'Principled Resistance' Meets '*ultra vires*': New Techniques in Opposing ECtHR Judgments

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Abstract

This article engages with the most recent jurisprudential developments in Poland and discusses them against the backdrop of the doctrinal concept of 'principled resistance'. It is submitted that the Polish Constitutional Tribunal, alongside with well-known arguments from the principled resistance background, introduced a new doctrinal argument into the Convention context, thereby borrowing the *ultra vires* doctrine known from the European Union (EU) context. This jurisprudence is interpreted as the endeavour to shield the sovereignty of the Polish State, and the competences of the Constitutional Tribunal, against interference from Strasbourg. At the same time, the pan-European dimension of the Polish rule of law crisis is addressed.

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DOI 10.17104/0044-2348-2022-3-641

https://doi.org/10.17104/0044-2348-2022-3-641, am 15.08.2024, 16:32:16
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Keywords

principled resistance – *ultra vires* – *Xero Flor* – *res interpretata* – rule of law backsliding

I. Introduction

Over the past 70 years, human rights protection in Europe has seen a marked increase in judicialisation. The European Convention on Human Rights (ECHR or 'the Convention')[1] largely contributed to this process. While in the early days of the European Court of Human Rights (ECtHR, 'the Strasbourg Court' or 'the Court'), human rights protection was aptly characterised as an exercise of 'legal diplomacy',[2] the approach has become more and more straightforward in recent years. Protocol No. 11,[3] which abolished the former Commission of Human Rights and concentrated human rights supervision in the hands of the (now permanently established) Court, appears to have been a turning point in this process.[4] Together with the Court's evolutive interpretation method (the 'living instrument' doctrine),[5] this jurisprudence laid the foundations of an ever-increasing human rights standard.[6]

However, this trend towards more and more judicial human rights protection was not welcomed by everyone – especially not by all States that are

1 Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, ETS No. 5.

2 See Mikael Rask Madsen, 'Legal Diplomacy – Law, Politics and the Genesis of Postwar European Human Rights' in: Stefan-Ludwig Hoffmann (ed.), *Human Rights in the Twentieth Century: A Critical History* (Cambridge: Cambridge University Press 2011), 62-81.

3 Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby of 11 May 1994, ETS No. 155.

4 For a similar analysis, see Mikael Rask Madsen, 'The Narrowing of the European Court of Human Rights? Legal Diplomacy, Situational Self-Restraint, and the New Vision for the Court', European Convention on Human Rights Law Review 2 (2021), 180-208 (181).

5 Locus classicus: ECtHR, *Tyrer v. United Kingdom*, Judgment of 25 April 1978, no. 5856/72, para. 31.

6 In this vein, e. g. ECtHR (Grand Chamber), *Selmouni v. France*, Judgment of 28 July 1999, no. 25803/94, para. 101: 'However, having regard to the fact that the Convention is a "living instrument which must be interpreted in the light of present-day conditions" […], the Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.'

https://doi.org/10.17104/0044-2348-2022-3-641, am 15.08.2024, 16:32:16
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subject to the ECtHR's jurisdiction. Therefore, alongside with the increase in human rights protection, we have seen a rise in resistance to the Court. This phenomenon, which is not only known from the Convention context but also from other international courts and tribunals, has instigated a number of theorisations. One of these theorisations is the new scholarly concept of 'principled resistance' which forms the core of the present paper.

This paper proceeds as follows: Part one seeks to explain the concept of principled resistance. After distinguishing permissible forms of resistance from impermissible ones along the lines of '*res judicata*' and '*res interpretata*', it ends with a differentiation of the principled resistance paradigm from other scholarly concepts. Part two presents most recent jurisprudential developments in Poland. Two instances of Polish reactions to the ECtHR's *Xero Flor* judgment are considered. In this judgment, Strasbourg had declared the Polish Constitutional Tribunal not to be 'established by law'. The third case under analysis deals with Polish reactions to further relevant case law from Strasbourg. Part three analyses this case law against the backdrop of the principled resistance paradigm. By declaring ECtHR judgments to be *ultra vires*, the Polish Constitutional Tribunal introduced a legal technique into the Convention context that was previously dominant in the EU context. It is submitted that due to the confrontational gesture of the *ultra vires* argument and the fact that it leaves no room for a legal compromise, the Polish case law has an impact that equals principled resistance. Thus, the concept of principled resistance can help us to better understand and evaluate the disruptive potential of the Polish jurisprudence for the Convention system as a whole. At the same time, the paper endeavours to contextualise this phenomenon with the debate on Polish rule of law backsliding, seen from a pan-European perspective.

II. Part One: Taking Stock

1. Defining Principled Resistance

The notion of 'principled' can be interpreted in different ways. According to the Oxford English Dictionary, it may have connotations such as 'taking a position on principle' or 'acting in accordance with morality, showing recognition of right and wrong'.[7] In the context of resistance to the ECtHR, it can be understood as referring to a particularly principled position taken by an

[7] See <www.oed.com>, entry 'principled'.

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actor, who thereby expresses resistance to a particular judgment. Equally, it could refer to an exceptional character of resistance. That is to say that usually, the State is willing to implement ECtHR judgments whilst in exceptional circumstances, it refuses to do so.

However, the principled resistance concept does not capture each and every type of conflict. The principled resistance concept focuses on situations where implementation of ECtHR judgments will be (or is likely to be) definitely blocked at the national level for genuinely legal reasons. The paradigm concentrates on such impasse situations because those situations pose a serious risk for the functioning of the Convention system as a whole.[8] At the same time, analysing the legal obstacles brought forward in such cases allows us to better understand whether the lack of implementation is the result of mere political unwillingness, whether there are legal obstacles that may be difficult, albeit not impossible, to overcome, or whether there is a risk of a true deadlock situation.[9] Hence, principled resistance is understood to have the following characteristics:

> '(1) It is a legal conflict, normally resulting from a clash between the national constitution and the Convention. (2) The conflict leads to a permanent blockade, in the sense that an ECtHR judgment cannot and will not be implemented. This may result either (a) from a deep disagreement between a national actor and the Court on the protection of human rights or (b) from a conflict between the ECtHR judgment and "national identity" (or indeed both of them).'[10]

To a certain degree, the definition of principled resistance was inspired by the 2015 Judgment No 21-П/2015 of the Russian Constitutional Court ('the RCC'),[11] Russia at that time still being a party to the Convention.[12] In its judgment, the RCC indicated two possible avenues for resisting an ECtHR judgment: one related to international law and one related to constitutional law. However, adopting this two-pronged approach was not merely accidental. It reflects the imperatives of logic whereby a national judge who intends

8 See the warnings by former Commissioner for Human Rights Nils Muižnieks, *Annual Activity Report 2016* (Council of Europe 2017), 8, 71.

9 See Marten Breuer, '"Principled Resistance" to ECtHR Judgments: Dogmatic Framework and Conceptual Meaning' in: Marten Breuer (ed.), *Principled Resistance to ECtHR Judgments – A New Paradigm?* (Berlin, Heidelberg: Springer 2019), 3-34 (16 et seq.).

10 Breuer (n. 9), 20.

11 RCC, Judgment no. 21-П of 14 July 2015.

12 Russia ceased to be a party to the Convention on 16 September 2022, see the ECtHR Plenary's Resolution on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights of 22 March 2022, para. 1; Resolution CM/Res(2022)3 on legal and financial consequences of the cessation of membership of the Russian Federation in the Council of Europe, adopted on 23 March 2022, para. 7.

https://doi.org/10.17104/0044-2348-2022-3-641, am 15.08.2024, 16:32:16
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to oppose an international judgment will have two options of expressing opposition: either by questioning the international outcome or by opposing the result achieved internationally by the imperatives of national law.[13] The latter scenario is enabled by the fact that nationally – not internationally![14] –, in many (if not in most) countries, the national constitution enjoys supremacy vis-à-vis international treaty law. So, while there were reasons of logic, the RCC gave the distinction between the international and the national level a particularly vociferous expression. Therefore, the 2015 judgment will be used here for illustrative purposes.

The first avenue of resistance relied on by the RCC is derived from the rules of treaty interpretation as enshrined in the Vienna Convention on the Law of Treaties (VCLT).[15] The RCC begins its reasoning with a reference to the ordinary meaning rule, today found in Article 31 § 1 VCLT. It continues to explain that

> 'if the European Court of Human Rights, interpreting a provision of the Convention for the Protection of Human Rights and Fundamental Freedoms in the course of the consideration of a case, gives to a notion used in the Convention a meaning other than the ordinary one or carries out interpretation contrary to the object and purpose of the Convention, the state, in respect of which the judgment has been passed on this case, has the right to refuse to execute it as it goes beyond the obligations, voluntarily taken by this state upon itself when ratifying the Convention.'[16]

Three key points are worth mentioning here: (1) The RCC's argument is what appears in the above definition of principled resistance as a form of 'deep disagreement between a national actor and the [ECtHR] on the protec-

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[13] Marten Breuer, 'Principled Resistance to the European Court of Human Rights and Its Case Law: A Comparative Assessment' in: Helmut Philipp Aust and Esra Demir-Gürsel (eds), *The European Court of Human Rights. Current Challenges in Historical Perspective* (Cheltenham, UK; Northampton, MA, USA: Edward Elgar 2021), 43-70 (52); cf. similarly the differentiation between 'local contestation' and 'internationally-minded contestation' by Antonios Tzanakopoulos, 'Final Report. Mapping the Engagement of Domestic Courts with International Law' in: International Law Association, *Report of the Seventy-Seventh Conference Held in Johannesburg August 2016*, 2017, 996-1028 (1022).

[14] From the perspective of international law, even obstacles coming from the constitution do not justify non-observance of an international treaty, see Article 27 VCLT and Article 32 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA); for details, see Breuer (n. 9), 5 et seq.

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

[16] RCC, Judgment no. 21-П of 14 July 2015, para. 3 (translation of the Venice Commission, CDL-REF(2016)019); see Vladimir Starzhenetskiy, 'The Execution of ECtHR Judgements and the "Right to Object" of the Russian Constitutional Court' in: Marten Breuer (ed.), *Principled Resistance to ECtHR Judgments – A New Paradigm?* (Berlin, Heidelberg: Springer 2019) 245-272 (262 et seq.).

https://doi.org/10.17104/0044-2348-2022-3-641, am 15.08.2024, 16:32:16
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tion of human rights'.[17] (2) The argument revolves around treaty interpretation, i. e. it is clothed in methodological terms. (3) The argument is related to the execution of an ECtHR judgment.

The second avenue of resistance is related to constitutional law. Here, the Constitutional Court concluded that when a certain interpretation by the ECtHR

> 'unlawfully, from the constitutional-law point of view, affect[s] principles and norms of the Constitution of the Russian Federation, Russia may, as an exception, deviate from fulfilment of obligations imposed on it, when such deviation is the only possible way to avoid violation of fundamental principles and norms of the Constitution of the Russian Federation'.[18]

Again, three observations can be made: (1) This argument is what appears in the above definition of principled resistance as 'a conflict between the ECtHR judgment and "national identity"'.[19] (2) Unlike the first avenue of resistance, it does not attack the meaning of a certain Convention provision at the international level, but it opposes the outcome of a certain Strasbourg case by the imperatives of constitutional law, making use of the supremacy of the Russian Constitution vis-à-vis treaty law. (3) This opposition is, in the words of the Constitutional Court, viable only as an 'exception' if this is 'the only possible way to avoid violation of fundamental principles and norms' of the Russian Constitution, i. e. not each and every conflict with a constitutional provision leads to this scenario but only conflicts with a certain category of constitutional norms (characterised as 'national identity' in the above definition).

2. Distinguishing Permissible and Impermissible Forms of Resistance

Disagreement between the ECtHR and a national actor is central to the principled resistance concept. Therefore, it is essential to know where, from the international law point of view, disagreement is permitted and where it is not. Here, the distinction between the *res judicata* principle and the *res interpretata* principle comes into play.[20] Article 46 § 1 ECHR establishes the

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17 Breuer (n. 9), 20.

18 RCC, Judgment no. 21-П of 14 July 2015, para. 2.2 *in fine* (translation of the Venice Commission, CDL-REF(2016)019); see Starzhenetskiy (n. 16), 260 et seq.

19 Breuer (n. 9), 20.

20 For the following, see Marten Breuer, '"Principled Resistance" to ECtHR Judgments: An Appraisal' in: Marten Breuer (ed.), *Principled Resistance to ECtHR Judgments – A New Paradigm?* (Berlin, Heidelberg: Springer 2019), 323-350.

 DOI 10.17104/0044-2348-2022-3-641

https://doi.org/10.17104/0044-2348-2022-3-641, am 15.08.2024, 16:32:16
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binding force of Strasbourg judgments but only as far as the parties to the proceedings are concerned. Hence, it is generally accepted that a defendant State is bound by an ECtHR judgment, which is called the '*res judicata* principle'. It is also accepted that this principle leaves no room for exceptions, not even in cases involving a State's 'national identity'. Thus, the techniques of resistance referred to above are impermissible under the *res judicata* principle.

However, the question arises whether, beyond the mere wording of Article 46 § 1 ECHR, States that have not taken part in the Strasbourg proceedings are bound by the interpretation given to certain notions of the Convention by the ECtHR – hence the term *res interpretata*. On that matter, views are divided. Some scholars argue for a legally binding force of the Court's reasoning so that ECtHR judgments, beyond the scope of Article 46 § 1 ECHR, produce effects '*erga omnes*'.[21] Others hold by contrast that beyond Article 46 § 1 ECHR, ECtHR judgments only have persuasive authority, which leaves room for disagreement with the Court's reasoning.[22] The principled resistance concept takes this latter stance. Therefore, from a legal point of view, national courts are entitled to disagree with the Strasbourg Court as far as the *res interpretata* effect is concerned.[23] However, if such disagreement occurs too frequently or in a language that is too confrontational, the credibility and general position of the ECtHR may be undermined. Therefore, domestic courts should use their 'right to disagree' under the *res interpretata* principle in a respectful manner which does not undermine the authority of the Court. Otherwise, there is a risk that this might lead to situations where ECtHR judgments remain permanently unimplemented.[24]

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[21] In this sense, e. g. Samantha Besson, 'The *Erga Omnes* Effect of Judgments of the European Court of Human Rights – *What's In a Name*?' in: Samantha Besson (ed.), *La Cour européenne des droits de l'homme après le Protocole 14 – Premier bilan et perspectives* (Geneva, Zurich, Basel: Schulthess 2011), 127-150; Cedric Marti, *Framing a Convention Community. Supranational Aspects of the European Convention on Human Rights* (Cambridge: Cambridge University Press 2021), 153 et seq.

[22] In this sense, e. g. Adam Bodnar, '*Res Interpretata:* Legal Effect of the European Court of Human Rights' Judgments for Other States Than Those Which Were Party to the Proceedings' in: Yves Haeck and Eva Brems (eds), *Human Rights and Civil Liberties in the 21st Century* (Berlin, Heidelberg: Springer 2014), 223-262; Eckart Klein, 'Should the Binding Effect of the Judgments of the European Court of Human Rights Be Extended?' in: Paul Mahoney, Franz Matscher, Herbert Petzold and Luzius Wildhaber (eds), *Protecting Human Rights: the European Perspective. Studies in Memory of Rolv Ryssdal* (Cologne: Heymann 2000), 705-713.

[23] Breuer (n. 20), 333 et seq.

[24] Breuer (n. 20), 339 et seq.

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3. Differentiating Principled Resistance from Other Scholarly Concepts

The principled resistance concept significantly differs from other scholarly concepts developed in recent years to analyse resistance to international courts or tribunals. The concept of 'backlash vs pushback' is a case in point. Although it has certain similarities with the principled resistance concept, 'backlash vs pushback' is much more far-reaching as it does not concentrate on implementation deficits. 'Backlash vs pushback' embraces acts of resistance that go far beyond the non-implementation of a judgment, such as blocking the re-election of judges, denouncing the acceptance of an international court's jurisdiction, or shutting down an international tribunal altogether.[25] The width of this concept allows for an analysis of the socio-political implications, but is less apt for a genuinely legal analysis.

Concentration on deficits in the implementation phase of an ECtHR judgment is also absent from the concept of 'reasonable resistance'. This concept mainly deals with national courts' strategy to 'justify resorting to fundamental principles as a tool to disregard international law'.[26] Unlike 'backlash vs pushback', it centres around the legal argumentation brought forward to justify disregard of international law. Yet, the concept of 'reasonable resistance', too, is much more far-reaching than the principled resistance paradigm because it includes deviations from international treaty obligations *as such* (also in the absence of a judicial pronouncement), norms of customary international law, EU law, etc.[27] Hence, in comparison with the principled resistance concept, the results produced by this scholarly concept are less specific.

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[25] See Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, 'Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', International Journal of Law in Context 14 (2018), 197-220 (203 et seq.). For similar concepts, see Courtney Hillebrecht, *Saving the International Justice Regime. Beyond Backlash Against International Courts* (Cambridge: Cambridge University Press 2021); Wayne Sandholtz, Yining Bei and Kayla Caldwell, 'Backlash and International Human Rights Courts' in: Alison Brysk and Michael Stohl (eds), *Contracting Human Rights. Crisis, Accountability and Opportunity* (Cheltenham, UK; Northampton, MA, USA: Edward Elgar 2018), 159-178.

[26] Fulvio Maria Palombino, 'Introduction' in: Fulvio Maria Palombino (ed.), *Duelling for Supremacy. International Law vs. National Fundamental Principles* (Cambridge: Cambridge University Press 2019), 1-5 (3).

[27] See, e. g. Daniele Amoroso, 'Italy' in: Fulvio Maria Palombino (ed.), *Duelling for Supremacy. International Law vs. National Fundamental Principles* (Cambridge: Cambridge University Press 2019), 184-209 (186 et seq. – customary international law; 192 et seq. – treaty law; 197 et seq. – EU Law).

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The concept of 'criticism of the ECtHR',[28] despite certain overlaps with the principled resistance concept, again has a different focus. It distinguishes between different degrees of criticism, ranging from sparse, moderate, strong to hostile. A potential strength of this concept is that it allows for a holistic picture of ECtHR compliance. At the same time, this overarching approach comes at the expense of accuracy and level of detail as far as the 'pathological' cases are concerned, which form the centre of the principled resistance concept.

Other scholarly pieces, such as the 'very first comprehensive empirical analysis of the use of Strasbourg case law and its effect on the reasoning of domestic courts',[29] go for obvious reasons beyond the scope of principled resistance. After all, it might be said that principled resistance has become accepted in academic writings. Although critical comments have been raised occasionally,[30] the concept has been cited with approval by a growing number of academics.[31] Therefore, good reasons exist to argue that the principled resistance concept has become a well-established tool to analyse implementation deficits.[32] The cases in the next section illustrate the importance of concentrating on the legal techniques employed by national actors striving to block ECtHR judgments.

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28 See Patricia Popeliler, Sarah Lambrecht and Koen Lemmens (eds.), *Criticism of the European Court of Human Rights. Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Cambridge: Intersentia 2016).

29 See David Kosař et al., *Domestic Judicial Treatment of European Court of Human Rights Case Law. Beyond Compliance* (Abingdon, Oxon: Routledge 2020), 4.

30 See Alice Donald, 'Book Review', European Convention on Human Rights Law Review 1 (2020), 297-302.

31 See Adam Bodnar, 'Protection of Human Rights after the Constitutional Crisis in Poland', JöR 66 (2018), 639-662 (659); Armin von Bogdandy and Laura Hering, 'In the Name of the European Club of Liberal Democracies: On the Identity, Mandate and National Buffering of the ECtHR's Case Law' in: Hélène Ruiz Fabri, André Nunes Chaib, Ingo Venzke and Armin von Bogdandy (eds.), *International Judicial Legitimacy* (Baden-Baden: Nomos 2020), 271-300 (272); Kanstantsin Dzehtsiarou, *Can the European Court of Human Rights Shape European Public Order?* (Cambridge: Cambridge University Press 2021), 88; Helen Keller and Reto Walther, 'The Bell of *Görgülü* Cannot Be Unrung – Can It?' in: Giuliana Ziccardi Capaldo (ed.), *The Global Community. Yearbook of International Law and Jurisprudence 2019* (Oxford: Oxford University Press 2020), 83-114 (84); Raffaela Kunz, *Richter über internationale Gerichte?* (Berlin, Heidelberg: Springer 2020), 219; Marti (n. 21), 190 et seq.; Angelika Nußberger, 'Die Europäische Menschenrechtskonvention – eine Verfassung für Europa?', JZ 74 (2019), 421-428 (428); Angelika Nußberger, *The European Court of Human Rights* (Oxford: Oxford University Press 2020), 129; Silvia Steininger, 'With or Without You: Suspension, Expulsion, and the Limits of Membership Sanctions in Regional Human Rights Regimes', ZaöRV 81 (2021), 533-566 (542).

32 See generally Marten Breuer, 'The Concept of "Principled Resistance" to ECtHR Judgments: A Useful Tool to Analyse Implementation Deficits?', Journal of International Dispute Settlement 12 (2021), 250-270.

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III. Part Two: Principled Resistance *à la polonaise*

The second part of this paper is devoted to the analysis of recent patterns of resistance by the Polish Constitutional Tribunal ('the CT'). As a matter of fact, this type of resistance not only relates to the ECtHR but also to the Court of Justice of the European Union ('the CJEU'). However, for analytical purposes, this paper concentrates on Polish responses to ECtHR case law although, incidentally, CJEU cases will be addressed where appropriate. The first two CT reactions concern a single ECtHR judgment (*Xero Flor*). In contrast, the most recent response relates to a whole series of ECtHR judgments. Those reactions will be discussed in chronological order.

1. The First CT Response to *Xero Flor* (Case P 7/20)

In the case of *Xero Flor*, the ECtHR held that the Polish CT could not be regarded as being 'established by law' as required by Article 6 § 1 ECHR. These findings were due to the grave irregularities surrounding the election of three CT judges after the 2015 election of the national Sejm.[33] The Strasbourg Court held in particular that

> 'in agreement with the series of Constitutional Court rulings referred to above, […] the election of the three judges, including Judge M. M., to the Constitutional Court on 2 December 2015 was carried out in breach of Article 194 § 1 of the Constitution, namely the rule that a judge should be elected by the *Sejm* whose term of office covers the date on which his seat becomes vacant.'[34]

The CT's first response was given a little more than one month after *Xero Flor*. The CT proceedings at issue were completely unrelated to the *Xero Flor* case. Rather, they concerned EU law, namely, the CJEU's competence to order interim measures with respect to the functioning of the newly created Disciplinary Chamber of the Supreme Court.[35] In a

[33] See Bodnar (n. 31), 641 et seq.; Laurent Pech, Patryk Wachowiec and Dariusz Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action', Hague Journal on the Rule of Law 13 (2021), 1-43 (6 et seq.); Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press 2019), 58 et seq.

[34] ECtHR, *Xero Flor w Polsce sp. z o. o. v. Poland*, Judgment of 7 May 2021, no. 4907/18, para. 264.

[35] CJEU, *Commission v. Poland*, Case C-791/19 R, Order of the Court (Grand Chamber) of 8 April 2020, ECLI:EU:C:2020:277; for analysis, see Laurent Pech, 'Protecting Polish Judges from Poland's Disciplinary "Star Chamber": *Commission v. Poland (Interim proceedings)*', CML Rev. 58 (2021), 137-162.

 DOI 10.17104/0044-2348-2022-3-641

https://doi.org/10.17104/0044-2348-2022-3-641, am 15.08.2024, 16:32:16
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judgment delivered on 14 July 2021, the CT ruled that the CJEU had no competence to do so.[36] In an interlocutory decision from 15 June 2021, however, the CT had to deal with the request by the then Polish Ombudsman, Adam Bodnar, to exclude one of the CT judges from participating in the examination of the case. In this context, Bodnar relied on *Xero Flor* to justify removal of the judge. A three judges formation of the CT replied to this request as follows:

> 'According to the Constitutional Tribunal, the ECtHR judgment of 7 May 2021, to the extent to which it refers to the Constitutional Tribunal, is based on arguments testifying to the Court's ignorance of the Polish legal system, including the fundamental constitutional assumptions specifying the position, system and role of the Polish constitutional court. To this extent, it was issued without legal grounds, overstepping the ECtHR's jurisdiction, and constitutes unlawful interference in the domestic legal order, in particular in issues which are outside the ECtHR's jurisdiction; for these reasons it must be considered as a non-existent judgment (*sententia non existens*).'[37]

As was rightly noted by academic commentators, although the CT does not employ the term, its decision may be characterised as an *ultra vires* type of argument.[38]

2. The Second CT Response to *Xero Flor* (Case K 6/21)

Unlike the previous example, the second CT reaction to *Xero Flor* is closely related to that very case. The proceedings were initiated by the Polish Minister of Justice, Zbigniew Ziobro, acting in his capacity as Prosecutor General. On 24 November 2021, the CT found, *inter alia*, Article 6 § 1 ECHR to be inconsistent with various articles of the Polish Constitution

> 'insofar as the term "tribunal" used in that provision comprises the Constitutional Tribunal of the Republic of Poland'.[39]

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[36] CT, Judgment of 14 July 2021, Case P 7/20 (translation available at <https://trybunal.gov.pl/en/>).

[37] CT, decision of 15 June 2021, Case P 7/20 (unofficial translation available at <https://ruleoflaw.pl/wp-content/uploads/2021/06/20819_P-7_20_eng.pdf>).

[38] Rick Lawson, '"Non-Existent". The Polish Constitutional Tribunal in a State of Denial of the ECtHR Xero Flor Judgment', Verfassungsblog of 18 June 2021 (available at <www.verfassungsblog.de>).

[39] CT, Judgment of 24 November 2021, Case K 6/21, Operative Part of the Judgment, para. 1 (translation according to <https://trybunal.gov.pl/en/>).

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In its reasoning, the CT relies on its 'primary task […] [of] reviewing the hierarchical conformity of legal norms and – where needed – the elimination of unconstitutional norms from the legal system'.[40] This primary function is, in the eyes of the CT, at odds with the criteria developed by the ECtHR for the inclusion of constitutional courts into the ambit of Article 6 § 1 ECHR. The Polish Ombudsman had come to the opposite conclusion,[41] as did the Bingham Centre for the Rule of Law, which had been asked by the Ombudsman for an Expert Opinion on this matter.[42] For the CT, the 'unconditional categorisation of the Polish Constitutional Tribunal as an organ of the judicial branch' within the meaning of Article 6 § 1 ECHR 'infringes the provisions of the Constitution which establish the position of the Polish constitutional court within the domestic constitutional order', as well as the 'principle of the supremacy of the Constitution, referred to in Article 8(1)'.[43] As was the case with the decision of 15 June 2021, the CT argues that there is a profound misunderstanding of national law on the part of the Strasbourg Court.

However, unlike in the previous decision, with regard to case K 6/21 the CT did not conclude that *Xero Flor* is *sententia non existens.* Rather, it held that the norm underlying *Xero Flor* – Article 6 § 1 ECHR – is inconsistent with the Polish Constitution, but only 'insofar as' the norm applies to the CT. Arguably, this differential approach has procedural reasons, since the CT's jurisdiction is mainly restricted to the review of normative acts.[44] As a result, in his motion, the Prosecutor General had put Article 6 § 1 ECHR *itself* to the test 'to the extent to which the term "court" encompasses the Constitutional Tribunal'.[45] The effect of this 'insofar as' technique is quite obvious: Although the CT's jurisdiction is mainly restricted to reviewing

[40] CT, Press Release after the Hearing, Case K 6/21. In the following, Press Releases from the CT's website will be used. To the author's knowledge, no full versions of the judgments in Case K 6/21 have been published so far, neither in Polish nor in English.

[41] Position taken by the Ombudsman [Rzecznik Praw Obywatelskich: RPO] at hearing before the Constitutional Tribunal in Case K 6/21, paras 26 et seq. (English translation available at <https://ruleoflaw.pl>).

[42] Expert analysis of the applicability of Article 6 of the European Convention on Human Rights to the constitutional courts of the States Parties, requested by the Polish Commissioner for Human Rights in the context of the Case K 6/21 pending before the Polish Constitutional Tribunal, 4 November 2021, 14 et seq. (available at <https://binghamcentre.biicl.org>).

[43] CT, Press Release after the Hearing, Case K 6/21 (n. 40).

[44] See also Lech Garlicki, 'The Experience of the Polish Constitutional Court' in: Wojciech Sadurski (ed.), *Constitutional Justice, East and West* (The Hague, London, New York: Kluwer Law International 2002), 265-282 (272).

[45] The wording of the motion (in English) can be found at Helsinki Foundation for Human Rights, 'The Motion of the Public Prosecutor General to Declare Unconstitutional Art. 6 Paragraph 1 of the ECHR', para. 6 (available at <www.hfhr.pl>).

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normative acts, using the 'insofar as' formula allows it to (indirectly) review judicial pronouncements in individual cases.[46] This means that the difference between the review of a particular norm in the abstract and the normative content ascribed to it in individual court decisions will be blurred.

Yet, this is a well-established technique in the national (Polish) context. Normally, a judicial interpretation must be 'permanent, universal and unambiguous' in order to be reviewed by the CT.[47] In rare instances only has the CT 'reviewed a legal norm deemed to have been created by a single resolution of the Supreme Court'.[48] One of those exceptional cases is directly linked to Poland's rule of law backlash: After the CJEU's *A.K.* ruling,[49] the Polish Supreme Court, acting in the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber (so far unaffected by the judicial reforms) passed a resolution to the effect that nomination of judges by the new National Council of the Judiciary ('the NCJ') affects the legality of court composition.[50] In turn, the CT found that this resolution was in breach of the Polish Constitution.[51]

Turning back to case K 6/21, the CT argued that

> '[a]lthough the said interpretation was arrived at in the context of a single case, it is binding for the High Contracting Parties on the basis of Article 32 of the Convention, and due to the position and authority of the ECtHR, the said interpretation is universally respected by national courts.'[52]

With that, the CT's jurisdiction was established. Although this reasoning could have sufficed, the CT adds an important additional argument:

> 'There exists no other mechanism for verifying the said interpretation than a review conducted by the Constitutional Tribunal, which – being "the court of the

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[46] Pertinent criticism in this respect: Position taken by the Ombudsman (n. 41), para. 4: 'under the guise of initiating control over the constitutionality of the law, […] the aim [is] eliminating a specific ECtHR judgement from legal proceedings in Poland.'

[47] Helsinki Foundation for Human Rights (n. 45), para. 14.

[48] Position taken by the Ombudsman (n. 41), para. 7.

[49] CJEU, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, Judgment of 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982.

[50] Supreme Court, Resolution of 23 January 2020, Case BSA I-4110-1/20 (translation available at <www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1_20_English.pdf>). For legal analysis, see Laurent Pech, 'Dealing With "Fake Judges" Under EU Law: Poland as a Case Study in Light of the Court of Justice's Ruling on 26 March 2020 in *Simpson* and *HG*', RECONNECT Working Paper No. 8 of May 2020 (available at <www.reconnect-europe.eu/wp-content/uploads/2020/05/RECONNECT-WP8.pdf>).

[51] CT, Judgment of 20 April 2020, Case U 2/20, Operative Part of the Judgment (translation available at <https://trybunal.gov.pl/en/>).

[52] CT, Press Release after the Hearing, Case K 6/21 (n. 40).

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last word" – is obliged to safeguard the fundamental constitutional principles expressed in the Constitution of the Republic of Poland.'[53]

We will come back to this later. In any event, we have seen that the CT had the means at its disposal to review the ECtHR *Xero Flor* judgment, albeit only indirectly by use of its 'insofar as' technique with regard to Article 6 § 1 ECHR. Yet, the result of this technique is very much the same as declaring the *Xero Flor* judgment *sententia non existens*: According to the CT's Press Release, the

> 'specified norms indicated in the operative part of the judgment and derived from Article 6(1), first sentence, of the Convention infringe the provisions of the Constitution and, as a result, *they have no legally binding force*'.[54]

Although the CT again avoids using the term '*ultra vires*', commentators argue that this is an *ultra vires* type of argument, which allows the CT to decide which ECtHR judgment should be implemented within Poland and which should not.[55] In response to this judgment, the Council of Europe's Secretary General, Marija Pejčinović Burić, initiated an inquiry under Article 52 ECHR, which in and of itself is a highly unusual step to be taken.[56]

3. CT Response to Further ECtHR Rulings (Case K 7/21)

On 10 March 2022, once more upon the motion of the Prosecutor General, the CT ruled Article 6 § 1 ECHR to be incompatible with the Polish Constitution, 'insofar as'

> '(1) under the phrase "civil rights and obligations", it comprises the judge's subjective right to hold a managerial position within the structure of common courts in the Polish legal system
>
> […]

53 CT, Press Release after the Hearing, Case K 6/21 (n. 40).

54 CT, Press Release after the Hearing, Case K 6/21 (n. 40) (emphasis added).

55 See Ewa Łętowska, 'The Honest (Though Embarrassing) Coming-Out of the Polish Constitutional Tribunal', para. 2, Verfassungsblog of 29 November 2021 (available at <www.verfassungsblog.de>).

56 See Press Release DC 235rev(2021) of 7 December 2021. Last time, this procedure was used by former Secretary General Thorbjørn Jagland in response to the non-implementation of ECtHR judgments concerning Ilgar Mammadov, see Press Release DC 187(2015) of 16 December 2015. The Secretary General also requested the Committee of Ministers to initiate an infringement procedure under the new Article 46 § 4 ECHR, which led to the first-ever ECtHR judgment in that procedure, the Court finding a violation, on behalf of Azerbaijan, of Article 46 § 1 ECHR, see Esra Demir-Gürsel, 'The Former Secretary General of the Council of Europe Confronting Russia's Annexation of the Crimea and Turkey's State of Emergency', European Convention on Human Rights Law Review 2 (2021), 303-335 (315).

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(2) in the context of assessing whether the requirement of "tribunal established by law" has been met:

(a) it permits the European Court of Human Rights and/or national courts to overlook the provisions of the Constitution and statutes as well as the judgments of the Polish Constitutional Tribunal,

(b) makes it possible for the European Court of Human Rights and/or national courts to independently create norms, by interpreting the Convention, pertaining to the procedure for appointing national court judges

[…]

(c) authorises the European Court of Human Rights and/or national courts to assess the conformity to the Constitution and the ECHR of statutes concerning the organisational structure of the judicial system, the jurisdiction of courts, and the Act specifying the organisational structure, the scope of activity, modus operandi, and the mode of electing members of the National Council of the Judiciary

[…].'[57]

The background of this case differs from the previous two examples. The case did not concern the composition of the CT but was related to the involvement of the new NCJ in the election of judges after the major reorganisation occurring in 2017.[58] While the CJEU had taken the lead in criticising undue political interference in the election of Polish judges *via* the 2017 reform of the NCJ in the *A.K.* judgment (mentioned above),[59] in 2021 and 2022 the ECtHR delivered a series of judgments coming to the same conclusion.[60] In those judgments, the Strasbourg Court became unusually explicit stating that it is

'inherent in the Court's findings that the violation of the applicants' rights originated in the amendments to Polish legislation which deprived the Polish judiciary of the right to elect judicial members of the NCJ and enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, thus systematically compromising the legitimacy of a court composed of the judges so appointed'.[61]

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57 CT, Judgment of 10 March 2022, Case K 7/21, Operative Part of the Judgment (translation according to <https://trybunal.gov.pl/en/>).

58 See Bodnar (n. 31), 647 et seq.; Pech, Wachowiec and Mazur (n. 33), 11 et seq.; Sadurski (n. 33), 99 et seq.

59 See CJEU, *A.K. and Others* (n. 49), paras 142 et seq.

60 ECtHR, *Reczkowicz v. Poland*, Judgment of 22 July 2021, no. 43447/19; ECtHR, *Dolińska-Ficek and Ozimek v. Poland*, Judgment of 8 November 2021, nos 49868/19 and 57511/19; ECtHR, *Advance Pharma sp. z o.o v. Poland*, Judgment of 3 February 2022, no. 1469/20.

61 ECtHR, *Dolińska-Ficek and Ozimek* (n. 60), para. 368; ECtHR, *Advance Pharma* (n. 60), para. 364.

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In another case, the ECtHR found a violation of Article 6 § 1 ECHR on account of the complete lack of legal remedies against the premature ending of the applicants' term of office as vice-presidents of a Regional Court.[62]

In some ways, the judgment in case K 7/21 resembles that of case K 6/21. In both cases, the CT uses its 'insofar as' technique. Again, Article 6 § 1 ECHR itself had been put to the test by the Prosecutor General. In the same vein, the CT avoids the term '*ultra vires*' but uses an *ultra vires* type of argument in the end. Interestingly, upon closer scrutiny, the legal technique employed by the CT differs significantly from the previous judgment. Here, the main argument does not concern the ECtHR's alleged misunderstanding of central characteristics of the Polish legal system but rather the 'law-making character' of ECtHR judgments. The purported misunderstanding appears only as a kind of by-product when the CT holds that

> '[a]s a rule, the Constitutional Tribunal of the Republic of Poland avoids conflict of laws with the international legal order, relying on the principle of the favourable interpretation of the Constitution with regard to the international legal order or the-conflicts-of-laws rules. However, this was not possible in the case under examination, as the source of the problem is the ECtHR's manifestly defective activity in the course of creating norms derived from Article 6(1) of the Convention, where the ECtHR relied on its *misunderstanding of the Polish legal system*.'[63]

Now, the central argument is the 'law-making character' of ECtHR judgments, with the effect that – according to the CT – 'outside the constitutional procedure for the ratification of an international agreement, i. e. without the state's consent,' a new content of the Convention norm has been created by the ECtHR.[64] So, in case K 7/21 the CT attacks the interpretation given by the ECtHR at the international level, relying on the consent originally given by the Polish State in the course of ratifying the Convention.

As for the consequences of its judgment, the CT holds that it 'entails the elimination of the indicated norms from the legal system, and consequently the four rulings delivered on those grounds by the ECtHR'. The CT adds that 'for the Polish state, those judgments lack the attribute specified in Article 46 of the Convention (the obligation to execute judgments)'.[65] From that statement, one might deduce that the elimination of the (alleged) norms does *not* only relate to the Polish legal system but is valid, according to the

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[62] ECtHR, *Broda and Bojara v. Poland*, Judgment of 29 June 2021, nos 26691/18, 27367/18.

[63] CT, Press Release after the Hearing, Case K 7/21 (emphasis added).

[64] CT, Press Release after the Hearing, Case K 7/21 (n. 63).

[65] CT, Press Release after the Hearing, Case K 7/21 (n. 63).

 DOI 10.17104/0044-2348-2022-3-641

https://doi.org/10.17104/0044-2348-2022-3-641, am 15.08.2024, 16:32:16
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CT, also on the international level. By contrast, case K 6/21 was more ambiguous in that respect: Here, the CT found that the identified norms of Article 6 § 1 ECHR 'infringe the provisions of the Constitution and, *as a result*, they have no legally binding force'.[66] The reliance on the breach of the Constitution could have been interpreted as implying that the legal vitiation was meant to take effect only in the Polish legal order. In case K 7/21, the CT makes it clear that the Polish State is not bound by the ECtHR judgments as a matter of international law. Finally, the CT endeavours to depict its judgment as 'an objection on the part of the state to an attempt at reshaping an international obligation by adding new content and imposing it on Poland *per facta concludentia*, outside the procedure for amending treaties'.[67] So, while employing a different technique in case K 7/21, the CT comes to a result which very much resembles the '*sententia non existens*' verdict of the 15 June 2021 decision.

IV. Part Three: Evaluation

The third part of this paper, after some preliminary remarks (1.), endeavours to analyse the CT jurisprudence in terms of the principled resistance paradigm (2.). It proceeds with an inquiry into the origins of the *ultra vires* doctrine (3.), before inquiring into the conceptual differences between the two (4.).

1. Preliminary Remarks

The 'insofar as' technique allows the CT to oppose an ECtHR judgment with its own findings. This is noticeable, especially when compared with the Russian experience. In Russia, following the RCC's 2015 judgment, a wholly new procedure was introduced for checking the enforceability of international court judgments.[68] For a long time, Russia was the only Council of

66 CT, Press Release after the Hearing, Case K 6/21 (n. 40) (emphasis added).

67 CT, Press Release after the Hearing, Case K 7/21 (n. 63).

68 Федеральный конституционный закон от 14.12.2015 N 7-ФКЗ "О внесении изменений в Федеральный конституционный закон 'О Конституционном Суде Российской Федерации'" [Federal Constitutional Law No. 7-FKZ of 14 December 2015 'On introducing amendments to the Federal constitutional law "On the Constitutional Court of the Russian federation"'], Federal Gazette No. 6855 (284); for an English translation, see CDL-REF(2016) 006. In 2000, this procedure was elevated to constitutional rank by a constitutional referendum, see the amended Russian Constitution, in a translation provided by the Russian Constitutional Court on behalf of the Venice Commission, CDL-REF(2021)010.

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Europe Member State having such a 'blocking mechanism' at its disposal,[69] and the country was criticised accordingly by the Venice Commission.[70] In Poland, the 'insofar as' technique allowed the CT to reach the very same result, without the need for a formal change in legislation.[71]

In case K 6/21, the CT made the claim that there is 'no other mechanism for verifying the [ECtHR's] interpretation than a review conducted by the Constitutional Tribunal'.[72] This statement is flawed. The Convention itself provides for a procedure to review a Chamber judgment, namely, the referral to the Grand Chamber under Article 43 § 1 ECHR. However, in *Xero Flor* the Polish Government did not even request a referral (possibly because there were no dissenting judges and because the Court had relied on criteria established only six months ago in a Grand Chamber judgment).[73] From an international law perspective, this inactivity of the Polish Government might even be seen as implying tacit acceptance of the *Xero Flor* judgment.[74] In *Reczkowicz*, the request for a referral was later withdrawn by the Polish Government.[75] Those examples demonstrate that mechanisms do exist but that they were simply not used. Instead, the CT unilaterally challenged the ECtHR's findings.

In case P 7/20, this challenge occurred in a set of proceedings completely unrelated to the *Xero Flor* judgment. Hence, the *res interpretata* effect of that judgment was at stake leaving room for disagreement by national courts.[76] In case P 7/20, however, the CT judges used their 'right to disagree' in such a confrontational manner that there is at least a *prima facie* case for an act of principled resistance. What could be more detrimental to the authority of the Strasbourg Court than calling one of its pronouncements '*sententia non*

69 See Keller and Walther (n. 31), 93.

70 See Venice Commission, Opinion No. 835/2015, CDL-AD(2016)016, paras 31 et seq.

71 For the sake of completeness, it should be noted that this technique is also known from other jurisdictions where the Constitutional Court's role is mainly restricted to the review of normative acts, see: Italian Constitutional Court, Judgment of 22 October 2014, n. 238/2014, where that Court *inter alia* declared the national law incorporating the UN Charter unconstitutional, 'so far as' the national judge is obliged to comply with the ICJ Judgment in ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, ICJ Reports 2012, 99.

72 See n. 53.

73 See Marcin Szwed, 'The Judgement of the ECtHR on the Composition of the Polish Constitutional Tribunal', Verfassungsblog of 9 May 2021 (available at <www.verfassungsblog.de>), referring to ECtHR (Grand Chamber), *Guðmundur Andri Ástráðsson v. Iceland*, Judgment of 1 December 2020, no. 26374/18.

74 See Position taken by the Ombudsman (n. 41), para. 3.

75 See Oliver Garner and Rick Lawson, 'The Polish Constitutional Tribunal Assesses the European Convention on Human Rights', Verfassungsblog of 23 November 2021 (available at <www.verfassungsblog.de>).

76 See section II. 2. above.

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existens'? Of course, one could ask whether the Strasbourg Court itself had elicited such a harsh reaction by questioning the CT's legal basis. Was it not the ECtHR which had cast the first stone? However, one should not forget that the ECtHR largely relied on case law of the ('old', 'uncaptured') CT itself, so it did not attack the CT on its own motion but relied on national forces that were beyond suspicion of political influence.

By contrast, cases K 6/21 and K 7/21 directly concerned the implementation of the ECtHR judgments in question. In these cases, the *res judicata* principle applied which leaves no room for exceptions.[77] In case K 7/21, the CT tried to downplay the relevance of its judgment as simply 'delineat[ing] a boundary of the ECtHR's law-making freedom'.[78] It thereby alluded to the dialogical relationship between the Strasbourg Court and its national counterparts, which in certain cases has successfully led to a fine-tuning of the ECtHR's case law.[79] However, it must not be forgotten that this option is viable only under the *res interpretata* principle and not under *res judicata*.[80] The Convention provides for no 'right to object',[81] as far as the *res judicata* is concerned. The Strasbourg Court therefore was quite correct in holding that the CT judgment of 24 November 2021 was 'an apparent attempt to prevent the execution of the Court's judgment in Xero Flor w Polsce sp. z. o.o under Article 46 of the Convention and to restrict the Court's jurisdiction under Articles 19 and 32 of the Convention in respect of Poland'.[82] In the same vein, in her inquiry based on Article 52 ECHR the Council of Europe's Secretary General invited the Polish Government to explain 'the manner in which the internal law ensures the effective implementation of Articles 6 and 32 of the Convention following the judgment of the Constitutional Court of 24 November 2021 in case K 6/21'.[83]

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[77] See section II. 2. above.

[78] CT, Press Release after the Hearing, Case K 7/21 (n. 63).

[79] Cf. the well-known *Al-Khawaja and Tahery* saga where the Grand Chamber refined its jurisprudence in response to a Supreme Court judgment in *Horncastle* presenting further arguments in support of the national legislation, see Ed Bates, 'Principled Criticism and a Warning from the "UK" to the ECtHR?' in: Marten Breuer (ed.), *Principled Resistance to ECtHR Judgments – A New Paradigm?* (Berlin, Heidelberg: Springer 2019), 193-244 (233 et seq.); Mads Andenas and Eirik Bjorge, 'National Implementation of ECHR Rights' in: Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe. The European Court of Human Rights in a National, European and Global Context* (Cambridge: Cambridge University Press 2013), 181-262 (211 et seq.).

[80] See Breuer (n. 20), 341.

[81] See Nußberger (n. 31), 83.

[82] ECtHR, *Advance Pharma* (n. 60), para. 320.

[83] See n. 56 (the Secretary General's letter is available at <https://rm.coe.int/rau-mfa-poland-sg-article-52-constitutional-court-07-12-2021/1680a4cd03>).

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2. Analysis in Terms of Principled Resistance

After these more general considerations, let us now analyse the three cases in terms of the principled resistance paradigm. It is submitted that all of them show characteristics that are typical for principled resistance cases. It may be remembered that principled resistance was defined above as 'a legal conflict, normally resulting from a clash between the national constitution and the Convention'.[84] In both cases K 6/21 and K 7/21, the CT found an incompatibility of Article 6 § 1 ECHR ('insofar as' it contained certain elements) with the Polish Constitution. In case K 6/21, the CT was particularly explicit with its reliance on the supremacy of the Polish Constitution.[85] In combination with the *ultra vires* type of argument, however, this was somewhat unpersuasive. Supposed the legal norm developed by the ECtHR was legally inexistent, then there was no need to rely on the supremacy of the national constitution to deprive it of its legal force.

A second element of principled resistance was said to be 'a deep disagreement between a national actor and the [ECtHR] on the protection of human rights'.[86] This element relates to the international level, in the sense that the findings of the ECtHR themselves are called into question. An outspoken example in that regard is case K 7/21: The CT, relying on the original meaning of the Convention[87] reproached the ECtHR for having gone too far with its evolutive interpretation. This argument is in direct parallel with the RCC claiming a 'right to refuse to execute [an ECtHR judgment] as it goes beyond the obligations, voluntarily taken by this state upon itself when ratifying the Convention'.[88] Cases P 7/20 and K 6/21 are less obvious examples in this regard. Although in those cases the CT declared the *Xero Flor* judgment to be *ultra vires*, it did not criticise Strasbourg for generally including constitutional courts into the ambit of Article 6 § 1 ECHR. Instead, the CT reproached the Court for having misunderstood fundamental characteristics of Polish law with regard to the position and function of the CT. Yet, Article 6 § 1 ECHR requires a tribunal to be 'established by law', so the Convention itself refers to national law. This reference made it necessary for the ECtHR to develop an opinion of its own on whether or not Polish constitutional law had been complied with. Against this background, the CT did not attack the interpretation of Article 6 § 1 ECHR *as such* but only insofar as it refers to Polish national law.

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84 Breuer (n. 9), 20.

85 See n. 43.

86 Breuer (n. 9), 20.

87 In the words of the CT: the 'very content of the Convention's provision which Poland adopted by ratifying the Convention', see CT, Press Release after the Hearing, Case K 7/21 (n. 63).

88 Supra n. 16.

 DOI 10.17104/0044-2348-2022-3-641

https://doi.org/10.17104/0044-2348-2022-3-641, am 15.08.2024, 16:32:16
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A third element of principled resistance, according to the above definition, is a 'conflict between the ECtHR judgment and "national identity"'.[89] In this respect, case K 6/21 is a good example. The CT relies on its role as 'safeguard[ing] the fundamental constitutional principles expressed in the Constitution of the Republic of Poland'.[90] In combination with its insistence on the supremacy of the Polish Constitution, one could argue that *cum grano salis*, case K 6/21 is an example of the 'national identity' type of argument while case K 7/21 is an example of the 'international law related branch' of principled resistance. It should be noted, however, that the CT's reliance on the Polish Constitution was relatively broad. This was less so in cases P 7/20 and K 6/21 where one could argue that the position of the CT concerned 'fundamental constitutional assumptions specifying the position, system and role of the Polish constitutional court'.[91] By contrast, in case K 7/21, the CT seems to rely on a series of 'ordinary' constitutional provisions. It goes without saying that, from an international law perspective, both options were not viable avenues since under Article 27 VCLT, arguments related to national law are deemed irrelevant, be they of a fundamental nature or not.[92]

Finally, principled resistance cases were qualified according to their potential of leading to 'a permanent blockade, in the sense that an ECtHR judgment cannot and will not be implemented'.[93] In this regard, the Polish cases have a novel and particularly noteworthy element, which is the *ultra vires* type of argument. It may be characterised as a 'black and white approach'. Given the rigidity of this argument, it is very difficult to think of some kind of legal compromise. The 'black and white' topic is also known from Russian cases. *Anchugov and Gladkov* was the first case in which the RCC used its competence to decide on the executability of an ECtHR judgment.[94] In this case, the RCC on the one hand decided that the Strasbourg judgment could not be implemented, as far as the constitutional ban on voting rights for serving prisoners was concerned.[95] On the other hand, the RCC left room for what itself called a 'lawful compromise',[96] in that changes in ordinary legislation

89 Breuer (n. 9), 20.

90 See n. 53.

91 See n. 37.

92 See n. 14.

93 Breuer (n. 9), 20.

94 ECtHR, *Anchugov and Gladkov v. Russia*, Judgment of 4 July 2013, nos 11157/04 and 15162/05.

95 RCC, Judgment no. 12-П of 19 April 2016, operative para. 1 (translation available at <http://www.ksrf.ru/en/>).

96 RCC, Judgment no. 12-П of 19 April 2016, para. 4.4 (translation available at <http://www.ksrf.ru/en/>).

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were not excluded.[97] The case was closed along these lines with the Committee of Ministers contenting itself with the changes made in Russian legislation.[98] In the second case, *Yukos*, it is much more difficult to think of a ‘lawful compromise’. This case concerned the amount of just satisfaction owed to the former shareholders of the dissolved oil company.[99] The sheer amount of almost EUR 1.9 billion was declared by the RCC as leading to constitutional impediments.[100] This, too, is a black-and-white decision with only two alternatives: payment or non-payment.[101] So far, no progress has been made, despite the Committee of Ministers’ insistence upon the ‘unconditional obligation assumed by the Russian Federation under Article 46 of the Convention to abide by the judgments of the European Court’.[102]

Comparing these two instances with the Polish cases, it should be clear that the *ultra vires* argument deployed by the CT definitely has a potential equalling principled resistance. It has a particularly disruptive element for the functioning of the Convention system as a whole because it leaves no room for manoeuvre. If an ECtHR judgment (or, alternatively, the norm ‘insofar as’ enunciated in that judgment) is legally inexistent, there is nothing to comply with for the Polish State. This was exactly the position taken by the CT in case K 7/21 when it claimed that the opposed ECtHR judgments ‘lack the attribute specified in Article 46 of the Convention’.[103] The disruptive potential of the CT’s *ultra vires* approach becomes even more apparent when the CT in case K 7/21 declares that national acts implementing the attacked ECtHR jurisprudence ‘may be revoked’ in the future where there are ‘procedures for revoking those acts’.[104] With that, the CT does not content itself with *retrospectively* blocking the implementation of ECtHR judgments but declares that *prospectively*, where possible, any national act implementing

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97 RCC, Judgment no. 12-П of 19 April 2016, operative para. 2 (translation available at <http://www.ksrf.ru/en/>).

98 See CM/ResDH(2019)240 adopted by the Committee of Ministers on 25 September 2019; for a critical assessment, see Gleb Bogush and Ausra Padskocimaite, ‘Case Closed, But What About the Execution of the Judgment? The Closure of Anchugov and Gladkov v. Russia’, 30 October 2019 (available at <www.ejiltalk.org>).

99 ECtHR, *OAO Neftyanaya Kompaniya Yukos v. Russia*, Judgment (Just Satisfaction) of 31 July 2014, no. 14902/04.

100 RCC, Decision no. 1-П of 19 January 2017 (translation available at <http://www.ksrf.ru/en/>).

101 See Breuer (n. 32), 266.

102 Decision of 9 March 2022, CM/Del/Dec(2022)1428/H46-30, para. 2. For the sake of completeness, it should be mentioned that the Committee of Ministers will continue to supervise the execution of ECtHR judgments even after 16 September 2022, see Resolution CM/Res (2022)3 (n. 12), para. 7.

103 See n. 65.

104 CT, Press Release after the Hearing, Case K 7/21 (n. 63).

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those judgments will be eliminated from the Polish legal order. At the same time, as of February 2022, 94 applications were pending before the Strasbourg Court concerning the reorganisation of the Polish judiciary.[105] Given the fact that in the eyes of the ECtHR, participation of the new NCJ in the election of judges automatically leads to a violation of Article 6 § 1 ECHR, hundreds of potential applications are to come.[106] It is difficult to imagine how a legal compromise should be found in order to bridge the differences between the CT and the ECtHR.

3. Borrowing Doctrinal Arguments

It is no secret that the *ultra vires* doctrine derives from the jurisprudence of the German Federal Constitutional Court (FCC) relating to EU law, so it may be worth comparing the *ultra vires* argument à la Karlsruhe and the argument developed by the CT in Warsaw. As will be recalled, the *ultra vires* doctrine was originally developed by the FCC in its *Maastricht* judgment holding the following:

> 'If […] European institutions or authorities were to apply or extend the Union Treaty in some way which was no longer covered by the Treaty in the form which constituted the basis of the German law approving it, the resulting legal acts would not be binding on German sovereign territory.'[107]

Compared to the *ultra vires* argument à la Warsaw, a first difference stands out: While the FCC confines itself to declaring that, 'on German sovereign territory', *ultra vires* acts were to have no legally binding force, the CT's approach is much more confrontational because it attacks the very legal existence of ECtHR judgments at the international level. An example of such an attack is the *sententia non existens* rhetoric in case P 7/20. Another example is the CT's claim that there is no breach of the obligation under Article 46 § 1 ECHR in case K 7/21. Case K 6/21 is a less obvious example because of the argument that the norms enunciated by the ECtHR in *Xero Flor* 'have no legally binding force', which can be understood either as referring to the international level or as being restricted to the national realm.[108]

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[105] ECtHR, *Advance Pharma* (n. 60), para. 226.

[106] See Marcin Szwed, 'Hundreds of Judges Appointed in Violation of the ECHR?' Verfassungsblog of 29 July 2021 (available at <www.verfassungsblog.de>).

[107] FCC, Judgment of 12 October 1993, nos 2 BvR 2134 and 2159/92, BVerfGE 89, 155 (translation according to Andrew Oppenheimer (ed.), *The Relationship Between European Community Law and National Law: The Cases* (Cambridge: Cambridge University Press 1994), 526-575 (556)).

[108] See n. 66.

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It is well known that the FCC was particularly hesitant to use its *ultra vires* doctrine. This jurisprudence was regarded as sending a warning to the CJEU not to go too far with its interpretation of EU competences. For a long time, the FCC was criticised for failing to declare that the CJEU had actually gone too far, as was particularly pertinent in the *Mangold* case.[109] Against this background, it may have come as a surprise when the FCC finally declared acts of the European Central Bank (ECB) and the corresponding CJEU's *Weiss* judgment to be *ultra vires* in the *PSPP* case.[110] Nevertheless, it has to be stressed that notwithstanding the fact that some parts of the judgment use confrontational wording (declaring the CJEU *Weiss* judgment 'not comprehensible and thus objectively arbitrary'[111]), the reaction of the FCC appears fairly moderate: It contented itself to holding that German constitutional organs, administrative bodies and courts may not participate in the 'implementation, execution or operationalisation of *ultra vires* acts'.[112] Moreover, the main criticism of the FCC was the insufficient motivation of the PSPP programme by the ECB, which made it relatively easy to comply with the Karlsruhe requirements.[113] As a result, the infringement proceedings that had been initiated by the European Commission on account of the *PSPP* judgment were stalled,[114] after some kind of a 'legal compromise' had been reached.

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109 FCC, Order of 6 July 2010, no. 2 BvR 2661/06, BVerfGE 126, 286 (translation available at <http://www.bverfg.de/e/rs20100706_2bvr266106en.html>); see Robert Chr. van Ooyen, 'Mit "Mangold" zurück zu "Solange II"? Das Bundesverfassungsgericht nach "Lissabon"', Der Staat 50 (2011), 45-59 (54 et seq.).

110 FCC, Judgment of 5 May 2020, nos 2 BvR 859/15 et al., BVerfGE 154, 17 (translation available at <http://www.bverfg.de/e/rs20200505_2bvr085915en.html>); for a critical assessment, see Franz C. Mayer, 'To Boldly Go Where No Court Has Gone Before. The German Federal Constitutional Court's ultra vires Decision of May 5, 2020', German Law Journal 21 (2020), 1116-1127; Matthias Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception', German Law Journal 21 (2020), 979-994; for an assessment of the *PSPP* judgment's impact on Poland, see Stanisław Biernat, 'How Far Is It from Warsaw to Luxembourg and Karlsruhe: The Impact of the PSPP Judgment on Poland', German Law Journal 21 (2020), 1104-1115.

111 FCC, Judgment of 5 May 2020 (n. 110), para. 118; explaining (and justifying) this wording FCC judge Peter Michael Huber in a newspaper interview: '"Spieler auf Augenhöhe"', *Süddeutsche Zeitung*, 13 May 2020, 5.

112 FCC, Judgment of 5 May 2020 (n. 110), para. 234.

113 See FCC, Order of 29 April 2021, nos 2 BvR 1651/15 and 2 BvR 2006/15 (available at <https://www.bundesverfassungsgericht.de/e/rs20210429_2bvr165115en.html>); for analysis, see Martin Nettesheim, 'Das Ende eines epochalen Verfassungsstreits', Verfassungsblog of 18 May 2021 (available at <www.verfassungsblog.de>).

114 European Commission, Press Release of 2 December 2021 (available at <https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201>); for critical reflection, see Matthias Ruffert, 'Verfahren eingestellt, Problem gelöst?', Verfassungsblog of 7 December 2021 (available at <www.verfassungsblog.de>).

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Compared to this, the Polish CT's approach appears directly confrontational: It attacks the legal existence of ECtHR judgments and leaves no room for a compromise. The CT appears to be anxious to protect the sovereignty of the Polish State in organising its national judiciary against any international interference whatsoever. This becomes particularly clear in the EU-related case K 3/21 where, in a judgment from 7 October 2021, the CT declared the primacy of EU law to be inconsistent with the Polish Constitution.[115] This judgment led to an outcry in academia[116] and Commission President von der Leyen issued a statement in response.[117] On 22 December 2021, the European Commission commenced infringement proceedings against Poland.[118] This parallelism of events shows that the claim of a conflict between Poland and individual actors (most notably, the European Commission) is flawed.[119] The Polish rule of law crisis has a pan-European dimension. The quest for shielding Polish sovereignty against outside interference appears in the Convention context, too. This is exemplified in case K 6/21 where the CT insists, in an allusion to the famous *Görgülü* judgment of the FCC,[120] on 'being "the court of the last word"'.[121] The sovereignty of the Polish *State* hereby serves as a pretext for upholding the sovereign competences of the Polish CT.[122] This demonstrates that, in the end, principled

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115 CT, Judgment of 7 October 2021, Case K 3/21 (translation available at <https://trybunal.gov.pl/en/>).

116 See Petra Bárd and Adam Bodnar, 'The End of an Era. The Polish Constitutional Court's judgment on the primacy of EU law and its effects on mutual trust', CEPS Policy Insights No. 2021-15; 'Editorial Comments', CML Rev. 58 (2021), 1635-1648; Anna Wojcik, 'Legal PolExit. Julia Przyłębska's Constitutional Tribunal held that CJEU Judgments Are Incompatible With the Constitution', 8 October 2021 (available at <https://ruleoflaw.pl>); see also 'Statement of Retired Judges of the Constitutional Tribunal of 10 October 2021' (available at <https://ruleoflaw.pl>).

117 See 'Statement by Commission President von der Leyen', Press Release of 8 October 2021 (available at <https://cyprus.representation.ec.europa.eu/news/statement-commission-president-von-der-leyen-2021-10-08_en>).

118 European Commission, Press Release of 22 December 2021 (available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7070>).

119 See Garner and Lawson (n. 75).

120 FCC, Order of 14 October 2004, no. 2 BvR 1481/04, BVerfGE 111, 307. It has to be underlined, however, that the legal environment in Germany is much more favourable to the ECtHR, the FCC being a 'principled complier' rather than a 'principled resistor', see: Heiko Sauer, 'Principled Resistance to and Principled Compliance with ECtHR Judgments in Germany' in: Marten Breuer (ed.), *Principled Resistance to ECtHR Judgments – A New Paradigm?* (Berlin, Heidelberg: Springer 2019), 55-87 (56). See also the warning that *Görgülü* served as an 'icebreaker' for sovereigntist constitutional-supremacist thinking across States by Keller and Walther (n. 31), 105 et seq.

121 See n. 53.

122 See in this regard Breuer (n. 13), 67.

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resistance cases may be conceptualised as power struggles about the proper allocation of competences.[123]

4. Relationship between Principled Resistance and *ultra vires*

In a final step, this leads us to consider the conceptual relationship between principled resistance and *ultra vires*. Is *ultra vires* just another subcategory of principled resistance – maybe one that was originally 'forgotten' but now has been added to the concept? Is the *ultra vires* argument a mere variation of the 'international law related branch' of principled resistance? Or is it preferable to keep the two concepts, despite certain overlaps, separate in terms of legal doctrine?

Starting with *ultra vires*, it has to be stressed that at least in an international context,[124] this concept has its origins in the law of international organisations.[125] It is the logical continuation of the principle of conferral, which is a founding principle of EU law under Article 5(2) Treaty on European Union (TEU). Being referred to as 'principle of speciality' or 'doctrine of attributed powers', the principle of conferral also designates a general principle of the law of international organisations.[126] It is closely linked to the difference made between primary law and secondary law, in the sense that acts of secondary law that find no proper basis in primary law are devoid of legal effects.[127] Seen in this light, the principle of conferral is mainly (though not exclusively) concerned with law-making activities of an international organisation.

Yet, the ECtHR as such is not an international organisation. Nor does it qualify as the 'judicial branch' of the Council of Europe.[128] There are clearly strong intersections between the two institutions. However, Article 10 of the

123 Breuer (n. 20), 348 et seq.

124 The *ultra vires* doctrine might also be relevant in the national context, see William Wade and Christopher Forsyth, *Administrative Law* (11th edn, Oxford: Oxford University Press 2014), 27 et seq.

125 See Matthias Ruffert and Christian Walter, *Institutionalised International Law* (Baden-Baden: Nomos 2015), 92 et seq.; Stefanie Schmahl, 'Das Recht der Internationalen Organisationen' in: Wolfgang Graf Vitzthum and Alexander Proelß (eds), *Völkerrecht* (8th edn, Berlin, Boston: De Gruyter 2019), 319-462 (420 et seq.).

126 Ruffert and Walter (n. 125), 92.

127 See Markus Benzing, 'International Organizations and Institutions, Secondary Law' in: Rüdiger Wolfrum (ed.), *MPEPIL* (Oxford: Oxford University Press 2008), para. 36.

128 See Marten Breuer, 'The Council of Europe and International Institutional Law. An Appraisal' in: Stefanie Schmahl and Marten Breuer (eds), *The Council of Europe. Its Law and Policies* (Oxford: Oxford University Press 2017), para. 38.37.

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Statute of the Council of Europe[129] mentions only two organs of the Council, namely, the Committee of Ministers and the Consultative Assembly (today known as the Parliamentary Assembly of the Council of Europe, or 'PACE').[130] Therefore, the ECtHR qualifies as a judicial organ of its own whose task is to 'ensure the observance of the engagements undertaken by the High Contracting Parties' (Article 19 ECHR). Hence, the situation of the ECtHR significantly differs from that of the CJEU, which, according to Article 13(1)(2) TEU, is an organ of the European Union, so judicial activities of the CJEU may be attributed to the Union. This difference raises concerns about the appropriateness of applying the *ultra vires* doctrine to an international court, such as the ECtHR, rather than to an international organisation.

Applying the *ultra vires* doctrine to judicial activities becomes even more dubious if we accept that the principle of conferral has close affinities to the difference made between an international organisation's primary and secondary law and that, in this context, it mainly relates to law-making activities. Under Article 38 § 1 (d) of the ICJ Statute,[131] decisions of international courts do not qualify as sources of law but as 'subsidiary means for the determination of rules of law'. This clearly reflects traditional Montesquieuan thinking, according to which judges are 'la bouche qui prononce la parole de la loi'.[132] Admittedly, from a methodological point of view, the understanding of judicial decisions as mere acts of cognition is challengeable.[133] Yet, political and judicial decision-making still differ insofar as judges, unlike legislators, must not decide according to their political preferences but have to base their judgments as far as possible on the law as it stands.[134] Given the fact that it is impossible to determine where precisely cognition ends,[135] it becomes difficult to address a court judgment as an independent piece of law-making. Judgments, seen from this perspective, have no legal existence separate from the law that they interpret.

129 Of 5 May 1959, ETS No. 1.

130 On the relationship between the three institutions, see: Elisabeth Lambert-Abdelgawad, 'The Court as a Part of the Council of Europe: the Parliamentary Assembly and the Committee of Ministers' in: Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe. The European Court of Human Rights in a National, European and Global Context* (Cambridge: Cambridge University Press 2013), 263-300.

131 Statute of the International Court of Justice of 26 June 1945, UNCIO vol. XV, 335.

132 Charles-Louis de Secondat de Montesquieu, *De l'Esprit des lois*, Livre XI, Chapitre 6 (Paris: Garnier 1961).

133 See Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford: Oxford University Press 2014), 102 et seq.; Marten Breuer, *Staatshaftung für judikatives Unrecht* (Tübingen: Mohr Siebeck 2011), 16 et seq.

134 See von Bogdandy and Venzke (n. 133), 109 et seq.

135 See Breuer (n. 133), 25.

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Contrastingly, the Polish CT reproached the ECtHR for having created normative content that was previously inexistent. The gist of the argument is the (allegedly) law-making character of the ECtHR jurisprudence. Severing the normative content of an ECtHR judgment from the Convention itself allowed the CT to treat such 'judge-made norms' as separate legal acts and to activate the *ultra vires* doctrine on their behalf. It is submitted that this is a consequence of the CT's jurisdiction being restricted to the control of normative acts.[136] However, this approach appears to be flawed based on the reasons outlined above.

The principled resistance paradigm takes a different avenue. Although the 'international law related branch' of principled resistance contains an outright attack on the outcome of a particular ECtHR judgment – and in this regard, it has certain similarities with *ultra vires* –, the claim is *not* that this judgment is legally inexistent. Rather, the criticism is one in terms of methodology. It alleges that the ECtHR went too far with its evolutive interpretation and that, as a consequence, the judgment should not be adhered to. Under the 'national identity related branch' of principled resistance, Strasbourg judgments are not treated as legally inexistent, either. To the contrary, in those cases the ECtHR judgment is opposed by the imperatives of national (constitutional) law. So, while both principled resistance and *ultra vires* cases have certain similarities, the underlying assumptions are fundamentally different. It is one thing to accept the legal existence of a Strasbourg verdict and to call into question its binding force or to oppose it by norms of constitutional law. But it is a different thing to deny the legal existence of the judgment (or a legal norm contained therein) altogether. Consequently, principled resistance and *ultra vires* should be kept apart in terms of legal doctrine.

The problem with the CT's case law is that the Polish Tribunal, as we have seen in section IV. 2., mixed up principled resistance related arguments and *ultra vires* doctrine. On the one hand, the CT relied on the supremacy of the Polish Constitution (case K 6/21) and criticised the ECtHR for going beyond the obligations voluntarily undertaken by the Polish State (case K 7/21). On the other hand, it declared a particular Strasbourg judgment '*sententia non existens*' (case P 7/20) or, alternatively, declared the legal norm as enunciated in a set of Strasbourg judgments legally invalid (case K 7/21). This confusion, however, does not call into question the fundamental differences between principled resistance and *ultra vires*. On the contrary, it can be seen as a proof of the usefulness of these doctrinal concepts in that they help us better understand existing analytical differences.

136 See section III. 2. above.

 DOI 10.17104/0044-2348-2022-3-641

https://doi.org/10.17104/0044-2348-2022-3-641, am 15.08.2024, 16:32:16
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V. Conclusion

In its reaction to ECtHR judgments concerning the reform of the Polish judiciary, the CT used several arguments that had appeared before in the principled resistance context. What appears to be novel is the *ultra vires* type of argument, which to date was mainly related to the EU context. In turn, the CT introduced this type of argument into the Convention context, using it as a shelter against perceived undue interference into Polish sovereignty. In this context, the principled resistance paradigm not only proved a useful analytical pattern to detect different assumptions underlying *ultra vires* and principled resistance. With its concentration on cases leading to a permanent blockade of an ECtHR judgment, it also made clear that the *ultra vires* argument, despite its differences in background, has a potential to at least equate principled resistance. This is due to the directly confrontational gesture of the *sententia non existens* verdict and the 'black and white' nature of the *ultra vires* argument, which leaves no room for a legal compromise.

It is needless to say that this is an extremely dangerous development. The Convention system rests on the *bona fide* cooperation between national courts and the Human Rights Court in Strasbourg. Denying judgments of that Court any legal existence might easily lead to a spiral of mutual accusations and assaults, which is detrimental to the human rights protection in Europe. The pan-European dimension of this conflict has shown that, if at all, the solution can only be a pan-European one.

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