

The Russian Constitutional Court versus the European Court of Human Rights: How the Strasbourg Court Should Respond to Russia's Refusal to Execute ECtHR Judgments

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The European Court of Human Rights (ECtHR) and the Council of Europe face significant enforcement problems regarding Russia. These problems stem from Russia's resistance towards implementing ECtHR judgments. This resistance was formalized by a 2015 Russian law which granted the Russian Constitutional Court the power to review international human rights rulings to decide if they violate the Russian Constitution and are therefore "non-executable." In April 2016, the Russian Constitutional Court used this power to refuse to implement the ECtHR judgment against Russia in the case of Anchugov and Gladkov v. Russia. This 2015 law and the Russian Constitutional Court's subsequent ruling represents a significant development in how Russia views international law. Moreover, Russia's actions pose a major problem for the legitimacy and future of the ECtHR. This Note examines the Russian Constitution's treatment of international law and the broader context of Russian legal compliance with ECtHR judgments. By examining these relationships, this note seeks to determine the significance of Russia's recent decisions and guide the Council of Europe and the ECtHR's response going forward. This note finds that, while Russian non-compliance with the ECtHR is not new, Russia's recent actions against ECtHR judgments nevertheless pose a threat to the European Convention on Human

Rights (ECHR) system. Therefore, the Council of Europe and the ECtHR should assert the supremacy of the ECHR over Russian domestic law utilizing every mechanism within the current Council of Europe and ECHR framework. However, in doing so, this Note recommends that the Council of Europe and the ECtHR acknowledge Russia's position and, when possible, avoid further contradiction between ECtHR judgments and Russian constitutional law.

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TIMELINE

Dec. 25, 1993 — The Constitution of the Russian Federation comes into force, when it is published in Rossiiskaia Gazeta newspaper

Feb. 28, 1996 — Russia is admitted to the Council of Europe

March 30, 1998 — Russia ratifies the 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR)

Nov. 1, 1998 — ECHR enters into force in Russia

July 4, 2013 — European Court of Human Rights (ECtHR) final judgment in the case of *Anchugov and Gladkov v. Russia*

Dec. 6, 2013 — The Russian Constitutional Court refrains from deciding legal superiority with regard to the Russian Constitutional Court versus the ECtHR in relation to the ECtHR judgment in *Markin v. Russia*

Dec. 15, 2014 — ECtHR final judgment in *Case of OAO Neftyanaya Kompaniya Yukos v. Russia*, in which the ECtHR awards the Yukos shareholders close to €1.9 billion

July 14, 2015 — The Russian Constitutional Court issues a ruling, refusing to declare the 1998 Russian Federal law on Russia's ratification of the ECHR and its Protocols unconstitutional, but invites the Russian legislature to amend the Federal Constitutional Law of the Russian Federation in order to allow the Constitutional Court to issue advisory opinions on the constitutionality of ECtHR judgments

Dec. 14, 2015 — Amendment to the Federal Constitutional Law of the Russian Federation, granting the Constitutional Court the power to declare opinions from international human rights bodies “impossible to execute”

April 19, 2016 — The Russian Constitutional Court rules that it is impossible to execute the ECtHR's final judgment in the case of *Anchugov and Gladkov v. Russia*

Jan. 19, 2017 — The Russian Constitutional Court rules that it is impossible to execute the ECtHR *Yukos* judgment, because it violates the Russian Constitution

INTRODUCTION

In 2015, the State Duma, the lower house of Russia's federal legislature, passed a law granting Russia's Constitutional Court [hereinafter "Constitutional Court"] the power to review international human rights rulings to decide if they violate the Russian Constitution and are therefore "non-executable."¹ The Constitutional Court encouraged the Duma to pass this law when it issued its July 14, 2015 judgment regarding the constitutionality of several sections and articles of Russian Codes relating to the implementation of international law in the Russian Federation.² Following the expansion of the Constitutional Court's powers, the Constitutional Court found the judgment of the European Court of Human Rights [hereinafter "ECtHR" or the "Strasbourg Court"] in the case of *Anchugov and Gladkov v. Russia*³ to be in conflict with the Russian Constitution and therefore non-executable.⁴

This Note examines the context and significance of the Russian legislature and Constitutional Court's recent actions. It finds that granting the Constitutional Court the power to invalidate ECtHR judgments served as a declaration of the supremacy of Russian constitutional law over international law norms and legal decisions stemming from Russia's international treaty obligations. Further, this represents a significant development in how Russia views international law and a departure from Russia's previous relationship with

1. Federal'nyi Zakon RF o Vnesenii Izmeniĭ v Federal'nyi Konstitutsionnyi Zakon "O Konstitutsionnom Sude Rossiiskoi Federatsii" [Federal Law of the Russian Federation on Amendments to the Federal Constitutional Law "On the Constitutional Court of the Russian Federation"], ROSSIISKAIA GAZETA [ROS. GAZ.] [RUSSIAN GAZETTE] (Dec. 16, 2015), <https://rg.ru/2015/12/15/ks-site-dok.html> [<https://perma.cc/B393-V3HL>].

2. Specifically, Article 1 of the Federal Law "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto," Items 1 and 2 of Article 32 of the Federal Law "On International Treaties of the Russian Federation," as well as others. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 14 iuliia 2015 g. [Ruling of the Russian Federation Constitutional Court of July 14, 2015], ROS. GAZ. (July 27, 2015), <https://rg.ru/2015/07/27/ks-dok.html>. For an English translation of key points of the ruling see KONSTITUTIONNĪI SUD ROSSIISKOI FEDERATSII [RUSSIAN CONSTITUTIONAL COURT], *Resume 2015 21-P*, <http://www.ksrf.ru/en/Decision/Judgments/Documents/resume%202015%2021-%D0%9F.pdf> [<https://perma.cc/2Z2P-54HH>].

3. *Anchugov and Gladkov v. Russia*, App. Nos. 11157/04 and 15162/05, Eur. Ct. H.R. (Sept. 12, 2013), <http://hudoc.echr.coe.int/eng?i=001-122260> [<https://perma.cc/J8RS-UMN9>].

4. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 apreliia 2016 g. [Ruling of the Russian Federation Constitutional Court of Apr. 19, 2016], ROS. GAZ. (May 5, 2016), <https://rg.ru/2016/05/05/sud-dok.html> [<https://perma.cc/X2S2-RGCT>].

the ECtHR. Finally, Russia's decision to undermine its treaty obligations under the European Convention on Human Rights [hereinafter the "ECHR"] threatens the authority of the ECtHR and the protection of human rights under the ECHR.

This Note explores these events in order to determine how the ECtHR, which oversees compliance with the ECHR among member-states of the Council of Europe, and other bodies of the Council of Europe should respond to Russia. Part I looks at the Russian Constitution's treatment of international law and Russia's legal obligations under the ECtHR, with the purpose of presenting Russia's domestic legal framework for the execution (and non-execution) of ECtHR judgments.⁵ Part II explores Russia's relationship with the ECtHR by tracing the legal developments in recent ECtHR and Constitutional Court case law, specifically leading up to *Anchugov and Gladkov v. Russia*. Part III then examines the ramifications of these developments in terms of both Russia's understanding and treatment of international law, as well as the effectiveness and future of the ECtHR and human rights under the ECHR in Russia and throughout ECHR member-states. Finally, Part IV offers solutions for how the Council of Europe and ECtHR should respond to the actions of the Russian legislature and Constitutional Court.

This note concludes that Russia has internalized the ECHR system to an extent where it is unlikely that Russia will fully pull out of the Council of Europe. Therefore, the Council of Europe must use every mechanism at its disposal to compel Russia to comply with the ECHR and fulfill its legal obligations to execute ECtHR judgments. At the same time, however, the ECtHR should tread carefully when issuing judgments that contradict provisions of the Russian Constitution. This is especially true given recent support over the last few years for greater isolationism and nationalism—both within Russia and globally. The ECtHR should take due care to evaluate Russia's margin of appreciation and, if possible, find a way to write judgments without offending provisions of Russian constitutional law. If, on the other hand, the Strasbourg Court is unable to avoid confrontation with the Russian Constitution, it should then directly engage with Russian constitutional law that supports the Strasbourg Court's position. In sum, this note will explain why Russia's recent actions against ECtHR judgments pose a threat to the ECHR system and then present ways for the Council of Europe and the ECtHR to assert the

5. Part I and the historical background section of Part II adopt portions of the research and language from my unpublished M.A. thesis from 2014, which looked at the political factors that motivated Russia to join the Council of Europe and accept the jurisdiction of the ECtHR, and the subsequent impact that joining the court has had on domestic law in Russia.

supremacy of the ECHR over Russian domestic law, while acknowledging Russia's position and, when possible, avoiding further contradiction between ECtHR judgments and Russian constitutional law.

I. THE RUSSIAN CONSTITUTION AND INTERNATIONAL LAW

The 1993 Russian Constitution⁶ establishes the framework for understanding the application of international law and the treatment of international treaties and agreements in the Russian Federation. Drafted at the end of the twentieth century, it specifically addresses modern notions of international law and the legal frameworks of international organizations.⁷ Therefore, the Council of Europe and the ECtHR must understand the Russian Constitution and the importance it places on international law in order to evaluate and respond to recent actions by the Constitutional Court and the State Duma. Further, invoking the Russian Constitution and Russia's commitments to international human rights law and international law norms under the ECHR is vital to challenging Russia's position that it cannot execute any judgment that violates the Russian Constitution.

Part I looks at the Russian Constitution and Russia's membership-agreements with the Council of Europe. To demonstrate how the ECtHR should invoke the Russian Constitution in the ECtHR's reasoning, and therefore utilize the Russian Constitution's support of international law and international treaty obligations, this section starts by examining the text of the Russian Constitution. Section A of Part I looks closely at Article 15(4), which establishes the relationship between international and national law in Russia, in addition to other articles that address international human rights. Section B examines the history of Russia joining the Council of Europe, to analyze what Russia agreed to and what Russian membership in the Council of Europe and the ECtHR meant for international human rights law in Russia, as well as Russia's international legal obliga-

6. KONSTITUTSIJA ROSSIJSKOI FEDERATSII [KONST. RF] [CONSTITUTION].

7. See KONST. RF art. 15(4). See also B. L. ZIMNENKO, INTERNATIONAL LAW AND THE RUSSIAN LEGAL SYSTEM xli (William E. Butler ed. and trans., Eleven International Publishing 2007) ("The interface between international law and the Russian legal system has been transformed by Article 15 of the 1993 Russian Constitution, which establishes that general principles and norms of international law and international treaties of the Russian Federation are an integral part of the Russian legal system."). See generally ANDREI P. TSYGANKOV, RUSSIA'S FOREIGN POLICY: CHANGE AND CONTINUITY IN NATIONAL IDENTITY 31-89 (2006) (detailing Russian foreign policy shifts under Mikhail Gorbachev and debates within Russia's different schools of foreign policy prior to and following the collapse of the Soviet Union).

tions under the ECHR.

A. The Importance of International Law in the Russian Constitution

Article 15(4) of the 1993 Russian Constitution addresses international law and international human rights norms as well as the interaction between international law and national law in Russia. Article 15(4) states:

Generally recognized principles and norms of international law as well as international agreements of the Russian Federation shall be a constituent part of its legal system. If an international agreement of the Russian Federation establishes rules which differ from those stipulated by law, the rules of the international agreement shall apply.⁸

The treatise *International Law—A Russian Introduction*, written by over a dozen Russian practitioners and scholars and edited by V.I. Kuznetsov and B. R. Tuzmukhamedov, emphasizes that “[Article 15(4)] is not an ‘ordinary’ constitutional norm, but a norm of the highest order—a general legal principle (for the law of Russia) and

8. In Russian, the text of Article 15(4) is «Общепризнанные принципы и нормы международного права и международные договоры Российской Федерации являются составной частью ее правовой системы. Если международным договором Российской Федерации установлены иные правила, чем предусмотренные законом, то применяются правила международного договора.» The full constitution is available in Russian on the Kremlin website. KONST. RF, <http://constitution.kremlin.ru/> [<https://perma.cc/QCV7-8SMP>]. I am using the Max Planck Institute’s translation, which is available through OXFORD CONSTITUTIONS OF THE WORLD. KONST. RF, *translated in OXFORD CONSTITUTIONS OF THE WORLD, Constitution of the Russian Federation: December 12, 1993 (as Amended to July 21, 2014)* (Max Planck Institute, trans., Oxford University Press 2014), <http://oxcon.ouplaw.com/> [<https://perma.cc/QGW2-MV2X>]. However, it should be noted that there is no official translation of the Russian Constitution into English. As a result, there is not a fully agreed upon translation of each word of this article. For example, the word “Общепризнанные” translated here as “generally recognized,” can also be translated as “universally recognized,” “avowed,” or “conventional.” For examples of other translations, see WILLIAM E. BUTLER, *RUSSIAN PUBLIC LAW 7* (2005) (“Generally-recognized principles and norms of international law and international treaties of the Russian Federation shall be an integral part of its legal system. If other rules have been established by an international treaty of the Russian Federation than provided for by a law, the rules of the international treaty shall apply.”); LAURI MÄLKSOO, *RUSSIAN APPROACHES TO INTERNATIONAL LAW* 111 (2015) (“The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.”).

one of the foundations of the constitutional system of Russia.”⁹ Therefore, Article 15(4) should serve as the starting point for any discussion about Russia and international law as well as for understanding other provisions regarding international human rights law in the Russian Constitution.

Article 15(4) defines the interaction between international and Russian national law, for the first time consolidating “Generally recognized principles and norms of international law as well as international agreements of the Russian Federation” and integrating them as “a constituent part” of Russia’s legal system.¹⁰ Further, this article states that “[i]f an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, *the rules of the international agreement shall be applied.*”¹¹ It is significant because it recognizes norms of international law, instead of simply referencing the principle of good-faith fulfillment of international obligations, as was the case in the Soviet Union’s previous constitutions.¹²

While the 1993 Russian Constitution is not unique in the fact that it addresses international law and establishes how international law should interact with domestic law, its approach, in terms of its deliberate and increased focus on international law, is significant.¹³ In contrast to the 1977 Soviet Constitution’s notion of international law as operating entirely outside the domestic sphere of the Soviet Union, the 1993 Constitution provides for the possibility of directly

9. V. I. KUZNETSOV & B. R. TUZMUKHAMEDOV, *INTERNATIONAL LAW—A RUSSIAN INTRODUCTION* 168 (William E. Butler, ed. and trans., Eleven International Publishing 2009) (first published in 2001).

10. KONST. RF art. 15; see MÄLKSOO, *supra* note 8, at 111 (“When this constitutional provision was adopted, it was praised by Russian and foreign legal experts as path-breaking in the fragile history of Russia’s constitutionalism because for the first time, international law was apparently given priority over domestic law. The previous Soviet constitutions, including the Brezhnev constitution of 1977, contained no similar stipulation specifically regulating the role of international law in the country’s legal system.”) (original citations omitted); KUZNETSOV & TUZMUKHAMEDOV, *supra* note 9, at 167 (“An illustrative example of the first time by the Russian Constitution in Article 15(4) of provisions concerning generally-recognized principles and norms of international law and international treaties of Russia as an integral part of its legal system, and also the priority of the application of provisions of international treaties if they contain rules other than in laws.”).

11. KONST. RF art. 15 (emphasis added); see MÄLKSOO, *supra* note 8.

12. See MÄLKSOO, *supra* note 8, at 111.

13. Gennady Danilenko, *The New Russian Constitution and International Law*, 88 AM. J. INT’L L. 451, 452 (1994) (“The issue of assuring effective compliance with Russia’s international obligations figured prominently in the constitutional debate. As a result, the 1993 Constitution contains an unprecedented number of references to international law.”).

applying international law in the domestic legal sphere.¹⁴ The constitutions of other formerly communist states in the Eastern Bloc also took this approach, placing a greater emphasis on the incorporation of international law.¹⁵

The 1993 Russian Constitution's integration of international law illustrates Russia's move toward a more pro-Western internationalization during the 1990s.¹⁶ During this period, "liberal Westernizers" promoted "a different concept of national interest" from that of the Soviet Union.¹⁷ This meant pushing for integration with Western Europe and the United States, through membership or participation in the West's economic, political, and security organizations.¹⁸ This also meant adopting western liberal ideas domestically through building democratic institutions and "guaranteeing the rights and freedoms of all Russians."¹⁹

Within this context, Article 15(4) gave rise to new discussions about the correlation and interaction between Russian national and international law.²⁰ Many Russian and foreign legal experts, largely due to the language of the Article itself, advanced the notion that Ar-

14. *Id.* at 458 ("The former Soviet Union never considered international law as something that might be invoked before, and enforced by, its domestic courts. The 1977 Constitution did not allow the direct operation of international law in the domestic setting. Although the Constitution proclaimed that the relations of the USSR with other states should be based on the principle of 'fulfillment in good faith of obligations arising from the generally recognized principles and rules of international law, and from international treaties signed by the USSR,' this broad clause was never interpreted as a general incorporation of international norms into Soviet domestic law.") (internal citations omitted).

15. See Eric Stein, *International Law in Internal Law: Toward Internationalization of Central-East European Constitutions?*, 88 AM. J. INT'L L. 427, 447 (1994) (discussing the drafting of the Czech Republic and Slovakia's constitutions, as well as the status of treaties and the effect of international law in the constitutions or draft constitutions of Bulgaria, Hungary, Romania, the Federal Republic of Yugoslavia, Croatia, Slovenia, Estonia, Poland, Lithuania, and Ukraine, concluding: "Of the fifteen constitutions or drafts I surveyed, most incorporate treaties as an integral part of the internal order, and although this is not clear in all instances, treaties have the status of ordinary legislation. In five (probably seven) instances treaties are made superior to both prior and subsequent national legislation, while in three documents this exalted rank is reserved for human rights treaties only.").

16. See TSYGANKOV, *supra* note 7.

17. *Id.* at 58.

18. *Id.*

19. *Id.* (quoting a 1992 article by Andrei Kozyrev, Russia's Foreign Minister from 1991 until 1996).

20. MÄLKSOO, *supra* note 8, at 111 ("Russia's constitutional provision of 1993 may appear quite straightforward at first glance but in Russian scholarship there is an ongoing debate what exactly these words mean, and what the relationship of Russia's constitutional law to international law is.").

Article 15(4) established the primacy of international law in Russia over conflicting domestic norms, making international treaties and certain norms of international law directly applicable.²¹ This was not the unanimous understanding of the force of international law in Russia, however, and Article 15(4) continued to stir debate among Russian legal scholars throughout the 2000s.²²

The idea that international law and domestic law are two separate legal systems has historically dominated Russian and, particularly, Soviet legal thinking.²³ A leading advocate of this decisively dualistic view of international versus national law is E. T. Usenko.²⁴ Usenko and other Russian legal theorists who subscribe to dialectical dualism believe that international law cannot operate within the sphere of domestic law and that “the fulfillment of international obligations is possible only after the ‘transformation’ into domestic law or the acquisition by them of the force of norms of domestic law by means of the issuance of respective national normative legal acts.”²⁵ Usenko has criticized the construction of Article 15(4) and argued that the Russian Constitution’s treatment of international law is not revolutionary, but merely a continuation of the Soviet Union’s position.²⁶ Furthermore, V. I. Kuznetsov and B. R. Tuzmukhamedov’s

21. See REIN MÜLLERSON, ORDERING ANARCHY: INTERNATIONAL LAW IN INTERNATIONAL SOCIETY, 184–85 (2000); MÄLKSOO *supra* note 8, at 111–12.

22. MÄLKSOO, *supra* note 8, at 111; KUZNETSOV & TUZMUKHAMEDOV, *supra* note 9, at 168 (“The very emergence of the norms of Article 15(4) of the 1993 Russian Constitution has given rise to contradictory assessments.”); WILLIAM E. BUTLER, THE LAW OF TREATIES IN RUSSIA AND THE COMMONWEALTH OF INDEPENDENT STATES 38 (2002) (“Although the 1993 Constitution has incorporated generally-recognized norms of international law into the legal system, their place in the legal system is not determined with precision by the 1993 Constitution.”).

23. See MÄLKSOO, *supra* note 8, at 112; KUZNETSOV & TUZMUKHAMEDOV, *supra* note 9, at 166 (noting that the Soviet theory of international and national law “was rather close to the theory of dialectical dualism,” which the authors attribute to M. Shaw and L. Henkin, summarizing: “international law may participate in the regulation of relations which are the subject-matter of international law, but does not occur automatically nor by virtue of the nature of international law itself, but as a result of the permission of the respective State, a manifestation of its sovereignty”).

24. See KUZNETSOV & TUZMUKHAMEDOV, *supra* note 9, at 167.

25. *Id.* at 167; see E.T. Usenko, *Sootmoshenie i Vzaimodejstvie mezhdunarodnogo i Nacional'nogo Prava i Rossijskaja Konstitucija*, 2 MOSKOVSKIJ ZHURNAL MEZHDUNARODNOGO PRAVA 13 (1995).

26. See KUZNETSOV & TUZMUKHAMEDOV, *supra* note 9, at 168 (referencing Usenko); Usenko, *supra* note 25, at 17 (stating “the idea laid down in this paragraph of the Constitution [article 15.4], is in fact a logical continuation of the development of Soviet and Russian legislation, which is stated above [article 129 of the 1961 “fundamentals of civil legislation of the USSR and Republics” (art. 170 of the 1991 “Fundamentals of civil legislation of the

treatise and textbook on international law and Russia²⁷ notes that Article 15(4) does not directly answer whether, within the hierarchy of law, “any international treaty possesses priority of application with respect to a national law and does not suggest, unlike [various other] foreign constitutions, conditions for such priority to arise.”²⁸ In his 2015 book *Russian Approaches to International Law*, Lauri Mälksoo describes other Russian legal scholars, such as S. V. Chernichenko and B. L. Zimnenko, who have rejected the idea of ‘direct applicability’ of international treaties and norms.²⁹ These ‘statist scholars’³⁰ largely represent the current view of the Russian government and the Constitutional Court on international law, which serves to support notions of state sovereignty and “keep international law at a safe distance from Russia’s own—narrowly construed—legal system.”³¹

The statist scholars’ interpretation of the 1993 Constitution, however, is in many ways a departure from the originally intended meaning and understanding of the Constitution.³² Both the text of Article 15(4) of the Constitution and the period in which it was drafted indicate the drafters’ intention to embrace international law in a much broader way than had been the case in the Soviet Union.³³ Ac-

USSR and Republics ”)]. However, the text in paragraph 4 of article 15 of the Constitution raises serious observations and moreover, objections.” («Идея, заложенная в этом пункте Конституции, по сути дела является логическим продолжением того развития советского и российского законодательства, о котором сказано выше. Однако сам текст пункта 4 статьи 15 Конституции вызывает серьезные замечания и, более того, возражения.»)).

27. For an analysis of Russian textbooks on international law see Lauri Mälksoo, *International Law in Russian Textbooks: What’s in the Doctrinal Pluralism?*, 1 GÖTTINGEN J. OF INTERNATIONAL LAW 279 (2009) (Kuznetsov and B. R. Tuzmukhamedov’s textbook was “written under the auspices of the Russian Association of International Law”).

28. See KUZNETSOV & TUZMUKHAMEDOV, *supra* note 9, at 171. See also MÄLKSOO, *supra* note 8, at 112 (citing E. T. USENKO, OCHERKI TEORII MEZHDUNARODNOGA PRAVA 153–68 (2008) as an example of a dualist in Russia criticizing and labeling scholars who interpret Article 15(4) “to mean that there is now primacy of international law” as ‘monists’).

29. See MÄLKSOO, *supra* note 8, at 112–17.

30. MÄLKSOO, *supra* note 8, at 112–16 (explaining that as co-author of the textbook of the Diplomatic Academy of the Russian MFA, Chenichenko’s ‘strict objective dualism’ view serves as “the main statist example” for the understanding of whether norms of international law can be applied directly and whether they are self-executing; similarly, Zimnenko’s book, *Mezhdunarodnoe pravo i pravovaya sistema Rossiiskoi Federatsii* (2010), which is addressed primarily to Russian judges, repeats Chenichenko’s position, arguing that “a collision between international legal norms and domestic norms is ‘objectively’ impossible because the two are different legal systems”).

31. *Id.* at 116.

32. *Id.*

33. See Danilenko, *supra* note 13, at 452 (“To a large extent, the constitutional provi-

cordingly, other Russian scholars have been more open to the idea that international treaties and norms could be directly applicable in Russia. V. I. Kuznetsov and B. R. Tuzmukhamedov argue that the Federal Law of July 15, 1995 "On International Treaties of the Russian Federation," and several decrees of the Plenum of the Supreme Court of the Russian Federation, (not to be confused with the Constitutional Court)³⁴ support the understanding that international treaty law shall be as equally binding as federal law.³⁵ Therefore, specific legislation is not required to "transform" international norms into domestic ones, and an expression of the will of a state by way of adopting a treaty may be equally binding within the sphere of national jurisdiction as is domestic legislation.³⁶ Additionally, this treatise notes that agencies that establish norms and enforce laws, as well as other domestic actors, "use norms of international law, and refer to them."³⁷ Mälksoo refers to several other Russian legal scholars, such as G. V. Ignatenko, S. Y. Marochkin, B. I. Osminin, V. V. Gavrilov, and M. L. Entin, within this "other school of thought advocating more openness towards international law in Russia"³⁸ While these scholars agree that the 1993 Constitution provides for 'the su-

sions on international law reflect the desire of democratic Russia to become an open and law-abiding member of the international community. These provisions, as well as politico-legal developments leading to their adoption, demonstrate the expanding role of international law in the building of modern states based on the rule of law"); Eric Stein, *International Law in Internal Law: Toward Internationalization of Central-East European Constitutions*, 88 AM. J. INT'L L. 427, 445 (1994) ("When the parliament of the *Russian Federation* delayed action on President Yeltsin's proposed Constitution, he called a "constitutional meeting," which produced a new draft. This text was approved in a popular referendum on December 12, 1993. It makes treaties part of the internal legal system, superior, in case of a conflict, to internal law, and it envisions review of treaties for constitutionality by the Constitutional Court. In the earlier draft of the Constitutional Commission, only those treaties which were "ratified" by the parliament were accorded superiority over internal law. The omission of "ratified" is said to indicate the intent of the proponents of a strong presidential republic to accord "executive agreements" the same standing as treaties approved by the legislature.") (internal citations omitted).

34. Under Article 125 of the Russian Constitution, the Supreme Court has the authority to decide conformity with the Russian Constitution. Under Article 126, the Supreme Court is "the highest judicial body for civil cases, settlement of economic disputes, criminal, administrative and other cases under the jurisdiction of courts formed in accordance with federal constitutional law; it shall exercise judicial supervision over their activities in the procedural forms envisaged by federal law and shall provide interpretation on issues of court proceedings." KONST. RF arts. 125(5) & 126.

35. KUZNETSOV & TUZMUKHAMEDOV, *supra* note 9, at 169.

36. *Id.*

37. *Id.* at 168 (noting practical manuals for judges and commentaries on codes and laws as examples).

38. See MÄLKSOO, *supra* note 8, at 117–20.

premacY of the norm of international law in the domestic legal order,' they do not advance a clearly unified view of how Article 15(4) ought to look in practice.³⁹

Beyond Article 15(4), the 1993 Russian Constitution establishes further provisions regarding international human rights law. Article 17(1), the first article under Chapter 2 on the Rights and Freedoms of Man and Citizen, establishes that rights and freedoms shall be recognized and guaranteed "according to the universally recognized principles and norms of international law . . ."⁴⁰ William E. Butler, the preeminent English language scholar on Russian Law, argues that this "places international law ahead of the Constitution and, in so doing, confers upon international law a special status in the Russian Legal System."⁴¹ Additionally, under the same chapter, Article 55(1) states that rights and freedoms are not limited to the rights directly established in the Constitution of the Russian Federation and these specifically enumerated rights "shall not be interpreted as a rejection or derogation of other universally recognized human rights and freedoms."⁴² Taken in conjunction with Article 15(4), these articles demonstrate that the Russian Constitution supports compliance with the ECHR and, thus, judgments from the Strasbourg Court.

Therefore, while there is not a definitively accepted understanding of the relationship between international and national law in Russia, the ECtHR should look to the text of the Russian Constitution and the history surrounding its adoption. By invoking the text of the Russian Constitution to support a finding that Russia has violated provisions of the ECHR, the Strasbourg Court could then argue that repeated violations of the ECHR or refusal to execute ECtHR judgments is counter to Russia's own Constitution, which has integrated international legal principles and international human rights norms into its text and, therefore, established international law as a foundational legal principle of Russian law.

39. See MÄLKSOO, *supra* note 8, at 120 (quoting Entin, who wrote "The existing Constitution of Russia is based on the supremacy of the norm of international law in the domestic legal order . . . But this is only the first step. The second would be to concretize what meaning we give to this principle, with what content it is to be filled.").

40. KONST. RF art. 17(1), <http://www.constitution.ru/en/10003000-02.htm> [<https://perma.cc/4A4C-TC5K>].

41. BUTLER, *supra* note 22, at 38.

42. KONST. RF art. 55(1). See also Angelika Nußberger, *The Reception Process in Russia and Ukraine*, in A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS 616 (Helen Keller & Alec Stone Sweet eds., 2008).

B. Russia's Legal Commitments Under the ECHR

On May 7, 1992, before the Russian Constitution even entered into force, Russia applied for membership in the Council of Europe.⁴³ Joining the Council of Europe required ratification of the ECHR and becoming subject to the ECtHR's jurisdiction. Russia's desire to join the Council of Europe was consistent with the Westernizers' push to join Western European international organizations.⁴⁴ When the Parliamentary Assembly of the Council of Europe finally invited Russia to join in 1996, it required Russia to undertake significant legal and policy commitments and reforms.⁴⁵ Given the Russian Constitution's emphasis on international law and the importance of international human rights norms, the ECHR took on significant importance in the domestic legal sphere of Russia. However, due to ongoing debate over Article 15(4), a similar debate began regarding the ECHR's relationship to the Russian Constitution. Despite this debate, Russia's legal commitments under the ECHR impacted Russian domestic jurisprudence and the ECHR became imbedded in Russia's legal framework.

1. Extension of Membership in the Council of Europe to Russia

When the Parliamentary Assembly invited the Russian Federation to join the Council of Europe on January 25, 1996, it did so with the understanding that the conditions in Russia did not yet meet the standards of the Council of Europe and the ECHR. The rule of law and human rights protections in Russia both suffered from inadequacies.⁴⁶ Many members of the Parliamentary Assembly expressed concern about lowering the standards of the Council of Europe as a result of admitting new member-states.⁴⁷ However, these members also recognized that requiring an overly prolonged wait for the applicant states was "not in the interest of Europe, nor of its programme of security and defence nor of the promotion of the fundamental values

43. Eur. Parl. Ass., *Application by Russia for Membership to the Council of Europe*, 1st Part Sess., Opinion No. 193 (1996), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=13932&lang=en> [<https://perma.cc/5UMR-2Y2N>].

44. See TSYGANKOV, *supra* note 7, at 69–72.

45. See Eur. Parl. Ass., *supra* note 43.

46. *Id.*

47. Eur. Parl. Ass., *Motion for a Recommendation on the Accession of East European Countries and Notably the Russian Federation to the Council of Europe presented by Mr. Ruffy and others*, 3rd Part Sess., Doc. No. 7075 (1994); see also Nußberger, *supra* note 42, at 604.

of [Europe].”⁴⁸ The Parliamentary Assembly therefore decided to extend membership to Russia and other Eastern European states. They did so based on the idea that membership offered a framework within which new members could make reforms that would bring existing laws in line with the standards and principles of the Council of Europe.⁴⁹

When Russia accepted the Council of Europe’s offer of membership, Russia agreed to adopt the international norms, rights, and protections of the ECHR.⁵⁰ Specifically, Russia agreed to sign the ECHR at the moment of accession, ratify the Convention and Protocols Nos. 1, 2, 4, 7 and 11 within a year, and recognize the rights of individual application under Article 34 and the compulsory jurisdiction of the Court under Article 46 of the Convention.⁵¹ Moreover, under Article 46 of the ECHR, Russia became obligated to “abide by the final judgment of the Court” in any cases to which it is a party.⁵² On the other hand, Russia’s Constitution was already consistent with many of these key components of the ECHR system. The Russian Constitution already provided for the guarantee of human rights under Article 17(1), the primacy of international law in Article 15(4), and the right of Russian citizens “under the international treaties of the Russian Federation to seek redress from international bodies for the protection of human rights and freedoms once all available domestic remedies have been exhausted.”⁵³

Beyond ensuring structural integration with the ECHR system, Russia also agreed to modify existing domestic law and pass new legislation in order to bring Russian law in line with the standards of the Council of Europe.⁵⁴ The Council of Europe specifically detailed many of the required changes to existing Russian laws and practices at the time of offering membership to Russia.⁵⁵ The mem-

48. Eur. Parl. Ass., *supra* note 47.

49. *See id.*; Alexei Trochev, *All Appeals Lead to Strasbourg? Unpacking the Impact of the European Court of Human Rights on Russia*, 17 DEMOKRATIZATSIYA 145 (2009).

50. Eur. Parl. Ass., *supra* note 43.

51. *Id.* § 10.

52. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 46, Nov. 4, 1950, 213 U.N.T.S. 221.

53. Anatoly I. Kovler, *European Convention on Human Rights in Russia: Fifteen years after*, in THE IMPACT OF THE ECHR ON DEMOCRATIC CHANGE IN CENTRAL AND EASTERN EUROPE: JUDICIAL PERSPECTIVES 351, 353–54 (Iulia Motoc & Ineta Ziemele eds., 2016).

54. Eur. Parl. Ass., *supra* note 43, § 10.

55. *Id.* (for example: § 7.5 stated that Russia will adopt “new laws in line with Council of Europe standards . . . on the role, functioning and administration of the Procurator’s Office

bership agreement also required Russia to change aspects of Russian international relations and Russia's foreign policy.⁵⁶ Russia has met these commitments with varying degrees of compliance, fulfilling or partially fulfilling some accession agreements, while only enacting other reforms after significant delay or without corresponding changes in practice.⁵⁷ The Parliamentary Assembly has continuously monitored Russian progress in fulfilling these commitments, in addition to Russia's fulfillment of its ECHR obligations.⁵⁸

2. The ECHR in Relation to the Russian Domestic Legal Order

There is consensus among Russian legal scholars that the ECHR has primacy over statutory law in the Russian Federation.⁵⁹

and of the Office of the Commissioner for Human Rights; for the protection of national minorities; on freedom of assembly and on freedom of religion"; § 7.9 established that Russia would bring detention conditions into line with European standards; § 10.2 set forth that Russia would "sign within one year and ratify within three years from the time of accession Protocol No. 6 to the European Convention on Human Rights on the abolition of the death penalty in time of peace, and to put into place a moratorium on executions with effect from the day of accession"; § 10.17 stated that Russia would revise its "law on federal security services in order to bring it into line with Council of Europe principles and standards within one year from the time of accession: in particular, the right of the Federal Security Service (FSB) to possess and run pre-trial detention centres should be withdrawn").

56. *Id.* (for example, § 10.9 states that upon accession to the Council of Europe, Russia agrees to ratify within six months the October 21, 1994 agreement between Russia and Moldova and to withdraw its military from the Republic of Moldova within three years from the date of signature of the agreement).

57. For example, under Eur. Parl. Ass., *supra* note 43, § 10, Russia was required to change its law on compulsory military service in order to bring it in line with European practice. In 2002 Russia adopted a law on alternative military service. However, as the Parliamentary Assembly's compliance report pointed out in 2012, "the formal adoption of a law cannot automatically stand for compliance with obligations and commitments." This report expanded on findings in the Parliamentary Assembly's 2005 compliance report and found that Russia's law did not comply with European standards regarding alternative military service, as it "did not offer a fair alternative for young draftees." Eur. Parl. Ass., *The Honouring of Obligations and Commitments by the Russian Federation*, 4th Part Sess., Doc. No. 13018 (2012). *See also infra* Part II.

58. *See id.*; Eur. Parl. Ass., *The Honouring of Obligations and Commitments by the Russian Federation*, 4th Part Sess., Resolution No. 1896 (2012). *See generally* Pamela A. Jordan, *Russia's Accession to the Council of Europe and Compliance with European Human Rights Norms*, 11 DEMOKRATIZATSIYA 281 (2003); Bill Bowring, *Russia's Accession to the Council of Europe and Human Rights: Four Years On*, 4 EUR. HUMAN RTS. L. REV. 362 (2000).

59. *See, e.g.*, ANTON BURKOV, THE IMPACT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ON RUSSIAN LAW: LEGISLATION AND APPLICATION IN 1996-2006, at 26 (2007) ("As was shown before, the domestic status of the Convention is higher than that of any federal

Since Russian accession to the Convention, however, scholars have been in disagreement regarding the exact legal hierarchy of the ECHR in relation to the Russian Constitution. Angelika Nußberger, in her extensive study of the reception process of the ECHR in Russia, notes that scholars take three different positions: (i) arguing that the Constitution of the Russian Federation ranks higher than the ECHR; (ii) that the two rank equally; and (iii) that the ECHR ranks higher than the Russian Constitution.⁶⁰ Additionally, while the case law of the Strasbourg Court is understood to be “obligatory” for Russian courts, and the Constitutional Court refers to the ECHR regularly, the extent to which the Strasbourg Court actually impacts the jurisprudence of the Constitutional Court is unclear.⁶¹ Nußberger notes however, that the Constitutional Court has widely cited ECtHR judgments and international law not only to emphasize that the Court had reached the correct decision, but also to develop an interpretation of the Russian Constitution and Russian law.⁶² The Constitutional

law or even federal constitutional law.”).

60. Nußberger, *supra* note 47, at 617.

61. *Id.* at 617, 618.

62. *Id.* at 620, 621. See also Valery Zorkin, *Interaction Between National and Supranational Justice in Modern Times: New Prospects*, in *RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS: A DECADE OF CHANGE* 27, 29 (Olga Chernishova & Mikhail Obov eds., 2013); Kovler, *supra* note 53, at 355 (“[A]pplying enacted laws in particular circumstances proved an uphill struggle on the ground. It was here that the European standards came in handy as a universal scale of values to measure national realities. The highest courts of the Russian Federation – the Constitutional Court, the Supreme Court, and the Supreme Commercial Court – made a significant contribution to implementing the principle of direct application of the international law norms by domestic courts, as well as provision of general and specific remedies in compliance with European Court judgments.”); Trochev, *supra* note 49, at 158 (“In its judgments, the [Russian Constitutional Court] routinely examines and frequently refers case law to the ECtHR. The RCC refers to jurisprudence concerning not only Russia, but also other member states of the 1950 convention and, thus, underscores the universal binding effect of the decisions. Opinions about the real impact of the Strasbourg court’s decisions on the jurisprudence of the RCC are divided. RCC judges never tire of insisting that their court ‘refers to arguments based on international law not only to underscore the correctness of the legal positions worked out on the basis of the Constitution, but also to explain the idea and the meaning of the text of the Constitution and for defining the constitutional meaning of the contested legal provision.’” (citing Valerii Zorkin, *Rol konstitutsionnogo Suda Rossiiskoi Federatsii v realizatsii Konventsii o zashchite prav cheloveka i osnovnykh svobod*, 1 *SRAVNITELNOE KONSTITUTIONNOE OBOZRENIIE* 34 (2006); Oleg Tiunov, *O roli Konventsii o zashchite prav cheloveka i osnovnykh svobod i reshenii Yevropeiskogo suda po pravam cheloveka v praktike Konstitutsionnogo Suda RF*, 3 *KONSTITUTIONNOE PRAVO: VOSTOCHNOEVROPEISKOIE OBOZRENIIE* 96 (2001); Tamara Morshchakova, *Primenenie mezhdunarodnogo prava v konstitutsionnom pravosudii: itogi i perspektivy*, 4 *KONSTITUTIONNOE PRAVOSUDIIE* 119 (2001); NIKOLAI VITRUK, *KONSTITUTIONNOE PRAVOSUDIIE V ROSSII (1991–2001 GG.)* 125-53 (2001); Boris Ebzeev, *Zashchita prav cheloveka v Konstitutsionnom Sude Rossiiskoi Federatsii*, 1 *KONSTITUTIONNOE PRAVOSUDIIE*

Court's use of international law, and the ECHR in particular,⁶³ demonstrates the Constitutional Court's complex relationship with the ECHR and international law. It also demonstrates how the Constitutional Court has internalized international law in the Russian Federation.⁶⁴ The Constitutional Court has made the ECHR and international law an important part of how it expresses opinions about the Russian Constitution and, more broadly, Russia's legal system and national interests—at least to the extent that international law provides further legitimacy and strength to Russian law and the Constitutional Court's interpretations.

II. RUSSIA'S RELATIONSHIP WITH THE ECtHR

The Russian Legislature and Constitutional Court's actions in recent years represent a departure from Russia's previous treatment of ECtHR judgments. Since Russia joined the Council of Europe and the ECtHR, there have been numerous cases brought against Russia.⁶⁵ While Russia has generally not responded positively or quickly to judgments rendered against it, many legal observers have noted some of the positive effects ECtHR judgments have had on human rights norms in Russia.⁶⁶ In addition to allowing Russian citizens to directly petition the ECtHR, Russian accession to the Council of Europe also began to impact Russian legal jurisprudence.⁶⁷ Russia's re-

95-96 (2003); Nikolai Bondar, *Konventionnaya yurisdiksiya Yevropeiskogo suda po pravam cheloveka v sootnoshenii s kompetentsiei Konstitutsionnogo Suda RF*, 6 *ZHURNAL ROSSIISKOGO PRAVA* 113–27 (2006)).

63. Zorkin, *supra* note 62, at 29.

64. This internalization is key to understanding why nations obey international law. See Harold Koh, *Why Do Nations Obey International Law?* 106 *YALE L. J.* 2599, 2603 (1997) (“[T]his overlooked process of interaction, interpretation, and internalization of international norms into domestic legal systems is pivotal to understanding why nations ‘obey’ international law.”).

65. See Pamela A. Jordan, *Russia's Accession to the Council of Europe and Compliance with European Human Rights Norms*, 11 *DEMOKRATIZATSIYA* 281 (2003); Bill Bowring, *Russia's Accession to the Council of Europe and Human Rights: Four Years On*, 4 *EUR. HUM. RTS. L. REV.* 362 (2000).

66. See JANE HENDERSON, *THE CONSTITUTION OF THE RUSSIAN FEDERATION: A CONTEXTUAL ANALYSIS* 246–51 (Peter Leyland & Andrew Harding eds., 2011); Vladislav Starzhenetskii, *Assessing Human Rights in Russia: Not to Miss the Forest for the Trees A Response to Preclik, Schönfeld and Hallinan*, in *RUSSIAN AND EUROPEAN HUMAN-RIGHTS LAW: THE RISE OF THE CIVILIZATIONAL ARGUMENT* 214 (Lauri Mälksoo, ed., 2014) (“Russia is undoubtedly moving toward European standards of human-rights protection; it is trying to accommodate its legal and political systems to the requirements of the Convention.”).

67. See HENDERSON, *supra* note 66, at 194 (“Russia's membership of the Council of

lationship toward the ECtHR over the last five years has become increasingly tense, however, and the Constitutional Court's decision that the ECtHR judgment in *Anchugov and Gladov v. Russia* is non-executable due to its contradiction with the Russian Constitution is the culmination of these increasingly strained relations.

A. Impact of Council of Europe Membership & the ECHR in Russia

In the late 1980s Mikhail Gorbachev, the final leader of the Soviet Union, began the process of altering fundamental aspects of the Soviet Union's domestic and foreign policy.⁶⁸ He sought to internalize international legal norms so that international law would have a direct effect on domestic law in the Soviet Union.⁶⁹ He based his domestic and foreign policy on the belief that to be a legitimate state and partner in the eyes of the international community, specifically the West, a state must truly adopt and abide by international legal and human rights norms.⁷⁰ Thus, since the breakup of the Soviet Union, Russian leaders have, at times, promoted Russia as a country that shares the values of the West, citing Russia's commitment to economic cooperation, democracy, and the rule of law.⁷¹ During these moments, Russia has sought membership and greater participation in international organizations such as the Organization for Security and Co-operation in Europe (OSCE), the Council of Europe and various economic organizations like the International Monetary Fund (IMF), the G-8, and the World Trade Organization (WTO).⁷² At other moments during the Russian Federation's recent history, Russian leaders have emphasized that Russia is a country that possesses its own unique values and place in the international community of states.⁷³ While these shifts in portrayal of Russia's national interests are not mutually exclusive and have frequently been promoted simul-

Europe created a two-way street. The jurisprudence of the European Court of Human Rights is beginning to have an impact on domestic cases."); *see also id.* at 251 ("Russia's accession to the Convention has brought the full panoply of the Court's jurisprudence directly into the Russian courts. Judges are supplied with Russian translations of the Court's findings, and increasingly citation is made of Convention rights by Russian courts, even if as yet in a sporadic and unsophisticated manner.").

68. GEORGE GINSBURGS, FROM SOVIET TO RUSSIAN INTERNATIONAL LAW: STUDIES IN CONTINUITY AND CHANGE 7-9 (1998).

69. *Id.*

70. *Id.*

71. TSYGANKOV, *supra* note 7, at 68-71.

72. *Id.*

73. *Id.* at 64-66.

taneously, these types of sentiments manifest in the actions of Russian officials.⁷⁴ Calls to respect Russian sovereignty and policies accompany resistance to carrying out Russian international legal commitments and the staunch defense of Russian authorities' actions at home and abroad.⁷⁵

All of Russia's subsequent leaders have had to grapple with striking a balance between the desire to assert independent Russian power, both within Russia and globally, and cooperating, which often means conforming, with other world powers and the international community of states.⁷⁶ This struggle was present under Russia's first president, Boris Yeltsin. Yeltsin's first Minister of Foreign Affairs, Andrei Kozyrev, pursued greater international integration and cooperation.⁷⁷ He advocated that it was in Russia's national interest to integrate with Western economic and security institutions.⁷⁸ In pursuing this policy of greater cooperation and partnership with the West, Kozyrev maintained that Russia would "not cease to be a great power."⁷⁹ However, he declared that Russia would "be a normal great power."⁸⁰ As a result of the widespread poverty and disorder that plagued Russia during the first half of the 1990s, however, those advocating for Westernization and the adoption of neoliberalist policies, such as Kozyrev, lost their influence over domestic and foreign policy.⁸¹ Yeltsin replaced Kozyrev, appointing Yevgeni Primakov as Russia's second Foreign Minister in January 1996.⁸² Instead of advocating that Russia should give way to the West by joining it, Primakov argued Russia needed to restore its previous great power status.⁸³ Similarly, under Russian President Vladimir Putin's first term, which began in 2000, Russian academics, political leaders, and the general public continued to debate Russia's place in the post-

74. See generally TSYGANKOV, *supra* note 7.

75. See, e.g., Valery Zorkin, *An Apologia of the Westphalia System*, 3 RUSSIA IN GLOBAL AFFAIRS, (Aug. 10, 2004), http://eng.globalaffairs.ru/number/n_3371 [<https://perma.cc/JP6H-5YZE>].

76. See generally TSYGANKOV, *supra* note 7, at 55–188.

77. See Andrei Kozyrev, *Russia: A Chance for Survival*, FOREIGN AFFAIRS, March 1, 1992, at 1; see also Richard Sakwa, 'New Cold War' or Twenty Years' Crisis? *Russia and International Politics*, 84 INT'L AFFAIRS 243 (2008).

78. Kozyrev, *supra* note 77, at 6.

79. *Id.* at 7.

80. *Id.*

81. See TSYGANKOV, *supra* note 7, at 83–86.

82. See *id.* at 94.

83. See *id.* at 96.

Soviet world.⁸⁴ Some tried to make sense of post-Soviet geopolitics by villainizing the United States, associating it with the economic turmoil of the 1990s while continuing to seek greater integration with Europe.⁸⁵ Since these early days of the Russian Federation, government officials have continued to grapple with how best to shape and pursue Russia's national interests and foreign policy goals.

In July 2012, the Council of Europe rapporteurs tasked with assessing Russia's progress in fulfilling its obligations and commitments filed a report with the Parliamentary Assembly of the Council of Europe. They stated, "[W]e have been charged with the particularly difficult task of assessing the democratic progress in a country which seems to be at a crossroads, confronted with the choice of its own future . . . it is difficult to predict in which direction Russia will go."⁸⁶ As a result of, or perhaps as a reflection of this uncertainty, Russian reception of the European Court of Human Rights has been mixed as well. While the outpour of cases from Russia indicates a level of acceptance of the ECtHR at least among those who submit applications to the ECtHR, government officials have been less accepting of the ECtHR's findings of violations against Russia.⁸⁷ Officials have expressed concern about political motivations and biased

84. See Dmitry Shlapentokh, *The Great Friendship: Geopolitical Fantasies About the Russia/Europe Alliance in the Early Putin Era (2000–2008) – The Case of Alexander Dugin*, 22 DEBATE: J. OF CONTEMPORARY CENTRAL AND EASTERN EUROPE 49 (2014).

85. *Id.* at 53 ("The United States and Europe had often played entirely different roles in the minds of many Russians, both in the emerging post-Soviet elite and the masses. The US came to be considered as a symbol of everything negative that had happened during the early Gorbachev/Yeltsin era: the economic collapse, the impoverishment, the rise of the tycoons and the spread of crime. It was Americans who were connected in the minds of most early Putin-era Russians with the perversion of democratic principles transformed in what Russians called 'dermokratia' ('shitocracy'). Finally, the US's nefarious influence was related to the collapse of the East European empire and, finally, with the USSR itself."; "This peculiar view of Europe should be placed in the context of the general Europhilism that prevailed in the early Putin era among the Russian public. For most urban Russians, Europhilism was connected mostly with high living standards and, in a way, was grounded in realities: something that the Russian middle class had either already achieved or wanted to achieve.").

86. Eur. Parl. Ass., *The Honouring of Obligations and Commitments by the Russian Federation*, Doc. No. 13018, 61.

87. Between 1959 and 2016, there were 140,731 applications allocated to a judicial formation from the Russian Federation and a total of 133,087 applications from the Russian Federation were decided by the European Court of Human Rights—the greatest number of any member state. EUROPEAN COURT OF HUMAN RIGHTS, OVERVIEW 1959-2016 5 (2017). See also William E. Pomeranz, *Uneasy Partners: Russia and the European Court of Human Rights*, 19 HUM. RTS. BRIEF 17 (2012); Trochev, *supra* note 49, at 165 (noting that by the time he was writing in 2009 that "[o]rdinary Russians flooded the ECtHR in such great numbers that this supranational tribunal is bound to become a supercassation court for Russia.").

feelings toward Russia impacting the rulings of the Strasbourg Court.⁸⁸ In response to these concerns, in June 2011, Russia's Acting Federation Council Speaker Aleksandr Torshin introduced legislation that would allow Russia's Constitutional Court to override rulings of the ECtHR.⁸⁹ The bill was quickly and widely admonished by Russian human rights organizations for proposing that Russia violate its international legal commitments, and it ultimately failed.⁹⁰ However, it represented negative sentiments among Russian officials directed toward the Strasbourg Court. These sentiments have reappeared to a degree whenever there is a particularly controversial ruling against Russia by the ECtHR—such as the unprecedentedly high *Yukos* judgment or a judgment that touches on or stems from a disputed territory in which Russia has involved itself.⁹¹ This eventually led to the success of the 2015 amendment to the law on the Constitutional Court and the Constitutional Court's decision regarding *Anchugov and Gladkov v. Russia*.

In assessing the impact that the ECtHR has had on Russia, it is easy to view the many shortcomings of the ECHR regarding domestic compliance and implementation. The hundreds of largely similar cases that pour out of Russia, many of which result from systemic human rights and judicial problems, evidence these shortcomings. But, the ECHR has fulfilled the promises of Russian supporters of the Convention in two major regards.

First, Russian advocates for legal reform and the bolstering of human rights protections have succeeded in using the ECHR to spur changes to the domestic laws of Russia. One major and early step was Russia's adoption of a new Code of Criminal Procedure on December 18, 2001.⁹² The new Code removed the possibility for investigative bodies to arrest, search, or seize without a court order, and

88. See Trochev, *supra* note 49, at 146 (noting how some Russian officials have attempted to characterize the ECtHR as “plotting against Russia or as a biased, slow, ineffective court,” citing “Strasbourg Court Seen as Biased,” MOSCOW TIMES, March 2, 2009, at 3; and Interfax, “Senior Russian Senator Lambasts European Court of Human Rights,” Johnson's Russia List, e-mail message to author, March 23, 2009”).

89. Tom Balmforth, *Russian Legislation Takes Aim At Human Rights Court In Strasbourg*, RADIO FREE EUROPE, (June 28, 2011, 2:00 AM), http://www.rferl.org/content/russia_legislation_takes_aim_european_human_rights_court/24248275.html [https://perma.cc/JA7D-5SDZ].

90. See Pomeranz, *supra* note 87, at 19.

91. See *e.g.* *Ilaşcu and others v. Moldova and Russia*, 2004-VII Eur. Ct. H. R.1 (2004) and *Catan and Other v. Moldova and Russia*, 2012-B Eur. Ct. H. R. 309 (2012) (finding Russia responsible for human rights violations in Transdniestria (the separatist region of Moldova)).

92. Nußberger, *supra* note 42, at 609–10.

added the requirement that everyone who is arrested must be brought before a judge within forty-eight hours.⁹³ Russia has successfully pursued other judicial reforms such as the creation of the Investigative Committee which is in charge of pre-trial investigations and its subsequent separation from the Prosecutor's Office. Penitentiary reforms have helped to decrease the amount of people held in pre-trial detention.

The second way that the ECHR has fulfilled expectations is by strengthening the rights of the individual in Russia. The protection of the ECHR and the right to individual petition have made a difference in securing the rights of individual applicants.⁹⁴ The Strasbourg Court has provided justice through compensatory damages for Russians who were unable to obtain this level of justice from their own judicial system and country.⁹⁵ These two contributions alone demonstrate the way in which the ECHR has secured the supremacy of international law in Russia, in keeping with Article 15(4) of the Russian Constitution.

Regardless of Russia's past failures in implementing the judgments of the ECtHR and the perceived resistance to the Strasbourg Court in Russia, international law and participation in international legal structures has remained an important part of Russia's foreign policy and image. Despite the number of judgments from the Strasbourg Court that Russian leaders have met with opposition, thus far, Russia has not withdrawn from the realm of international law or the ECtHR.⁹⁶ In 2011 at the St. Petersburg International Legal Fo-

93. SZ RF no. 249, pos. 2861, ROSSIJSKAIA GAZETA (Dec. 22, 2001); see Nußberger, *supra* note 42, at 609–10.

94. Trochev, *supra* note 49, at 148–49 (“Applying to the ECtHR is an increasingly attractive option because its judgments order Russia to rectify the violations of individual rights not just on paper but also in practice. The judgments of the ECtHR usually involve two kinds of orders to Russia: to eliminate the conditions that gave rise to the violation of the 1950 convention and to pay compensation to the successful applicants. So far, the second kind of order has received the greatest amount of attention. In 2006, the ECtHR ordered Russia to pay a total of €1.376 million and 1.055 million rubles. In 2007, the court ordered Russia to pay a total of €4.3 million. And between January 2008 and March 2009, the Strasbourg-based tribunal ordered Russia to pay some €9.3 million to successful applicants. Therefore, the Strasbourg court enjoys something that all other Russian courts lack: nearly complete enforcement of its judgments in terms of compensating those who won their cases”) (citations omitted).

95. Eur. Ct. H. R. Press Unit, *Russia*, updated July 2017, http://www.echr.coe.int/Documents/CP_Russia_ENG.pdf [https://perma.cc/C6NB-VLTP], (last visited Oct. 18, 2017); see also Trochev, *supra* note 49, at 148–49.

96. English law professor Alan Riley argues that international law has played a very important role in the overall legal framework of Russia and serves to not only protect human rights in Russia, but also Russian businesses and investors through international arbitration

rum, President Medvedev addressed the forum stating:

It is clear that citizens' possibility of appealing national court decisions in the international courts is an inalienable part of the status of the individual, of law and order. The international courts, by their very nature, always involve us conceding a bit of our national sovereignty. Russia enforces their decisions and will continue to do so. We do this because we want to be a normal modern and civilised country, even when we are not completely in agreement with a decision, for whatever reasons, or think decisions excessively politicised.⁹⁷

Former Russian President Medvedev's remarks perfectly reflect international legal scholar Harold Koh's argument that nations abide by international law because repeated participation in the transnational legal process "helps to reconstitute national interests, to establish the identity of actors as ones who obey the law, and to develop the norms that become part of the fabric of emerging international society."⁹⁸

Furthermore, regardless of whether these remarks reflect Russia's actual policy when it comes to implementation of ECtHR judgments, Russian leaders have publicly declared Russia to be a nation that obeys international law and shares in the values of the ECHR as a member of the European community. Russian leaders have certainly critiqued the ECtHR for not respecting member-states' margin of appreciation and emphasizing that it is within the purview of the state to decide how to implement ECtHR judgments. However, these leaders have been unwilling to say Russia is no longer a member of the European community of nations that share common values and beliefs about human rights. In 2012, Valery Zorkin, the Chairman of the Constitutional Court of the Russian Federation since 1991, called for the creation of a mechanism that would "determine . . . the necessity of taking general [legal] measures following the ECHR judgments . . ."⁹⁹ However, in calling for the Constitutional Court to have more power in the execution of judgments from the ECtHR, Zorkin characterized this as a way for the Constitutional Court to

tribunals. See Alan Riley, *Russia's Courts of Last Resort*, N.Y. TIMES, Aug. 4, 2011, <https://nyti.ms/2ycvtV7> [<https://perma.cc/34WY-CPAR>].

97. Dmitry Medvedev, Address at the St. Petersburg International Legal Forum (May 20, 2011) (transcript available at <http://eng.kremlin.ru/transcripts/2239>) [<https://perma.cc/WX9V-RPLB>].

98. Koh, *supra* note 64, at 2655.

99. Zorkin, *supra* note 62, at 35.

achieve greater dialogue with the Strasbourg Court.¹⁰⁰ He went on to emphasize that it was important to not forget that Russia “joined the Convention wishing to guarantee a better implementation of the fundamental constitutional provisions on the rights and freedoms of the individual, which is its highest value.”¹⁰¹ These comments demonstrate that while Russian leaders have pushed back against the Strasbourg Court, they have still publicly committed to being a part of the ECHR system. Consequently, walking away from the ECtHR and the Council of Europe entirely would represent a significant departure from Russia’s previous position of advocating for respect of Russian jurisprudence and dialogue between the Russian Constitutional Court and the ECtHR.

As a result of globalization, Russia’s economic interests, and Russia’s position within leading international organizations and structures, Russia has not withdrawn and, in many ways, cannot withdraw from its commitments under international law. The number of Russian complaints filed with the Strasbourg Court and the Russian media’s coverage of Russian cases before the ECtHR, indicate that, even if ECtHR case law is not often directly cited in courts across Russia,¹⁰² the principle that anyone has the right to seek redress from the Strasbourg Court has still manifested itself in the Russian consciousness.¹⁰³ While Russian legal observers contest the extent to which Russian judges are aware of the ECHR and case law from the Strasbourg Court, some Russian judges have also internalized the standards of the ECHR.¹⁰⁴ In 2009, Alexei Trochev wrote an article arguing that the ECtHR was “the most popular court in Russia”¹⁰⁵ Further, he noted that “Russian judges increasingly refer to the jurisprudence of the ECtHR despite Russia’s losses in the Strasbourg Court, the insistence of Russia’s leaders that ECtHR decisions are ‘politicized,’ and the resistance among certain circles in the legal academy to recognizing the binding force of ECtHR judgments

100. *Id.*

101. *Id.* at 36.

102. See Anton Burkov, *Motivation for Direct Application of the Convention for the Protection of Human Rights and Fundamental Freedoms in Russian Courts*, 12 *BALTIC Y.B. INT’L L.* 229 (2012).

103. See Trochev, *supra* note 49, at 148 (noting public opinion surveys in the 2000s that indicate the Russian public’s continuous increase in awareness of the Strasbourg Court and willingness to complain to the ECtHR to protect their rights, despite a simultaneous decrease in trust for Russian domestic courts).

104. Compare Burkov, *supra* note 102, and Sergei Y. Marchochkin and Vladimir A. Popov, *International Humanitarian and Human Rights Law in Russian Courts*, 2 *J. INT’L HUMAN LEGAL STUD.* 216 (2011), with Trochev, *supra* note 49.

105. Trochev, *supra* note 49, at 145.

on Russia's courts."¹⁰⁶ The Strasbourg Court has therefore become ingrained in the political, social, and legal frameworks of Russia. While the attitudes among leaders of the Russian branches of government may vacillate between greater international cooperation and Russian independence, Russia's inherently political decision to join the Council of Europe has had fundamental and long-lasting legal consequences for Russia. In ratifying the ECHR and accepting the jurisdiction of the Strasbourg Court, Russia internalized international human rights law and strengthened the position of Russia as a country committed to the rule of law and European standards of human rights.

B. Controversial ECtHR Judgments Against Russia and Russia's Response by Asserting the Supremacy of the Russian Constitution Over International Law

While Russia has continuously met ECtHR judgments against it with a mixture of acceptance and resistance, with some criticizing the ECtHR as exhibiting bias against Russia,¹⁰⁷ recent developments over several years have exacerbated Russian relations with the ECtHR. Specifically, the Constitutional Court has begun to take a more aggressive position toward ECtHR judgments against Russia. Valery Zorkin, the Chairman of the Constitutional Court, has advocated this position, asserting the power of the Constitutional Court and supremacy of Russian constitutional law.¹⁰⁸ The Constitutional Court is not the only branch of Russian government that has demonstrated hostility toward the ECtHR, however, and members of the State Duma have led many of these legal developments.¹⁰⁹ These actions by members

106. *Id.* at 146–47.

107. *See, e.g.,* MÄLKSOO, *supra* note 8, at 162 (quoting a 2004 declaration from the Russian MFA condemning the ECtHR judgment and its use of “double standards” against Russia).

108. *See* Lauri Mälksoo, *Russia's Constitutional Court Defies the European Court of Human Rights: Constitutional Court of the Russian Federation Judgment of 14 July 2015, No 21-II/2015*, 12 EUR. CONST. L. REV. 377, 385 (2016) (“Judge Zorkin’s opposition to the judicial activism of the Strasbourg Court has over the last years been as programmatic as his support for the principle of subsidiarity and margin of appreciation in the context of the Strasbourg Court has been vocal.”).

109. *Id.* at 377 (“[O]ne can say that the redefinition towards the European human rights protection system was undertaken by the entire Russian government, since in December 2015, the State Duma and the Federation Council, the two chambers of the Russian parliament, made amendments to the Federal Constitutional Law ‘On the Constitutional Court of the Russian Federation’ which subsequently gave a legislative foundation and concrete procedures to the approach envisaged in the 14 July 2015 judgment of the Constitutional

of the State Duma culminated in the passage of a 2015 law granting the Constitutional Court the power to review international human rights rulings to decide if they violate the Russian Constitution and are therefore “non-executable.”¹¹⁰

Three ECtHR cases—*Markin v. Russia*, *Neftyanaya Kompaniya Yukos v. Russia*, and *Anchugov and Gladkov v. Russia*—played a central role in recent legal developments in Russia regarding the ECtHR, sparking a reaction and serving as the basis for the Duma and the Constitutional Court’s actions. Russian legal observers and experts have cited the ECtHR judgment in *Markin v. Russia* as the first case to cause this major shift in the relationship between the ECtHR and the Constitutional Court.¹¹¹ The second case to cause major backlash in Russia is *Neftyanaya Kompaniya Yukos v. Russia*.¹¹² The final judgment in this case sparked a group of Russian MPs to submit a request to the Constitutional Court to evaluate the question of constitutionality of Article 1 of the Federal Law “On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto,” Items 1 and 2 of Article 32 of the Federal Law “On International Treaties of the Russian Federation,” and several other sections and articles of Russian Codes relating to the implementation of international law in the Russian Federation.¹¹³ Following the Constitutional Court’s ruling on July 14, 2015, that the law was constitutional, the Constitutional Court encouraged the Duma to pass the 2015 law that expanded the Constitutional Court’s powers.¹¹⁴ This then allowed the Constitutional Court to find that the

Court.”).

110. Federal’nyi Zakon RF, *supra* note 1.

111. *Markin v. Russia*, 2012-III Eur. Ct. H.R. 77, <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-109868&filename=001-109868.pdf> [<https://perma.cc/DJM3-78KY>]; Mälksoo *supra* note 108, at 385 (“For the Russian Constitutional Court, apparently, the mental turning point was the *Markin v Russia* case . . .”).

112. *Neftyanaya Kompaniya Yukos v. Russia*, Eur. Ct. H.R. (2012), <https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-4836419-5901050&filename=Judgment%20Yukos%20v.%20Russia%20concerning%20just%20satisfaction.pdf> [<https://perma.cc/W4G5-K69T>].

113. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 14 iulia 2015 g. [Ruling of the Russian Federation Constitutional Court of July 14, 2015], ROSSIISKAIA GAZETA [ROS. GAZ.] July 27, 2015, <https://rg.ru/2015/07/27/ks-dok.html> [<https://perma.cc/69NP-4WKS>]. For an English translation of key points of the ruling, see KONSTITUTIONNII SUD ROSSIISKOI FEDERATSII [RUSSIAN CONSTITUTIONAL COURT], *Resume 2015 21-P*, <http://www.ksrf.ru/en/Decision/Judgments/Documents/resume%202015%2021-%D0%9F.pdf> [<https://perma.cc/2Z2P-54HH>].

114. *Id.*

judgment in the third ECtHR focal case, *Anchugov and Gladkov v. Russia*,¹¹⁵ was in conflict with the Russian Constitution and therefore non-executable.¹¹⁶

1. *Markin v. Russia*

The Constitutional Court issued its judgment regarding *Markin v. Russia* on December 6, 2013.¹¹⁷ Many anticipated that the Constitutional Court would settle the question of which court—the Constitutional Court or the ECtHR—was legally superior.¹¹⁸ However, the Constitutional Court left this question open, finding a way to sidestep the issue and implement the ECtHR judgment.¹¹⁹ In this ECtHR judgment against Russia, the ECtHR held that Russia had violated Article 14 of the ECHR, which prohibits discrimination, and Article 8 of the ECHR, which guarantees the right to respect for private and family life, when Russia denied Konstantin Markin's request for three-year parental leave from the Russian military.¹²⁰ Russia's basis for denying Markin's request was that under Russian law only female military personnel were entitled to receive such parental leave.¹²¹

115. *Anchugov and Gladkov v. Russia*, Eur. Ct. H.R. (2013), <http://hudoc.echr.coe.int/eng?i=001-122260> [<https://perma.cc/YD6Z-88LV>].

116. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 apreliia 2016 g. [Ruling of the Russian Federation Constitutional Court of Apr. 19, 2016], ROSSIISKAIA GAZETA [ROS. GAZ.], May 5, 2016, <https://rg.ru/2016/05/05/sud-dok.html> [<https://perma.cc/V3PE-KWM2>].

117. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 6 dekabrya 2013 g. No. 27-P po delu o proverke konstitutsionnosti polozhenii stat'i 11 i punktov 3 i 4 chasti chetvertoi stat'i 392 Grazhdanskogo protsessual'nogo kodeksa Rossiiskoi Federatsii v svyazi s zaprosom prezidiuma Leningradskogo okruzhnogo voennogo suda [Judgment of the Constitutional Court of the Russian Federation of the 6 December 2013 No. 27-P in the Case Concerning Review of Constitutionality of Provisions of Article 11 and of Article 392, section 4, paragraphs 3 and 4, of the Code of Civil Procedure of the Russian Federation as Instituted by Application of the Presidium of the Leningrad District Military Court], <http://www.ksrf.ru/en/Decision/Judgments/Documents/2013%20December%206%2027-P.pdf> [<https://perma.cc/HB6R-YWUH>] (last visited Oct. 18, 2017) [hereinafter *Markin Judgment*].

118. See Grigory Vaypan, *Acquiescence Affirmed, Its Limits Left Undefined: The Markin Judgment and the Pragmatism of the Russian Constitutional Court Vis-à-vis the European Court of Human Rights*, 2 RUS. L. J. 130, 130–35 (2014).

119. *Id.*

120. *Markin v. Russia*, 2012-III Eur. Ct. H.R.79, <http://hudoc.echr.coe.int/eng?i=001-109868> [<https://perma.cc/CEW6-REFQ>].

121. *Id.* at 87 ¶ 26.

Following the ECtHR judgment, Markin petitioned a local St. Petersburg court to reopen proceedings in his case for parental leave.¹²² The local court then petitioned the Constitutional Court, arguing that there was a contradiction between the Constitutional Court's previous rejection of Markin's complaint and the ECtHR judgment, and that within the domestic legal framework these two decisions appeared to be equal.¹²³ The ECtHR's judgment was publicly met with anger from Russian officials, including from the President of the Constitutional Court Valery Zorkin.¹²⁴ The Constitutional Court, however, refrained from deciding whether the Constitutional Court is legally superior to the ECtHR. The Constitutional Court left this question of superiority open and merely stated that if an ECtHR judgment challenges Russian legal provisions that are "found to be consistent with the Constitution, the Constitutional Court . . . within the limits of its competence will determine possible constitutional means of implementation" of the ECtHR's judgment.¹²⁵ This judgment came as a surprise to some observers who expected the Constitutional Court to take a firmer stance. Yet, the Constitutional Court maintained that it sought to comply with ECtHR judgments and avoid conflict with the ECtHR, while balancing Russian domestic legal interests, constitutional law, and constitutional judgments.¹²⁶

2. *Neftyanaya Kompaniya Yukos v. Russia*

The year 2014 saw increasingly tense and deteriorating relations between Russia and the rest of the Council of Europe. On July 31, 2014, the ECtHR issued its judgment in *Neftyanaya Kompaniya Yukos v. Russia*, holding that the Russian government must pay close to €1.9 billion to the Yukos shareholders as a result of violating Article 1 of Protocol No. 1: the right to property.¹²⁷ While the ECtHR judgment is just one small chapter in a lengthy and still unfolding

122. *See id.*

123. *Id.* at 115 ¶¶ 131–32.

124. SPYRIDON FLOGAITIS ET AL., *THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS DISCONTENTS: TURNING CRITICISM INTO STRENGTH* 73 (2013); *see also* Vaypan, *supra* note 118, at 132.

125. Vaypan, *supra* note 118, at 134 (translating and quoting the Constitutional Court judgment).

126. For a full analysis of this case, *see id.*

127. *See* OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/04, (2012) 54 Eur. H. R.Rep. 19, <https://hudoc.echr.coe.int/eng?i=001-106308> [<https://perma.cc/W4G5-K69T>].

story regarding the *Yukos* case,¹²⁸ this decision came in the midst of already strained international relations between Western Europe and Russia. The judgment came after Russia's annexation of Crimea on March 18, 2014, and amid continued unrest in Eastern Ukraine, resulting in an exchange of sanctions between the European Union and Russia. In order to signify its disapproval with Russia's actions regarding Ukraine, the Council of Europe, through the Parliamentary Assembly, passed Resolution 1990 on April 20, 2014.¹²⁹ This Resolution suspended the Russian delegation's voting rights, its right to be represented in the Bureau of the Assembly, the Presidential Committee and the Standing Committee, and its right to participate in election observation missions.¹³⁰ The Parliamentary Assembly passed this Resolution "in order to mark its condemnation and disapproval of the Russian Federation's actions with regard to Ukraine"¹³¹

In the midst of the geopolitical controversy surrounding Ukraine, the ECtHR issued its compensation decision which followed its "principal judgment,"¹³² issued in 2012, where the ECtHR found that Russia had violated Article 6 of the Convention, which ensures the right to a fair hearing, and Article 1 of Protocol No. 1, the right to property.¹³³ The ECtHR then calculated and determined that Russia owed the *Yukos* shareholders close to €1.9 billion.¹³⁴ This just satisfaction judgment followed final awards against Russia from three arbitral tribunals, stemming from the Energy Charter Treaty, resulting in ongoing litigation and numerous legal actions across multiple jurisdictions.¹³⁵ Consequently, the judgment added to mounting discord between Russia and Western Europe.

128. For a brief, but fuller, summary, see Conor McCarthy, *The ECtHR's Largest Ever Award for Just Satisfaction Rendered in the Yukos Case*, EJIL: TALK! (Aug. 15, 2014), <http://www.ejiltalk.org/the-ecthrs-largest-ever-award-for-just-satisfaction-rendered-in-the-yukos-case/> [https://perma.cc/DX54-9CME].

129. Eur. Parl. Ass., *Reconsideration on substantive grounds of the previously ratified credentials of the Russian delegation*, 16th Sess., Res. No. 1990 (2014), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=20882&lang=en> [https://perma.cc/5NH7-2E64].

130. *Id.*

131. *Id.* See *infra* Part IV.

132. The principal judgment examined whether there had been a violation of the ECHR, while the compensation decision decided the amount of damages.

133. *Yukos v. Russia*, 54 Eur. H. R. Rep., ¶ 26.

134. *Id.* ¶ 25.

135. See *A Case of Winning the Battle and Losing the War: Yukos v Russian Federation*, DLA PIPER (2016), https://www.dlapiper.com/~media/Files/Insights/Publications/2016/06/Yukos_vs_Russian_Federation.pdf [https://perma.cc/U3M6-M929].

3. *Anchugov and Gladov v. Russia* and its Aftermath

On July 4, 2013, the ECtHR held in *Anchugov and Gladov v. Russia* that Russia had violated Article 3 of Protocol No. 1 of the ECHR because it did not allow convicted prisoners to vote in state elections.¹³⁶ Article 32 of the Russian Constitution proclaims that prisoners do not have the right to vote or be elected. In this case, “the applicants complained that their disenfranchisement on the ground that they were convicted prisoners violated their right to vote and, in particular, that they had been unable to vote in a number of elections held between 2000 and 2008.”¹³⁷ The Russian Government argued that the Russian Constitution “was the highest-ranking legal instrument within the territory of Russia and took precedence over all other legal instruments and provisions of international law.”¹³⁸ The government asserted that this meant that the Russian Constitution has superior legal authority over the ECHR.¹³⁹ Therefore, it argued that the ECtHR did not have the power to review the compatibility of Article 32 of the Russian Constitution with the ECHR. The ECtHR did not agree with Russia’s assertions regarding the ECtHR’s competence to examine the compatibility of the Russian Constitution with the ECHR, and found for the petitioners, holding that the Russian Constitution’s voting restrictions violated Article 3 of Protocol No. 1.

In the wake of the *Yukos* and *Anchugov and Gladov* judgments, the Russian government, through the Constitutional Court and the State Duma, undertook actions to clarify and redefine Russia’s relationship with the ECtHR. Ninety-three deputies from the State Duma requested that the Constitutional Court clarify the Russian legal order with regard to judgments coming from the ECtHR, which they argued presented a contradiction with the Russian Constitution, resulting in Constitutional Court Judgment No 21-II/2015.¹⁴⁰ This

136. *Anchugov and Gladov v. Russia* (Nos. 1157/04 and 15162/05) (July 4, 2013) <http://hudoc.echr.coe.int/eng?i=001-122260> [<https://perma.cc/P3NQ-GTMZ>]; Article 3 of Protocol No. 1 to the Convention reads as follows: “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

137. *Anchugov and Gladov*. at 11 ¶ 47.

138. *Id.* at 11 ¶ 48.

139. *Id.*

140. See Lauri Mälksoo, *Russia’s Constitutional Court Defies the European Court of Human Right: Constitutional Court of the Russian Federation Judgment of 14 July 2015, No 21-II/2015*, 12 EUR. CONST. L. REV. 377, 378 (2016); Natalia Chaeva, *The Russian Constitutional Court and its Actual Control over the ECtHR Judgement in Anchugov and Gladkov*, EJIL: TALK! (April 26, 2016), <http://www.ejiltalk.org/the-russian-constitutional-court-and->

request took the form of an invitation to declare the 1998 Russian Federal law on Russia's ratification of the ECHR and its Protocols unconstitutional.¹⁴¹ As a result, the Constitutional Court examined and decided the constitutionality of the provisions of Article I of the Federal Law "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto," Items 1 and 2 of Article 32 of the Federal Law "On International Treaties of the Russian Federation," and several other sections and items of the Civil Procedure Code, the Arbitration Procedure Code, the Administrative Judicial Proceedings Code, and the Criminal Procedure Code of the Russian Federation.¹⁴² On July 14, 2015, the Constitutional Court issued a decision, finding that these provisions do not contradict the Constitution of the Russian Federation based on the Constitutional Court's understanding of the procedural relationship between Russia's domestic courts and state bodies and the ECHR.¹⁴³

The Constitutional Court explained that it came to this conclusion for three reasons. First, it stated that "if all internal constitutionally established intra-state means of judicial protection have been exhausted," this ensures the application of the ECHR and ECtHR judgments.¹⁴⁴ Second, the Constitutional Court explained that if a Russian court, in considering "a case in connection with [the] adoption of a judgment by the ECHR," decides that the law the Strasbourg Court found to be in violation of the ECHR is constitutional, the Russian court must petition the Constitutional Court to determine the ECtHR judgment and the applicable law's "conformity to the Constitution of the Russian Federation."¹⁴⁵ Third, with regard to state bodies tasked with ensuring "fulfilment by the Russian Federation of international treaties of which it is a party, having come to the conclusion on impossibility to execute a judgment of the ECHR passed on a complaint against Russia," which would result in a possible "diver-

its-actual-control-over-the-ecthr-judgement-in-anchugov-and-gladko/
[<https://perma.cc/E4MB-DL2U>].

141. Chaeva, *supra* note 140.

142. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 14 iulia 2015 g. [Ruling of the Russian Federation Constitutional Court of July 14, 2015], ROS. GAZ. (July 27, 2015), <https://rg.ru/2015/07/27/ks-dok.html>. For an English translation of key points of the ruling see KONSTITUTIONNII SUD ROSSIISKOI FEDERATSII [RUSSIAN CONSTITUTIONAL COURT], *Resume 2015 21-P*, <http://www.ksrf.ru/en/Decision/Judgments/Documents/resume%202015%2021-%D0%9F.pdf> [<https://perma.cc/2Z2P-54HH>].

143. *Id.*

144. *Id.*

145. *Id.*

gence with the Constitution of the Russian Federation,” these state bodies are also entitled to petition the Constitutional Court for instruction on how to execute an ECtHR judgment “and take measures of individual and common character, aimed at ensuring the fulfilment of this Convention.”¹⁴⁶

In his 2016 case note on Constitutional Judgment No 21-II/2015, Lauri Mälksoo explains that “the July 2015 judgment of the Constitutional Court is a little bit of an attempt to be both in and out [of the jurisdiction of the ECtHR] at the same time.”¹⁴⁷ However, by issuing this decision, the Constitutional Court invited the legislature to create an official legal mechanism for ruling on the ‘constitutionality’ of any ECtHR judgment by declaring such a judgment to be inconsistent with the Russian Constitution and thus “impossible to implement.”¹⁴⁸ Therefore, the Constitutional Court’s Judgment, imposing the procedure by which Russian state organs responsible for the enforcement of ECtHR judgments must seek guidance from the Constitutional Court if there appears to be a contradiction between implementation and the Russian Constitution, was subsequently “turned into positive law by the Russian parliament.”¹⁴⁹

On February 2, 2016, The Russian Ministry of Justice appealed to the Constitutional Court to decide the possible inability of implementing the ECtHR’s decision.¹⁵⁰ The Constitutional Court then ruled that it was “impossible to implement” the final judgment of the ECtHR.¹⁵¹ One basis for the Constitutional Court’s Judgment no 12-II/2016 (n. 2) in April 2016 is that the contradictions between the Russian Constitution and the ECHR at the time when Russia rati-

146. *Id.*

147. Mälksoo, *supra* note 140, at 395.

148. *Id.* at 377.

149. *Id.* at 383.

150. See European Commission for Democracy Through Law (Venice Commission), *Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court*, Opinion No. 832/2015 CDL-AD(2016) 016 [“Venice Commission 832/2015”], [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)005-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)005-e) [https://perma.cc/H5WY-DK4Y] (last visited Sept. 27, 2017).

151. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 apreliia 2016 g. [Ruling of the Russian Federation Constitutional Court of Apr. 19, 2016], ROS. GAZ. (May 5, 2016), <https://rg.ru/2016/05/05/sud-dok.html> [https://perma.cc/X2S2-RGCT]. An official English translation of the judgment is not available from the Constitutional Court, however, the Council of Europe has published a translated version: European Commission for Democracy Through Law (Venice Commission), *Judgment No. 12-II/2016 of 19 April 2016 of the Constitutional Court*, Opinion No. 832/2016 CDL-REF(2016) 033, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2016\)033-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)033-e) [https://perma.cc/ZR45-A76R].

fied the ECHR essentially served “as ‘an implied reservation’ regarding the interpretation of Article 3 of Protocol No. 1 to the ECHR.”¹⁵² This is based on the Constitutional Court’s argument that the Council of Europe was aware of these provisions of the Russian Constitution and did not raise any objections to Russian ratification of the ECHR and, therefore, “the conflict between the Russian Constitution and the ECHR should be resolved in light of the conditions in which Russian ratification occurred.”¹⁵³ Therefore, in its judgment, the Constitutional Court challenged the ECtHR’s power to render judgments in an ‘evolutive manner.’¹⁵⁴

While asserting that the ECtHR did not have the power to render judgments that challenge provisions of the Russian Constitution that were in place at the time of Russian accession to the ECtHR, the Constitutional Court also challenged the ECtHR’s interpretation of the Russian Constitution itself. The Constitutional Court opposed the ECtHR’s finding that “the Russian system of disenfranchisement of convicted prisoners was imposed in an automatic and indiscriminate manner.”¹⁵⁵ Instead, the Constitutional Court explained that Article 32 of the Constitution applied to “convicted persons isolated from the society in places of deprivation of liberty,” and therefore, disenfranchisement must be understood as a “special kind of criminal penalty.”¹⁵⁶ Therefore, Russian courts take into consideration the fact that individuals deprived of liberty in “colony-settlements or correctional colonies” will face disenfranchisement during sentencing of criminal defendants.¹⁵⁷

Markin v. Russia, Neftyanaya Kompaniya Yukos v. Russia, and Anchugov and Gladkov v. Russia each pushed the Russian government toward implementing legal reforms that gave the Constitutional Court the power to invalidate ECtHR judgments. First, *Markin*

152. Pietro Pustorino, *Russian Constitutional Court and the execution ‘à la carte’ of ECtHR judgments*, 32 QIL, ZOOM-IN 5, 14 (2016); see also Elena Kuznetsova, *The Constitutional Court left a loophole for Strasbourg* (tr.), FONTANKA (Apr. 4, 2016), www.fontanka.ru/2016/04/19/182 [<https://perma.cc/MK7P-ABCK>].

153. Pustorino, *supra* note 152, at 14.

154. *Id.* at 13.

155. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 apreliia 2016 g. [Ruling of the Russian Federation Constitutional Court of Apr. 19, 2016], ROS. GAZ. (May 5, 2016), <https://rg.ru/2016/05/05/sud-dok.html> [<https://perma.cc/X2S2-RGCT>], points 5.1-5.3, pp. 14–18; Venice Commission 832/2015 at 5 ¶ 14.

156. Judgment No. 12/P/2016 of 19 April 2016, points 5.1–5.3, pp. 14-18; Venice Commission 832/2015 at 5 ¶ 14.

157. Judgment No. 12/P/2016 of 19 April 2016, points 5.1–5.3, pp. 14-18; Venice Commission 832/2015 at 5 ¶ 14.

highlighted tensions between the Constitutional Court and the ECtHR if the Russian Constitution and the ECHR seemed to be in conflict. Next, the Constitutional Court's July 14, 2015 ruling on the Russian MPs' request to evaluate the Yukos judgment encouraged the Duma to pass the 2015 law, expanding the Constitutional Court's powers.¹⁵⁸ This then allowed the Constitutional Court to find the Strasbourg Court's judgment in *Anchugov and Gladkov v. Russia* to be in conflict with the Russian Constitution and therefore non-executable.¹⁵⁹ While the significance of these legal developments in Russia remain to be fully seen, the Constitutional Court exercised its expanded powers once again on January 19, 2017. The Constitutional Court ruled that it was impossible to execute the ECtHR's *Yukos* judgment. The Constitutional Court made this decision based on the finding that executing the ECtHR judgment would contradict "constitutional principles of equality and justice in tax relations (Article 17, Section 3; Article 19, Sections 1 and 2; Article 55, Sections 2 and 3; Article 57 of the Constitution of the Russian Federation)."¹⁶⁰ On one hand, this decision is unsurprising given that this case accelerated the chain of events that culminated in the Constitutional Court gaining the power to invalidate decisions from international human rights bodies. On the other hand, this development is alarming, demonstrating the potential ways the Constitutional Court may exercise its expanded powers in the future.

158. See Ruling of the Russian Federation Constitutional Court of July 14, 2015, *supra* note 113.

159. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 apreliia 2016 g. [Ruling of the Russian Federation Constitutional Court of Apr. 19, 2016], ROS. GAZ. (May 5, 2016), <https://rg.ru/2016/05/05/sud-dok.html> [<https://perma.cc/V3PE-KWM2>].

160. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 janvarja 2017 g. [Ruling of the Russian Federation Constitutional Court of Jan. 19, 2017] ROS. GAZ. (Feb. 3, 2017), <https://rg.ru/2017/02/03/konstsudyukosdok-dok.html> [<https://perma.cc/86ZW-XZCJ>]; English Translation, 19–20 (http://www.ksrf.ru/en/Decision/Judgments/Documents/2017_January_19_1-P.pdf); for a summary of the Constitutional Court's decision and its significance see Iryna Marchuk, *Flexing Muscles (Yet Again): The Russian Constitutional Court's Defiance of the Authority of the ECtHR in the Yukos Case*, EJIL TALK! (Feb. 13, 2017), <https://www.ejiltalk.org/flexing-muscles-yet-again-the-russian-constitutional-courts-defiance-of-the-authority-of-the-ecthr-in-the-yukos-case/> [<https://perma.cc/XQ52-SZZD>].

III. SIGNIFICANCE OF RUSSIA'S TREATMENT OF ECtHR JUDGMENTS

A. *What these Developments Mean for Russia's Greater Understanding of International Law and for the Protection of Human Rights in Russia*

Recent legal developments in Russia regarding the Constitutional Court did not arise unexpectedly. In 2012, Zorkin, the Chairman of the Constitutional Court, called for expanding the Constitutional Court's power so that it could "determine—upon the request of subjects determined by the law, that is, the parliament or highest courts—the necessity of taking general measures following the ECHR judgments and to formulate the contents of these measures."¹⁶¹ The 2015 amendment to the law on the Constitutional Court is in many ways a fulfillment of that wish. Further, this amendment seems to answer many of the questions surrounding the status of international law and the direct application of international human rights norms in Russia. If this is the case, then this amendment establishes a settled understanding of international law and international human rights in Russia—that there must be a domestic act of 'transformation' to directly apply international law and international human rights norms in the domestic sphere.¹⁶²

Russian and international legal scholars and observers are currently debating the full significance of the 2015 amendment and the Constitutional Court's subsequent April 2016 judgment.¹⁶³ While Russian scholars in the 'statist school' would assert that this judgment only confirms what has always been the legal hierarchy within the Russian Federation, other observers fear this sets a dangerous precedent and represents a new way for Russia to dismiss judgments from the ECtHR.¹⁶⁴ In his 2016 case note on Constitutional Judgment No 21-II/2015, Lauri Mälksoo notes that "[e]very time a judgment of the Strasbourg Court is not enforced, or properly enforced, in the respective member state of the Council of Europe, we are essentially talking about the violation of the country's international legal obligation, whatever the constitutional perspective of the respective Constitutional Court might be."¹⁶⁵ Human Rights Watch has gone

161. Zorkin, *supra* note 62, at 35.

162. See KUZNETSOV & TUZMUKHAMEDOV, *supra* note 9, at 168; Usenko, *supra* note 25, at 17–26.

163. See Mälksoo, *supra* note 140.

164. See KUZNETSOV & TUZMUKHAMEDOV, *supra* note 9, at 168; Usenko, *supra* note 25, at 17–26.

165. Mälksoo *supra* note 140, at 394.

further stating that “the Constitutional Court’s new powers risk gutting the European system of human rights protection in Russia closing of [sic] a final avenue help for victims of abuses.”¹⁶⁶

While it remains to be seen to what extent the Constitutional Court will invoke its new power and decide that it is impossible to implement ECtHR judgments due to contradictions with the Russian Constitution, this very concept raises questions about Russia’s actions under international law. Article 27 “Internal law and observance of treaties” of the 1969 Vienna Convention on the Law of Treaties states, “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”¹⁶⁷ Additionally, Russia’s position violates many scholars’ understanding of Russia’s own Constitution as well as Russia’s commitments and obligations when Russia acceded to the Council of Europe.

B. Significance for the future of the ECtHR

While Russian non-compliance with the ECHR is not new, Russia’s recent actions against ECtHR judgments nevertheless pose a threat to the European Convention on Human Rights (ECHR) system. Russia’s actions pose a threat for the future of the ECtHR, with regard to not only Russia’s compliance with ECtHR judgments, but also the compliance of other member-states, whose governments have previously protested the reach of the ECtHR and may follow suit.¹⁶⁸ Shortly after Russia’s judgment regarding the ECtHR’s *Anchugov and Gladkov* judgment, the Venice Commission issued an opinion determining “that empowering the Russian Constitutional Court to declare international decisions, including judgments of the European Court of Human Rights, as ‘unenforceable’ is incompatible with Russia’s international legal obligations.”¹⁶⁹ The Venice Commission

166. Russia: Constitutional Court Backs Selective Justice Overrules Binding European Court of Human Rights Judgment, HUMAN RIGHTS WATCH (April 19, 2016), <https://www.hrw.org/news/2016/04/19/russia-constitutional-court-backs-selective-justice>, [<https://perma.cc/77YM-U4AR>] (last visited October 6, 2017).

167. Vienna Convention on the Law of Treaties art. 27, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

168. See Philip Leach and Alice Donald, *Russia Defies Strasbourg: Is Contagion Spreading?*, EJIL: TALK! (Dec. 19, 2015), <https://www.ejiltalk.org/russia-defies-strasbourg-is-contagion-spreading/> [<https://perma.cc/3GF8-C7FA>] (discussing how the United Kingdom’s position may have influenced the Russian legislature and how Russia’s recent actions demonstrate that “[t]hese are undoubtedly troubled times for the European human rights system” and that in addition to weakening human rights protections for Russian citizens, the new Russia law “is cataclysmic, too, for European human rights protection as a whole.”).

169. Venice Commission: Newsroom, “Russian law on Constitutional Court incompati-

stressed that Russia “should have recourse to dialogue, instead of resorting to unilateral measures,” noting that dialogue had “been an effective tool in several Council of Europe states for removing possible tensions between the European Court’s rulings and national systems.”¹⁷⁰

On the other hand, the Council of Europe’s decision to admit the Russian Federation and other Eastern European states was aspirational. This decision was made in full awareness of the inadequacies of human rights protections and legal standards in Russia.¹⁷¹ Despite this awareness of human rights violations within Russia and the risk of allowing Russia to join the Council of Europe and the ECtHR, however, the Constitutional Court’s actions represent “a bid to use the maximum possible margin-of-appreciation doctrine and to have a special regime of sorts for Russia in the context of the Strasbourg Court.”¹⁷² Additionally, “it would be a problem for the future of the international/European human rights protection regime if one of the weakest performers in the system could dictate the newest common standard.”¹⁷³ Consequently, Russia’s actions threaten the entirety of the ECHR system, as allowing Russia to establish a procedure for the Constitutional Court to approve or refuse to implement judgments may embolden other member states to take similar actions and establish their own procedures for rejecting ECtHR judgments.

ble with international obligations, must be amended, says Venice Commission,” COUNCIL OF EUROPE (March 11, 2016), https://www.coe.int/en/web/portal/full-news/-/asset_publisher/VN6cYYbQB4QE/content/russian-law-on-constitutional-court-incompatible-with-international-obligations-must-be-amended-says-venice-commission?_101_INSTANCE_VN6cYYbQB4QE_languageId=en_GB [https://perma.cc/L9RR-29CN].

170. *Id.*

171. See JANE HENDERSON, THE CONSTITUTION OF THE RUSSIAN FEDERATION 249 (2011) (discussing the risks of admitting member-states “with poor human rights records,” which would “dilute the effect of the Council, whose powers are largely advisory and whose decisions are made by consensus.”).

172. Mälksoo, *supra* note 140, at 395.

173. Mälksoo, *supra* note 140, at 395 (“When the Russian Constitutional Court claims extensive constitutional rights vis-à-vis the Strasbourg Court, other Council of Europe member states may also *not* want to comply with its judgments, and the contagion of ignoring judgments of the Strasbourg Court through constitutional brakes and objections would spread further, with the potential of paralyzing the Strasbourg Court and the whole Convention system.”).

IV. SOLUTIONS FOR THE ENFORCEMENT OF ECtHR JUDGMENTS

Politically, Russia has a considerable amount of room to maneuver regarding its Council of Europe commitments. The Council is limited in its ability to impose any additional sanctions against Russia beyond individual ECtHR judgments, which the Council of Europe and the ECtHR have struggled to enforce.¹⁷⁴ Previously, the ECtHR has awarded financial damages for Russian non-compliance with the ECHR and made specific suggestions to bring Russian law into compliance.¹⁷⁵ The ECtHR turned to the pilot-judgment procedure as a way to address reoccurring violations caused by systemic problems under Russian law.¹⁷⁶ These methods will no longer be effective, however, if the Constitutional Court has the power to decide when a judgment is in conflict with the Russian Constitution and therefore not subject to enforcement. This power to invalidate ECtHR judgments not only threatens to undermine the ECHR and the ECtHR, but challenges the Vienna Convention and well-established notions of international law.

The Constitutional Court and Legislature have left the Council of Europe and the ECtHR with a need to develop strategies to effectively enforce ECtHR judgments, in light of the Constitutional Court's newfound powers. These strategies will likely require both

174. See EUR. PARL. ASS. DEB., *The Effectiveness of the European Convention on Human Rights: the Brighton Declaration and beyond*, Doc. 13719 Report (Mar. 2, 2015), <http://website-pace.net/documents/19838/1041670/20141210-BeyondBrighton-EN.pdf/9b39d1d4-e9b2-44ea-baaa-901ced892426> [<https://perma.cc/9YR8-XF5A>] (“[T]he Assembly deplores the fact that this progress has not been met by corresponding positive developments at the level of States Parties to the Convention. It notes with concern that the prevailing challenges facing the Court, most notably the high number of repetitive applications as well as persisting human rights violations of a particularly serious nature, reveal a failure by certain High Contracting Parties to discharge their obligations under the Convention.”); Philip Leach and Alice Donald, *Human Rights Implementation: Our Shared Responsibility*, EJIL: TALK! (Mar. 22, 2015), <https://www.ejiltalk.org/human-rights-implementation-our-shared-responsibility/#more-13220>. For general information about the structure of the Council of Europe, see SOPHIE LOBEY, *History, Role, and Activities of the Council of Europe: Facts, Figures and Information Sources*, GLOBALEX (http://www.nyulawglobal.org/globalex/Council_of_Europe.html) (last accessed Oct. 27 2017) [<https://perma.cc/J2YZ-HY5J>].

175. However, Russia has responded with “à la carte compliance, generally satisfying the mandates on reparations but ignoring symbolic, accountability, and nonrepudiation measures.” COURTNEY HILLEBRECHT, DOMESTIC POLITICS AND INTERNATIONAL HUMAN RIGHTS TRIBUNALS: THE PROBLEM OF COMPLIANCE 115 (2014).

176. See EUROPEAN COURT OF HUMAN RIGHTS, THE PILOT-JUDGMENT PROCEDURE: INFORMATION NOTE ISSUED BY THE REGISTRAR (2009), http://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf [<https://perma.cc/9X4C-P8VE>].

political pressure through the Council of Europe and other member-states, as well as legal steps through the Venice Commission and the ECtHR itself. Political pressure presents many risks, as too much pressure may drive Russia further from the European community and possibly cause it to leave the Council of Europe and the ECtHR. Therefore, the Council of Europe will need to weigh the importance of maintaining order within the ECtHR by insisting on full compliance with the ECHR among member-states, while affording a modicum of human rights protections for citizens of Russia.

If the Council of Europe decides that Russia's continued membership is more important, one way to promote maximum compliance with ECtHR judgments in Russia is to carefully write each judgment against Russia so that it arguably does not conflict with any aspect of the Russian Constitution. If explicitly done, this step would weaken the ECtHR, by effectively ceding judicial supremacy to the Constitutional Court of a member state and subordinating the ECHR to the national constitutions of member-states. Consequently, a multi-faceted approach will likely prove the most effective, by combining political pressure, through every channel available to the Council of Europe and the ECtHR, with legal reasoning in the very judgments of the ECtHR. These judgments will continue to have the greatest force if they pragmatically avoid constitutional issues, while still protecting the human rights of Russian citizens under the ECHR.

A. The Council of Europe and the ECtHR Should Utilize Every Mechanism Within Its Existing Framework to Pressure Russia to Comply with Its Treaty Obligations

1. Parliamentary Assembly of the Council of Europe (PACE)

The Parliamentary Assembly of the Council of Europe (PACE) is one body through which the Council of Europe may apply legal and political pressure on Russia. PACE has monitored Russia's progress in coming into compliance with the ECHR through legal reforms since Russia's accession in 1998.¹⁷⁷ In response to the situation in Chechnya in 2000, PACE suspended Russia's voting rights in the Parliamentary Assembly.¹⁷⁸ Following Russia's annexation of Crimea and involvement in Eastern Ukraine, PACE again took action against Russia. PACE could once again exert political pressure against Russia if Russia further invalidates ECtHR judgments as in-

177. See HENDERSON, *supra* note 66, at 248 (discussing the PACE's Monitoring Committee's criticism of the situation in Chechnya).

178. *Id.*

consistent with the Russian Constitution. This will be especially appropriate for any decision that the Constitutional Court makes that is loosely tied to finding a contradiction with the Russian Constitution, such as the 2017 *Yukos* decision.

2. Venice Commission

The Venice Commission is another body that the Council of Europe might employ. In its Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court, the Venice Commission declared that “there remains only one possibility for the State to respect its international obligation,” if a state finds a whole ECtHR judgment non-executable under its Constitution.¹⁷⁹ This one possibility is for the state to amend the Constitution.¹⁸⁰

3. Council of Europe Steering Committee for Human Rights (CDDH)

The Council of Europe Steering Committee for Human Rights (CDDH) produced a report on the longer-term future of the system of the ECHR, following the CCDH’s 84th meeting from December 7th through 11th in 2015. This report outlines the major challenges facing the ECHR system, focusing on the authority of the Convention in terms of national implementation, the authority of the ECtHR, the authority of the ECtHR’s judgments and their execution and supervision, and “the place of the Convention mechanism in the European and International legal order.”¹⁸¹ In addressing how the ECHR system currently operates, the CDDH affirms that the Convention’s control mechanism is based on and should be interpreted within the framework of international law as defined by the 1969 Vienna Convention on the Law of Treaties.¹⁸² The CDDH further maintains that the ECtHR “is the **final authority for interpretation and application of the Convention**” under Articles 32 and 44 of the Convention.¹⁸³ As such, the ECtHR “seeks to ensure consistent interpretation

179. VENICE COMM’N, FINAL OPINION ON THE AMENDMENTS TO THE FEDERAL CONSTITUTIONAL LAW ON THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION ADOPTED BY THE VENICE COMMISSION AT ITS 107TH PLENARY SESSION, Opinion No. 832/2015 (June 13, 2016), ¶ 23.

180. *Id.*

181. COUNCIL OF EUROPE STEERING COMM. FOR HUMAN RIGHTS (CDDH), CDDH REPORT ON THE LONGER-TERM FUTURE OF THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Dec. 11, 2015), 3–4 [hereinafter CDDH 2015].

182. *Id.* at 14.

183. *Id.*

of the Convention by maintaining that its terms are ‘autonomous concepts’, of which the meanings under the Convention do not depend on definitions given under domestic laws.”¹⁸⁴

While the Constitutional Court judgments emphasize the principles of subsidiarity and the margin of appreciation, which the CDDH also defines as key principles of the Convention system, the CDDH report maintains that under the ECtHR’s case law, “the Convention is seen as a living instrument, to be interpreted in light of present day conditions.”¹⁸⁵ Beyond specific judgments against Russia in cases to which it is a party, the CDDH emphasizes that “High Contracting Parties should also **give consideration to the general principles that are developed in the case law as a whole**, including, where appropriate, judgments against other High Contracting Parties”¹⁸⁶ Therefore, the CDDH envisions a much broader role for the ECHR than Russia has indicated it will accept. The CDDH encourages this broader role for ECtHR case law in order to strengthen the authority of the ECHR and prevent future violations.¹⁸⁷

Simplistically, it is easy for the ECtHR and the CDDH to promote “preventive anticipation of possible violations,” by telling member-states that if they wish to avoid judgments against them, they should proactively take into account the ECtHR case law, whether or not a judgment is directly against that state.¹⁸⁸ However, Russia has demonstrated that embarrassment resulting from a judgment against the Russian government is not enough to deter Russia from violating the ECHR or avoiding ECtHR judgments. In a legal landscape where Russia is backing away from its explicit obligations under the Convention, such as its obligation to “abide by the final judgment of the Court” in any cases to which it is a party under Article 46,¹⁸⁹ Russia is unlikely to accept the CDDH’s suggestion that ECtHR case law take on an expanded role. Consequently, this is not a solution for strengthening Russian compliance with the ECHR. Instead, critics of the existing ECHR system, such as Valery Zorkin, are likely to view this expansion with hostility and as reason for the Constitutional Court to assert its power against the ECHR’s increasing creep into the Russian domestic legal sphere.¹⁹⁰

184. *Id.*

185. *Id.* at 13–14.

186. *Id.* at 16.

187. *Id.* at 20.

188. CDDH 2015 at 21.

189. ECHR art. 46.

190. *See Zorkin, supra* note 62.

The problem with much of the CDDH's report is that it envisions at least a minimal level of cooperation on the part of the member state. This may come in the form of the member state's national courts, executive branch, legislature, or civil society and human rights organizations.¹⁹¹ However, in the case of Russia, much of the CDDH's suggestions fall short of the baseline problem in Russia. This problem centers around the increased hostility toward the ECHR from all three branches of government in Russia, compounded by a situation in which civil society and human rights monitoring bodies have been stripped of legitimacy, power, and their very ability to operate in Russia in recent years.¹⁹²

4. Committee of Ministers

The 2015 CDDH report affirms that the ECHR “creates **other mechanisms for its collective enforcement.**”¹⁹³ One such mechanism is the Committee of Ministers, which has the power and responsibility to supervise the execution of judgments. Additionally, the Secretary of the Council of Europe may also “conduct inquiries under Article 52 of the Convention.”¹⁹⁴

5. Pilot-Judgment Procedure

In response to the high volume and similarity of cases facing the ECtHR, in 2004 the Court developed the pilot-judgment procedure.¹⁹⁵ A case decided as a pilot-judgment is “not only intended to facilitate effective implementation by respondent states of individual and general measures necessary to comply with the Court's judgments, but also induces the respondent state to resolve large numbers of individual cases arising from the same structural problem at do-

191. CDDH 2015 at 20 (“[E]ffective national implementation may presuppose the **effective involvement of an interaction between a wide range of actors** (members of the government, parliamentarians, and the judiciary as well as national human rights institutions, civil society and representatives of the legal professions) to ensure that legislation and other measures and their application in practice, comply fully with the Convention standards.”).

192. See *Briefing on Shrinking Space for Civil Society in Russia*, HUMAN RIGHTS WATCH (Feb. 24, 2017), <https://www.hrw.org/news/2017/02/24/briefing-shrinking-space-civil-society-russia> [<https://perma.cc/TW79-TLNN>].

193. CDDH 2015 at 16.

194. *Id.*

195. See generally PHILIP LEACH ET AL., RESPONDING TO SYSTEMIC HUMAN RIGHTS VIOLATIONS: AN ANALYSIS OF ‘PILOT JUDGMENTS’ OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THEIR IMPACT AT NATIONAL LEVEL (2010).

mestic level.”¹⁹⁶ The 2015 CDDH report explains that the ECtHR developed the pilot-judgment procedure to allow the ECtHR to “identify in a judgment both the nature of the structural or systemic problem or other dysfunction as established as well as the type of remedial measures which the Contracting Party concerned is required to take at the domestic level by virtue of the operative provisions of the judgment.”¹⁹⁷

This program is ineffective, however, if the Constitutional Court finds the ECtHR’s judgment of an issue to be in conflict with the Russian Constitution and thus not subject to enforcement. Therefore, it is necessary to rethink the pilot-judgment procedure in order to revamp it in light of Russia’s most recent legal actions.

B. Dialogue-Based and Conceptual Approaches

The ECtHR should focus on creating a dialogue with the Constitutional Court in its legal reasoning in ECtHR judgments against Russia. In many ways, Judgment 12-II/2016 is carefully written in a way to appeal to a widespread audience with varying positions on Russia and the ECtHR.¹⁹⁸ Similarly, it is important for the ECtHR to walk a narrow line and diplomatically issue judgments against Russia moving forward. Venice Commission Opinion no. 832/2015 recommends greater dialogue between the Russian national courts and the ECtHR as a solution for remedying any “possible tensions and contradictions” between rulings of the ECtHR and a state’s national system.¹⁹⁹ This opinion emphasizes that the ECtHR already examines national law in the process of examining and determining the context of a case.²⁰⁰ This allows the ECtHR to avoid conflicts with a national conception of rights according to the ECtHR principle of allowing for a margin of appreciation with respect to a given right and how different states treat that right. Additionally, the Venice Commission notes that generally speaking, national, constitutional, or supreme courts are usually the most well-suited for weighing two opposing rights and striking a balance. Following this understanding, in some cases, the ECtHR will show “special respect for constitutional rights provisions, or the judgments of constitutional, or supreme

196. EUR. CT. H. R. PRESS UNIT, *supra* note 95, at 16.

197. CDDH 2015 at 16.

198. *See* Kuznetsova, *supra* note 152.

199. Venice Commission Opinion No. 832/2015 at ¶ 100.

200. *Id.* ¶ 106.

courts interpreting constitutional right catalogues.”²⁰¹ However, this does not preclude the ECtHR from finding a violation, notwithstanding its deference or respect for a state’s constitution and court, and “the ECtHR, if it is to do its job, should only defer to national balancing exercises when these have been performed in accordance with principles laid down by the ECtHR.”²⁰²

Taking this a step further, when finding a violation the ECtHR should try to base its findings in Russian statutory law whenever possible, instead of the Russian Constitution. This would allow the Strasbourg Court to avoid any legal arguments regarding the legal hierarchy of the ECHR versus the Russian Constitution—which the 2015 Russian amendment has mooted, at least for the time being. This is because basing violations in statutory instead of constitutional law prevents the Russian government from later bringing the judgment to the Constitutional Court to decide whether Russia can implement the judgment without violating the Russian Constitution. This is certainly not always possible and, further, not a guaranteed way to prevent the Constitutional Court from finding a way to invalidate an ECtHR judgment based on an overly expansive view of the Russian Constitution, like in its *Yukos* decision. However, avoiding direct confrontation with the Russian Constitution would allow the ECtHR to engage positively with the areas of the Russian Constitution that support the ECHR and implementation of Strasbourg judgments, rather than creating a series of direct standoffs with the Constitutional Court.

Finally, garnering cooperation and support for the ECtHR from other member states is crucial for preventing further resistance in executing judgments. Russia has pointed to the behavior of other member states as justification for the Constitutional Court’s actions, claiming that Russia is merely following in the footsteps of states like Italy, Germany, and Great Britain, which Russia claims have also declined to implement judgments of the ECtHR. Therefore, if the ECHR system is going to continue to function and ensure the protection of human rights, all member-states must support human rights, international law, the values and principles of the ECHR, and most importantly the ECtHR. Without support for the ECtHR and the ECtHR’s authority, there is a substantial risk that judgments will no longer be binding or have a real effect on states’ behavior.

201. *Id.* ¶ 60.

202. *Id.* ¶ 61.

CONCLUSION

Increased confrontation between the Constitutional Court and the ECtHR is likely, as Russia has now clearly established that the Russian Constitution has priority over international judgments, even judgments stemming from Russian treaty obligations. Since the Constitutional Court ruled that the ECtHR's judgment in *Anchugov and Gladkov v. Russia* was non-executable, the Constitutional Court has found that the ECtHR's *Yukos* judgment is also in violation of the Russian Constitution and therefore non-executable.²⁰³ Further, the Constitutional Court has indicated that it is unlikely to choose to resolve conflicts between the ECHR and the Russian Constitution by calling for the amendment of the Russian Constitution in order to comply with the ECtHR. Therefore, it is critical for the ECtHR to avoid issuing judgments that directly challenge the Russian Constitution. Instead, the ECtHR and the Council of Europe must employ other means of establishing Russian compliance with ECHR norms. The ECtHR and the Council of Europe can achieve this by either issuing judgments that find violations stemming from bodies of Russian law other than the Constitution, or by turning to other diplomatic and political channels to encourage Russian compliance with ECHR norms. Finally, increased engagement with the Russian Constitution, both to ensure that the ECtHR treads carefully and to emphasize the Russian Constitution's broad acceptance and incorporation of international law, will help the ECtHR avoid outright conflict with the Constitutional Court and avoid worsening a political standoff between the two courts.

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203. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 janvarja 2017 g., *supra* note 160.

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