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Human Rights Under Threat: States’ Withdrawal from and Non-compliance with ECHR

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Summary

International human rights law has been progressively expanding and filling the areas that have traditionally been subject to the political decision-making process of sovereign states. Some states, however, have resisted to this, for instance, by refusing to implement the judgments of the European Court of Human Rights. For the same reason, they are also considering the withdrawal from the European Convention on Human Rights.

This research sheds light on the complexity of implications of the withdrawal and non-compliance. It analyses them with respect to the UK and Russia. Furthermore, it determines the impact of these measures on the protection of human rights on the global, domestic and regional levels.

The findings show that, on the one hand, the withdrawal and non-compliance can have significantly different impacts on the human rights protection. On the other hand, substantially disparate implications can stem from the same measures taken by various states.

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List of Abbreviations

CM	Committee of Ministers
CoE	Council of Europe
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IHRL	International Human Rights Law
PCIJ	Permanent Court of International Justice
RC	Russian Constitution
RCC	Russian Constitutional Court
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

International human rights law (IHRL) has been progressively filling the spaces that have traditionally been subject to the political decision-making process of sovereign states. As a consequence, human rights have narrowed the boundaries of ways the sovereign states can exercise their rights. These developments, however, do not take place without resistance. Some states have stood up against them. They have expressed the opposition differently.

Upon assumption of power, the UK Prime Minister argued for withdrawal from the Convention for the Protection of Human Rights and Fundamental Freedoms, more commonly known as the European Convention on Human Rights (ECHR). Moreover, for over a decade, the UK has been defying the binding force of the European Court of Human Rights (ECtHR) judgments by failing to comply with them. Similarly, the Russian government has clearly expressed their dissatisfaction with the Convention. They have amended their constitutional law to resist the Court judgments. In fact, in violation of international law, they have refused to enforce a few of the Court judgments.

Such expressions of resistance affect the protection of human rights on different levels in particular globally, domestically and regionally. Nevertheless, the extent of impact on human rights cannot be generalized due to the complexity of the matter. It cannot be assumed that the same measure taken by different states will give rise to the same implications. Similarly, it is not certain what implications will stem from different measures taken by one state.

Several studies in the field have investigated the relationship between sovereignty and human rights. Researchers have identified the role of IHRL and the extent to which it has limited sovereignty. Additionally, some studies have identified underlying reasons for the state discontent with human rights while others have focused on the possibility of overcoming the challenge of states' resistance. However, little attention has been drawn to the complexity

of implications that the withdrawal from the Convention or the non-compliance with the judgments can have. For this reason, this research will attempt to contribute to reducing this gap.

1.1 Purpose and Research Question

This research focuses on the specific measures that states can take in particular on the withdrawal from the Convention and non-compliance with the Court judgments. It intends to shed light on the complexity of their implications and to identify the factors that influence the impact on the protection of human rights on the global, domestic and regional levels. This study will attempt to address the following questions:

- What are anticipated impacts of the withdrawal and non-compliance on the protection of human rights on the global, domestic and regional levels?
- Do state characteristics affect the impact? If yes, how?
- Is there an interplay on several dimensions between, on the one hand, the withdrawal and non-compliance and on the other hand, different characteristics of the member states to the Convention?

1.2 Methodology

This thesis is attempting to achieve its purpose using a combination of qualitative and quantitative research. It is mainly based on international and national laws, rulings and reports of international and national bodies and NGOs, other acts of governments, official statements of international organizations and governments as well as on the works of scholars and statistics.

The research, firstly, identifies the relationship between human rights and state sovereignty. Then, it describes a framework of the European human rights system, including ECHR and the rules of ECtHR. Afterward, the thesis analyses two states - the UK and Russia. Furthermore, in these states, the research identifies tendencies to withdraw from the Convention and refuse to comply with the Court. Subsequently, legality of the withdrawal and non-compliance is determined under the applicable international law. Then, the research turns to the impact of the tendencies on the protection of human rights on the global, domestic and regional levels. Finally, through comparative analysis, conclusions are drawn.

1.3 Delimitations

There are multiple factors globally, regionally and domestically that threaten the protection of human rights. However, this research will only study the withdrawal of the member states from ECHR and the refusal by the member states to implement the judgments of ECtHR. Despite this limitation, the thesis will explore the global, domestic and regional implications of the withdrawal and non-compliance.

There are 47 member states to ECHR. Due to size restrictions, however, this research will only focus on two member states in particular the United Kingdom and Russian Federation. This combination was chosen on the basis that these states have substantially different characteristics such as a reputation and a role in the Convention system. This, as a result, will allow the thesis to demonstrate the widest spectrum of possible implications of the withdrawal and non-compliance. Nevertheless, on the contrary, due to the limitation of the analysis to merely two states, the research may disregard an important factor that is not present with respect to the UK and Russia.

Finally, it has to be noted that the research is based on legal and factual circumstances as of 15 May 2017.

1.4 Outline

This thesis will attempt to answer the questions in 5 chapters - the first being the introduction. The second chapter will describe human rights, state sovereignty and the European human rights protection system. The third chapter will provide a country analysis. It will describe human rights situations in the UK and Russia in general as well as it will go into detail with respect to ECHR and identify the tendencies to withdraw from the Convention and refuse to implement the Court judgments. After that, the fourth chapter will elaborate on the country analysis. It will determine the legality of the withdrawal and non-compliance. Then, it will identify possible implications on the protection of human rights on the global, domestic and regional levels. Finally, the sixth chapter will outline findings of the research.

2 International Human Rights Law

2.1 Human Rights and Sovereignty

2.1.1 Human Rights

Human rights are a set of principles that govern a vertical relationship of states and individuals. These principles are in place to protect individuals from more powerful, highly organized and resourceful states. Individuals have human rights, for instance, the right to life, freedom from torture, fair trial, liberty and security, private and family life, freedom of religion, freedom of expression and freedom from discrimination. States have corresponding positive and negative obligations to respect, protect and fulfil these rights.

Human rights are said to be universal, inalienable, indivisible, interdependent and interrelated. Universality and inalienability refer to the fact that everyone possesses them without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[1] Human rights cannot be taken away. They are indivisible, interdependent and interrelated as they exist together, overlap and cannot be enjoyed separately.

Human Rights are protected on international and domestic levels. However, main developments in the field take place on the international level. When changes happen on the international level they are mirrored by domestic legislations. Consequently, obligations of a number, if not the vast majority of states are affected. However, when a development in the field of human rights takes place on the domestic level usually it does not have a significant effect on the international obligations of the state. Even if the

[1] Universal Declaration of Human Rights 1948 (217 A (III)) art 2.

change on the domestic level affects the international obligations of the state, mostly, it is exclusively limited to that state only and does not impact international human rights obligations of other states.

The concept of human rights is not an invention of the 20th or 21st century. They have been prescribed in such old documents as the 13th century Magna Carta, a charter agreed to by King John of England. However, the beginning of IHRL, as we know it now, started after the World War II.

IHRL constitutes a part of public international law. For this reason, sources of the former and the latter are the same.[2] These are:

(a) international conventions;

(b) international custom;

(c) general principles of law recognized by civilized nations;

(d) judicial decision and the teachings of the most highly qualified publicists of the various nations.[3]

International conventions are primary sources of IHRL today.[4] Universal and regional human rights systems, including instruments and their monitoring bodies, are established by international and regional treaties. However, despite the fact that almost all the rules of IHRL are regulated by treaties, international customary law remains important.[5] This is because unlike the treaty obligations, the rules of customary law are binding for every state with no regard to its consent or membership to a treaty.[6] Accordingly, it is an obligation of all states to fulfil the requirements of a human rights norm of customary law. General principles of law, judicial decisions and writings

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[2] Daniel Moeckli and others (eds), *International Human Rights Law* (Second Edition, Oxford University Press 2013) 75.

[3] Statute of the International Court of Justice 1946 art 38 (1).

[4] Moeckli and others (n 2) 77.

[5] ibid 83.

[6] Except a persistent objector.

of jurists are used as subsidiary sources. They come into effect only when a legal issue cannot be resolved by a treaty or a customary norm.

Stephen Hopgood in his book *The Endtimes of Human Rights* distinguishes two forms of human rights.[7] He calls them "human rights" and "Human Rights." The former, according to Hopgood, is a domestic and transnational activism that sheds light on existing abuses. It demands measures to be taken by governments and the United Nations (UN). It is rooted in the common understanding and demand for fairness and equality. Hopgood claims that the "human rights" do not and will never have endtimes.

The latter, on the other hand, according to him, represents human rights frameworks and organization under international law. It consists of own legislations as well as legislative and judicial bodies. They speak in the name of humanity as a whole and require that all adhere to the norms that are based on the universality and secular moral authority. The moral authority in the past has been of impartial nature, neutral and apolitical. However, these characteristics rendered the activism to be weak and ineffective against powerful abusers. In order to provide human rights with a more powerful platform, states have been placed in the centre of human rights protection. As a result, according to Hopgood, a major trait of the moral authority - the lack of self-interest was compromised. Due to the fact that the state powers got involved in advancing and protecting human rights, "Human Rights" became a platform where certain conceptions of society were promoted. Consequently, the human rights regime suffered the loss of legitimacy.[8]

It has to be taken into account that states enjoy sovereignty. Hopgood notes that "when the sovereign changes its mind and declares itself and its clients exempt from its own rules" the "Human Rights" will be even weaker than before, it will be left without the moral authority. Unfortunately, according to Hopgood, in the face of diminishing power of moral norms, it is

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[7] Stephen Hopgood, *The Endtimes of Human Rights* (Cornell University Press 2013) VIII–IX.

[8] ibid VII–XV.

not sufficient to name and shame governments. As a result, "[s]overeignty will be reaffirmed, global markets will be extended, and some forms of transnational culture will grow, but global liberal norms will stagnate and even contract in terms of meaningful impact on the daily lives of ordinary people."[9]

2.1.2 State Sovereignty

Sovereignty is an exclusive feature of states. It's only the states that have sovereignty and no other entity can exercise it. Hélène Ruiz Fabri notes that, in line with a traditional approach, the meaning of sovereignty is different on domestic and international levels. In the domestic legal setting, the term refers to a supreme power or authority that is often described as absolute or unlimited. However, from the international law perspective, sovereignty is not descriptive of the characteristic of having power, but of freedom - sovereign states are free to exercise their powers as they desire. It implies to the fact that a state is not subject to the oversight and control of a higher authority nor to the obligations that the state has not consented to. However, this does not mean that states have unlimited supreme powers. For this reason, according to Ruiz Fabri, the definition of state sovereignty under international law is more realistic.[10]

Sovereignty in international law takes into account the coexistence of multiple states on the basis of sovereign equality.[11] In fact, the notion of sovereign equality and sovereignty are complementary. The latter provides that every sovereign state has the same rights and legal capacity as any other sovereign state. One particular state, however sovereign, cannot make

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[9] ibid XIII.

[10] Hélène Ruiz Fabri, 'Human Rights and State Sovereignty: Have the Boundaries Been Significantly Redrawn?' in Philip Alston and Euan Macdonald (eds), *Human Rights, Intervention and the Use of Force*, vol The collected courses of the Academy of European Law (Oxford University Press 2008).

[11] ibid.

decisions on behalf of others due to the fact that every sovereign state is entitled to make its own decisions. Hence, the sovereignty of one state is limited by the sovereignty of other states. In other words, the sovereignty of one state ends where the other's start.

In addition to this, the principle of non-interference in the internal affairs of a sovereign state derives from state sovereignty. It is enshrined in the United Nations Charter: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter."[12] Moreover, the International Court of Justice (ICJ) confirmed that the principle of non-interference is a norm of international customary law. ICJ, in the case of *Nicaragua v the United States*, interpreted the UN Charter provision as follows:

> *the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy.*[13]

One of the main aspects of state sovereignty is the capacity to conclude international treaties that confer rights and obligations on the concluding state itself.[14] This is enshrined in the Vienna Convention on the Law of Treaties (VCLT) - "Every State possesses capacity to conclude treaties."[15] However, in line with the abovementioned principles of international law, article 34 of VCLT establishes that "a treaty does not create

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[12] Charter of the United Nations 1945 (1 UNTS XVI) art 2(7).

[13] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (1986) 1986 ICJ Rep (International Court of Justice) [205].

[14] Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press 2011) 107.

[15] Vienna Convention on the Law of Treaties 1969 art 6.

either obligations or rights for a third State without its consent." It has to be noted that the state consent may be invalidated if it has been expressed based on error, fraud, corruption or coercion.[16]

Accordingly, states themselves legislate rules of international law which, after they enter into force, will apply only to those who consented to be bound by them. For instance, the application of universal human rights treaties has been consented by the vast majority of sovereign states - International Covenant on Civil and Political Rights (ICCPR) with 169 state parties and the International Covenant on Economic, Social and Cultural Rights (ICESCR) with 165 state parties. Similarly, the vast majority of European states - 47 - are parties to the regional European Convention on Human Rights. Consequently, in accordance with the principle of state sovereignty, states that have yet to become parties to these treaties are not directly bound by them.

2.1.3 Human Rights vs. State Sovereignty

Whereas state sovereignty is about freedom, IHRL places limitations on states through the imposition of obligations to respect, protect and fulfil human rights. Ruiz Fabri has suggested that the boundaries between state sovereignty and human rights have been redrawn.[17] Additionally, Noel Malcolm holds a similar opinion that the human rights law has substantially eroded the unlimited breadth of politics.[18]

Ruiz Fabri argues that state sovereignty has been restricted voluntarily as well as non-voluntarily. Firstly, she notes the existence of voluntary limitations. These are international human rights commitments that states have consented to be bound by, for instance, by entering into a human rights

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[16] ibid art 48-52.

[17] Ruiz Fabri (n 10).

[18] Noel Malcolm, 'Human Rights Law & the Erosion of Politics' (2016) 34 *The New Criterion* <http://www.newcriterion.com/articles.cfm/Human-rights-law---the-erosion-of-politics-8306> accessed 16 May 2017.

treaty. According to the Permanent Court of International Justice (PCIJ) treaties that establish obligations do indeed restrict the exercise of the sovereign rights of the state. However, PCIJ emphasized that a state's consent to be bound by a treaty is not "an abandonment of its sovereignty." In fact, "the right of entering into international engagements is an attribute of State sovereignty" itself.[19]

In addition to treaties, Ruiz Fabri considers the rules of customary law to be voluntary limitations.[20] The author of the research believes that international customs can, in specific circumstances, be voluntary. However, due to the fact that the creation of customary norm does not require a valid consent from any particular state, mostly, it is hard to consider them to be completely voluntary.

Secondly, Ruiz Fabri categorizes some of the limitations as non-voluntary. According to her, these limitations are placed on states in the name of human rights through coercion or other means. For example, the imposition of economic embargos on particular states to urge them to obey the rules of human rights. Similarly, UN Security Council (UNSC) takes measures against the breaches of "international peace and security," including grave violations of human rights.[21] ICJ in the case of *Barcelona Traction* established that 'the principles and rules concerning the basic rights of the human person' give rise to *erga omnes* obligations. These are the obligations that a state has 'towards the international community as a whole' and 'all States can be held to have a legal interest in their protection.' States, in accordance with international law, enjoy the 'rights of protection' with respect to *erga omnes* obligations.[22]

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[19] *SS 'Wimbledon' (United Kingdom, France, Italy & Japan v Germany)* [1923] Permanent Court of International Justice III.I., No. 1 Ser A 25.

[20] Ruiz Fabri (n 10) 47.

[21] Ruiz Fabri (n 10).

[22] *Barcelona Traction (Belgium v Spain)* 1970 ICJ Rep (International Court of Justice) [33–34].

Lastly, Ruiz Fabri distinguishes the third category of limitations that she calls the "element of irrecusability."[23] There, she allocates the limitations that do not fall within the voluntary or involuntary limitations. Examples of irrecusable limitations are human rights conditionality clauses in aid agreements and conditioning the recognition of emerging new states upon the fulfilment of certain requirements related to human rights. The final example of this category is the unforeseeability of the future developments of human rights instruments.[24] For instance, the negotiating states in the drafting process of the European Convention on Human Rights could not foresee the manner in which the instrument would develop in the future. We will return to this issue later in this chapter.

2.2 European Human Rights System

2.2.1 Universal and Regional Systems

Non-binding Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly in 1948 is a foundation of the universal system of human rights. Later in 1966, the General Assembly, on the basis of UDHR, adopted two covenants. Rights listed in UDHR were categorized into two groups, namely, the first generation and the second generation of human rights. The covenant that enshrined the former was named, International Covenant on Civil and Political Rights, and the latter was included in the International Covenant on Economic, Social and Cultural Rights. Nowadays, the three documents in particular UDHR, ICCPR and ICESCR are referred to as the International Bill of Human Rights.

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[23] Ruiz Fabri (n 10) 50.

[24] Ruiz Fabri (n 10).

The International Bill of Human Rights has recognized the protected human rights and made it binding for its state parties to respect, protect and fulfil them. Moreover, the implementation of the covenants by the state parties is monitored by the Human Rights Committee (HRC) and the Committee on Economic, Social and Cultural Rights.

Other than the universal human rights system, there are regional human rights systems that monitor, promote and protect human rights in specific regions of the world. These regional human rights systems have been established within frameworks of regional intergovernmental organizations. These are the Council of Europe (CoE),[25] Organization of American States and African Union. They have adopted human rights instruments that constitute the foundations of the regional human rights systems. The Organization of American States adopted the American Declaration of the Rights and Duties of Man (1948) and the American Convention on Human Rights (1969) as well as their monitoring bodies the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights. The African Union adopted the African Charter on Human and Peoples' Rights (1981), also known as the Banjul Charter, with monitoring bodies, the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights. It has to be noted that there are other regional organizations in Europe, Americas and Africa that are operating in the field of human rights. However, the former organizations remain the backbones of the regional systems. In addition to these regions, there are developments in the field of human rights in the countries of the Middle East and Southeast Asia within the frameworks of the League of Arab States and the Association of Southeast Asian Nations, respectively.

[25] The CoE system will be discussed in the upcoming part.

2.2.2 Overview of the CoE System

The Council of Europe, founded in Strasburg in 1949, initially, was a distinctively western organization. Its aim has been to "achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress."[26] Importance and the influence of the organization have been boosted through its activities in the field of human rights. Article 3 of the statute of CoE makes it mandatory for every member state to "accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms."[27] Since 1990 the organization has expanded its membership throughout the entire continent - at the moment of writing this thesis, CoE has 47 member states.

The key institutions of the organization are the Committee of Ministers (CM), Parliamentary Assembly, Secretariat, European Commissioner for Human Rights, Congress of Regional and Local Authorities, Conference of International Non-Governmental Organizations, and finally, the European Court of Human Rights. These institutions carry out the entire spectrum of functions of the organization.

The Council of Europe, since its establishment, has adopted over 220 treaties on a wide range of issues.[28] Among these, some of the important achievements are the adoption of the European Social Charter (1961, revised in 1996), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987) and the European Framework Convention for the Protection of National Minorities (1995). However, above all, the European Convention on Human Rights is considered to be the main achievement of the organization.

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[26] Statute of the Council of Europe 1949 art 1(a).

[27] ibid art 3.

[28] 'Complete List of the Council of Europe's Treaties' (16 May 2017) <http://www.coe.int/en/web/conventions/full-list> accessed 16 May 2017.

2.2.3 European Convention on Human Rights

The European Convention on Human Rights was drafted in 1950 and entered into force on 3 September 1953. It was intended to provide an independent judicial mechanism for the collective enforcement of human rights.[29] The Convention with its accompanying court has for many decades been a highly celebrated achievement in the field of human rights. It has redressed a countless number of human rights violations in its member states.

Since its adoption, the Convention has been amended for a number of times. As of now, the Convention consists of three sections. Section I concerns the rights and freedoms protected under the Convention. Section II regulates the establishment of the European Court of Human Rights and its rules of operation. Finally, Section III includes various concluding provisions. Additionally, several protocols enshrine rights and freedoms that are not included in Section I of the Convention. For example, the Protocol 1 supplement the protection of property, the right to education and the right to free elections to the list of rights over which the Court has jurisdiction. However, here it needs to be noted that the protocols to the Convention do not automatically have a legally binding force on the member states to the Convention. Each protocol becomes legally binding only for those particular states that have ratified it.

2.2.4 Rules of the Court

The Convention allows inter-state as well as individual applications. For inter-state cases, any party to the Convention may lodge an application against another party to the Convention alleging a breach of the provisions of the Convention and the protocols thereto.[30] Nevertheless, inter-state cases are

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[29] Convention for the Protection of Human Rights and Fundamental Freedoms 1950 preamble.

[30] ibid art 33.

very rare before the Court. Since 2000, there has only been a number of applications lodged by Georgia and Ukraine against Russian Federation.[31]

Moreover, the Convention grants the Court the capacity to "receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto."[32] In fact, the vast majority of the cases originate from individual applications. The Court deals with a colossal number of individual applications. At times, the number of pending cases before the Court has exceeded hundred thousand.

The application process of the Court has been reformed for a number of occasions. As of now, the Court rulings are delivered by different formations of the Court in particular single-judge formation, three-judge committee, seven-judge Chamber and 17-judge Grand Chamber.[33] The Court has a jurisdiction to deliver a judgment on the merits of the case determining whether or not a member state has violated rights protected under the Convention and protocols thereto. If the Court finds a violation of the Convention rights, it may afford just satisfaction to the injured party.[34] A final judgment of the Court has a binding force and member states must obey it.[35] They are transmitted to the Committee of Ministers for the supervision of execution.[36]

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[31] Council of Europe, 'Inter-States Applications' <http://www.echr.coe.int/Documents/InterStates_applications_ENG.pdf> accessed 16 May 2017.

[32] Convention for the Protection of Human Rights and Fundamental Freedoms (n 29) art 34.

[33] ibid art 26.

[34] ibid art 41.

[35] ibid art 46(1).

[36] ibid art 46(2).

2.2.5 Living Instrument Doctrine

The Court, when determining whether or not a violation of human rights has taken place, applies standards set by the Convention. Nevertheless, it is the Court that interprets the standards. In doing so, the Court incorporates recent human rights developments. This makes the Convention reflective of modern social change. Otherwise, the Convention that was drafted in 1950 would have indeed been outdated by over a half a century later. In this process, the Court uses the "living instrument" doctrine. This doctrine was established by the Court in the case of *Tyrer v. The United Kingdom*.[37] In the case, the Court stated that "the Convention is a living instrument which [...] must be interpreted in the light of present-day conditions."[38] The use of the doctrine in *Tyrer v. The United Kingdom* meant that birching as a corporal punishment was deemed to be causing humiliation that attained the level inherent in the notion of degrading punishment contrary to article 3 of the Convention.[39] In the determination of the present-day conditions, the Court takes into account whether or not the conditions in question are "common" or "shared" amongst member states to the Convention. The Court also takes into account "any emerging consensus" with respect to the concerned human rights.[40] On the other hand, a stance of the respondent state's authorities on the issue at hand or public opinion in that state does not have a decisive power before the Court.[41]

Living instrument doctrine has had a significant impact on the Court's interpretation of the Convention rights. Besides the case of *Tyrer v. The United Kingdom*, there have been developments in the Court's interpretation of almost all the Convention rights. These include the evolutive interpretation

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[37] *Tyrer v The United Kingdom* [1978] European Court of Human Rights 5856/72.

[38] ibid 31.

[39] ibid 35.

[40] *Bayatyan v Armenia* [2011] European Court of Human Rights 23459/03 [102].

[41] George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Its Legitimacy' (Social Science Research Network 2012) SSRN Scholarly Paper ID 2021836 2 <https://papers.ssrn.com/abstract=2021836> accessed 16 May 2017.

of death penalty,[42] prohibition of torture,[43] prohibition of slavery and forced labour,[44] right to a fair trial,[45] right to family life,[46] right to private life,[47] freedom of thought, conscience and religion,[48] freedom of expression,[49] freedom of assembly and association.[50]

Here we pick up from where we left off under 2.1.3 part in this chapter - Human Rights vs. State Sovereignty. As noted, the state sovereignty and the principle of non-intervention imply that only the states themselves can decide what commitments they make in international law. They have indeed exercised their sovereignty when they voluntarily consented to be bound by the Convention. Accordingly, the states have agreed to the list of rights and freedoms that would be included in the Convention as well as the scope of these rights and freedoms. Moreover, they have consented that the Court would fulfil the role of a monitoring body. Consequently, the Court is allowed to interpret the provisions of the Convention and apply them to the cases that are brought before it.

As a result, the Convention system received "a certain degree of autonomy from the will of their creators."[51] Since its establishment, the Convention system has developed in a manner that the creators could not foresee at the time of drafting and adoption of the Convention. The autonomous widening of the scope of the Convention rights has further restricted the sovereignty of the member states. However, the member states have not provided an additional consent for the new restrictions. For this

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[42] *Soering v The United Kingdom* [1989] European Court of Human Rights 14038/88.

[43] *Selmouni v France* [1999] European Court of Human Rights 25803/94.

[44] *Rantsev v Cyprus and Russia* [2010] European Court of Human Rights 25965/04.

[45] *Kress v France* [2001] European Court of Human Rights 39594/98.

[46] *Kozak v Poland* [2010] European Court of Human Rights 13102/02.

[47] *Christine Goodwin v The United Kingdom* [2002] European Court of Human Rights 28957/95.

[48] *Bayatyan v. Armenia* (n 40).

[49] *Stoll v Switzerland* [2007] European Court of Human Rights 69698/01.

[50] *Demir and Baykara v Turkey* [2008] European Court of Human Rights 34503/97.

[51] Ruiz Fabri (n 10) 52.

reason, the Convention system is an example of the irrecusable limitations that, according to Ruiz Fabri, has redrawn the boundaries between human rights and state sovereignty.[52]

Nevertheless, the partial autonomy of the Convention system does not entail an unlimited power of the Court. The latter still remains restricted by the provision of the Convention and the rules of international law. The Court has itself emphasized that the living nature of the Convention does not grant the Court the capacity to adopt a new right that is not included in the Convention or to ignore an existing Convention right. According to the Court, it neither can establish an exception or justification that is not recognized by the Convention.[53]

Despite the fact that the Court has itself emphasized its own limitations under the international law and the Convention, it is often criticized for crossing this boundary. The Court is frequently called out to be legislating where it deems to be necessary. For instance, Lord Hoffmann, a former senior British judge, while agreeing that the Convention must be an evolutive instrument, criticizes the use of the doctrine of living instrument. He states that the "proposition that the Convention is a 'living instrument' is the banner under which the Strasbourg court has assumed power to legislate what they consider to be required by 'European public order.'" He supports his criticism with an example of a judgment of the Court in which it is attempted to recognize a concept of "protection of environmental human rights"[54] under the Convention that does not prescribe such a concept.[55]

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[52] Ruiz Fabri (n 10).

[53] *Austin and Others v The United Kingdom* [2012] European Court of Human Rights 39692/09, 40713/09, 41008/09 [53].

[54] *Hatton and Others v The United Kingdom* [2003] European Court of Human Rights 36022/97 Joint Dissenting Opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner [1].

[55] Lord Hoffmann, 'The Universality of Human Rights' (Judicial Studies Board Annual Lecture, 19 March 2009) <https://www.judiciary.gov.uk/wp-content/uploads/2014/12/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf> accessed 16 May 2017.

2.2.6 Margin of Appreciation Doctrine

Additionally, there is another doctrine used by the Court - margin of appreciation - that, in a broader context, is related to the living instrument doctrine and most importantly, to this research. Current 47 member states of the Convention have different political, economic, social and cultural backgrounds. Because of this, the member states have individual approaches to some of the human rights issues. However, provided that only one convention is to be applied to all of its member states, such individual approaches create challenges for the Court. To overcome them, the Court resorted to the doctrine of margin of appreciation.

According to this doctrine, the Court, in certain circumstances, may deem the domestic authorities to be "in a better position," compared to the judges of the Court, to determine whether the concerned state is in compliance with the requirements of the Convention.[56] Granting member states the margin of appreciation entails the states having discretionary power to decide on the respective issues. Still, where a state has been granted a margin of appreciation, its decisions are subject to the supervision of the Court. This happens as a consequence of the fact that the system of human rights protection established by ECHR is "subsidiary" to the domestic human rights systems. Primarily, the member states are in charge of protecting the Convention rights. And, the Court has a jurisdiction to deal with a human rights matter only after all domestic remedies are exhausted with respect to the latter.[57]

When the Court is determining whether or not a member state has acted in compliance with the requirements of the Convention, it takes into account the width of the margin of appreciation granted to the state.[58] The

[56] *Handyside v The United Kingdom* [1976] European Court of Human Rights 5493/72 [48].

[57] Convention for the Protection of Human Rights and Fundamental Freedoms (n 29) art 35(1).

[58] *Handyside v. The United Kingdom* (n 56) [48–49].

wider the margin is, the more discretionary power the state enjoys. The Court decides on the width of the margin using three criteria. Firstly, the more "important facet of an individual's existence or identity is at stake," the more limited is the margin. Secondly, the margin increases in situations where a state is required to strike a balance between competing interests. Lastly, the Court assesses the existence of consensus among the member states. Where the Court is unable to establish a consensus on an issue, the margin with respect to that issue widens.[59]

The doctrine of margin of appreciation is praised and criticized at the same time. For instance, a former judge of the Court Ronald St. John Macdonald called the doctrine "a useful tool in the eventual realization of a European-wide system of human rights protection, in which a uniform standard of protection is secured." According to him, "[t]he margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and Contracting States over their respective spheres of authority."[60] Nevertheless, in the same work, Macdonald criticized the inconsistent application of the doctrine by the Court.[61]

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[59] *Dickson v The United Kingdom* [2007] European Court of Human Rights 44362/04 [78].

[60] Ronald St J Macdonald and F Matscher, *The European System for the Protection of Human Rights* (Kluwer Law International 1993) 123.

[61] ibid 85.

3 Country Analysis

3.1 United Kingdom

3.1.1 UK and Human Rights

Historically, the UK has consistently played a central role in the human rights friendly development within the Convention as well as throughout the world. As a matter of fact, UK has been one of the initial birthplaces of human rights and has, since then, stood up against human rights abuses in the world. As an individual state and a permanent member of UNSC, the UK has led peacekeeping and humanitarian missions and encouraged and pressured abusive governments to respect human rights.

Because of its consistent support for human rights, according to the Secretary General of the Council of Europe Thorbjørn Jagland, the UK has a position of "the best pupil in class." This gives the UK a lead over other "pupils" (states). In this position, it can help human rights as well as devastate them. For instance, when it ratifies a new human rights instrument or recognizes a new right, the UK has the power and credibility to pressure other states to do the same. Unfortunately, at the same time, if the UK takes a measure that denounces human rights or delegitimizes a human rights instrument, according to the Council of Europe Commissioner for Human Rights Nils Muižnieks, other states might "follow the UK's lead" and do the same or similar.[62] Other states "will say, 'If the United Kingdom is doing that, we can also do it'"[63] For this reason, the acts of the UK are directly related to

[62] Nils Muižnieks, 'Memorandum to the UK Chair of the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill Mr Nick Gibb' <https://rm.coe.int/16806db5c2> accessed 16 May 2017.

[63] Joint Committee of House of Lords and House of Commons, 'Draft Voting Eligibility (Prisoners) Bill' (House of Commons 2013) HL Paper 103; HC 924 para 109

the human rights developments. This UK's position grants it the influence and power over human rights and because of this, the UK has an additional responsibility as well.[64]

3.1.2 UK and ECHR

The UK was the first state in depositing the instrument of ratification of the European Convention on Human Rights in 1951. Moreover, it has made one of the major contributions to the drafting process of the Convention. Additionally, in 1998, the UK passed Human Rights Act with overwhelming cross-party support. This UK law incorporates Convention rights into domestic legislation, allowing victims of violations to claim their rights before the UK's domestic courts.

The Convention and the Court have made a significant contribution to the protection of human rights in the UK, including the protection of gender equality, LGBT rights, freedom of speech and of the press, presumption of innocence, right to a fair trial and the prohibition of domestic violence, corporal punishment, torture and inhuman and degrading treatment. For this reason, generally, the Convention and the values it contains have been greatly appreciated by the British governments for decades.

Nevertheless, during the last decade, attitudes towards the Convention, Court and Human Rights Act have changed. Recently, British politics have been overwhelmed by sceptical rhetoric towards the CoE system. British state officials have often spoken against it. British Conservative politicians have accused judges at the European Court of Human Rights of engaging in "mission creep" - slowly increasing the scope of Convention rights. Their argument is that the UK has not originally agreed

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<https://www.publications.parliament.uk/pa/jt201314/jtselect/jtdraftvoting/103/103.pdf> accessed 16 May 2017.

[64] Nils Muižnieks (n 62).

to the contemporary interpretation of the Convention rights.[65] They criticize the fact that the Convention is a 'living instrument,' which means that the rights enshrined in the Convention have to "be interpreted in the light of present-day conditions" in order to prevent the system from becoming outdated.[66]

A former senior British judge Lord Hoffmann has been quite vocal about his critical attitude towards the Convention and the Court. In 2009, he wrote:

> *The fact that the 10 original Member States of the Council of Europe subscribed to a statement of human rights in the same terms did not mean that they had agreed to uniformity of the application of those abstract rights in each of their countries, still less in the 47 States which now belong.*[67]

There, Hoffmann differentiates human rights "in abstraction" and "in application." He argues that, on the one hand, human rights enshrined in ECHR are universal in abstraction. On the contrary, when it comes to the application of the Convention, the same human rights are national. Yet, according to him, ECtHR, in fact, provides the universal application of the abstract human rights. For this reason, Hoffman notes, the Court renders itself constitutionally illegitimate. To demonstrate the Court's illegitimacy, he provides a scenario in which the balance between the freedom of the press and privacy in the UK is "decided by a Slovenian judge saying of a decision of the German Constitutional Court."[68]

The statements of the British politicians have been particularly critical of the CoE system. For example, in 2015, then Prime Minister David

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[65] Human Rights Watch, 'The UK Government's Proposals Regarding the Human Rights Act and the European Court of Human Rights' (20 May 2015) <https://www.hrw.org/news/2015/05/20/uk-governments-proposals-regarding-human-rights-act-and-european-court-human-rights> accessed 16 May 2017.

[66] *Tyrer v. The United Kingdom* (n 37) [31].

[67] Lord Hoffmann (n 55).

[68] ibid.

Cameron said that he wants “British judges making decisions in British courts, and also the British Parliament being accountable to the British people.” Nevertheless, he did not explicitly suggest the withdrawal from ECHR, but ruled out “absolutely nothing” to achieve the abovementioned wish.[69] However, the successor of David Cameron, Prime Minister Theresa May has been directly lobbying for the Britain’s withdrawal from ECHR.[70]

Both Prime Ministers have often pointed towards possible causes of the sceptical attitudes. They have accused the Convention of compromising the national security and the public safety of the country. For example, Cameron mentioned the inability of the government to deport “these foreign criminals committing offence after offence […] because of their right to a family life.”[71] May continued the same line of reasoning. She named several motivating factors for the withdrawal from the Convention. In particular, she mentioned the deportation and extradition proceedings of the suspected terrorists and the prisoners’ voting rights. She confirmed Cameron’s claim that ECHR makes the UK less secure by preventing the deportation of dangerous foreign nationals.[72]

In fact, the UK has been involved in a number of legal battles before the European Court of Human Rights concerning the deportation and extradition. The loss of some of these cases has initiated strong criticism from the politicians and public.[73]

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[69] Nicholas Watt, ‘Cameron Refuses to Rule out Leaving European Convention on Human Rights’ *The Guardian* (3 June 2015) <https://www.theguardian.com/law/2015/jun/03/cameron-refuses-to-rule-out-leaving-european-convention-on-human-rights> accessed 19 May 2017.

[70] James Slack and Jason Groves, ‘Britain Must Quit Europe’s Human Rights Court, Says Theresa May’ *Daily Mail* (26 April 2016) <http://www.dailymail.co.uk/news/article-3558594/Britain-quit-Europe-s-human-rights-court-says-Home-Secretary-opens-major-split-No-10-saying-UK-leave-wants-kick-terrorists-foreign-criminals.html> accessed 16 May 2017.

[71] Nicholas Watt (n 69).

[72] James Slack and Jason Groves (n 70).

[73] Nick Renaud-Komiya, ‘Britain Pays out Millions to Criminals after Losing 202 Human Rights Cases since 1998’ *The Independent* (8 October 2013) <http://www.independent.co.uk/news/uk/politics/britain-pays-out-millions-to-criminals-after-losing-202-human-rights-cases-since-1998-8866274.html> accessed 17 May 2017.

For instance, the case of *Othman (Abu Qatada) v. The United Kingdom*, brought in 2009 before ECtHR, enraged public and politicians as it delayed the deportation of a suspected terrorist and the proceedings cost the UK taxpayers around two million British pounds.[74] In the case, the Court assessed whether the deportation of a Jordanian national from the UK to Jordan would breach his rights under the Convention. After three-year-long proceedings, the Court unanimously found that the deportation would breach article 6. This was due to the fact that the applicant if deported risked that his trial in Jordan would not meet the requirements of the right to a fair trial under the Convention. Subsequently, the UK and Jordan ratified a treaty that provided guarantees and clarities that the requirements of the right to a fair trial would be met in Abu Qatada's trial. After the ratification of the treaty in 2013, Abu Qatada was deported to Jordan.[75]

Another case that the UK politicians often mention concerns the extradition from the UK to the United States of a UK national suspected of terrorism. It was brought before the Court in 2008. Consequently, the UK was not permitted to extradite the applicant during the Court proceedings which lasted for 3 years. In the end, the Court found that the extradition would not breach human rights of the applicant under the Convention.[76]

Moreover, article 8 of the Convention, the right to family life raises a highly publicized and politicized issue in the UK.[77] Foreign offenders who are subject to deportation often claim that the deportation will violate their right to family life under the Convention. In fact, such claims have proven to

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[74] Martin Robinson, 'One in Three Cases Lost by Britain at the European Court of Human Rights Are Brought by Terrorists, Prisoners or Criminals' *Daily Mail* (18 August 2015) <http://www.dailymail.co.uk/news/article-3201918/One-three-cases-lost-Britain-European-Court-Human-Rights-brought-terrorists-prisoners-criminals.html> accessed 16 May 2017.

[75] *Othman (Abu Qatada) v The United Kingdom* [2012] European Court of Human Rights 8139/09.

[76] *Babar Ahmad and Others v The United Kingdom* [2012] European Court of Human Rights 36742/08.

[77] Alice Philipson, 'More than 300 Foreign Criminals Use "Right to Family Life" to Escape Deportation' *The Telegraph* (2 September 2013) <http://www.telegraph.co.uk/news/uknews/immigration/10279941/More-than-300-foreign-criminals-use-right-to-family-life-to-escape-deportation.html> accessed 17 May 2017.

be effective in stopping deportations due to the fact that the UK judges often agree that the deportation will contradict with the requirements of the Convention. On this ground, UK immigration authorities are forced to halt the deportation proceedings and allow the persons in question to remain in the UK.

There are a few ECtHR judgments against the UK that are particularly relevant to this research. These cases concern the prisoners' right to vote. The UK imposes a blanket ban on the prisoners' voting rights. Because of this, it has been involved in a long legal battle with its prisoners before the Court.

In 2005, the Grand Chamber of ECtHR in the case of *Hirst v United Kingdom (No. 2)*, with the majority of twelve votes to five, found the UK to be in violation of the right to free elections under article 3 of Protocol No. 1 to the Convention, in denying all prisoners the right to vote. The Grand Chamber of the Court established that while the margin of appreciation in this area is wide, due to the "general, automatic and indiscriminate" nature of the restriction on a "vitally important" Convention right falls outside the margin, "however wide that margin might be."[78]

In spite of the 2005 Court judgment, the government of UK did not amend its legislation and refused to abolish the blanket ban on the prisoners' voting rights. As a consequence, since 2005, over one thousand prisoners have resorted to the Court with similar claims that their right to free elections has been violated by the blanket ban. Subsequently, the Court found the UK to be in violation of the Convention in the cases of *Greens and M.T. v. the United Kingdom*,[79] *Firth and Others v. the United Kingdom*,[80] *McHugh and Others v. the United Kingdom*[81] and *Millbank and Others v. the United*

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[78] *Hirst v The United Kingdom (No 2)* [2005] European Court of Human Rights 74025/01 [82].

[79] *Greens and MT v The United Kingdom* [2010] European Court of Human Rights 60041/08, 60054/08.

[80] *Firth and Others v The United Kingdom* [2014] European Court of Human Rights 47784/09, 47806/09, 47812/09...

[81] *McHugh and Others v The United Kingdom* [2015] European Court of Human Rights 51987/08, 49043/09, 49065/09...

Kingdom.[82] CoE bodies, for over a decade, have been trying to persuade the UK government to halt these Convention violations.

Yet, as of writing this thesis, UK has not implemented the judgments. Efforts of over thousand individuals, the Court and other bodies of CoE to put an end to these human rights violations have proven to be ineffective. UK government has not changed its stance and has persistently refused to do so. In fact, the UK politicians have been very vocal about their intentions. For instance, Cameron has said that it makes him "physically ill even to contemplate having to give the vote to anyone who is in prison."[83] Regardless of these attitudes, in 2010, UK government proposed a bill to bring the legislation in line with the Convention, but the members of the UK Parliament, by 234 to 22, voted overwhelmingly against the proposal.[84]

3.2 Russian Federation

3.2.1 Russian Federation and Human Rights

The relationship of the Russian Federation and human rights has been quite the opposite of the UK's. The Russian government has been becoming more and more repressive domestically and internationally. Human rights situation has substantially deteriorated in Russia as a result of narrowing fundamental rights and freedoms such as the freedom of expression, assembly, speech. Political freedoms are to the lowest as the imprisonment and assassination

[82] *Millbank and Others v The United Kingdom* [2016] European Court of Human Rights 44473/14, 58659/14, 70874/14...

[83] Andrew Hough, 'Prisoner Vote: What MPs Said in Heated Debate' *The Telegraph* (11 February 2011) <http://www.telegraph.co.uk/news/politics/8317485/Prisoner-vote-what-MPs-said-in-heated-debate.html> accessed 16 May 2017.

[84] Voting by Prisoners 2011 [Column 493].

rates of members of political oppositions are significantly high. LGBT groups are constantly oppressed under the Russian anti-LGBT "propaganda" law.[85]

Russia in 2014 annexed the Ukrainian territory of Crimea.[86] It also waged war against and invaded the Republic of Georgia in 2008.[87] Furthermore, the Russian government has consistently supported rebels on several territories outside Russia, including eastern Ukraine as well as Abkhazia and South Ossetia in Georgia.[88] Additionally, the Russian government is one of the key allies of the Syrian government. As a permanent member of UNSC, Russia has vetoed resolutions intended to halt the Syrian war and hold those responsible for the war crimes accountable.[89] As a consequence, the Syrian civil war continues and causes more civilian deaths every day. These international acts of Russia have devastated human rights situation in the respective territories and destabilized states concerned.[90]

As a result of having such a questionable human rights record, Russia is fairly antagonized. It does not possess the same human rights platform as does the UK. Nor do other states expect Russia to set an example.

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[85] Human Rights Watch, 'World Report 2016: Russia' (2016) <https://www.hrw.org/world-report/2016/country-chapters/russia> accessed 17 May 2017.

[86] Human Rights Watch, 'Ukraine: Fear, Repression in Crimea: Rapid Rights Deterioration in 2 Years of Russian Rule' (18 March 2015) <https://www.hrw.org/news/2016/03/18/ukraine-fear-repression-crimea> accessed 16 May 2017.

[87] Human Rights Watch, 'Up In Flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia' (2009) <https://www.hrw.org/report/2009/01/23/flames/humanitarian-law-violations-and-civilian-victims-conflict-over-south> accessed 17 May 2017.

[88] Human Rights Watch, 'World Report 2016: Ukraine' (2016) <https://www.hrw.org/world-report/2016/country-chapters/ukraine> accessed 17 May 2017.

[89] Euan McKirdy, '8 Times Russia Blocked a UN Resolution on Syria' *CNN* (13 April 2017) <http://www.cnn.com/2017/04/13/middleeast/russia-unsc-syria-resolutions/index.html> accessed 21 May 2017.

[90] Human Rights Watch, 'Living in Limbo: Rights of Ethnic Georgians Returnees to the Gali District of Abkhazia' (2011) <https://www.hrw.org/report/2011/07/15/living-limbo/rights-ethnic-georgians-returnees-gali-district-abkhazia> accessed 17 May 2017.

3.2.2 Russian Federation and ECHR

The Russian Federation ratified ECHR in 1998, including most of the optional protocols to the Convention. Since the ratification, Russia has been bound by the obligations enshrined in the Convention and its respective protocols.[91] As a matter of fact, Russia has been among the few states that have the most applications brought against it. Furthermore, Russia is also among the states that are found by the Court in violation of the Convention and its protocols the most. During the period of 1959-2016, Russia, with 1834 judgments, was the second (after Turkey). In these cases, Russia has been found to be in violation of the entire spectrum of the Convention rights and freedoms such as the prohibition of torture, inhuman and degrading treatment or punishment, right to liberty and security, right to a fair trial, right to respect for private life, correspondence and family life, protection of property, right to education, prohibition of collective expulsion of aliens, prohibition of discrimination.[92]

While the Court continuously finds Russia in violation of the Convention, criticism from the Russian government of the Court has been common. Russian politicians accuse the Court of fulfiling political functions,[93] disregarding specificities of each state[94] and contradicting with the principles of "one of the most democratic constitutions."[95] As part of this trend, President of Russia Vladimir Putin has said that the consideration of

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[91] Council of Europe, 'Simplified Chart of Signatures and Ratifications' (17 May 2017) <http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/chartSignature/3> accessed 17 May 2017.

[92] Council of Europe, 'Statistics of the ECHR - Violation by Article and by State during 1959-2016' <www.echr.coe.int/Documents/Stats_violation_1959_2016_ENG.pdf> accessed 20 May 2017.

[93] 'Putin on the European Court of Human Rights' *Putin Info* (15 August 2014) <http://putininfo.com/2121-putin-o-evropejskom-sude-po-pravam-cheloveka/> accessed 17 May 2017.

[94] Natalia Gorodetskaya, 'Alexei Pushkov Proposes to Denounce Russia's International Treaties' *Kommersant* (2 March 2015) <https://www.kommersant.ru/doc/2678066> accessed 17 May 2017.

[95] 'Ombudsman of the Ministry of Foreign Affairs of the Russian Federation on ECHR Decisions' *TASS* (18 December 2015) <http://tass.ru/politika/2540753> accessed 17 May 2017.

the possibility of withdrawal from the Convention is on the agenda.[96] In addition to the Russian politicians' criticism, Russian judges in the European Court of Human Rights actively write dissenting opinions in the judgments of the Court where Russia is found to be in violation of the Convention and/or its protocols.

The Russian opposition to the Court reached its culminating point when it passed a law allowing the Russian Constitutional Court (RCC) to review acts of international human rights bodies.[97] This law was adopted after RCC established that neither ECHR nor ECtHR prevailed over the constitution of Russia.[98] The new law empowers the Constitutional Court to determine whether or not decisions and judgments of international human rights bodies, for instance, ECtHR, are in line with the Russian Constitution (RC). According to the new law, when a decision or a judgment contradicts with the RC, the Constitutional Court is entitled to declare the ruling non-executable and refuse to implement it without any regard to the legal nature of the ruling, be it binding or not.

Russia, similar to the UK, has been involved in a legal battle before the Court in connection with the prisoners' voting rights. On 4 July 2013, ECtHR, in the case of *Anchugov and Gladkov v. Russia*, found Russia to be in violation of the Convention in imposing a blanket ban on its prisoners to vote. The legal principles that the Court used in the judgment were the same as in the case of *Hirst v. the United Kingdom (No. 2)*. The ban, according to the Court, "applied to all persons convicted and serving a custodial sentence, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances."[99] Hence, it was

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[96] 'Putin: Russia's Withdrawal from ECHR Possible' *RAPSI* (14 August 2014) <http://www.rapsinews.com/news/20140814/271910430.html> accessed 17 May 2017.

[97] Russian Federal Law on introducing amendments to the Federal Constitutional Law 'On the Constitutional Court of the Russian Federation' 2015 (7-FKZ).

[98] *Concerning the Enforcement of the ECTHR Judgments in Russia* [2015] Constitutional Court of the Russian Federation No. 21-P/2015.

[99] *Anchugov and Gladkov v Russian Federation* [2013] European Court of Human Rights 11157/04, 15162/05 [101].

a general, automatic and indiscriminate restriction on the right to free elections which, as a matter of fact, contradicted with the Convention. Nevertheless, the Russian government tried to differentiate the present case from *Hirst (No. 2)* by emphasizing the fact that unlike in the UK's legal system, prisoner's voting rights in Russia were regulated by the Russian Constitution. However, the Court dismissed such claim, stating that the Convention does not distinguish constitutional provisions from the ones of the "ordinary" law. For these reasons, the Court found the violation of the right to free elections, article 3 of Protocol No. 1.[100]

Nearly 3 years after the *Anchugov and Gladkov* judgment, in 2016, the Russian Constitutional Court delivered a ruling concerning the possibility of implementing the ECtHR judgment. The ruling was based on the new powers that RCC assumed by the 2015 constitutional law amendment. In the ruling, RCC argued that, firstly, the ban on the prisoners' voting rights was explicitly imposed by article 32 of the Russian Constitution.[101] Secondly, according to RC, its provisions prevail over international treaties, including the European Convention on Human Rights. Lastly, RCC determined that the article 32 of RC could not be interpreted as not being absolute. Moreover, it noted that Russia has never agreed to the interpretation of the Convention that the Court employed in the judgment. It stated that the change in the original interpretation of the Convention was done by the Court through the doctrine of living instrument. However, according to RCC, the doctrine shouldn't have been used due to the lack of consensus among CoE member states. Subsequently, the Constitutional Court established that it was impossible to execute *Anchugov and Gladkov* judgment of the ECtHR.[102] As a result, as of writing this thesis, Russia has not abolished the blanket ban on the prisoners'

[100] *Anchugov and Gladkov v. Russian Federation* (n 99).

[101] Constitution of the Russian Federation 1993 art 32.

[102] *Concerning the Possibility of Execution of the ECtHR Judgment in the Case of Anchugov and Gladkov v Russia (11157/04, 15162/05)* [2016] Constitutional Court of the Russian Federation No. 12-P/2016.

voting rights in compliance with the ECtHR judgment in *Anchugov and Gladkov*.

Anchugov and Gladkov judgment is not the only ECtHR judgment that Russia has refused to comply with. On 31 July 2014, ECtHR, in the case of *OAO Neftyanaya Kompaniya Yukos v. Russia*, delivered a judgment on just satisfaction. The latter judgment came subsequent to a judgment on merits in the same case. These judgments concerned the tax and enforcement proceedings brought by Russia against OAO Neftyanaya Kompaniya Yukos, a Russian oil company, which led to its liquidation. In the case, the Court found Russia to be in violation of the Convention. Firstly, in giving an insufficient period of time to the applicant company for preparation of the case before the domestic courts, Russia had violated the procedural requirements of the right to a fair trial under article 6 of the Convention. Secondly, the imposition and calculation of penalties were carried out in violation of the protection of property under article 1 of Protocol No. 1. Finally, the fast pace of the enforcement proceedings, the obligation to pay the full enforcement fee and the Russian authorities' failure to take proper account of the consequences of their actions had violated the protection of property under article 1 of Protocol No. 1.[103] As a consequence, the Court, in the judgment on just satisfaction, ordered the amount of €1.87 billion to be paid in pecuniary damages to the applicant company's shareholders.[104] As a matter of fact, this is the largest sum of money that the Court has ever awarded to the victims of human rights violations.

Despite the judgment on just satisfaction, Russia did not pay the award to the victims. On 19 January 2017, RCC delivered a similar ruling to the one concerning the case of *Anchugov and Gladkov*. Accordingly, it was delivered based on the 2015 constitutional amendments. The RCC ruling concerned the possibility of enforcement of ECtHR judgment on just satisfaction in the case

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[103] *OAO Neftyanaya Kompaniya Yukos v Russian Federation* [2011] European Court of Human Rights 14902/04, Judgment on Merits.

[104] *OAO Neftyanaya Kompaniya Yukos v Russian Federation* [2014] European Court of Human Rights 14902/04, Judgment on Just Satisfaction.

of *OAO Neftyanaya Kompaniya Yukos*. The Constitutional Court stated that the damages that the applicant company suffered were the result of their illegal activities with respect to taxation. According to RCC, the company had resorted to unlawful schemes of evading taxes that had a negative effect on Russia's economy. Due to these tax evasion schemes, the Russian state budget had been significantly underfinanced. It also emphasized that it is the same underfinanced budget that the ECtHR judgment ordered Russia to pay the award from. For these reasons, according to RCC, the enforcement of the ECtHR judgment will violate RC, namely, the constitutional principles of equality and fairness. Accordingly, on the basis of the 2015 constitutional amendments, RCC concluded that the Russian government is not bound by the obligation to pay the award of €1.87 billion.[105] In fact, as of writing this thesis, the Russian government has not implemented the *OAO Neftyanaya Kompaniya Yukos* judgment on just satisfaction.

In addition to the withdrawal from the Convention and declaring particular ECtHR judgments to be non-executable, other developments have also been discussed with respect to Russia. Laurence R. Helfer has speculated that Russia may establish a "rival European human rights regime comprised of a few allies in Eastern Europe and the former Soviet republics in central Asia."[106] He notes that this new framework could formally resemble the CoE system, in "reality, however, [it] would be much weaker." According to him, in such circumstances, the Russian government would be able to use the new regime to produce competing rulings to the ECtHR judgments. Subsequently, it could "point to the competing decisions [...] to justify and legitimize

[105] *Concerning the Possibility of Execution of the ECtHR Judgment in the Case of OAO Neftyanaya Kompaniya Yukos v Russian Federation (14902/04)* [2017] Constitutional Court of the Russian Federation No. 1-P/2017.

[106] The members of the European Union cannot be considered, as their membership in such a regime will contradict with their international commitments.

noncompliance with the Strasbourg Court's judgments," while, at the same time, remain a party to ECHR.[107]

[107] Laurence Helfer, 'The Successes and Challenges for the European Court, Seen from the Outside' <https://www.ejiltalk.org/the-successes-and-challenges-for-the-european-court-seen-from-the-outside/> accessed 17 May 2017.

4 Threats

The previous chapter has analysed human rights situation in the UK and Russia. In particular, it focused on the tendencies in these member states to withdraw from the Convention and refuse the implementation of the judgments of the Court. This chapter, in the first place, will determine whether or not withdrawal from the Convention is legal under the applicable rules. Subsequently, it will analyse the global, domestic and regional implications of the withdrawal. After that, the next subchapter will determine the legality of non-compliance with the Court judgments under the applicable rules of international law. The last three parts will analyse the global, domestic and regional implications of the refusal to implement a judgment.

4.1 Withdrawal from ECHR

4.1.1 International Law and the Convention

International law allows the withdrawal of a contracting state from an international treaty. According to article 54 of the Vienna Convention on the Law of Treaties, which is a codification of a rule of customary law,[108] "the withdrawal of a party [from a treaty] may take place: (a) In conformity with the provisions of the treaty; or (b) At any time by consent of all the parties after consultation with the other contracting States." Some of the human rights treaties do not allow the withdrawal of parties to it. For instance, contracting states to the International Covenant on Civil and Political Right may not withdraw from the Covenant. This is due to the fact that, as its monitoring body Human Rights Committee established, ICCPR "is not the

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[108] Corten and Klein (n 14) 1237–1241.

type of treaty which, by its nature, implies a right of denunciation."[109] Nevertheless, there is a considerable number of human rights treaties that permit state parties' withdrawal[110] such as the Convention on the Rights of Persons with Disabilities (2006) and the Convention on the Rights of the Child (1989).

The European Convention on Human Rights, article 58, originally proposed by the UK in 1950,[111] permits contracting parties to withdraw from the Convention through denunciation or ending membership to the Council of Europe. According to the Convention, a "High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice."[112] Hence, the denunciation will take effect after the expiry of six months' period from the submission of an advance notice.

Additionally, any "High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions."[113] In accordance with the Statute of the Council of Europe, the withdrawal from CoE will take effect at the end of the next financial year.[114] This implies that the withdrawal from CoE will have the effect of denunciation of the Convention at the end of the next financial year. Hence, despite the fact that the withdrawal from either CoE or the Convention will eventually have the same effect of denunciation of the Convention, the moment that the denunciation becomes effective is different. This is particularly important due to the fact that, in line with the Convention, the

[109] UN Human Rights Committee, 'CCPR General Comment No. 26: Continuity of Obligations' (1997) CCPR/C/21/Rev.1/Add.8/Rev.1.

[110] William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 41–43.

[111] The United Kingdom Delegation, Proposed Amendments to the European Convention on Human Rights [CM 1 (50) 6, A 1867, V TP 66–71] 68–70.

[112] Convention for the Protection of Human Rights and Fundamental Freedoms (n 29) art 58(1).

[113] ibid art 58(3).

[114] Statute of the Council of Europe (n 26) art 7.

state in question will not be released from its obligations under the Convention with respect to the acts which may have been performed before the date at which the denunciation became effective.[115]

In practice, it is not common to invoke the article 58. It is more common for politicians of member states to consider the prospects of denunciation in the domestic and international politics. Since the adoption of the Convention, denunciation has taken place only once. In December 1969, Greece announced its decision to withdraw from CoE and submitted the six months' advance notice to denounce the Convention. In such circumstances, on the basis of article 58 paragraph 3 of ECHR and article 7 of the Statute of CoE, Greece would simultaneously cease membership to CoE and the Convention at the end of the next financial year, particularly, on December 31, 1970. Nevertheless, due to the fact that Greece had also submitted the six months' advance notice to denounce the Convention, in accordance with the article 58 paragraph 1 of ECHR, Greece would be released from the Convention obligations after six months, in June 1970. For these reasons, while Greece ceased to be a member of CoE in December 1970, it was released from its obligations under the Convention 6 months earlier.

As a consequence of withdrawal, individuals and other member states will not be able to lodge applications against the withdrawing state, except in connection with the acts which "may have been performed […] before the date at which the denunciation became effective."[116] For instance, after the denunciation of the Convention by Greece in 1970, the European Commission of Human Rights deemed itself competent to continue the consideration of an application against Greece beyond the moment the denunciation became effective. However, in this particular case, on the basis of consent from the applicant states and Greece, the application was struck

[115] Convention for the Protection of Human Rights and Fundamental Freedoms (n 29) art 58(2).

[116] ibid art 58(2).

out of the list of cases in 1974.[117] The abovementioned entails that if the UK and Russia were to withdraw from the Convention, they could still be held accountable for the acts performed before the denunciation becomes effective.

In addition to this, the Convention imposes an obligation on a withdrawing state to remain bound by the judgments of the Court delivered in connection with the acts performed before the denunciation becomes effective.[118] Accordingly, withdrawal from the Convention to nullify obligations arising from the Court judgments is not a viable option under the Convention. Thus, the UK and Russia, in case of withdrawal from the Convention, will still remain bound by the judgments of the Court with respect to the prisoners' voting rights. Additionally, Russia will remain bound by the obligation to pay the award in compliance with the *OAO Neftyanaya Kompaniya Yukos* judgment.

4.1.2 Global Implications

The global implications of the withdrawal of a member state from the Convention depend on several factors. Perhaps the most important factor is the characteristics and the role of the withdrawing state in the field of human rights. Because of this, the impact of withdrawal can be drastically different depending on a particular withdrawing state.

If we take the UK, for example, its long-standing positive relationship with human rights must be taken into account. Its leading role in the human rights field is crucial for this assessment. States around the globe expect the UK to set an example and show the direction of human rights developments. According to UN Special Rapporteur on Torture Juan Mendez, the UK's

[117] *Denmark, Norway and Sweden v Greece* [1970] European Commission of Human Rights 4448/70, Two decisions on admissibility; *Denmark, Norway and Sweden v Greece* [1976] European Commission of Human Rights 4448/70, Report.

[118] Convention for the Protection of Human Rights and Fundamental Freedoms (n 29) art 58(2).

withdrawal be “a very bad example for the rest of the world.”[119] Given this fact, its withdrawal will send a signal of sacrificing human rights. Additionally, the fact that the UK is one of the founder member states of the Convention will amplify the negative impact. This will knock the UK off the global podium of human rights leading developers. Furthermore, the pressure that the UK has placed on the governments worldwide to respect, protect and fulfil human rights will lose credibility and legitimacy. As a consequence, human rights improvements can stagnate or reverse in some parts of the world.

The role of the UK as a permanent member of UNSC must be taken into consideration. This position gives the UK a stronger platform to influence the human rights protection all around the world. For this reason, Muižnieks emphasized that “the UK has additional responsibilities within the UN system.”[120] For the effective achievement of the goals of UNSC, it is crucial for its members to have credibility. However, the UK’s withdrawal from the most successful human rights instrument will render it less credible and its commitment to the respect for human rights questioned.

On the contrary to the UK’s withdrawal from the Convention, withdrawal of Russia will have a substantially different impact on the human rights protection on the global scale. This is due to the characteristics of the Russian Federation and the role that it plays in the human rights protection. Owing to its questionable human rights record, there are not many states that look up to Russia for setting an example in the field of human rights. Neither does Russia exercise pressure on other governments to fulfil the human rights obligations. Accordingly, it is not crucial that Russia maintains its current platform and credibility in promoting and encouraging human rights protection. For these reasons, Russia’s withdrawal from ECHR will have

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[119] Mark Townsend, ‘UN Torture Investigator Says UK Plan to Scrap Human Rights Act Is “dangerous”’ *The Guardian* (3 October 2015) <https://www.theguardian.com/law/2015/oct/03/un-criticises-british-government-bill-of-rights> accessed 22 May 2017.

[120] Nils Muižnieks (n 62).

substantially limited negative implications on the global scale compared to that of the UK.

The same applies to Russia's permanent membership of UNSC. Normally, the credibility and reputation of the five permanent members of the Security Council are particularly important.[121] However, due to the existing antagonistic relationship between Russia and human rights, this factor is not essential for the global impact assessment of Russia's withdrawal from ECHR.

In conclusion, the withdrawal of member states from the Convention will have varying effects on the human rights protection on the global scale. For the global impact assessment, the main factors are role and reputation of a particular withdrawing member state in the field of human rights. Withdrawal of a leading human rights advocate and a founder state of the Convention in particular the UK will have a substantial negative impact on the protection of human rights on the global scale. In contrast, the withdrawal of a member state with a questionable human rights record in particular Russia will generate an insignificant impact.

4.1.3 Domestic Implications

Withdrawal of a member state from the Convention will have one of the largest impacts on the human rights protection domestically in that state. This is due to the fact that ECtHR will lose the jurisdiction to rule on the acts of the former member states that are performed after the denunciation takes effect. Accordingly, the victims of human rights violations committed by the former member states of the Convention will lose access to the Court.

In theory, after the withdrawal, the victims of human rights violations can make use of the individual complaint mechanism under the International Covenant on Civil and Political Rights. ICCPR, similar to ECHR, enshrines

[121] ibid.

civil and political rights and in some aspects, goes even beyond the Convention, for instance, in the protection of the rights of minorities.[122] Optional Protocol to ICCPR establishes the individual complaint mechanism that grants the Human Rights Committee the capacity to "receive and consider communications from individuals."[123] HRC adopts views on communications that it receives and determines whether or not the human rights enshrined in the Covenant have been violated. The Committee regards its views as "authoritative determinations" of the obligations under the Covenant. According to the Committee, state parties are required to comply with its views in order to fulfil their obligations under article 2 of ICCPR - effective remedy.[124]

While HRC can determine whether or not a state has violated human rights under ICCPR, a few factors need to be accounted for. For instance, the HRC does not have the jurisdiction to receive communications against all of the ECHR member states. The individual complaint mechanism is optional for the state parties to the Covenant. As a result, while ICCPR has 169 parties to it, only 116 of them have also agreed to the mechanism.[125] The UK, for instance, is a party to ICCPR. However, it has not agreed to the mechanism.

Consequently, in the case of the UK's withdrawal from ECHR, it will become up to its domestic judicial authorities to redress the human rights violations.[126] In fact, in 2016, the Court has found the UK to be in violation of the Convention in seven judgments, compared to the average of about 18. Therefore, we can conclude that the UK's judicial branch is redressing human

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[122] International Covenant on Civil and Political Rights 1966 art 27.

[123] Optional Protocol to the International Covenant on Civil and Political Rights 1966 art 1.

[124] Human Rights Committee, 'CCPR General Comment No. 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights' (2008) CCPR/C/GC/33 paras 13–14.

[125] 'Multilateral Treaties Deposited with the Secretary-General' (*United Nations Treaty Collection*) <https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&clang=_en> accessed 21 May 2017.

[126] It has to be noted that there are universal and regional specialized human rights bodies that can receive communications from individuals on the matters that are within their jurisdiction. Nevertheless, these bodies do not cover all the rights protected by ECHR.

rights violations fairly well.[127] Nevertheless, as demonstrated by the statistics, it is not perfect and accordingly, we can assume that the UK's withdrawal from the Convention will have an adverse effect on the human rights protection in the UK.[128]

Another factor to take into account is the capacity of HRC to consider a large number of communications. So far, it has adopted a small number of views. To put it in perspective, the full-time ECtHR, having jurisdiction over 820 million individuals, in the year of 2016, delivered 989 judgments. Among these judgments, 228 of them were against Russia.[129] On the contrary, the part-time HRC, having jurisdiction over 2.3 billion individuals,[130] last year, adopted only 68 views.[131] The latter number is 3.4 times less than the number of the ECtHR judgments against Russia. For this reason, the author of the research believes, HRC will not be able to handle the caseload originating from some of the member states of ECHR such as Russia.

Accordingly, if Russia withdraws from the Convention, the Human Rights Committee will not have the ability to cope with the high number of human rights violations. Consequently, the Russian domestic judicial authorities will have the final say in the human rights cases.[132] Unfortunately, the statistics of ECtHR clearly show that the Russian judiciary is unable to

127 This analysis disregards the size of population per CoE member state. The UK's population is about four times larger (65 million) than the CoE member states' average (approximately 17 million). Such difference strengthens the conclusion that the UK's judicial branch is redressing the human rights violations fairly well.

128 Council of Europe, 'Statistics of the ECHR in 2016 - Violation by Article and by State' <www.echr.coe.int/Documents/Stats_violation_2016_ENG.pdf> accessed 20 May 2017.

129 ibid.

130 World Bank, 'Population of States Which Grant a Right to Complain of Violations of the International Covenant on Civil and Political Rights as of December 21, 2016' <http://www.humanrightsvoices.org/site/documents/?d=14165> accessed 21 May 2017.

131 Human Rights Committee, 'Report of the Human Rights Committee of the 114th, 115th and 116th Sessions' (United Nations 2016) A/71/40 iii <http://www.un.org/ga/search/view_doc.asp?symbol=A/71/40> accessed 21 May 2017.

132 It has to be noted that there are universal and regional specialized human rights bodies that can receive communications from individuals on the matters that are within their jurisdiction. Nevertheless, these bodies do not cover all the rights protected by ECHR. Furthermore, their ability to cope with a high number of communications and to ensure that the human rights violations are redressed is highly unlikely.

redress human rights violations.[133] Additionally, it has to be considered that the Court's jurisdiction serves as a deterrent to the human rights violations. Hence, the withdrawal from the Convention will abolish the deterrent effect, resulting in more human rights violations without redressing them. Therefore, the Russia's withdrawal from ECHR will have a substantial negative effect on the human rights protection in Russia.

In conclusion, the domestic level implications of the withdrawal will be significant. Due to the complexity of the issue, it is hard to name all the factors that affect the outcome. In the case of UK, the essential factor is its international commitments, namely, the fact that it has not consented to the individual complaint mechanism under ICCPR. On the other hand, the main factor for Russia is a high number of human rights violations and at the same time, the inability of its judiciary branch to redress the violations. Lastly, owing to the complexity of the issue, this research cannot determine whether the human rights protection on the domestic level will suffer more in the UK or Russia.

4.1.4 ECHR Implications

Withdrawal of member states from the Convention will have wide-ranging effects on the Convention system. One of the most obvious effects of the withdrawal is the reduced applicability of the Convention. The Court has the jurisdiction only over member states to the Convention. For this reason, the number of member states to the Convention is proportional to the breadth of the capacity of the Court. Accordingly, withdrawal of each member state will reduce the capacity of the Court as the withdrawal will render the Court without the jurisdiction to rule on the withdrawing state.

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[133] Council of Europe, 'Statistics of the ECHR in 2016 - Violation by Article and by State' (n 128); Council of Europe, 'Statistics of the ECHR - Violation by Article and by State during 1959-2016' (n 92).

Moreover, similar to the global implications, the impact of the withdrawal on the Convention system will differ depending on a particular withdrawing member state. This is due to the fact that states play different roles in the protection of human rights.

For instance, according to Jagland, all member states expect the UK to set an example.[134] Moreover, the UK has consistently placed pressure on the governments of European states to make international commitments to the protection of human rights.[135] On the contrary, the UK's withdrawal will set a bad example for the rest of the member states. As a consequence, it will release the UK's pressure over other states to respect human rights. According to Muižnieks,

> *Whereas member states of the Council of Europe are generally willing to subject themselves to criticism or "peer review" by other member states, they are less receptive to such criticism by non-member states [...]. If the UK does withdraw from the Council of Europe, other European countries will likely be far less receptive to the UK's interventions on human rights related matters.*[136]

If the UK withdraws from the Convention, the same will very likely be placed on the agenda in member states such as Russia, Turkey, Hungary and Poland. Unfortunately, in that case, the UK will not have the platform any longer to pressure these states to refrain from the withdrawal. As a consequence, this process can resemble a domino effect which can have a significant negative impact on the capacity and the influence of the Court. In such a case, the jurisdiction of the Court will be substantially reduced, limited to states with leading human rights records. Therefore, the Court will become unable to redress human rights violations and improve the livelihood of individuals in the countries where it makes the most substantial positive

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[134] Joint Committee of House of Lords and House of Commons (n 63) para 109.

[135] Such limitations on the state sovereignty is discussed under the second chapter of the thesis.

[136] Nils Muižnieks (n 62).

difference. At a certain point in this process, the Court can become so limited to the most human rights friendly states that it will be rendered nearly obsolete. However, even in that case, the Court can still continue to function - it will provide the guarantees for the human rights protection in a few states that will remain member to the Convention. Therefore, while the UK's withdrawal poses a threat to the protection of human rights in some parts of the continent, the threat will not be existential to the Convention system.

In contrast, Russia plays a substantially different role in the Convention. In general, other member states do not expect Russia to set an example. Nor does it place pressure on other states to respect human rights. For this reasons, the probability that the other member states will follow the Russia's lead is fairly low. Perhaps, it is reasonable to allow the possibility of one or two member states following Russia out of the Convention. Nevertheless, the extent of this reaction will be essentially narrower in comparison with the expected impact of the UK's withdrawal. Additionally, since Russia did not pressure other states to respect human rights, the Russia's withdrawal will not release any other state from limitations. Therefore, the impact of Russia's withdrawal on the Convention system will be so insignificant that it can hardly pose any threat whatsoever to it.

In conclusion, withdrawal of member states from the Convention will have varying effects on the Convention system. Here, the main factor is the role played by the withdrawing state in the Convention system. This part of the research has demonstrated that the withdrawal of a leading human rights advocate and a founder state of the Convention in particular the UK will have a substantial impact on the Convention system - it can render the Convention and the Court nearly obsolete, but it will not pose an existential threat to it. In contrast, the withdrawal of a member state with a questionable human rights record in particular Russia will generate an insignificant impact on the Convention system.

4.2 Non-compliance with the Judgments

4.2.1 International Law and the Convention

According to the Convention, "[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties."[137] This establishes a binding force of the Court judgments for the states concerned. This provision is based on the general principle of *pacta sunt servanda* (agreements must be kept)[138] codified in article 26 of the Vienna Convention on the Law of Treaties as well as in the Preamble to it: "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."

The judgments of the Court are "essentially declaratory" by nature[139] and lack "an invalidating effect." If a Court, in judgment, finds a violation of the Convention, due to the declaratory nature, state authorities are given discretion to determine specific measures that are necessary to implement the ruling.[140] These measures can be individual or general, depending on the specificities of the violation. When a violation yields individual measures, a respondent state is required "to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention." As for the case of general

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[137] Convention for the Protection of Human Rights and Fundamental Freedoms (n 29) art 46(1).

[138] *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland (No 2)* [2009] European Court of Human Rights 32772/02 [87].

[139] ibid 61.

[140] Alain Zysset, *The ECHR and Human Rights Theory: Reconciling the Moral and the Political Conceptions* (Routledge 2016) 117.

measures, the state is to prevent "new violations similar to that or those found or [to] put[...] an end to continuing violations."[141]

In line with the Convention, final judgments of the Court are transmitted to the Committee of Ministers for the supervision of execution.[142] If a member state were to fail to implement the Court judgment, CM can, in theory, adopt measures in response to the failure.[143] Nevertheless, in spite of the fact that there have been a number of cases where a respondent state failed to implement judgments, CM has never invoked the abovementioned capacity.

With respect to a state party's failure to implement a judgment, the Court has established that the state's international responsibility can be engaged.[144] Under the rules on responsibility of states, a state responsible for an internationally wrongful act has the obligations of cessation and non-repetition of that act.[145] The state is also required to "make full reparation for the injury caused"[146] and "to make restitution [...] to re-establish the situation which existed before the wrongful act was committed."[147]

Furthermore, it has to be noted that the state's obligation to implement a judgment of the Court exists with no regard to the provisions of its domestic law. This is on the basis of article 27 of VCLT, which states that a "party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[148] As a consequence, article 26 of VCLT prevails over any conflict between the fulfilment of a treaty obligation and internal laws of

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[141] Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements 2006 rule 6(2)(b).

[142] Convention for the Protection of Human Rights and Fundamental Freedoms (n 29) art 46(2).

[143] ibid art 46(5).

[144] *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2)* (n 138) [85].

[145] Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 (Supplement No 10 (A/56/10), chpIVE1) art 30.

[146] ibid art 31.

[147] ibid art 35.

[148] Vienna Convention on the Law of Treaties (n 15) art 27.

the state in question.[149] The notion of "internal law" refers to the domestic legal system in its entirety, including legislative, administrative and regulatory provisions as well as gaps in the legal system.[150] According to PCIJ, it also includes states' constitutional principles and provisions.[151]

As a matter of fact, the European Commission for Democracy through Law (Venice Commission) issued an opinion that concerns the relationship between the international obligations of a state and the latter's internal laws. The opinion was issued in response to the 2015 amendments to the Russian Federal Constitutional Law on the Constitutional Court that empowered the latter to declare decisions of international courts "unenforceable."[152] The Venice Commission emphasized that the compliance with the judgments of the Court "is an unequivocal, imperative legal obligation."[153] It determined that the provisions of the Russian law in question were "in direct conflict with the obligations" under ECHR and VCLT.[154] According to the Commission, non-compliance with the Court judgments were out of the question. It concluded that in the case where the enforcement is impossible under the Constitution, there is only one option left for the state in question - to amend its constitution.[155]

Accordingly, generally, the refusal to implement a judgment of the Court violates the provisions of the Convention and international law. Nevertheless, the following two paragraphs will apply the abovementioned

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[149] Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (BRILL 2009) 371–373.

[150] Corten and Klein (n 14) 692–693.

[151] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (1932) 44 Ser -B (Permanent Court of International Justice) 42.

[152] European Commission for Democracy through Law (Venice Commission), 'On The Amendments to the Federal Constitutional Law on the Constitutional Court' (2016) Opinion no. 832/2015 <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)016-e> accessed 17 May 2017.

[153] ibid 38.

[154] ibid 42.

[155] ibid 23.

principles to assess the legality of the UK's and Russia's failure to implement the judgments.

On the one hand, the UK has not implemented judgments in *Hirst (No. 2)*, *Greens and M.T.*, *Firth and Others*, *McHugh and Others* and *Millbank and Others*, for political reasons. The UK government is disagreeing with the Court in these judgments. Moreover, a bill that was intended to bring the UK legislation in line with the Convention was not successful. The failure to fulfil obligations under the Convention cannot be excused for these reasons. Accordingly, in failing to implement the judgments, the UK is violating the Convention and international law.

On the other hand, Russia has not implemented Court judgments in *Anchugov and Gladkov* and *OAO Neftyanaya Kompaniya Yukos* on the ground that the Russian Constitutional Court declared the judgments to be in contradiction with the Russian Constitution and deemed them unenforceable. Under the applicable rules of international law states are not allowed to invoke provisions of internal laws, including constitutions, as justification for their failure to perform treaties. Therefore, we can conclude that the Russia's failure to implement the Court judgments is in violation of international law and the Convention.

4.2.2 Global Implications

When it comes to global implications of non-compliance with judgments of the Court, a former Attorney General of the UK Dominic Grieve stated that the "reputational consequences" of non-compliance will be "a very serious consideration." This is due to the fact that it will be a major departure from the UK's attitude towards its international commitments and human rights.[156] For this reason, the non-compliance will damage the credibility and reputation of the UK with respect to human rights. This, as a consequence,

[156] Joint Committee of House of Lords and House of Commons (n 63) para 108.

will be a hurdle in lobbying for the new developments or for the maintenance of a status quo in the field of human rights anywhere in the world.

A clear example of reputational consequences that have realized recently was triggered by the UK's Prime Minister's mere political statements.[157] In 2014, Kenyan President Uhuru Kenyatta, when addressing the national assembly and the senate regarding the charges against him brought by the International Criminal Court, cited David Cameron's skeptical stance towards ECtHR.[158]

On the contrary, implications of the non-compliance by Russia will be different. This is due to the fact that unlike the UK, Russia has a negative human rights record. It already lacks a good reputation and a high degree of credibility in the human rights field. Most likely, the Russia's refusal to implement the Court judgments will not come as a surprise to other states. For this reason, the global consequences of its non-compliance with the judgments will not be substantial.

In conclusion, the non-compliance with the Court judgments will have varying effects on the human rights protection on the global scale. Essentially, it depends on a particular state that is failing to comply with the judgments. Non-compliance by a leading human rights advocate and a founder state of the Convention, the UK, will have a noticeable impact on the protection of human rights on the global scale. On the contrary, the non-compliance by a state with a negative human rights record, Russia, will not generate a significant impact.

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[157] Ian Dunt, 'Kenyan Leader Cites Cameron's Human Rights Attack as He Fights Charges in the Hague' <http://www.politics.co.uk/blogs/2014/10/22/kenyan-leader-cites-cameron-s-human-rights-attack-as-he-figh> accessed 17 May 2017.

[158] Mr. President, at the material time, was being charged before the International Criminal Court with crimes against humanity. In his speech, the President defended the sovereignty of Kenya and criticized international bodies. He emphasized that even the UK, with its human rights friendly history, was of the same opinion that a global conflict is taking place between national sovereignty and overly ambitious international courts.

4.2.3 Domestic Implications

Domestic implications of noncompliance of a member state with the Court judgments are directly related to the judgments in question. The implications will vary per judgment. In the circumstances, where a violation yields individual measures, for instance, in *OAO Neftyanaya Kompaniya Yukos*, the non-compliance will have the largest impact on the applicants in the case. On the contrary, in the case of general measures, as it is in the judgments concerning the prisoners' voting rights, the non-compliance will impact the interests of a larger community, in this case, all prisoners of the state in question belonging to the group that in accordance with the Convention, must have the right to free elections.

Additionally, it has to be taken into account that the non-compliance with the Court judgments will put a dent in its binding force. It will set a precedent that a state, against the provision of international law, is allowed to refrain from implementing a judgment of the Court for any particular reason. Such will negatively influence a general situation of the human rights protection in the non-complying state. Muižnieks emphasized that it will weaken "the safeguards for individuals and companies against possible state abuses."[159]

4.2.4 ECHR Implications

The binding force of the Court judgments has played one of the key elements in the success of the CoE system. It is due to the binding nature that governments have to protect human rights and redress violations. This obligation applies without any regard to the willingness of the concerned governments. However, the non-compliance with the Court judgments

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[159] 'Commissioner Concerned about Non-Implementation of a Judgment of the European Court of Human Rights in Russia' [2017] Council of Europe <https://www.coe.int/en/web/commissioner/-/commissioner-concerned-about-non-implementation-of-a-judgment-of-the-european-court-of-human-rights-in-russia> accessed 17 May 2017.

directly contradicts with this imperative legal obligation under the Convention and international law. Many have spoken out that for that reason, the non-compliance will pose existential threats to the Convention system and consequently, it will jeopardise the human rights protection in Europe. For example, Muižnieks stated that the non-compliance "threatens the very integrity and legitimacy of the system of the European Convention on Human Rights."[160] He draws such a drastic conclusion owing to the message that the non-compliance will send. According to him, it will set a dangerous precedent that the member states can willingly refuse the standards of democracy, human rights and the rule of law required by CoE.[161] He concludes that since the non-compliance poses existential threats to the system, the member states should withdraw from the Convention instead of defying the Court by refusing to implement its judgments.[162]

In discussions on the UK's non-compliance, its leading role in the consistent support for the positive human rights developments is always emphasized. According to Jagland, the UK has a powerful platform as "the best pupil in class." This position gives the UK lead over other member states. Any example, be it good or bad, will have a significant influence in the CoE system. In fact, the non-compliance with the binding Court judgments, without any doubt, will be a bad example. For this reason, he fears that the UK will cause a serious reaction in the system - "Many others will say, 'If the United Kingdom is doing that, we can also do it.'" According to him, it "may be … the beginning of the weakening of the Convention system and probably after a while there may also be dissolution of the whole system."[163]

Muižnieks expressed a similar view, stating that if the UK, as one of the founders of CoE and leading states in the human rights protection "decides to "cherry-pick" and selectively implement judgments, other states will

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[160] ibid.

[161] ibid.

[162] Nils Muižnieks (n 62).

[163] Joint Committee of House of Lords and House of Commons (n 63) para 109.

invariably follow suit and the system will unravel very quickly." He noted that, in his opinion, as of October 2013, the UK's refusal to implement the "*Hirst (No. 2)* and *Greens and M.T* judgments has thus far not caused irreparable damage to the Court, the Council of Europe, or the UK's international reputation." According to him, the impact is just a matter of time and if the UK continued to refuse the implementation of the judgments, other member states "would probably follow the UK's lead and also claim that compliance with certain judgments is not possible, necessary or expedient."[164] Muižnieks deems such scenario as "probably [...] the beginning of the end of the ECHR system."[165]

The author's thesis supervisor, Göran Melander is sceptical of the idea that the UK's non-compliance with the judgments will constitute the beginning of the end of the ECHR system. He deems such rhetoric somewhat exaggerated. In his opinion, the Court will adapt to the new circumstances and overcome challenges.[166]

Unlike the case of UK, the response to Russia's refusal to implement the Court judgments has not been so pronounced. Discussions regarding the importance of the Russian Constitutional Court's rulings have been limited. Muižnieks has been one of the few who responded to the RCC ruling concerning *OAO Neftyanaya Kompaniya Yukos*, stating that it "threatens the very integrity and legitimacy of the system of the European Convention on Human Rights."[167] Nevertheless, there was no mention of "the beginning of the end" in his statement. Nor has anyone else implied that Russia's refusal to implement the judgments will pose an existential threat to the Convention system.

The author of the research believes that this has to do with Russia's role in the field of human rights protection. Russia does not have a leading

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[164] Nils Muižnieks (n 62).

[165] ibid.

[166] Interview with Göran Melander, 'Regarding Thesis Supervision' (10 May 2017).

[167] 'Commissioner Concerned about Non-Implementation of a Judgment of the European Court of Human Rights in Russia' (n 159).

role in the field, and any acts that have an adverse impact on human rights will be nearly isolated to Russia. This applies to the rulings of the Russian Constitutional Court.

Nevertheless, in the author's opinion, Russia's refusal to implement the Court judgments has the potential to affect the Convention system. In the case of non-compliance, the Committee of Ministers, under the Convention, has the capacity to take responsive measures.[168] CM's failure to take effective measures may send a strong signal to the member states, that the CoE system is unable to ensure the respect for human rights against the will of an oppressive government. Such signal will most likely damage the credibility and reputation of the Convention system.

In conclusion, the non-compliance with the Court judgments have a potential to pose existential threats to the Convention system. Nevertheless, the impact depends on a particular state that refuses to implement the judgments. For instance, the refusal to implement a judgment by a leading human rights friendly state in particular the UK can mean "the beginning of the end." Whereas, the impact of the non-compliance by a state with a questionable human rights record - Russia - will be significantly less important to the Convention system.

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[168] Convention for the Protection of Human Rights and Fundamental Freedoms (n 29) art 46(5).

5 Conclusion

For over a few years, the government of UK has been planning to withdraw from the European Convention on Human Rights. Moreover, it has also failed to implement binding judgments of the European Court of Human Rights. Similarly, the Russian government has confirmed that the withdrawal from the Convention is being considered while, at the same time, it refuses to implement two judgments of the Court. This thesis has analysed these factual circumstances in light of the relevant legal norms. Subsequently, it has drawn conclusions on the impact that these tendencies will have on the protection of human rights on global, domestic and regional levels. The research has demonstrated that while both tendencies will have an adverse impact on human rights on all three levels, the impact varies significantly per state as well as per scenario - withdrawal and non-compliance.

Firstly, according to the findings of the research, the impact on the protection of human rights on various levels is significantly different, depending on whether a state withdraws from the Convention or refuses to implement a judgment of the Court. The main reason for the difference is the legality of the two. On the one hand, the withdrawal is in compliance with the Convention and international law. It is regulated and stays within the legal framework of the Convention. On the contrary, the non-compliance violates the Convention and the applicable rules of international law. It defies the purpose of the Convention and of the human rights system.

The research findings show that the impacts of withdrawal and non-compliance are the most different on the regional level within the CoE system. The withdrawal from the Convention can have a significant effect on the Convention system. It has the potential to drastically reduce the number of member states to the Convention. Nevertheless, according to the findings of the research, a state withdrawal from the Convention does not pose an existential threat to the human rights system. On the contrary, the research shows that the non-compliance with the Court judgments can have a more severe impact on the system. It contradicts with the principal element of the

establishment - the binding force of the Court judgments. For this reason, the non-compliance can pose an existential threat to the Convention system.

Secondly, the findings of the research show that in either of the circumstances, be it withdrawal or non-compliance, the impact on the protection of human rights significantly differ, depending on a particular member state involved. The main reason for the difference is varying characteristics of states such as reputation and credibility in the field of human rights. The thesis studied the implications in connection with two member states, the UK and Russia. The two are substantially different with respect to human rights.

The difference of impacts caused by the UK and Russia is clearly noticeable on the global and regional levels. In connection with the UK, the findings show that both the withdrawal and non-compliance, due to the reputational consequences, will have a significant negative impact on the protection of human rights on the global and regional levels. On the contrary, the withdrawal or non-compliance by Russia, according to the findings, will not generate a significant impact on the global and regional levels.

Moreover, the findings demonstrate the complexity of the research topic, as they do not follow a consistent pattern. This is due to a high number of variables that influence the outcome, for instance, international commitments as well as the effectivity of domestic judicial branch. In fact, unlike the UK, Russia has consented to the individual complaint mechanism under ICCPR. On the other hand, unlike Russia, the UK's judicial branch is better equipped to redress human rights violations without an oversight of an international human rights body. For these reasons, it is hard to determine whether the UK's or Russia's withdrawal will cause more significant adverse impact on the domestic level. As a matter of fact, this research does not cover such determination.

There are some of the relevant issues that are not covered by this study and require further research. Firstly, to account the findings for the measures that CoE and its member states can take in response to the withdrawal and/or non-compliance a further research can be carried out. Secondly, this research

studies an ongoing process. The factual and legal circumstances of the research are as of 15 May 2017. For this reason, any development in the area can become a subject of additional research. Lastly, this research only analyses two states, the UK and Russia. The research can be expanded over other states.

In conclusion, the research has studied current tendencies within the CoE and found that the protection of human rights on the global, domestic and regional levels will be differently affected by two intersecting factors. In one dimension, the impact depends on whether a state is withdrawing from the Convention or refusing to comply with the judgment of the Court. In the other dimension, the impact varies depending on the characteristics of a particular state involved. The author believes that the research and its findings are important to the field of international human rights law as they continue the academic discussion on the contemporary challenges. The research contributes to the better understanding of the wide-ranging implications of the measures that states can take within the European human rights system.

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