out the case as it was “no longer justified to continue the examination of applications within the meaning of Article 37 § 1 (c) of the Convention”, without prejudice to the Court’s power to restore the examination of such cases in the future “if subsequent developments or indeed a lack thereof, justify such a course of action”. Relying on this case, in 2021, the Court struck out of the list several other applications, with many applicants who were in an identical

¹⁵¹ ECtHR, *Zorica Jovanović v. Serbia*, no. 21794/08, Judgment (2013), § 42.

¹⁵² *Ibid.*, § 73.

¹⁵³ *Ibid.*, § 74.

¹⁵⁴ *Ibid.*, § 92.

¹⁵⁵ *Ibid.*

¹⁵⁶ See, Committee of Ministers, information on the status of execution: <<http://hudoc.exec.coe.int/eng?i=004-7011>> (accessed 8 January 2022).

¹⁵⁷ ECtHR, *Mik and Jovanović v. Serbia*, nos. 9291/14 and 63798/14, Decision (2021), § 92.

situation to Zorica Jovanović.¹⁵⁸ According to the available data as of the end of 2020, around 700 requests have been lodged with the domestic courts in Serbia by individuals seeking the truth about their missing babies in accordance with the procedure prescribed by the act implementing the *Zorica Jovanović* judgment.¹⁵⁹ While, legally speaking, Serbia might have complied with this judgment by enacting said legislation, albeit belatedly, it remains to be seen in practice whether the parents of the missing babies will indeed be able to find out the truth about the fate of their newborn children who were allegedly taken from them in State run hospitals.

In the second case, that of *Ališić and Others*, the Grand Chamber of the Court found a violation of Article 1 of Protocol No. 1 and Article 13 of the Convention in respect of Serbia's obligation to ensure a system where individuals are compensated for their "old" foreign-currency savings.¹⁶⁰ When this judgment was rendered, despite there being many other potential applicants, 1,850 applications were introduced on behalf of more than 8,000 individuals before the Court.¹⁶¹ Such an overwhelming trend of applications and other prospective applicants called for urgent measures to be taken at the national level, as a means of providing redress to those potential victims. When invoking Article 46 and applying the pilot-judgment procedure, the Court held as follows:

Serbia must make all necessary arrangements, including legislative amendments, within one year and under the supervision of the Committee of Ministers in order to allow Šahdanović and all others in his position to recover their "old" foreign-currency savings under the same conditions as Serbian citizens who had such savings in domestic branches of Serbian banks.¹⁶²

This important Grand Chamber case is also referred to in other Chapters of this study, but only briefly considering that in respect of North Macedonia and Bosnia and Herzegovina no violations have been found by the Court. Therefore, in this part, there is a need to explain this case and its impact on Serbia's domestic legal order in greater detail. Prior to the dissolution of the SFRY, many individuals had deposited foreign-currency savings with various banks

¹⁵⁸ ECtHR, *Savković v. Serbia*, no. 9864/15, Decision (2021), and ECtHR, *Ilić and Others v. Serbia*, nos. 33902/08 and 7 others, Decision (2021).

¹⁵⁹ See, Committee of Ministers, information on the status of execution: <<http://hudoc.exec.coe.int/eng?i=004-7011>> (accessed 8 January 2022).

¹⁶⁰ ECtHR, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, Judgment (2014).

¹⁶¹ *Ibid.*, § 144.

¹⁶² *Ibid.*, §§ 144-150.

operating therein.¹⁶³ Following the collapse of the SFRY, those savings which are commonly referred to as “old” or “frozen” foreign-currency savings were placed under a special regime.¹⁶⁴ As a result of this regime in combination with differing measures adopted by each successor State on their own, many savers had not been able to dispose of their savings for more than 20 years.¹⁶⁵ For instance, this was the case with Mr Šahdanović, a national of Bosnia and Herzegovina, who had savings in Serbian banks. Considering that Serbia applied nationality as a qualifying factor (being Serbian) in the repayment scheme applicable at the time, Mr Šahdanović was automatically disqualified from the prospect of obtaining any repayment. As rightly suggested by scholars, it was only a matter of time before these individuals would succeed in their applications to the ECtHR.¹⁶⁶ Even though the applicants filed their complaints against five successor States of the SFRY, the Court only found Serbia and Slovenia to have been responsible for a breach of their property rights and for not according them appropriate domestic remedies.¹⁶⁷

For the purposes of this study, the *Ališić and Others* judgment is important for two main reasons. The first pertains to the lack of domestic remedies to address this matter domestically, the existence of which would remove the need for the Strasbourg Court to intervene; and the second pertains to the conduct of Serbia following the judgment in *Ališić and Others* with a view to fulfilling the general measures proposed through the pilot-judgment procedure. An in-depth analysis of the developments in Slovenia¹⁶⁸ exceeds the scope of the present study; however, for contrast and comparison purposes, this study

¹⁶³ Ibid., §§ 12-20 for an overview of commercial banking in Yugoslavia before the reform in 1989/90; and §§ 21-23 for an overview of commercial banking following the reform in 1989/90.

¹⁶⁴ Ibid., for the circumstances pertaining to the “old” or “frozen” foreign-currency savings regime in each respective successor State see §§ 24-41 for Bosnia and Herzegovina, §§ 42-43 for Croatia, §§ 42-47 for Serbia, §§ 48-51 for Slovenia and § 52 for North Macedonia.

¹⁶⁵ Ibid. It should be noted that the new successor states, namely Slovenia, Croatia, Serbia, Bosnia and Herzegovina, and North Macedonia did not apply an identical strategy when it came to reimbursing depositors for their savings. The repayment schemes made repayment subject to varying conditions such as the territoriality of the deposits or nationality of the depositors.

¹⁶⁶ Škrk, Polak Petrič and Rakovec (2015).

¹⁶⁷ ECtHR, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, Judgment (2014), operative part.

¹⁶⁸ Škrk, Polak Petrič and Rakovec (2015), reflecting the heavy criticism of this pilot judgment in Slovenia for the fact that the Grand Chamber had allegedly “failed to scrutinize the positive obligations of all respondent States against whom the applicants’ complaints were directed”.

refers to the adequate steps undertaken by Slovenia with a view to implementing the Court's judgment. In 2015, Slovenia adopted a law for the purpose of executing the aforementioned judgement,¹⁶⁹ thereby complying with the general measures requested by the Court in a timely fashion.¹⁷⁰ At the beginning of 2018, the Committee of Ministers declared that Slovenia had fulfilled all its obligations in terms of executing this judgment,¹⁷¹ and there was no need for the Court to deal with cases stemming from Slovenia. Meanwhile, Serbia did not manage to fulfil the general measures proposed by the Court in a timely fashion.¹⁷² In the case of *Muratović*, the Court recognised Serbia's efforts when it decided to reject an application as inadmissible for failing to submit a request for compensation in line with the requirements foreseen in the "Ališić Implementation Act", which Serbia enacted in 2016 with a view to implementing the general measures indicated by the Court.¹⁷³ More specifically, the Court found that the "Ališić Implementation Act [met] the criteria set out in the pilot judgment" and that all applicants must use the remedy introduced by this act (namely, a request for verification) before filing an application with the Strasbourg Court.¹⁷⁴ However, the Court inserted a security clause by stipulating that its approach "as to the potential effectiveness of the remedy in question" might change should the implementation of this legal act in practice show, in the long run, that "savers are being refused on formalistic grounds, that verification proceedings are excessively long or that domestic case-law is not in compliance with the requirements of the Convention".¹⁷⁵ In all, it took Serbia several years longer than the Court's deadline and several amendments to the initial legislation enacted in 2016, before the Committee of Ministers closed the case for further consideration in 2020, at a time when around 75% of the applications at the domestic level had been successfully processed by the Serbian authorities and were awaiting their payment in instalments as foreseen by the national law.¹⁷⁶

¹⁶⁹ See Act on the Method of Execution of the European Court of Human Rights Judgment, Official Gazette RS, No. 48/2015, 22 June 2015. Through this law, Slovenia set up a repayment scheme that will ensure repayment of savings with interest. Around 300,000 claims are presumed to have been filed which will put a financial burden of EUR 385,000,000 on Slovenia.

¹⁷⁰ Škrk, Polak Petrič and Rakovec (2015).

¹⁷¹ Committee of Ministers, Resolution CM/ResDH(2018)11 of 15 March 2018.

¹⁷² ECtHR, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, Judgment (2014), §§ 144-150.

¹⁷³ ECtHR, *Muratović v. Serbia*, no. 41698/06, Decision (2017), §§ 10-12.

¹⁷⁴ *Ibid.*, §§ 17-19.

¹⁷⁵ *Ibid.*, § 19.

¹⁷⁶ Committee of Ministers, Resolution CM/ResDH(2020)184 of 3 September 2020.

In the third case, that of *Grudić*, the Court found a violation of Article 1 of Protocol No. 1 due to the suspension of payment of the applicants' pensions.¹⁷⁷ The applicants in this case were Serbian nationals who were granted their disability funds by the Kosovo branch office of the Serbian Pensions and Disability Insurance Fund. They suddenly stopped receiving their funds after 1999 without any explanation whilst in 2005 the fund formally suspended the payment of pensions on the ground that Kosovo was now under international administration.¹⁷⁸ The Court considered such a suspension to be contrary to the right of protection of property and, in view of the large number of potential applicants, it required Serbia to take all appropriate measures to "implement the relevant laws in order to secure payment of the pensions and arrears in question".¹⁷⁹ Whilst the constitutional appeal was not considered effective for the applicants in the *Grudić* case, the Court noted that for applicants who filed their claims after 7 August 2008, the constitutional appeal should have been exhausted, especially after noting many examples in the case-law of the Constitutional Court which made it an effective remedy.¹⁸⁰ According to the Committee of Ministers, Serbia has managed to fulfil the general measures required by the Court after having publicly invited all potential pensioners to register for a verification procedure which would enable them to obtain their pensions.¹⁸¹

It needs to be noted that there was another case, *Vučković and Others*, in which the Chamber of the Court invoked Article 46 after finding a violation of Article 14 in conjunction with Article 1 of Protocol No. 1 in respect of per-diem payments to war reservists,¹⁸² but this decision was overturned by the Grand Chamber which declared the applications inadmissible for failing to exhaust all available domestic remedies.¹⁸³ This case will be further elaborated under important cases with respect to exhaustion of domestic remedies. Therefore, only two judgments ordering general measures to be taken are in force in respect of Serbia and as was seen above, despite the noted difficulties and delays, both have been implemented.

¹⁷⁷ ECtHR, *Grudić v. Serbia*, no. 31925/08, Judgment (2012).

¹⁷⁸ *Ibid.*, §§ 6-24.

¹⁷⁹ *Ibid.*, § 99.

¹⁸⁰ ECtHR, *Skenderi and Others v. Serbia*, nos. 15090/08 and 4 others, Judgment (2017), §§ 79 and 109.

¹⁸¹ Committee of Ministers, Resolution CM/ResDH(2017)427 of 7 December 2017.

¹⁸² ECtHR, *Vučković and Others v. Serbia*, nos. 17153/11 and 29 others, Judgment (2012).

¹⁸³ ECtHR, *Vučković and Others v. Serbia* [GC], nos. 17153/11 and 29 others, Judgment (2014).

In the second category of cases, there are seven cases where individual measures were requested under Article 46. For instance, in the case of *Youth Initiative for Human Rights*, the Court found a violation of Article 10 due to the refusal of the Serbian authorities to allow a non-governmental organisation (NGO) access to intelligence information despite the fact that they had obtained a binding decision allowing the disclosure of such information.¹⁸⁴ The NGO sought to obtain information with respect to the number of people that had been subjected to electronic surveillance by the Serbian Intelligence Agency in 2005.¹⁸⁵ Said NGO had obtained a binding decision from the Information Commissioner ordering the Serbian Intelligence Agency to make the requested information available to the applicant NGO within three days.¹⁸⁶ This decision was not executed and the NGO filed a complaint with the ECtHR. After finding a violation of Article 10 for the reasons stated above, the Court invoked Article 46, concluding that the most natural execution of this judgment would be a situation in which the principle of *restitutio in integrum* is secured, namely that the Serbian Intelligence Agency should “provide the applicant with the information requested (namely, how many people were subjected to electronic surveillance by that agency in the course of 2005).”¹⁸⁷ Such information was provided to the applicant NGO in 2014,¹⁸⁸ despite the fact that the Serbian Intelligence Agency had previously declared that it did not possess such information.¹⁸⁹ In the remaining cases Article 46 was invoked as a means of indicating the need for a specific individual measure to redress the violation found by the Court by, for example, enforcing an interim access order and the diligent conclusion of ongoing civil proceedings,¹⁹⁰ ensuring the speedy enforcement of an eviction order;¹⁹¹ creating the necessary conditions for the speedy enforcement of a demolition order;¹⁹² and the examination of an applicant’s appeal on point of law by the Supreme Court on its merits.¹⁹³

¹⁸⁴ ECtHR, *Youth Initiative for Human Rights v. Serbia*, no. 48135/06, Judgment (2013).

¹⁸⁵ *Ibid.*, §§ 5-10.

¹⁸⁶ *Ibid.*, § 9.

¹⁸⁷ *Ibid.*, §§ 31-32.

¹⁸⁸ Committee of Ministers, Resolution CM/ResDH(2018)71 of 21 February 2018.

¹⁸⁹ ECtHR, *Youth Initiative for Human Rights v. Serbia*, no. 48135/06, Judgment (2013), § 10.

¹⁹⁰ ECtHR, *V.A.M. v. Serbia*, no. 39177/05, Judgment (2007), § 166.

¹⁹¹ ECtHR, *Ilić v. Serbia*, no. 30132/04, Judgment (2007), § 112.

¹⁹² ECtHR, *Kostić v. Serbia*, no. 41760/04, Judgment (2008), § 80.

¹⁹³ ECtHR, *Đokić v. Serbia*, no. 1005/08, Judgment (2011), § 47.

1.2. Cases with the Highest Number of Violations: Article 6 issues

To date, Serbia has been found in violation of Article 6 on more than 160 occasions in respect of many joined applications which reflects the repetitive nature of these violations.

The vast majority of violations relate to length of proceedings and non-enforcement of final decisions issued by courts or other domestic authorities. In the following, these two large pools of cases will be elaborated first before continuing with a few other specific violations of Article 6 which are of crucial importance for the implementation of right to fair trial standards by national courts but which do not fall under the aforementioned pools of cases.

With regard to the first pool of cases concerning length of proceedings, the dialogue between Serbia and the ECtHR began in 2007 when the V.A.M judgment was rendered.¹⁹⁴ From that moment until the end of 2021, the Court issued around 50 judgments where Serbia had failed to ensure the reasonable time requirement. Despite Serbia's initial claims that its legal system provided for an effective legal remedy which the applicant in the V.A.M judgment had failed to exhaust, the Court reached a different conclusion due to the lack of any reference to the concrete remedy or case-law of the national courts proving its alleged effectiveness.¹⁹⁵ As a result, the Court found a violation of Article 6 taken together with Article 13 of the Convention precisely because there was no effective legal remedy at the domestic level.¹⁹⁶ In this respect, it is interesting to observe the evolution of the Court's case-law in response to measures that Serbia undertook to introduce effective legal remedies as well as the influence that the case-law of the national courts has had in shifting the jurisprudence of the ECtHR in respect of Serbia.

In a subsequent post-V.A.M. judgment, the Court once again repeated its findings.¹⁹⁷ Yet, it never explicitly requested that the Serbian authorities introduce

¹⁹⁴ ECtHR, *V.A.M. v. Serbia*, no. 39177/05, Judgment (2007). See also ECtHR, *Matijasević v. Serbia*, no. 23037/04, Judgment (2006).

¹⁹⁵ ECtHR, *V.A.M. v. Serbia*, no. 39177/05, Judgment (2007), § 78 and §§ 82-88 for the observations of the domestic authorities, where it was claimed that the applicant had the possibility to either file a separate (new) claim with the regular courts complaining about length of proceedings or to request the speeding up of proceedings through presidents of courts in Serbia.

¹⁹⁶ *Ibid.*, § 155.

¹⁹⁷ See ECtHR, *Ilić v. Serbia*, no. 30132/04, Judgment (2007), § 105, and ECtHR, *Cvetković v. Serbia*, no. 17271/04, Judgment (2008), § 59.

a remedy for undue length of proceedings, as it did with some other States Parties.¹⁹⁸ It seems that Serbia took the hint without the Court's need to request general measures under Article 46, by introducing legislation through which litigants could seek the speeding up of the proceedings and/or just satisfaction.¹⁹⁹ In this process, the Constitutional Court was heavily involved through the constitutional complaint mechanism which, through time, became a crucial remedy. In this respect, the judicial dialogue between the Serbian authorities and the Court shifted in terms of whether the constitutional complaint fulfils the criteria to be regarded as effective, whether it should be exhausted by the applicants and whether it can provide the prospect of redress. Initially, in *Vinčić and Others*, the Court declared the constitutional appeal to be a remedy that should, in principle, be considered effective in respect of applications lodged as of 7 August 2008.²⁰⁰ The Court rejected the Government's objection of non-exhaustion for all cases that had been filed prior to that date,²⁰¹ and it found violations in respect of length in cases filed before that date without requiring the exhaustion remedies proposed by the Government as they were considered to be ineffective.²⁰² At the national level, the Constitutional Court created a substantial case-law with respect to length whereby it awarded compensation for non-pecuniary damage that the applicants claimed to have suffered due to proceedings exceeding the reasonable time requirement.²⁰³

Even though the Constitutional Court was recognising the breach of the right to a fair trial within a reasonable time and was awarding just satisfaction, applicants kept on filing their grievances with the ECtHR. Some of them even refused to accept the amount of just satisfaction awarded by the Constitutional Court claiming that the amounts were too low.²⁰⁴ The Court agreed with

¹⁹⁸ See, for example, *Luli and Others v. Albania*, nos. 64480/09 and 4 others, Judgment (2014).

¹⁹⁹ See Articles 82 § 2 and 84 § 1 of the Constitutional Court Act <<http://www.ustavni.sud.rs/page/view/en-GB/237-100030/law-on-the-constitutional-court>>, (accessed 8 January 2022).

²⁰⁰ ECtHR, *Vinčić and Others v. Serbia*, nos. 4698/06 and 30 others, Judgment (2009), § 51.

²⁰¹ ECtHR, *Ristić v. Serbia*, no. 32181/08, Judgment (2011), § 39.

²⁰² See ECtHR, *Veljkov v. Serbia*, no. 23087/07, Judgment (2011), and ECtHR, *Vilotijević v. Serbia*, no. 26042/06, Judgment (2013).

²⁰³ See Constitutional Court of Serbia, Decision no. UŽ-391/08, 9 April 2009; Constitutional Court of Serbia, Decision no. UŽ-143/09, 17 March 2010; Constitutional Court of Serbia, Decision no. UŽ-1387/09, 17 February 2011; Constitutional Court of Serbia, Decision no. UŽ-5466/10, 20 December 2012; Constitutional Court of Serbia, Decision no. UŽ-1063/12, 30 May 2012; and Constitutional Court of Serbia, Decision no. UŽ-5660/12, 7 February 2013.

²⁰⁴ See e.g. ECtHR, *Vidaković v. Serbia*, no. 16231/07, Decision (2011), where the ECtHR concluded that the just satisfaction awarded by the Constitutional Court in the amount of

some applicants and considered that they had not lost victim status because the compensation was not adequate. For instance, in *Borović and Others*, all of the applicants had already obtained decisions from the Constitutional Court which found a violation of their right to a hearing within a reasonable time and awarded non-pecuniary damages to them.²⁰⁵ The Serbian authorities opined that these actions taken by the Constitutional Court, i.e. finding a violation and awarding non-pecuniary damages “constituted sufficient redress for the breach of the applicants’ right to a hearing within a reasonable time”.²⁰⁶ Whilst the Court recognised that the Constitutional Court’s acknowledgement of the breach of the reasonable time requirement resulted in the fulfilment of the first condition laid down in the Court’s case-law,²⁰⁷ the sums awarded to the applicants were not deemed sufficient and did not amount to appropriate redress.²⁰⁸ When scrutinising the effectiveness of the constitutional complaint, the Court had already held that an applicant does not lose her/his victim status until she/he has been paid the full amount that the Constitutional Court awarded for the breach of this right to a fair and impartial trial within a reasonable time.²⁰⁹ In line with *Cocchiarella v. Italy*,²¹⁰ the Court reiterated that whilst the amounts awarded by the Constitutional Court may be lower than those awarded by the Court and still be considered reasonable, such awards may not be significantly lower as was the case in *Savić and Others v. Serbia*.²¹¹

Until the end of 2015, Serbia continued to operate without a specific law on length of proceedings but with legal provisions enshrined in other laws regulating the judiciary in Serbia. Since January 2016, a new *lex specialis*, replacing the former regime, was enacted for the purposes of regulating the procedure for speeding up or requesting compensation for undue length of proceed-

EUR 500 was enough and as a result the applicant had lost his victim status. The ECtHR accepted the observation of the Government that finding a violation and awarding EUR 500 for this particular case and for the circumstances of this case amounted to sufficient redress.

²⁰⁵ See ECtHR, *Borović and Others v. Serbia*, nos. 58559/12 and 3 others, Judgment (2017), § 6.

²⁰⁶ *Ibid.*, § 12.

²⁰⁷ *Ibid.*, § 15.

²⁰⁸ *Ibid.*, § 20.

²⁰⁹ ECtHR, *Marković v. Serbia*, no. 70661/14, Judgment (2017), § 21.

²¹⁰ ECtHR, *Cocchiarella v. Italy* [GC], no. 64886/01, Judgment (2006).

²¹¹ ECtHR, *Savić and Others v. Serbia*, nos. 22080/09 and 7 others, Judgment (2016), §19. An identical violation was found in ECtHR, *Prohaska Prodanić and Others v. Serbia*, nos. 63003/10 and 2 others, Judgment (2016). In both cases the Court considered that the amounts awarded by the Constitutional Court were significantly lower than the minimum required by the case-law of the ECtHR.

ings.²¹² According to this new legislation, the burden is no longer solely on the Constitutional Court; now, each court is responsible to deal with complaints regarding length. The new law enables interested parties to initiate three types of legal actions: an objection to speed up the procedure which is submitted to the president of the court where the proceedings are being conducted; an appeal following the result of such an objection; and a request for just satisfaction.²¹³ However, there seems to be no case before the ECtHR where the effectiveness of the new legislation has been evaluated. It remains to be seen whether the new legislative framework will assist Serbia in fixing its enormous problem with length of proceedings. The Court, on the other hand, has continued to find numerous violations of length of proceedings each year either due to the ineffectiveness of domestic remedies in terms of their capacity to afford proper redress to the applicants or due to proceedings being excessively lengthy in view of the particular circumstances of a case.²¹⁴ As explained in the part where the case-law of the Constitutional Court is reflected, the Court has even found a violation of length of proceedings before the Constitutional Court itself,²¹⁵ which confirms the fact that the systemic issue with length of proceedings touches upon each branch of the Serbian judiciary and remains the principal Convention issue at the domestic level.

As far as the second pool of cases with respect to non-enforcement is concerned, the failure of the Serbian authorities to enforce final and binding judgments has been noted in numerous cases before the ECtHR. The Court's case-law on non-enforcement in respect of Serbia may be divided into two main clusters. In the first group, there are various cases that do not necessarily emerge as the result of a specific structural problem of non-enforcement. These are 'one-off' types of cases where the non-enforcement is related to the particular circumstances of the proceedings.²¹⁶ The second group of cases entails non-enforcement cases

²¹² See Law on Protection of the Right to Fair Trial Within a Reasonable Time. This is a specific law which establishes a new regime for dealing with the right to a fair trial in Serbia. It has been in force since 1 January 2016 <http://www.parlament.gov.rs/upload/archive/files/lat/pdf/zakoni/2015/926-15_lat.pdf> (accessed 8 January 2022).

²¹³ *Ibid.*, the maximum compensation available through this new law is between EUR 300 and EUR 3,000.

²¹⁴ Among many authorities, see, ECtHR, *Blagojević v. Serbia*, no. 63113/13, Judgment (2017); *Hrustić and Others v. Serbia*, nos. 8647/16 and 2 others, Judgment (2018); ECtHR, *Nikolić v. Serbia*, no. 41392/15, Judgment (2019); ECtHR, *Mladenović and Đokić v. Serbia*, nos. 44719/18 and 44998/18, Judgment (2021); and ECtHR, *Ivković and Others v. Serbia*, nos. 62554/19, Judgment (2021).

²¹⁵ ECtHR, *Milanović v. Serbia*, no. 44614/07, Judgment (2010), § 84-90.

²¹⁶ See e.g. ECtHR, *Raguž v. Serbia*, no. 8182/07, Judgment (2015); ECtHR, *Stošić v. Serbia*, no. 64931/10, Judgment (2013).

which are directly linked to numerous socially owned enterprises that operated or are still operating in Serbia. Such enterprises are often referred to as being “a relic of the former Yugoslav brand of communism and self-management.”²¹⁷ Whilst cases pertaining to the first cluster are indeed problematic and call for further analysis and consideration, cases pertaining to the second cluster represent more of an alarming development, especially when we look at this problem from the prism of subsidiarity and the notion of shared responsibility to offer Convention protection domestically.

A leading case which demonstrates the ongoing challenging issue of non-enforcement linked to socially owned enterprises is the case of *R. Kačapor and Others*.²¹⁸ In essence, this case set out to answer the question as to whether Serbia can be held responsible for the debts incurred by a socially owned enterprise. At first, Serbia denied any responsibility whilst the applicants strongly advocated for the respondent State to be held responsible.²¹⁹ Accordingly, the main dispute between the applicants and the Serbian authorities before the ECtHR was whether socially owned enterprises were or were not controlled by the State and as a result whether the State should cover the debts incurred by such enterprises. The ECtHR clarified this point by holding that the debtor, in this case the socially owned enterprise, did not enjoy “sufficient institutional and operational independence from the State to absolve the latter from its responsibility under the Convention.”²²⁰ From then on, it was fairly easy to reach the conclusion that non-enforcement of final and binding decisions amounted to a breach of the right to a fair trial and the right to property, based on the abundant ECtHR jurisprudence on that matter.²²¹

In its follow-up case, *Crnišaniin and Others v. Serbia*, the Court confirmed that “the State is responsible for the debts of the enterprises predominantly comprised of social capital” and that the Serbian authorities had not presented any evidence that would make the Court depart from that stance.²²² The failure of the Serbian authorities to take necessary measures to enforce the judgments in respect of the applicants led to the Court finding identical violations as in the leading case referred to above.²²³

²¹⁷ ECtHR, *R. Kačapor and Others v. Serbia*, nos. 2269/06 and 5 others, Judgment (2008), § 71.

²¹⁸ *Ibid.*

²¹⁹ *Ibid* § 92.

²²⁰ *Ibid* §§ 98–99.

²²¹ See e.g. ECtHR, *Hornsby v. Greece*, no. 18357/91, Judgment (1997), § 40.

²²² ECtHR, *Crnišaniin and Others v. Serbia*, nos. 35835/05 and 3 others, Judgment (2009), § 124.

²²³ ECtHR, *R. Kačapor and Others v. Serbia*, nos. 2269/06 and 5 others, Judgment (2008).

The Court resumed rendering judgments in committee formations when these types of non-enforcement cases became well-established case-law.²²⁴ It is interesting to note that despite the Court's well-established case-law, there were instances when the Serbian authorities again raised the argument of accountability for the acts of a socially owned enterprise. That happened in a case where a judgment of the regular courts in Serbia was not enforced for 13 years.²²⁵ The Court summarily rejected the objection raised by the Serbian authorities whilst reiterating that this line of reasoning had been repeated by the Court on numerous occasions in cases against Serbia.²²⁶ Since there were no new developments that would make the Court depart from its previous case-law, the same stance remains in force and is used as a precedent for continuously finding similar violations.²²⁷

The effectiveness of the constitutional complaint was also discussed at the ECtHR level with regard to issues related to non-enforcement of final court decisions. Originally, the constitutional complaint was deemed ineffective as regards the non-enforcement of judgments that were taken in respect of socially owned enterprises because the Constitutional Court did not order pecuniary damages – it only ordered non-pecuniary damages.²²⁸ After noting the developments in the case-law of the Constitutional Court, the Court later held that whilst the constitutional complaint is still to be regarded as ineffective for the non-enforcement of judgments issued against socially owned enterprises that are undergoing restructuring, it should be considered effective in respect of all those enterprises undergoing insolvency and those which have ceased to exist.²²⁹ In *Ferizović v. Serbia*, the Court recognised that the Constitutional Court had harmonised its approach²³⁰ towards the non-enforcement of judgments and deemed the constitutional complaint to be effective as of 4 October

²²⁴ See e.g. ECtHR, *Tehnogradnja DOO v. Serbia*, nos. 35081/10 and 68117/13, Judgment (2017).

²²⁵ ECtHR, *Ignjatović v. Serbia*, no. 49915/08, Judgment (2017).

²²⁶ *Ibid.*, § 22.

²²⁷ See, among many examples, cases that rely on ECtHR, *R. Kačapor and Others v. Serbia*, nos. 2269/06 and 5 others, Judgment (2008), namely: ECtHR, *Mives DOO v. Serbia*, no. 48966/09, Judgment (2017); ECtHR, *Špoljarić v. Serbia*, no. 36709/12, Judgment (2019); ECtHR, *Kostić and Others v. Serbia*, no. 45727/16 and 51 others, Judgment (2018); ECtHR, *Kladničanin v. Serbia*, no. 137/10, Judgment (2020); and ECtHR, *Lilić and Others v. Serbia*, nos. 16857/19 and 43001/19, Judgment (2021).

²²⁸ ECtHR, *Milunović and Čekrlić v. Serbia*, no. 3716/09, Decision (2011).

²²⁹ ECtHR, *Marinković v. Serbia*, no. 5353/11, Judgment (2013).

²³⁰ Constitutional Court of Serbia, Decision no. UŽ-1712/2010, 21 March 2013; Constitutional Court of Serbia, Decision no. UŽ-1645/2010, 7 March 2013; and Constitutional Court of Serbia, Decision no. UŽ-1705/2010, 9 May 2012.

2013.²³¹ In *Ignjatović v. Serbia*, the Court also held that the constitutional appeal could only be deemed effective from 22 June 2012 or 4 October 2013 depending on the specific status of the debtor enterprise.²³² No other updates on this matter are to be found in the Court's case-law.

The analysis provided above shows that the non-enforcement of final judicial decisions remains an enormous problem in Serbia. The regular courts and the Constitutional Court are trying to contribute by aligning their case-law with the jurisprudence of the ECtHR – but their efforts do not seem to be sufficient to stop the flow of well-founded cases that are filed in Strasbourg.

In addition to these two large and problematic pools of cases, violations of Article 6 have also been found in respect of issues related to the presumption of innocence,²³³ the right to a tribunal established by law,²³⁴ the impartiality of a tribunal,²³⁵ and the examination of witnesses.²³⁶

1.3. Cases under Articles 13: Lack of Effective Domestic Remedies

There are around 20 cases in which Serbia was found to have violated the applicant's right to an effective legal remedy at the domestic level. The highest percentage of cases, more than 90%, where a violation of Article 13 was found relates to length of proceedings or length of non-enforcement proceedings.²³⁷

²³¹ ECtHR, *Ferizović v. Serbia*, no. 65713/13, Decision (2013).

²³² ECtHR, *Ignjatović v. Serbia*, no. 49915/08, Judgment (2017), § 25.

²³³ ECtHR, *Hajnal v. Serbia*, no. 36937/06, Judgment (2012), §§ 127-132, and ECtHR, *Matijasević v. Serbia*, no. 23037/04, Judgment (2006), §§ 47-51.

²³⁴ ECtHR, *Momčilović v. Serbia*, no. 23103/07, Judgment (2013), §§ 27-33.

²³⁵ ECtHR, *Šorgić v. Serbia*, no. 34973/06, Judgment (2011), 66-71.

²³⁶ ECtHR, *Dimović v. Serbia*, no. 24463/11, Judgment (2016), § 48; ECtHR, *Dimović and Others v. Serbia*, no. 7203/12, Judgment (2018), § 64.

²³⁷ See, in this context, cases where the Strasbourg Court found a violation of Article 13 due to length of proceedings: ECtHR, *V.A.M. v. Serbia*, no. 39177/05, Judgment (2007), §§ 154-155; ECtHR, *Tomić v. Serbia*, no. 25959/06, Judgment (2007), §§ 114-116; ECtHR, *Jevremović v. Serbia*, no. 3150/05, Judgment (2007), §§ 120-122; ECtHR, *Ilić v. Serbia*, no. 30132/04, Judgment (2007), §§ 104-105; ECtHR, *Mikuljanac, Malić and Sefer v. Serbia*, no. 41513/05, Judgment (2007); ECtHR, *Stevanović v. Serbia*, no. 26642/05, Judgment (2007), §§ 67-68; ECtHR, *Jovičević v. Serbia*, no. 2637/05, Judgment (2007), §§ 33-34; ECtHR, *ZIT Company v. Serbia*, no. 37343/05, Judgment (2007), §§ 64-65; ECtHR, *Cvetković v. Serbia*, no. 17271/04, Judgment (2008), §§ 58-59; ECtHR, *Dorić v. Serbia*, no. 33029/05, Judgment (2009), §§ 17-22; ECtHR, *Felbab v. Serbia*, no. 14011/97, Judgment (2009), §§ 73-75; ECtHR, *M.V. v. Serbia*, no. 45251/07, Judgment (2009), §§ 23-29; ECtHR, *Popović v. Serbia*, no. 33888/05, Judgment (2009), §§ 34-37; ECtHR, *Nemet v. Serbia*, no. 22543/05, Judgment (2009), § 18;

Such cases have been elaborated previously under other headings in this chapter as has the Grand Chamber case of *Ališić and Others*. Therefore, this section will not repeat such findings. There is, in fact, only one case with a violation of Article 13 that does not fall under this category. In *Paunović and Miliwojević* (elaborated above under cases where a violation of Article 3 of Protocol No. 1 has been found), the Court also declared a violation of Article 13 due to the lack of effectiveness of the civil proceedings in addressing the applicant's complaints for the breach of his passive electoral rights.²³⁸

1.4. Cases with Violations Under Other Articles of the Convention

Whilst most of the violations against Serbia stem from the Article 6 domain, the case-law in other areas reflects different issues with the domestic application of Convention standards. To date, in addition to the violations already discussed, the Court has also found Serbia to be in breach of Article 2, on three occasions; Article 3, on twelve occasions; Article 5, on nine occasions; Article 8, on sixteen occasions; Article 10, on eight occasions; Article 14, on two occasions; Article 4 of Protocol No.7, on one occasion; and Article 1 of Protocol No.1, on seventy-five occasions.

In the following part, this study will highlight one particular case from each article by selecting the most important one for the domestic application of Convention principles. If there are more cases worthy of noting, the study will do so either in the main body or in footnotes.

In the area of Article 2, all three violations concern the lack of effective investigations into the death of a person.²³⁹ All three cases were brought by the applicants following the death of their sons. Thus far, the Court has found a violation of Article 2 against Serbia only as far as the procedural aspect is concerned. For instance, the latest case concerned investigations into the death of a person who lost his life in 1995 in the facilities of Grmeč, a company which was engaged in the “covert production of composite solid rocket fuel under the auspices of the State Intelligence Service”.²⁴⁰ The applicant's son and some

ECtHR, *Milić v. Montenegro and Serbia*, no. 28359/05, Judgment (2012), § 76; and ECtHR, *DOO Brojler Donje Sinkovce v. Serbia*, no. 48499/08, Judgment (2013), §§ 58-59;

²³⁸ ECtHR, *Paunović and Miliwojević v. Serbia*, no. 41683/06, Judgment (2016), § 73.

²³⁹ ECtHR, *Mladenović v. Serbia*, no. 1099/08, Judgment (2012); ECtHR, *Petrović v. Serbia*, no. 40485/08, Judgment (2014); and ECtHR, *Mučibabić v. Serbia*, no. 34661/07, Judgment (2016).

²⁴⁰ ECtHR, *Mučibabić v. Serbia*, no. 34661/07, Judgment (2016), §§ 6-13.

other victims lost their lives as a result of an accident in this facility. The post-mortem examination of their bodies showed that their death had been violent and caused by the burns of the explosion.²⁴¹ Investigations started in 1995 and in 2000, the public prosecutor decided not to prosecute the case “relying on secret evidence and information”.²⁴² The applicant pursued a subsidiary criminal prosecution but to no avail as the case was still pending before the Serbian judiciary almost two decades after the incident.²⁴³ Before the ECtHR, the applicant alleged that the Serbian authorities had “failed to carry out a prompt and effective investigation into his son’s death, with the alleged intention of concealing the respondent State’s abuse”.²⁴⁴ The Court noted that the present case was a “matter of considerable political and pressing public sensitivity” and that there may “have been obstructiveness deployed by various sides to prevent progress” in the investigation proceedings.²⁴⁵ Nevertheless, the Court maintained that the sensitive nature a particular case and the obstacles that might be posed “are less an excuse for delay than a further reason for the State to have organised its judicial system to overcome earlier defects and omissions by the prompt and diligent establishment of the facts” which would serve to bring those who were responsible to justice.²⁴⁶ In conclusion, the Court found that the delays in finding the public officials that were responsible for the fatal accident were incompatible with the State’s positive obligation to ensure the effectiveness of investigations and that Serbia, in this regard, had failed to provide a “prompt, due diligent and effective response” when its legal system was faced with “an arguable case of negligence causing lethal injuries”.²⁴⁷

In the area of Article 3, there are many cases showing the failure of the Serbian authorities to refrain from violating this right as well as cases showing their failure to ensure, through their positive obligations, that torture does not happen.²⁴⁸ An interesting case relates to the events following the assassination of

²⁴¹ Ibid., § 18.

²⁴² Ibid., § 35.

²⁴³ Ibid., § 66-74, where it is reflected that in civil proceedings, the Constitutional Court had awarded non-pecuniary damages for the breach of his right to a fair and impartial trial within a reasonable time.

²⁴⁴ Ibid., § 88.

²⁴⁵ Ibid., § 134.

²⁴⁶ Ibid.

²⁴⁷ Ibid., § 136.

²⁴⁸ See, *inter alia*, some of the cases for which Serbia has been found to have violated Article 3: ECtHR, *Milanović v. Serbia*, no. 44614/07, Judgment (2010); ECtHR, *Stanimirović v. Serbia*, no. 26088/06, Judgment (2011); ECtHR, *Hajnal v. Serbia*, no. 36937/06, Judgment (2012); ECtHR, *Lakatoš and Others v. Serbia*, no. 3363/08, Judgment (2014); ECtHR, *Habimi and Others v. Serbia*, no. 19072/08, Judgment (2014); ECtHR, *Gjini v. Serbia*, no. 1128/16,

former Serbian Prime Minister, Zoran Đinđić, when a large scale police operation known as “Operation Sabre” resulted in approximately 10,000 people being arrested and placed in pre-trial detention as a result of the state of emergency that was declared following this event.²⁴⁹ Among those individuals, the applicant was also arrested and questioned. He claimed to have been subjected to different types of physical and verbal abuse, including being kicked, beaten and maltreated with baseball bats, police truncheons, nylon bags being put over his face and other acts which made him lose consciousness.²⁵⁰ The applicant lodged complaints with the responsible authorities in Serbia but to no avail.²⁵¹ He even tried to raise the matter before the Constitutional Court but the latter rejected some of his complaints as manifestly ill-founded whilst rejecting the complaint under Article 3 as falling outside its temporal jurisdiction.²⁵² The Court concluded that the applicant did not benefit from an effective investigation considering that, *inter alia*, the national authorities proved “incapable of even identifying the State agents who abused the applicant – even though it had been proven that the applicant was subjected to ill-treatment.”²⁵³

In the area of Article 5, Serbia has been found in violation of almost all five paragraphs of this provision, with the exception of paragraph two.²⁵⁴ The case of *Mitrović* concerns an individual sentenced to eight years’ imprisonment by a court which was under the control of the so-called “Republic of Serbian Krajina”, “an internationally unrecognised self-proclaimed entity established on the territory of Croatia during the wars in the former Yugoslavia.”²⁵⁵ Following the “Erdut Agreement”, by which Croatia assumed sovereignty over its territory, the applicant was transferred to a prison in Serbian territory to serve the

Judgment (2019); ECtHR, *Krsmanović v. Serbia*, no. 19796/14, Judgment (2017); ECtHR, *Almaši v. Serbia*, no. 21388/15, Judgment (2019); ECtHR, *Zličić v. Serbia*, nos. 73313/17 and 20143/19, Judgment (2021); and ECtHR, *Stevan Petrović v. Serbia*, nos. 6097/16 and 28999/19, Judgment (2021).

²⁴⁹ ECtHR, *Krsmanović v. Serbia*, no. 19796/14, Judgment (2017), §§ 6–9.

²⁵⁰ *Ibid.*, §§ 10–22.

²⁵¹ *Ibid.*, §§ 23–37.

²⁵² *Ibid.*, §§ 37–38.

²⁵³ *Ibid.*, §§ 75–84.

²⁵⁴ See, *inter alia*, some of the cases for which Serbia has been found to have violated Article 5: ECtHR, *Vrenčev v. Serbia*, no. 2361/05, Judgment (2008); ECtHR, *Milošević v. Serbia*, no. 31320/05, Judgment (2009); ECtHR, *Đermanović v. Serbia*, no. 48497/06, Judgment (2010); ECtHR, *Mitrović v. Serbia*, no. 52142/12, Judgment (2017); ECtHR, *Purić and R.B. v. Serbia*, nos. 27929/10 and 52120/13, Judgment (2019); and ECtHR, *Stevan Petrović v. Serbia*, nos. 6097/16 and 28999/19, Judgment (2021).

²⁵⁵ ECtHR, *Mitrović v. Serbia*, no. 52142/12, Judgment (2017), §§ 8–15.

remainder of his sentence.²⁵⁶ He complained that his detention for a period of more than two years was unlawful considering that it had been ordered “by a ‘court’ of an entity which had not been recognised” by Serbia and this, as a result violated his Article 5 rights.²⁵⁷ His similar complaints were rejected as unfounded by the Constitutional Court,²⁵⁸ whilst, on the other hand, the ECtHR maintained that the violation had occurred precisely because the domestic authorities had failed to “implement the appropriate procedure ... for recognition of a foreign decision in criminal matters” which, in turn, rendered his detention unlawful.²⁵⁹

In the area of Article 8, there are numerous examples which reflect the failure of the domestic authorities, including the highest domestic courts, to apply and implement Convention standards with respect to the protection of private and family life.²⁶⁰ The notorious systemic case of *Zorica Jovanović* and its impact on the Court’s case-law and caseload has already been elaborated above, as the leading Article 8 case against Serbia. However, in addition to that high profile case, the recent case of *Boljević*²⁶¹ also merits elaboration, especially in respect of the failure of domestic courts to catch Article 8 violations. The case concerned the applicant’s plea “for establishment of his purported father’s paternity based on DNA testing methods which only became available many years after the domestic court had already ruled on the issue”.²⁶² He had never doubted that ‘his father’ was his biological father until he died and the inheritance proceedings documents cast doubts over this particular aspect of his private life.²⁶³ He basically found out that the person who he thought was his father, Mr A, had successfully brought proceedings to disavow paternity of the applicant who was 3 years old at the time.²⁶⁴ Such decisions became final in 1972 and the applicant claims to

²⁵⁶ Ibid., § 12.

²⁵⁷ Ibid., § 27.

²⁵⁸ Ibid., §§ 16-17.

²⁵⁹ Ibid., § 43.

²⁶⁰ See, *inter alia*, some of the cases for which Serbia has been found to have violated Article 8: ECtHR, *Tomić v. Serbia*, no. 25959/06, Judgment (2007); ECtHR, *Felbab v. Serbia*, no. 14011/97, Judgment (2009); ECtHR, *Salontaji-Drobnjak v. Serbia*, no. 36500/05, Judgment (2009); ECtHR, *Krivošej v. Serbia*, no. 42559/08, Judgment (2010); ECtHR, *Zorica Jovanović v. Serbia*, no. 21794/08, Judgment (2013); ECtHR, *Isaković Vidović v. Serbia*, no. 41694/07, Judgment (2014); ECtHR, *Milojević and Others v. Serbia*, nos. 43519/07 and 2 others, Judgment (2016); ECtHR, *Boljević v. Serbia*, no. 47443/14, Judgment (2020); and ECtHR, *Nikolić v. Serbia*, no. 15352/11, Judgment (2021).

²⁶¹ ECtHR, *Boljević v. Serbia*, no. 47443/14, Judgment (2020).

²⁶² Ibid., Introduction and §§ 4-11.

²⁶³ Ibid., § 7.

²⁶⁴ Ibid., § 6.

have found out about such legal proceedings only in 2012 when he requested the reopening of proceedings.²⁶⁵ The domestic courts rejected his request on procedural grounds,²⁶⁶ whilst the Constitutional Court also ruled against the applicant by maintaining, in substance, that the rights complained of by the applicant “could not, considered constitutionally, be deemed to have been impacted in any way by the impugned court decisions, given both their content and their legal nature”.²⁶⁷ In other words, the Constitutional Court did not see any issue with the applicant’s rights under Article 8. However, the ECtHR did see an issue in this respect and went on to find a very specific violation for the following reasons, whilst noting the uncommon circumstances of the case. The Court noted that there was no arbitrariness in the reasoning of the domestic courts and that the reopening of proceedings concluded by a means of the final 1972 judgment, as requested by the applicant, raised serious implications for the principle of legal certainty.²⁶⁸ Therefore, time-limits in paternity related proceedings were considered to have had a legitimate aim, that aim being to ensure legal certainty and protect the rights of others.²⁶⁹ However, in light of the particular circumstances of the case, the Court was of the opinion that a fair balance had not been struck as various competing interests were involved and a better balancing exercise should have been carried out by the domestic courts, especially in taking account of the applicant’s vital and overriding interest in establishing the identity of his biological father.²⁷⁰ Neither the preservation of legal certainty in itself as a ground for depriving the applicant of his right to ascertain his parentage, nor the private life of a deceased person from whom a DNA sample could have been taken, were to be considered as sufficient reasons to deny him the possibility of finally ascertaining the identity of his biological father.²⁷¹ The case is from 2020 and is yet to be executed by the Serbian authorities.

In the area of Article 10, most of the cases concern criminal convictions against journalists for publishing various articles in newspapers, which were considered to be an insult to other parties.²⁷² The case of *Milisavljević* is the latest

²⁶⁵ Ibid., § 8.

²⁶⁶ Ibid., §§ 9–11.

²⁶⁷ Ibid., § 13.

²⁶⁸ Ibid., § 48.

²⁶⁹ Ibid., §§ 46–48.

²⁷⁰ Ibid., §§ 54–56.

²⁷¹ Ibid.

²⁷² See, *inter alia*, some of the cases for which Serbia has been found to have violated Article 10: ECtHR, *Lepojić v. Serbia*, no. 13909/05, Judgment (2007); ECtHR, *Bodrožić and Vujić v. Serbia*, no. 38435/05, Judgment (2009); ECtHR, *Youth Initiative for Human Rights v.*

case where a violation of a journalist's right to freedom of expression was found after the domestic courts decided that Ms Milisavljević had committed the criminal offence of insult against Ms Nataša Kandić.²⁷³ The latter is a Serbian human rights activist who is known for her support of the ICTY and her activities "in investigating crimes committed during the armed conflicts in the former Yugoslavia, including those committed by Serbian regular and irregular forces".²⁷⁴ The applicant, a journalist, in her article about Ms Kandić stated, *inter alia*, that "... she had been called a witch and a prostitute".²⁷⁵ Following this article, Ms Kandić initiated a private prosecution against the applicant which ended with the latter being convicted of the criminal offence of insult and being given a judicial warning as a sentence.²⁷⁶ The national courts interpreted the applicant's right to freedom of expression very narrowly by stating that the mere fact that she had not put the above-mentioned phrase in quotation marks meant that she agreed with the statement in question and that therefore, that was the journalist's opinion.²⁷⁷ The Court disagreed by stating that "while the impugned words are offensive" it is clear from the formulation of the sentence that the applicant journalist merely stated how she was perceived by others and not by her.²⁷⁸ In this respect, the Court concluded that the domestic courts had "failed to make any balancing exercise whatsoever between Ms Kandić's reputation and the applicant's freedom of expression and her duty, as a journalist, to impart information of general interest".²⁷⁹

In the area of Article 14, there are two cases. One of them is the case of *Vučković and Others* which was elaborated under Article 46 cases. The other concerns an applicant who was a leading member of Hare Krishna, a Hindu religious community in Serbia,²⁸⁰ and who is believed to have been repeatedly attacked and threatened by an organisation called "Srpski vitezovi", a local branch of a far-right organisation known as "Obraz", widely known for their "incitement to racial and religious hatred throughout Serbia".²⁸¹ In addition to finding a violation of Article 3 due to the failure of the domestic authorities

Serbia, no. 48135/06, Judgment (2013); ECtHR, *Tešić v. Serbia*, nos. 4678/07 and 50591/12, Judgment (2014); and ECtHR, *Milisavljević v. Serbia*, no. 50123/06.

²⁷³ ECtHR, *Milisavljević v. Serbia*, no. 50123/06, Judgment (2017), §§ 12-14.

²⁷⁴ *Ibid.*, § 7.

²⁷⁵ *Ibid.*, § 9.

²⁷⁶ *Ibid.*, §§ 10-16.

²⁷⁷ *Ibid.*, §12.

²⁷⁸ *Ibid.*, § 37.

²⁷⁹ *Ibid.*

²⁸⁰ ECtHR, *Milanović v. Serbia*, no. 44614/07, Judgment (2010).

²⁸¹ *Ibid.*, §§ 7-50 and § 63.

to prevent the applicant's ill-treatment and conduct an effective investigation, the Court also found a separate violation of Article 14 in conjunction with Article 3.²⁸² In this respect, the Court pointed out that national authorities are obliged to take necessary steps to "unmask any religious motive" behind attacks and establish "whether or not religious hatred or prejudice may have played a role in the events".²⁸³ The Serbian authorities' investigations into the applicant's complaints were considered by the Court to have amounted "to little more than a pro forma investigation" and that even the police themselves had "serious doubts, related to the applicant's religion, as to whether he was a genuine victim", despite there being no room for such doubts to be raised.²⁸⁴

In the area of Article 1 of Protocol No. 1, there are numerous violations which rank this provision as the second most violated provision after Article 6. While some violations of the right to protection of property are quite particular and do not necessarily stem from the same problems in Serbia,²⁸⁵ the vast amount of violations relate to non-enforcement of final judgments rendered at the domestic level.²⁸⁶ In fact, more than 90% of the violations of this specific provision stem from the domestic failure to implement final and binding decisions issued by the domestic authorities – a problematic issue which has been widely covered even in cases related to Articles 6 and 13 discussed above.

²⁸² Ibid., see the operative part of the judgment.

²⁸³ Ibid., § 96.

²⁸⁴ Ibid., § 100.

²⁸⁵ See, *inter alia*, some of the cases for which Serbia has been found to have violated Article 1 of Protocol No. 1: ECtHR, ECtHR *Grudić v. Serbia*, no. 31925/08, Judgment (2012); ECtHR, *Milosavljev v. Serbia*, no. 15112/07, Judgment (2012); and ECtHR, *Aktiva DOO v. Serbia*, no. 23079/11, Judgment (2021).

²⁸⁶ See e.g. ECtHR, *R. Kačapor and Others v. Serbia*, nos. 2269/06 and 5 others, Judgment (2008), as a leading case with regard to non-enforcement of final judicial decisions; see also some of the follow-up cases: ECtHR, *Vlahović v. Serbia*, no. 42619/04, Judgment (2008); ECtHR, *Crnišaniin and Others v. Serbia*, nos. 35835/05 and 3 others, Judgment (2009); ECtHR, *EVT Company v. Serbia*, no. 3102/05, Judgment (2007); ECtHR, *Grišević and Others v. Serbia*, nos. 16909/06 and 2 others, Judgment (2009); ECtHR, *Bjelajac v. Serbia*, no. 6282/06, Judgment (2012); ECtHR, *Adamović v. Serbia*, no. 41703/06, Judgment (2012); ECtHR, *Stošić v. Serbia*, no. 64931/10, Judgment (2013); ECtHR, *Sekulić and Kučević v. Serbia*, nos. 28686/06 and 50135/06, Judgment (2013); ECtHR, *Lolić v. Serbia*, no. 44095/06, Judgment (2013); ECtHR, *Marinković v. Serbia*, no. 5353/11, Judgment (2013); ECtHR, *Nikolić-Krstić v. Serbia*, no. 54195/07, Judgment (2014); ECtHR, *Jovičić and Others v. Serbia*, nos. 37270/11 and 7 others, Judgment (2015); ECtHR, *Raguž v. Serbia*, no. 8182/07, Judgment (2015); ECtHR, *Rafailović and Stevanović v. Serbia*, nos. 38629/07 and 23718/08, Judgment (2015); and ECtHR, *Krndija v. Serbia*, nos. 30723/09 and 3 others, Judgment (2017).

In the area of Article 3 of Protocol No. 1, there is one case in which the Court has found a violation on account of the termination of the applicant's parliamentary mandate, despite his will to hold on to the mandate as an independent parliamentarian no longer associated with the party with which he had won the seat.²⁸⁷ At the domestic level, all of the national courts failed to recognise the applicant's right to free elections, including the Supreme Court and the Constitutional Court which both rejected his complaints based on procedural grounds and without entering into the merits.²⁸⁸ The gist of the matter was the fact that before the elections, all of the candidates were obliged to sign an undated letter of resignation as well as an authorisation for their political party to appoint other candidates in their place if necessary.²⁸⁹ After the elections however, the applicant wished to keep his mandate and declared, through an officially certified statement, "his prior resignation letter to be null and void".²⁹⁰ Nonetheless, his previous resignation was handed to the Parliament by a representative of his party "in defiance of the applicant's express wishes to the contrary" and was accepted as a basis for terminating his mandate.²⁹¹ The Court, in this respect, found a violation because "the entire process of revoking the applicant's mandate was conducted outside the applicable legal framework and was therefore unlawful".²⁹² Even in this case, the Constitutional Court rejected the applicant's case without considering the merits of his complaints,²⁹³ despite the fact that in 2003 the Constitutional Court itself had held that "the mandate of an elected MP belonged to the MP personally, and not to the political party on whose list he or she was elected".²⁹⁴ In this particular case, it can be said that the Constitutional Court did not follow its own jurisprudence when it comes to the right of political parties to take the mandate from an elected MP in spite of his/her wish to continue the mandate as an independent MP.

In the area of Article 4 of Protocol No. 7, there is only one case where a violation of this right was found considering that the applicant was found guilty of a criminal offence following his conviction in misdemeanour proceedings which related to the same conduct and substantially the same facts. The applicant's allegations before the Constitutional Court were summarily dismissed

²⁸⁷ ECtHR, *Paunović and Milivojević v. Serbia*, no. 41683/06, Judgment (2016).

²⁸⁸ *Ibid.*, §§ 15-17.

²⁸⁹ *Ibid.*, § 9.

²⁹⁰ *Ibid.*, § 10.

²⁹¹ *Ibid.*, § 64.

²⁹² *Ibid.*, §§ 65-66.

²⁹³ *Ibid.*, § 17.

²⁹⁴ Constitutional Court of Serbia, Decision no. IU-197/2002, 27 May 2003.

as ill-founded.²⁹⁵ The ECtHR specifically noted this flaw in the domestic court proceedings by stipulating that the “Constitutional Court failed to apply the principles established in the *Zolotukhin* case and thus correct the applicant’s situation.”²⁹⁶

As a general remark, the violations under Articles 6 and 13 of the Convention, as well as the violations under other provisions of the Convention show a lack of know-how on the part of the domestic authorities and courts to apply the Court’s case-law and the standards set therein. Whilst in some cases it can be argued that the violations found by the ECtHR were very specific and perhaps not easy to catch, the vast amount of violations elaborated above could have been detected at the domestic level merely by applying basic Convention principles. However, the domestic courts, including the Constitutional Court as the final ‘Convention filterer’ at the national level, seem unable to flag up and resolve important Convention complaints at the domestic level. This has led to many violations being found against Serbia at the Strasbourg Court, thus turning the latter into one the major contributors to well-founded case-law. It can therefore be said that Serbia has not been very successful, on many occasions, to fulfil its role under Articles 1 and 13 of the Convention, i.e. to create an effective domestic system whereby violations can be solved at the domestic level.

1.5. Admissible Cases where No Violation was Found

The Court’s docket shows that, so far, there are around 40 cases where the Court reviewed the merits of the specific case but decided that there had been no violation of the Convention by the Serbian authorities, either entirely or for specific Convention allegations. In total, there is one case under Article 2; six cases under Article 3; three cases under Article 5; fifteen cases under Article 6; five cases under Article 8; two cases under Article 10; one case under Article 13; one case under Article 14; three cases under Article 34; and four cases under Article 1 of Protocol No. 1. Considering the large number of cases and the limited space to comment on each case, the following analysis will focus on a few cases which show the effectiveness of domestic remedies in Serbia in preventing violations at the national level and thus obviating the need for

²⁹⁵ Ibid., § 16.

²⁹⁶ Ibid., § 48. See also ECtHR, *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, Judgment (2009).

applicants to seek supranational redress before the Strasbourg Court. In the following cases, the domestic courts played their subsidiary role in line with Convention requirements as interpreted by the ECtHR.

For instance, in the case of *Mitić*, the Court found that the Serbian authorities did not act in violation of Article 2, neither in its procedural nor its substantive limb, following the allegations of a father that “the authorities were responsible for his son’s death and/or that they failed to protect his life”.²⁹⁷ The applicant’s son had committed suicide by hanging himself whilst serving a prison sentence.²⁹⁸ The Court was satisfied with the effectiveness of the investigations which were confirmed by the Supreme Court as well as with the fact that there was no manifest omission on the part of domestic authorities in preventing the immediate risk of his suicide.²⁹⁹ In the case of *Popović and Others*, the Court did not consider that the applicants had been discriminated against by receiving lower disability benefits available to them as civilians as opposed to the higher benefits awarded to military beneficiaries – despite the fact that they had the exact same paraplegic disability.³⁰⁰ The Court noted that the civil proceedings brought by the applicants, alleging discrimination before the national courts, including the Constitutional Court, had been unsuccessful; but the Court did not see any reason to decide otherwise considering that “the difference in treatment ... had an objective and reasonable justification” and was thus compatible with Article 14 guarantees.³⁰¹ In two cases under Article 10 involving the same journalist, the Court deferred entirely to the decisions of the domestic courts by considering them as “relevant and sufficient” in striking a fair balance between the applicant’s freedom of expression and the interests of Mr B to protect his reputation.³⁰² The journalist had published an article involving particularly serious and sensitive allegations that Mr B (a municipal public servant) was involved in the alleged sexual abuse of an underaged Romani girl.³⁰³ Following his acquittal on all charges, Mr B initiated civil defamation proceedings against the applicant journalist which were concluded in Mr B’s favour.³⁰⁴ The Constitutional Court also dealt with the matter and considered that the regular courts had struck a fair balance between the journal-

²⁹⁷ ECtHR, *Mitić v. Serbia*, no. 31963/08, Judgment (2013).

²⁹⁸ *Ibid.*, § 5.

²⁹⁹ *Ibid.*, §§ 53 and 57.

³⁰⁰ ECtHR, *Popović and Others v. Serbia*, no. 26944/13 and 3 others, Judgment (2020).

³⁰¹ *Ibid.*, §§ 11–21 and 80.

³⁰² ECtHR, *Milosavljević v. Serbia*, no. 57574/14, Judgment (2021), § 68. See also ECtHR, *Milosavljević v. Serbia (no. 2)*, no. 47274/19, Judgment (2021), § 71.

³⁰³ ECtHR, *Milosavljević v. Serbia*, no. 57574/14, Judgment (2021).

³⁰⁴ *Ibid.*, §§ 9–18.

ist's freedom of expression and the protection of Mr B's reputation – a stance which was supported by the ECtHR as well.³⁰⁵ The Strasbourg Court concluded by deferring to the reasoning of the national courts' decisions on the ground that the freedom of expression afforded to journalists "is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism".³⁰⁶

The Court also deferred to the reasoning of the national courts in an Article 8 case where no violation was found in respect of the applicant's allegations that Serbia had failed to safeguard her contact with her child and that the decisions of the Supreme Court and of the Constitutional Court granting custody to her biological father had been arbitrary.³⁰⁷ After analysing the decisions of the domestic courts, the ECtHR concluded that there had been no violation in this case considering that "the domestic courts consistently emphasised the best interests of the child" and "based their decisions on a number of additional considerations, such as the relationship between the parents, the attitude and availability of the parents, and the specific environments involved".³⁰⁸ The reasons adduced by the national courts were considered "relevant and sufficient" and the domestic authorities had not overstepped "their margin of appreciation in arriving at their decision" to accord custody of the child to the father, rather than to the mother (the applicant).³⁰⁹ In view of the circumstances of the case, the decision to award custody of the child to her father, according to the Court, "cannot be regarded as disproportionate to the legitimate aim of protecting the child's best interests".³¹⁰ In the area of Article 13 of the Convention, compared to more than twenty cases where a violation of the right to an effective remedy was found, there is only one case where the Article 13 complaint was declared admissible but no violation was found. In the case of *Jovčić and Others*, the Court found no violation of this provision with respect to the alleged failure of the Serbian authorities to enforce a number of domestic decisions.³¹¹

Other cases where specific complaints were declared admissible but where no violation was found are to be found in cases related to the prohibition of tor-

³⁰⁵ Ibid., §§ 19-21 and 55-67.

³⁰⁶ Ibid., § 69.

³⁰⁷ ECtHR, *Cvetković v. Serbia*, no. 42707/10, Judgment (2017)

³⁰⁸ Ibid., § 59.

³⁰⁹ Ibid., § 63.

³¹⁰ Ibid., § 64.

³¹¹ ECtHR, *Jovčić and Others v. Serbia*, nos. 37270/11 and 7 others, Judgment (2015), § 45.

ture,³¹² the right to a fair and impartial trial,³¹³ the right to liberty and security,³¹⁴ the right to individual petition,³¹⁵ and the right to protection of property.³¹⁶

1.6. Other Important Cases Related to Exhaustion of Domestic Remedies

One of the two Grand Chamber judgments against Serbia relates precisely to the exhaustion of domestic remedies. As indicated above, the Chamber of the ECtHR initially declared the applications in *Vučković and Others* as admissible and found a violation of Article 14 in conjunction with Article 1 of Protocol No. 1.³¹⁷ However, a successful referral to the Grand Chamber, at Serbia's request, completely overturned the final outcome of the case. The applications, as viewed by the Grand Chamber, failed to pass the admissibility threshold due to non-exhaustion of domestic remedies as regards the discrimination complaint under Article 14 of the Convention, taken together with Article 1 of Protocol No. 1 and Article 1 of Protocol No. 12.³¹⁸ The applicants in this case were reservists who had been drafted by the Yugoslav Army following the NATO intervention in Serbia. They were part of the military service during the NATO campaign between March and June 1999 and were entitled to per diems which they did not receive despite Government promises. In 2008, the Government of Serbia reached an agreement with reservists that were living in some "underdeveloped" municipalities and agreed to pay their per diems in monthly instalments; but this agreement did not cover reservists that were living outside

³¹² See e.g. ECtHR, *Stevan Petrović v. Serbia*, nos. 6097/17 and 28999/19, Judgment (2021), § 123, where the ECtHR did not find a violation of Article 3 in its procedural aspect.

³¹³ See e.g. ECtHR, *Svilengačanin and Others v. Serbia*, no. 50104/10 and 9 others, Judgment (2021), where the Court endorsed the domestic court's finding with respect to the alleged impartiality of the Supreme Court.

³¹⁴ See e.g. ECtHR, *Luković v. Serbia*, no. 43808/07, Judgment (2013), where the Court concluded that there was no violation of Article 5 in respect of the alleged length of pre-trial detention, because national authorities had displayed special diligence in the conduct of highly complex proceedings.

³¹⁵ See e.g. ECtHR, *Grujović v. Serbia*, no. 25381/12, Judgment (2015), § 73, where the Court did not find that the Serbian state had failed to comply with Article 34 obligations.

³¹⁶ See e.g. ECtHR, *Popović v. Serbia*, no. 33888/05, Judgment (2009), § 80, where the Court did not find a violation of Article 1 of Protocol No. 1 in a case related to alleged discrimination with regard to disability funds.

³¹⁷ ECtHR, *Vučković and Others v. Serbia*, no. 17153/11 and 29 others, Judgment (2012).

³¹⁸ ECtHR, *Vučković and Others v. Serbia* [GC], nos. 17153/11 and 29 others, Judgment (2014).

such municipalities – which led them to argue that they have been discriminated against on grounds of residence.³¹⁹

The decisive factor in this case involved ascertaining whether the applicants had an effective remedy for their discrimination complaint before the national courts, more specifically before the Constitutional Court. Whilst on the one hand, the Chamber initially rejected the Government's objection of non-exhaustion by stipulating that "the Constitutional Court effectively ignored" the applicants' complaints and "offered no substantive assessment of the issue whatsoever",³²⁰ the Grand Chamber, on the other hand upheld the Government's objection of non-exhaustion mainly because it considered that the applicants "did not raise their discrimination complaint before the Constitutional Court, either expressly or in substance".³²¹ The Grand Chamber, unlike the Chamber, after taking note of three decisions of the Constitutional Court issued in comparable cases (one of them after a judgment by the Chamber), was not of the opinion that "the constitutional remedy would not have been effective in the applicants' case".³²² After finding that the national legal system offered sufficient civil and constitutional remedies to afford redress in respect of the applicants' grievances with respect to discrimination, the Grand Chamber concluded its analysis as follows:

"... [T]he Court does not find that there were any special reasons for dispensing the applicants from the requirement to exhaust domestic remedies in accordance with the applicable rules and procedure of domestic law. On the contrary, had the applicants complied with this requirement, it would have given the domestic courts that opportunity which the rule of exhaustion of domestic remedies is designed to afford States, namely to determine the issue of compatibility of the impugned national measures, or omissions to act, with the Convention and, should the applicants nonetheless have pursued their complaint before the European Court, this Court would have had the benefit of the views of the national courts ... Thus, the applicants failed to take appropriate steps to enable the national courts to fulfil their fundamental role in the Convention protection system, that of the European Court being subsidiary to theirs ..."³²³

Three judges of the Court respectfully (but strongly) disagreed with the conclusion of the Grand Chamber. Their leading criticism was that "the majority judgment suffers from an excess of formalism" by inferring that the applicants "did not plead" before the domestic courts, including the Constitutional Court

³¹⁹ Ibid., §§ 13-16 for facts of the case.

³²⁰ ECtHR, *Vučković and Others v. Serbia*, nos. 17153/11 and 29 others, Judgment (2012), § 72.

³²¹ ECtHR, *Vučković and Others v. Serbia* [GC], nos. 17153/11 and 29 others, Judgment (2014), § 82.

³²² Ibid., § 83.

³²³ Ibid., § 90.

in a “form that the majority consider to be the only acceptable one”.³²⁴ According to the dissenting judges, the applicants had indeed raised their discrimination complaint before the national courts, including before the Constitutional Court, and therefore the Grand Chamber should have declared the applications admissible and reviewed the merits of the case.³²⁵

In addition to this case, there are few other important cases where the Government’s objections of non-exhaustion were rejected by the Court as ungrounded mainly due to the lack of reference to the specific remedy or the lack of showing of case-law of the national courts confirming a domestic remedy.³²⁶ There is also one case where the Court rejected the applicant’s complaints for failing to exhaust a domestic remedy introduced after the Ališić Implementation Act.³²⁷

2. Impact and Effects of the ECHR and the ECtHR’s Case-Law in Serbia

The analysis in this chapter has shown that even though the ECHR is directly applicable in Serbia, it is not sufficiently and substantially embedded in the domestic legal order and the national judicial practice. A slight distance from the ECHR may be noticed by that fact that no court in Serbia, including the Supreme Court of Cassation and the Constitutional Court, ever finds a direct violation of the ECHR, even in cases when they rely on the Court’s case-law to reason their decisions. The allegations posed under the ECHR provisions are always requalified in order to adapt them to the constitutional provision which mirrors them and then to continue the analysis based on the latter. The judiciary in Serbia is obliged to take the Convention standards into consideration when deciding cases before them as well as when answering the allegations posed by the litigants. However, the case-law of the ECtHR against Serbia re-

³²⁴ See joint dissenting opinion of Judges Popović, Yudijska and De Gaetano in ECtHR, *Vučković and Others v. Serbia* [GC], nos. 17153/11 and 29 others, Judgment (2014).

³²⁵ *Ibid.*

³²⁶ ECtHR, *Đermanović v. Serbia*, no. 48497/06, Judgment (2010), §§ 35-43, with respect to the lack of an effective legal remedy for an Article 3 complaint relating to inadequate medical treatment during a detention period; ECtHR, *Stojanović v. Serbia*, no. 34425/04, Judgment (2009), §§ 62-66, with respect to the lack of an effective remedy for an Article 8 complaint relating to interference with correspondence while in prison; and ECtHR, *Milošević v. Serbia*, no. 31320/05, Judgment (2009), §§ 43-47, with respect to the lack of an effective remedy for an Article 5 complaint relating to being brought promptly before a judge.

³²⁷ ECtHR, *Muratović v. Serbia*, no. 41698/06, Judgment (2017).

flected in this chapter shows that, despite some good examples, in many cases the domestic courts failed to detect the Convention violation at the domestic level. This led to them falling short in fulfilling their role as the 'last-line defenders' of the Convention at the domestic level and to the applicants needing to seek relief at the supranational level before the Strasbourg Court.

Despite issues with the substantive aspect of the embeddedness of the Convention standards at the domestic level, there are several positive results which may be noted in Serbia following almost two decades of litigation before the Strasbourg Court. For example, the prohibition of interference with the correspondence of prisoners,³²⁸ the extension of freedom of expression at the domestic level to cover criticism of public figures,³²⁹ the judicial review of excessive length of detention while in police custody,³³⁰ and the prescription of State liability for debts of socially owned enterprises,³³¹ have been listed as some of the positive examples of the Convention's impact in the domestic legal order.³³² Other positive examples which have led to changes in domestic court practice as well as in legislation³³³ may be seen in the areas of: the participation of victims in investigations;³³⁴ improved legislative measures to monitor and prevent violence in detention as well as the obligation for medical personnel to keep records of all injuries sustained by detainees in order to inform the respective authorities in case violence is noticed;³³⁵ the alignment of the case-law of the Constitutional Court with the ECHR principle that the person must

³²⁸ ECtHR, *Stojanović v. Serbia*, no. 34425/04, Judgment (2009); ECtHR, *Milošević v. Serbia*, no. 31320/05, Judgment (2009); and ECtHR, *Jovančić v. Serbia*, no. 38968/04, Judgment (2010). See also, Committee of Ministers, Resolution CM/ResDH(2011)77 of 8 June 2011.

³²⁹ ECtHR, *Lepojić v. Serbia*, no. 13909/05, Judgment (2007). See also, Committee of Ministers, Resolution CM/ResDH(2009)135 of 3 December 2009.

³³⁰ ECtHR, *Vrenčev v. Serbia*, no. 2361/05, Judgment (2008); ECtHR, *Milošević v. Serbia*, no. 31320/05, Judgment (2009); ECtHR, *Đermanović v. Serbia*, no. 48497/06, Judgment (2010); and ECtHR, *Grujović v. Serbia*, no. 25381/12, Judgment (2015). See also, Committee of Ministers, Resolution CM/ResDH(2018)52 of 14 February 2018.

³³¹ ECtHR, *R. Kačapor and Others v. Serbia*, nos. 2269/06 and 5 others, Judgment (2008) and other related cases referred to above.

³³² Parliamentary Assembly AS/JUR/Inf (2016) 04 of 8 January 2016, *Impact of the European Convention on Human Rights in States Parties: selected examples*, prepared by the Legal Affairs and Human Rights Department, pages 33-34.

³³³ See the publication of the Department for Execution of Judgments of the European Court of Human Rights on main achievements in respect of Serbia <<https://rm.coe.int/ma-serbia-eng/1680a186c2>> (accessed 8 January 2022).

³³⁴ ECtHR, *Milanović v. Serbia*, no. 44614/07, Judgment (2010). See also, Committee of Ministers, Resolution CM/ResDH(2019)365 of 5 December 2019.

³³⁵ ECtHR, *Gjini v. Serbia*, no. 1128/16, Judgment (2019). See also, Committee of Ministers, Resolution CM/ResDH(2020)79 of 4 June 2020.

be brought before a judge within 48 hours;³³⁶ the impossibility of detaining individuals based on the decisions of foreign courts without such decisions having been duly recognised by the domestic courts;³³⁷ the harmonisation of domestic case-law to avoid inconsistencies in cases arising from identical claims and situations;³³⁸ the acceleration of criminal proceedings while also giving priority to cases concerning victims who happen to be minors;³³⁹ the enforcement of final judicial decisions against enterprises that were socially owned;³⁴⁰ the amendment of the Police Act in order to align it with the case-law of the ECtHR where a violation was found due to lack of foreseeability of the law;³⁴¹ the payment of pensions earned in Kosovo;³⁴² and the introduction of a repayment scheme for the “old” foreign-currency savings estimated at 310 million euros.³⁴³

These impact examples demonstrate that the impact and effects of the Convention and the Court’s case-law have not been limited only to national courts. This impact has also extended to the legislative and executive branches, considering that several violations found by the Strasbourg Court called for interventions through legislative measures. Some scholars claim that the direct influence of the Court’s case-law is easily noticeable in policies and laws that were changed and amended following the ECtHR’s recommendations; meanwhile, the effects of the dialogue between national judges and judges of the ECtHR seem to be “less perceptible” in addition to being generally under-researched.³⁴⁴ Therefore, it can be said that the violations found at the Strasbourg level have been an additional incentive to change not only the judicial

³³⁶ ECtHR, *Vrenčev v. Serbia*, no. 2361/05, Judgment (2008). See also, Committee of Ministers, Resolution CM/ResDH(2018)52 of 14 February 2018.

³³⁷ ECtHR, *Mitrović v. Serbia*, no. 52142/12, Judgment (2017). See also, Committee of Ministers, Resolution CM/ResDH(2020)78 of 4 June 2020.

³³⁸ ECtHR, *Vinčić and Others v. Serbia*, nos. 44698/06 and 30 others, Judgment (2009). See also, Committee of Ministers, Resolution CM/ResDH(2017)07 of 5 April 2017.

³³⁹ ECtHR, ECtHR, *Ristić v. Serbia*, no. 32181/08, Judgment (2011). See also, Committee of Ministers, Resolution CM/ResDH(2014)18 of 12 February 2014.

³⁴⁰ ECtHR, *EVT Company v. Serbia*, no. 3102/05 Judgment (2007), and ECtHR, *EVT Company v. Serbia*, no. 8024/08 Judgment (2015). See also, Committee of Ministers, Resolution CM/ResDH(2017)183 of 7 June 2017.

³⁴¹ ECtHR, *Milojević and Others v. Serbia*, nos. 43519/07 and 2 others, Judgment (2016). See also, Committee of Ministers, Resolution CM/ResDH(2018)93 of 15 March 2018.

³⁴² ECtHR, *Grudić v. Serbia*, no. 31925/08, Judgment (2012). See also, Committee of Ministers, Resolution CM/ResDH(2017)427 of 7 December 2017.

³⁴³ ECtHR, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia [GC]*, no. 60642/08, Judgment (2014). See also, Committee of Ministers, Resolution CM/ResDH(2020)184 of 3 September 2020.

³⁴⁴ *Ibid.*

domestic practice – which has been modified in line with the Court’s case-law – but also an incentive to change laws and regulations. In this respect, it is argued that the protection of Convention rights by the domestic courts in Serbia “is most commonly achieved through the abstract (general) and concrete (individual) review of constitutionality and conventionality by the Constitutional Court” but also through the “reopening of judicial proceedings before ordinary courts”.³⁴⁵ The former is considered as an intervention at the domestic level by the Constitutional Court which is intended to prevent a supranational intervention by the Strasbourg Court, whilst the latter is considered as a means to rectify a violation following the violation found by the Strasbourg Court.³⁴⁶ It is also argued that the “attitude towards the Convention and the Court’s jurisprudence” has contributed to the alternation of the domestic judicial practice (including that of the highest domestic courts) as well as to the type of pleading that the parties do at the domestic level.³⁴⁷ Following the ratification of the Convention and the adoption of the new Constitution in 2006, the changes in the domestic legal order have been described as “fundamental” and not “merely technical”.³⁴⁸ In this respect, the impact of the ECHR and the case-law of the ECtHR in Serbia can be seen from two special angles.³⁴⁹ The first pertains to impact that the ECHR and the Court’s case-law have played in law-making and judicial reforms in Serbia, and the second pertains to the impact of the Court’s case-law in the Serbian judiciary and its jurisprudence.³⁵⁰

With respect to the implementation of the Court’s judgments at the domestic level, the data from the specific database where the status of the execution of ECtHR judgments is registered, HUDOC EXEC, shows 565 cases in total that have been through or are still going through execution monitoring procedures by the Committee of Ministers. Of the total number of cases, 516 are considered as closed and 49 are still pending execution. Moreover, of the total number of cases, 163 were resolved through friendly settlement; 198 through friendly settlement with undertakings; 57 are marked as leading cases; while 360 are considered repetitive cases. Of those 49 which are still pending execution, 8 are new cases, 26 are in standard supervisory procedure, and 15 are under the so-called “enhanced procedure” of monitoring by the Committee of Ministers. It is quite concerning for a State Party as well as for the Convention

³⁴⁵ Popović and Marinković (2016), 385.

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*, 383.

³⁴⁸ *Ibid.*

³⁴⁹ Popović (2011).

³⁵⁰ *Ibid.*

protection machinery to have such a high number of repetitive cases from one country, in addition to having several cases under the enhanced procedure of monitoring. For instance, the list of cases which fall under the latter category shows that Serbia's major problems continue to be the issue of non-enforcement of final judicial decisions, the delayed payment of damages and length of proceedings. Other important cases which are pending implementation concern issues related to violation of the right to private life,³⁵¹ legal certainty,³⁵² the unfairness of proceedings concerning dismissal from the police force,³⁵³ the utilisation of confessions following ill-treatment suffered at the hands of law enforcement agents,³⁵⁴ etc. Despite lagging behind in some areas, Serbia has managed to close several cases where general measures were required by the Court.³⁵⁵ However, the infamous cases of missing babies in Serbia are still an issue to be resolved domestically in line with the general measures suggested by the Court in the case of *Zorica Jovanović*.³⁵⁶

In respect of international reports monitoring the situation in Serbia, there are a few important points to be highlighted with respect to the judiciary and fundamental rights, deriving from the latest Progress Report on Serbia issued by the European Union.³⁵⁷ First and foremost, the Report notes that the legal framework applicable in Serbia “does not provide sufficient guarantees against political influence over the judiciary” and that the constitutional reform initiated to address this issue was relaunched in 2020 but is still pending.³⁵⁸ The Report mentions the case of *Zorica Jovanović* and the fact that the “implementation of the mechanism providing individual redress to parents” in similar cases is still “ongoing, with collection of, and checks over, cases submitted by parents of missing babies”.³⁵⁹ With respect to ill-treatment by the police, the Report notes that “ill-treatment is an accepted practice within the current police culture” and, as a result, in 2021, the ECtHR found Serbia to have violated Article 3 of the ECHR for failing to conduct an effective investigation into the applicant’s allegations of “inhuman and degrading treatment while in police

³⁵¹ ECtHR, *Boljević v. Serbia*, no. 47443/14, Judgment (2020), and ECtHR, *Dragan Petrović v. Serbia*, no. 75229/10, Judgment (2020).

³⁵² ECtHR, *Mirković and Others v. Serbia*, nos. 27471/15 and 12 others, Judgment (2018).

³⁵³ ECtHR, *Grbić v. Serbia*, no. 5409/12, Judgment (2018).

³⁵⁴ ECtHR, *Stanimirović v. Serbia*, no. 26088/06, Judgment (2011).

³⁵⁵ See [Part IV](#) of this Chapter for more on Article 46 cases against Serbia.

³⁵⁶ ECtHR, *Zorica Jovanović v. Serbia*, no. 21794/08, Judgment (2013).

³⁵⁷ European Commission of the European Union, ‘Serbia 2021 Report’, Commission Staff Working Document no. SWD(2021) 288 final, 19 October 2021.

³⁵⁸ *Ibid.*, page 17.

³⁵⁹ *Ibid.*, pages 31-32.

custody”³⁶⁰ With regard to the plan of the Serbian authorities to introduce life imprisonment without any possibility of conditional release for a few selected crimes, the Report notes that such amendments to the criminal legislation are considered to be contrary to the ECtHR case-law.³⁶¹

Overall, the analysis provided in this chapter leads to the conclusion that the ECHR standards are only somewhat embedded in the national legal order. Despite the fact that the Convention is directly applicable, its utilisation at the domestic level is neither profound nor systematic. Although the domestic courts have demonstrated (in certain cases) their efforts to improve their record of Convention application domestically, the case-law of the ECtHR against Serbia shows that they have not been able to fully fulfil their role in preventing Convention violations and in becoming the Court’s trusted ‘Convention partners’ at the domestic level. Nevertheless, the analysis above also showed numerous plausible examples of the impact and effects of the Convention principles and the case-law of the ECtHR in the domestic legal order, be it in the national judiciary or in other branches of government. Additional efforts by the domestic courts and other ‘first-line defenders’ in Serbia are needed in order to increase the absorption capacity of Convention know-how and thus improve the overall record of utilisation of ECHR standards domestically. Better records of Convention application at the domestic level are needed in order for litigants to find redress at the national level and not have the need to address to the Strasbourg Court.

³⁶⁰ Ibid., page 32. See also ECtHR, *Zličić v. Serbia*, nos. 73313/17 and 20143/19, Judgment (2021).

³⁶¹ European Commission of the European Union, ‘Serbia 2021 Report’, Commission Staff Working Document no. SWD(2021) 288 final, 19 October 2021, page 32.

V. Summary and Conclusion

This chapter has provided an in-depth analysis of four main areas of interest for this study, namely: (i) an analysis of the status of international law in general and the ECHR in particular in the domestic legal order; (ii) an in-depth analysis of the case-law of the highest courts in Serbia and their 'Convention talk' in relation to the utilisation of Convention principles and the Court's case-law in their judicial decision-making process; (iii) an in-depth examination of the case-law of the Strasbourg Court against Serbia; and (iv) an analysis of the impact and effects of the Convention and the Court's case-law in the domestic legal order. Through concrete examples, this chapter has shown the manner in which the Convention principles are utilised by the highest national courts as a means of assessing whether they are sufficiently equipped to act as the Court's 'Convention partners' at the domestic level.

[Part I](#) of the chapter provided a historical reflection on Serbia's endeavours to leave the past behind and modernise its human rights protection mechanisms by becoming a member of the Council of Europe in 2003 and embarking on a profound constitutional reform in 2006 which culminated with the enactment of a new Constitution and the establishment of a new judicial structure and system. In that respect, the introductory part provided a synopsis of the most important events, from Serbia's accession to the Council of Europe in 2003 to the latest developments within the national judiciary and the case-law of the Strasbourg Court in respect of Serbia.

[Part II](#) outlined the relationship of the domestic law *vis-à-vis* international law, with particular focus on the legal status of the ECHR in the domestic legal order. The analysis concluded that the Convention is formally 'embedded' in the constitutional legal order but it is almost never utilised without a reliance on the mirroring provisions of the Constitution. The domestic courts are obliged to render their decisions in compliance with the Constitution and the international instruments duly ratified in Serbia, including the ECHR; however, the national case-law suffers from a lack of harmonisation, consistency and profoundness when it comes to the application of the ECHR standards. The national judicial practice showed that while the Constitutional Court is leading the way towards substantial embeddedness of the Convention principles,

there is considerable room for improvement and advancement towards a more profound utilisation of the Convention principles by the regular courts in Serbia, including by the highest courts.

[Part III](#) examined the domestic court system and its relationship with the Convention principles, by focusing mostly on an in-depth analysis of the jurisprudence of the highest national courts. Considering the particularity of the domestic court system, a reference to the case-law of the lower courts was also occasionally made. Prior to the constitutional reform in 2006, there was no possibility for citizens to file a direct constitutional appeal before the Constitutional Court. The changes introduced in this reform have transformed the landscape of the judicial review of human rights violations in Serbia and have contributed to a more consolidated embeddedness of the Convention principles. Despite the fact that there are many ways in which the constitutionality and conventionality of norms are checked in Serbia, the domestic courts do not have the possibility to approach the Constitutional Court for a preliminary review of the compliance of a particular norm with the ECHR. The lack of such a legal avenue has contributed to the 'Convention talk' between the Constitutional Court and the Supreme Court of Cassation being poorer. Overall, the national judiciary is to be considered as intermediately equipped with Convention know-how. There is a need for substantial progress in order for the domestic courts to reach an advanced level of Convention application.

[Part IV](#) provided an in-depth examination and analysis of all cases that have been adjudicated before the ECtHR in respect of Serbia. This case-law was categorised into six different pools of cases, namely: (i) [cases under Article 46 – where general and/or individual measures were required by the Court](#); (ii) [cases under Article 6 – right to fair trial issues](#); (iii) [cases under Article 13 – lack of effective domestic remedies](#); (iv) [cases with violations under other articles of the Convention](#); (v) [admissible cases where no violation was found](#); and, lastly, (vi) [other important cases related to exhaustion of domestic remedies](#). The first pool of cases showed Serbia's systemic flaws in several areas. That part of the study reflected all 10 cases where the Court indicated the need for general and/or individual measures to be taken as the only means to secure the implementation of the Court's judgments. In this respect, the most concerning cases for the Convention protection machinery were those which affect numerous current and potential applicants, both domestically and before the ECtHR. As noted above, Serbia was required to provide effective remedies at the domestic level in order to ensure that parents are able to know the truth

about the fate of their missing babies,³⁶² that pensioners are able to receive their suspended pensions,³⁶³ and that individuals who had “old” foreign-currency savings are able to benefit from a repayment scheme that needed to be introduced by the national authorities.³⁶⁴ While most of the judgments requiring Article 46 measures were closed for further review by the Committee of Ministers, important judgments in this area are yet to be implemented. The second pool of cases reflected Serbia’s major issues in the area of the right to a fair and impartial trial as the most litigated provision at the domestic and supranational levels. While violations of other aspects of Article 6 are not to be neglected, the most problematic issues in Serbia pertain to the non-enforcement of final and binding judicial decisions and length of proceedings. The high number of violations found at the Strasbourg level demonstrated a degree of negligence on the part of the domestic authorities in implementing the general principles established by the Court under Article 6. The third pool of cases reflected one of the most serious areas of Convention violations with 90% of the violations of Article 13 having been found in conjunction with Article 6 due to lack of effective legal remedies to address non-enforcement of judicial decisions and length of proceedings. Interestingly, only one Article 13 case did not relate to these two problematic issues as it concerned the lack of effectiveness in addressing complaints on electoral rights. The fourth pool of cases showed that in addition to a significant number of violations found under Article 6, there is also a considerable amount of case-law where a violation of Article 1 of Protocol No. 1 was found, on more than 70 occasions. There were other concerning violations found under Articles 2, 3, 5, 8, 10 and 14 of the Convention. Due to the number of cases that were interesting to report and the limited space available to elaborate on them all, the reporting of cases in this specific pool focused on those cases where domestic courts had failed to detect Convention violations at an earlier stage. This analysis showed that even in cases where there was already well-established case-law at the Strasbourg level, the domestic courts overlooked such violations and the applicants needed to seek supranational relief before the ECtHR. The fifth pool reflected several cases where the ECtHR considered that the national authorities could not be held responsible for the breach of the alleged rights. This part of the analysis focused on the cases where the Strasbourg Court was comfortable to defer to the reasoning of the domestic courts and thus not find a violation at

³⁶² ECtHR, *Zorica Jovanović v. Serbia*, no. 21794/08, Judgment (2013) and other cases related to missing babies referred to above.

³⁶³ ECtHR, *Grudić v. Serbia*, no. 31925/08, Judgment (2012).

³⁶⁴ ECtHR, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, Judgment (2014).

the Strasbourg level. Despite the number of cases not being so high, this part showed that the national courts, at times, have demonstrated their potential to act as 'last-line defenders' – thus obviating the need for parties to reach out to the ECtHR. The sixth pool shed light on some other important inadmissibility cases related to the issue of exhaustion of domestic remedies. Here the focus was on the Grand Chamber case of *Vučković and Others* which was declared inadmissible due to the applicants' failure to exhaust the constitutional appeal before filing a case with the Strasbourg Court. The heated debate over the effectiveness of this domestic remedy was reflected in several parts of this chapter due to its importance for the domestic application of the Convention standards. Lastly, in [part IV](#), this study reflected on the impact and effects of the ECHR and the ECtHR's case-law in the domestic legal order by providing concrete examples of positive impact as well as examples where a greater impact is needed.

Based on this analysis and findings, the overall conclusion is that Serbia and its national courts are still at an "early" to "intermediate" stage of application of Convention principles at the domestic level. The current level of application of Convention standards cannot be considered satisfactory at any level of domestic adjudication, despite there being a few notable decisions that merit praise and recognition. The Constitutional Court clearly leads the way in the process of embedding Convention principles at the domestic level but it also faces a lot of criticism for the manner in which it undertakes this important constitutional duty. For the ECtHR to be able to defer to the national courts more frequently and in a confident manner, there is a need for substantial improvement in the utilisation of the Convention standards and the Court's case-law by the national courts. The latter needs to find workable methods for harmonising their domestic legal practice and aligning it with the ECtHR standards, considering the inconsistency and lack of predictability which is considered to have adversely affected the rights of individuals. In this respect, there is an urgent need for more systematic, accurate and comprehensive reliance on the ECtHR case-law in order to make the judicial practice more predictable and less prone to being considered contradictory and inconsistent. Only when this is achieved in practice and Serbia has managed to move towards an advanced stage of Convention application at the domestic level will the Strasbourg Court be able to defer, more frequently, to national courts as trustworthy 'Convention partners'.

Chapter 8 Assessment of the Impact and Effects of the ECHR and the ECtHR's Case-Law in the Western Balkans

I. Introduction

The primary aim of this study was to analyse the impact and effects of the ECHR and the case-law of the ECtHR in the Western Balkan States, namely Albania,¹ Bosnia and Herzegovina,² Kosovo,³ Montenegro,⁴ North Macedonia⁵ and Serbia.⁶

¹ For a statistical overview of the impact and effects of the ECHR and the case-law of the ECtHR in Albania, see ECtHR, 'Albania - Press country profile 2021', <https://www.echr.coe.int/documents/cp_albania_eng.pdf> (accessed 10 January 2022).

² For a statistical overview of the impact and effects of the ECHR and the case-law of the ECtHR in Bosnia and Herzegovina, see ECtHR, 'Bosnia and Herzegovina - Press country profile 2021', <https://www.echr.coe.int/documents/cp_bosnia_and_herzegovina_eng.pdf> (accessed 10 January 2022).

³ For a general statistical view on the application of the ECtHR case-law in Kosovo, see, Constitutional Court of Kosovo, Annual Reports 2009-2020, <https://gjk-ks.org/en/publication_category/annual-report/> (accessed 10 January 2022).

⁴ For a statistical overview of the impact and effects of the ECHR and the case-law of the ECtHR in Montenegro, see ECtHR, 'Montenegro - Press country profile 2021', <https://www.echr.coe.int/documents/cp_montenegro_eng.pdf> (accessed 10 January 2022).

⁵ For a statistical overview of the impact and effects of the ECHR and the case-law of the ECtHR in North Macedonia, see ECtHR, 'North Macedonia - Press country profile 2021', <https://www.echr.coe.int/Documents/CP_Republic_of_North_Macedonia_ENG.pdf> (accessed 10 January 2022).

⁶ For a statistical overview of the impact and effects of the ECHR and the case-law of the ECtHR in Serbia, see ECtHR, 'Serbia - Press country profile 2021', <https://www.echr.coe.int/documents/cp_serbia_eng.pdf> (accessed 10 January 2022).

The study had six objectives related to its overarching aim.⁷ The first objective was to provide an overview of the key notions, principles and doctrines which impact the process of reception and embeddedness of the Convention and the ECtHR's case-law in domestic legal orders. The second objective was to provide a comprehensive overview of the status of the Convention in all six domestic legal orders of the selected Western Balkan States as a means of assessing how this status affects the overall impact and effects of the Convention and the ECtHR case-law in those States. The third objective was to provide a comprehensive overview of the entire body of case-law of the highest domestic courts in the Western Balkan States relating to the (non)application of the Convention and the Court's case-law at the domestic level. The fourth objective was to provide a comprehensive overview of the entire body of case-law of the ECtHR rendered against the Western Balkan States as a means of assessing the reaction of the domestic courts and other domestic authorities following violations found at the Strasbourg level. The fifth objective was to provide an overall assessment of the impact and effects of the Convention and the ECtHR case-law in each of the Western Balkan States. The sixth objective was to provide a comprehensive comparative analysis of the overall impact that the Convention and the Court's case-law has had in the Western Balkans, whilst also drawing a number of final conclusions and making some remarks and recommendations that might contribute to better reception and embeddedness of the ECHR in the selected States.

In seeking to achieve the above referred aim and objectives, this study started, in [Chapter 1](#), with a review of the relevant theoretical aspects related to reception and embeddedness of the Convention and the Court's case-law within a domestic legal order.⁸ In relation to these two terms which have been held as the essential theoretical notions for this study, [Chapter 1](#) also discussed the features of several other important interrelated concepts that served as an analytical basis for the substantive chapters comprising the six National Reports ([Chapters 2-7](#)). In so doing, [Chapter 1](#) provided answers with respect to: (1) the role of the key notions, principles and doctrines, i.e. effectiveness, subsidiarity, margin of appreciation and shared responsibility in the process of reception and embeddedness of the Convention and the Court's case-law domestically;⁹ (2) the roles (different, yet complementary) of the domestic courts and the Strasbourg Court in their "shared responsibility" to secure and ensure the

⁷ See [Chapter 1, Part V, point 1](#).

⁸ See [Chapter 1, Part I](#).

⁹ See [Chapter 1, Part I](#) and [II](#).

effective protection of Convention rights;¹⁰ and, (3) the concept of deference and instances in which the Strasbourg Court can comfortably defer to domestic courts and other national ‘first-line defenders’ of Convention rights.¹¹ That analysis contributed to the achievement of the first objective of the study.

Following this discussion of the key theoretical aspects on which the study is based, [Chapters 2-7](#) presented six National Reports which sought to provide answers to identical research questions,¹² thereby enabling the overall comparative analysis in terms of reception and embeddedness of the ECHR and the ECtHR case-law among the Western Balkan States which now follows. In this respect, [Chapters 2-7](#) were drafted with a view to providing answers to the following research questions in each of the six National Reports, notably: (1) What is the relationship between the domestic and international law in each of the Western Balkan States, i.e. is the national system more monist or dualist in respect of the status of international law within the domestic legal order? (2) What is the status of the ECHR in the domestic legal orders of the selected States, i.e. does the Convention have at least supra-legislative status? (3) Can applicants directly invoke Convention provisions before the domestic courts? (4) Can applicants directly invoke the Court’s case-law to argue their case before the domestic courts relying on the *res interpretata* effect? (5) What have the domestic courts in the Western Balkans said about the status of the Convention and the Court’s case-law in their own domestic legal orders? (6) Can domestic courts in the Western Balkans set aside a norm in favour of applying the Convention directly and is there a domestic procedure obliging the executive and legislative branches to ensure the compatibility of the proposed legislation with the Convention standards and the Court’s case-law? (7) How often do the domestic courts in the Western Balkans refer to the Convention and the ECtHR case-law in their judicial decisions? (8) In what type of cases may such references be found and are the references consistent, systematic and relevant or more general in nature? (9) Do national courts in the Western Balkans follow interpretative methodologies that may be found in the Court’s case-law when assessing allegations of violations of Convention rights? (10) How have the domestic courts in the Western Balkans reacted following a violation found at the Strasbourg level in respect of their State, i.e. have they aligned their judicial practice in conformity with the Court’s case-law or not? (11) Do the domestic courts take account of the *res interpretata* effects of the Court’s case-law in general or are they mainly concerned with

¹⁰ See [Chapter 1, Part III](#).

¹¹ See [Chapter 1, Part IV](#).

¹² With exceptions for Kosovo as noted in [Chapter 1, Part V, point 1](#).

following the case-law against their own State? (12) How often do the highest domestic courts, namely Supreme Courts as the highest judicial organs of the regular judiciary and Constitutional Courts as the ultimate organs for the domestic interpretation of the Constitution and the Convention, engage in ‘Convention talk’ and what is the quality of this judicial exchange? (13) What are the effects of the “individual constitutional appeal mechanism” and the “incidental control procedure” – two of the most crucial jurisprudential exchanges in the process of judicial embeddedness of the Convention standards at the domestic level? (14) Finally, and more generally, what stage have the highest domestic courts in the Western Balkans reached in the process of applying the Convention standards and the Court’s case-law, i.e. early stage, intermediate stage or advanced stage? Although not in a strict or direct question versus direct answer approach, the substance of the six National Reports nonetheless provided answers to all of the aforementioned research questions. By providing such answers, the National Reports contributed to the achievement of the second, third, fourth and fifth objectives of this study.

Accordingly, this study will now conclude with [Chapter 8](#), in which an overall “Assessment of the Impact and Effects of the ECHR and the ECtHR’s Case-Law in the Western Balkans” will be provided. The main objective of this closing chapter relates to the sixth objective of the study, i.e. to provide a comprehensive comparative analysis of the overall impact and effects that the Convention and the Court’s case-law has had in the Western Balkan States as well as providing some final conclusions, remarks and recommendations with a view to further advancing the embeddedness efforts in the selected States. The comparative analysis will be conducted by recalling some of the significant answers provided to the research guiding questions referred to in the paragraph above.

Additionally, in achieving the final sixth objective, which is closely related to the primary aim of the study, the following part of this chapter will seek more specifically to provide direct answers to the following comparative research questions: (1) What is the level of reception and embeddedness of the ECHR and the ECtHR’s case-law in each of the six Western Balkan States? (2) Do the Western Balkan States differ among themselves in how they have chosen to implement the Convention domestically and if so, what do such differences mean for the ultimate goal of protecting rights at home? (3) Are there particular reasons why the ECtHR has found systemic problems for some of the States Parties and not for others? (4) What has been the role of the Western Balkans’ domestic courts in acting as final ‘filterers’ of Convention violations before cases reached the Court’s docket and are there differences among the domestic courts in how they approach the ECHR and the case-law of the Strasbourg

Court? (5) What are the good and not so good ECHR embeddedness practices that may be observed across the Western Balkan States, with particular focus on the practices of the domestic courts? (6) What final conclusions, remarks and recommendations can this study provide with a view to proposing ways of achieving better implementation of the Convention standards and the Court's case-law at home? (7) What is ultimately needed to bring the Convention home and firmly embed it in all Western Balkan States? At the very end, this PhD monograph will attempt to offer a list of possible answers to this final question: How can the Western Balkans become 'A Western Balkans of Rights' and what does it ultimately take to bring the Convention home?

II. The ECHR in the Western Balkan Legal Orders

As is the case with other national systems in Europe, the Western Balkans are also “increasingly porous to the influence of the ECHR and the case-law of its Court.”¹³ The inclination to lean towards monism in respect of the relationship between the domestic law and international law has created adequate space for the ECHR to have a direct impact in all six domestic legal orders that were surveyed by this study.¹⁴ Formally speaking, there are no constitutional obstacles in any of the Western Balkan States in respect of the applicability of the ECHR within the national systems. The questions that arise have more to do with the quality of the application of the Convention standards, rather than with formal barriers to its application. The Convention is therefore part of the *bloc de constitutionnalité* in all six selected States and it has, at least, supra-legislative status in all national legal orders, with some States providing a slightly more special or privileged status to the Convention than others.¹⁵

At the level of national constitutions, albeit with diverse formulations and slight variations in the degree of openness towards international law, all six Western Balkan States recognise that the international law has a special place in their domestic legal orders. Some States (Bosnia and Herzegovina and Kosovo) specifically refer to the ECHR in their Constitution,¹⁶ while the remaining four States refer more generally to the ratified international treaties by describing the way in which they have become internalised in the domestic legal orders following their ratification by the national parliaments.¹⁷ One particular State (Kosovo) even refers directly to the case-law of the ECtHR in its Constitution as a means of obliging domestic courts and other public authorities to interpret human rights and freedoms “in harmony” with the jurisprudence of the Strasbourg Court.¹⁸ Another State (Albania) also refers directly to the ECtHR by providing that public officials who have undergone the vetting

¹³ Keller and Stone Sweet (2008).

¹⁴ See Chapters 2-7, Part II, point 1.

¹⁵ See Chapters 2-7, Part II, point 2.

¹⁶ See Article II.2 of the Constitution of Bosnia and Herzegovina and Article 22 of the Constitution of Kosovo.

¹⁷ See Chapters 2 and 5-7, Part II.

¹⁸ See Article 53 of the Constitution of Kosovo.

process have the right to file petitions with the Strasbourg Court.¹⁹ Another State (North Macedonia) specifically refers to the obligation to follow the case-law of the ECtHR in a recent law,²⁰ while in the remaining States, the direct applicability of the ECHR has become a norm following the interpretations provided by domestic courts.²¹ The latter, to a greater degree in some States and a lesser degree in others, have shown a predisposition to take note of the *res interpretata* effects of the ECtHR's case-law and apply them as a means of supporting their adjudication or to support their call for the necessary alignment of the domestic laws with the Convention standards.

Overall, in all the Western Balkan States the ECHR is said to have primacy over the domestic legislation and the highest domestic courts have confirmed this direct applicability of the Convention and the Court's case-law within all six national legal orders.²² Regarding the obligation of the executive and legislative branches to ensure, *ex ante*, the compatibility of the proposed legislation with Convention standards (including the Court's case-law), the analysis revealed that none of the Western Balkan States has a special procedure that specifically obliges these two branches to make this assessment beforehand. A special procedure of that kind exists only in respect of the obligation to ensure the compatibility of legislation with the *acquis* of the European Union, with many States having to produce a formal document declaring such compliance before proceeding further with the legislative initiative. Nevertheless, in all the Western Balkan States there is at least a basic obligation to ensure the compatibility of legislation with the Constitution (in which the ECHR is usually incorporated) and, in some specific States, an obligation to ensure the compatibility of legislation with international law.

The examples referred to in the National Reports showed that the executive and legislative branches have frequently failed to enact Convention compliant legislation which has been detected by their respective constitutional courts following their *ex post* (or, depending on the competences of constitutional courts, in some cases even *ex ante*) review of the conventionality of legislation. Additionally, the case-law of the ECtHR against Western Balkan States also showed examples where the systemic problems derived precisely from legislation which was not Convention compliant and produced a vast number of repetitive cases before the ECtHR. To this day, several Western Balkan States

¹⁹ See Article F.8 of the Constitution of Albania.

²⁰ See Articles 18 (5) and (6) of the Law on Courts of North Macedonia (2019).

²¹ See Chapters 2-7, Parts II and III.

²² See Chapters 2-7, Part II, point 2 and, more generally, Part III.

are confronted with well-founded applications due to their failure to align their laws with the Convention guarantees and thus provide effective redress at the national level.

On the whole, there are no noted formal barriers pertaining to the direct effect of the Convention in the Western Balkan legal orders that have been observed, and the ECHR has often been used to cross-check the conventionality of domestic legislation as well as decisions of other public authorities, including national courts. There is also no notable resistance on the part of the domestic courts and other 'first-line defenders' to recognising the special status of the ECHR in their domestic legal orders. However, despite the lack of overt formal resistance, there is practical resistance towards the ECHR in the sense that the possible benefits of this human rights instrument are not fully exploited in all of the Western Balkan States or by all 'first-line defenders'. The mere fact that there are no formal impediments to the direct applicability of the Convention in the domestic legal orders of the selected States and the fact that there is no declared resistance to the Convention and the case-law of the Court, does not necessarily mean that the situation with regard to the protection of ECHR rights is satisfactory across the Western Balkans. The examples reflected in respect of the selected States demonstrate that, in addition to not having formal barriers to the direct applicability of the ECHR, all 'first-line defenders' need to be proactive in making additional efforts to amplify the much needed impact and effects of the Convention and the Court's case-law domestically. In particular, there is a need for the domestic authorities, as primary guarantors of ECHR rights, to employ a proactive and preventive approach towards securing the protection of Convention rights in advance, well before well-founded and repetitive cases reach the docket of the Strasbourg Court.

The examples reflected in the National Reports have shown that this proactive and preventive approach was often missing and, as a result, the domestic authorities have repeatedly been unsuccessful in fulfilling their primary role of securing effective ECHR protection at the national level and thus sharing their burden of responsibility in offering effective and efficient protection of Convention rights. As a result, despite many good impact examples, the level of reception and embeddedness of the ECHR cannot be regarded as deeply instilled within the Western Balkans. The following parts of this study will comment further on where the embeddedness efforts are lacking and how such embeddedness could be increased with a view to improving the records Convention application at home, within all of the Western Balkan States.

III. The Western Balkan Domestic Courts: ‘Convention talk’

The primary role of “secur[ing] to everyone within their jurisdiction the rights and freedoms” defined in the Convention pertains to each State Party,²³ and the Strasbourg Court is there only to “ensure the observance of engagements undertaken” by the States Parties.²⁴ The “secure” versus “ensure” equation is said to place “a rather heavy responsibility on national courts” as they are obliged to make sure that the ECtHR’s case-law is being correctly implemented domestically,²⁵ as the final ‘Convention filterers’ and the Court’s most frequent ‘Convention partners’. This is particularly true for the highest domestic courts which have the responsibility to act not only as ‘first-line defenders’ at times but very frequently as ‘last-line defenders’ of Convention rights before cases reach the Strasbourg Court’s docket. The primary role of the domestic authorities in securing Convention rights has been strongly reinforced and emphasised through the insertion of a specific reference to the principle of subsidiarity into the Preamble of the Convention.²⁶ Prior developments initiated by the so called “Interlaken process” and the recent amendment of the Convention through Protocol No. 15 have elevated the importance of the domestic courts in securing the protection of ECHR rights to an even greater degree, while hinting at a decrease in the ECtHR’s power to intervene. Indeed, the Court seems to have taken this message seriously and, moreover, to agree with the fact that the only sustainable long-term solution for the effectiveness of the Convention protection machinery is to have strong domestic courts and other strong ‘first-line defenders’ who are able to apply the already embedded and well-established principles of the ECtHR without the need for constant supranational supervision and intervention.

The “fine-grained doctrinal refinement” or the jurisprudential shift towards “process-based review” leading to a more robust application of the principle of subsidiarity and the application of the “responsible courts doctrine”²⁷ to afford meritorious deference to domestic courts/domestic authorities may serve to

²³ Article 1 of the ECHR.

²⁴ Article 19 of the ECHR.

²⁵ Gerards (2014).

²⁶ Preamble to the ECHR and Protocol No. 15 to the ECHR.

²⁷ Spano (2018); Çali (2016).

confirm that the latter are considered as the most important players in the hierarchy of Convention protection machinery. The ECtHR's momentous insistence that it cannot “*usurp* [emphasis added] the role of the domestic courts” as such an approach would be contrary “to the subsidiary character of the Convention machinery”²⁸ also serves to confirm the increased role of the domestic courts' decisions in the eyes of the Strasbourg Court. The latter has even been taking complementary steps, outside its regular judicial role, to nurture its partnership with the highest domestic courts of all 47 member States with the aim of “enrich[ing] the dialogue and the implementation of the Convention” at the national level.²⁹ Strengthening “the bonds between the Strasbourg Court and the national superior courts” was considered as an “absolute necessity” for the “future of the Convention system”.³⁰ These bonds can only be strengthened through comprehensive and respectful judicial dialogue where the national courts and the supranational court in Strasbourg have a clear understanding of their roles in the process of securing and ensuring the protection of Convention rights, jointly, throughout Europe in general and throughout the Western Balkans in particular.

Bearing these actualities in mind, the analysis in Part III of the six National Reports sought to assess the level of application and embeddedness of the ECHR and ECtHR case-law within the judicial practice of the domestic courts, by focusing on the highest domestic courts as the final filterers of possible Convention violations at the national level. The main aim of this analysis was to see the role that the domestic courts have played in embedding the Convention domestically and in serving as gatekeepers of possible Convention violations before well-founded cases reach the docket of the Strasbourg Court. In this respect, the preceding analysis in [Chapters 2-7](#) focused on showing ‘the good and not so good’ examples of utilisation of Convention standards and the Court's case-law by the Western Balkan domestic courts. This was done first by observing the case-law of the supreme courts as the highest regular judicial instance in each State, then by proceeding to observe the case-law of each constitutional court as the final guardians of the Constitution/ECHR within

²⁸ ECtHR, *Lee v. the United Kingdom*, no. 18860/19, Decision (2021), §§ 77-78.

²⁹ See e.g. the activities undertaken by the ECtHR through the Superior Courts Network <<https://www.echr.coe.int/Pages/home.aspx?p=court/dialoguecourts/network&c=>>> (accessed 8 January 2022).

³⁰ See Message from President Spano to the Superior Courts Network <https://www.echr.coe.int/Documents/SCN_Message_President_Spano_ENG.pdf> (accessed 8 January 2022).

the domestic legal orders, finally concluding with an in-depth analysis of the 'Convention talk' between the highest courts of each selected State.

Overall, the analysis showed that constitutional courts were better equipped and more inclined to rely on Convention standards and the Court's case-law than supreme courts. There are at least three reasons as to why this trend may be seen in the Western Balkan States. Firstly, the supreme courts tend to have a greater workload than the constitutional courts due to their wider jurisdiction and the fact that they oversee the work of the whole judiciary by standing at the top of the regular courts pyramid. As a result, they are obliged to deal with vast number of cases and they do not always have the time and resources to engage in profound Convention analysis. Secondly, the constitutional courts, by their very nature, are considered as human rights courts and reliance on human rights standards and the ECtHR case-law is by default within their primary callings. All constitutional courts in the Western Balkans were established to ensure that human rights and freedoms guaranteed by their respective constitutions and international human rights instruments are duly protected. Therefore, it is customary that the constitutional courts are more inclined and better equipped to apply those standards. In fact, it is highly concerning when the constitutional courts that have specifically been established to ensure the protection of human rights as the last possible instance at the domestic level, fail to use the ECHR standards and the Court's case-law in a manner which would enable the applicants to obtain adequate effective redress domestically and thus obviate their need to seek relief before a supranational court. Some examples reflected in the preceding National Reports showed that such instances do exist considering that many constitutional courts had the opportunity to review the Convention complaints raised by the applicants but they failed to see that there had indeed been a violation of their rights, as subsequently confirmed by the Strasbourg Court. Thirdly, the practice of using human rights instruments to adjudicate a case and using precedents and/or the *res interpretata* effects of the jurisprudence of a supranational court to decide the outcome of a national case is a fairly new venture for the Western Balkan domestic courts, especially the supreme courts which have a long practice of deciding cases solely and strictly based on the basic laws of their States. In this respect, there is a need for a shift in the mindset of the domestic judges as well as a need for the States to substantially increase their efforts in supporting the domestic courts in this new trend so that they become better equipped to implement Convention standards domestically.

In more concrete terms, the analysis of the case-law of each court independently as well as the analysis of their judicial exchange described as ‘Convention talk’ between the highest domestic courts (and at times between other ‘first-line defenders’, such as governments, parliaments and ombudspersons) revealed that most of the supreme courts are to be considered at an early stage with respect to know-how and the level of utilisation of Convention standards and the Court’s case-law, with some courts having progressed to an intermediate stage, while half of the constitutional courts stand at an advanced stage and the other half at an intermediate or early stage, or somewhere in between. This classification does not claim to be definitive as there are evident shortcomings for it to be considered scientifically and systematically proven. Rather, this classification stems from an overall impression gained by analysing and observing the case-law of each of the 12 domestic courts and noting how often they relied on the case-law of the ECtHR and how well they utilised such standards to reason their decisions. Therefore, this classification serves only to give a general idea of approximately where each court stands in the process of application of Convention standards and the case-law of the Strasbourg Court.

With this essential disclaimer in mind, this study notes that the domestic courts that are considered to be at an “early stage” of preparedness to use Convention standards are usually courts which rarely rely on Convention provisions and the Court’s case-law and even when they do, such reliance is not systematic, coherent, relevant or detailed.³¹ In most instances, such courts merely mention (in the small number of cases that they do), in a general manner, a few Convention provisions or a few ECtHR cases, without entering in any profound Convention analysis as to how such provisions or decisions relate to the domestic case they are deciding. The domestic courts that are considered to be at an “intermediate stage” of preparedness to use Convention standards are usually courts which rely more often (but not frequently) on Convention provisions and the Court’s case-law and when they do, such reliance is usually explained and easily understood by the reader.³² In most in-

³¹ See e.g. some of the Western Balkan domestic courts that were considered to fall, more or less, into this category of preparedness to use the Convention principles and the Court’s case-law: the Supreme Court of Kosovo, the Supreme Court of Albania, the Supreme Court of Cassation of Serbia, the Supreme Court of North Macedonia, the Supreme Court of Montenegro, the Constitutional Court of North Macedonia and the Constitutional Court of Albania.

³² See e.g. some of the Western Balkan domestic courts that were considered, more or less, to fall into this category of preparedness to use the Convention principles and the Court’s case-law: the State Court of Bosnia and Herzegovina and the Constitutional Court of Serbia.

stances, such courts tend to rely on Convention standards in the difficult cases that they have to decide and utilise those standards to persuade the parties of the correctness of their decision based, *inter alia*, on the Court's case-law. The domestic courts that are considered to be at an "advanced stage" of preparedness to use Convention standards are usually courts which frequently rely on Convention provisions and the Court's case-law and, when they do, such reliance is directly relevant to the case, systematic, coherent and detailed.³³ These courts continually utilise the general principles established by the Court in order to support their *ratio decidendi* even by copying the interpretative principles and argumentative approaches developed by the ECtHR with respect to the justification of restrictions (lawfulness, legitimate aim, proportionality, fair balance, relevant and sufficient test, etc.) as well as with respect to doctrines of positive and negative obligations, margin of appreciation and other tools for assessing the Convention complaints of a particular case. The analysis of the case-law of the ECtHR against Western Balkan States reveals that the Court has mostly been inclined to defer to these particular domestic courts considering that they have demonstrated a faithful application of Convention standards and good know-how with respect to the balancing exercises employed by the ECtHR. Phrases such as "[the Court finds] no strong reasons which would require [it] to substitute its view for that of the domestic courts and set aside the balancing done by them" are almost always used to commend the work done by the domestic courts which have shown an advanced stage of preparedness to use the Convention standards and the Court's case-law.

Nevertheless, it must be pointed out that the mere fact that a national court relies on the Convention provisions and the Court's case-law is not an automatic guarantee that they have indeed correctly applied such standards. The case-law of the ECtHR has demonstrated that, even when such reliance might be present, the manner of application or the substance of the solution offered at the domestic level did not adequately comply with the Convention. However, the reliance on Convention standards by the domestic courts is a very important factor when it comes to assessing the embeddedness of the Convention in the judicial practice of the domestic courts and to assessing their level of expertise in finding and applying the relevant general principles established by the ECtHR. It goes without saying that no domestic court can be

³³ See e.g. some of the Western Balkan domestic courts that were considered, more or less, to fall into this category of preparedness to use the Convention principles and the Court's case-law: the Constitutional Court of Bosnia and Herzegovina, the Constitutional Court of Montenegro and the Constitutional Court of Kosovo.

right in each and every case that it decides, but it is nevertheless important to see how they reason their decisions (even when the final outcome is not confirmed by the ECtHR) in light of the application of the Convention standards and the ECtHR's case-law, so that when cases reach the Strasbourg Court, the latter has before it the view of the domestic courts on how a certain Convention matter should be resolved. That forms the basis of meaningful and relevant judicial dialogue between national courts and the supranational court in Strasbourg. In line with the idea that the ECtHR recognises that more than one "corridor of solutions" is possible provided that the domestic courts apply the ECtHR standards in a proper fashion,³⁴ those domestic courts which are at an advanced stage of preparedness to apply these standards might see their decisions more regularly confirmed by the ECtHR in comparison to the domestic courts which are not inclined to pay sufficient attention to its well-established general principles.

This study offers some good news and some not so good news when it comes to the application of Convention standards and the Court's case-law by the Western Balkan domestic courts. The not so good news is that many domestic courts cannot be considered to have reached the level at which the ECtHR could comfortably and frequently defer to their Convention *ratio decidendi*. As a result, many of these courts must drastically improve the quality of their Convention reasoning before they can be considered the Court's trusted 'Convention partners' at the domestic level. This is so because for many domestic courts surveyed by this study, there is a high number of cases that disclose: (i) a lack of knowledge of the Court's well-established general principles in respect of different Convention provisions; (ii) weak or non-existent reliance on the Convention standards and the Court's case-law, even in cases where such standards would evidently help the final resolution of the domestic case; (iii) a lack of reflection of the arguments raised by the applicants in respect of their Convention complaints which were construed based on the Court's case-law; (iv) an inability to detect even clearly evident violations of Convention rights; (v) brief and poor quality decisions without any elaboration on Convention standards by some domestic courts. However, to end on a more positive note, the good and encouraging news is that the study has come across some very good examples of noteworthy application of Convention standards and the Court's case-law in the judicial practice of each of the 12 highest domestic courts of the Western Balkans. Such examples mean that these do-

³⁴ Çali (2016). See also *Axel Springer AG v. Germany* [GC], no. 39954/08, Judgment (2012), § 62.

mestic courts have what it takes to faithfully implement Convention standards when they choose to do so and that is precisely why this study highlighted and commended these examples in respect of each domestic court. The other promising finding is that such examples are rising in number and there is an evident trend of amelioration in the domestic legal practice if one were to examine the trend of reliance on Convention standards and Court's case-law in the last decade or so.

Therefore, although the overall quality of the 'Convention talk' in the Western Balkans cannot be considered particularly high or sufficiently satisfactory at the present moment, there are promising signs that it is on a good path of advancement and further positive development. The new era of deference will certainly push these domestic courts to assume greater responsibility for securing Convention rights at home and thus substantially increasing their contribution to the overall efficacy and efficiency of the Convention protection machinery by becoming the Court's trusted 'Convention partners' in the Western Balkans. If this prognosis stands true, these courts shall not only contribute more by providing effective redress at the national level but they shall also contribute in affording to the ECtHR the necessary space to focus on highly complex Convention matters rather than on repetitive cases as is now so often the case.

IV. The Strasbourg Court v. the Western Balkans: Impact and Effects

The impact and effects of the Convention protection mechanism and its implementation in various domestic legal orders have produced a considerable amount of academic work as well as other types of practical analyses over the years, albeit not focused specifically on the Western Balkan States.³⁵ This study sought to fill the gap by providing an in-depth analysis of the impact and effects that the case-law of the Strasbourg Court has had in the Western Balkan States from the moment they joined the Council of Europe family to date. To mention just a few notable impact examples, the implementation of the ECHR standards in the Western Balkan States has led to domestic laws and the practices of domestic courts being amended, new laws and new judicial practices being created, new remedies being enacted, criminal proceedings being reopened, police brutality being addressed, victims' rights being recognised, greater protection of minority groups, freedom of expression rights being guaranteed, individuals being released from pre-trial detention, children being reunited with their parents, property owners finally enjoying the fruits of their property, etc.³⁶ This is not a small impact and the effects of the Convention protection machinery in the Western Balkans are by no means negligible.

In the process of conducting this impact assessment analysis for each Western Balkan State, particular attention was paid to the division of duties between the national actors and supranational actors in the process of guaranteeing effective protection of Convention rights in the Western Balkans. As often emphasised in this study, the ECtHR has only a secondary role in the process “ensur[ing] the observance of engagements undertaken” by the States Parties,³⁷ with the domestic authorities holding a primary role in “secur[ing] to everyone within their jurisdiction” the ECHR rights and freedoms.³⁸ This division of power leads to a practical application of the concepts of “shared responsibility” and subsidiarity, where the ECtHR is to treat domestic authorities as “al-

³⁵ Keller and Stone Sweet (2008), Gerards (2014), Motoc and Ziemele (2016), Hammer and Emmert (2012).

³⁶ See, Chapters 2-7, Part IV, point 2.

³⁷ Article 19 of the ECHR.

³⁸ Article 1 of the ECHR.

lies”, not obliging them to act as “its marionettes”, but rather encouraging them “to provide for independent and high level protection of Convention rights in a manner which is compliant with their constitutional and legal systems”³⁹ The cooperation of the ECtHR with national courts and other national authorities should therefore be perceived, on both sides, as open-minded and flexible with the overarching aim of enabling them “to resolve human rights issues, so as to obviate the need for recourse to Strasbourg” but with the ECtHR “having the last word in the event of interpretative disagreement”⁴⁰ In the process of ensuring that the Convention is being correctly implemented by the States Parties, the Court has increasingly shown a preference for deference to responsible courts and responsible domestic authorities which demonstrate reliable and high quality application of the ECHR. In this respect, this study has emphasised that the overarching purpose of deference is “to incentivise national authorities to fulfil their obligations to secure Convention rights, thus raising the overall level of human rights protection”⁴¹ by making the Convention a truly effective and domestic human rights instrument in all Western Balkan States. The analysis below will show that the Court is unable and unwilling to defer to domestic authorities which clearly fail to detect evident Convention violations and allow them to go unnoticed; on the other hand, the Court is more than willing to defer to domestic authorities which apply the Court’s general principles correctly. This is an important aspect for the overall impact and effects of the case-law of the Court at the domestic level considering that the level and quantity of deference afforded to domestic authorities is an indication of the level of embeddedness that the Court’s case-law has had in that particular domestic legal order.

With these important aspects in mind, the analysis in Part IV of the six National Reports sought to assess the impact and effects of the ECtHR case-law in each of the selected States, with some slight but necessary accommodations for the National Report on Kosovo. The main aim of this analysis was to evaluate the types of cases for which the Western Balkan States were found to be in breach of Convention guarantees and subsequently to assess the reaction of the domestic courts and other domestic authorities following violations found at the Strasbourg level. For a clearer analysis and in order to suit the needs of the study, the case-law of the Strasbourg Court was divided into six specific categories, recalled in the introductory part of this chapter. Such in-depth analysis enabled a more detailed examination of the impact and effects of the

³⁹ Gerards and Fleuren (eds) (2014), 51.

⁴⁰ Mahoney (2014), 116.

⁴¹ Spano (2019).

ECHR and the ECtHR's case-law in each particular State. The following part will assess, comparatively, the impact and effects of the ECHR and the ECtHR's case-law in each of the Western Balkan domestic legal orders. Accordingly, this analysis will enable us to see (i) whether there are any particular reasons as to why the ECtHR has found systemic problems for some of the States Parties and not for others and why some States are more prone to repetitive violations being found than others; (ii) which are the most problematic and concerning areas of Convention application for the Western Balkan States which generate the highest number of cases before the Strasbourg Court; (iii) where the Western Balkan States stand vis-à-vis the obligation to ensure Article 13 rights to everyone within their jurisdiction; (iv) in addition to repetitive cases and those which are regularly found under Article 6, in which areas of Convention law the Western Balkan States have most often failed to correctly apply the ECHR standards and the Court's case-law; (v) whether there are good examples of comfortable deference from the Strasbourg Court to the domestic courts and other domestic authorities and what these examples show in terms of the prospects for improving the Convention application at home; (vi) the most important findings from analysing the case-law of the Strasbourg Court on the non-exhaustion admissibility criterion in respect of the Western Balkan States. After concluding this comparative analysis, this part of the chapter will enable us to see whether there is a direct correlation between how well the domestic courts and other 'first-line defenders' in the Western Balkans apply the Convention standards domestically and the inclination of the Strasbourg Court to defer or not to them. By the end of this part, an answer with respect to the overall level of reception and embeddedness of the ECHR in the Western Balkan States will be provided.

In the first category of cases, i.e. cases under Article 46 – where general and/or individual measures have been requested by the Strasbourg Court, the analysis in the National Reports showed that the ECtHR has not invoked Article 46 in respect of all Western Balkan States and not all of them have systemic or structural problems. In this respect, Montenegro and North Macedonia are two of the States against which the Court has never invoked Article 46 in order to request individual and/or general measures or to otherwise declare the existence of systemic problems. On the other hand, for Albania, Bosnia and Herzegovina and Serbia, the Court has invoked Article 46 on many occasions in order to declare the existence of systemic problems or to point to the need for individual and/or general measures.⁴²

⁴² See Chapters 2, 3 and 7, Part II, point 1, sub-point 1.1.

For instance, in respect of Albania, the ECtHR has invoked Article 46 on ten occasions in relation to issues of restitution of property, length of proceedings, reopening of proceedings following an ECtHR judgment and the detention of mentally ill persons in health institutions and in prisons.⁴³ The analysis noted that the reaction of the domestic authorities has been very slow and that it always took several years longer than anticipated for them to implement the measures suggested by the Court, with some measures still pending and yet to be implemented domestically. The approach of the Albanian authorities towards the Court's judgments entailing general measures has produced a high number of repetitive cases before the ECtHR which led to many applications being joined and decided as clone cases by the Strasbourg Court, while the applicants continued to be without effective redress domestically. Only recently has Albania managed to convince the supervisory bodies in Strasbourg that it has taken sufficient measures to address the issue of restitution of property domestically, although, as noted by this study, the issue remains largely unresolved at the domestic level despite the new legislative measures being confirmed by the ECtHR.⁴⁴ The number of individuals still waiting for their restitution of property claims to be resolved according to the existing legislation is extremely high and this almost certainly means that the problem will again appear before the Strasbourg Court.

In respect of Bosnia and Herzegovina, the ECtHR has invoked Article 46 on twelve occasions with regard to issues related to the so called "old" and foreign currency savings, pensions, war damage claims, enforcement of final decisions, and discriminatory ineligibility of applicants to stand for elections to the House of Peoples and to the Presidency of Bosnia and Herzegovina.⁴⁵ While the domestic authorities continue to object to making the necessary constitutional amendments in order to resolve the structural problems found in the *Sejdić and Finci*⁴⁶ line of cases, there are some general measures which, albeit belatedly, have been implemented by Bosnia and Herzegovina and thus closed for further review by the Committee of Ministers.⁴⁷ What is really interest-

⁴³ See [Chapter 2, Part IV, point 1, sub-point 1.1](#). See there also cases where the ECtHR invoked Article 46 in order to point to the individual measures that should be taken in providing targeted redress in some specific cases.

⁴⁴ See [Chapter 2, Part IV, point 1, sub-point 1.1](#). See also, [Chapter 2, Part IV, point 2](#).

⁴⁵ See [Chapter 3, Part IV, point 1, sub-point 1.1](#). See there also cases where the ECtHR invoked Article 46 in order to point to the individual measures that should be taken in providing targeted redress in some specific cases.

⁴⁶ ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, Judgment (2009).

⁴⁷ See [Chapter 3, Part IV, point 2](#).

ing here is this study's finding that all violations declaring a structural problem in which Article 46 was invoked against Bosnia and Herzegovina stem directly from deficiencies in the national legislation and the reluctance of the legislative and executive branches to execute the Court's decisions by adopting the necessary general measures as well as their objections to executing some of the decisions of their own Constitutional Court which pinpointed the same problems as the ECtHR. This study considered this evasive approach on the part of the Bosnian governing authorities to be one which greatly undermines the good work that the domestic courts have been doing as well as the work of the ECtHR in rightly pointing out the necessary measures that ought to be taken in order to make the situation Convention compliant and provide redress to Convention rights holders. To date, there are still a few high profile and important cases in respect of Bosnia and Herzegovina which have not been implemented despite the Court's deadlines having passed many years ago now and despite repeated reprimands by the Committee of Ministers and other international reports evaluating human rights issues in Bosnia and Herzegovina.⁴⁸

In respect of Serbia, the ECtHR has invoked Article 46 on ten occasions in relation to issues concerning "old" and foreign currency savings, the issue of "missing babies" and the pensions issue.⁴⁹ The Committee of Ministers considers all ECtHR judgments requesting general measures to be taken by Serbian authorities to have been implemented, despite noted implementation difficulties and significant delays. The study noted that despite ticking the implementation box to satisfy the requirements of the Committee of Ministers, the domestic authorities have yet to implement the laws and amendments introduced as a result of the Court's judgments so that all potential victims find the sought redress. Therefore, although outside of the supervisory influence of the Convention machinery in Strasbourg, the problems with Article 46 cases remain largely unsolved in practical terms at the domestic level. This means that such cases might again come back to the Court's docket in the event that the implementation of the laws, whose enactment was considered sufficient for the purposes of fulfilling the general measures, does not progress at the suggested speed or with the suggested quality of implementation.

As far as Kosovo is concerned, the study noted that, despite a keen desire to do so, the Constitutional Court was not able to fully replicate the role that supranational supervision from the ECtHR would have had. In relation to gen-

⁴⁸ Ibid.

⁴⁹ See [Chapter 7, Part IV, point 1, sub-point 11](#).

eral measures more specifically, the study observed that although there is no specific competence allowing the Constitutional Court to declare the need for enactment of such measures, a broader interpretation of its role as the final possible guarantor of Convention rights in Kosovo could have been used to express a greater degree of activism in this regard. Such an approach would have been welcomed, especially considering the vacuum left by the ECtHR's lack of jurisdiction over Kosovo. Nevertheless, in some recent cases, the Constitutional Court has been more proactive in hinting to the applicants that, despite its lack of jurisdiction to award pecuniary or non-pecuniary damages, they are entitled to use other domestic means to obtain compensation for the violation of their rights as confirmed by its decision. This alternative approach has generated some success considering that some applicants were successful in obtaining compensation based on judgments of the Constitutional Court finding a violation of the Convention.

According to an interactive map produced by the Council of Europe, the ECtHR has awarded a total of more than EUR 75,000,000 in respect of the Western Balkan countries over a ten year period, from 2011-2021. Ranked in order of the highest amount of damages awarded against each State, Albania leads with EUR 56,600,630, followed by Serbia, with EUR 8,806,169; Montenegro, with EUR 5,334,636; North Macedonia, with EUR 2,335,825; and Bosnia, with EUR 2,276,247.⁵⁰ There are no statistics available for Kosovo due to the lack of competence of the Constitutional Court to award damages following a violation of Convention rights. Most of these pecuniary and non-pecuniary damages awarded by the ECtHR are due to repetitive cases and the failure of the domestic authorities to resolve their underlying structural problems at the domestic level. Now, answering the question as to why the ECtHR has found systemic problems for some of the States Parties and not for others and why some States are prone to more repetitive violations being found by the Strasbourg Court, this study considers that this has to do with the level of proactivity shown by the domestic authorities. For example, the ECtHR did not consider it necessary to invoke Article 46 against North Macedonia in the case of *Alisić and Others* precisely because issues with “old” and foreign currency savings had been resolved beforehand.⁵¹ Similarly, the ECtHR did not consider it necessary to invoke Article 46 against Montenegro in respect of length of proceedings because this particular State had been proactive in introducing

⁵⁰ Council of Europe, Department for the Execution of Judgments of the ECtHR, ‘Payment information’ <Payment information (coe.int)> (accessed 10 January 2022).

⁵¹ ECtHR, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, Judgment (2014).

Convention compliant legislation before the Court had even declared any violation in this respect against them. On the other hand, the situation in Albania, Bosnia and Herzegovina and Serbia reflect a somewhat different approach on the part of the domestic authorities towards domestic structural problems which, as already explained, obliged the Court to draw attention to them as they were posing a threat to the overall effectiveness of the Convention protection machinery.

In the second category of cases, i.e. cases with the highest number of violations, the analysis showed that the highest number of violations, in all of the Western Balkan States, rests with Article 6 issues.⁵² In this respect, ranked in order of the highest number of violations per State, Serbia has been found in breach of different aspects of the right to a fair and impartial trial in 160 cases; North Macedonia in 114 cases; Bosnia and Herzegovina in 73 cases; Albania in 59 cases and Montenegro in 42 cases. The same trend is applicable for Kosovo where the highest number of violations found by the Constitutional Court are also under Article 6 issues. In total, for all of the Western Balkan States, the analysis in this category of cases shows that the highest number of violations has been found in respect of access to court, length of proceedings and enforcement of final and binding decisions. These three Article 6 issues constitute the major problems that applicants face following their tedious litigation before the domestic courts in the Western Balkans. These violations are highly concerning given that the Court's general principles on the issue of access to court, enforcement of final decisions and length of proceedings have been well-established for many years now. Therefore, it is not that domestic authorities in the Western Balkans are having to deal with novel or complex Convention complaints in order to provide effective and Convention compliant solutions to these problems. On the contrary, they ought merely to faithfully implement these readily available principles as a means of offering effective protection to the applicants domestically and thus obviating the ECtHR's need to deal with repetitive clone cases that might be best resolved by the national stakeholders. The other types of violations under Article 6 are more "one-off" types of cases which relate to the specific circumstances of various particular cases. As long as these issues are not repetitive in nature but reflect certain difficulties in solving the Convention questions involved, they do not

⁵² See Chapters 2, 3 and 7, Part IV, point 1, sub-point 1.2. and Chapters 5 and 6, Part IV, point 1, sub-point 1.1. It is noteworthy to highlight that the number of violations per country depends on many factors and while this PhD monograph reports the number of violations with respect to different Convention articles, it does analyse all possible factors that could influence the number and/or types of violations found at the level of the ECtHR.

necessarily pose a huge problem for the Convention protection machinery as the Strasbourg Court is there precisely to deal with these types of cases and especially with cases for which there might not be well-established case-law. Overall, this study observes that the domestic authorities are not always sufficiently active in playing their mandated Convention role in the equation of “shared responsibility” to protect Convention rights when it comes to Article 6 issues, considering that they are constantly found in breach of repetitive cases which could easily be resolved domestically if there were the will and determination to implement the general measures suggested by the Court and follow the well-established and long embedded general principles in respect of Article 6 issues.

In the third category of cases, i.e. cases under Article 13 relating to lack of effective domestic remedies, the analysis showed that all the Western Balkan States have issues in this regard, with some particular States having serious and concerning records of violations in respect of this highly important provision.⁵³ Together with Article 46 cases and those which are repetitive in nature, cases under Article 13 have been considered by this study as the most problematic area for the effectiveness of the protection of Convention rights domestically. Article 13 is considered as a vital provision of the Convention, closely related to the principle of effectiveness, as it guarantees the Convention rights holders that their State (or the State under whose jurisdiction they happen to be) is obliged to provide them with a remedy to enforce the substance of their sought right or freedom. It has been rightly emphasised by the ECtHR that in all instances when Article 13 guarantees are not secured at the domestic level, “individuals will systematically be forced to refer to the Court in Strasbourg complaints that [could] otherwise, and in the Court’s opinion more appropriately” be addressed at the domestic level.⁵⁴ This study has analysed every Article 13 violation found in respect of Western Balkan States.⁵⁵ This analysis shows that, ranked in order of the highest number of violations found per State, Albania has been found in breach of Article 13 in conjunction with other Convention rights in 29 cases; Serbia in 20 cases; North Macedonia in 13 cases; Montenegro in 5 cases; and Bosnia and Herzegovina in 4 cases. While a few violations of Article 13 in respect of Western Balkan States have been found in relation to Articles 3, 5, 8, 14 and Article 3 of Protocol No. 1 to

⁵³ See Chapters 2, 3 and 7, Part IV, point 1, sub-point 1.3. and Chapters 5 and 6, Part IV, point 1, sub-point 1.2.

⁵⁴ ECtHR, *Kudła v. Poland*, no. 30210/96, Judgment (2000), § 155.

⁵⁵ In total, 71 violations declared by the ECtHR have been analysed, in addition to violations for Kosovo declared by the Constitutional Court.

the ECHR, the vast majority of Article 13 violations were found in conjunction with Article 6 and Article 1 of Protocol No. 1, relating to repetitive cases of non-enforcement of final decisions, length of proceedings and property issues.⁵⁶ A similar trend is applicable in Kosovo where most of the Article 13 violations found by the Constitutional Court are related to Article 6 and Article 1 of Protocol No. 1 issues.⁵⁷ The repetitive violations are especially concerning as they relate to issues of which the States are very well aware but they nevertheless fail to undertake the appropriate Convention compliant measures to put an end to the continuing trend of such violations.

In the fourth category of cases, i.e. cases with violations under other articles of the Convention, the analysis showed the existence of different types of cases against each of the Western Balkan States,⁵⁸ with some having more distinctive and interesting body of case-law than others. In this category of cases, the study focused on violations that are more specific and which differ from those repetitive Article 6 issues. In total, from the beginning of litigation before the ECtHR up to the end of 2021, the Western Balkan States that are under the supervision of the Strasbourg Court were found in violation of the Convention on 676 occasions; in violation of Article 6 as the leading provision on 447 occasions; in violation of Article 1 of Protocol No. 2 as the second leading provision on 172 occasions; and in violation of Article 13 as the third leading provision on 66 occasions. The rest of the violations were found in respect of other Convention rights, with there being, in many instances, more than one violation per case. Ranked in order of the highest number of violations found per State in respect of other Convention articles, Serbia was found in breach of other provisions of the Convention on 128 occasions (with 232 judgments in total);⁵⁹ Bosnia and Herzegovina with 94 violations under other articles of the Convention (with 105 judgments in total);⁶⁰ North Macedonia with 63 violations under other articles of the Convention (with 185 judgments in total);⁶¹ Albania with 41 violations under other articles of the Convention (with 86 judg-

⁵⁶ See Chapters 2-7, Part IV, point 1, sub-point 1.2. for a full analysis of each Article 13 violation found by the ECtHR against the Western Balkan States.

⁵⁷ For Kosovo specifically, see [Chapter 4, Part III](#).

⁵⁸ See Chapters 2, 3 and 7, Part IV, point 1, sub-point 1.4. and Chapters 5 and 6, Part IV, point 1, sub-point 1.3.

⁵⁹ Excluding from this statistic 160 violations under Article 6 and 20 violations under Article 13, referred to in the two previous categories of cases.

⁶⁰ Excluding from this statistic 73 violations under Article 6 and 4 violations under Article 13, referred to in the two previous categories of cases.

⁶¹ Excluding from this statistic 114 violations under Article 6 and 13 violations under Article 13, referred to in the two previous categories of cases.

ments in total),⁶² and Montenegro with 25 violations under other articles of the Convention (with 68 judgments in total).⁶³ These statistics show that the highest number of violations under other articles of the Convention relates to property issues where, ranked in order of the highest number of violations found per State, Serbia has been found in violation of Article 1 of Protocol No. 1 on 87 occasions; Bosnia and Herzegovina on 57 occasions; Albania on 24 occasions; North Macedonia on 14 occasions; and, Montenegro on 5 occasions. The third category of cases with the highest number of violations related to Article 13 violations which have been covered in the preceding category of cases. In terms of the total number of violations found against all of the Western Balkan States supervised by the ECtHR, ranked in order of the highest number of violations per Article (excluding Article 6 cases), the Western Balkan States have been most frequently found in violation of Article 1 of Protocol No. 1, on 172 occasions; Article 13, on 66 occasions; Article 3, on 43 occasions; Articles 5 and 8, on 36 occasions each; Article 10, on 12 occasions; Article 2, on 9 occasions; Article 14, on 8 occasions; Article 11 and Article 1 of Protocol No. 12, on 5 occasions each; Article 3 of Protocol No. 1, on 4 occasions; Article 7, Article 34 and Article 4 of Protocol No. 7, on 2 occasions each; and Article 9, on 1 occasion.

These statistics are necessary to observe the trend of violations found by the Strasbourg Court in respect of the Western Balkan States (jointly and separately) as a means of spotting the critical areas where they lack efficient application of Convention standards and the Court's case-law. These statistics show clearly that the major issues for the Western Balkan States rest firmly with issues related to the right to a fair and impartial trial (mainly non-enforcement of judicial decisions and length of proceedings), property issues (mainly due to "old" and foreign currency savings, restitution of property, pensions and war claim damages) and the effectiveness of domestic remedies to address Convention violations, especially those related to the most frequent violations under Article 6 and Article 1 of Protocol No. 1. Additionally, these statistics and the analysis provided in the National Reports are also necessary to observe the other areas where the Western Balkan States have difficulties in correctly applying the Convention standards and the Court's case-law. The most problematic areas stemming from the violations of provisions other than Articles 6 and 13 and Article 1 of Protocol No. 1, pertain to issues related to

⁶² Excluding from this statistic 65 violations under Article 6 and 29 violations under Article 13, referred to in the two previous categories of cases.

⁶³ Excluding from this statistic 42 violations under Article 6 and 5 violations under Article 13, referred to in the two previous categories of cases.

the prohibition of torture, degrading and inhuman treatment; the right to liberty and security; the right to private life; freedom of expression; the right to life and the prohibition of discrimination. Additionally, while fewer in number, the case-law of the Strasbourg Court also shows issues in the Western Balkan States which are related to freedom of assembly and association; the right to free elections; the right to no punishment without law; the right to file individual applications; the right not to be tried or punished twice; and, freedom of thought, conscience and religion.

Considering the vast number of cases under this broad category of problematic areas and the practical impossibility of commenting on every case against each of the selected States, this study chose to showcase in the National Reports at least one leading case (at times more depending on their importance) from every article of the Convention for each State.⁶⁴ The choice of cases was made bearing in mind the aim of the study and thus focusing on those cases where the violation occurred due to the evident inability of the domestic courts to detect the violation beforehand despite having the chance to do so. Overall, the analysis showed that, albeit successful in some areas, the domestic courts have often been unsuccessful in detecting clear violations of Convention provisions. The most concerning aspect in this regard is that if these courts had used the already embedded and well-established general principles created by the ECtHR, they would have been able to act as better 'Convention filterers' and better 'last-line defenders' domestically. The least concerning aspect relates to instances in which the domestic courts made serious attempts to balance the rights and freedoms and to decide the Convention matter to the best of their knowledge by using the Convention standards and the Court's case-law – but they simply did not manage to strike the right balance in that particular case. This aspect does not raise concerns about the application of the ECHR at the domestic level as it at least shows the best efforts that have been made by the domestic courts in correctly applying the Convention standards and any possible interpretative flaws may be corrected in the future by aligning their stance and ensuring that it conforms with the subsequent case-law of the Strasbourg Court on that matter.

In the fifth category of cases, i.e. cases where no violation was found, the analysis presented in the National Reports showcased some very good examples of proper application of Convention standards and the Court's case-law

⁶⁴ See Chapters 2-7, Part IV.

by the domestic courts.⁶⁵ This section of the study demonstrated that, indeed, the ECtHR is ready to defer to responsible and strong domestic courts when they demonstrate that they have done a good job in applying Convention standards. This study considers it vital to highlight the existence of such good examples in each of the selected States as a means of demonstrating that each of the domestic courts has what it takes to apply the Convention standards and the Court's case-law when they choose to do so and when they treat Convention complaints with the utmost seriousness. From a statistical point of view, in total, from the beginning of litigation before the ECtHR up to 1 January 2022, the Strasbourg Court declared Convention complaints admissible for review on the merits but found that the Western Balkan States had not violated such Convention rights on 107 occasions, Serbia leading with 43 cases; North Macedonia with 28 cases; Albania with 15 cases; Bosnia and Herzegovina with 13 cases and Montenegro with 8 cases. The analysis in respect of Kosovo also showed that the Constitutional Court had increased the number of cases which were declared admissible but where no violation was then found. The trend of non-violations in respect of Convention rights is similar to the trend with violations but not identical. For instance, at the level of all of the Western Balkan States, while most non-violations are under Article 6, the number of non-violations is quite low in respect of Article 1 of Protocol No. 1 (nine in total) and Article 13 (three in total). The next article with most non-violations is Article 3 where twenty non-violations have been recorded. Non-violations have also been recorded in respect of Articles 2, 5, 7, 8, 9, 10, 14 and 34. The case-law examined under this specific category displays in the best manner the inclination of the ECtHR to defer to domestic courts and other 'first-line defenders' in the Western Balkans when they prove that they have correctly applied the Convention standards. As such, the examples referred to in this section should further motivate the domestic authorities in the process of embedding the Convention principles and case-law of the Court so that the number of deference cases increases in the future. The higher the number of cases in which the ECtHR decides to defer to the domestic authorities, the higher the quality of implementation of Convention standards domestically, which means that there is certainly a link between how often the ECtHR defers to domestic courts and the quality of Convention decision-making at the national level.

⁶⁵ See Chapters 2, 3 and 7, Part IV, point 1, sub-point 1.5. and Chapters 5 and 6, Part IV, point 1, sub-point 1.4.

In the sixth category of cases, i.e. other important cases related to exhaustion of domestic remedies, the analysis showed some of the most important inadmissibility decisions related to cases in which certain Convention complaints were declared inadmissible due to the applicant's failure to exhaust domestic remedies before the national courts, and cases in which the Court dismissed the Government's observation that the applicant(s) had failed to exhaust a particular remedy.⁶⁶ This part was important to reflect the arguments of the parties, the governments and of the Court as to why the domestic systems of different Western Balkan States offer or do not offer effective domestic remedies. This part showed that the ECtHR is not ready to accept arguments concerning the effectiveness of domestic remedies without the domestic authorities proving, via national case-law, that such suggested remedies have indeed been effective in practice and are not just illusory or theoretical in nature. Additionally, this part also showed instances of reckless observations on the part of governments insisting on the effectiveness of domestic remedies which had already been declared ineffective by the ECtHR. Lastly, this part showed that the ECtHR is also not ready to admit for review on the merits any case in which the applicants fail to prove the ineffectiveness of the domestic remedies or any case in which they failed to follow the exhaustion line of domestic remedies before approaching the Strasbourg Court. Among the most important cases commented on under this category was the Grand Chamber case of *Vučković and Others*,⁶⁷ in which the ECtHR concisely quantified and confirmed the general principles pertaining to the exhaustion of legal remedies, while, as suggested by some authors, requiring the applicants, with more persistence than in its previous case-law "to be more diligent in raising their Convention complaints for domestic remedies to be properly exhausted".⁶⁸

The preceding analysis of the judicial exchanges between the Western Balkan States and the Strasbourg Court reflects the presence of "confirmative" and "corrective" dialogue between the ECtHR and the domestic courts, while there is an evident lack of the two other types of dialogue that academics have noted as possible exchanges with other States Parties to the Convention, namely "dialogue with discrepancy" and "proposed dialogue".⁶⁹ This could potentially

⁶⁶ See Chapters 2, 3 and 7, Part IV, point 1, sub-point 1.6. and Chapters 5 and 6, Part IV, point 1, sub-point 1.5.

⁶⁷ ECtHR, *Vučković and Others v. Serbia* [GC], nos. 17153/11 and 29 others, Judgment (2014), §§ 69–77. See also, Spano (2018), 486.

⁶⁸ See Spano (2018), 486. For a criticism of the approach employed by the ECtHR, see the Joint Dissenting Opinion of Judges Popović, Yudkivska and De Gaetano in ECtHR, *Vučković and Others v. Serbia* [GC], nos. 17153/11 and 29 others, Judgment (2014).

⁶⁹ López Guerra (2017). See also, more generally, [Chapter 1, Part III](#).

mean either of the following two things. Firstly, that the domestic courts in the Western Balkans agree on every possible point with the ECtHR, which by the very nature of adjudication is highly unlikely; or, secondly, that the domestic courts in the Western Balkans do not have the capacity, confidence or interest to engage in profound Convention dialogue with the ECtHR through the other two types of possible judicial exchange. After evaluating the case-law of the domestic courts and their reaction to the Strasbourg Court's case-law in general, this study suggests that the lack of two other types of debate is mostly due to the second possibility. In this respect, although this study does not support, under any circumstances, the stance of some domestic courts in the Council of Europe that explicitly refuse to follow the Court's decisions or domestic courts that show some form of hostility towards the jurisdiction of the ECtHR, neither does it support the idea that the domestic courts should merely apply ready-made case-law without trying to influence the further development of Convention law by engaging in respectful and professional judicial dialogue with the ECtHR. In this sense, the fact that there are no records of Western Balkan domestic courts engaging in other types of dialogue with the ECtHR is more a sign of their disinterest or lack of confidence to engage in profound 'Convention talk' with the ECtHR than a sign that they are highly respectful of the Court's decisions. That said, overall, this study considers that, although the level of embeddedness of the ECHR and the case-law of the ECtHR in the domestic legal order of the Western Balkan States cannot be considered as highly satisfactory, there are good signs pointing to its continuing improvement and the inclination of the domestic courts to rely more and more on Convention standards in deciding their cases.

V. A ‘Western Balkan of Rights’: Final Conclusions and Recommendations

As stated above, the final part of this study will offer a list of possible answers to the following question: How can the Western Balkans become ‘A Western Balkan of Rights’ and what does it ultimately take to bring the Convention home? In addressing this question, this study will draw some final conclusions and recommendations to that end.

Bringing the Convention home, embedding it and making it a truly domestic instrument is the ultimate goal with a view to attaining effective protection of Convention rights and freedoms across the Western Balkans. While utilising the embeddedness efforts undertaken by the ECtHR since its inception, and its current inclination to defer to the *ratio decidendi* of “diligent” and “responsible courts”,⁷⁰ the ultimate aim for the Western Balkan States should be to increase their level of implementation of Convention standards domestically, thereby playing their role as primary defenders of Convention rights with very little supranational intervention by the ECtHR except in highly difficult cases that cannot be solved nationally due to the need for a highly complex interpretation of the Convention. For all other cases where there is well-established case-law of the Court and clearly elaborated general principles as to how to conduct a proper analysis of a certain Convention complaint, the Western Balkan States should play their part in terms of the shared responsibility to offer effective protection of Convention rights at home. This should be the ultimate purpose of all reception and embeddedness processes combined.

Although all six Western Balkan States are to be considered at a comparable level of application of Convention standards, the level of reception, embeddedness and deference in these States varies and is highly dependent on how seriously the domestic authorities take the Convention standards and the Court’s case-law. For instance, while some States Parties (e.g. Montenegro and North Macedonia) were proactive in introducing general measures on their own motion and without the need for the ECtHR to invoke Article 46 in any case against them, there are other States Parties (e.g. Bosnia and Herzegovina) which explicitly refuse to implement certain decisions of the ECtHR, and other States Parties (Albania and Serbia) which are constantly in a state of de-

⁷⁰ Çali (2016) and Mjöll Arnardóttir (2017).

lay when it comes to implementing the general measures suggested by the Strasbourg Court.⁷¹ While there will always be a need for the ECtHR as a final interpreter of the Convention, national courts in the Western Balkans must at least become sufficiently capable of detecting and providing redress for evident, repetitive and well-established Convention violations. One of the aims for all Western Balkan States should be that cases against them which reach the Court's docket should primarily be cases which presented significant difficulties in terms of resolving the Convention question at the domestic level and which will also be challenging for the ECtHR itself to solve. The idea is that domestic authorities should become better equipped to absorb the already well-established principles of the Court on all Convention rights as well as becoming capable of following up on new developments in the case-law of the Court so that they can swiftly and efficiently align their judicial practice with the newly established or refined principles of the Convention as a living instrument that is constantly evolving.

Going back to the final question of this PhD monograph referred to at the beginning of this part, as a preliminary note, it should be emphasised that it takes much more than simply referring to the ECHR and the case-law of the Court to truly bring the Convention home in the Western Balkans. There are at least four fundamental traits that each State must possess for the Convention to be considered a fully domesticated human rights instrument in the Western Balkan States. The existence of these fundamentals is a necessary prerequisite for generating the much needed impact and effects of the Convention and the case-law of the Court in the selected States. Although these fundamentals might or might not apply to the domestic situation of other member States of the Convention protection machinery, the following proposals are specifically relevant to the Western Balkan States and are based on the preceding assessment of the current level of reception and (lack of sufficient) embeddedness of the Convention and the ECtHR's case-law.

Firstly, starting with the very basics, the Convention must have at least supra-legislative status within the constitutional orders of each State.⁷² This is a basic precondition for all other points that will follow. The analysis provided in the six National Reports confirms that this precondition exists in all of the Western Balkan States. The monist approach endorsed by all six Western Balkan

⁷¹ See Chapters 2-7, Part IV, point 2.

⁷² Keller and Stone Sweet (2008), where this is defined as the first reception mechanism of the ECHR within a domestic legal order.

States allows for the direct applicability of the Convention in these domestic legal orders by also enabling applicants to rely directly on Convention provisions before the domestic authorities.

Secondly, there is a need to introduce mandatory procedures for *ex ante* review of the compatibility of any proposed legislation with the Convention and the case-law of the Court. This is a very important step in deepening the embeddedness of the ECHR within a domestic legal order. Having supra-legislative status means that the ECHR is above all ordinary law and, as a result, the laws of each State must be Convention compliant.⁷³ Although all the Western Balkan States recognise (directly or indirectly) that laws ought to be in line with the Convention and that the Convention is above all ordinary law, there is no specific procedure obliging the executive and legislative branches in any of the selected States to formally ensure that any proposed legislation is Convention compliant. As a result, there is a need for a formal procedure (similar to the procedure for examining the compatibility of legislation with the *acquis* of the European Union) to be established. Such a procedure should oblige the executive branch and all other parties that are entitled to propose legislation to submit a formal analysis and declaration with respect to the compatibility of the proposed legal initiative with the ECHR and the case-law of the ECtHR. Similarly, such a procedure should also oblige the legislative branch to formally and actively analyse whether each proposed legal initiative, including the ones stemming from its members, is Convention compliant or not. One of the long-term benefits of this compliance mechanism would be that whenever the Strasbourg Court has a case before it, the domestic authorities can defend their stance by relying, *inter alia*, on the legislative history which would show how they had analysed and ensured the compatibility of the proposed legislation with the Convention. This study pointed to the evidence that there is an increased preference on the part of the ECtHR to defer to domestic authorities which have done a good job in enacting Convention compliant laws or judicial decisions.⁷⁴

Thirdly, there is a need for strong domestic courts which are capable of acting as 'first' and 'last-line defenders' of Convention rights at the domestic level before cases reach the docket of the Strasbourg Court. While the first and second fundamentals referred to above are very important on their own, if a State does not have strong, capable and independent domestic courts which

⁷³ Keller and Stone Sweet (2008), where this is defined as a second reception mechanism which operates in more discrete institutional settings.

⁷⁴ See [Chapter 1, Part IV](#).

are adequately skilled to meticulously assess whether the actions of the other branches of government are Convention compliant, the embeddedness of the ECHR in the Western Balkan States can never be considered satisfactory, let alone flawless. As a result, this study advocates that the need for strong domestic courts is the most important fundamental trait for proper and profound domestication of Convention standards and the Court's case-law. As 'first-line defenders', the domestic courts are able to act on all occasions when they are called upon to review the compatibility of any proposed legislation, either through an incidental control procedure filed by the regular domestic courts or through other procedures of legislative review. As 'last-line defenders', the domestic courts are able to act on all occasions when they are called upon to review, as a last possible instance before the Strasbourg Court, the final decisions of the domestic courts and other public authorities. The exercise of both competences, including other interrelated judicial competences, requires strong domestic courts which have the necessary expertise to correctly and faithfully implement Convention standards and the case-law of the ECtHR at the domestic level. As we have seen, the Strasbourg Court is ready to defer only to such courts.

A question that naturally presents itself is, what is then to be considered a strong domestic court for the purposes of sound Convention application? The following elements might contribute in providing a non-exhaustive answer to this question, namely that a strong court is: (i) a court which has the necessary capacities to absorb the general principles established by the ECtHR; (ii) a court which takes seriously every Convention complaint and responds to the arguments raised by the parties through the application of Convention based arguments and counter-arguments to approve or refute the allegations raised; (iii) a court which is able to apply the general principles established by the ECtHR in the concrete circumstances of the national case through proper usage of interpretative and argumentative methodologies shaped by the ECtHR; (iv) a court which is able to finally convince the public that the parties have been duly heard and that the final outcome of the case is based on the Convention standards and the Court's case-law. Such strong courts should play the role of 'mini-Strasbourg courts' at the domestic level by replicating the review that the Strasbourg Court would conduct in relation to the Convention complaints raised, thereby acting as gatekeepers to possible Convention violations. While the domestic courts themselves have their share of responsibility in taking measures that will help them become stronger courts, the executive and legislative branches have a massive responsibility to create the necessary conditions for such strong and independent domestic courts to flourish within

their domestic legal orders. This, of course, is easier said than done considering that it requires strong incentives and political will which is not always present in the Western Balkan States. The analysis of the judicial practice of the 12 highest domestic courts shows that whilst many courts do possess elements of strong domestic courts in respect of Convention application, there is considerable room for improvement for all of the Western Balkan domestic courts to fully deserve this title.

Fourthly, there is a need to increase considerably the workings of the “informal” reception mechanisms related to know-how, knowledge sharing and its production at the domestic level.⁷⁵ Although referred to as the last element, this is certainly not the least important element when it comes to assisting the embeddedness efforts at the domestic level to the most practical extent possible. In fact, without the presence of these informal reception mechanisms, a profound embeddedness of the ECtHR in all spheres of public life will never be achieved. There are numerous informal mechanisms that might help in raising the awareness, knowledge and practical utilisation of the Convention standards and the Court’s case-law. To name a few, there is a need for the Western Balkan States to: (i) increase the number of translations of important judgments into domestic languages for the courts, applicants and other interested parties to use; (ii) utilise and promote the knowledge-sharing materials produced by the ECtHR (the Jurisconsult directorate), namely case-law guides, case-law information notes, case-law reports (by also translating them into domestic languages, if no translation has already been provided by the ECtHR); (iii) create effective case management tools for judges and court lawyers to use at the domestic level; (iv) create special units within courts which create and disseminate relevant Convention know-how and information as well as specialised units which assist judges with ECtHR case-law research and legal drafting; (v) facilitate continuing professional development programs including by sending judges and court lawyers to longer-term secondment scheme training programmes at the ECtHR; (vi) increase the visibility of their domestic case-law related to the application of the Convention by publishing all cases on their websites as well as publishing yearly reports, case-law bulletins and other materials that can help to increase the level of utilisation of Convention standards and the Court’s case-law in their domestic legal system; (vii) improve their case-law search engines and databases so that it is easy to navigate them and easy to find the relevant ECtHR case-law that has been utilised

⁷⁵ Keller and Stone Sweet (2008), where information with respect to knowledge production is regarded as one of the more informal reception mechanisms.

by the domestic courts; (ix) create the conditions for profound and frequent formal and informal dialogue between the highest domestic courts, the lower courts and other key players that are involved in Convention application at the domestic level.

Despite the fact that there are certainly many other factors which have a direct and indirect effect on the embeddedness of the ECHR and the case-law of the Court in a domestic legal order, this study considers the existence of the four fundamental traits referred to above as indispensable for the Convention to be considered a properly domesticated human rights instrument in the Western Balkans. As highlighted above, the presence of these four fundamentals in a national legal system is an essential prerequisite for generating the much needed impact and effects of the Convention and the case-law of the Court in the selected States. Without the ECHR having a favourable status in the domestic legal order, without strict and formal mechanisms to control the conventionality of laws and other decisions of public authorities, without strong and capable domestic courts which are able to apply the Court's case-law, and without the assistance of informal knowledge-producing and knowledge-sharing mechanisms – it is impossible to reach a state of satisfactory level of embeddedness. The analysis in this study has shown, through concrete examples and observations, that while some of these fundamentals are present in all of the Western Balkan States, most of them are only partly present. Therefore, there is a need for the Western Balkan States to intensify their efforts in creating the necessary conditions for all of these fundamental traits to be fully present in their domestic legal orders. The full presence of these fundamentals is what it will ultimately take to bring the Convention home in a 'Western Balkans of Rights'.

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Curriculum Vitae

Venera Kabashi is a lawyer based in Strasbourg with a keen interest in the domestic enforcement of the ECHR and the case-law of the ECtHR. She completed her PhD in law at the University of Zurich in Switzerland (2023); her LL.M. at University College London in the United Kingdom (2012); and her basic studies in law at the University of Prishtina in Kosovo (2008). She served as Senior Legal Advisor/Chief Legal Advisor at the Constitutional Court of Kosovo, and she has spent several periods of time at the European Court of Human Rights for the purpose of conducting academic research and study visits. She is presently engaged as an independent legal expert on matters related to Kosovo's accession to the Council of Europe. Ms. Kabashi speaks Albanian, English, French and Bosnian-Croatian-Serbian.

What does it ultimately take to bring the ECHR home in all Western Balkans States and embed it properly within these domestic legal orders? This is the main query of this PhD thesis. How have the domestic courts and other domestic authorities reacted following violations found at the Strasbourg level in respect of their State? How often do the highest domestic courts in the Western Balkans engage in Convention talk and what is the quality of such judicial dialogue? What are the roles of the ECtHR and of the domestic courts in view of their shared responsibility to secure and ensure effective protection of Convention rights? When can the Strasbourg Court comfortably defer to the *ratio decidendi* of the domestic courts and other domestic authorities? What has been the impact and effects of the Convention and the ECtHR's case-law in Albania, Bosnia and Herzegovina, Montenegro, Kosovo, North Macedonia, and Serbia? What are the good and not so good ECHR embeddedness practices that may be noticed across the Western Balkan States and what are the recommendations that this study suggests with a view to achieve better embeddedness/domestication of the ECHR? These are only some of the remaining research questions that are explored in this PhD monograph.