Reinventing or rediscovering international law? The Russian Constitutional Court's uneasy dialogue with the European Court of Human Rights

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This article discusses interactions between the Constitutional Court of the Russian Federation and the European Court of Human Rights. More specifically, it critically examines evolving legal reasoning of the CC with respect to its interpretation of international law. Furthermore, it reflects on broader implications of the CC's recent rulings that reaffirm the primacy of the Constitution of the Russian Federation over the ECtHR judgments in part where they appear to be contrary to the constitutional law provisions. These rulings are anticipated to have a long-lasting effect on the Russian legal system. They reflect a changing relationship between international and domestic law and signal a shift in Russia toward a more autonomous understanding of international law rooted in the principle of sovereignty that differs from the Western narrative of the discipline. Even more broadly, these emerging new interpretations support the idea of fragmentation of international law not only from a strictly legal perspective—as a plethora of conflicting sources of law—but also from a socio-legal perspective as a discipline harboring conflicting narratives.

1. Introduction

A qualitative shift in the relationship between the European Court of Human Rights (ECtHR) and the Constitutional Court of the Russian Federation (CC) did not happen overnight, as it has taken place against the backdrop of bigger challenges to the dominant narrative of international law in Russia. A push for the reinvention of the discipline of international law became noticeable following the 2008 Georgia–Russia war when Russian forces were deployed to intervene in the domestic affairs allegedly

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acting on behalf of the population of the breakaway regions of South Ossetia and Abkhazia. In order to justify its intervention, the Russian government invoked a unique interpretation of the principle of "responsibility to protect" adopted by the UN General Assembly in 2005.[1] The inclination to view international law autonomously only intensified after the annexation of Crimea, which Russia has repeatedly justified by defending the right of the population of Crimea to self-determination.[2]

A visible shift toward the understanding of the doctrine is also visible in the soft-law instruments adopted by Russia, such as a joint declaration of June 25, 2016, between Russia and China, reiterating their commitment to the principles of international law as they are reflected in the UN Charter and 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States.[3] The two states underlined the principles of sovereign equality, non-intervention, and peaceful resolution of disputes as a "cornerstone for just and equitable international relations."[4] The timing of this declaration as well as the principles of international law that the declaration singled out are not accidental. The declaration was adopted shortly before the Permanent Court of Arbitration in The Hague rejected China's historically driven territorial claims in the South China Sea.[5] It also underlines nearly a decade of Russia's efforts to re-establish itself as an independent and authoritative actor in interpreting international law.

The latest jurisprudence of the CC, which denies the enforcement of the ECtHR judgments, only reiterates Russia's alternative interpretation of international law that differs from dominant Western narratives of the discipline. The ECtHR on many occasions and over a long period of time berated Russia's poor record of human rights compliance, but it was not until the *Markin* standoff that the seeds of open opposition were planted. A decision that sparked a controversy in the circles of the Russian elite and exhibited first signs of Russia's strained relationship with the ECtHR was the case of *Markin v. Russian Federation*, in which the ECtHR essentially overturned the ruling

[1] UN General Assembly, World Summit Outcome 2005, Resolution A/RES/60/1 (Oct. 24, 2005), ¶¶ 138–139, *available at* www.un.org/summit2005/documents.html; Official Statements on Russia–Georgia Conflict by Dmitry Medvedev, Vladimir Putin, and Vitaly Churkin, September 11, 2009, *available at* http://www.sras.org/statements_on_russia_georgia_conflict_2.

[2] President of Russia justified annexation of Crimea by the right of the people to self-determination. *See* President of Russia, Meeting of the Valdai International Discussion Club, October 24, 2014, *available at* http://eng.kremlin.ru/ news/23137.

[3] The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, June 25, 2016, *available at* http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2331698.

[4] *Id. See also* Anne Peters, *After Trump: China and Russia Move from Norm-takers to Shapers of the International Legal Order*, EJIL: Talk!, November 10, 2016, *available at* http://www.ejiltalk.org/after-trump-china-and-russia-move-from-norm-takers-to-shapers-of-the-international-legal-order/; Lauri Mälksoo, *Russia and China Challenge the Western Hegemony in the Interpretation of International Law*, EJIL: Talk!, July 15, 2016, *available at* https://www.ejiltalk.org/russia-and-china-challenge-the-western-hegemony-in-the-interpretation-of-international-law/.

[5] Republic of Philippines v. The People's Republic of China, PCA Case No. 2013–19, award dated July 12, 2016 ("South China Sea award"), ¶ 1203.

of the CC.[6] In Russia, this was viewed as a direct confrontation between the ECtHR and the CC, as the former was accused of showing no respect whatsoever for Russia's highest judicial body, as well as interfering with the matters of national sovereignty.[7] The remarks by the chairperson of the CC, Valerii Zorkin, on the supremacy of the Constitution over international treaties, including the ECHR (European Convention on Human Rights), garnered popular support and resulted in the law draft that aimed at establishing the competence of the CC to deny the enforcement of decisions of "inter-state organs" that were contrary to the Constitution.[8] However, the proposed law draft never became a law bill, as it was later recalled from the parliamentary agenda.

Four years later, the ECtHR delivered a highly controversial ruling in the case of *Yukos*, having granted an unprecedented compensation in the amount of €1.9 billion to the former shareholders. The ruling rekindled the debate and prompted many political stakeholders in Russia to openly criticize the authority of the Court, as it was deemed to encroach upon Russia's sovereignty. A group of parliamentary deputies submitted the request to the CC asking the judges to rule on the enforceability of the ECtHR decisions that appear to be contrary to the Constitution.[9] As a result, the CC took an unprecedented step toward "autonomization" of national legal order. Having been seized of the question on the enforceability of the judgments of the ECtHR, the CC judges chose to downgrade the European human rights jurisprudence in the domestic hierarchy of the sources of law,[10] as they emphasized the subsidiary role of the ECHR. In adopting this decision, the CC judges enabled the legislator to create a special mechanism to essentially review the possibility of the enforcement of the ECtHR judgments. At the same time, the CC directed the lower courts and other state organs tasked with enforcing the ECtHR judgments to refer to the CC if there appeared to be a conflict with the Constitution. The Court also granted the president and the government the right to submit *proprio motu* requests to the CC to review any ECtHR decision, which they find unenforceable due to its noncompliance with the Constitution.[11]

In its decision, the CC did not set aside international law altogether but rather creatively engaged with its doctrines interpreting them in a way that allowed it to redefine its own powers with respect to the enforcement of the ECtHR judgments which it considers to be

6 ECtHR, Konstantin Markin v. Russia, No. 30078/06 (Oct. 7, 2010).

7 V. Zorkin, *Predel ustupchivosti*, Rossiiskaia gazeta (Oct. 29, 2010), *available at* http://www.rg.ru/2010/10/29/zorkin.html.

8 For more, *see* William E. Pomeranz, *Uneasy Partners: Russia and the European Court of Human Rights*, Human Rights Brief 19.3, 19 (2012); Chto budet, *esli "proekt Torshina" stanet zakonom* [*What Will Happen if "Torshin Draft" Becomes Law*], June 27, 2011, *available at* https://www.novayagazeta.ru/articles/2011/06/26/44972-chto-budet-esli-proekt-torshina-stanet-zakonom.

9 Deputati Gosdumi zaprosili KS o primenimosti reshenii ESPCH na territorii Rossii [Parliamentarians of State Duma Requested the CC to Rule on the Enforcement of the ECtHR Decisions on The Territory of Russia], June 15, 2015, *available at* http://tass.ru/politika/2041769 (in Russian).

10 Decision of the Constitutional Court of the Russian Federation on the Review of Constitutionality of Article 1 of Federal Law "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Additional Protocols Thereto" (. . .) (CC Decision on the Enforcement of the ECtHR Decisions), No. 21-П (July 14, 2015).

11 *Id.*, ¶ 6.

contrary to the Constitution. Such engagement is not an express rejection of the authority of the ECHR and its judgments but a reassessment of its reach and persuasive authority in Russia. Despite seemingly being at loggerheads with the ECtHR, the CC made clear that it wished to continue a constructive "dialogue" with the ECtHR striking a "sensible balance ensuring that, on the one hand, its own rulings comply with letter and spirit of the ECtHR, and, on the other hand, do not contradict the Russian constitutional order."[12]

The far-reaching legal effect of the 2015 ruling is thus the creation of an additional "internal" review mechanism that allows the CC to have a final say when it comes to the enforcement of the ECtHR judgments. This development is problematic, as it undermines the authority of the ECtHR and the finality of its decisions. It also imposes additional obstacles upon the claimants who already have to comply with a number of stringent admissibility criteria when submitting an individual application to the ECtHR, including the exhaustion of domestic remedies.

Following the ruling of the CC, the Russian parliament adopted the law that established the competence of the CC to rule on the enforcement of the decisions of interstate bodies that appear to be contrary to the Constitution. The newly acquired powers of the CC were tested in the two most recent decisions in the case of *Anchugov and Gladkov* and the case of *Yukos* that are subsequently discussed in greater detail in this article. From the perspective of international law, the latest case law of the CC is significant, as it informs about Russia's approaches toward the doctrine of international law that significantly differs from the dominant Western narrative.

The article contextualizes the discussion on Russian approaches to international law by scrutinizing the arguments invoked by the CC and rooted in international law. In doing so, it deconstructs the most important claims advanced by the CC in order to assert its dominant position over the ECtHR. The purpose of this exercise is to reveal how international law is being instrumentalized in the dialogue between the CC and the ECtHR. The second part of this article briefly outlines Russia's strained relationship with the Council of Europe (CoE) in light of its accession to the ECHR. The third part explores the nature of the interaction between international and domestic law in the process of the enforcement of the judgments of the ECtHR. The fourth part focuses on evolving judicial interpretation of the CC in three different rulings that have redefined Russia's engagement with its European counterpart. The last part reflects on broader implications of the CC's interpretation of international law and its affirmation of constitutional primacy for Russia's future in the CoE.

2. Russia's accession to the CoE and the CC's position in the *Markin* case

Prior to the discussion of the strained relationship between the ECtHR and the CC with respect to the enforcement of the ECtHR judgments, it is necessary to highlight a few

[12] Decision of the Constitutional Court of the Russian Federation on the Possibility of Enforcement in Accordance with the Constitution of the Russian Federation of the Decision of the European Court of Human Rights of July 31, 2014 in the Case of OAO Neftyanaya Kompaniya Yukos v. Russia (CC Decision in *Yukos*), 1-П/2017 (Jan. 19, 2017), ¶ 1.

aspects of Russia's membership in the CoE. The Russian Federation first applied for a membership in the CoE in 1992, with the view of strengthening its trade and cooperation ties with other European states. However, the slow pace of domestic reforms and human rights violations in Chechnya had prevented it from joining the organization until 1996 when Russia was eventually accepted as a full-fledged member of the CoE with the following comment from the Parliamentary Assembly: "Russia does not yet meet all Council of Europe standards. But integration is better than isolation; cooperation is better than confrontation."[13]

The Russian Federation ratified the European Convention on Human Rights on May 5, 1998. It was unprecedented that Russia agreed to such comprehensive external supervision, and the CoE, from its side, accepted Russia's accession despite the ongoing First Chechen War.[14] Since joining the CoE, Russia has fulfilled a number of mandatory membership criteria—it has ratified the ECHR, introduced some amendments to its legislation, and agreed to implement the decisions of the ECtHR. There has been limited praise in the literature that both the CC and other domestic courts have been citing the ECHR, thereby legitimizing its effect on domestic legal order.[15] In 2013, the Supreme Court of Russia instructed judges to take into account the rulings of the ECtHR.[16] The relationship between the CoE and Russia has nonetheless been rather tense—almost every year the Parliamentary Assembly adopted resolutions condemning the human rights situation in Russia.[17] Bowring discusses a number of challenges in the relationship between the CoE and Russia, including latter's prolonged reluctance to ratify Protocol 14 to the ECHR which was designed to increase the Court's effectiveness (eventually ratified by Russia in 2010 and entered into force the same year).[18]

However, as mentioned in the introductory part, the relationship between the CC and the ECtHR had nonetheless been relatively stable until the controversial case of *Markin* that came under enormous scrutiny in Russia. In this particular case, Russian courts refused to grant Konstantin Markin, a serviceman, a three-year parental leave to take care of his infant, stating that such right was only reserved for women in military service. Markin petitioned to the CC requesting it to declare as unconstitutional legal provisions that established differential treatment for men and women with respect to childcare in the military. In 2009, the CC rejected the applicant's claim concluding that the legislator was entitled to limit the rights and freedoms of the military personnel who fulfilled constitutionally significant functions. The CC reasoned that limitations in that sphere were justified because servicemen could not collectively

[13] Pamela A. Jordan, *Russia's Accession to the Council of Europe and Compliance with European Human Rights Norms*, Demokratizija, 281, 285 (2003); P.A., Doc. 7443 of January 2, 1996, Report of the Political Affairs Committee, Report on Russia's request for membership of the Council of Europe, rapporteur Ernst Muehlemann, printed in 17(3–6) Hum. Rts. L. J. 187.

[14] B. Bowring, *Russia and Human Rights: Incompatible Opposites?*, 1(2) Göttingen J. Int'l L. 33, 43 (2009).

[15] Jordan, *supra* note 13, at 293.

[16] Postanovlenie plenuma Verkhovnoga Suda Rossiiskoi Federatsii ot 27 iunya 2013.g No 21 "O primenenii sudami obshei iurisdiktsii Konventsii o zashite prav cheloveka i osnavnykh svobod ot 4 noiabrya 1950 goda i Protokolov k nei," *available at* http://www.rg.ru/2013/07/05/konvencia-dok.html.

[17] L. Mälksoo, Russian Approaches to International Law 159 (2015).

[18] Bowring, *supra* note 14, at 50.

avoid fulfilling their duties without damaging the protected interests.[19] Markin appealed the case to the ECtHR, which rendered its judgment in 2010, having found the violations of article 8 (right to private and family life) and article 14 of the ECHR (non-discrimination). The ECtHR openly criticized the CC for the lack of fairness and its failure to conduct a proper balancing test of competing interests of maintaining an effective army and protecting military personnel from discrimination in private life. "Denying men in the military parental leave when women are entitled to such leave is not reasonably justified," concluded the ECtHR.[20]

This judgment created a backlash within the CC and Russian political circles. In his article published in one of the leading newspapers, the chairman of the Russian Constitutional Court, Valerii Zorkin, openly criticized the judgment of the ECtHR and defended the position of the CC in the case.[21] Zorkin noted with regret that until the *Markin* case, there had been no instances when the ECtHR questioned the CC's approach, while the CC frequently invoked the ECtHR case law in its work. Zorkin further emphasized upon his support for the "profound and constructive dialogue between the CC and the ECtHR."

In the same article, Zorkin made known his negative view of the criticism levied by the ECtHR against the CC's ruling. He argued there was no violation of the provisions of the Russian Constitution on gender equality and supported his position with arguments on sovereignty, margin of appreciation in selecting national priorities, and practice of other countries' national institutions, including that of the German Constitutional Court. These arguments later prominently feature in the reasoning of the July 14, 2015, CC ruling on the enforceability of the ECtHR decisions, which is discussed in the following section.

Russia appealed *Markin* to the ECtHR Grand Chamber, which essentially decided the case in the same way.[22] However, the Grand Chamber adopted a more conciliatory tone, pointing to the evolution of modern society toward equal participation of men and women in childcare. The ECtHR accepted that there might be exceptions in the military for the sake of national security but they must not be discriminatory.[23] Whereas the first decision of the ECtHR, in addition to specific measures, also recommended general measures aimed at changing the legislation in Russia, the second decision of the Grand Chamber limited itself to the factual circumstances of the case and did not impose the requirement upon Russia to amend its legislation.[24]

The *Markin* saga ended in the CC, which was asked for directions on the application of law by Russia's lower courts. According to article 392(4) of the Russian Civil Procedure Code, applicants holding the judgments of the ECtHR in their favor may

[19] Ruling of the Constitutional Court of Russia "Rejecting to accept for consideration a claim of the citizen Konstantin Aleksandrovich Markin for violation of his constitutional rights . . . ," No. 187-O-O (Jan. 15, 2009).

[20] ECtHR, Konstantin Markin v. Russia, No. 30078/06 (Oct. 7, 2010), ¶¶ 57–59.

[21] Zorkin, *supra* note 7.

[22] ECtHR, Konstantin Markin v. Russia, No. 30078/06 (Grand Chamber) (Mar. 22, 2012).

[23] *Id.*, ¶¶ 139, 149.

[24] *Id.*, *dispositif*. *See also* ECtHR, Konstantin Markin v. Russia, No. 30078/06 (Oct. 7, 2010), ¶ 67.

petition to have their case reopened. Markin did just that, which signaled that the lower court may find itself in a bottleneck situation with the two conflicting decisions as in the present case—the 2009 CC ruling and the 2012 ECtHR judgment. The CC diplomatically avoided a bigger question by focusing on the specifics of the case—Markin had already received compensation awarded by the ECtHR and was no longer eligible for parental leave.[25] Furthermore, the CC reaffirmed that the rights enshrined in the Constitution and the ECHR are essentially the same, highlighting the absence of a genuine conflict between the two instruments. The CC upheld the right of persons to request the reopening of the case pursuant to article 392(4) of the Civil Procedure Code. It also instructed lower courts to stay proceedings and request the final resolution by the CC in the case of uncertainty. Despite its conciliatory tone, the CC underlined that any doubt regarding the compatibility of legal provisions must be resolved by the CC.[26] *Markin* put the relationship between the ECtHR and the CC under serious pressure.[27] The CC chose, however, to limit its discourse to this individual case and therefore avoid denouncing the possibility of the enforcement of the ECtHR judgments. The framework of interaction between the two courts was thus left undisturbed post-*Markin*. This stands in stark contrast to the July 14, 2015, ruling of the CC that marked its unilateral re-definition of the authority of the ECtHR.

3. Contestation or dialogue? Relationship between the ECtHR and CoE member states

Çali defines authority of international law in domestic orders as "the capacity of a particular international law to impose duties or to confer powers on state officials."[28] When international law advances certain authority claims, state officials have to engage in deliberative practices, weighing and comparing the authority of domestic and international law.[29] One way in which the authority of international law operates is by imposing rebuttable duties on states that state authorities can set aside when they are able to demonstrate other competing duties barring performance.[30] This type of engagement is characteristic of human rights law. The ECtHR allows states a certain margin of appreciation, or a leeway, to choose ways to comply with their international human rights obligations.

The interaction between international judicial institutions and national authorities can be conceptualized as a dialogue, as it usually involves some form of assessment by the former or the latter. The ECtHR usually evaluates the level of state compliance with specific human rights guaranteed by the ECHR. National authorities also

[25] Decision of the Constitutional Court of Russia "Pertaining to constitutionality of Article 11 and clauses 3 and 4 of Article 392 of the Civil Procedure Code of Russia," No. 27-П (Dec. 6, 2013).

[26] *Id.*, ¶ 3.2.

[27] For more, *see* Pomeranz, *supra* note 8.

[28] Basak Çali, The Authority of International Law: Obedience, Respect, and Rebuttal 11 (2015).

[29] *Id.*

[30] *Id.* at 80.

engage in the dialogue when tasked with enforcing the ECtHR judgments. The relationship between those two actors is that of interdependency: international courts rely on states in the effective implementation of their judgments. However, states have the powers to restrict the activities of international courts and tribunals, for example, through limiting their funding, or even withdrawing from the founding treaty. National authorities do not only implement international law out of deference but often due to its purposive social practice that signifies adherence to the common project of advancing international cooperation. As rightly put by Çali, a state's general disposition to take into account international law is not necessarily rooted in its consent to international law but in a more fundamental attitude that it is necessary for international law to be a meaningful instrument.[31]

Tensions between the two interlocutors in this type of dialogue are not uncommon. The ECtHR pushes the boundaries of national interpretation of certain rights, and, therefore, it is not unusual that the rulings of the ECtHR may create some degree of dissatisfaction among the CoE member states. When the ECtHR judgment contradicts national law of a particular country, it gives broad discretionary powers to the state to find suitable ways to implement its decision. This process largely depends on the role accorded to international law in the domestic hierarchy of sources of law, the authority of a national constitutional (or supreme) court, and, inevitably, a degree of political willingness to engage with the CoE and the ECtHR. However, it is ultimately up to the states to find ways to reconcile its domestic law with its international obligations. If they fail to do so, they violate their obligations under the ECHR.

In that regard, it is particularly instructive to examine the position adopted by the German Federal Constitutional Court in the aftermath of the ECtHR's judgment in *Görgülü v. Germany*.[32] The ECtHR ruled against Germany in *Görgülü*, having found that the biological father's visitation rights prevailed over the rights of the adoptive parents.[33] This position was at odds with the German constitutional provision at that time. As a starting point, the German Federal Constitutional Court, faced with the burdensome task of reconciling the ECtHR judgment with Germany's Basic Law, acknowledged the status of the ECHR as a federal law that was placed below the Constitution in the domestic legislative hierarchy. [34] At the same time, the Court reaffirmed its obligation to interpret *all* laws—both ordinary and constitutional law—in accordance with the rulings of the ECtHR.[35] Consequently, on the surface, it may appear that the German Federal Constitutional Court accorded more weight to its own constitutional order, whereas in reality it merely distinguished between two legal orders—domestic and international ones. This decision provides some guidance on how to approach a potential conflict between the two orders, without dismissing the fact that non-compliance with the judgments of the ECtHR represents a violation of Germany's international obligation.

[31] *Id.*, at 4.
[32] Görgülü v. Germany (App. No. 74969/01) (Dec. 16, 2005).
[33] BVerfG, Order of the Second Senate of 14 October 2004, 2 BvR 1481/04, ¶¶ 1–72.
[34] *Id.*, ¶ 18.
[35] *Id.*, ¶ 58.

So far, only the UK engaged in the standoff with the ECtHR that may possibly signify its withdrawal from the ECHR.[36] This step, albeit still a remote possibility, will not be as dramatic as anticipated since the UK incorporated the ECHR in the 1998 Human Rights Act, while its domestic courts absorbed the precedents of their European counterpart, making them part of the country's internal legal order. The point of rupture between the UK and the ECtHR occurred with the passing of the *Hirst* judgment, in which the ECtHR ruled that the UK's blanket ban on convicted prisoners voting rights breached article 3 of Protocol No. 1.[37] The hostility that this ruling spurred in the UK led to the proposals by the country's leaders to withdraw from the ECHR. In the aftermath of *Hirst v. UK*, the Joint Committee on the Draft Prisoner Voting (Eligibility) Bill produced the report that called for the law reform to ensure compliance with the Convention.[38] The UK Parliament has been later criticized for procrastinating and failing to take any meaningful steps in implementing the committee's report. [39] Following a 12-year standoff with the ECtHR, the UK finally reached the compromise deal that granted voting rights to prisoners who were "on temporary release and at home under curfew."[40]

In Russia, a similar backlash was created by the ECtHR judgment in the *Yukos* case, in which the ECtHR ordered Russia to pay compensation to the ex-shareholders, as they had stood at the time of the company's liquidation, in the amount of €1,866,104,634 in pecuniary damages.[41] This ruling was widely criticized in the Russian political circles. It prompted 93 parliamentarians to request the CC to annul federal law stipulating the obligation to comply with the judgments of the ECtHR on the ground of its conflict with constitutional provisions of Russian law.[42] On July 14, 2015, the CC adopted a middle-ground approach: it rejected the deputies' request, while at the same time creating a legal mechanism that could impede the enforcement of the ECtHR judgments that are contrary to the Constitution.[43] The pushback against the ECHR continued when the Head of the Investigative Committee suggested striking out constitutional provisions that incorporate international law into the legal system of Russia.[44]

[36] Christopher Hope, Theresa May to fight 2020 election on plans to take Britain out of European Convention on Human Rights after Brexit is completed, December 28, 2016, *available at* http://www.telegraph.co.uk/news/2016/12/28/theresa-may-fight-2020-election-plans-take-britain-european/.

[37] Hirst v. The United Kingdom, App. No. 74025/01 [2005] ECHR 681 (Oct. 6, 2005).

[38] House of Lords and House of Commons, Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, Report together with formal minutes, December 18, 2013, ¶ 234.

[39] Ed Bates, *The Continued Failure to Implement* Hirst v. UK, EJIL: Talk! December 15, 2015, *available at* http://www.ejiltalk.org/the-continued-failure-to-implement-hirst-v-uk/.

[40] Owen Bowcott, Council of Europe accepts UK compromise on prisoner voting rights, December 7, 2017, *available at* https://www.theguardian.com/politics/2017/dec/07/council-of-europe-accepts-uk-compromise-on-prisoner-voting-rights.

[41] Oao Neftyanaya Kompaniya Yukos v. Russia (App. No. 14902/04), Judgment (Just Satisfaction), ECHR (July 31, 2014).

[42] Constitutional Court Allowed Not to Enforce the Rulings of the ECtHR If They Are Incompatible with the Constitution, *Kommersant*, July 14, 2015, *available at* http://www.kommersant.ru/doc/2767837.

[43] Press Release, Ruling of the Constitutional Court Regarding the Applicability of the ECtHR Judgments on the Territory of Russian Federation, July 14, 2015, official website of the Constitutional Court, *available at* http://www.ksrf.ru/ru/News/Pages/ViewItem.aspx?ParamId=3244.

[44] *The Head of the SK Suggested Separating International Law from Russia's Legal System*, Gazeta. Ru, July 23, 2015, *available at* http://www.gazeta.ru/politics/news/2015/07/23/n_7404005.shtml.

To sum up, the CC ruling of July 14, 2015, asserted its supremacy over its European counterpart in constitutional law matters, while moving toward more "autonomous" interpretation of Russian law and away from the human rights law jurisprudence of the ECtHR. As a result, on December 14, 2015, the Russian Parliament, in line with the CC's ruling, amended the law regulating the functioning of the CC, granting the president and the government the right to request the Court to review the decisions of international human rights bodies, including the ECtHR, if there appears to be a conflict with the Constitution.[45] Following those amendments, the Ministry of Justice swiftly submitted a request to the CC asking to rule on the possibility of implementing the ECtHR judgment in *Anchugov and Gladkov*[46] and, subsequently, in the *Yukos* case.[47]

These developments in Russia have weakened the authority that international law can exert on Russian state officials in the future. It has also shifted the weight toward domestic legal order and away from Strasbourg. The following parts of the article deconstruct legal reasoning in the three CC's rulings that demonstrate a significant level of instrumentalization of international law in the discourse analysis adopted by the Court.

4. Evolving judicial interpretation of the CC and its uneasy dialogue with the ECtHR

4.1. Analysis of the CC ruling of July 14, 2015, on the enforcement of the ECtHR judgments

The 2015 decision was largely a response to the 2014 ECtHR judgment that obliged Russian authorities to make payments to the *Yukos* ex-shareholders and, in doing so, stirred strong resistance in the circles of the Russian political elite.[48] Some arguments of the CC could have been expected, while the others represent novel interpretation of international law.[49] The more predictable arguments include the recognition of the subsidiary nature of the ECHR for the protection of rights and freedoms in Russia and the importance of the doctrine of the margin of appreciation.[50] In its ruling, the CC's judges referred to article 46 of the ECHR that allows the respondent state some flexibility in

[45] Constitutional Law No. 7 Amending the Federal Constitutional Law "On the Constitutional Court of the Russian Federation" approved by the State Duma on December 4, 2015 and by the Federation Council on December 9, 2015. Entered into force on December 14, 2015.

[46] Decision of the Constitutional Court of the Russian Federation on the Possibility of Enforcement in Accordance with the Constitution of the Russian Federation of the Decision of the European Court of Human Rights of July 4, 2013 in the Case of Anchugov and Gladkov v. Russia (CC Decision in Anchugov and Gladkov), No. 12-П/2016 (Apr. 19, 2016).

[47] CC Decision in *Yukos*, 1-П/2017 (Jan. 19, 2017), ¶ 1.

[48] For the context in which the CC decision was rendered, *see* Lauri Mälksoo, *Russia's Constitutional Court Defies the European Court of Human Rights*, 12(2) Eur. Const. L. Rev. 377, 378–379 (2016).

[49] *See also* analysis of the Venice Commission contained in the Interim Opinion on the amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation adopted by the Venice Commission at its 106th Plenary Session (Venice, Mar. 11–12, 2016), CDL-AD(2016)005-e.

[50] CC Decision on the Enforcement of the ECtHR Decisions, ¶¶ 2, 6.

choosing the method of enforcement of the ECtHR judgments, which, by virtue of implementation, become part of the legal system of Russia.[51] Article 46 of the Convention has been repeatedly construed in the ECtHR case law as giving the state the choice of the means to execute a judgment in its domestic legal system.[52] However, it must be noted that the choice of the means does not entail that the enforcement of the ECtHR judgments could be delayed or denied, which renders the CC's argument misaligned.[53]

Following this, the CC turned to sovereignty, the primacy of the Constitution in the Russian constitutional legal order, and impossibility of the implementation of international agreements that entail curtailment of constitutional rights and freedoms or may be detrimental to Russian constitutional order.[54] In light of this, the CC found that neither the ECHR nor the ECtHR case law enjoys the primacy over the Constitution.[55] Speaking of Russia's role as a fully-fledged member of the international community, which manifests in its ability to conclude international treaties and membership in international organizations, the CC established that such a role does not entail giving up its sovereignty at the expense of fundamental constitutional principles.[56] Hence, the CC reserved the right, as a matter of exception, not to implement decisions of the ECtHR "if this is the only possible way to avoid violations of fundamental principles and norms of the Constitution."[57]

The CC turned for support to several cases decided by the highest courts in Germany, Italy, Austria, and the UK, in which the latter are said to have upheld the principle of priority of national constitutions over the conflicting judgments of the ECtHR.[58] The analogy with other countries may be somewhat misleading because, as, for instance, in the case of Germany, the German Federal Constitutional Court did not simply give priority to its own constitutional order but rather discussed the ways in which international obligations may be complied with.[59] It emphasized that German law, including the Constitution, must as far as possible be interpreted in harmony with Germany's obligations under international law.[60] In the UK, the problem with implementing the

[51] Constitution of the Russian Federation art. 15(4).

[52] CC Decision on the Enforcement of the ECtHR Decisions, ¶ 2.1. *See also* ECtHR, Belilos v. Switzerland, App. No. 10328/83 Judgment of April 29, 1988, § 78; ECtHR, Scordino v. Italy [GC] App. 36813/97, March 29, 2006, § 233.

[53] *Id. See also* ECtHR, Vermeire v. Belgium App. 12849/87, November 29, 1991), § 26 ("The freedom of choice allowed to a state as to the means of fulfilling its obligation under Article 53 cannot allow it to suspend the application of the Convention while waiting for such a reform to be completed . . .").

[54] *Id.*, ¶ 2.2.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*, ¶4.

[59] BVerfG, Order of the Second Senate of October 14, 2004, 2 BvR 1481/04, ¶¶ 1–72; Görgülü v. Germany (App No. 74969/01) (Dec. 16, 2005).

[60] For the analysis of the decision, *see* Gertrude Lübbe-Wolff, ECHR, and national jurisdiction—The *Görgülü* Case, paper presented at a conference on "The implementation of decisions of the European Court of Human Rights in the jurisprudence of Constitutional Courts in European Countries" at the Institute for Law and Public Policy under the aegis of the Constitutional Court of the Russian Federation, Moscow, December 2005, http://www.vaeter-aktuell.de/english/ECHR_and_national_jurisdiction_-_The_Goerguelue_Case.pdf.

Hirst v. UK judgment stemmed not from the blanket denial of its enforceability but rather from the fact that the parliament dragged its feet in taking meaningful steps to amend the legislation. The impasse was latter resolved by adopting a compromise deal that did not have to be voted through the parliament.[61] In contrast, the CC questioned the enforceability of certain ECtHR judgments in Russia, thereby "purporting to extinguish the effect of Article 46 of the ECHR."[62]

More controversial arguments advanced by the CC pertain to its autonomous interpretation of the Vienna Convention on the Law of Treaties (VCLT) and the subtleties of the internal constitutional legal order. The judges highlight a number of constitutional provisions that uphold state sovereignty and bar incorporation into the domestic legal system of any international agreements that may violate the constitutional foundations of Russia.[63] Sovereignty is one of the fundamental principles of the Constitution that includes the supremacy and independence of state authority. The CC avers that Russia, as a player in the international arena, concludes international agreements and participates in the work of international organizations to the extent that it does not contradict its sovereignty.[64]

The CC linked the idea of constitutional sovereignty to the principles of interpretation enshrined in article 31(1) of the VCLT. According to this provision, "a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." The judges conclude that an international agreement is binding on the state parties as long as it is interpreted in accordance with the rules laid down in article 31(1) of the VCLT. Therefore, if the ECtHR decides to deviate from these rules and attribute a different meaning than originally envisioned to the provision of the ECHR that contradicts the object and purpose of the ECHR or violates peremptory norms of international law, a state party may refuse to enforce the ruling in such circumstances.[65] The CC then went as far as recognizing sovereign equality as a rule of *jus cogens*.

This is at odds with the general reading of *jus cogens*, or peremptory norms of international law, as the *limitation* on state sovereignty and a guarantee against the unabridged exercise of state power.[66] The underlying rationale of *jus cogens* is precisely to safeguard fundamental common interests and values of the international community as a whole as distinct from the interests of individual states.[67] In this sense, *jus cogens* protects basic values of the entire international community.[68] The International Criminal Tribunal for the Former Yugoslavia in *Furundzija* affirmed the *jus cogens* nature of certain norms because of the values they seek to protect[69]:

[61] Bates, *supra* note 39; Bowcott, *supra* note 40.

[62] Philip Leach & Alice Donald, *Russia Defies Strasbourg: Is Contagion Spreading?*, EJIL: Talk!, December 19, 2015, *available at* http://www.ejiltalk.org/russia-defies-strasbourg-is-contagion-spreading/.

[63] Constitution of the Russian Federation arts. 4(1), 15(1), 79.

[64] CC Decision on the Enforcement of the ECtHR Decisions, ¶ 2.2.

[65] *Id.*, ¶ 3.

[66] Alexander Orakhelashvili, Peremptory Norms in International Law 542 (2006).

[67] *Id.* at 46; Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60(1) Am. J. Int'l L. 55, 58 (1966); Lauri Hannikainen, Peremptory Norms in International Law Historical Development 2–5, 261 (1988).

[68] Orakhelashvili, *supra* note 47; Hannikainen, *supra* note 20.

[69] Prosecutor v. Furundžija, ICTY Case No. IT-95-17/1-T, Trial Judgment, December 10, 1998, ¶¶ 153–154.

> Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.

It is noteworthy that in its analysis the CC does not acknowledge special rules of interpretation applicable to the human rights instruments, most notably, that the ECHR is a "living instrument" that has to be interpreted in light of the present-day circumstances. The judges also fail to mention another rule of interpretation that may be particularly relevant for the human rights instruments, such as the ECHR. This rule is reflected in article 31(3)(b) of the VCLT providing that, together with the context, there shall be taken into account, among others, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. This is an essential provision supporting the evolving nature of the human rights jurisprudence.

The CC also submitted that article 27 of the VCLT, which prohibits the party from invoking its internal law to shun its international commitments, contains an exception stipulated in article 46 of the VCLT, which reads as follows[70]:

> (1) A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
> (2) A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

In other words, the CC posits that a rule of internal law of fundamental importance, in particular constitutional law provisions, may serve as a justification to eschew its treaty obligations. The logic of the argument goes as follows: although Russia cannot conclude treaties that contradict its Constitution, it is possible that at the time of the ratification of the ECHR, its provisions were compatible with Russia's constitutional order. With the development of the ECtHR case law, some interpretation offered by the ECtHR has become contradictory to its constitutional order, which is something Russia could not have envisaged at the time of joining the treaty. Therefore, the CC concluded that if there is a conflict between the ECtHR judgment and constitutional provisions, it is possible to invoke article 46(2) of the VCLT and therefore refuse to execute the judgment of the ECtHR on the basis of its non-compliance with the constitutional rule of fundamental importance.

There are two major objections to this argument. First, it appears more plausible that article 46 of the VCLT relates to the procedural provisions of internal law regulating the capacity to conclude treaties rather than the content of substantive law. [71]

[70] B. Tuzmukhamedov, *The Russian Constitutional Court in International Legal Dialogues*, *in* Judges as Guardians of Constitutionalism and Human Rights (M. Scheinin & H. Krunke eds., 2016).

[71] Bakhtiyar Tuzmukhamedov, *The Russian Constitutional Court in International Legal Dialogues*, *in* Judges as Guardians of Constitutionalism and Human Rights 224 (Martin Scheinin & Helle Krunke eds., 2016).

As rightly put by Deutsch, "if claims under treaties were subject to being met with contentions that the treaty is not binding on the country against which the claim is made because of some internal-law limitation, the stability of an international legal order would be jeopardized."[72] Moreover, this provision seems to apply to the conduct of states rather than international courts. Second, the Constitution incorporates international law in the Russian legal system and grants international treaties primacy over domestic law.[73] The constitutional provisions related to human rights also allude to the hierarchy of sources of law. In particular, the Constitution guarantees basic rights and freedoms in accordance with the commonly recognized principles and norms of international law, as well as it grants everyone the right to appeal to interstate organs for the protection of human rights and freedoms.[74]

It must be noted that article 15(4) of the Constitution does not clarify whether "domestic law" covers *only* federal law or federal law *and* the Constitution itself. There is no consensus on the interpretation of this provision; however, most commentators lean toward the primacy of the Constitution over international agreements. For instance, Lazarev in his commentary points to article 22 of the Law on International Agreement, holding that if an international agreement contains a provision that contradicts the Constitution, the agreement's obligatory status is only confirmed following the amendments to the Constitution.[75] The commentary authored by Lazarev and Zorkin is even more explicit, stating that a possible collision between the Constitution and international treaties must be resolved in favor of the Constitution because international treaties are an integral part of the country's legal system, which holds no acts higher than the Constitution.[76] The CC in July 2015 confirmed this standpoint by upholding the primacy of the Constitution over international treaties in cases of a conflict between norms of international law and national law. This reading of the hierarchy of sources of law in Russia is a clear sign of a trend toward autonomization of the national legal order.

By ratifying the ECHR and accepting the binding effect of decisions of the ECtHR, Russia consented to treaty obligations that come with it. Although those obligations may place certain limitations on sovereignty, they are only in place as long as treaty obligations are in force. This, however, does not take away from the sovereign right of the state to withdraw from the treaty and, in doing so, rescind its treaty obligations. Being part of the ECHR system, while at the same time reserving the right to cherry-pick decisions of the ECtHR for enforcement, seriously undermines the legitimacy

[72] Eberhard P. Deutsch, *Vienna Convention on the Law of Treaties*, 47(2) Notre Dame L. Rev. 297, 301 (1971).

[73] For instance in 1997, the CC held that when the norms of the Criminal Procedure Code conflict with the International Covenant on Civil and Political Rights, the latter should take precedence pursuant to article 15(4) of the Constitution. *See* Decision of the Constitutional Court of the Russian Federation rejecting the request of the judge of Moscow District Court N.V. Grigoryevoi, July 3, 1997, No. 87-O.

[74] Constitution of the Russian Federation arts. 17(1), 46(3).

[75] Constitution of the Russian Federation art. 15(4). *See also* Commentary to the Constitution of the Russian Federation, Article 15(4) (L. V. Lazarev ed., 3d ed., 2009).

[76] Id.

and integrity of the human rights protection system and sets up a bad precedent for other CoE member states. As put by Lord Mackay of Clashfern, "the principle of parliamentary sovereignty is not an argument against giving effect to the judgment of the European Court of Human Rights."[77]

The new law adopted in December 2015 implementing the provisions of this CC ruling allows the executive branch to request the CC to rule on the possibility of the enforcement of the ECtHR judgment in cases where there appears to be a conflict between the Constitution and the judgment of the ECtHR.[78]

4.2. Analysis of the CC decision of April 19, 2016, in the case of *Anchugov and Gladkov*

On April 19, 2016, the CC issued its pilot decision testing its newly acquired powers to refuse the implementation of the rulings of the ECtHR that are contrary to the Constitution.[79] The case under review was *Anchugov and Gladkov v. Russia,* in which the ECtHR found that automatic and indiscriminate ban on prisoners' voting rights was disproportionate, thereby violating article 3 of Protocol No. I of the ECHR (similar to its reasoning in *Hirst v. UK* as mentioned above).[80] Since the judgment was delivered in Strasbourg, the Russian authorities have viewed this ruling as problematic, as it appears to be contrary to article 32(3) of the Constitution, which reads as follows: "Deprived of the right to elect and be elected shall be citizens recognized by court as legally unfit, as well as *citizens kept in places of confinement by a court sentence*."

The CC found that the ECtHR judgment in *Anchugov and Gladkov* could not be enforced.[81] However, the CC did not dismiss the ECtHR judgment outright, as it attempted to adopt a diplomatic approach by not ruling out the introduction in the future of more penalties involving non-custodial sentences that limit the freedom but do not impede a convicted person to exercise his voting rights. The CC nonetheless insisted on its previous interpretation of article 32(3) as sufficiently limited in scope to satisfy the requirements of article 3 of Protocol No. 1. The judges further mentioned European pluralism with respect to the organization of electoral processes in different member states as well as inconsistent interpretation of the ECtHR itself in matters concerning voting rights.[82]

[77] House of Lords and House of Commons, Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, Report together with formal minutes, December 18, 2013, ¶¶ 92, 111.

[78] Constitutional Law No. 7 Amending the Federal Constitutional Law "On the Constitutional Court of the Russian Federation" approved by the State Duma on December 4, 2015 and by the Federation Council on December 9, 2015. Entered into force on December 14, 2015.

[79] CC Decision in Anchugov and Gladkov, No. 12-П/2016 (Apr. 19, 2016). For the analysis, *see also* Final Opinion No. 832/2015 on the Amendments to the Federal Constitutional Law on Constitutional Court, adopted by the Venice Commission at its 107th Plenary Session (Venice, June 10–11, 2016), CDL-AD(2016)016.

[80] *Id.*

[81] For a comprehensive analysis of this judgment, *see* Grigory Vaipan, *Trudno bit bogom: Konstituticionnii Sud Rossii I ego pervoe delo o vozmozhnosti ispolnenija postanovlenija Evropeiskogo Suda po pravam cheloveka,* 4(113) Sravnitelnoe Konstitucionnoe Pravosudije 107 (2016) (in Russian).

[82] The CC contrasted *Hirst v. UK* (2005) and *Scoppola v. Italy* (2012) judgments, pointing to a certain change of heart by the Strasbourg court. *See* Scoppola v. Italy (No. 3) App. No. 126/05, Judgment, Eur. Ct. H.R. (2012); Hirst v. The United Kingdom, App. No. 74025/01 [2005] ECHR 681 (Oct. 6, 2005).

While distinguishing between general measures and individual measures that benefit an applicant, the CC reached three important conclusions. First, *Anchugov and Gladkov* cannot be implemented in what concerns general measures involving repealing or changing article 32(3) of the Constitution given its supremacy in the Russian legal system. The CC found it particularly troubling that the provision in question can only be changed by virtue of adopting a new Constitution.[83] Second, *Anchugov and Gladkov* can be implemented in what concerns general measures ensuring fairness, differentiation, and proportionality of the restrictions on voting rights. Here, the CC adopted a rather questionable approach arguing that only a custodial sentence leads to the disenfranchisement of the offender concerned. The distinction between custodial and non-custodial sentences represents, in the view of the CC, sufficient differentiation, as the majority of the first-time offenders charged with minor crimes do not receive an imprisonment sentence and therefore their voting rights are intact. It is noteworthy that the ECtHR has already dismissed this claim in *Anchugov and Gladkov* pointing to the lack of evidence that courts take into account impending disenfranchisement when deciding on the type of sanctions to be imposed on a convicted person.[84] Possibly sensing some weaknesses in its argument, the CC made a concession for the future—the legislator may optimize the Russian penitentiary system to ensure the introduction of punishments limiting freedom but not involving imprisonment, thus guaranteeing voting rights of convicted persons.

Finally, the CC held that *Anchugov and Gladkov* cannot be enforced in what pertains measures benefitting individual applicants because the applicants were convicted for serious offences and sentenced to 15 years of imprisonment—a term that automatically leads to their disenfranchisement. Further to this, the CC found that *restitutio integrum* was simply impossible in this case since the elections in which the applicants wished to participate had already taken place.

In *Anchugov and Gladkov*, the CC seized an opportunity created by its July 14, 2015, ruling and refused the implementation of the ECtHR judgment that was deemed contrary the Constitution, thereby upholding its supremacy. It should be noted, however, that the CC did not approach its new powers lightly—the decision is a hefty 43 pages and the CC judges attempted to reach a certain compromise by alluding to the possible introduction of future sanctions not involving disenfranchisement, thus acknowledging the sensitivity of the matter. *Anchugov and Gladkov* shows that the CC, despite having ruled on the impossibility to execute the ECtHR decision, did so in a rather cautious way. This could be attributed to the novelty of the exercise or the desire of the CC to avoid direct and open confrontation with the ECtHR. Interestingly, the CC decision in *Anchugov and Gladkov* was not treated by the CoE as being non-compliant with the ECtHR judgment. The Secretary-General Thorbjørn Jagland interpreted the

[83] Article 135 of the Constitution of Russia provides that chapters 1, 2, and 9 cannot be amended by the Federal Assembly and thus must be put to referendum. Chapter 2, entitled Rights and Freedoms of Man and Citizens, includes the ban on prisoners' voting rights.

[84] Anchugov and Gladkov v. Russian Federation, App. No. 11157/04 (ECtHR, July 4, 2013), ¶ 106.

CC decision as demonstrating "a way to resolve the issue through a change of legislation which would alleviate the existing restrictions on the right to vote."[85]

4.3. Analysis of the CC decision of January 19, 2017, in the case of *Yukos*

The protracted argument between the Yukos oil company's ex-shareholders and Russia has spanned over a decade before the ECtHR. In 2004, Yukos shareholders sought compensation from the Russian government before the ECtHR in the amount of nearly €38 billion for the actions of Russian authorities, which eventually led to its bankruptcy. Following lengthy proceedings on the admissibility of a case that were only settled in 2009,[86] the ECtHR delivered its judgment on the merits on September 20, 2011.[87] The Court found that Russia acted in breach of article 6 of the ECHR by failing to accord sufficient time to Yukos for preparation of its case before national courts.[88] More specifically, the Court found that those procedural irregularities encountered by the applicant restricted the rights of the defense and resulted in the violation of the right to fair trial in article 6 of the Convention.[89]

Furthermore, the ECtHR found two breaches of article 1 of Protocol I (protection of property), in particular with respect to the assessment of penalties by the Russian tax authorities in 2000–2001 and their failure to "strike a fair balance" in the enforcement proceedings against Yukos.[90] With regard to the assessment of penalties, the Court criticized Russian tax authorities' retroactive application of article 113 of the Tax Code that imposed a three-year statutory time bar for the investigation of tax offenses. The Court was also critical of the CC's decision of July 14, 2005, which interpreted this three-year bar limit to the investigation of tax offenses as not applicable to taxpayers who acted fraudulently.[91] In the majority's opinion, the CC's interpretation on retroactive applicability of article 113 to dishonest taxpayers could not have been reasonably foreseen, as "it had changed the rules applicable at the relevant time by creating an exception from a rule which had had no previous exceptions."[92] In light of this, the Court found the violation of article 1 of Protocol No. 1 on account of the "change in interpretation of the rules on the statutory time-bar resulting from the CC's decision of 14 July 2005," as well as "the effect of this decision on the outcome of the Tax Assessment 2000 proceedings."[93]

[85] Coe Statement, Secretary General comments on Russian Constitutional Court judgment today, April 19, 2016, https://www.coe.int/en/web/secretary-general/-/secretary-general-comments-on-russian-constitutional-court-judgment-today.

[86] Case of OAO Neftyanaya Kompaniya Yukos v. Russia (App. No. 14902/04) Judgment (Admissibility) (Jan. 29, 2009).

[87] Case of OAO Neftyanaya Kompaniya Yukos v. Russia (App. No. 14902/04) Judgment (Merits) (Sept. 20, 2011).

[88] *Id.*, *dispositif* (2)(3)–(7).

[89] *Id.*, ¶ 551.

[90] *Id.*

[91] *Id.*, ¶ 572.

[92] *Id.*, ¶ 573.

[93] *Id.*, ¶ 574.

The issue of just satisfaction was settled in the 2014 ECtHR judgment that awarded €1,866,104,634 in pecuniary damages to be paid by Russia to the Yukos ex-shareholders.[94] The compensation awarded by the Court under article 41 of the Convention was calculated on the basis of pecuniary losses sustained by the applicant company in breach of article 1 of Protocol No. 1 on account of the retroactive imposition of the penalties and the payment of tax penalties for the years 2000–2001[95] as well as on account of the manner in which the authorities conducted the enforcement proceedings.[96] Such an unprecedented amount of pecuniary compensation awarded in the context of human rights litigation prompted a negative counter-reaction in Russian political and legal circles, which culminated in the request of the Ministry of Justice of Russia to the CC to rule on the possibility of enforcement of the *Yukos* award. Yet again, the CC utilized its newly acquired powers that allowed it to refuse the implementation of the award on the basis of its incompatibility with the Constitution.

The CC decision in *Yukos* replicates to a great extent the judicial reasoning of its previous ruling in *Anchugov and Gladkov* by re-asserting the primacy of the Constitution over the ECHR.[97] While acknowledging the primacy, the majority treaded carefully by calling to find an appropriate balance—when enforcing the judgments of the ECtHR—between "the spirit and letter of the ECHR" and the Russian constitutional protection of human rights.[98] In order to substantiate its position on the primacy of the Constitution over the ECHR in part where there exists a conflict between two legal instruments, the majority invoked the same obscure reading of articles 31(1) and 46 (1) of the VCLT as in its 2015 decision on the enforcement of the ECtHR decisions (discussed above).[99] Yet again, the CC erroneously interpreted the principle of sovereignty and non-interference in internal matters as belonging to *jus cogens*, therefore justifying Russia's non-compliance with its international treaty obligations.

The CC in *Yukos* found that non-enforcement of the ECtHR judgments might be justified in cases where the Constitution provides for a higher level of protection of human rights than those guaranteed by the ECtHR "in balance with rights and freedoms of other persons."[100] This is a misreading of a "more favourable protection clause." Article 53 ECHR indeed stipulates that "[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party." However, this provision cannot resolve tensions or conflicts between the rights of private individuals. It rather offers solutions in the case of one individual and the respective more favorable treatment offered

[94] Case of OAO Neftyanaya Kompaniya Yukos v. Russia (App. No. 14902/04) Judgment (Just Satisfaction) (July 31, 2014).

[95] *Id.*, ¶¶ 20–26. The compensation awarded amounts to €1,299,324,198.

[96] *Id.*, ¶¶ 27–35. The compensation awarded amounts to €566,780,436.

[97] CC Decision in *Yukos,* 1-П/2017 (Jan. 19, 2017), ¶ 1. *See also* Maxim Timofeyev, *Money Makes the Court Go Round: The Russian Constitutional Court's Yukos Judgment*, Verfassungsblog (Jan. 26, 2017), http://verfassungsblog.de/author/maxim-timofeyev/.

[98] *Id.*, ¶ 2.

[99] *Id.*

[100] *Iid.*

under different legal regimes.[101] Therefore, the CC's reference to the Constitution as providing at times a higher degree of human rights protection, by virtue of "balancing" guarantees afforded to different parties, was misplaced.

The subsequent parts of the CC's judgment dealt with interpretation of article 113 of the Russian Tax Code that provides for a statutory time bar to hold a person accountable for tax offenses. The CC upheld its earlier decision of July 14, 2005, that the statutory time-bar was not applicable to "dishonest taxpayers."[102] In its judgment, the CC also referred to the historical context of turbulent 1990s marred by economic instability, in which the tax legislation and regulations have been shaped.[103] In the opinion of the majority, the reform of the Russian tax system in early 2000, which aimed to guarantee the compliance of the biggest taxpayers with its obligations, addressed the weaknesses of the transitional period marked by widespread tax evasion and poor accountability for tax offenses.[104]

The CC found that, despite the ECtHR award of pecuniary damages to Yukos, such damages had been the result of the company's illegal activities leading to state's interference by imposing responsibility for the damage caused.[105] More specifically, it held that *Yukos* took advantage of "sophisticated unlawful schemes" to avoid paying taxes and left behind an unsettled debt, which had the "destructive effect" on the Russian legal system.[106] In light of this, the CC concluded that enforcement of the ECtHR decision—through the distribution of payment among the ex-shareholders and their successors—would contravene the constitutional principles of equality and fairness in the area of taxation.[107]

This line of argument elevated article 113 of the Tax Code, which is a technical provision on the statute of limitations in tax proceedings, to constitutional law status and construed it by means of invoking overly broad and abstract principles of equality and fairness in the matters of taxation. As it stands, the decision of the CC is an example of excessively creative judicial reasoning obfuscated by references to overly stretched principles of international and constitutional law. This approach, when applied in the context of the case, makes little sense. At the heart of the case are the matters of tax law, in particular retroactive application of the legal provision in the Tax Code as well as the enforcement of tax penalties. However, acknowledging that would impede the CC to exercise its jurisdiction, as it can only intervene when constitutional law matters are at stake.

Finally, in a rather conciliatory tone, the CC held that it did not exclude the possibility of Russia demonstrating its goodwill and agreeing to pay *some* ex-shareholders, in

[101] Adamantia Rachovitsa, *Treaty Clauses and Fragmentation of International Law: Applying the More Favourable Protection Clause in Human Rights Treaties*, 16(1) Hum. Rts. L. Rev. 77, 88 (2016); Çali, *supra* note 28, at 65.

[102] CC Decision in *Yukos*, 1-П/2017 (Jan. 19, 2017), ¶ 4.2.

[103] *Id.*, ¶ 4.3.

[104] *Id.*

[105] *Id.*, ¶ 4.5.

[106] *Id.*

[107] *Id.*

particular those who had incurred financial loss as a result of the actions of the company's management.[108] However, such payment was recognized as being conditional upon Yukos's settling of its outstanding debts with the creditors.[109] The majority decision was accompanied by two dissenting opinions that, albeit are different in their argumentation line, argued that the Ministry's request on the enforceability of the ECtHR judgment should have been considered inadmissible by the CC.

One of the dissenting judges, Judge Yaroslavtsev, in support of his position on non-admissibility of the ministerial request, as a starting point, referred to his earlier dissent, in which he argued against the CC's broad interpretation of article 113 of the Tax Code that allowed for its retroactive application after the statute of limitations had passed.[110] Following this and turning to the ECtHR decision, he questioned the appropriateness of bringing the matter before the CC. He pointed to the available referral mechanism provided for in article 43 of the ECHR, which entitles any party to the case, "in exceptional circumstances, to request that the case be referred to the Grand Chamber," which, however, had not been invoked by the Russian government.[111] He also criticized the Ministry for seeking "simplified" ways to resolve the impasse.[112] In his opinion, the CC cannot exercise its jurisdiction, as it would contravene the principle of *nemo judex in propria causa* (no one should be a judge in his own case).[113] This is due to the fact that the ECtHR judgment in *Yukos* was to a great extent based on the 2005 CC's decision on retroactive application of tax legislation.[114] Therefore, he directed the Ministry—instead of seeking "easy ways" to get out of the deadlock—to continue the dialogue with the CoE Committee of Ministers, with the view of finding the solution. [115]

Another dissenting voice in the Court was that of Judge Aranovskii who joined his fellow colleague on the bench Judge Yaroslavtsev in arguing that the CC cannot act as an "arbitrator" in the case of a disagreement between Russia represented by the Ministry and the ECtHR.[116] Aranovskii also criticized the inconsistent position of Russia's Ministry of Justice that disagreed with the ECtHR in part where the Court largely adopted the position of the Ministry itself.[117] More specifically, the Ministry engaged in the discussion on the amount of just compensation, thereby signaling the willingness of the Russian government to pay the compensation, just later to retract its position altogether and contest the enforceability of the ECtHR award before the CC.[118]

[108] *Id.*, ¶ 7.
[109] *Id.*, ¶ 7.
[110] *Id.*, ¶ 1 (separate opinion of Judge Yaroslavtsev).
[111] *Id.*, ¶ 2.
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*, ¶ 3.
[116] *Id.*, ¶ 1.3 (separate opinion of Judge Aranovsii), ¶¶ 1.18–1.19 (similar line of reasoning).
[117] *Id.*, ¶ 1.2.
[118] *Id.*

The crux of Judge Aranovskii's criticism, however, related to the CC's lack of competence to seize the jurisdiction of international courts.[119] He dismissed the majority's argument that such a significant amount in compensation would deplete social welfare funds in the state budget. In his view, this false line of reasoning would allow the signatories to the ECHR to invoke immunity from the jurisdiction of the Court on the basis of the burden of social expenses at home.[120] Also, Judge Aranovskii stated that despite an exceptionally high amount awarded in the context of the ECtHR proceedings in this particular case, the member states that ratified the ECHR have not discussed the maximum amounts they are willing to pay in compensation, and therefore a perceived "excessive" award in the compensation cannot be invoked as an argument in support of the non-enforceability of the ECtHR decision.[121] While Judge Aranovskii was critical of the CC judicial interference in the case, he also disapproved of the ECtHR handling of the case, as it awarded compensation to unnamed individuals who did not partake in the proceedings and thus did not demonstrate that they personally suffered harm as a result of state action.[122] In sum, the position of the dissenting judge is that neither the ECtHR nor the CC handled the case properly and both institutions, acting in their best interests, served justice as "they wish for" rather than "what it ought to be."[123]

The two dissenting judges are right that the case should not have ended up before the CC in the first place. While being discontent with the judgment of the ECtHR, the Russian government should have pursued settlement of the case in Strasbourg instead of simply ignoring the procedural deadlines and seeking to justify its inaction through initiating proceedings before the CC.[124] Putting this aside, the ruling of the CC is significant, as the majority clearly asserted the supremacy of constitutional law provisions over international law, reiterated its interpretation of the principle sovereignty as belonging to *jus cogens,* and, as a result, denied the enforcement of the ECtHR judgment in relation to individual measures. The position of the CC that essentially denies the enforcement of individual measures in *Yukos* differs from its approach in *Anchugov and Gladkov* where the CC denied the enforcement of general measures directed at amending the Constitution in part that concerns the prisoners' voting rights. Following the CC's ruling in *Anchugov and Gladkov*, it was perceived that the CC would only invoke its newly acquired powers to rule on the enforceability of general measures where there is a clear compatibility issue with the constitutional provisions. However, the CC has shown in *Yukos* that it construes its powers broadly when it chose to deny the enforcement of individual measures by referring to the broadly defined constitutional principles.

[119] *Id.*, ¶ 2.2.
[120] *Id.*, ¶ 1.7.
[121] *Id.*
[122] *Id.*, ¶¶ 2.4, 3.1
[123] *Id.*, ¶ 3.6.
[124] Secretariat of the Committee of Ministers, Doc. DH-DD(2016)217, February 25, 2016, *available at* https://rm.coe.int/16805acc6d.

The CC decision in *Yukos* was followed by a relatively mild reaction of the CoE that expressed its concern over Russia's refusal to implement the judgment as threatening "the very integrity and legitimacy of the system of the ECHR" and urging the Russian government "to change the federal law to accommodate for the CC's powers to prevent the implementation of the judgments of the ECtHR."[125] However, this lukewarm position of the CoE is rather surprising, as the law had already been changed in 2015 granting such powers to the CC and appears to be actively utilized by the Russian government, with the view of hindering the enforcement of the ECtHR judgments, which are viewed as problematic in Russia.

5. The CC's interpretation as a broader challenge to the Western narrative of international law

Viewed broadly, the CC's interpretation of the fundamental international law concepts, such as the principle of sovereignty, serves as an empirical example of alternative versions of international law as advanced by different legal cultures. The emerging new interpretations support the idea of fragmentation of international law not only from a strictly legal perspective—as a plethora of conflicting sources of law—but also from a socio-legal perspective as a discipline harbouring conflicting narratives and interpretations. Arguably, the conflict of visions may lead to further cultural clashes and formations of "international law power blocks," such as the one evidenced by the 2016 Russia–China Joint Declaration.

This recent declaration showcases current proximity of the two countries' outlook on the core principles underlying international law.[126] The Chinese judge at the International Court of Justice, Xue Hanqin, openly voiced her country's critical stance toward international law as an instrument of colonial domination and political expansion.[127] The Chinese understanding of the principles of equity, mutual benefit, and mutual respect for sovereignty and territorial integrity largely corresponds not only to the present vision of international law in Russia but also to the Soviet view of the doctrine centered on sovereignty and self-determination.[128]

In his book on the origins of the Soviet approaches to international law, Bowring refers to contemporary writings on international law in Russia that underline the importance of these principles in the Soviet doctrine.[129] For instance, Bowring cites a passage from the article by Alwyn Freeman published in 1968, in which Freeman insisted that "Soviets retain the classical strict conception of the states alone as subjects

[125] CoE Statement, Commissioner Concerned About Non-Implementation of a Judgment of the European Court of Human Rights in Russia, January 20, 2017, http://www.coe.int/en/web/commissioner/-/commissioner-concerned-about-non-implementation-of-a-judgment-of-the-european-court-of-human-rights-in-russia.

[126] Mälksoo, *supra* note 17, at 21.

[127] Xue Hanqin, Chinese Contemporary Perspectives on International Law: History, Culture and International Law 29 (2012).

[128] *Id.* at 31.

[129] B. Bowring, Law, Rights and Ideology in Russia: Landmarks in the Destiny of a Great Power 77 et seq. (2013).

of international law, with a rigid insistence on sovereignty in its most extreme form. They do, however, recognize an exception in favour of peoples fighting for 'national liberation.'"[130] Likewise Evgeny Korovin noted that "international law is the sum-total of legal norms guaranteeing international protection of the democratic minimum," but he added that there was a need after the war for a new and more profound treatment of international sovereignty, which is the expression of the principle of national self-determination.[131] Arguably, the recent trends in Russian approaches to international law as manifested by the reasoning of the CC presented in this article signal the strengthening of the restrictive and state-centered vision of international law.[132]

Russian scholars traditionally emphasize the idea of sovereignty as a cornerstone principle of international law.[133] Mälksoo highlights the intense debate in Russian scholarship between "statists" focused on sovereignty and "pro-human rights" scholars, the former school being predominant.[134] For instance, Professor Moiseev from the Diplomatic Academy of the Russian Ministry of Foreign Affairs maintains that, as a legal category, sovereignty cannot be limited as it is absolute and indivisible.[135] Historically, such vision could be explained by the fear of territorial disintegration against the background of a rather weak federalist system introduced by the Soviets following the collapse of the Tsarist regime.[136]

However, the advent of human rights law in the 1990s marked a surge in liberal thinking. The new Constitution of the Russian Federation, adopted by referendum on December 12, 1993, contained many human rights provisions taken verbatim from the ECHR and major UN instruments.[137] Russia signed a number of multilateral treaties and joined the CoE. Many in Russia and in Europe saw Russia's accession to the CoE as a step in its re-socialization with European institutions, norms and practices.[138] Pursuant to this vision, the post-Soviet country is essentially European and thus only needs to re-establish itself as part of the shared space of common values. Current approaches to international law exhibited by the latest reasoning in the CC demonstrate a symbolic return to an autonomous view of international law, prominent in the Soviet doctrine.

[130] *Some Aspects of Soviet Influence on International Law*, 62(3) Am. J. Int'l L. 710, 716 (1968), as cited by Bowring, *supra* note 128, at 83.

[131] E. Korovin, *The Second World War and International Law*, 40(4) Am. J. Int'l L. 742 (1946), as cited by Bowring *supra* note 128, at 80.

[132] Mälksoo, *supra* note 17, at 98. For the example of the "human rights approach," *see* G. V. Ignatenko, Mezhdunarodnoe pravo i vnutrigosudarstvennoe pravo. Problemy sopryazhennosti i vzaimodeistvia (2012); for the "statist" approach, *see* S. V. Chernichenko, Teoria mezhdunarodnoga prava (vols. 1 and 2, 1999).

[133] T. P. Koretskaya, *The Role of the CC in The Constitutional Mechanism of Protecting Sovereignty of the Russian Federation*, 45 Bull. No. 25 (380) Chelyabinsk St. 49, 53 (2015); V. A. Terehin, *The Russian Legal System and the ECtHR: Problems of Interaction*, *Izvestiya Vysshyh Uchebnih Zavedenii (Povolzhskii region)*, 2(38) Social Sciences 66, 70–71 (2016).

[134] Mälksoo, *supra* note 17, at 100.

[135] A. A. Moiseev, Suverenitet gosudarstva v mezhdunarodnom prave 55–87 (2009), as cited by Mälksoo, *supra* note 17, at 101.

[136] A. Medushevsky, *Model dlya sborki: Rossisky federalism XX-nachala XXI veka v poiskah identichnosti. Chats 1*, 2(117) Sravnitelnoe Konstitucionnoe Obozrenije 15 (2017); Mälksoo, *supra* note 17, at 101.

[137] Bowring, *supra* note 14, at 44.

[138] Mälksoo, *supra* note 17, at 160.

Most current academic works on international law in Russia treat human rights merely as one of the ten principles in international law as reflected in the UN General Assembly's 1970s Friendly Relations Declaration.[139] Some even exhibit certain skepticism toward the institution of human rights. For instance, Elena Safronova writes that most heinous international crimes in the world are often committed under the pretext of the protection of human rights.[140] Notably, the Chinese stance is somewhat similar in this regard. As argued by Judge Xue Hanqin: "[h]uman rights, democracy, rule of law and good governance, although shared by all States in principle, are often advocated overtly with an aim of regime change for Western democracy."[141] This view stands in stark contrast to Western-centric thinking about international law as liberal and cosmopolitan, with an emphasis on the protection of human rights and democratic accountability of governments.[142]

6. Concluding words

As evidenced by the recent case law of the CC, the evolving reasoning of the Court reflects Russia's alternative approaches to international law challenging the dominant Western narrative of the discipline. The principle of sovereignty has been elevated to the rule of *jus cogens* invoked by the CC to deny the enforcement of the ECtHR judgments, which were perceived as problematic at home, in relation to both general and individual measures. Although, at first sight, the Constitution accords an utmost importance to international law, its ambiguous wording leaves room for questions regarding the relative weight of international law in the domestic legal order. The CC invoked this ambiguity and re-established the hierarchy of sources of law by clearly placing constitutional law provisions above international treaties that have been ratified by Russia.

Notwithstanding Russia's patchy compliance record with the decisions of the ECtHR, the CC's 2017 and 2016 decisions are the first of a kind adopted by the highest judicial authority of a CoE member state openly dismissing the authority of the ECtHR. The latest developments take place against the backdrop of mounting pressure on Russia in light of nearly 4000 individual applications related to the events eastern Ukraine and Crimea submitted to the ECtHR.[143] Given a floodgate of applications against Russia in the ECtHR, it is probably not the last time when the CC invokes its powers to deny the enforcement of the ECtHR decision. This may exhibit early signs of Russia's departure from the CoE. However, the exit of Russia from the CoE would be unfortunate, as the decisions of the ECtHR have had a catalyzing effect on the

[139] *Id.* at 122.

[140] E. Safronova, Mezhdunarodnoe publichnoe pravo 115–116 (2013), as cited by Mälksoo, *supra* note 17, at 124.

[141] Mälksoo, *supra* note 17, at 93.

[142] *Id.* at 19.

[143] Press Country Profile "Russia" as of March 2017, http://www.echr.coe.int/Documents/CP_Russia_ENG.pdf.

development of the legislative and judicial practices in Russia. It would also wreck significant reputational damage, as leaving the CoE would be tantamount to breaking away from the rule of law and human rights.

From the perspective of the CoE, it is doubtful that it would be inclined to exert extra pressure on Russia to either change its current interpretative practices or leave the organization. It is true that membership in the CoE has certain conditions attached to it. As a measure of last resort, article 8 stipulates that any member that has seriously violated article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw from CoE. However, a high degree of interdependence of states on a global or regional arena entails higher political costs when imposing sanctions for non-compliance. This challenge leads to sporadic rather than systematic sanctioning.[144] Hard choices are sometimes, nonetheless, inevitable, as was the case of the suspension by the Parliamentary Assembly of the Council of Europe (PACE) of the voting and representation rights of Russia as a response to its annexation of Crimea.[145] While condemning Russia for violating the sovereignty and territorial integrity of Ukraine, PACE remained highly cautious stressing that political dialogue must continue.[146] Nonetheless, although PACE acted with respect to the annexation of Crimea, it is unlikely to invoke the same powers with respect to Russia's non-compliance with the latest ECtHR judgments. There is a common interest in the continuity of Russia's participation in the ECHR, especially in light of the rise in many European states of isolationist populist rhetoric that may potentially escalate to open calls for exiting regional organizations, such as the EU or the CoE. It is thus more likely that the Committee of Ministers of the CoE—its executive branch—will continue applying only mild political pressure to ensure its continued engagement with Russia.

[144] Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements 3 (1995)

[145] Reconsideration on substantive grounds of the previously ratified credentials of the Russian delegation, Resolution 1990 (2014).

[146] *Id.*, ¶¶ 13, 14.